A TRIAL BY ANY OTHER NAME: DAISEY KATES AND INJUSTICE IN PRETRIAL REVOCATION OF PROBATION AND PAROLE*

I. INTRODUCTION

Mrs. Daisey Kates was born on April 4, 1928.[1] She was the mother of nine children and lived near Perth and Master Streets,[2] in today's Ludlow neighborhood of Philadelphia. In 1969, Mrs. Kates was arrested and charged with wantonly pointing a firearm and aggravated assault and battery.[3] She had reportedly fired a gun at an acquaintance named Mr. Frank Jordan.[4] She was convicted in a bench trial and sentenced to three years of probation.[5] Then, early on Sunday, June 28, 1970, Mr. Jordan returned to Mrs. Kates's home.[6] According to a detective on the scene, Mr. Jordan broke two windows in Mrs. Kates's house shortly after midnight.[7] The allegation was that Mrs. Kates then fired a single shot from a revolver, hitting Mr. Jordan behind the ear.[8] Mr. Jordan was pronounced dead on arrival at a local hospital, and Mrs. Kates reportedly confessed to the killing to the police.[9] At the time, Mrs. Kates's oldest child was twelve years old.[10] Mrs. Kates was arrested and charged with murder.[11]

It is considered "good law" in Pennsylvania that prosecution can bring a violation of probation or parole (VOP) hearing for a direct violation of the conditions of parole[12]

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1. Docket at 1, Commonwealth v. Kates, No. MC-51-CR-0507301-1969 (Phila. Mun. Ct. May 10, 1969).
2. *Mother of Nine Held in Killing*, PHILA. INQUIRER, June 29, 1970, at 26.
3. Commonwealth v. Kates, 305 A.2d 701, 703 (Pa. 1973).
4. *Mother of Nine Held in Killing*, *supra* note 2, at 26.
5. *Kates*, 305 A.2d at 703.
6. *Mother of Nine Held in Killing*, *supra* note 2, at 26.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *See Probation and Parole*, ACLU OF PA., https://www.aclupa.org/issues/criminal-legal-reform/probation-and-parole/ [https://perma.cc/2LXF-DMA6] (last visited Oct. 20, 2025). A direct probation or parole violation occurs when an individual under supervisory status is convicted of a new crime. *See id.* This is in contrast to a technical violation, which refers to an alleged failure by a person under supervisory status to comply with their conditions of supervision. *See id.* While an arrest for the alleged commission of a new crime is considered a technical violation, it becomes a direct violation upon conviction. *Id.* However, under the Daisey Kates hearing sequence, an arrest violation can be ruled on by a VOP judge before the opportunity for conviction or acquittal. *See* Commonwealth v. Kates, 305 A.2d 701, 706 (Pa. 1973). In effect, under this sequence, technical

even before the alleged violation's substantive criminal trial takes place.[13] Mrs. Kates's name has since become synonymous with pretrial VOP hearings for direct violations.[14] This Comment calls for a true end to this unjust and unfair practice, arguing primarily that "Daisey Kates" hearings serve as an unconstitutional prosecutorial back channel that undermines appropriate criminal procedure, allowing the accused to be incarcerated under the preponderance standard without proper access to due process.

Section II of this Comment unearths the legacy of Mrs. Kates, as well as two others linked to her by judicial history, Mr. Cleo McClellan and Mr. James Allen. It interrogates the reasoning and efficacy of their consolidated case, *Commonwealth v. Kates*, beginning in Part II.A.1 with narrative histories of each appellant as compiled from court and press records. This research reveals the deeply human stories that are shadowed by the *Kates* decision: those of a mother, an eighteen-year-old boy, and a man suffering in unimaginable prison conditions. Part II.A.2 outlines the reasoning of the *Kates* majority opinion, including its analysis of statutory interpretation, due process, constitutional concerns, and judicial efficiency regarding the Daisey Kates hearing sequence. Part II.A.3 highlights the opinion's dissent, including its finding that the majority's result is "illogical and unconstitutional."[15] Part II.B evaluates the current standing of the *Kates* precedent in Pennsylvania law. Part II.B.1 examines how the contemporary understanding of the design of VOP hearings differs from the prevailing point of view at the time of *Kates*. Part II.B.2 describes the polarized treatment of the Daisey Kates sequence by the courts following the *Kates* decision, while Part II.B.3 brings to light efforts by modern prosecutors to minimize the practice of pretrial VOP proceedings.

In Section III, this Comment critiques the *Kates* decision. Part III.A unmasks the function of the direct VOP hearing as essentially identical to that of a criminal trial. Using contemporary judicial understanding of the purposes of these hearings, this Part examines how the lower standard of proof required for, and deprivation of due process stemming from, the Daisey Kates sequence creates prosecutorial pathways ripe for the proliferation of injustice, especially as it relates to the possibility of post-VOP-hearing acquittals. Part III.B further highlights the practical realities of the Daisey Kates sequence. Part III.B.1 outlines the effect that a Daisey Kates hearing can have on the accused with a mathematical evaluation of sentencing law. Part III.B.2 exposes today's

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arrest violations are treated as direct violations. *See id.* at 714 (Manderino, J., dissenting). In line with this precedent, this Comment refers to arrest violations falling under the *Kates* sequence as direct violations.

13. *Kates*, 305 A.2d at 706.

14. *See* Commonwealth v. Colon, 102 A.3d 1033, 1036 (Pa. Super. Ct. 2014); Commonwealth v. Ortega, 995 A.2d 879, 882 (Pa. Super. Ct. 2010). Philadelphia courts have expressed that Daisey Kates is often used instead of the more common procedural name, *Gagnon II*. Commonwealth v. Moriarty, 180 A.3d 1279, 1282 n.3 (Pa. Super. Ct. 2018) ("Where the court holds a revocation hearing, based on new criminal charges, before the defendant's trial on the new charges, the proceeding is commonly known as a '*Daisey-Kates* hearing.' Here, the parties and PCRA court refer to Appellant's revocation hearing as a *Gagnon II* hearing, so we will use that terminology as well." (emphasis omitted) (citation omitted)). The Philadelphia District Attorney's Office also refers to these hearings internally as "Daisy [sic] Kates" hearings. *See Philadelphia DAO Additional Policies To End Mass Supervision*, OFF. OF THE DIST. ATT'Y: CITY OF PHILA. (Jan. 17, 2022), https://phillyda.org/wp-content/uploads/2022/02/SupervisionPolicy2022.pdf [https://perma.cc/55YK-L43M]. In fact, the Daisey Kates hearing practice has become so ubiquitous that it is even referenced in the Pennsylvania Rules of Criminal Procedure. PA. R. CRIM. P. 708 cmt.

15. *Kates*, 305 A.2d at 714 (Manderino, J., dissenting).

conflicting opinions on the Daisey Kates sequence and explores the risk of future weaponization of the sequence in light of the politics of prosecution and criminal punishment.

II. OVERVIEW

A. Commonwealth v. Kates*, Consolidated Cases*

1. The Appellants

The case *Commonwealth v. Kates* consolidated the separate trials of three appellants: Mrs. Daisey Kates, Mr. Cleo McClellan, and Mr. James Allen. This Part details the individual posture and personal circumstances of each of the *Kates* appellants leading up to their consolidated case. On July 16, 1970, before her criminal trial on her homicide charge, Mrs. Kates[16] had a VOP hearing.[17] She did not testify, and her probation was revoked "[p]rimarily on the basis of an incriminating statement attributed to [her]": the confession she had given on the day of the killing.[18] The presiding judge sentenced her to three years of imprisonment in the State Correctional Institution at Muncy for violating the terms of her probation.[19] After her VOP hearing, Mrs. Kates made a pretrial motion in limine to suppress the confession, which was granted.[20] At her subsequent criminal trial for the homicide charge, the confession was ruled inadmissible based on improper *Miranda* warnings and she was found not guilty.[21] On appeal, Mrs. Kates sought to challenge the revocation of her probation and resentencing based on her subsequent trial acquittal, the *Miranda* suppression of the confession, and an allegation of a coerced confession.[22]

Mr. Cleo McClellan was born on June 29, 1950.[23] On May 16, 1969, at eighteen years old, he was arrested and charged with attempted burglary, larceny, and receiving stolen goods.[24] He pleaded guilty to these charges and was sentenced to eight years of concurrent probation.[25] In December of that year, he was again arrested and this time charged with assault and battery, indecent assault, and assault and battery with intent to

16. *See supra* Section I.

17. *Kates*, 305 A.2d at 703.

18. *Id.*; *see also Mother of Nine Held in Killing*, *supra* note 2, at 26 (describing Mrs. Kates's purported confession).

19. *Kates*, 305 A.2d at 703.

20. *See* Philip R. Goldsmith, *Court Rules Accused Criminals Can Lose Parole*, PHILA. INQUIRER, May 9, 1973, at 13-A.

21. *Kates*, 305 A.2d at 703, 711. *Miranda* warnings require law enforcement to inform those subject to custodial interrogation of their right to remain silent, among other constitutional protections. Miranda v. Arizona, 384 U.S. 436, 468–69 (1966).

22. *Kates*, 305 A.2d at 703, 711; *see also Miranda*, 384 U.S. at 468–69 (detailing warnings that law enforcement must issue to properly obtain a confession).

23. Docket at 1, Commonwealth v. McClellan, No. MC-51-CR-0115661-1969 (Phila. Mun. Ct. Jan. 19, 1969).

24. *See* Docket at 1, Commonwealth v. McClellan, No. CP-51-CR-0600541-1969 (Pa. Ct. C.P. Phila. Cnty. June 3, 1969).

25. *Kates*, 305 A.2d at 703–04.

ravish (which was understood at the time to mean rape).[26] Mr. McClellan had a VOP hearing on April 8, 1970, prior to any criminal trial on the charges.[27] A police officer testified about the assault and provided minimal details about a struggle Mr. McClellan had with "a young lady."[28] Like Mrs. Kates, Mr. McClellan elected not to testify at his revocation hearing in reliance on his Fifth Amendment rights.[29] His attorney had informed him that testimony at the VOP hearing could be used to prejudice him at his subsequent criminal trial.[30] Mr. McClellan's VOP hearing judge revoked his probation and sentenced him to a minimum of three years' and a maximum of ten years' imprisonment based on his charges.[31] At his criminal trial, Mr. McClellan was only found guilty of assault and battery, not indecent assault or rape.[32] Mr. McClellan attempted to appeal his resentencing, but the Pennsylvania Superior Court affirmed the judgment without opinion in November of that year.[33] He then appealed to the Pennsylvania Supreme Court.[34]

Mr. James Allen was born on September 29, 1943.[35] He lived on North Forty-First and Poplar Streets,[36] in today's East Parkside neighborhood of Philadelphia. He was twenty-six years old when he was arrested and charged with stealing a taxicab and thirteen dollars on January 18, 1970.[37] Following his arrest, Mr. Allen was held in Philadelphia County's Holmesburg Prison, a now-defunct institution infamously known for its facilitation of unethical medical experiments on incarcerated people.[38] Then, on July 4, 1970, a riot broke out at Holmesburg.[39] Referred to by then-Superintendent of Philadelphia County Prisons Edward Hendrick as the "worst riot Holmesburg ha[d] ever

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26. *Id.* at 703–04; Docket at 1, Commonwealth v. McClellan, No. MC-51-CR-1200201-1969 (Phila. Mun. Ct. Dec. 1, 1969); *see Ravish*, BLACK'S LAW DICTIONARY (4th ed. 1968) ("Ravish. To have carnal knowledge of a woman by force and against her will; to rape."). *See generally* 18 PA. STAT. AND CONS. STAT. ANN. § 3121 (West 2025) (effective Feb. 6, 2003) (providing Pennsylvania's rape offense and associated penalties).

27. *Kates*, 305 A.2d at 704.

28. *Id.*

29. *Id.* at 707.

30. *Id.* at 704.

31. *Id.*

32. *Id.*

33. *Id.*; Commonwealth v. McClellan, 270 A.2d 231, 231 (Pa. Super. Ct. 1970) (mem.) (per curiam), *aff'd sub nom.*, *Kates*, 305 A.2d 701.

34. *Kates*, 305 A.2d at 704.

35. Docket at 1, Commonwealth v. Allen, No. MC-51-CR-0112051-1970 (Phila. Mun. Ct. Jan. 18, 1970).

36. *Police Hold Suspect; Stolen Cab Is Recovered*, PHILA. INQUIRER, Jan. 19, 1970, at 8.

37. *See id.* In September 2025, $13 is closer to $112. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/DM9S-FDF2] (last visited Nov. 9, 2025).

38. *See* Aaron Epstein, *Human Guinea Pigs: Dioxin Tested at Holmesburg*, PHILA. INQUIRER, Jan. 11, 1981, at 1-A; Denise Gellene, *Dr. Albert M. Kligman, Dermatologist, Dies at 93*, N.Y. TIMES (Feb. 22, 2010), https://www.nytimes.com/2010/02/23/us/23kligman.html (on file with the Temple Law Review). *See generally* ALLEN M. HORNBLUM, ACRES OF SKIN: HUMAN EXPERIMENTS AT HOLMESBURG PRISON (1998) (documenting Dr. Albert Kligman's medical experimentation using the Holmesburg Prison population as test subjects from 1951 to 1974).

39. *See* Dennis Kirkland, *After the Riot Is Over, Prison Is a Blood-Spattered Wreckage*, PHILA. INQUIRER, July 5, 1970, at 6 ("The guards, many of whom had given up their holiday when news of the riot reached them . . . .").

seen,"[40] the altercation resulted in 103 people injured.[41] The vast majority of those injured—approximately eighty people—were incarcerated individuals.[42] Frank Rizzo, then-Police Commissioner of Philadelphia, described the prisoners deemed responsible for the riot as "barbarians," stating that the altercation "was a complete racial problem" and that officials "had to use firepower and manpower to drive the [B]lack inmates back."[43] Other contemporaries rejected the race riot angle.[44] The Holmesburg population at the time was ninety percent Black, so many believed that racial tensions in the institution were not significant enough to cause such an incident.[45] Those rejecting the racialized narrative included a committee of local chaplains, who argued that the riot was instead caused by "intolerable conditions" in the prison.[46] As a simple example to support the chaplains' position (aside from the known accounts of human experimentation), Holmesburg was built to contain six hundred people; on the day of the riot, there were close to thirteen hundred imprisoned in the facility.[47]

Mr. Allen was named as a "ringleader[] and noted troublemaker[]" in the prison and was one of around thirty inmates transferred to the Eastern State Penitentiary to await arraignment on riot charges,[48] despite the fact that the Penitentiary had been officially closed earlier that year.[49] He was arraigned one month later,[50] and his bail was set at $25,000,[51] which was the highest bail amount set for any of the inmates involved.[52] A grand jury convened in the Holmesburg Prison chapel in November of that year to decide charges against Mr. Allen and six others.[53] On May 7, 1971, Mr. Allen pleaded guilty to riot and conspiracy.[54] He was sentenced to two years of probation for conspiracy and

40. Editorial, *Ugliness at Holmesburg*, PHILA. INQUIRER, July 6, 1970, at 12 [hereinafter Editorial, *Ugliness at Holmesburg*].

41. *Racism Is Linked to Prison Brawl*, N.Y. TIMES, July 7, 1970, at 32.

42. *List of Injured in Holmesburg Prison Riot*, PHILA. INQUIRER, July 5, 1970, at 7.

43. *Racism Is Linked to Prison Brawl*, *supra* note 41, at 32.

44. *See, e.g.*, Acel Moore & James N. Riggio, *Chaplains Blame Poor Conditions for Prison Riot*, PHILA. INQUIRER, July 6, 1970, at 1; Editorial, *Ugliness at Holmesburg*, *supra* note 40, at 12; Editorial, *Disgrace at Holmesburg*, PHILA. INQUIRER, July 7, 1970, at 10.

45. *See Racism Is Linked to Prison Brawl*, *supra* note 41, at 32; Editorial, *Ugliness at Holmesburg*, *supra* note 40, at 12.

46. *Racism Is Linked to Prison Brawl*, *supra* note 41, at 32; Moore & Riggio, *supra* note 44, at 1.

47. *Racism Is Linked to Prison Brawl*, *supra* note 41, at 32; *see also Gov. Shafer Asks Prison Take-Over*, N.Y. TIMES, July 12, 1970, at 33 (detailing the population and capacity of Holmesburg at the time); *Jury Alerted City on Prison Prior to Riot*, PHILA. INQUIRER, July 8, 1970, at 27 (detailing repeated findings of overcrowding at Holmesburg by grand juries in the years preceding the July 4 riot).

48. *Racism Is Linked to Prison Brawl*, *supra* note 41, at 32; *see* Howard Shapiro & Hoag Levins, *City Reopens Abandoned State Facility*, PHILA. INQUIRER, July 6, 1970, at 1; *18 Arraigned in Holmesburg Riot, Held for Hearings in $275,000 Bail*, PHILA. INQUIRER, Aug. 5, 1970, at 8; *Gov. Shafer Asks Prison Take-Over*, *supra* note 47, at 33.

49. *History of Eastern State Penitentiary*, E. STATE PENITENTIARY, https://easternstate.org/about/history-of-eastern-state-penitentiary [https://perma.cc/A8KG-2TKE] (last visited Oct. 20, 2025); *see City Reopens Abandoned State Facility*, *supra* note 48, at 1.

50. Docket at 1, Commonwealth v. Allen, No. MC-51-CR-0802241-1970 (Phila. Mun. Ct. Aug. 4, 1970).

51. In September 2025, $25,000 is closer to $208,000. *See CPI Inflation Calculator*, *supra* note 37.

52. *18 Arraigned in Holmesburg Riot*, *supra* note 48, at 8.

53. *Seven at Holmesburg Held to Grand Jury*, PHILA. INQUIRER, Nov. 5, 1970, at 17.

54. Commonwealth v. Kates, 305 A.2d 701, 704 (Pa. 1973).

five years of probation for riot, with both sentences set to run concurrently.[55] Then, just sixteen days later, police stopped a vehicle in which Mr. Allen was a passenger.[56] They found "a single packet of narcotics" inside the vehicle and arrested and charged Mr. Allen with both use and possession.[57] Mr. Allen's VOP hearing was scheduled for July 12, 1971.[58] He requested a continuance until after his substantive criminal trial but was denied.[59] He then asked for a writ of prohibition from the Pennsylvania Supreme Court to prevent the hearing from being held before his criminal trial on the charges.[60] Mr. Allen's hearing judge agreed to postpone his revocation hearing until the court's decision on the writ.[61]

2. The Majority

In 1973, the Pennsylvania Supreme Court handed down its decision in *Commonwealth v. Kates*.[62] In just eleven pages, the majority cemented the fate of pretrial probation and parole revocation in the Commonwealth for the next fifty years. The opinion, authored by former Deputy Attorney General Robert N.C. Nix, Jr.,[63] consolidated three different appeals.[64] Two of those appeals, Mrs. Kates's and Mr. McClellan's, were for probation revocations and sentences already imposed.[65] The third appeal, Mr. Allen's, was an attempt to stop Mr. Allen's VOP hearing from taking place before his substantive criminal trial.[66]

Each of the three consolidated defendants based their appeal at least in part on the issue of holding a VOP hearing prior to the substantive criminal trial for a direct violation.[67] For all three, a 6-1 majority held that this sequencing issue did not violate due process.[68]

The *Kates* court began its analysis with a survey of applicable statutory authority.[69] It evaluated three Pennsylvania probation statutes—the Acts of 1909,[70] 1911,[71] and

55. *See id.*; Docket at 2, Commonwealth v. Allen, No. CP-51-CR-1113272-1970 (Pa. Ct. C.P. Phila. Cnty. Nov. 20, 1970); Docket at 1, Commonwealth v. Allen, No. CP-51-CR-1205021-1970 (Pa. Ct. C.P. Phila. Cnty. Dec. 15, 1970).

56. *Kates*, 305 A.2d at 704.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 703–04.

61. *Id.* at 704.

62. *Id.* at 701.

63. Phila. Bar Ass'n Bd. of Governors, *Philadelphia Bar Association Resolution Urging that the Pennsylvania Judicial Center Be Renamed "Chief Justice Robert N. C. Nix, Jr. Judicial Center,"* PHILA. BAR ASS'N (June 24, 2020), https://philadelphiabar.org/?pg=ResJune20_4 [https://perma.cc/BNN5-9525].

64. *Kates*, 305 A.2d at 703.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* at 703, 711; *id.* at 711–12 (Roberts, J., concurring in part and dissenting in part) (dissenting on unrelated grounds); *id.* at 713 (Manderino, J., dissenting).

69. *Id.* at 704–06 (majority opinion).

70. Act of May 10, 1909, No. 275, 1909 Pa. Laws 495.

71. Act of June 19, 1911, No. 812, 1911 Pa. Laws 1055.

1941[72]—and held that the Act of 1911 was controlling for revocation issues.[73] The court emphasized section 4 of the Act, which reads:

> Whenever a person placed on probation, as aforesaid, shall violate the terms of his or her probation, he or she shall be subject to arrest in the same manner as in the case of an escaped convict; and shall be brought before the court which released him or her on probation, which court may thereupon pronounce upon such defendant such sentence as may be prescribed by law, to begin at such time as the court may direct.[74]

Based on their statutory interpretation, the court found that, because section 4 of the Act of 1911 contained no express provision allowing for a pretrial VOP hearing, there was no express statutory restriction against such a process.[75]

The court then addressed the constitutional and due process arguments lobbied by the appellants.[76] Prior to the decision in *Kates*, Pennsylvania jurisprudence on the rights of people on probation and parole in revocation contexts was limited. A seminal parole case, *Morrissey v. Brewer*, had been argued in front of the United States Supreme Court the year before.[77] The *Morrissey* Court held that because "[p]arole arises after the end of the criminal prosecution," it is not part of the criminal prosecution process, and since it is not part of that process, "the full panoply of rights due [to] a defendant in such a proceeding does not apply."[78] *Morrissey* also held that revocation of parole does not actually involve a deprivation of liberty in the same way a criminal trial might, but only the deprivation of "conditional liberty" that individuals have exclusively because of their parole status.[79] Despite these holdings, the *Morrissey* Court still found that some due process was owed to people on parole in revocation proceedings.[80] The Court set out a number of "minimum requirements" for due process in this setting, including:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of 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 parole.[81]

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72. Act of Aug. 6, 1941, No. 323, 1941 Pa. Laws 861.

73. *Kates*, 305 A.2d at 706.

74. *Id.* at 706 (quoting Act of June 19, 1911, § 4).

75. *Id.*

76. *Id.* at 706–09.

77. *See generally* 408 U.S. 471 (1972) (outlining minimum due process protections in parole revocation proceedings).

78. *Id.* at 480.

79. *Id.*

80. *Id.* at 485.

81. *Id.* at 489; *see also Kates*, 305 A.2d at 709 (quoting *Morrissey*, 408 U.S. at 489) (recognizing the *Morrissey* precedent as applied to Pennsylvania procedure).

The *Kates* majority relied on the *Morrissey* due process standard in part to determine the rights owed to people on probation and held that the *Morrissey* decision was applicable to probation revocation as well as parole.[82]

As to the constitutional issues, the appellants primarily claimed that pretrial revocations create an "unjustifiable tension" between a defendant's right to due process[83] and their right against self-incrimination[84] in accordance with *Simmons v. United States*.[85] Stated simply, the appellants argued that circumstances could arise where it might be helpful for a defendant to give testimony in a VOP hearing, but they could then face a conflict if such testimony might later be used to incriminate them at trial.[86] The *Simmons* opinion, delivered in 1968, addressed a conflict between the defendant's ability to assert a Fourth Amendment claim and his ability to refrain from self-incrimination under the Fifth Amendment.[87] In the case of the defendant in *Simmons*, who was on trial for robbery, "the testimony required for standing [to bring the Fourth Amendment claim] itself prove[d] an element of the offense."[88] In order to resolve the tension between these constitutional rights created by this marginal issue, the *Simmons* Court held that testimony offered at a suppression hearing to establish standing for a Fourth Amendment claim could not be used against a defendant at a subsequent criminal trial.[89] The *Kates* court rejected the appellants' reference to *Simmons* on the basis that Mrs. Kates and Mr. McClellan voluntarily elected not to testify at their hearings and that Mr. Allen's hearing had not yet happened.[90] The court felt that "it [was] difficult to conceive of any testimony that may have been helpful during the violation hearing that would be incriminating at the time of trial," so to address this *Simmons* conflict would be speculative.[91] The court finished its tension analysis by holding that "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow," and that the appellants' conflicts of choosing whether or not to testify in these cases were insufficient to raise a constitutional issue.[92]

Second, the appellants presented the court with a judicial efficiency argument, contending that handling probation revocation at or after a criminal trial would conserve

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82. *Kates*, 305 A.2d at 709 n.10.

83. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

84. *Id.* ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

85. *Kates*, 305 A.2d at 706–07; *cf.* Simmons v. United States, 394 U.S. 377, 390 (1968) (holding that, where a defendant's testimony is necessary at a suppression hearing to establish standing for a Fourth Amendment claim, that testimony cannot subsequently be used against the defendant at trial). The *Kates* court's reference to an "unjustifiable tension," *Kates*, 305 A.2d at 706, is somewhat mysterious. The language in *Simmons* is actually an "undeniable tension," *Simmons*, 390 U.S. at 394, but it is possible that the *Kates* court is quoting language from the appellate briefs.

86. *See Kates*, 305 A.2d at 706–07.

87. *Simmons*, 390 U.S. at 394 ("Thus, in this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination.").

88. *Id.* at 391.

89. *Id.* at 394.

90. *Kates*, 305 A.2d at 707.

91. *Id.*

92. *Id.* at 707–08 (quoting McMann v. Richardson, 397 U.S. 759, 769 (1970)).

time and resources.[93] The court rejected this argument, holding that, since the issues in a revocation hearing and the issues in a criminal trial are not identical, having two separate proceedings is appropriate.[94] The *Kates* majority emphasized that criminal trials are centered on the Commonwealth's ability to prove elements of an offense beyond a reasonable doubt, while revocation hearings are centered on whether probation has been effective in affecting rehabilitation and deterrence.[95] The court resorted to a public safety answer to the judicial economy argument, reasoning that "the possibility of duplicating effort is far outweighed by other policies," including society's "right to expect a prompt hearing when a probationer has allegedly engaged in a course of criminal activity."[96] Citing a number of other state and federal cases as persuasive, the court also noted that its public policy argument was bolstered by similar decisions in other jurisdictions.[97]

As to Mrs. Kates's contested confession, the court ruled that, regardless of its inadmissibility at trial, Mrs. Kates's confession given without *Miranda* warnings was permissible to use against her in her VOP hearing without impacting her due process rights.[98] In the instant appeal, Mrs. Kates had attempted to additionally argue that her confession was coerced.[99] The court ruled that, because Mrs. Kates had not raised a coercion claim at her original suppression hearing, she had forfeited the argument.[100] The majority decision did not clearly state whether a coercion claim would have been sufficient to establish a due process violation and thus reverse Mrs. Kates's revocation and resentencing, nor did it address Mrs. Kates's subsequent acquittal.[101]

In addition to the claims raised above, Mr. McClellan argued in his appeal that there was a Sixth Amendment Confrontation Clause issue,[102] as only a police officer testified against him at his revocation hearing and not the alleged victim.[103] The court ruled, without explanation, that there was no constitutional requirement to confront the alleged victim at VOP hearings.[104] The court did address Mr. McClellan's acquittal on the indecent assault and rape charges, but held that the evidence establishing his guilty verdict on the assault and battery charge made the acquittals insignificant in terms of reevaluating his revocation.[105] While the court agreed that the "evidence may not have been sufficient to establish the intent to ravish," it held that this finding was "not controlling," as the record establishing Mr. McClellan's assault and battery was sufficient for revocation of his probation.[106] Since the revocation and resentencing

93. *Id.* at 708.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 708–09.

98. *Id.* at 711.

99. *Id.*

100. *Id.*

101. *See id.*

102. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

103. *See Kates*, 305 A.2d at 711.

104. *Id.*

105. *Id.*

106. *Id.*

decisions were not based "solely" on the acquitted sex crimes, the court affirmed the judgment against him.[107]

As for Mr. Allen's case, the court offered no fact-specific reasoning for its decision. It said only the following: "The petition for writ of prohibition is denied and the case remanded for a probation violation hearing in accordance with this opinion."[108]

3. The Dissent

Justice Manderino dissented from the entire majority opinion.[109] Justice Manderino began his dissent by proclaiming that "[c]onstitutional protections apply to all persons at all times. There is no exception."[110] He argued that the majority's decision created a new class out of people on probation, which leads to unfair deprivation of constitutional rights based on status.[111] For Justice Manderino, no status of probation should prevent a person accused of committing a crime from accessing the regular protections afforded to all other accused persons.[112] These protections, Justice Manderino argued, "admit of no exceptions," and the question as to whether they apply to those on probation should be answered by the Constitution itself.[113]

Still, in addressing the court's opinion, Justice Manderino looked into different controlling statutes.[114] Instead of using the silence of the probation statutes as determinative, as the majority did,[115] Justice Manderino turned to parallel provisions in statutes applicable to people on parole, who he asserted "are not in any significant manner different from persons on probation."[116] One of the controlling parole statutes at the time established that parole could not be revoked based on the commission of a new crime unless and until the person on parole was tried and convicted or pleaded guilty or nolo contendere.[117] This legislation made clear the fact that parole revocation could occur only after the substantive criminal trial, which Justice Manderino interpreted as providing people on parole with all the constitutional protections afforded to the accused.[118] In Justice Manderino's opinion, the majority's adherence to its interpretation of silence in probation statutes creates a situation where rights are denied to people on probation that are not denied to any others in either the Pennsylvania Constitution or the federal Constitution, nor in parallel legislation for parole.[119] The dissent emphasized the

107. *Id.*

108. *Id.*

109. *Kates*, 305 A.2d at 713–15 (Manderino, J., dissenting).

110. *Id.* at 713.

111. *Id.*

112. *Id.* at 713–14.

113. *Id.* at 714.

114. *Id.*

115. *Id.* at 706 (majority opinion).

116. *Id.* at 714 (Manderino, J., dissenting).

117. *Id.*; *see also* Act of Aug. 6, 1941, No. 323, § 16, 1941 Pa. Laws 861, 867 (repealed 2009) (requiring a conviction to revoke parole based on a direct violation).

118. *Kates*, 305 A.2d at 714 (Manderino, J., dissenting).

119. *Id.*

ideal of the presumption of innocence until proven guilty, proof of which happens only after a criminal trial has been conducted.[120]

Justice Manderino also drew a comparison between people on probation and incarcerated people, asserting that the majority's opinion would make it so people on probation actually had fewer rights than those incarcerated.[121] He reasoned that the presumption of innocence still applied to those incarcerated, since people in prison could not be given additional time on their sentences solely for being accused of committing a crime.[122] Since incarcerated people could suffer no new penalties until after a trial, in this marginal context of VOP hearings, incarcerated people enjoyed more rights than those with probation or parole statuses.[123]

Justice Manderino questioned the court's reliance on *Morrissey*.[124] His issue was not with any probation versus parole distinction, but rather with the fact that the parole violations alleged in *Morrissey* were technical violations, not direct violations stemming from the commission of a new crime.[125] The *Morrissey* case consolidated two appeals of different petitioners: Mr. John Morrissey and Mr. G. Donald Booher.[126] While the Supreme Court did not offer treatment on the specifics of Mr. Morrissey and Mr. Booher's violations, Justice Douglas did note in his partial dissent that the Eighth Circuit Court of Appeals described them in its prior opinion.[127] For Mr. Morrissey, his violations were unauthorized purchases using an alias and violations of employment conditions associated with his parole.[128] For Mr. Booher, it was leaving the territorial limits specified in his parole agreement, obtaining a driver's license with an alias, and violating employment conditions.[129] Justice Manderino distinguished the case at hand on the basis that the violations in question for the *Kates* appellants were direct violations in the form of alleged commission of new crimes as opposed to the technical violations alleged against the *Morrissey* appellants.[130]

The dissent additionally called out the issue of the possible quandary inherent in cases where a probation revocation is followed by a subsequent acquittal on the substantive crime that created the violation in the first place.[131] Justice Manderino found that the majority's decision would allow a person on probation to suffer the consequences of a crime that they were actually acquitted for, an outcome that he described as "illogical and unconstitutional" and "double jeopardy of the defendant's liberty."[132]

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Morrissey v. Brewer, 408 U.S. 471, 472–74 (1972).
127. *Id.* at 495 n.4 (Douglas, J., dissenting in part).
128. Morrissey v. Brewer, 443 F.2d 942, 943 n.1 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972).
129. *Id.* at 944 n.2.
130. *Kates*, 305 A.2d at 714 (Manderino, J., dissenting).
131. *Id.*
132. *Id.*

Justice Manderino ended his opinion with a call for the reversal of Mrs. Kates's probation revocation.[133] As to Mr. McClellan, he argued the sequencing problem and addressed a different angle of acquittal.[134] Even though Mr. McClellan had been found guilty of some of his crimes, he was acquitted "of the higher offense of assault with intent to rape."[135] Justice Manderino questioned if the revocation Mr. McClellan had received, which sentenced him to three to ten years' imprisonment, was fairly imposed based on his conviction.[136] The dissent hinted that the length and severity of Mr. McClellan's sentence was for that higher offense of rape, which became unjust punishment once he had been acquitted.[137] Finally, as to Mr. Allen, Justice Manderino argued that his writ of prohibition should have been granted, and his revocation hearing should have been stayed until his relevant criminal trial.[138]

B. Treatment of Commonwealth v. Kates

1. The Procedure and Purpose of VOP Hearings

Kates was decided on May 8, 1973.[139] Just six days later, on May 14, 1973, the United States Supreme Court would hand down its most influential probation decision up to that point in *Gagnon v. Scarpelli*.[140] The *Gagnon* Court noted *Morrissey*'s conclusion that revocation of parole was not a part of the criminal process and further extended that finding to apply in the same way to probation revocation.[141] Still, the Court found that the deprivation of liberty following revocation required due process in the form of both a preliminary and final revocation hearing in line with *Morrissey*'s conditions.[142] That preliminary hearing would focus on determining the existence of probable cause to believe that a probation violation occurred, while the final hearing would be focused on revocation and sentencing.[143] These hearings would become known as Gagnon I and Gagnon II hearings, respectively.[144]

Gagnon was implemented in Pennsylvania under *Commonwealth v. Davis* in 1975.[145] The *Davis* court held that, regarding a Gagnon I hearing, a conviction in a municipal court or a court of common pleas, or a preliminary hearing in a municipal

133. *Id.* at 714–15.

134. *See id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 701 (majority opinion).

140. *See generally* 411 U.S. 778 (1973) (establishing due process protections for probation violation hearings).

141. *Id.* at 781–82.

142. *Id.* at 782.

143. *Id.*

144. Commonwealth v. Davis, 336 A.2d 616, 620–21 (Pa. Super. Ct. 1975) ("Because the term 'preliminary hearing' has a particular meaning in Pennsylvania criminal law, it will be convenient to refer to the 'preliminary hearing' to which a parolee or probationer is entitled as a 'Gagnon I hearing,' and to the second 'somewhat more comprehensive hearing' as a 'Gagnon II hearing.'"); *see* PA. R. CRIM. P. 708(E).

145. *See Davis*, 336 A.2d at 620.

court, satisfies the due process requirements.[146] As to Gagnon II hearings, the court reaffirmed *Kates*'s ruling that VOP hearings could be held before a substantive criminal trial, clarifying that such a revocation hearing would satisfy the requirements of a Gagnon II hearing.[147] The *Davis* court noted that a Daisey Kates hearing is still valid even if a person on probation is acquitted of criminal charges at trial because "all factual support of the earlier revocation of probation is not necessarily removed."[148] This finding was based on *United States v. Chambers*, a 1970 Third Circuit Court of Appeals opinion holding that factual support can be retained after acquittal because the burden of proof is greater at a criminal trial than it is at a revocation hearing.[149] Still, the *Davis* court asserted that a Daisey Kates hearing resulting this way may be "possibly unjust" where a person's probation is revoked based on criminal charges for which they are later acquitted.[150] To combat this potential injustice, the court proposed that "it may in many cases be preferable" to hold the revocation hearing after the relevant criminal trial.[151] The *Davis* court also noted that, based on the holding in *Kates*, probation can only be revoked where there is evidence of some probative value that probation has been an ineffective rehabilitative tool.[152] The court stated that arrests alone do not have any probative value and that there must be some evidence beyond an arrest to permit a probation revocation.[153]

In Pennsylvania today, revocation is based on a finding that the individual under supervision violated some condition or committed a new crime by the preponderance of the evidence.[154] This is in contrast to the standard of proof required at full-scale criminal trials, where conviction is prohibited unless a person is proven guilty beyond a reasonable doubt.[155] While the *Kates* court did not offer a direct explanation in support of the use of a lower standard at VOP hearings, it did explain that VOP hearings differ from trials because "[t]he focus of a probation violation hearing, even though prompted by a subsequent arrest, is whether the conduct of the probationer indicates that the probation has proven to be an effective vehicle to accomplish rehabilitation and a sufficient deterrent against future antisocial conduct."[156]

However, more recent decisions have reinterpreted the purpose of VOP hearings. In 2019, the Pennsylvania Supreme Court held in *Commonwealth v. Foster* that "a violation of probation does not occur solely because a judge believes the probationer's

146. *See* Commonwealth v. Ball, 344 A.2d 675, 677 (Pa. Super. Ct. 1975); *Davis*, 336 A.2d at 616.

147. *Davis*, 336 A.2d at 623.

148. *Id.* at 622; United States v. Chambers, 429 F.2d 410, 411 (3d Cir. 1970).

149. *Chambers*, 429 F.2d at 411.

150. *Davis*, 336 A.2d at 623.

151. *Id.*

152. *Id.* at 620; Commonwealth v. Kates, 305 A.2d 701, 710 (Pa. 1973).

153. *Davis*, 336 A.2d at 620; Commonwealth v. Jones, 50 A.2d 342, 344 (Pa. 1947); Commonwealth v. Newman, 310 A.2d 380, 381 (Pa. Super. Ct. 1973).

154. Commonwealth v. Foster, 214 A.3d 1240, 1243 (Pa. 2019) ("[T]he VOP court must find, based on the preponderance of the evidence, that the probationer violated a specific condition of probation or committed a new crime to be found in violation.").

155. Jackson v. Virginia, 443 U.S. 307, 309 (1979) ("The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt.").

156. *Kates*, 305 A.2d at 708.

conduct indicates that probation has been ineffective to rehabilitate or to deter against antisocial conduct"[157] and instead that "the effectiveness of probation as a rehabilitative tool and as a deterrent to antisocial conduct is the lens through which a violation is to be viewed."[158] This language has been further interpreted by the Pennsylvania Superior Court as a two-step inquiry: After a court determines whether a violation occurred, only then can the effectiveness of supervision be considered as a factor for revocation.[159]

2. Judicial Interpretations of the Daisey Kates Sequence

Over the years following *Kates*, Pennsylvania decisions on the best uses of Daisey Kates hearings have varied.[160] Many opinions echo the *Davis* court's sentiment that conducting a pretrial revocation hearing may not be in the Commonwealth's best interest.[161] Some courts have held that, because criminal conviction requires probation revocation as a matter of law, delaying the revocation hearing until after trial may be preferable to conserve judicial resources.[162]

Still, other decisions have implied some disadvantages stemming from waiting for a posttrial revocation hearing.[163] The United States Supreme Court itself offered some support for pretrial revocation, stating in *Morrissey* that "it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the [s]tate."[164] Beyond this, in *Commonwealth v. Brown*, the Pennsylvania Supreme Court, in another opinion written by Justice Nix, criticized the Commonwealth based on its order of operations.[165] In *Brown*, the Commonwealth elected to defer a VOP hearing until after the relevant criminal trial.[166] The defendant was acquitted at that trial, yet the Commonwealth still attempted to pursue probation revocation after the jury verdict was delivered.[167] The court held that this was an

157. 214 A.3d at 1243.

158. *Id.* at 1251.

159. Commonwealth v. Giliam, 233 A.3d 863, 869 (Pa. Super. Ct. 2020) ("First, a VOP court must determine whether a probation violation actually occurred. If it did, only then the court may consider the rehabilitative effectiveness of the probation in deciding whether to revoke the probation.").

160. *See generally* Commonwealth v. Infante, 888 A.2d 783 (Pa. 2005), *abrogated by*, Commonwealth v. Foster, 214 A.3d 1240 (Pa. 2019) (holding that, in certain circumstances, VOP hearings can occur both before and after related criminal trials); *Giliam*, 233 A.3d at 863 (holding that an acquittal at a subsequent criminal trial can void a prior finding of probation or parole violation).

161. *See, e.g.*, *Infante*, 888 A.2d at 791; Commonwealth v. Brown, 469 A.2d 1371, 1376 (Pa. 1983) ("[I]t has been recognized that it may in many cases be preferable to defer that hearing until after the trial, thus avoiding the possibly unjust result of revoking probation, only to find later that the probationer has been acquitted of the charges that prompted the revocation hearing." (internal quotation marks omitted) (quoting Commonwealth v. Burrell, 441 A.2d 744, 746 (Pa. 1982))); *Giliam*, 233 A.3d at 869; Commonwealth v. Mayfield, 247 A.3d 1002, 1007 (Pa. 2021) ("[T]his Court has expressed a preference for deferring VOP proceedings until after the resolution of a defendant's new charges . . . ."); Commonwealth v. Parson, 259 A.3d 1012, 1021 (Pa. Super. Ct. 2021) ("Although it is often more prudent to defer a VOP proceeding until after the resolution of a probationer's new charges, it is not a requirement.").

162. *E.g.*, *Burrell*, 441 A.2d at 746–47.

163. *See, e.g.*, *Brown*, 469 A.2d at 1376–78.

164. Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

165. 469 A.2d at 1377.

166. *Id.* at 1372.

167. *Id.*

impermissible attempt at a "second bite of the apple" by the Commonwealth on the basis of collateral estoppel, and that allowing the revocation to go forward "would not only be unseemly but fundamentally unfair."[168] In that case, the court reaffirmed the *Kates* option of having the revocation hearing before the trial and held that the Commonwealth may actually inadvertently cut off channels of prosecution by electing to defer the hearing instead.[169]

In some cases, courts have appeared to reward the prosecution for deferring such hearings, holding that a VOP hearing can be properly administered even after the probationary term itself has expired if its delay was in the interest of waiting for the relevant criminal trial to be completed.[170] Additionally, in *Commonwealth v. Infante*, the Pennsylvania Supreme Court held that revocation hearings could, in certain circumstances, be held both before and after the relevant criminal trial.[171] There, the hearing judge revoked Mr. Jose Infante's parole on the basis of technical violations and imposed a county-level sentence and probation at resentencing.[172] However, at that hearing, the judge noted that Mr. Infante had outstanding criminal charges pending trial and told him that "[i]f there is a guilty verdict on any of those charges, I will terminate your parole. I will revoke your probation and send you to state prison."[173] Mr. Infante was found guilty at his criminal trial and his parole hearing judge followed through on her promise.[174] The Pennsylvania Supreme Court upheld this revocation, holding that the hearing judge's "leniency" should not "be construed, as a matter of law, to operate to tie its hands concerning a distinct, disclosed, and lawful pending but contingent basis for revocation and re-sentencing [sic]."[175] As noted by Chief Justice Cappy in his dissenting opinion, since the pending criminal charges were known to the judge at the initial hearing, the majority's opinion in this case "would subject a probationary defendant to multiple revocations based upon the identical conduct."[176]

Most recently, in *Commonwealth v. Giliam*, the Pennsylvania Superior Court held that, when new criminal charges are the state's only grounds for probation revocation, later acquittal on those criminal charges will void any revocation and resentencing.[177] The *Giliam* court noted that, "[g]iven the Pennsylvania Supreme Court's ruling in *Foster*, the application of *Kates* in cases like this one, where the sole basis of a probation violation is the commission of a new crime, is highly dubious."[178] Based on this case history, the doctrine of Daisey Kates hearings has remained somewhat unsettled since its inception. According to Pennsylvania Supreme Court Justice McDermott, the law as it

168. *Id.* at 1376, 1378.

169. *Id.* at 1375–76.

170. *See, e.g.*, Commonwealth v. Burrell, 441 A.2d 744, 745–46 (Pa. 1982).

171. 888 A.2d 783, 785 (Pa. 2005), *abrogated by*, Commonwealth v. Foster, 214 A.3d 1240 (Pa. 2019).

172. *Id.* at 787.

173. *Id.* (alteration in original) (emphasis omitted).

174. *See id.*

175. *Id.* at 793–94.

176. *Id.* at 795 (Cappy, C.J., dissenting).

177. 233 A.3d 863, 868 (Pa. Super. Ct. 2020).

178. *Id.* at 869 n.4.

currently stands creates "negative practical effects."[179] In his opinion, pretrial revocation means:

> The Commonwealth will now do one of two things: either bring probation revocation hearings prior to the criminal trial based on the criminal activity itself and not the conviction, thereby eviscerating the protection to the probationer, or to simply present the evidence of the underlying criminal activity at the probation revocation hearing thereby forcing the Commonwealth to put on two trials.[180]

3. Prosecutorial Opposition to Daisey Kates

Recent opposition to the Daisey Kates sequence has emerged within the Philadelphia District Attorney's Office, which was litigated at the Pennsylvania Supreme Court in 2021.[181] In *Commonwealth v. Mayfield*, the trial court told the Commonwealth to schedule a motion to revoke Mr. Demetrius Mayfield's probationary status at a Daisey Kates hearing.[182] The Commonwealth responded to the court's order by informing it that there was a new policy change at the District Attorney's Office requiring assistant district attorneys "to obtain approval from a supervisor before filing a revocation motion prior to the disposition of new criminal charges."[183] The trial court told the Commonwealth that it wanted to "knock this one out," in reference to pursuing the case regardless of the District Attorney's Office policy, and set a revocation hearing date.[184] At the VOP hearing, an assistant district attorney informed the trial court that the internal approval to pursue the Daisey Kates motion had been denied and claimed that it was solely up to the discretion of the District Attorney's Office to determine whether to defer these hearings.[185] In response, the trial court said that the hearing would move forward "independent of whether or not the Commonwealth decide[d] to do [its] job."[186] The trial court then appointed a special prosecutor to represent the Commonwealth in the District Attorney's Office's stead, picking a name "from the wheel" of lawyers who would be present in the courtroom that day.[187] In the end, the Pennsylvania Supreme Court found the *Mayfield* trial court had acted without authority and vacated the appointment of the special prosecutor.[188] However, the court specifically noted that "[its] decision should not be interpreted as approving of the Commonwealth's refusal to participate in a prompt

179. Commonwealth v. Royster, 572 A.2d 683, 686 (Pa. 1990) (McDermott, J., dissenting).

180. *Id.* at 687.

181. *See generally* Commonwealth v. Mayfield, 247 A.3d 1002 (Pa. 2021) (holding that it is within a trial court's discretion to order a Daisey Kates hearing and that the Commonwealth must comply promptly with such an order).

182. *Id.* at 1004.

183. *Id.* This policy was one of a number implemented by the District Attorney's Office in an effort to "end mass supervision." *Philadelphia DAO Additional Policies To End Mass Supervision*, *supra* note 14.

184. *Mayfield*, 247 A.3d at 1004.

185. *Id.*

186. *Id.* (second alteration in original).

187. *Id.* In fact, this lawyer was a defense attorney. *Id.* at 1005 n.7 ("On October 3, 2018, [the special prosecutor] filed a motion to substitute counsel, claiming that he cannot act as a court-appointed special prosecutor because he currently represents multiple criminal defendants in his capacity as a criminal defense attorney. The trial court did not rule on that motion.").

188. *Id.* at 1007.

VOP hearing as the court instructed" and that the court "[has] never held that trial courts lack the discretion to hold VOP hearings prior to a probationer's new trial."[189]

A similar issue was raised before the Pennsylvania Superior Court in *Commonwealth v. Parson*, where the court held that a trial court's decision to pursue a VOP hearing despite objections by the Commonwealth was not an abuse of discretion.[190] The *Parson* court held that "it is the court, not the Commonwealth, that has 'inherent power' to revoke a defendant's probation."[191] Philadelphia District Attorney Larry Krasner appeared before the court on behalf of the Commonwealth in this case, arguing that the VOP court was "undermining the prosecution's position by assuming powers that belong to the prosecution" and that holding Daisey Kates hearings for violations based solely on new criminal charges was unnecessary.[192]

III. DISCUSSION

A. Cheating Justice and Outcome Disparity in Daisey Kates Hearings

Central to the decision in *Kates* is the legal fiction that a VOP hearing for a direct violation serves a different functional purpose than a criminal trial.[193] The *Kates* majority based its distinction between VOP hearings and criminal trials on what it determined to be the design of a VOP hearing.[194] For the court, this purpose is not related to criminal prosecution, but rather to understanding whether probation or parole has served to adequately rehabilitate and deter the individual with this status.[195] This is an illogical reading for the direct violation context; without a proper criminal trial and an actual conviction, a VOP judge cannot say if these supervisory statuses are "working" based on accusations alone. Illogic notwithstanding, the *Kates* court's reading of the purpose of supervision has since been completely overshadowed.

As of the Pennsylvania Supreme Court's holding in *Foster*, the idea that VOP hearings are about determining the effectiveness of rehabilitation and deterrence in probation and parole populations is simply no longer accurate.[196] Where the *Kates* decision framed this effectiveness determination as the primary function of a VOP hearing,[197] after *Foster*, this determination is only the second step of a two-step inquiry.[198] Post-*Foster*, the first threshold inquiry is whether, by objective determination of the hearing judge, the accused committed the crime in question.[199] With this contemporary interpretation, the *Kates* reasoning for placing VOP hearings outside the criminal procedure scheme is no longer effective. If the main purpose of the VOP hearing

189. *Id.*

190. 259 A.3d 1012, 1020–21 (Pa. Super. Ct. 2021).

191. *Id.* at 1021 (quoting 42 PA. STAT. AND CONS. STAT. § 9771(a) (West 2025)) (citing *Mayfield*, 247 A.3d at 1007).

192. *Id.* at 1015 n.3.

193. Commonwealth v. Kates, 305 A.2d 701, 708 (Pa. 1973).

194. *See id.*

195. *Id.*

196. *See* Commonwealth v. Foster, 214 A.3d 1240, 1243 (Pa. 2019).

197. *Kates*, 305 A.2d at 708.

198. *Foster*, 214 A.3d at 1251.

199. *Id.*

process is a judicial determination of guilt, it unquestionably serves the same function as the criminal process. The line of reasoning that persists through *Morrissey*, *Kates*, and *Gagnon* is severed by the *Foster* decision.

Even the pre-*Kates* majority in *Morrissey* understood that a direct VOP hearing serves as a functional replacement for a prosecution, a pathway taken advantage of by prosecutors because it allows for easier pursuit of charges on lower evidentiary standards.[200] This is a brief glimpse of legal realism that elucidates the issue here—VOP hearings can be used as back-channel trials without juries, without full-scale due process, and on only a preponderance standard. Even Justice Roberts's concurrence in *Kates* echoes this sentiment: "In practice, probation revocation is frequently used as an alternative to prosecution for serious offenses. If the probationer is clearly convictable for the new offense, there is little need both to prosecute him for it and revoke his probation."[201] This exposes the point directly. If an individual prosecutor imagines that a person is obviously guilty, the Daisey Kates framework allows them to pursue a VOP hearing to get the accused incarcerated without having to deal with the hassles of trial—those hassles being due process and the rights of the accused.

The question of due process in VOP procedures is larger than the scope of this Comment. There is grave injustice in the entire scheme, but what is most significant here are the due process violations that emerge from the Daisey Kates sequence specifically. This includes all of the rights and standards at issue in the *Kates* consolidated cases: *Miranda* suppression, the Confrontation Clause, the right against self-incrimination, the right to a jury trial, and the enforcement of the beyond a reasonable doubt standard. Because of the Daisey Kates sequence, the *Kates* appellants were found in violation and resentenced without access to any of these protections.

It is undeniable that the allowance of these due process rights would have changed the fate of the *Kates* appellants. For Mrs. Kates, she was acquitted at trial after she was allowed to suppress the *Miranda*-violative confession, which her VOP judge acknowledged as a primary factor in finding her in violation.[202] For both Mrs. Kates and Mr. McClellan, it is apparent that the higher evidentiary burden on the prosecution and the exercise of the full scope of due process rights played a role in their acquittals. If their trials were held before their VOP hearings, allowing them access to these rights, there is a world where Mrs. Kates would have been spared her three-year carceral sentence and Mr. McClellan his ten. However, because of the court's insistence that these individuals were not entitled to due process and that the Daisey Kates sequence was permissible, they were forced to serve these unjust sentences for crimes they did not commit.

The *Kates* court failed to explain exactly why the VOP setting accepts lower standards than a full-scale criminal trial. The *Kates* court held that, because Mrs. Kates was "simply" facing a revocation hearing,[203] her confession obtained through coercion

200. *See* Morrissey v. Brewer, 408 U.S. 471, 479 (1972) (stating that a pretrial VOP hearing for a direct violation "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State").

201. Commonwealth v. Kates, 305 A.2d 701, 712 (Pa. 1973) (Roberts, J., concurring in part and dissenting in part) (quoting ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 153 (Frank J. Remington ed., 1969)).

202. *Id.* at 703, 711 (majority opinion).

203. *Id.* at 710.

and in violation of *Miranda* was admissible.[204] In the same way, where Mr. McClellan was "simply" facing revocation,[205] his constitutional right to confront his accuser was not relevant and need not be protected.[206] And for both Mrs. Kates and Mr. McClellan, the VOP setting afforded them no relief in the conflict between self-incrimination and due process.[207] Perhaps most importantly, for all three of the consolidated appellants, the presumption of innocence was unaccounted for. The fact of acquittal highlights the manner in which the *Kates* majority completely did away with this guiding light of criminal law. Here, the appellants were presumed guilty by their VOP judges, and when that presumption turned out to be untrue, the courts paid no recompense. Mrs. Kates and Mr. McClellan, even after acquittal, were required to serve sentences based entirely or in part on crimes they were not guilty of.

The court offered no explanation or discussion of how this outcome disparity of acquittal fits into the Daisey Kates hearing scheme, nor did it acknowledge the procedural injustice that occurred from this outcome. It would be difficult to argue that Mrs. Kates's fate is some kind of fringe case and that this is the reason why the court elected not to engage with her acquittal—the titular appellant, whose name has created a legacy based on this decision, cannot be an outlier. A similar note rings true for Mr. McClellan's case. While the court did acknowledge that he was acquitted on the rape charge,[208] it chose to disregard the role that that charge may have played in his initial VOP finding and resentencing. Only the dissent connected the unfairness here, noting that it was apparent that Mr. McClellan's harsh resentencing to a maximum of ten years' imprisonment was the result of the rape charge.[209] This overly punitive resentencing—obviously based largely, if not entirely, on a crime for which he was found not guilty—is an overt violation of justice. This reasoning, coupled with later decisions like *Brown* that actively encourage prosecutors to slip in a Daisey Kates hearing before any chance of acquittal,[210] cements the potential for acquittal as one of the most problematic elements of the *Kates* precedent.

The Daisey Kates framework opens the door for VOP judges to make determinations as to guilt, innocence, and sentencing under different standards and without the accountability of a formal trial. The *Kates* appellants themselves make this fact of an overreach of judicial discretion apparent. Take Mr. McClellan, whose hearing judge heard an accusation of a violent sex crime and took all negative inferences from it, resentencing him to ten years of incarceration. It seems the *Kates* court made the same biased error—no presumption or even fact of innocence could protect Mr. McClellan from the contempt of judges upon hearing the heinousness of his charges. A similar story reveals itself for Mr. Allen. It seems, at first, odd that the *Kates* court offered no sympathy towards him or his potential for acquittal,[211] especially given that he was charged with both use and possession of narcotics when the record presents a clear issue of

204. *Id.* at 711.
205. *See id.* at 710.
206. *See id.* at 711.
207. *See id.* at 707.
208. *See id.* at 711.
209. *See id.* at 715 (Manderino, J., dissenting).
210. *See* Commonwealth v. Brown, 469 A.2d 1371, 1375–76 (Pa. 1983).
211. *See Kates*, 305 A.2d at 711.

constructive possession.[212] However, the narrative of his charges and history[213] and an understanding of racial disparities in probation and parole[214] presents a clear case for why the court tossed him aside. Mr. Allen was accused of leading a race riot in prison, injuring guards, and negatively impacting the reputation of the correctional institution. It is not so unbelievable that the *Kates* court viewed him as an unsympathetic appellant, unworthy of consideration because it viewed his alleged actions as bad enough that any jury would find him guilty, so the acquittal problem would not arise. The Daisey Kates framework allowed a potentially innocent man to face the wrath of a biased and inhumane judiciary without most of his constitutional rights, this time spurred on by racial tensions and disdain.

While cases like *Giliam* have addressed solutions in situations where individuals are resentenced at pretrial VOP hearings based on charges for which they are eventually acquitted,[215] a more prophylactic cure exists. Instead of waiting for an acquittal to remedy those unjustly incarcerated in the Daisey Kates sequence, courts could simply postpone VOP hearings until post-trial to prevent the unjust incarceration in the first place. If actual fairness is more than a fleeting promise, the only solution is waiting to sentence entirely until a finding of guilt at trial.

B. Daisey Kates in Practice

1. The Resentencing Problem

In 1972, revocation of probation and parole was a semiregular occurrence.[216] It is even more commonplace today. As of January 1, 2022, the total adult population in the United States on state probation was 2,969,360 people.[217] That year, 75,420 people on probation were reincarcerated under their current sentence, while 47,910 people were reincarcerated on new sentences.[218] Out of 1,358,810 people overall terminating state probationary status in 2022, reincarceration accounted for a little over 23% of all noncompletion exits.[219] In Pennsylvania, reincarceration on current or new sentences accounted for just over 37% of all noncompletion probation exits.[220] Of those exits,

212. *See id.* at 704.

213. See *supra* Part II.A.1 for documentation of the legal and historical background of Mr. Allen's case.

214. *See* JESSE JANNETTA, JUSTIN BREAUX, HELEN HO & JEREMY PORTER, URB. INST., EXAMINING RACIAL AND ETHNIC DISPARITIES IN PROBATION REVOCATION 1 (2014), https://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF [https://perma.cc/Z28P-WSPG].

215. *See* Commonwealth v. Giliam, 233 A.3d 863, 868 (Pa. Super. Ct. 2020).

216. *See* Morrissey v. Brewer, 408 U.S. 471, 479 (1972) ("Yet revocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35%—45% of all parolees are subjected to revocation and return to prison."); PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: CORRECTIONS 62 (1967), https://www.ojp.gov/pdffiles1/Digitization/179NCJRS.pdf [https://perma.cc/D6VJ-2QVP].

217. DANIELLE KAEBLE, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., PROBATION AND PAROLE IN THE UNITED STATES, 2022, at 21 (2024), https://bjs.ojp.gov/document/ppus22.pdf [https://perma.cc/PMX9-F8RF].

218. *Id.* at 23.

219. *See id.*

220. *See id.* at 24.

almost half were for reincarceration on new sentences.[221] The numbers are starker for parole: Out of all 103,850 noncompletion parole exits, nearly 74% resulted in reincarceration.[222] In Pennsylvania, over 31% of parole exits were for reincarceration on new sentences.[223] As with all areas of criminal law, racial demographics reveal disparities.[224] Where Black people make up only 13% of the total U.S. population, they account for 30% of the probation population and 40% of the parole population.[225]

One of the many outcomes for a finding of violation at a VOP hearing is resentencing.[226] Resentencing procedures differ based on whether the accused is on probation or parole. For parole, resentencing is capped at the remainder of the individual's original sentence.[227] In contrast, resentencing for a probation violation can actually consist of an entirely new sentence, as long as it is a sentence that was originally available to the court at the time of the individual's initial sentencing.[228] Pennsylvania courts have interpreted this to be greatly flexible, meaning that, "upon sentencing following a revocation of probation, the trial court is limited *only* by the maximum sentence that it could have imposed originally at the time of the probationary sentence."[229] This means that an individual found in violation of their probation for the commission of a new crime can be given a completely new sentence based not on this subsequent crime, but instead on the maximum of their initial conviction.[230]

If there is any question remaining as to the unjust outcomes stemming from Daisey Kates hearings, resentencing guidelines make it apparent that VOP hearings for direct violations have significant influence on the liberty of the accused. To illustrate, imagine a fictional man, John, who is convicted of aggravated assault causing serious bodily injury.[231] Pennsylvania's sentencing guidelines[232] provide that, without aggravating or mitigating factors and with no prior offense record, his minimum sentence should be somewhere between thirty-six to forty-eight months.[233] At sentencing, courts must provide the maximum carceral sentence timeline as well.[234] This maximum cannot be more than twice the minimum sentence,[235] so for this illustration, imagine John is facing a minimum of thirty-six months and a maximum of seventy-two months of incarceration,

221. *See id.*

222. *See id.* at 30.

223. *See id.* at 31.

224. *See generally* Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218 (2019) (examining the disparate racial impacts of algorithmic risk assessment systems in determining recidivism risk in the criminal punishment system); Tona M. Boyd, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571 (2009) (examining the trend of disparate racial outcomes in juvenile discipline in the K-12 school system and its connection to future criminal punishment).

225. JANNETTA ET AL., *supra* note 214, at 1.

226. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 9771(b) (West 2024).

227. Commonwealth v. Holmes, 933 A.2d 57, 59 n.5 (Pa. 2007).

228. *Id.*

229. Commonwealth v. Fish, 752 A.2d 921, 923 (Pa. Super. Ct. 2000) (emphasis added).

230. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 9771(b) (West 2025).

231. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2702(a)(1) (West 2025).

232. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 2154(a) (West 2025).

233. 204 PA. CODE §§ 303a.9, 303a.14.

234. 42 PA. STAT. AND CONS. STAT. ANN. § 9756(a) (West 2025).

235. *Id.* § 9756(b)(1) (West 2025).

or three to six years. In Pennsylvania, an incarcerated person eligible for parole can potentially be released at the parole board's discretion as early as the end of their minimum date.[236] Say John serves his three years and is then released on parole. When he gets out, he is soon arrested and charged with personal possession of less than thirty grams of marijuana.[237] He has no criminal trial, only a VOP hearing. The hearing judge finds him in violation, and it is at that judge's discretion, on only the preponderance standard, to require John to serve his remaining three years for that possession. John could have had as little as a single gram of marijuana on him, and yet he is functionally sentenced to three years of incarceration for it with no trial. According to the sentencing guidelines, for a person facing the same charge without parole status, they would be sentenced to restorative sanctions,[238] usually meaning fines or community service.[239]

The situation is even more bleak for those out on probation. No matter when John's probationary term starts, if he is arrested and charged for that possession at any time, his VOP judge has discretion to resentence him based on his original offense.[240] The judge can issue any sentence that was available to the original sentencing judge, meaning the VOP judge can essentially imprison John on aggravated assault guidelines when he is facing only a simple possession charge and, notably, one that, under the Daisey Kates framework, he has not even been convicted of. This VOP judge could even go beyond John's original sentence since John's sentencing judge gave him the low minimum for his aggravated assault—only thirty-six months. If this VOP judge wanted, it would be in their discretion to order him to the high-end minimum of forty-eight months, meaning a maximum of ninety-six months. In an instant, with no trial and under the preponderance standard, John could be looking at eight years of incarceration for possession of less than thirty grams of marijuana solely because of his probationary status and the Daisey Kates sequence.

This problem can be even more extreme. Imagine now Daniel, a youth convicted of first-degree murder when he was fifteen years old.[241] Sentencing guidelines suggest a minimum of 420 months incarceration for this offense, or thirty-five years.[242] That would mean a maximum of 840 months, or seventy years. Say Daniel is sentenced to that maximum but is paroled after his minimum date is up, when he is fifty years old. He goes another twelve years without any negative interaction with law enforcement, then like John, he is picked up for simple possession of less than thirty grams of marijuana. Now, at sixty-two, he can be sentenced by a VOP judge, without trial, to another thirty-five years in prison. In Daniel's case, his parole status creates an avenue for him to be almost certainly sentenced to die in prison for possession.[243] Probation parallels in the same

236. 61 PA. STAT. AND CONS. STAT. ANN. § 6137(a)(3) (West 2025).

237. *See* 35 PA. STAT. AND CONS. STAT. ANN. § 780-113(a)(31)(i) (West 2025).

238. 204 PA. CODE §§ 303a.9, 303a.14.

239. *Id.* § 303a.14.

240. *See* Commonwealth v. Fish, 752 A.2d 921, 923 (Pa. Super. Ct. 2000).

241. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2502(a) (West 2025).

242. 204 PA. CODE §§ 303a.9, 303a.14.

243. *See* Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL'Y INITIATIVE (Aug. 2, 2023), https://www.prisonpolicy.org/blog/2023/08/02/aging/ [https://perma.cc/LPP5-RCC6] ("Years of limited resources, inaccessibility, and understaffing in prison healthcare have created a situation in which each year spent in prison takes two years off of an individual's life expectancy." (emphasis

way. If Daniel is sentenced to thirty-five years plus any term of probation and then is found to have violated that probation with any offense, he can be resentenced to another term of up to seventy years. That is another functional death sentence, still with no trial, still with minimal due process rights, still without the presumption of innocence, and still on the preponderance standard.

2. Unpopularity Contest

The practical reception of a decision should not, in theory, have any determinative impact on its efficacy or credibility. *Kates* may prove an exception to that rule. As it relates to the actual procedure of Daisey Kates hearings, meaning pretrial probation and parole revocation hearings for direct violations, *Kates* has become profoundly unpopular. *Davis*, the case incorporating *Gagnon* in Pennsylvania and one of the first to touch the *Kates* decision, recognized the possibility for injustice stemming from unknowable guilt or innocence before a proper trial.[244] Where cases like *Brown* attempt to circumvent this issue by encouraging prosecutors to pursue VOP hearings before substantive criminal trials,[245] other cases like *Infante* have tried, and somewhat failed, to create avenues for fairness with deferred VOP hearings.[246] In *Infante*, this attempt instead distinctly opened the door for repeated revocations for the same offense, which only perpetuates the injustice.[247] It is only cases like *Davis* and the recent 2020 decision in *Giliam*,[248] which explicitly address the issue of potential acquittal as unjust, that appropriately question the practice. Still, neither of those cases have called for an explicit end to the practice of Daisey Kates hearings. To the *Giliam* court, it may be a "highly dubious" practice,[249] but that is all.

Perhaps surprisingly, it appears that it is "progressive prosecutors"[250] largely leading the charge in opposition to pursuing Daisey Kates hearings. The cases that have

omitted)); Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ [https://perma.cc/8JXD-BGFM].

244. Commonwealth v. Davis, 336 A.2d 616, 621–23 (Pa. Super. Ct. 1975).

245. Commonwealth v. Brown, 469 A.2d 1371, 1375–76 (Pa. 1983).

246. Commonwealth v. Infante, 888 A.2d 783, 785 (Pa. 2005), *abrogated by*, Commonwealth v. Foster, 214 A.3d 1240 (Pa. 2019); *see also* Commonwealth v. Burrell, 441 A.2d 744, 746 (Pa. 1982) (recognizing judicial economy in postponing VOP hearings until after substantive criminal trials).

247. *Infante*, 888 A.2d at 795 (Cappy, C.J., dissenting).

248. Commonwealth v. Giliam, 233 A.3d 863, 869 n.4 (Pa. Super. Ct. 2020); *see also* Commonwealth v. Royster, 572 A.2d 683, 686–87 (Pa. 1990) (McDermott, J., dissenting) (recognizing the problematic effects of a future acquittal in the Daisey Kates sequence).

249. *Giliam*, 233 A.3d at 869 n.4.

250. *See, e.g.*, Rachel Foran, Mariame Kaba & Katy Naples-Mitchell, *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 496, 498–99 (2021) ("Throughout this piece, we use quotations around 'progressive prosecution' and 'progressive prosecutors' for three key reasons. First, prosecutors are law enforcement and prosecution is a systemic component of the criminal punishment system, a death-making system of racialized social control; no matter the personal politics of an individual candidate or officeholder, abolitionists believe that prosecution—as an integral element of the criminal punishment system—cannot be progressive. The quotes serve to question the rationality and accuracy of the phrase, which we see as an inherent contradiction in terms." (emphasis omitted)); Jonathan Rapping, *The Costs of the Progressive Prosecutor Movement*, 46 CHAMPION 12, 17 (2022) ("Let me begin by saying I appreciate prosecutors who are committed to reducing the harm baked into the criminal legal system. However,

litigated the issue range from impassioned to ridiculous, highlighting the tension of the doctrine.[251] Cases like *Mayfield* and *Parson* show the disconnect between the majority of the judiciary and the trend in actual practice, where courts will attempt to enforce Daisey Kates hearings at extensive cost to judicial efficiency, prosecutorial procedure, and even rare glimpses of leniency in prosecutorial discretion.[252] While the opinion of the current District Attorney of Philadelphia on this practice is clearly negative, that may not last forever. It is unknowable how future officeholders will view the Daisey Kates sequencing problem, and based on certain opposition evident in this line of cases, it is not unquestionable that the next or any future leader will actively pursue these pretrial revocation hearings, or at least give into judicial pressure more fully. This is especially true considering the political weaponization of criminal punishment ideals in recent prosecutorial elections, where a growing "tough-on-crime" minority could easily open the door for reinstatement of these hearings.[253] Even though Daisey Kates hearings rarely present themselves in practice today, the risk of leaving the procedure open as a channel for future use is high. With this in mind, courts should take warnings from past decisions and opposition from attorneys seriously and to their natural conclusion, officially relegating the Daisey Kates hearing as a thing of the past.

IV. CONCLUSION

Modern post-*Kates* courts have established that the purpose of a VOP hearing for a direct violation is to determine the guilt of those under supervision.[254] This, coupled with the deprivation of liberty allowed by resentencing guidelines, reveals how VOP hearings often serve as functional criminal trials without protections for the accused.[255] Daisey Kates hearings, as pretrial direct VOP hearings, allow for carceral sentences without convictions based solely on hearings held on the preponderance standard. The Daisey Kates sequence disregards the potential for acquittal and the presumption of innocence, opening the door for prosecutors to cheat justice and secure what are effectively convictions on cases that would otherwise earn not guilty verdicts under the full panoply of due process rights at trial. Where VOP sentences will be voided after acquittal,[256] and where a finding of guilt at trial is a per se violation,[257] holding VOP hearings pretrial is, at best, a waste of time. At worst, and in reality, pretrial VOP hearings can lead to vastly unfair punishments for the accused. Like Mrs. Kates and Mr. McClellan, those later

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I have never embraced the term 'progressive prosecutor.' Even the most compassionate prosecutors take the reins of a system in which no progressive outcome is possible.").

251. *See* Commonwealth v. Parson, 259 A.3d 1012, 1015 n.3 (Pa. Super. Ct. 2021); Commonwealth v. Mayfield, 247 A.3d 1002, 1004 (Pa. 2021).

252. *Mayfield*, 247 A.3d at 1004; *Parson*, 259 A.3d at 1015 n.3.

253. Anna Orso & Ellie Rushing, *Patrick Dugan Wants To Cap His Military and Judicial Career by Becoming Philly's Top Prosecutor. Can He Win?*, PHILA. INQUIRER (Mar. 27, 2025), https://www.inquirer.com/politics/election/patrick-dugan-district-attorney-race-military-service-20250327.html (on file with the Temple Law Review).

254. *See* Commonwealth v. Foster, 214 A.3d 1240, 1243 (Pa. 2019).

255. See *supra* Part III.A for a discussion of the rights not afforded to the *Kates* appellants and of how the Daisey Kates hearing functions to avoid the accountability required in a formal trial.

256. Commonwealth v. Giliam, 233 A.3d 863, 867–68 (Pa. Super. Ct. 2020).

257. *See* Commonwealth v. Burrell, 441 A.2d 744, 746–47 (Pa. 1982).

acquitted can still be forced to serve time awaiting their proper trials. Even when a sentence is later voided, months of pretrial incarceration can cause irreparable damage to the lives of the accused. As a prophylactic measure, those on probation and parole accused of a new crime should not be resentenced without a trial verdict. Unless courts are ready and willing to require that VOP hearings take on all the rules and requirements of full-scale criminal trials, a fair and just hearing for a direct violation cannot be held before the requisite substantive criminal trial. Any attempts by prosecution or a court itself to hold Daisey Kates hearings are knowing and intentional efforts to bypass the rights of the accused. Courts should heed the contemporary reception of *Kates*, coupled with all the unconstitutionalities that stem from the decision, as a signal to officially strike pretrial probation and parole revocation hearings for direct violations from practice.