ORDER

PER CURIAM

AND NOW, this 5th day of April, 2023, the Petition for Allowance of Appeal is **DENIED**.

1

COMMONWEALTH of Pennsylvania, Respondent

v.

Matthew Jeffrey SIPPS, Petitioner

No. 458 MAL 2022

Supreme Court of Pennsylvania.

April 5, 2023

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 5th day of April, 2023, the Petition for Allowance of Appeal is **DENIED**.

2

COMMONWEALTH of Pennsylvania, Appellant

v.

Christopher Albert KOGER, Appellee

No. 15 WAP 2022

Supreme Court of Pennsylvania.

Argued: October 25, 2022
Decided: May 16, 2023
Reconsideration Denied: June 23, 2023

Background: Defendant's county parole for possession of child pornography and criminal use of communication facility was revoked by the Court of Common Pleas, Washington County, Criminal Division, No. CP-63-CR-0000233-2018, Valarie Costanzo, J., and defendant appealed. The Superior Court, No. 251 WDA 2020, 2021 WL 1233387, remanded case to Court of Common Pleas for supplemental opinion addressing whether it imposed, or advised defendant of, terms of probation and parole at time of initial sentencing. On remand, the Court of Common Pleas issued letter stating that parole and probation requirements were explained to defendant by adult probation officer following sentencing proceeding. The Superior Court, 255 A.3d 1285, vacated revocation order and judgment of sentence, and Commonwealth appealed.

Holdings: The Supreme Court, No. 15 WAP 2022, Dougherty, J., held that:

(1) statutes governing order of probation and modification or revocation of probation did not govern revocation of county parole;

(2) trial court had statutory authority to delegate to county adult probation office responsibility of communicating conditions of parole to defendant post-sentencing;

(3) Commonwealth's challenge to superior court's reversal of order revoking defendant's county parole was not rendered moot by expiration of parole period; and

(4) State Parole Board had no authority to provide general rules of parole or impose conditions of supervision in county parole cases.

Reversed and remanded; application for reargument denied.

Donohue, J., filed concurring opinion.

Todd, C.J., and Donohue, J., dissented to denial of reargument.

1. Criminal Law ⚿1134.28, 1139

Statutory interpretation presents a question of law for which the scope of appellate review is plenary and the standard of review is de novo.

2. Pardon and Parole ⚿70.1

Parole may be revoked only after a court finds the defendant has violated an actual condition for which he had notice. Pa. R. Crim. P. 708(B)(2).

3. Pardon and Parole ⚿70.1

Statute governing order of probation, which required sentencing court to "attach reasonable conditions authorized by statute [enumerating conditions of probation] as it deems necessary to ensure or assist the defendant in leading a law-abiding life," together with statute governing modification or revocation of probation, did not govern revocation of county parole imposed for possession of child pornography and criminal use of a communication facility. 42 Pa. Cons. Stat. Ann. §§ 9754(b), 9771(b), 9776(e); Pa. R. Crim. P. 708(B)(2).

4. Constitutional Law ⚿2507(3)
Pardon and Parole ⚿64.1
Sentencing and Punishment ⚿1916, 1960

While constitutional principles like due process may in some ways offer similar protections to probation and parole revocations, it is, at the end of the day, the General Assembly's prerogative to authorize whatever conditions for probation and parole that it sees fit, and to permit them to be relayed to the defendant by some entity other than the trial court at the time of sentencing. U.S. Const. Amend. 14.

5. Pardon and Parole ⚿64.1

In sentencing defendant to county parole for possession of child pornography and criminal use of communication facility, trial court had authority to delegate to county adult probation office responsibility of communicating conditions of parole to defendant post-sentencing, under statute requiring that, in county parole case, trial court "shall place the inmate in the charge of and under the supervision of a designated probation officer," which necessarily included authority of probation office to impose conditions of parole in addition to trial court. 42 Pa. Cons. Stat. Ann. § 9776(d).

6. Pardon and Parole ⚿92

Commonwealth's challenge to superior court's reversal of order revoking defendant's county parole for possession of child pornography and criminal use of communication facility, and new sentence, under statutes governing probation and revocation of same on ground that Commonwealth failed to prove that trial court advised defendant of conditions of parole at time of initial sentencing, and therefore could not have found that defendant violated those conditions, was not rendered moot by expiration of parole period; impact of revocation went beyond resentencing decision, as it would impact future sentencing proceeding if defendant was convicted of another crime or had future revocation proceeding. 42 Pa. Cons. Stat. Ann. §§ 9754(b), 9771(b).

7. Pardon and Parole ⚿55.1, 64.1

State Parole Board had no authority to provide general rules of parole or impose conditions of supervision in county parole cases where maximum sentence did not exceed two years, under statute providing that, where sentencing court granted county parole, "parole shall be without supervision by the board." 42 Pa. Cons. Stat. Ann. § 9775.

Appeal from the Order of the Superior Court entered June 4, 2021 at No. 251 WDA 2020, reversing the revocation of

probation and parole and vacating the Judgment of Sentence of the Court of Common Pleas of Washington County entered January 22, 2020 at No. CP-63-CR-0000233-2018. Valarie S. Costanzo, Judge

Rebecca J. Kulik, Esq., Northampton County District Attorney's Office, for Amicus Curiae Pennsylvania District Attorneys Association.

John Paul Friedmann, Esq., Washington County District Attorney's Office, for Appellant.

Timothy Joseph Lyon, Esq., Lyon LLC, for Appellee.

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

OPINION

JUSTICE DOUGHERTY

In *Commonwealth v. Foster*, 654 Pa. 266, 214 A.3d 1240 (2019), this Court examined the statutory framework governing probation revocations and concluded that, under the "clear and unambiguous" language of 42 Pa.C.S. § 9771(b) (Modification or revocation of order of probation) and 42 Pa.C.S. § 9754(b) (Order of probation), "a court may find a defendant in violation of probation only if the defendant has violated one of the 'specific conditions' of probation included in the probation order or has committed a new crime." *Foster*, 214 A.3d at 1250. The present case is not about probation; it is about parole. Purporting to rely on certain passages from *Foster* and the statutes we examined in that decision, the Superior Court below held "a sentencing court may not delegate its statutorily pr[e]scribed duties" but must instead personally "communicate any conditions of probation **or parole** as a prerequisite to violating any such condition." *Commonwealth v. Koger*, 255 A.3d 1285, 1291 (Pa. Super. 2021) (emphasis added). We granted the Commonwealth's petition for allowance of appeal to consider whether the Superior Court improperly expanded *Foster* in this regard. As we conclude it did, we reverse in part.

Appellee Christopher Albert Koger pleaded guilty on August 21, 2018, to one count each of possession of child pornography and criminal use of a communication facility.[1] The charges stemmed from "child pornography [that] had been found on [his] cellular telephone" by his daughter, who alerted law enforcement. N.T. Guilty Plea Hearing, 8/21/18 at 7. The trial court accepted appellee's guilty plea and imposed eight to twenty-three months' incarceration for possession of child pornography and a consecutive term of three years' probation for criminal use of a communication facility. Additionally, "[a]s special conditions of this sentence," the court ordered appellee to "have no contact with any victims or persons displayed in the images. [He] shall submit to a drug and alcohol evaluation and complete any recommended treatment; perform 100 hours of [c]ommunity [s]ervice[;] and complete sexual offender counseling." *Id.* at 17.

After being awarded credit for time served, appellee was immediately paroled to the supervision of the Washington County Adult Probation Office.[2] Relevant

1. *See* 18 Pa.C.S. § 6312(d) and § 7512(a).

2. Where, as here, the total sentence imposed is less than two years, the Sentencing Code gives parole authority to the sentencing judge. *See* 42 Pa.C.S. § 9776(a) ("Except as otherwise provided under this chapter or if the Pennsylvania Parole Board has exclusive parole jurisdiction, a court of this Commonwealth ... may, after due hearing, release on parole an inmate in the county correctional institution of that judicial district."). If a sentencing court "paroles [an] inmate, it shall place the inmate in the charge of and under

here, "[i]n accordance with long standing procedures in Washington County, the trial court ... did not advise [appellee] of the general conditions of his probation or parole at the time of sentencing. Rather, the general rules, regulations, and conditions governing probation and parole in Washington County **were explained to [appellee] by an adult probation officer immediately following the sentencing proceeding."** Trial Court Letter, 5/6/21 at 1 (emphasis added). Appellee signed and was "provided [with] a copy of the rules[.]" N.T. Revocation Hearing, 11/4/19 at 9.

Only weeks later, appellee violated the terms of his release. A revocation petition alleged that, "[o]n September 14, 2018, [he] was in possession of pornographic [ ] and sexually perverse material in violation of [his] sex offenders[']] program." First Petition for Revocation of Probation or Parole, 10/4/18 at 2.[3] At a subsequent revocation hearing, appellee acknowledged he "committed a violation of [his] parole and probation." N.T. Revocation Hearing, 12/21/18 at 8. "Based upon the stipulation[,]" the trial court revoked appellee's parole and probation and remanded him to serve the balance of his maximum sentence on count one, with the privilege of work release, and on the condition he was to be re-paroled on June 21, 2019. *Id.* at 8-9. As for count two, "[e]ven after [appellee] stipulated to being in technical violation of his probation, the [c]ourt, nevertheless, gave [him] a second chance to make meaningful progress towards his rehabilitation without having to resort to state incarceration, and merely reinstated his probation for a period of three years." Trial Court Opinion, 5/26/20 at 22.

"However," appellee "continued to violate [the] terms" of his supervision within weeks of being re-released. *Id.* According to a second parole and probation revocation petition filed on September 16, 2019, appellee violated the following conditions of his supervision shortly after being re-paroled on June 21, 2019:

> Condition #1: Report to your [probation officer ("PO")] as directed and permit a PO to visit you at your residence or place of employment and submit to warrantless searches of your residence, vehicle, property, and/or your person and the seizure and appropriate disposal of any contraband found....
>
> Condition #2: Do not violate any criminal laws or ordinances....
>
> Condition #7: Refrain from any assaultive, threatening or harassing behavior....
>
> Condition #10: Avoid unlawful and disreputable places and people. Avoid any specific persons, places, groups, or locations if so instructed by your PO....

Second Petition for Revocation of Probation or Parole, 9/16/19 at 2.[4]

In addition to providing a brief factual summary in support of each alleged violation within the petition itself, *see id.*, Probation Officer Jeremy Bardo ("PO Bardo") also testified to appellee's infractions at a hearing. PO Bardo explained how, on July 16, 2019, he and another probation officer visited appellee's residence and performed

the supervision of a designated probation officer.'' *Id.* § 9776(d).

3. Providing just one example, the revocation petition described a ''chat dialog'' in which appellee stated to another, ''I've done 8 but they aren't developed enough to cum.'' First Petition for Revocation of Probation or Parole, 10/4/18 at 2.

4. The Commonwealth never produced or admitted into evidence the rules provided to and signed by appellee following sentencing, so they are not in the certified record. It is thus unclear whether the ''conditions'' discussed above are verbatim reproductions of the rules or summaries thereof.

a search of appellee's bedroom. Although appellee "was calm initially," once the officers asked to see his cell phone he "cl[e]nched, tightened up, held the phone, [and] turned away." N.T. Revocation Hearing, 11/4/19 at 9-10. Appellee "was trembling, shaking, real nervous, [and] real defensive[,]" and he told the officers they "weren't allowed to look through the phone." *Id.* at 9. The situation escalated and the officers had to use force to detain him. Ultimately, the officers determined they "should put him in custody due to [their] safety, and his safety." *Id.* at 10.

During transport to the Washington County Correctional Facility, PO Bardo asked appellee for the passcode to unlock his cell phone, which appellee eventually provided. Appellee then confirmed there "might be" pornographic material on his phone. *Id.* at 7. Upon examining the phone, PO Bardo found messages between appellee and "a female who identified herself as Jessica, 15 years old." *Id.* at 14. PO Bardo elaborated he saw

> [t]ext[s], pictures.... I saw enough in the texts. [Appellee] also sent a picture of himself and identified himself, his age. Presently he is 46 years old, and also there was a picture of [the fifteen-year-old female] without any clothes on pleasuring herself.

Id. at 15. In PO Bardo's view, "[i]t appeared in the messages [appellee] was grooming [the minor] with conversation, her past life, relationships with family, his personality, [and] romance." *Id.*

PO Bardo also testified about what occurred once they arrived at the jail. He explained he overheard appellee say, "You're fucking with the wrong German." *Id.* at 9. PO Bardo asked appellee to whom he was speaking and whether he was threatening to fight the officers. Appellee responded, "not you, but him," referring to another officer. *Id.*[5]

Finally, PO Bardo detailed a prior incident during which appellee was removed from a community service office for "using vulgar language and being disrespectful with staff[.]" *Id.* at 8. On that occasion, appellee became agitated after he was confronted for having a prohibited "cell phone while working at the [Furlough Into Service ("FITS")] program." *Id.* at 7-8.[6]

At the conclusion of the revocation hearing, the trial court determined appellee had "violated his parole and probation by committing technical violations thereof, and his parole and probation [were t]hereby revoked." *Id.* at 34. In its Pa.R.A.P. 1925(a) opinion, the court explained that, based on PO Bardo's testimony — which the court found "to be unbiased and extremely credible" — "the Commonwealth provided sufficient evidence to sustain [appellee]'s parole and probation revocation and established **each specific violation thereof** by a preponderance of the evidence." Trial Court Opinion, 5/26/20 at 14, 18 (emphasis added).[7]

5. The court did not credit appellee's explanation at the revocation hearing that his threat to "fight" the other officer was actually "about fighting him [on] the law." N.T. Revocation Hearing, 11/4/19 at 23. We also observe appellee's counsel acknowledged, "If the [c]ourt finds that that is threatening bodily harm, then I could see a revocation[.]" *Id.* at 32.

6. The FITS program "allows [participants incarcerated at W.C.C.F. the opportunity to reduce" their court-related financial obligations by permitting them "to perform large-scale projects on weekends and smaller projects on weekdays." *Community Services,* WASHINGTON CTY. COURTS, https://www.washingtoncourts.us/170/Community-Services (last visited May 1, 2023).

7. Notwithstanding the trial court's statement in its opinion that it determined each specific violation had been proven, it made no mention of Condition #10, in which PO Bardo

Having revoked appellee's parole and probation for the second time, the trial court proceeded to resentence him on January 22, 2020. With respect to count one, the court ordered appellee "remanded to [a] state correctional institution to serve the balance of his maximum sentence." N.T. Resentencing Hearing, 1/22/20 at 24. Regarding count two, the court expressed its view that, "[c]learly, [appellee]'s probation was no longer achieving its desired aims of rehabilitation and deterring criminal activity." Trial Court Opinion, 5/26/20 at 22. "Therefore, instead of reinstating a probation sentence for a third time," the court "determined that a sentence of incarceration was necessary in order to vindicate [its] authority." *Id.* at 22-23. Accordingly, the court imposed a consecutive sentence of one to three years' state imprisonment.

Appellee filed a timely appeal. He challenged the sufficiency of the evidence supporting the revocation of both his parole and probation, as well as the legality of his newly imposed sentence. As appellee saw it, the evidence was insufficient to support either revocation because the Commonwealth failed to present any "evidence of what the actual terms and conditions" of his supervision were. Appellee's Superior Court Brief at 17. Put differently, appellee believed the Commonwealth needed to introduce a copy of the rules he signed immediately after sentencing, and he argued the revocation petition's ostensible recitation of those conditions — even when considered alongside PO Bardo's credited testimony that appellee personally signed and was given a copy of the conditions of his parole — was not enough to prove appellee was subject to them by a preponderance of the evidence. *See id.* (positing without such evidence, "the Commonwealth could not, by necessity, prove [he] had violated" any terms or conditions of his supervision). The Commonwealth, in contrast, argued appellee's sufficiency-related claims were waived because they are really due process challenges, and at no time during the revocation hearing did appellee ever "object[ ] to any failure to establish the conditions of supervision." Commonwealth's Superior Court Brief at 8. In any event, the Commonwealth contended it produced sufficient evidence because the revocation petition "clearly indicates the conditions and alleged violations" and, regardless, it was "unable to locate any case law" requiring it to produce the actual signed conditions. *Id.] see also* Trial Court Opinion, 5/26/20 at 26 (rejecting argument appellee was unaware of his alleged violations because "[n]ot only did Officer Bardo include [in the revocation petition] the particular numeric conditions [appellee] allegedly violated, but he also provided specific examples and dated events" relevant to each violation).

A three-judge panel of the Superior Court remanded with instructions. The panel explained it was "unable to deter-

alleged appellee failed to "[a]void unlawful and disreputable places and people" by being "in possession of sexually perverse material and dialogue with a fifteen year old female on his cellular phone." Second Petition for Revocation of Probation or Parole, 9/16/19 at 2. In any event, the court clearly found appellee had violated the other conditions alleged, including two violations of Condition #7 regarding threatening or assaultive behavior. *See, e.g.,* Trial Court Opinion, 5/26/20 at 15 (appellee's "statement at the sally port, alone, provided ... sufficient evidence to revoke"); *id.* (crediting Officer Bardo's description of the incident at the community service office); *id.* at 17 (concluding appellee violated Condition #1 because he "refused to submit to a warrantless search and seizure of his cell phone"); *id.* at 18 (finding appellee "in direct violation of Condition [#]2" based on "the messages and photographs [PO Bardo] personally observed between [appellee] and a fifteen-year-old child" on appellee's cell phone).

mine whether the sentencing court, on August 21, 2018, imposed the conditions [appellee] has now been found to have violated." *Commonwealth v. Koger*, 2021 WL 1233387, at *3 (Pa. Super. 2021) (unpublished memorandum). So, it remanded "for the trial court to prepare a supplemental opinion addressing whether it imposed, or advised [appellee] of, the terms of his probation and parole at the time of the initial sentencing." *Id.* at *1. The trial court responded with the letter cited earlier, in which it candidly acknowledged the parole and probation requirements "were explained to [appellee] by an adult probation officer immediately following the sentencing proceeding." Trial Court Letter, 5/6/21 at 1.

When the case returned to the Superior Court, it reversed appellee's parole and probation revocations and vacated his new judgment of sentence. In a published opinion authored by Judge McCaffery and joined by President Judge Emeritus Bender and Judge Lazarus, the court held that, "because the [trial] court did not advise [appellee] of the conditions of his probation and parole at the time of the initial sentencing, the court could not have found he violated these conditions." *Koger*, 255 A.3d at 1287. As *Foster* was central to the Superior Court's holding, we pause briefly here to examine our decision there.

We granted discretionary review in *Foster* to consider whether the Superior Court erred by "ignoring the governing statute and due process protections" when it sanctioned the revocation of Foster's probation based solely on his offensive social media posts, even though the terms of his probation made no such proscription. *Foster,* 214 A.3d at 1245-46. In concluding it did so err, we "resolved [the case] through our rules of statutory construction," rendering it unnecessary to "address Foster's due process claim." *Id.* at 1247 n.8. We explained:

> We find the language of the pertinent statutory provisions to be clear and unambiguous. The law provides a general condition of probation — that the defendant lead "a law-abiding life," *i.e.*, that the defendant refrain from committing another crime. [42 Pa.C.S]§ 9754(b). To insure that general condition is met, or to assist the defendant in meeting that general condition, the order must also include certain "specific conditions" from the list enumerated in section 9754(c). Only upon the violation of any of the "specified conditions" in the probation order (general or specific) may a court revoke the defendant's probation. *Id.* § 9771 (b). In other words, a court may find a defendant in violation of probation only if the defendant has violated one of the "specific conditions" of probation included in the probation order or has committed a new crime. The plain language of the statute does not allow for any other result.

Id. at 1250. *Foster* thus settled "what constitutes a permissible basis for a court to find an individual in violation of probation": a 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." *Id.* at 1243.

Returning to this case, the Superior Court in a footnote acknowledged *Foster* dealt exclusively with "probation revocations and not parole[.]" *Koger*, 255 A.3d at 1291 n.6. However, it reasoned that since *Foster* cited "language in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)" — wherein the High Court held due process requires states to afford some opportunity to be heard prior to revoking an individual's parole — it was appropriate to "review violations of probation and parole under the same standard." *Id.* Based on that understanding, the court

made the following two attempts to bring the processes for parole and probation revocations into parity.

First, the Superior Court bracketed the phrase "or parole" directly into *Foster's* language. It stated: "Because the trial court did not impose, at the time of the August 21, 2018, sentencing any specific probation or parole conditions, the court could not have found he 'violated one of the specific conditions of probation **[or parole]** included in the probation order[.]' " *Id.* at 1291 (bracketed material in original; emphasis added), *quoting Foster,* 214 A.3d at 1250; *see also id.* at 1289-90 (making same bracketed insertion two additional times). Second, while citing 42 Pa.C.S. § 9754(b), the court used an ellipsis in a manner that removed any reference to the "conditions of probation" to which the statute refers. *Compare Koger,* 255 A.3d at 1291 ("The court shall attach such of the reasonable conditions . . . as it deems necessary to insure or assist the defendant in leading a law-abiding life.") (internal quotations, citation, and emphasis omitted; ellipsis in original) *with* 42 Pa.C.S. § 9754(b) ("The court shall attach reasonable conditions authorized by section 9763 (relating to conditions of probation) as it deems necessary to ensure or assist the defendant in leading a law-abiding life.").[8] It then relied on that abridged version of the statute to hold "a sentencing court may not delegate its statutorily prescribed duties to probation and parole offices and is required to communicate any conditions of probation **or parole** as a prerequisite[.]" *Koger,* 255 A.3d at 1291 (emphasis added).

[1] At the Commonwealth's request, we granted allowance of appeal to determine whether the Superior Court "err[ed] in expanding this Court's holding in [*Foster*], and the statutory requirements related to probation conditions under 42 Pa. C.S. § 9754[,] to not only probation but also parole cases[.]" *Commonwealth v. Koger,* 276 A.3d 202 (Pa. 2022) (*per curiam*).[9] This presents a question of law involving statutory interpretation, "for which our scope of review is plenary and our standard of review is de novo." *Foster,* 214 A.3d at 1247.

Upon our review, we conclude the Superior Court erred. We begin by emphasizing *Foster* "present[ed] a question of statutory interpretation[.]" *Id.* More precisely, it required us to examine several statutes — notably, 42 Pa.C.S. § 9771 and § 9754 — which relate exclusively to probation, not parole. In conducting our analysis, we explained the plain terms of Section 9771, titled "Modification or revocation of order of probation," clearly provide that "[r]evocation of probation . . . is sanctioned only 'upon proof of the violation of specified conditions of the probation.' " *Id.* at 1250 (emphasis omitted), *citing* 42 Pa.C.S. § 9771 (b). In turn, "[u]nder the heading '[c]onditions generally,' [S]ection 9754 requires the sentencing court to attach any 'reasonable conditions . . . as it deems nec-

8. Section 9754 was amended effective December 18, 2019, shortly after appellee's parole and probation were revoked the second time. *See* Pub. L. 776, No. 115, § 4. The version in effect when his supervision was initially imposed read: ''The court shall attach such of the reasonable conditions authorized by subsection (c) of this section as it deems necessary to insure or assist the defendant in leading a law-abiding life.'' 42 Pa.C.S. § 9754(b) (former). Thus, the amendment simply removed the applicable ''conditions of probation'' from subsection (c) of Section 9754, and all conditions are now found within 42 Pa.C.S. § 9763(b).

9. The Commonwealth now agrees the Superior Court's reversal of appellee's probation revocation was ''in line with this Court's holding in *Foster.*'' Commonwealth's Brief at 18. Consequently, we are only concerned here with the propriety of his parole revocation.

essary to insure or assist the defendant in leading a law-abiding life.' " *Id.* at 1249, *citing* 42 Pa.C.S. § 9754(b) (former). As we expounded in *Foster,* although this latter statute generally requires **the court** to attach the conditions of probation, this Court has also "recognized that probation officers may, consistent with their [own] statutory authority, impose specific conditions of supervision pertaining to [a] defendant's probation ... 'in furtherance of the trial court's conditions of probation.' " *Id.* at 1244 n.5, *quoting Commonwealth v. Elliott,* 616 Pa. 524, 50 A.3d 1284, 1292 (2012).

Here, the Superior Court did not engage in a statutory analysis. Instead, its only justification for expanding *Foster* to cover parole cases was its explanation that, "as the trial court state[d]," the *Foster* Court "relied on language in *Morrissey*' and, thus, "the same standard" applies to violations of probation and parole. *Koger,* 255 A.3d at 1291 n.6. And, the trial court itself explained:

> Although *Foster* specifically addresse[d] the requirements for a probation revocation, not a parole revocation, the Pennsylvania Supreme Court reached its decision, in part, based on the language in the seminal decision, *Morrissey v. Brewer*, 408 U.S. 471, 92 *[sic]* (1971). *Foster,* 214 A.3d at 1248. In *Morrissey,* the United States Supreme Court addressed the requisites needed to find a defendant in violation of his parole, stating that "the first step in a revocation decision ... involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole." *Id.* at 479-80 [92 S.Ct. 2593]. Therefore, it is this [c]ourt's interpretation that a court may only find a defendant to be in violation of either parole or probation, if it is established by the Commonwealth, by a preponderance of the evidence, that a defendant violated one of the "specific conditions" of his parole or probation, or committed a new crime. *Foster*, 214 A. 3d at 1250.

Trial Court Opinion, 5/26/20 at 13.

[2] As a matter of due process, which is all that was at issue in *Morrissey,* we have no reason to quarrel with the trial court's conclusion parole may be revoked only after a court finds the defendant has violated an actual condition for which he had notice. *See, e.g., Morrissey,* 408 U.S. at 479, 92 S.Ct. 2593 ("Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole."). In fact, even as a matter of state law, the idea parole can be revoked only after a violation of its terms has been proven is quite unremarkable. *See* Pa.R.Crim.P. 708(B)(2) ("the judge shall not revoke" county parole "unless there has been ... a finding of record that the defendant violated a condition of" it); 42 Pa.C.S. § 9776(e) ("The court may, on cause shown by the probation officer that the inmate has violated his parole, recommit ... the inmate[.]"). Accordingly, had the Superior Court gone only as far as the trial court in this regard, its minor tinkering with our language in *Foster* may have been tolerable. The problem is it went further and, in so doing, "seized one bridge too far." Commonwealth's Brief at 19.

[3] Aside from bracketing in the words "or parole," the Superior Court used an ellipsis to pave over the problematic parts of Section 9754 referring only to probation conditions. It then cited that altered authority and accused the trial court of wrongly "delegat[ing] its statutorily prescribed duties" relative to appellee's parole conditions. *Koger*, 255 A.3d at 1291. And the Superior Court relied on its own judi-

cially modified version of the statute to support its new rule that "a sentencing court . . . is required to communicate any conditions of . . . parole as a prerequisite" to revocation. *Id.* To state the obvious, this was improper and violated the most basic tenets of statutory construction. *See, e.g., Commonwealth v. McCoy*, 599 Pa. 599, 962 A.2d 1160, 1168 (2009) (courts "are not permitted to ignore the language of a statute"); 1 Pa.C.S. § 1921 (a) ("Every statute shall be construed, if possible, to give effect to all its provisions."); *id.* § 1921 (b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

[4] Section 9754, as its title and text make plain, has absolutely no bearing on parole. Moreover, as the Commonwealth correctly points out, "[n]either this Court's decision in *Foster* nor Section 9754 impose an independent, non-statutory mandate in parole cases that a judge specify the conditions of parole at the time of sentenc[ing]." Commonwealth's Brief at 18. Indeed, while constitutional principles like due process may in some ways offer similar protections to probation and parole revocations, it is, at the end of the day, the General Assembly's prerogative to authorize whatever conditions for probation and parole that it sees fit, and to permit them to be relayed to the defendant by some entity other than the trial court at the time of sentencing. *See Morrissey,* 408 U.S. at 488, 92 S.Ct. 2593 ("We cannot write a code of procedure; that is the responsibility of each State.").

Respecting probation in this Commonwealth, the General Assembly has instructed that "[t]he court shall attach reasonable conditions authorized by section 9763 (relating to conditions of probation) as it deems necessary to ensure or assist the defendant in leading a law-abiding life." 42 Pa.C.S. § 9754(b). This is the default rule. However, we have also held "the Board and its agents may impose conditions of supervision that are germane to, elaborate on, or interpret any conditions of probation that are imposed by the trial court." *Elliott*, 50 A.3d at 1292; *see id.* ("a trial court may impose conditions of probation in a generalized manner, and the Board or its agents may impose more specific conditions of supervision pertaining to that probation, so long as those supervision conditions are in furtherance of the trial court's conditions of probation"). Taken together, then, Section 9754 and our interpretive decision in *Elliott* (as well as *Foster)* provide a full framework for imposing conditions of probation.

[5] Yet, "[u]nlike probation conditions, there is no equivalent mandate regarding the conditions of parole[.]" Commonwealth's Brief at 18. Particularly for **county** parole cases like this, appellee has not directed us to, and we have been unable to find, any statutory limitations within the Sentencing Code regarding who may impose parole conditions, the permissible conditions that may be imposed, or the time for imposing them. In fact, the only relevant statutory authority we have found, Section 9776 of the Sentencing Code, does not operate to restrict such powers; it enlarges them. It specifically directs that in a county parole case, the trial court "shall place the inmate **in the charge of** and under the supervision of a designated probation officer." 42 Pa.C.S. § 9776(d) (emphasis added). The phrase "in the charge of" is significant, insofar as it must mean something different than the "under the supervision of phrase that directly follows it. *See Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 648 Pa. 604, 194 A.3d 1010, 1034 (2018) ("When interpreting a statute, courts must presume that the legislature

did not intend any statutory language to exist as mere surplusage; consequently, courts must construe a statute so as to give effect to every word."). In our view, the difference is obvious: the former phrase places parolees "in the charge of a county probation officer, which necessarily includes the authority to impose parole conditions in addition to the trial court, whereas the latter phrase indicates the officers are also then responsible for "the supervision of the parolee and his or her compliance with all conditions imposed.

Of course, the Superior Court did not discuss this (or any other) statute relating to parole. Rather, the lower court essentially determined — incorrectly — that *Foster* was grounded in principles of due process that apply equally to probation and parole, thereby giving it license to fiddle with our holding and selectively quote portions of an inapplicable statute to support its expansion of the law. As discussed, however, *Foster* was nothing more than a case of statutory construction pertaining to probation; our passing mention of *Morrissey,* a parole case, was in no way intended to suggest that, in all respects and notwithstanding state statutes and rules to the contrary, courts must "review violations of probation and parole under the same standard." *Koger*, 255 A.3d at 1291 n.6. In short, the Superior Court's extension of *Foster* and its attendant statutes to also cover parole revocations assumed too much. And, since no statutory counterpart to Section 9754 exists with respect to the imposition of county parole, and in light of Section 9776, we conclude that sentencing courts are authorized to delegate to county probation officers the responsibility of communicating to defendants the conditions of their parole, and to do so post-sentencing.[10]

10. The concurrence argues we go too far in resolving the delegation issue, but we disagree. Contrary to the concurrence's belief we have raised the issue *sua sponte* and that it was "never discussed in the lower courts[,]" Concurring Opinion at 714, the Superior Court unequivocally held, in a published opinion of first impression, that "a sentencing court may not delegate its statutorily prescribed duties to probation and parole offices and is required to communicate any conditions of probation or parole as a prerequisite to violating any such condition." *Koger*, 255 A.3d at 1291. In making this new pronouncement of law, the lower court expressly cited *Foster's* emphasized statement that only a "court" can impose such conditions. *Id., citing Foster*, 214 A.3d at 1244 n.5 (emphasis in original). After its reargument petition was denied, the Commonwealth sought further review before this Court, arguing the Superior Court improperly expanded *Foster* and "ignored or misapplied statutes governing parole supervision!.]" Petition for Allowance of Appeal at 9. Notably, the Commonwealth alleged the lower court wrongly held the power to impose parole conditions "could not be delegated by the sentencing court to the probation department." *Id.* at 11. Likewise, in its brief before this Court, the Commonwealth continues to argue the Superior Court's holding that a court must specify the conditions of parole "does not exist in *Foster* or anywhere else in the law" and, in fact, "is contradicted by a series of statutes that specifically grant authority to parole agents to specify conditions of parole." Commonwealth's Brief at 18.

Given all this, we reject the concurrence's portrayal of our decision as resolving the delegation issue "sua sponte." Concurring Opinion at 716 n.4. Moreover, while the concurrence perceives "no essential connection between the question granted for review and the [delegation [i]ssue," *id.* at 716, in our respectful view, the connection is manifest. The Superior Court decided the delegation issue, citing *Foster,* and we granted the Commonwealth's petition for allowance of appeal to consider broadly whether the Superior Court "err[ed] in expanding" that decision. *Koger,* 276 A.3d at 202. Resolving that issue necessarily requires that we resolve the delegation issue, which the Commonwealth has raised at every step since the Superior Court interposed its new rule. Accordingly, we do not share the concurrence's cramped view of the issue before us. *See* Pa.R.A.P. 2116(a) ("The statement [of the questions involved in a brief] will be deemed to include every sub-

[6] Appellee's arguments do not convince us otherwise. He first argues we should dismiss this case as moot. According to him, the "case is moot because the parole sentence is over, having been fully served, and the Commonwealth cannot be given any effective relief if it prevails." Appellee's Brief at 9. We disagree. In rejecting the flip side of this argument in *Foster*—there, the Commonwealth claimed Foster's appeal was moot because he had finished serving his probation — we explained a "case is moot when facts that arise after the initiation of the case leave a litigant without a stake in the outcome of the matter." *Foster*, 214 A.3d at 1246 (citation omitted). However, we determined "the impact of a revocation of probation goes beyond the resentencing decision." *Id.* (citation omitted). Most significantly, we described how "[i]f the defendant is convicted of another crime or has a future revocation . . . proceeding, a past [ ] revocation is something that courts deciding these questions would consider in determining whether [supervised release] is an appropriate sentence." *Id.* (citations omitted). We see no reason why this interest, which was sufficient to shield Foster's claim from a mootness challenge, should apply any less fully to the Commonwealth here. We therefore reject the suggestion of mootness.

On the merits, appellee argues that, "[a]s with probation conditions, the judge has the sole statutory authority to impose conditions governing parole where a county parole sentence is imposed." Appellee's Brief at 21. "That authority," he continues, "is non-delegable." *Id.* The only support appellee supplies for this proposition beyond what the Superior Court stated, which we have already rejected, is our decision in *Elliott.* Appellee seizes on language in that case indicating the authority to impose probation conditions lies "solely with the trial courts," *Elliott*, 50 A.3d at 1291, and he submits the same should be true of parole conditions. We are unpersuaded. *Elliott*, like *Foster,* concerned only probation and was resolved on a statutory analysis of Section 9754 and other statutes, none of which apply to this county parole case. Put simply, in the same way *Foster* does not speak to the present issue, neither does *Elliott.*

[7] We do, however, find some purchase in one of appellee's arguments which bears brief discussion. Notably, he contends the "Commonwealth's argument that **the Parole Board,** with no jurisdiction, should have imposed the conditions of parole has no legal support." Appellee's Brief at 7 (emphasis added). In this respect, appellee refers to an argument by the Commonwealth which, although not entirely clear or explicit, seems to imply the state Parole Board (as opposed to county probation officers) may also have authority in county parole cases to provide "general rules of parole outside that of the court." Commonwealth's Brief at 20. We agree with appellee this is inaccurate.

Unlike with county parole cases, the Prisons and Parole Code, 61 Pa.C.S. §§ 101-7301, contains far more detailed procedures regarding state parole.[11] For

sidiary question fairly comprised therein.''); Pa.R.A.P. 1115(a)(4) (''The statement of questions presented [in a petition for allowance of appeal] will be deemed to include every subsidiary question fairly comprised therein.'').

11. In 2021, the General Assembly enacted the 2021 Pa. Legis. Serv. Act 2021-59 (S.B. 411), which included numerous amendments to the statutes controlling parole. Unless otherwise noted, all references herein to any statute found within the Prisons and Parole Code are to the current versions, though we recognize these statutes (many of which have simply been relocated or minimally altered) were not

example, Section 6141 permits the Board to "make general rules for the conduct and supervision of offenders and may, in particular cases, as it deems necessary to effectuate the purpose of parole, prescribe special regulations for particular persons." 61 Pa.C.S. § 6141. Similarly, under Section 6132, the Board is empowered to "establish special conditions of supervision for paroled offenders . . . based on the risk presented by and the rehabilitative needs of the offender." 61 Pa.C.S. § 6132(a)(3). As well, "conditions of supervision" are broadly defined under Section 6101 as "[a]ny terms or conditions of the offender's supervision, whether imposed by the court, the department or an agent, or promulgated by the board as a regulation[.]" 61 Pa.C.S. § 6101. The Commonwealth highlights these statutes and argues, "should the *Koger* decision stand and require special conditions of parole to also be imposed only by the court at sentencing, the parolee, the supervisory authorities (be it county parole agents or state parole agents), and the public will be at a disadvantage." Commonwealth's Brief at 21-22.

Where the Commonwealth's argument goes awry is in its belief that this case is one over which the state Parole Board had any authority. It did not. As appellee rightly notes, because his sentence involved a maximum sentence of less than two years, the sentencing judge was the one with jurisdiction over his parole. *See* Appellee's Brief at 6-7, *citing* 42 Pa.C.S. § 9775 (where sentencing court grants county parole, "parole shall be without supervision by the board"); *see also* 61 Pa. C.S. 6132(a)(2)(ii) ("the powers and duties conferred by this section shall not extend to persons sentenced for a maximum period of less than two years and shall not extend to those persons committed to county confinement within the jurisdiction of the court"). Although there is an exception to this rule, allowing a court "by special order [to] direct supervision by the [board], in which case the parole case shall be known as a special case and the authority of the [board] with regard thereto shall be the same as provided in this chapter[,]" 61 Pa.C.S. § 6171(a)(4), the trial court's sentencing orders here unmistakably referred appellee's parole supervision to the **county** probation office, and there was no "special order" directing supervision by the state Parole Board. Thus, to the extent the Commonwealth's argument could be construed as implying the Parole Board would have been permitted to act here in addition to the county probation department, we disagree with that much.

Nevertheless, there is no dispute the parole conditions appellee violated were imposed by the county probation office rather than the state Parole Board. As explained above at length, there was nothing improper about that, and the Superior Court erred in concluding otherwise. We therefore reverse its decision in that respect and remand for further proceedings consistent with this opinion.[12]

in place when appellee's parole was initially imposed.

12. By *sua sponte* injecting *Foster* into appellee's sufficiency-related parole challenge, the Superior Court avoided any need to address appellee's actual argument. Although we have strong doubts about whether the claim has been preserved at either the trial level, *see supra* at 703 n.5 & 704, or the appellate level, *see, e.g., Wirth v. Commonwealth*, 626 Pa. 124, 95 A.3d 822, 837 (2014) ("[O]ur rules of appellate procedure are explicit that the argument contained within a brief must contain 'such discussion and citation of authorities as are deemed pertinent.' "), *quoting* Pa.R.A.P. 2119(a), this Court's preferred course in this type of situation is ordinarily a remand. See, e.g., *Commonwealth v. Raboin*, —— Pa. ——, 258 A.3d 412, 424 (2021) (after holding evidence inadmissible under one rule, remanding to the Superior Court because "the question of its admissibility under [a different

Chief Justice Todd and Justices Wecht, Mundy and Brobson join the opinion.

Justice Donohue files a concurring opinion.

JUSTICE DONOHUE, concurring

I agree with the Majority's holding that *Commonwealth v. Foster*, 654 Pa. 266, 214 A.3d 1240 (2019)—a decision involving the statutory limitations on a trial court's authority to revoke a probation order—does not apply in equal measure to parole. Majority Op. at 709 (stating the Superior Court's "extension of *Foster* and its attendant statutes to also cover parole revocations assumed too much"). Having answered the specific question before this Court regarding *Foster*'s limited scope, I respectfully submit that no more was necessary. Nevertheless, the Majority also proclaims that, in county-parole cases, 42 Pa.C.S. § 9776(d) delegates to county probation officers "the authority to impose parole conditions in addition to the trial court[.]" Majority Op. at 709 (hereinafter "the Delegation Issue"). Regardless of one's agreement with that proposition, it answers a question that is not before this Court. In any event, I disagree with the Majority that Section 9776(d) authorizes the delegation of the trial court's responsibly to impose parole conditions. It says no such thing.

Foster

In *Foster*, this Court held that the clear and unambiguous language of the prior version of 42 Pa.C.S. § 9754 [1] required that "an order of probation must specify the length of the term thereof at the time of sentencing." *Foster*, 214 A.3d at 1248-49 (citing 42 Pa.C.S. § 9754(a)). That version of Section 9754 also provided a general condition of probation that a defendant "lead 'a law-abiding life,' i.e., that the defendant refrain from committing another crime." *Id.* at 1250 (quoting 42 Pa.C.S. § 9754(b)). In furtherance of that general condition, the statute required "the sentencing court to attach" to the probation order "any 'reasonable conditions authorized by subsection (c)[']" of Section 9754. *Id.* at 1249 (quoting 42 Pa.C.S. § 9754(b)). Section 9754(c) provided a non-exhaustive list of conditions that the sentencing court could impose.

The trial court determined that Foster violated his probation by appearing in social media posts while handling contraband. *Foster*, 214 A.3d at 1243. However, the court "did not find that Foster had violated a condition of his probation - in fact, [it] never mentioned the conditions of his probation in reaching its decision, and no order of probation appealed] in the certified record on appeal." *Id.* at 1244. The Superior Court affirmed, relying on this Court's statement in *Commonwealth v. Infante*, 585 Pa. 408, 888 A.2d 783 (2005), that a "probation violation is established whenever it is shown that the conduct of the probationer indicates the probation has proven to have been an in-

rule] remain[ed] unanswered'' and was beyond our allocatur grant); see *also Christian Legal Soc. Chapter of the Univ. of Cali., Hastings Coll. of the Law v. Martinez,* 561 U.S. 661, 697 n.28, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) (''When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves.''). We see no compelling reason to depart from this usual practice here.

1. The General Assembly amended Section 9754, effective on December 18, 2019, four months after we decided *Foster*. The revocations of Koger's parole and probation occurred under the prior statutory regime. Accordingly, from this point forward, all citations to Section 9754 refer to the pre-amendment version of the statute.

effective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct." *Infante*, 888 A.2d at 791 (internal citations omitted). We reversed the Superior Court, holding that both the trial court and the Superior Court had "disregarded **the statutory requirement** that a court must first find that the defendant either committed a new crime or violated a specific condition of probation in order to be found in violation." *Foster*, 214 A.3d at 1251 (emphasis added).

Koger's Probation and Parole Violations

On August 21, 2018, Koger pled guilty to one count each of child pornography, 18 Pa.C.S. § 6312(d) (count 1), and criminal use of a communication facility, 18 Pa.C.S. § 7512 (count 2); the trial court sentenced him at count 1 to eight to twenty-three months of incarceration and at count 2 to a term of three years of probation to run consecutive to the sentence imposed at count 1. The court then immediately paroled Koger based on credit for time served. Both his parole and probation were ordered to be supervised by the Washington County Adult Probation Office ("County Probation Office"). Two months later, the County Probation Office filed a petition alleging that Koger violated the terms of his probation and parole, and the parties proceeded by stipulating to those violations. The trial court revoked Koger's probation and parole, remanded Koger to county jail at count 1, and reinstated his three-year probation term at count 2. The trial court later reparoled Koger at count 1 on June 21, 2019.

Only three months later, the County Probation Office filed a second petition alleging three technical violations and one substantive violation of Koger's probation and parole. Petition for the Revocation of Parole and Probation, 9/17/2019, at 2 ("Revocation Petition"). At the conclusion of a hearing held on November 4, 2019 ("Revocation Hearing"), the trial court determined that Koger had "violated his parole and probation by committing technical violations and, accordingly, revoked his parole and probation." Trial Court Opinion, 5/26/2020, at 4. At the sentencing hearing held on January 22, 2020, the trial court remanded Koger to county jail to serve the balance of his sentence at count 1, and resentenced him at count 2 to one to three years of incarceration, consecutive to his sentence imposed at count 1.

Superior Court

In his timely appeal to the Superior Court, Koger presented three questions for review. Koger's Superior Court Brief, at 6. He claimed there was insufficient evidence to revoke his parole at count 1, insufficient evidence to revoke his probation at count 2, and he also tendered an illegal-sentencing claim. *Id.* Regarding the first claim, Koger argued that the Commonwealth failed to present sufficient "evidence to show that [he] violated a term or condition of his parole" because "the Commonwealth did not establish what the actual conditions of [his] parole were." *Id.* at 19, 20. Similarly, Koger argued that the Commonwealth failed to present sufficient evidence that he had "violated a specific term or condition of his probation" because "the Commonwealth did not establish at the Revocation Hearing what the actual conditions of [his] probation were." *Id.* at 23, 24. Koger's illegal-sentencing issue echoed his sufficiency claims; he asserted that, because the evidence was insufficient to show that he had "violated a specific term or condition of probation or parole or committed a new offense[,]" the trial court "lacked the legal authority to enter" the January 22, 2020 order of sentence. *Id.* at 28, 29.

Notably, Koger only cited *Foster* in support of his sufficiency claim concerning the revocation of his probation. *Id.* at 23-24. Nevertheless, the Superior Court addressed Koger's two sufficiency claims together and applied *Foster's* rationale to both. *Commonwealth v. Koger*, 255 A.3d 1285, 1290 (Pa. Super. 2021), *reargument denied* (Aug. 10, 2021), *appeal granted*, 276 A.3d 202 (Pa. 2022) ("Under these circumstances, we conclude the trial court erred in failing to specifically advise Appellant of the conditions of his probation and parole at the time of his initial sentencing. *See* 42 Pa.C.S. § 9754(b); *Foster*, 214 A.3d at 1244 n.5."). Consequently, the Superior Court reversed "the revocation of [Koger's] probation and parole" and vacated his judgment of sentence. *Id.* at 1291.[2]

The Commonwealth timely filed a petition for allowance of appeal, asking this Court to answer two questions. First, the Commonwealth presented the question: "Did the Superior Court err in expanding this Court's holding in . . . *Foster* and the statutory requirements related to probation conditions under 42 Pa.C.S.[ ] § 9754 to not only probation but also parole cases?" Commonwealth's Petition for Allowance of Appeal ("Petition"), 9/8/2021, at 5. We granted review of the question "as stated by" the Commonwealth. *Commonwealth v. Koger*, 276 A.3d 202 (Pa. 2022) (per curiam) ("Allocatur Order"). Second, the Commonwealth asked this Court to review whether "the Superior Court err[ed] in failing to provide guidance to the trial and sentencing courts, as well as probationers and parolees, as to how the conditions must be communicated?" Petition at 5. We denied review of the Commonwealth's second question.

Analysis

The Majority correctly concludes that Section 9754 does not require the trial court to issue conditions of parole at the time of sentencing. Majority Op. at 708. Consequently, *Foster* does not impose such a requirement, because *Foster's* rationale was squarely grounded in the text of Section 9754. *See Foster*, 214 A.3d at 1250 (stating "a court may find a defendant in violation of probation only if the defendant has violated one of the 'specific conditions' of probation included in the probation order or has committed a new crime. The plain language of the statute does not allow for any other result"). At that point, the Majority fully resolves the question before this Court.

The Majority nevertheless plows forward to address the Delegation Issue despite the fact that it was not accepted for our review, never briefed by the parties, and never discussed in the lower courts. The Majority asks itself, sua sponte: Under what authority does a trial court delegate its power to set parole conditions in county-parole cases? This is an interesting question, worthy of consideration after proper cultivation, but the Majority prematurely harvests an unsatisfactory answer, concluding that, in directing courts to place parolees "in the charge of" a county probation officer, Section 9776(d) authorizes a trial court to delegate its power to set the conditions of parole.

2. The Superior Court also ostensibly determined that Koger's judgment of sentence was illegal, but its ruling on the issue was somewhat ambiguous as it merely repeated its conclusion that the evidence was insufficient to support the revocations, again citing *Foster* and Section 9754(b). *Id.* ("Because the trial court did not impose the conditions which [Koger] is alleged to have violated, the Commonwealth could not prove by a preponderance of the evidence that [he] committed any violations as allegedly defined in the [Revocation Petition].").

The trial court neither imposed nor communicated Koger's parole conditions to him in accordance with "long standing procedures in Washington County." Trial Court Letter, 5/7/2021, at 1. The Majority acknowledges that the "Commonwealth never produced or admitted into evidence the rules provided to and signed by [Koger] following sentencing, so they are not in the certified record. It is thus unclear whether the 'conditions' [set forth in the Revocation Petition] are verbatim reproductions of the rules or summaries thereof." Majority Op. at 702 n.4. Not to be deterred by this information deficit, the Majority assures us that Probation Officer Jeremy Bardo ("PO Bardo"), who filed the Revocation Petition without attaching a copy of the parole conditions purportedly communicated to and signed by Koger, and who further neglected to produce the same at the Revocation Hearing, nevertheless "credibly" testified that Koger both received and signed a copy of those conditions. *Id.* at 704. The Commonwealth did not ask PO Bardo, nor did PO Bardo volunteer to divulge, whether he had personally witnessed Koger's receipt and/or signing of the parole conditions imposed, nor when (nor where, nor how) this off-the-record ritual occurred.

These are certainly matters of interest that may come into play in the Superior Court's consideration on remand of Koger's unanswered parole-related sufficiency claim. And, regardless of how the Superior Court resolves that claim, it should cause at least some concern that parole conditions are not routinely made part of the record at the earliest possible time following parole, if only to minimize confusion and thereby maximize fairness in the process of revocation should parolees transgress those conditions. That this is not already the case already must be due, in no small part, to the fact that trial courts routinely delegate their authority to impose parole conditions to county probation officers. Thus, I share the Majority's curiosity as to how it came to pass that trial courts delegate this power to probation officers in county-parole cases.

But that Delegation Issue is simply not yet before this Court. So why are we addressing it? The Majority approaches this Delegation Issue after lamenting that Koger "has not directed us to, and we have been unable to find, any statutory limitations within the Sentencing Code regarding who may impose parole conditions, the permissible conditions that may be imposed, or the time for imposing them." *Id.* at 708. It befuddles me why the Majority believes Koger, the appellee before this Court, had any responsibility to bring such authorities to this Court's attention, much less address an issue over which this Court did not grant review.

The Commonwealth never raised the Delegation Issue as a subsidiary argument to its *Foster* issue.[3] The Majority instead relies on the language of our Allocatur Order itself, which asked if "the Superior Court err[ed] in expanding this Court's holding in" *Foster*. *Commonwealth v. Koger*, 276 A.3d 202 (Pa. 2022) (per curiam). The Majority declares that the Delegation Issue is obviously subsumed within that question, citing the principle that a question presented for our review "will be

3. I observe only one solitary reference to Section 9776 in the Commonwealth's Brief, offered solely for the proposition that the "Sentencing Code gives parole authority for county sentences ... to the sentencing judge." Commonwealth's Brief at 20 (citing 42 Pa.C.S. § 9776(a)). This boilerplate statement of the law was never in dispute. The Commonwealth never mentioned, much less discussed, Section 9776(d)'s language directing trial courts to "place" paroled inmates "in the charge of and under the supervision of a designated probation officer." 42 Pa.C.S. § 9776(d).

deemed to include every subsidiary question fairly comprised therein[,]" but omits the corollary rule that only "the questions set forth in the petition, or fairly comprised therein, will ordinarily be considered by the court in the event an appeal is allowed." Pa.R.A.P. 1115(a). In my view, that question is **obviously not subsumed** within our allocatur grant.[4] Rule 1115 demands that we do not address the issue, because: 1) the Delegation Issue was not explicitly set forth in the text of the Allocatur Order; 2) it was not raised or argued by any party at any prior stage; 3) it did not form the basis of any ruling in the lower courts; 4) it does not directly resolve the question of whether the Superior Court erred in this case by misapplying *Foster*, and 5) it does not otherwise aid the Majority in resolving the *Foster* issue.[5] For these reasons, I ascertain no essential connection between the question granted for review and the Delegation Issue.

Nevertheless, the Majority answers a question it was never asked, and so I am compelled to address its answer. The Majority divines a solution to the Delegation Issue from its reading of Section 9776(d). Section 9776 governs the judicial power to release inmates: In cases that do not involve the exclusive parole jurisdiction of the Pennsylvania Parole Board,[6] i.e., coun-

4. Here, the Majority undoubtably raises the Delegation Issue sua sponte. To the extent the Majority believes that the Commonwealth attempted to raise concerns about the Delegation Issue in its petition for allowance of appeal, the Commonwealth at best did so vaguely and without any reference to the Section 9776(d) rationale now adopted by the Majority. See Petition for Allowance of Appeal at 12 (''This appeal should be granted to reaffirm this Court's supervisory authority over the lower courts, to reaffirm the holding of *Foster* and § 9754 and its application only to probation, and to remedy the conflict of the Superior Court's opinion with this Court's holding in *Foster* and with the duly enacted statutes.''). Nothing in the Commonwealth's petition stated or implied a conflict with Section 9776(d) as a basis for the Superior Court's error, nor does the Commonwealth assert such a conflict in is brief. Moreover, the statutes governing parole supervision referenced by the Commonwealth in its petition had nothing to do with the Delegation Issue at all, but instead concerned unrelated powers of probation officers generally and the power of the state Parole Board to issue parole conditions. *See* Petition for Allowance of Appeal at 9 (citing 42 Pa. C.S. §§ 9911 (definitions), 9912 (governing searches and seizure by probation officers), and 61 Pa.C.S. § 6141 (permitting the state Parole Board to issue ''general rules for the conduct and supervision of offenders and'' to ''prescribe special regulations for particular persons'' in state parole cases)). Sections 9911 and 9912 simply have no relationship to the Delegation Issue at all, and the Majority rightly rejects the Commonwealth's arguments related to Section 6141 elsewhere in its opinion, correctly stating that the state Parole Board had no authority in this county-parole case. *See* Majority Opinion at 711.

5. This Court has a long-standing policy against appellate courts raising issues sua sponte because it ''unnecessarily disturb[s] the processes of orderly judicial decisionmaking'' and ''deprives counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy.'' *Wiegand v. Wiegand*, 461 Pa. 482, 337 A.2d 256, 257 (1975). In a recent unanimous decision, this Court reiterated:

> An appellate court must address an appeal as it is filed and generally may not raise an issue sua sponte. An appellate court can only pass upon the legal question involved in any case which comes before it. We have held on numerous occasions that where the parties fail to preserve an issue for appeal, an appellate court may not address the issue, even if the disposition of the trial court was fundamentally wrong.

Gibraltar Rock, Inc. v. Dep't of Env't Prot., —— Pa. ——, ——, 286 A.3d 713, 724 (2022) (internal citations, brackets, ellipses, footnotes, and quotation marks omitted).

6. Section 9776 was subjected to a minor amendment in 2021, recasting the ''Pennsylvania Parole Board of Probation and Parole'' as the ''Pennsylvania Parole Board.'' No other changes in the text of the statute occurred.

ty-parole cases, "a court of this Commonwealth or other court of record having jurisdiction may, after due hearing, release on parole an inmate in the county correctional institution of that judicial district." 42 Pa.C.S. § 9776(a). "No inmate may be paroled" under Section 9776 "except on petition verified by the oath of the inmate or by the inmate's representative and presented and filed in the court in which the inmate was convicted." *Id.* § 9776(b). Once a petition is filed, the court is obligated to schedule a hearing, and a "copy of the petition shall be served on the district attorney and prosecutor in the case at least ten days before the day fixed for the hearing." *Id.* § 9776(c). Following the hearing, the court must issue an order "as it may deem just and proper." *Id.* § 9776(d). Critically for our purposes here, if the court grants parole, "it shall place the inmate in the charge of and under the supervision of a designated probation officer." *Id.* Finally, upon "cause shown by the probation officer that the [parolee] has violated his parole," the court may either recommit the parolee for the violation or reparole him if the court finds a "reasonable probability" that he will benefit from parole. *Id.* § 9776(e).

Ostensibly uncomfortable with the absence of explicit authority permitting a trial court to delegate its power to issue parole conditions, the Majority attempts to mine Section 9776(d) to validate the belief that such authority **must** exist. The Majority's "discovery" of such authority in Section 9776(d) is coated with a veneer of statutory construction that camouflages an underlying truth: Nothing in Section 9776, and nothing in Section 9776(d) in particular, speaks to the power to issue **conditions** of parole. Indeed, nothing in Section 9776 explicitly addresses parole conditions at all.

Nevertheless, the Majority dissects Section 9776(d)'s text, highlighting that when a court "paroles the inmate, it shall place the inmate **in the charge of** and **under the supervision of** a designated probation officer." 42 Pa.C.S. § 9776(d) (emphasis added). The Majority correctly casts aside the notion that the sequential use of the terms "in the charge of" and "under the supervision of" in Section 9776(d) is a redundancy, which might be the first impression of an unsophisticated reader.[7] From this unremarkable platform, the Majority jumps to conclude that the phrase "in the charge of must, therefore, add to that supervisory power "the authority to impose parole conditions[.]" Majority Op. at 709. Why? Yet again, we are assured that it is "obvious." *Id.*

It is not obvious. By its plain terms, Section 9776(d) says no such thing. I do not pretend to know with certainty what "in the charge of" means beyond the power to supervise, even if I agree with the Majority that the phrase cannot, by our canons of statutory construction, mean exactly the same thing as "under the supervision of." *See* 1 Pa.C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). However, it does not follow that "in the charge of must mean that a designated probation officer has independent "authority to impose parole conditions" merely because those phrases must be afforded different meanings.[8] The Majority's inability to un-

7. While this component of the Majority's statutory construction rationale is technically correct, it must be noted that the Majority effectively declares victory against a redundancy strawman, given that no party has asked this Court to interpret the meaning of Section 9776(d) in such a fashion and there is no interpretation by a prior court identified by the Majority suggesting that those terms are identical in meaning.

8. In the instant case, upon initially paroling Koger, the trial court ordered him to be "su-

cover any other authority to support its view that a trial court may delegate its power to issue parole conditions is no reason to find such authority in Section 9776(d).

Section 9776 simply does not discuss parole conditions at all, and there can be no doubt that when the Legislature intended to delegate the power to issue parole conditions, it said so in clear and unambiguous terms. In 2021, the Legislature granted the Pennsylvania Parole Board "exclusive power" in state parole cases to "establish special **conditions of supervision** for paroled offenders" and to "promulgate regulations establishing general **conditions of supervision** applicable to every paroled offender." 61 Pa.C.S. § 6132(a)(3)-(4) (emphasis added).[9] The General Assembly did not delegate the power to impose parole conditions to the Pennsylvania Parole Board by directing trial courts to place state-sentence parolees "in the charge of" the Pennsylvania Parole Board or its officers. It simply used the common sense, ordinary terms one would expect the Legislature to use, terms glaringly absent from the text of Section 9776(d). As such, in my view, Section 9776(d) means something other than the Majority's interpretation. Some advocacy would surely help.

Consequently, I join the Majority but for its incorrect, sua sponte interpretation of Section 9776(d).

ORDER

PER CURIAM

AND NOW, this 23rd day of June, 2023, Appellee's Application for Reargument is **DENIED**. The Commonwealth's Petition for Clarification is **GRANTED**. The Court's Opinion, filed May 16, 2023, is hereby amended at pages 18 and 19 of the slip opinion as follows (additions appear in bold underline; deletions appear in bold strikethrough):

~~Previously, Section 6132 contained~~ **Although there is** an exception to this rule, allowing a court "by special order [to] direct supervision by the [board], in which case the parole case shall be known as a special case and the authority of the [board] with regard thereto shall be the same as provided in this chapter[,]" ~~but the General Assembly~~

pervised'' by the County Probation Office; the court did not designate a probation officer in its order. Order of Sentence, 8/21/2018, at 2. In the December 21, 2018 order revoking Koger's initial parole, wherein the trial court ordered Koger to be reparoled on June 21, 2019, the court did not designate any supervising authority. Order, 12/21/2018, at 1-2. As interpreted by the Majority, ''a designated probation officer'' is authorized to impose conditions of parole. There is no evidence that the trial court designated a probation officer in this case. In any event, in ''ascertaining the intention of the General Assembly in the enactment of a statute[,]'' we presume that ''the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.'' 1 Pa.C.S. § 1922(1). It is absurd and/or unreasonable to believe that the General Assembly intended to place such broad authority to set parole conditions in the hands of one individual, if it intended to delegate such power at all. Indeed, the absurdity of the Majority's interpretation is even more evident when applied to the preceding language in Section 9776(d), which mandates that the trial court ''**shall** place the inmate in the charge of . . . a designated probation officer[,]'' which would suggest not only that the trial court **may** delegate its authority to set parole conditions to a parole officer, but that it **must** do so. 42 Pa.C.S. § 9776(d) (emphasis added). The General Assembly could not have intended to accomplish so much by saying so little, depriving the court of the authority to set conditions of parole while simultaneously delegating such authority to the arbitrary discretion of an individual probation officer.

9. Section 9776(d) predated the 2021 amendment.

~~eliminated this exception in 2021. 61 Pa. C.S. § 6132(a)(2)(i) (deleted by 2021, June 30, Pub. L. 260, No. 59, § 18). Regardless, though,~~ **61 Pa.C.S. § 6171(a)(4),** the trial court's sentencing orders here unmistakably referred appellee's parole supervision to the **county** probation office, and there was no "special order" directing supervision by the state Parole Board.

Chief Justice Todd and Justice Donohue note their dissent to the denial of Appellee's Application for Reargument.

COMMONWEALTH of Pennsylvania, Appellant

v.

Heather Louise HUMMEL

No. 1147 MDA 2022

Superior Court of Pennsylvania.

Submitted: December 27, 2022

Filed: April 4, 2023

Background: Defendant pleaded guilty in the Court of Common Pleas, Adams County, Criminal Division, No. CP-01-CR-0000309-2022, Thomas R. Campbell, J., to driving under the influence (DUI) of alcohol and controlled substances as a first-time DUI offender. The Commonwealth appealed.

Holdings: The Superior Court, No. 1147 MDA 2022, Panella, President Judge, held that defendant's acceptance of accelerated rehabilitative disposition for earlier DUI incident was prior offense that supported enhanced sentencing for current DUI offense.

Vacated and remanded.

1. Automobiles ⚿359.6

Defendant's prior acceptance of accelerated rehabilitative disposition (ARD) for an earlier driving under the influence (DUI) incident was a prior offense that supported enhanced sentencing for her subsequent guilty-plea conviction for driving under the influence of alcohol and controlled substances. 75 Pa. Cons. Stat. Ann. §§ 3802(d)(3), 3804, 3806(a).

2. Criminal Law ⚿1134.75, 1139

On challenges to the legality of a defendant's sentence the superior court's standard of review is de novo and its scope of review is plenary.

Appeal from the Judgment of Sentence Entered July 25, 2022, In the Court of Common Pleas of Adams County, Criminal Division, at No(s): CP-01-CR-0000309-2022, Thomas R. Campbell, J.

Kyle M. Reuter, Assistant District Attorney, Gettysburg, for Commonwealth, appellant.

Justin M. Heisler, York, for appellee.

BEFORE: PANELLA, P.J., McLAUGHLIN, J., and PELLEGRINI, J.*

OPINION BY PANELLA, P.J.:

The Commonwealth of Pennsylvania appeals from the judgment of sentence imposed following the guilty plea entered by Heather Louise Hummel to driving under the influence of alcohol and controlled substances ("DUI"), in violation of 75 Pa. C.S.A. § 3802(d)(3), as a first-time DUI

* Retired Senior Judge assigned to the Superior Court.