SJC-13157

COMMONWEALTH vs. CONCETTO COSTA.

Essex. December 6, 2021. - July 1, 2022.

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

Due Process of Law, Probation revocation, Fair trial. Constitutional Law, Confrontation of witnesses, Fair trial. Fair Trial. Practice, Criminal, Probation, Revocation of probation, Confrontation of witnesses, Fair trial, Hearsay. Witness, Impeachment, Credibility, Cross-examination. Evidence, Impeachment of credibility, Credibility of witness, Cross-examination, Hearsay.

Indictments found and returned in the Superior Court Department on March 22, 2006.

A proceeding for revocation of probation was heard by Kathe M. Tuttman, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Patrick Levin, Committee for Public Counsel Services, for the defendant.

Kathryn L. Janssen, Assistant District Attorney, for the Commonwealth.

Maura Healey, Attorney General, & Gabriel Thornton, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

Anthony D. Gulluni, District Attorney, & Katherine E. McMahon, Assistant District Attorney, for district attorney for the Hampden district & another, amici curiae, submitted a brief.

David E. Sullivan & Andrea Harrington, District Attorneys, & Jennifer K. Zalnasky & Thomas H. Townsend, Assistant District Attorneys, for district attorney for the northwestern district & another, amici curiae, submitted a brief.

GAZIANO, J. The probationer in this case had his probation revoked on the basis of hearsay statements by his former fiancée alleging, among other things, that the probationer had raped her repeatedly over a period of approximately four months when they were living together. The probationer argues that the proceedings at the probation violation hearing did not comport with due process of law under the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights because his accuser did not appear at the hearing to testify and to be cross-examined.

A probationer's request for live testimony at a probation violation hearing implicates two due process rights: (1) the right to confront adverse witnesses, and (2) the right to present a defense. See Commonwealth v. Hartfield, 474 Mass. 474, 479 (2016). The probationer argues that both of these rights were violated at his probation violation hearing. We do not agree that, in this case, the absence of the complainant, the probationer's former fiancée, violated the probationer's right to confront adverse witnesses, but we do agree that the

inability to question her violated his right to present a defense. Accordingly, the decision on the asserted violation of probation must be vacated and set aside, and a new hearing must be conducted, at which the probationer may call the complainant as a witness in his defense.[1]

1. Background. We recite the facts based on the evidence introduced at the evidentiary hearing and the final probation violation hearing, reserving certain details for later discussion.

In 2008, the probationer pleaded guilty to four counts of rape and abuse of a child, G. L. c. 265, § 23, and one count of indecent assault and battery on a child under fourteen, G. L. c. 265, § 13B. In 2014, after completing a sentence of incarceration on three of the four convictions of rape, the probationer began a term of ten years of probation on the remaining convictions. One of the conditions of that probation required the probationer to obey local, State, and Federal laws.

On February 11, 2019, the complainant went to the Salisbury police station and met with Sergeant James Leavitt. She told Leavitt that she had begun dating the probationer in May of

[1] We acknowledge the amicus brief submitted by the district attorneys for the Hampden and Plymouth districts in support of the Commonwealth, and the amicus brief of the Attorney General, as well as the amicus letter submitted by the district attorneys for the Berkshire and northwestern districts.

2018. Soon thereafter, they became engaged. They moved into an apartment together where they lived from October of 2018 to February of 2019. The complainant told Leavitt that, after she moved in with the probationer, their relationship had become rife with violence and intimidation. Leavitt assisted the complainant with an application for an abuse prevention order under G. L. c. 209A (209A order); in an attached affidavit, the complainant averred that the probationer had "forced himself on [her] sexually" and had threatened to kill her if she left him. Leavitt spoke by telephone with a judge of the trial court department, who issued an emergency 209A order. Leavitt also made an appointment to meet again with the complainant the following day.

On February 12, 2019, the 209A order was extended for a period of one year. Later that day, the complainant returned to the Salisbury police station to provide Leavitt with a more detailed description of how her relationship with the probationer had changed shortly after they moved in together. She discussed, in detail, how the probationer physically forced her to engage in sexual activity. These alleged incidents occurred numerous times each week, beginning in mid-October of 2018 and continuing through the end of January 2019. In addition, the complainant told Leavitt that, on several occasions, the probationer had threatened to stab her and kill

her. She also said that the probationer would prevent her from leaving the apartment; he did so by grabbing her arms, yelling threats at her, and, in some instances, throwing her to the floor. Based on the complainant's statements, a criminal complaint issued charging the probationer with multiple counts of rape, kidnapping, assault and battery on a household member, and making threats. After the probationer was arrested, the Commonwealth moved that he be held without bail pending trial, pursuant to G. L. c. 276, § 58A; following a hearing on the Commonwealth's motion, the probationer was found to be dangerous and was ordered detained.

In March of 2019, the complainant testified before a grand jury. During her testimony, she explained how her relationship with the probationer had changed after they moved into their shared apartment. She testified that the probationer became jealous and would accuse her of infidelity. She described incidents of forced oral, vaginal, and anal sex. She also explained that the probationer sometimes would prevent her from leaving the apartment by forcibly holding her, blocking her exit from the apartment, and threatening to kill her. The grand jury returned indictments charging the probationer with rape, assault and battery by means of a dangerous weapon, assault and battery on a family or household member, kidnapping, intimidation of a witness, and threatening to commit a crime.

As a result of these indictments, a notice of probation violation issued. The complainant told the assistant district attorney that she emotionally could not handle testifying at a probation violation hearing. Accordingly, in lieu of calling the complainant to testify, the assistant district attorney sought to admit the complainant's statements to Leavitt at the Salisbury police station, her affidavit attached to her application for a 209A order, and her testimony before the grand jury. Invoking his due process right to confront the witnesses against him, the probationer sought to preclude the Commonwealth from introducing these statements as unreliable hearsay. The Commonwealth opposed the motion, and itself sought to preclude the probationer from calling the complainant to testify.

At an evidentiary hearing on the Commonwealth's and the probationer's motions in June of 2019 (motion hearing), the Commonwealth submitted exhibits including a transcript of the complainant's grand jury testimony; the complainant's application for the 209A order, with the attached affidavit; and a Salisbury police department report that included Leavitt's proffered testimony as to what the complainant told him on February 11 and 12 of 2019. The probationer's exhibits included six reports by a private investigator who had interviewed four of the probationer's and the complainant's neighbors, a former husband of the complainant, and a former boyfriend. The

probationer also introduced material related to a 209A order that the same former husband had obtained against the complainant. Neither party called any witnesses to testify. After reviewing the documentary evidence and considering the parties' arguments, a Superior Court judge denied the probationer's motion to exclude the complainant's hearsay statements and allowed the Commonwealth's motion to preclude the probationer from calling the complainant to testify.

In late September of 2019, a different judge presided over the final probation violation hearing. In an attempt to impeach the complainant's credibility, the probationer called a former husband and a former boyfriend of the complainant to describe statements they had made to the private investigator that were contained in the investigator's reports. The hearing judge sustained many of the Commonwealth's objections to the introduction of testimony about the complainant's prior conduct, as described in the reports, because the judge concluded that the proffered testimony was opinion evidence and evidence of prior bad acts and, accordingly, was not relevant to any issue before the court. The hearing judge allowed the probationer to elicit some testimony from the former husband about his disputes with the complainant concerning custody of their daughter, but only to the extent that such statements bore on a potential motive to fabricate allegations about the probationer; any

statements as to her prior bad acts or mental state were excluded. The probationer also asked the hearing judge to reconsider the rulings which had been made by the judge who presided over the evidentiary hearing; the motion was denied.

The hearing judge then found that the probationer had violated the terms of his probation by committing new crimes, revoked his probation, and sentenced him to five years of incarceration on the fourth count of rape for which he initially had been sentenced to ten years of probation. The probationer appealed, arguing that the proceedings violated his due process rights to confront adverse witnesses and to present a defense. A panel of the Appeals Court affirmed the rulings. See Commonwealth v. Costa, 99 Mass. App. Ct. 435 (2021). One justice dissented on the ground that precluding the probationer from calling the complainant as a witness violated his right to present a defense. Id. at 454. We allowed the probationer's application for further appellate review.

2. Discussion. The probationer argues that the decision to allow the Commonwealth to introduce the three documents -- the grand jury transcript, the statement to Leavitt, and the application for the 209A order -- setting forth the complainant's statements, without allowing the probationer to cross-examine the complainant, violated his due process right to confront the witnesses against him. Similarly, the decision to

preclude him from calling the complainant to testify at the probation violation hearing impinged upon his right to present a defense. In the probationer's view, the hearing judge compounded this constitutional error by excluding statements by the complainant's former husband and her former boyfriend that the probationer had intended to use to impeach the complainant's credibility.

"Revocation hearings are not part of a criminal prosecution." Commonwealth v. Durling, 407 Mass. 108, 112 (1990). "Thus, a probationer need not be provided with the full panoply of constitutional protections applicable at a criminal trial." Id. By the time such a hearing takes place, "the Commonwealth has already gone through the expense and the effort of convicting" the probationer of an offense warranting a period of probation, and therefore has an interest "in maintaining administrative efficiency and reducing costs." Id. at 116. Nonetheless, the probationer continues to have a liberty interest at stake; having been afforded the opportunity to demonstrate rehabilitation and to reintegrate into society, a probationer obtains an interest in avoiding the arbitrary deprivation of that opportunity. See id. at 115. To protect these interests, due process requires, at a minimum,

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of the evidence against him; (c) opportunity to be heard in

> person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole" (alterations in original).

Id. at 113, quoting Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).

"[T]he right to confront adverse witnesses and the right to present a defense are distinct due process rights separately guaranteed to probationers." Commonwealth v. Kelsey, 464 Mass. 315, 327 n.12 (2013). Claims of violations of these rights "should not be conflated" and "must be analyzed separately." Hartfield, 474 Mass. at 479.

a. Right to confront adverse witnesses.[2] Due process guarantees a probationer "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Durling, 407 Mass. at 113, quoting Gagnon, 411 U.S. at 786. When the revocation of probation is based solely on hearsay

[2] Because the judges who presided over the evidentiary hearing and the revocation hearing based their findings only on documentary evidence, we review the record evidence before them de novo. Commonwealth v. Mazza, 484 Mass. 539, 547 (2020). See Commonwealth v. Tremblay, 480 Mass. 645, 656 (2018) (findings drawn from documentary evidence "are not entitled to deference and we may review such evidence de novo").

evidence, the proffered hearsay must have "substantial indicia of reliability" to satisfy the good cause requirement. Hartfield, 474 Mass. at 482, 484. See Durling, supra at 118 ("the probationer's interest in cross-examining the actual source [and hence testing its reliability] is greater when the hearsay is the only evidence offered").

To determine whether hearsay has substantial indicia of reliability, a judge may consider, inter alia,

> "(1) whether the evidence is based on personal knowledge or direct observation; (2) whether the evidence, if based on direct observation, was recorded close in time to the events in question; (3) the level of factual detail; (4) whether the statements are internally consistent; (5) whether the evidence is corroborated by information from other sources; (6) whether the declarant was disinterested when the statements were made; and (7) whether the statements were made under circumstances that support their veracity."

Hartfield, 474 Mass. at 484. "There is no requirement that hearsay satisfy all the above criteria to be trustworthy and reliable." Commonwealth v. Patton, 458 Mass. 119, 133 (2010).

In this case, the complainant's statements satisfy multiple of the indicia of reliability discussed in Hartfield. The complainant relayed events that she had personally experienced. See Durling, 407 Mass. at 117 n.4 ("Often the only witness with personal knowledge of the crime [in a rape case] is the victim"). She reported these events in February and March of 2019, close in time to the alleged pattern of abuse, which

spanned the period from mid-October of 2018 to January of 2019. See Commonwealth v. King, 445 Mass. 217, 237-238, 238 n.18 (2005), cert. denied, 546 U.S. 1216 (2006) (citing research suggesting that sexual assault victims "often do not promptly report or disclose the crime for a range of reasons, including shame, fear, or concern they will not be believed").

Although the complainant did not identify any specific dates during the approximately four-month period she lived with the probationer, she did describe certain of the alleged offenses with a high degree of factual detail.[3] See Durling, 407

[3] The complainant told Leavitt that the first incident of forced oral sex occurred in October of 2018, and she described with specificity how the probationer positioned his body over her head as she slept. The complainant also explained that the forced sexual activity occurred approximately four to five times each week and included incidents of anal and vaginal sex. The complainant identified particular parts of her body that would get bruised during the encounters. On several occasions when the complainant resisted the probationer's advances, she said that he threatened her with physical violence, specifically that he would stab her and kill her. She asserted that one time in the course of trying to force himself on her, after she resisted his advances, the probationer damaged a closet and left a knuckle print on a door and "something on the wall."

The complainant said that during the months they lived together, the probationer increasingly would prevent her from leaving the apartment; he did so by grabbing her arms, yelling threats at her, and, in some instances, throwing her to the floor. She indicated that these incidents occurred at least ten times each month. In response to a question whether the probationer ever used weapons, the complainant recalled one occasion, after she and the probationer had gone to visit her son, when the probationer became upset and, after they returned to the apartment, he got a knife and "put it to" her throat.

Mass. at 121 (statements from police reports were factually detailed, not general or conclusory; they were therefore reliable). Moreover, she repeated her allegations of rape, violence, and threats consistently to Leavitt and to the grand jury.[4] See Patton, 458 Mass. at 135 (witness's consistent recitation of details concerning indecent assault and battery made statements reliable). Other circumstances of her reporting also tended to suggest that the complainant's statements were reliable.[5]

At the same time, the complainant's allegations do not satisfy other indicia of reliability discussed in Hartfield.

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[4] The statements in the complainant's affidavit accompanying her application for a 209A order also generally were consistent with the statements the complainant made to Leavitt and with her testimony before the grand jury. The probationer notes that the complainant made inconsistent statements about whether she had had consensual sex with him while they lived together. She told Leavitt that she might have had consensual sex with the probationer a few times each month while they were living together, but she told the grand jury that they never had consensual sex. Although this inconsistency bears on her credibility, it does not directly undermine the reliability of the complainant's allegations that the probationer repeatedly assaulted her.

[5] For instance, in describing the encounters, the complainant appeared visibly distressed, and at times cried or trembled. The complainant told the prosecutor that she was anxious about testifying before the grand jury and felt as though she might vomit. See Patton, 458 Mass. at 134 (display of declarant's demeanor while speaking added to reliability of statements). Contrast Commonwealth v. King, 71 Mass. App. Ct. 737, 741 (2008) (complainant's sarcastic demeanor when describing incidents of domestic abuse to police undermined reliability of complainant's statements).

For example, the allegations were not corroborated by independent sources. It also is not evident that the complainant was a disinterested witness.[6]

At root, however, there is no requirement that hearsay satisfy all indicia of reliability in order to be admissible. See Patton, 458 Mass. at 133. As discussed, the complainant's allegations were based on her personal knowledge, and were made relatively close in time to the alleged incidents. With a few exceptions, her statements generally were internally consistent, and certain incidents were described with a high degree of factual detail. We discern no violation of the probationer's due process rights in the introduction of the complainant's prior recorded statements at the probation violation hearing.

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[6] According to the probationer, the complainant had a motive to fabricate the allegations and therefore cannot be considered a disinterested witness. Based on evidence proffered by the probationer, the complainant, among other things, was involved in a dispute with her former husband, who had physical custody of their daughter, over legal custody.

The probationer's counsel asserted in an affidavit that the complainant had been planning to have her daughter visit her at the apartment, and that the probationer "was an impediment to this plan," apparently because of the probationer's prior convictions; the probationer mentions as well a concern expressed by his own probation officer at the idea of him living in a house with a twelve year old child, and a meeting that the probation officer had with the probationer and the complainant to discuss it.

In addition, the probationer points to indications that the complainant had been diagnosed with a mental illness and was abusing drugs and alcohol.

b. Right to present a defense. The probationer argues that even if there was no constitutional impediment to the introduction of the complainant's statements in the Commonwealth's case-in-chief without calling her to testify, he must be allowed to call her as a witness in order to vindicate his due process right to present a defense.

Due process requires that a probationer have "a meaningful opportunity to present a defense." Hartfield, 474 Mass. at 480, quoting Kelsey, 464 Mass. at 321. "We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard." Crane v. Kentucky, 476 U.S. 683, 690 (1986). Although a probationer's liberty interest is not the same as that of a criminal defendant, "[t]o conclude that revocation hearings never implicate considerations similar to those implicated in the adjudication of guilt would be to ignore the close functional nexus that may exist between criminal trials and probation revocation proceedings." Kelsey, supra at 325 n.10. See id. at 322.

Whether the due process right to present a defense has been violated turns on the "totality of the circumstances in each case." Kelsey, 464 Mass. at 322. An analysis of the totality of the circumstances "must be structured and applied to ensure that adequate weight is given to the protection of the constitutional right and to the importance of making a

'reliable, accurate evaluation of whether the probationer indeed violated the conditions of his probation.'" Hartfield, 474 Mass. at 480-481, quoting Kelsey, supra. To that end, "a probationer has a presumptive due process right to call witnesses in his or her defense." Hartfield, supra at 481. This presumption "may be overcome by countervailing 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." Id. To safeguard a probationer's liberty interest, however, in evaluating the totality of the circumstances as to whether the testimony of a proposed witness is necessary in order for a probationer to present a defense, a judge must consider, at a minimum, three factors:

> "(1) whether the proposed testimony of the witness might be significant in determining whether it is more likely than not that the probationer violated the conditions of probation; (2) whether, based on the proffer of the witness's testimony, the witness would provide evidence that adds to or differs from previously admitted evidence rather than be cumulative of that evidence; and (3) 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 in court at the probation hearing" (citations omitted).

Id. As to the third factor, we have emphasized that a judge's assessment must be "individualized and evidence-based," and have rejected "a general rule that would prevent a probationer from

ever calling [a complainant alleging sexual assault] to testify in his or her defense." Id.

As at any probation violation hearing, here the probationer had a presumptive due process right to present a defense. See Hartfield, 474 Mass. at 481. We therefore consider whether the Commonwealth has successfully overcome the presumption that the defendant had a right to call the complainant to show that her allegations he committed new offenses were not credible and reliable. With respect to the first Hartfield factor, in this case, the complainant's live testimony would be highly significant in determining whether the probationer had violated the condition of probation that he not commit another crime. See id. The only witness with personal knowledge of the alleged offenses is the complainant. Her material statements that the probationer raped her, forcibly kept her from leaving the apartment, and threatened her with violence were uncorroborated by independent sources. Compare id. at 477 (complainant's allegation of rape was corroborated by deoxyribonucleic acid evidence; nonetheless, judge's decision to preclude probationer from examining complainant via live testimony was not harmless error). Police did not observe any signs of physical injury to the complainant, and their investigation into her assertions was minimal.

The Commonwealth's case rested entirely on the complainant's credibility, and the probationer's "best chance" to impeach her credibility was through the complainant's live testimony. See id. at 483. See also Gagnon, 411 U.S. at 782 n.5 (recognizing cases where "there is simply no adequate alternative to live testimony"); Commonwealth v. Leiva, 484 Mass. 766, 780 (2020) ("Subjecting the evidence to rigorous adversarial testing and entrusting an impartial fact finder as the judge of credibility are critical components of a functioning adversary justice system"); 5 Wigmore, Evidence § 1367, at 32 (Chadbourn rev. 1974) (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth").

Although questioning a complainant where the complainant's statement is essentially the entirety of the Commonwealth's case generally might provide the best grounds for impeachment, here the probationer also provided ample, specific reasons to question the complainant's credibility. According to the reports by the probationer's investigator, several of the probationer's and the complainant's neighbors said that, because the apartment walls were thin, they often heard the complainant arguing with the probationer. These frequent fights consisted of the complainant screaming at the probationer, "yelling at the top of her lungs," while the probationer was quiet or said

nothing. One neighbor characterized the complainant's treatment of the probationer as "verbal abuse." Another neighbor reported seeing the complainant throwing the probationer's clothes over the railing from their second-floor apartment, and then telling the probationer to "go fetch, you fucking dog!" The same neighbor described the complainant as "dishonest," and said that she frequently appeared intoxicated.

The private investigator also spoke with two of the complainant's former partners, a former husband and a former boyfriend. The husband's relationship with the complainant had lasted approximately three years, which he described as "the craziest three years of his life." He and the complainant argued frequently.

The former husband and the complainant had a daughter together; the husband obtained physical custody of the daughter when she was approximately nine months old, and she has remained in his custody since. The former husband described some of the complainant's troubling interactions with her daughter, and with him. For instance, on one occasion before a hearing in the Probate and Family Court, the complainant told the husband that she planned to "use old illicit text messages and photo[graph]s from [him], as leverage in order to get what she wanted in court." Due to the age of the photographs, the husband thought they likely would not harm him.

The probationer's investigator also spoke with one of the complainant's former boyfriends; the two had lived together for about one and one-half years. Among other things, the boyfriend said that he once saw the complainant in the bathroom, striking her own face to make it look red; when he asked her what she was doing, she told him, "You hit me, remember?"

In addition to the likely significance of the complainant's testimony, we also must consider whether, based on the proffered evidence, the testimony would yield "evidence that adds to or differs from previously admitted evidence rather than be[ing] cumulative of that evidence." See Hartfield, 474 Mass. at 481. The hearing judge determined that the probationer had not provided the court "with any information indicating that, if forced to testify, the Victim would testify differently at his revocation hearing than she did before the Grand Jury." Thus, given the admissibility of the hearsay evidence, the judge concluded that the second Hartfield factor militated against requiring the complainant's live testimony. "[T]he admission of [such] evidence does not mean that the probationer is absolutely barred from calling as a witness the declarant whose hearsay was admitted." Id. at 482. Proffered testimony is not cumulative so long as the probationer "seeks to elicit from the witness additional information that would support the inference that the probationer did not commit the violation or would demonstrate

that the hearsay evidence suggesting that he did commit the violation is unworthy of belief." Id.

At an evidentiary hearing, the probationer pointed to several lines of questioning which were not broached by the Commonwealth, but which he would have pursued if the complainant had testified. For instance, he would have asked the complainant to explain her inconsistent statements regarding the circumstances of their relationship. He would have pressed the issue of when the offenses occurred, given that the complainant did not provide specific dates. Based on the notes from the interviews with the neighbors, the probationer would have questioned, among other things, the complainant's assertions that he often yelled at her. The probationer also would have examined statements by the complainant to the grand jury that he had caused damage to the apartment, in light of an affidavit by the probationer's counsel that the landlord had been in the apartment after the allegations were made and had not seen any visible damage. These lines of examination were not speculative; they were supported by admissible record evidence proffered by the parties.

We turn to the third Hartfield factor, "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 in court at the probation hearing." Hartfield, 474 Mass. at 481. As discussed supra, Leavitt noted that the complainant appeared upset and often cried when she spoke to him. When an assistant district attorney met with the complainant to assess the possibility of an indictment, the assistant district attorney observed that the complainant was crying and trembling when describing the incidents and the possibility of testifying before the grand jury. In response to the assistant district attorney's inquiry, the complainant said that she was losing sleep and having nightmares. She also indicated that she had sought assistance from a domestic abuse crisis center to help her cope with her anxiety. When the complainant arrived to testify before the grand jury, she was accompanied by an advocate from such a center; the complainant told the assistant district attorney that she was anxious about testifying and felt as though she might vomit.

Such circumstances plainly weigh in the Commonwealth's favor. But, as we did in Hartfield, 474 Mass. at 481, we must reject "a general rule that would prevent a probationer from ever calling such an alleged victim to testify in his or her defense." Because the probationer has a presumptive right to call witnesses in his defense, we must weigh the risk of the complainant becoming more distressed in light of the totality of

the circumstances. Given the centrality of the complainant's credibility in this case, the minimal corroboration of her allegations, and the probationer's proffered reasons to doubt her credibility, we conclude that countervailing interests do not overcome the presumption, and the hearing judge erred in denying the probationer's request to call the complainant as a witness. We also cannot say that the error was harmless, given the nature of the evidence the probationer has proffered concerning the likely grounds of impeachment. See Kelsey, 464 Mass. at 319.

c. Due process right to introduce impeachment evidence. The probationer also suggests that the hearing judge's exclusion of statements by a former husband of the complainant, and a former boyfriend, compounded the violation of the probationer's due process right to present a defense. Such statements, the probationer contends, would have impeached the complainant's character for truthfulness.

In criminal prosecutions, "[w]hen evidence concerning a critical issue is excluded and when that evidence might have had a significant impact on the result of the trial, the right to present a full defense has been denied." Commonwealth v. Bohannon, 376 Mass. 90, 94 (1978), S.C., 385 Mass. 733 (1982), and cases cited. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973). "As discussed, however, a probationer's right to

present a defense is not coextensive with the parallel right held by a criminal defendant." Kelsey, 464 Mass. at 324.

We note as an initial matter that where a probationer seeks to introduce impeachment evidence to realize his or her right to present a defense, there is no requirement that the evidence demonstrate substantial indicia of reliability. See Durling, 407 Mass. at 118. In that case, we established such a requirement for situations where hearsay is offered as the only evidence of an alleged violation of probation, not when it is offered to impeach the credibility of a witness. Id. See Commonwealth v. Basch, 386 Mass. 620, 623 (1982) ("An out-of-court statement introduced to impeach a witness, and not to prove the truth of the matter asserted in the statement, is not hearsay"). Excluding impeachment evidence as hearsay ironically would narrow the scope of admissible evidence, belying the overriding principle that probation revocation proceedings "must be flexible in nature." Durling, supra at 114.

Rather, in determining whether the exclusion of proffered impeachment evidence would deprive a probationer of "a meaningful opportunity to present a defense," a judge must consider "the totality of the circumstances." Hartfield, 474 Mass. at 480, quoting Kelsey, 464 Mass. at 321, 322. As is the case for a criminal defendant, a probationer is "not necessarily deprived of the right to present his [or her] theory of defense

simply because the judge excludes a piece of evidence supporting such theory." See Commonwealth v. Pickering, 479 Mass. 589, 596 (2018), quoting Commonwealth v. White, 475 Mass. 724, 743 (2016). Where due process does not require the introduction of certain proffered impeachment evidence, a judge has the discretion to limit its admission by applying standard evidentiary rules. See Durling, 407 Mass. at 117-118. See also Hartfield, 474 Mass at 482, citing Commonwealth v. Odoardi, 397 Mass. 28, 34 (1986) ("Where a probationer's examination of a witness strays into issues that are irrelevant to the determination of whether the probationer violated the conditions of probation, cumulative of other evidence, or unduly harassing to the witness, the judge, consistent with due process, may restrict the scope of such testimony").

Here, although the statements by the complainant's former husband and her former boyfriend detailing specific instances of the complainant's conduct support the probationer's challenge to the complainant's credibility, we cannot say that the hearing judge's decision to exclude these statements to the probationer's investigator deprived the probationer of his due process right meaningfully to present a defense. As discussed, there was ample other evidence in the record, including the complainant's own statements, that was supportive of the probationer's theory of defense. See Pickering, 479 Mass.

at 596. Moreover, at the probation violation hearing, although much of his testimony was excluded, the probationer was able to elicit some testimony from the former husband about his disputes with the complainant concerning custody of their daughter, thereby suggesting that the complainant had a potential motive to fabricate her allegations.

3. Conclusion. Precluding the probationer from calling the complainant as a witness at the probation violation hearing violated his due process right to present a defense. Consistent with our precedent in Hartfield, 474 Mass. at 480-481, the probationer must be afforded the opportunity to call the complainant as a witness at such a hearing. The finding that the probationer violated the conditions of his probation and the order revoking his probation are vacated and set aside. The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

CYPHER, J. (dissenting in part). I concur in the court's conclusion that the complainant's prior recorded statements were admitted properly at the probationer's final probation violation hearing (violation hearing)[1] and that the surrender judge's exclusion of certain impeachment evidence did not deprive the probationer of his due process right to present a defense. I do not agree, however, that the complainant must be compelled to testify in these circumstances, and I dissent from the portion of the opinion that so holds.

Prior to the violation hearing, an evidentiary hearing was held on the Commonwealth's and the probationer's motions regarding the admissibility of the Commonwealth's proffered hearsay evidence and the right of the probationer to subpoena the complainant to testify (motion hearing). At the motion hearing, the probationer offered evidence of the complainant's alleged unreliability. This evidence overwhelmingly was second- and third-level hearsay, the reliability of which was not established. The private investigator allegedly responsible for creating much of this evidence did not testify, nor did any of

[1] Although this hearing was docketed as a final probation surrender hearing, section 6 (B) of the guidelines for probation violation proceedings in the Superior Court (2016) refers to a hearing that, as here, consists of both "(1) an evidentiary hearing to adjudicate whether the alleged violation has occurred; and (2) upon a finding of a violation, a dispositional hearing," as a final violation hearing.

the second-level hearsay declarants.[2] The probationer's attorney affidavits were -- with the exception of counsel's assertion that he is employed by the Committee for Public Counsel Services -- not based on any personal knowledge of the affiant, and the second-level hearsay declarants whose statements were relayed in those affidavits did not testify.[3] Thus, the reliability of such evidence was not proved sufficiently to render it admissible even under the relaxed evidentiary standards surrounding probation violation proceedings, and the evidence should not factor into the court's analysis whether the probationer should have been permitted to subpoena the complainant to testify at the violation hearing. Without this evidence, the probationer's proposed line of questioning was merely speculative, and the probationer's presumptive right to call the complainant as a witness was overcome by countervailing interests, including the likely trauma that testifying would cause to the complainant and the probationer's failure to establish that the complainant's live testimony was necessary to a fair adjudication of the alleged probation violation.

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[2] The probationer brought the complainant's former husband and former boyfriend to testify at the violation hearing, but not at the motion hearing.

[3] The probationer had one of the second-level hearsay declarants, his landlord, testify at the violation hearing, but not at the motion hearing.

It is true that "a probationer has a presumptive due process right to call witnesses in his or her defense." Commonwealth v. Hartfield, 474 Mass. 474, 481 (2016). However, that "presumption may be overcome by countervailing 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." Id. In determining whether, in the totality of the circumstances, this presumption has been overcome, the court must consider, at a minimum, the following three factors:

> "(1) whether the proposed testimony of the witness might be significant in determining whether it is more likely than not that the probationer violated the conditions of probation; (2) whether, based on the proffer of the witness's testimony, the witness would provide evidence that adds to or differs from previously admitted evidence rather than be cumulative of that evidence; and (3) 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 in court at the probation hearing" (citations omitted).

Id. As to the third factor, this court has rejected "a general rule that would prevent a probationer from ever calling . . . an alleged [sexual assault] victim to testify in his or her defense." Id. However, this court also has "recognize[d] the risk that an alleged sexual assault victim might suffer trauma from having to testify at a probation violation hearing." Id. In consideration of this risk, a court must conduct an

"individualized and evidence-based" assessment of the potential adverse effect of testifying on "the physical, psychological, or emotional health of an alleged sexual assault victim." Id.

As to the first factor, the defendant argues that the complainant's live testimony would be significant in determining whether it is more likely than not that the probationer violated the conditions of his probation because her credibility reasonably was at issue given the evidence the probationer had proffered on this point. However, I would conclude that all of the proffered evidence was inadmissible, and thus not to be considered in the court's analysis.

The probationer argues that the reports of his private investigator, his attorney's affidavits, and the affidavit of the complainant's former husband in an unrelated matter were admissible as hearsay statements where the formal rules of evidence do not apply to probation violation proceedings. However, even where the formal evidentiary rules are relaxed, such as here, the court must ensure that decisions are made on reliable evidence. Therefore, hearsay evidence must bear "substantial indicia of reliability" to be admissible in probation violation proceedings.[4] Hartfield, 474 Mass. at 482.

[4] The probationer argues that he should not be required, as the Commonwealth is, to show that his proffered hearsay evidence has substantial indicia of reliability. This argument is

As a preliminary matter, the probationer's proffered evidence is hearsay. The probationer argues that the proffered statements are not hearsay where, according to him, they were offered not to prove the truth of matter asserted, but to prove that the complainant "was an erratic and untrustworthy person and not a credible witness." What this argument ignores is that the proffered statements only show that the complainant "was an erratic and untrustworthy person" if the statements were true. This is not a case where the statements were "offered for a purpose whose relevance flows simply from the fact that the statements were made." Commonwealth v. Siny Van Tran, 460 Mass. 535, 551 (2011), quoting Commonwealth v. Serrano-Ortiz, 53 Mass. App. Ct. 608, 614 (2002). Where, as here, "a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, . . . the statement's utility is . . . dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not." Williams v. Illinois, 567 U.S. 50, 126 (2012) (Kagan, J., dissenting). Thus, because the relevance of the statements proffered by the probationer depends entirely on their truthfulness, they cannot reasonably be characterized as anything other than hearsay.

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without merit where "one-sided evidentiary rules are inherently unfair." Commonwealth v. Mayotte, 475 Mass. 254, 261 (2016).

As hearsay, the evidence may nevertheless be admissible under the relaxed evidentiary rules applicable in probation violation proceedings, provided that the evidence bears the requisite substantial indicia of reliability. Hartfield, 474 Mass. at 482. In considering whether hearsay evidence bears substantial indicia of reliability, the court

> "may consider (1) whether the evidence is based on personal knowledge or direct observation; (2) whether the evidence, if based on direct observation, was recorded close in time to the events in question; (3) the level of factual detail; (4) whether the statements are internally consistent; (5) whether the evidence is corroborated by information from other sources; (6) whether the declarant was disinterested when the statements were made; and (7) whether the statements were made under circumstances that support their veracity."

Id. at 484.

The reports of the private investigator do not bear the requisite indicia of reliability. First, the reports, as out-of-court statements of the private investigator, are themselves hearsay, effectively asserting that those interviewed by the investigator made certain statements to the investigator. The statements of the interviewees relayed in the report are, therefore, second-level hearsay and do not reflect any personal knowledge of the first-level hearsay declarant, the private investigator.[5] As the Appeals Court noted, "neither the

[5] To the extent that the reports relay conversations or arguments that the witnesses allegedly had with the complainant,

[interviewees'] statements nor the investigator's reports of those statements were made under oath," Commonwealth v. Costa, 99 Mass. App. Ct. 435, 440 n.7 (2021), and thus were not made in circumstances supporting their veracity. Further, the defendant could have but did not call the private investigator or any of the second-level hearsay declarants to testify at the motion hearing. Thus, no foundation was ever laid for the reports and no evidence of their authenticity is present in the record before us. That alone is, I think, sufficient to belie any claim of reliability as to the reports themselves and, thus, as to any first- or second-level hearsay statements contained in the reports. Additionally, the private investigator, as someone hired by the probationer, is not a disinterested declarant.[6]

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the complainant's statements constitute yet another level of hearsay -- at this point, third-level hearsay.

[6] As to the second-level hearsay contained in the reports of the private investigator, I would conclude likewise that they lack the requisite substantial indicia of reliability. For example, according to his own statements, the complainant's former husband has been engaged in a prolonged and bitter custody dispute with the complainant and is, thus, far from a disinterested declarant. Although his alleged statements are quite detailed and internally consistent, they are not corroborated by information from any other sources. Additionally, several of the statements do not appear to be based on personal knowledge, such as statements made about the complainant's conduct with their daughter or statements regarding calls the complainant allegedly placed to their daughter's school.

I would likewise decline to characterize the complainant's former boyfriend as a disinterested declarant where his

Thus, as neither the first- or second-level hearsay contained in the private investigator's reports bear the requisite substantial indicia of reliability, the reports are inadmissible even under the relaxed evidentiary standards applicable in probation revocation proceedings.

The probationer also proffered several documents related to restraining order proceedings initiated by the complainant's former husband against the complainant, including an affidavit by the former husband. Although the former husband's affidavit was made under oath, and thus made in circumstances that support its veracity, it is unclear how much of the affidavit is based on personal knowledge or observation and, conversely, how much of the affidavit is based on second-level hearsay.[7] Several of

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proffered statements indicate a contentious split from the complainant. Much of the report related to the interview between the former boyfriend and the probationer's private investigator detailed alleged statements of the complainant, i.e., uncorroborated third-level hearsay statements. The former boyfriend's own statements also were uncorroborated by information from other sources. For example, the former boyfriend asserted that an altercation with the complainant resulted in his conviction for assault, for which I presume some court documentation is available and yet none was submitted to the motion judge to corroborate the former boyfriend's assertion. Where the report asserts that the former boyfriend stated that "he wouldn't be surprised if [the complainant was] prostituting," the report also includes at least one second-level hearsay statement that appears entirely speculative and not based on any personal knowledge of the declarant.

[7] Even if the affidavit is admissible, although it does discuss conduct that would be concerning as to the complainant's ability to parent her daughter, it does not discuss any

the statements contained in the affidavit appear not to be based on personal knowledge or observation, such as the former husband's assertions surrounding an incident that allegedly occurred while the complainant was driving their daughter and the complainant's alleged mental health diagnosis.[8] Thus, the former husband's affidavit likely does not contain the requisite substantial indicia of reliability to render it admissible under

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allegedly dishonest conduct of the complainant, and thus does not bear on the complainant's credibility in this case.

[8] Additionally, I note that defendants in sexual assault cases routinely seek to admit evidence of their victims' mental health records, "[w]hether to be used as part of a legitimate defense, or as an intimidation tactic." Herbert, Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants, 83 Tex. L. Rev. 1453, 1453 (2005). Where courts already face the issue of pervasive bias against rape victims, "introducing mental health records, when not directly relevant to the victim's ability to comprehend and recall the events of the sexual assault, will only lead to further bias and an even more unbalanced trial." Id. at 1458. See Cole, She's Crazy (to Think We'll Believe Her): Credibility Discounting of Women with Mental Illness in the Era of #MeToo, 22 Geo. J. Gender & L. 173, 180 (2020) (Cole) ("the average police officer believes over [fifty percent] of sexual assault allegations are false").

The defendant sought to offer the complainant's purported mental health diagnosis as part of a broad effort to paint the complainant as generally unstable, and thus unbelievable. This all-too common argument essentially boils down to, "What? Don't believe her. She's crazy." Cole, supra at 173. Whether or not such evidence is proffered for a proper purpose, the risk is ever present that it will serve to entrench existing biases against rape victims and prevent a fair adjudication of the case. Id. at 187.

the relaxed evidentiary standards applicable in probation violation proceedings.

As to the attorney affidavits submitted by the probationer's counsel, as the Appeals Court observed, they "asserted no personal knowledge of the events described [therein], and the attached photograph was undated." Costa, 99 Mass. App. Ct. at 441 n.10. The first attorney affidavit summarized how the complainant allegedly spent Super Bowl Sunday of 2019 with the probationer and the probationer's mother. The identity is unknown of the declarant or declarants who relayed the assertions contained in the affidavit to the probationer's counsel. From the facts asserted, the declarant could have been the complainant, the probationer, or the probationer's mother. It is further unclear from whom or how the probationer's counsel learned that the complainant began a new relationship after accusing the probationer of the crimes that are the subject of the probation violation proceedings, or what relevance that alleged fact has to the complainant's credibility. The second attorney affidavit was largely a summary of statements allegedly made to the attorney by the probationer's landlord, which statements constitute second-level hearsay. Thus, where neither affidavit was based on personal knowledge and, instead, consisted almost entirely of second-level hearsay statements of unidentified declarants, where neither affidavit contains a

significant level of factual detail nor is corroborated by information from any other source, and where neither the first- or apparent second-level hearsay declarants were disinterested (with the possible exception of the probationer's landlord), the affidavits do not contain the requisite substantial indicia of reliability to render them admissible under the relaxed evidentiary standards for probation violation proceedings.

The probationer's sole evidence of the complainant's purported lack of credibility was the above-described inadmissible, unreliable hearsay evidence. The probationer argues that, regardless of whether the proffered evidence is inadmissible as a matter of law, the reports were nevertheless admitted as exhibits without objection during the motion hearing. The Commonwealth's failure to object to their admission does not absolutely preclude an appellate court from reviewing whether their admission was erroneous. See Commonwealth v. Yasin, 483 Mass. 343, 349 (2019), quoting Commonwealth v. Bettencourt, 447 Mass. 631, 633 (2006) ("we do 'occasionally exercise our discretion' to consider an issue that is raised for the first time on appeal"). Further, and more importantly here, the fact of the admission of the probationer's hearsay evidence did not require that the motion judge credit the assertions made therein.

"Hearsay, once admitted, may be weighed with the other evidence, and given any evidentiary value which it may possess." Commonwealth v. Keevan, 400 Mass. 557, 562 (1987), quoting Mahoney v. Harley Private Hosp., Inc., 279 Mass. 96, 100 (1932). "It is the exclusive province of the hearing judge to assess the weight of the evidence." Commonwealth v. Bukin, 467 Mass. 516, 521 (2014), citing Commonwealth v. Janovich, 55 Mass. App. Ct. 42, 50 (2002). "A judge is not required to credit assertions in affidavits," Commonwealth v. Buckman, 461 Mass. 24, 43 (2011), cert. denied, 567 U.S. 920 (2012), or in any other hearsay statements. This is true even where the hearsay statements are undisputed. Commonwealth v. Thurston, 53 Mass. App. Ct. 548, 551 (2002), citing Commonwealth v. Grace, 370 Mass. 746, 752 (1976), and others. Where the hearsay statements proffered by the probationer appear wholly unreliable for the reasons discussed supra, they possessed no evidentiary value, and the motion judge would have been entirely within her discretion to discredit them. This court likewise should not consider them in its analysis of the three Hartfield factors.

Without the probationer's proffered hearsay evidence, the probationer's proposed lines of questioning surrounding the complainant's credibility merely are speculative. Where the record contains no evidence that we may consider to suggest that the probationer would be able to show, through the complainant's

live testimony, that "it was more likely than not that [she] fabricated the alleged rape[s]" and assaults, Hartfield, 474 Mass. at 483, the defendant's argument that his examination of the complainant would be significant in determining whether it is more likely than not that the probationer violated the conditions of probation likewise is speculative. Thus, the first Hartfield factor weighs in the Commonwealth's favor.

As to the second factor, it is true that a witness's "testimony would not be cumulative where the probationer seeks to elicit from the witness additional information that would support the inference that the probationer did not commit the violation or would demonstrate that the hearsay evidence suggesting that he did commit the violation is unworthy of belief." Hartfield, 474 Mass. at 482. However, the probationer's claim that he would elicit noncumulative evidence from the complainant by attacking her credibility is mere speculation -- in the absence of any evidence that we may consider -- to suggest that the complainant's credibility is in doubt. Thus, the second factor weighs in the Commonwealth's favor.

To conclude otherwise would be to create an evidentiary system in probation proceedings in which any allegation of a witness's lack of credibility would result in the witness being compelled to testify, thus effectively rendering obsolete the

totality of the circumstances test articulated in Hartfield. Therefore, in my view, the probationer should, through reliable evidence, show that the witness's proposed testimony is more likely than not (1) to be "significant in determining whether it is more likely than not that the probationer violated the conditions of probation"; and (2) to provide "evidence that adds to or differs from the previously admitted evidence rather than be cumulative of that evidence," in order to establish the first and second Hartfield factors, respectively. See Hartfield, 474 Mass. at 481.

Finally, I find no error in the motion judge's conclusion, as to the third Hartfield factor, that there was "a legitimate risk" that the complainant would suffer "considerable anxiety and emotional distress" if compelled to testify at the violation hearing. As the majority notes, ante at , the complainant appeared on multiple occasions and to multiple people -- including police Sergeant James Leavitt and the assistant district attorney assigned to the case -- to be distraught and fearful when discussing the alleged assaults against her by the probationer. Additionally, the complainant was "extremely upset" and expressed to the assistant district attorney "extreme anxiety" at the prospect of testifying at the violation hearing. In the absence of any admissible evidence that we may consider regarding the complainant's alleged lack of credibility,

rendering speculative the significance and noncumulativeness of the complainant's proposed testimony, I must conclude that the complainant's "proposed testimony [appears] unnecessary to a fair adjudication of the alleged violation," Hartfield, 474 Mass. at 481. It also carries an unacceptable risk of retraumatizing the complainant for the reasons discussed supra. See id. Where all three Hartfield factors weigh in favor of the Commonwealth, under the totality of the circumstances the probationer's presumptive due process right to call the complainant has been overcome by countervailing interests. See id.

I note that the probationer's presumptive due process right to call the complainant has been overcome largely due to the probationer's failure, even in light of the relaxed evidentiary standards surrounding probation violation proceedings, to submit admissible evidence that would allow a motion judge or this court to consider his arguments as to the first two Hartfield factors. In other words, the Commonwealth has presented admissible evidence showing that all three Hartfield factors weigh in its favor and the probationer has failed to present any admissible evidence to rebut such a conclusion. Even in the context of a claimed constitutional violation against a criminal defendant, courts regularly decline to entertain claims that have no evidence in the record to support them. See

Commonwealth v. Leahy, 445 Mass. 481, 485 n.4 (2005) (dispensing with, as unsupported by any evidence, defendant's argument that Miranda waiver was involuntary because his release from being handcuffed to bench was conditioned on agreement to speak to police); Commonwealth v. Cruz, 90 Mass. App. Ct. 60, 66-67 (2016) (affirming motion judge's rejection of defendant's ineffective assistance of counsel claim based on finding "as a matter of fact and of law that the defendant presented no evidence to support his claim of ineffective assistance of counsel").

The arguments regarding the complainant's credibility do not rise above the speculative level and are, thus, insufficient to rebut the Commonwealth's showing that all three Hartfield factors weigh in the Commonwealth's favor; as a result, in the totality of the circumstances, the Commonwealth's countervailing interests have overcome the probationer's presumptive due process right to call the complainant as a witness. I would therefore affirm the motion judge's ruling precluding the probationer from calling the complainant as a witness at the violation hearing, and I dissent from that part of the majority opinion that holds otherwise.