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The Zealous Advocate

CPCS Training Bulletin

CHIEF COUNSEL'S MESSAGE

William J. Leahy, Esq.

UNFINISHED BUSINESS

Just three years ago, the right to counsel in Massachusetts was gravely endangered: made vulnerable by two decades of budgetary neglect, and under fresh attack by an efficiency-driven gubernatorial agenda. Private attorneys were declining to accept CPCS cases due to long stagnant payment rates, and CPCS staff lawyers were leaving in search of an adequate income.

Three years later, as a result of landmark litigation, a strong counsel commission report, compreshensive legislation and more robust funding, the right to counsel for poor people in Massachusetts is much healthier. The number of private lawyers accepting assignments is at an all-time high, and lawyers are applying for CPCS staff positions rather than fleeing from them. Moreover, the former administration has departed, replaced in the wisdom of the people by a Governor and Lieutenant Governor who value the right to counsel and the provision of equal justice for all.

Yet this is no time to rest on our accomplishments. First, there is a deficiency of almost nineteen million dollars in the current (FY07) appropriation for private counsel compensation and indigent court cost services. Second, none of the three reforms identified by the Commission and included in Chapter 54 legislation in 2005 has yet been fully achieved. The constitutional vice of inadequate compensation, condemned by the Court in its *Lavallee* decision, led to the Commission proposal for a series of hourly rate increases phased in over a three year period, yet only the first of these increases has occurred; and the sufficiency of CPCS staff salaries is at risk in every annual budget process. Likewise, the creation of a proper mix of private and public counsel as envisioned by the legislation has been accomplished only in part. Finally, the mandated examination of civil infraction reform, intended to save money and eliminate damaging, unforeseen collateral consequences resulting from unnecessary misdemeanor convictions has advanced not at all.

Make no mistake: we are properly proud of the significant progress which we've made through the persistence, the determination and the cooperation of all who revere the right to counsel. As we undertake our budget advocacy for FY08, I am confident that those qualities will once again produce success for our cause.

IN THIS ISSUE:

CPCS Criminal Defense Training Unit:
Cathleen Bennett, Training Director
Paul Rudof, Staff Attorney
Margaret Fox, Staff Attorney
Kristen Munichiello, Administrative Assistant

INDIGENT DEFENSE NEWS

STATUTE OF LIMITATIONS FOR SEX CRIMES

The Massachusetts legislature has revised the statute of limitations for certain sex crimes. The result of these efforts is appropriately titled "An Act Increasing the Statute of Limitations for Sexual Crimes Against Children." Chapter 303 of the Acts of 2006 **goes into effect on December 20, 2006**. A full text of the law can be read at: http://www.mass.gov/legis/laws/seslaw06/sl060303.htm.

The following changes have been made to G.L. c.277, §63:

- **For the offenses listed below, the statute of limitations have been abolished**

  AND

- **Any indictment or complaint found and filed more than *27 years* after the date of offense *"shall be supported by independent evidence that corroborates the victim's allegation*. Such independent evidence shall be admissible during trial and shall not consist exclusively of the opinion of mental health professionals."**
  - **ind a&b on child over 14** (c.265, §13B) [change from 6 yrs]
  - **a&b or ind a&b on mentally retarded perso**n (c.265, §13F) [change from 6 yrs]
  - **reckless endangerment of children** (c.265, §13L) [change from 6 yrs]
  - **rape of child under 16** (c.265, §22A0 [change from 6 yrs]
  - **rape of child** (c.265, §23) [change from 15 yrs]
  - **asslt on child under 16 w/I to commit rape** (c.265, §24B) [change from 15 yrs]

The statute of limitation has not changed for any of the other offenses listed in G.L. c.277, §63.

NOTICE TO CPCS DISTRICT COURT AND JUVENILE DELINQUENCY AND SUPERIOR COURT CERTIFIED ATTORNEYS

On March 14, 2007 MCLE will present Sex Offender Registration and Notification. All CPCS criminal defense practitioners on the District, Juvenile and Superior Court lists who have not yet attended previous offerings of this seminar are required to attend in order to maintain certification. The seminar will be held on **Wednesday, March 14, 2007 from 9 am to 5 pm at MCLE, 10 Winter Place, Boston MA 02108. Tuition is $95.00 for CPCS bar advocates.** To register you may go to www.mcle.org or call MCLE at 1-800-966-6253

CPCS ANNUAL TRAINING CONFERENCE

The 2006 CPCS Annual Training Conference will be held on Thursday, May 3, 2007 from 8:30 am to 5:00 pm at the DCU Center in Worcester, MA.

Criminal Law, CAFL, Appellate as well at Mental Health Litigation programs will be offered. The cost for the conference is a $95.00 contribution to the CPCS Training Trust. This entitles participants to attend all seminars and the awards luncheon and receive all conference materials. **Enrollment is limited and slots will be filled on a first-registered first-served basis**. The conference is only open to those attorneys who accept assignments through CPCS. To register, use the registration form on our website at http://www.mass.gov/cpcs/training/Registration_Form.pdf

CPCS ACCEPTS NOMINATIONS FOR AWARDS

The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public

Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy — the central principle governing the representation of indigents in Massachusetts.

The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.

The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or are otherwise at risk are treated fairly and with dignity.

The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.

The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary commitment to the representation of both children and parents in care and protection, children in need of services, and dispensation with consent to adoption cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.

Nominations: Nominations for these awards should be submitted to William J. Leahy, Chief Counsel, CPCS, 44 Bromfield Street, Boston, MA 02108. The deadline for submissions is **March 30, 2007**. The Committee will present the awards at the CPCS Training Conference on Thursday May 3, 2007.

NEW BAR ADVOCATES

The following bar advocates have recently joined CPCS after completing the bar advocate training course, "Zealous Advocacy in the District and Juvenile Courts."

BARNSTABLE
Lynda Brack
Michael Prevost
Paul DeCenzo
Patrick Mead
Regina Schwarzenberg
Erin Donovan
Jennifer McNulty

BRISTOL
Jean Whitney
Nicole Charleson
Gregory Lorincz
Maria Williams
Marc Roberts
Steven Parker
William Wheatley
Anthony Clune
John Lisa
Jason Gates

ESSEX
Michael Finamore
Andrea Mangano
Timothy Connors
Joanna Rodriguez
Janine Lepore
Susan Olms
Thomas Gately
Kristen Sherman

FRANKLIN
Timothy Flynn

HAMPDEN
Jeremy Powers
Anita Coll
Philip Mumblow
Colleen Lippiello

PILGRIM
Daniel Kallenberg
Kathleen Iaccarino
Mark Adams

HAMPSHIRE
Robert LaFlamme

MIDDLESEX
Michael Ortiz
Nina Lewin
Bridget Garballey
Michael Coyle
Katherine Joyce
Raymond Weicker

NORFOLK
Karen Wayne
John Hause
Mark Ruby
Sean Cunningham
Scott Murphy
Laura Presner

SUFFOLK
Kirsten Wenge
Theresa Gomes
Yeon Kim
Dmitry Lev
Barry Kilroy
Ronald Wayland
Marc Chamblee
Mark McGrath
James Doherty
Erinna Delle Brodsky
Willam Roa
Nikki Sanders
Michael Giery
Myong Joun

WORCESTER
Janice Chiaretto
Michael Sheridan
Katie Dahlgren
Ward Weizel
Richard Farrell

NEW CPCS STAFF

CPCS welcomes the following new Superior Court staff attorneys

Theo Beery	Springfield Office
Laurel Singer	Worcester Office
Michal Mokryn	Salem Office
Benjamin Selman	Cambridge Office
John Redden	Brockton Office
Laura Gitelson	Worcester Office
Kathleen Moore	Lowell Office
Mark Schmidt	Salem Office
Michael Zeman	Brockton Office

With the opening of 15 new CPCS District Court Offices and 4 new Children and Family Law Branch Offices, CPCS welcomes the following new Directors, staff attorneys, administrative assistants, and investigators

BRISTOL COUNTY

Carlos Brito	Director
Andrea DeVries	Supervisor
Gail Sargent	Administrative Assistant
Gopal Balachandran	Staff Attorney
Katharine Grubbs	Staff Attorney
Edward Kammerer Jr	Staff Attorney
Kristen Ray	Staff Attorney
Erin Steadman	Staff Attorney

PLYMOUTH COUNTY

Patricia Downey	Director
Louise Johnson	Administrative Assistant
Carla Barrett	Staff Attorney
Christopher Bracci	Staff Attorney
Rob Hofmann	Staff Attorney
Julieanne Parolin	Staff Attorney

HAMPDEN COUNTY

Larry Madden	Director
Tracy Magdalenski	Staff Attorney
Becca Bodner	Staff Attorney
David Estabrook	Staff Attorney
Mark Hopkins	Staff Attorney
Jennifer Johnson	Staff Attorney
Hemangi Pai	Staff Attorney
Lisa Polk	Staff Attorney

WORCESTER COUNTY

Jennifer Ginsburg	Director
Marjory Thomas	Administrative Assistant
Jamie Anne Bennett	Staff Attorney
Brian Murphy	Staff Attorney
Natalie Rose	Staff Attorney
Elisabeth Ryan	Staff Attorney
James Vandersalm	Staff Attorney

MIDDLESEX COUNTY (LOWELL)

Lynda Dantas	Director
Julie Ireson	Administrative Assistant
Jenna Koerper Brownson	Staff Attorney
Katelynn O'Connell	Staff Attorney
Gabriella Robin	Staff Attorney

MIDDLESEX COUNTY (CAMBRIDGE)

Paul McManus	Director
Cheryl Mulcahy	Administrative Assistant
Josh Michtom	Staff Attorney
Meaghan Cary	Staff Attorney
Eva Vekos	Staff Attorney
Lauren Weitzen	Staff Attorney
Scott Lauer	Staff Attorney

MIDDLESEX COUNTY (FRAMINGHAM)

David Twohig	Director
Michael Perpall	Staff Attorney
Jeffrey Stuffings	Staff Attorney
Samantha Gillombardo	Staff Attorney

ESSEX COUNTY

Susan Oker	Director
Elaine Deraney	Administrative Assistant
Sharon Chaitin-Pollak	Staff Attorney
John Fennel	Staff Attorney
Tatum Pritchard	Staff Attorney
Sierra Rosen	Staff Attorney

FRANKLIN/HAMPSHIRE COUNTY

Thomas Estes	Director
Kurt Conner	Staff Attorney
Lisa Lippiello	Staff Attorney

BARNSTABLE COUNTY

Susan Crocker	Director
Janice Rhoden	Administrative Assistant
Colleen Duarte	Staff Attorney
David Manza	Staff Attorney

NORFOLK COUNTY

Stuart Hurowitz	Director
Frank Doucette	Supervisor
Denise Simonini	Administrative Assistant
Thomas Whiting	Investigator
Lauren McDonough	Staff Attorney
Claire Donohue	Staff Attorney
Crystal Myers	Staff Attorney
Kim Posocco	Staff Attorney
Constance Utada	Staff Attorney
Ethan Yankowitz	Staff Attorney

WORCESTER – JUVENILE DEFENDERS OFFICE

Jeff Richards	Director
Francene Markunas	Administrative Assistant
Amanda Kirchoffer	Staff Attorney
Lynsey Heffernan Murphy	Staff Attorney

SUFFOLK COUNTY (ROXBURY)

Lisa Grant	Director
Gerry Heavey	Supervisor
Dierdre Griffin	Administrative Assistant
Renay Frankel	Staff Attorney
Megan Koch	Staff Attorney
Olubunmi Olotu	Staff Attorney
Cora Vestal	Staff Attorney
Tim Brown	Staff Attorney

SUFFOLK COUNTY (BOSTON)

Kari Tannenbaum	Director
Donna Cuipylo	Supervisor
Carole Kane	Administrative Assistant
Elizabeth Grote	Staff Attorney
Beau Kealy	Staff Attorney
Todd Pomerleau	Staff Attorney
Anne Rousseve	Staff Attorney
Dave Shea	Staff Attorney
Amanda Ward	Staff Attorney
Yue Zheng	Staff Attorney

BERKSHIRE COUNTY

Jill Sheldon	Director
Kathleen Shea	Staff Attorney
Vanessa Halley	Staff Attorney

CHILDREN AND FAMILY LAW - BOSTON

Andrew Hoffman	Director
Tamika Jones	Administrative Assistant
Nancy Hathaway	Staff Attorney
Sarah Lyons	Staff Attorney
Mimi Wong	Staff Attorney

CHILDREN AND FAMILY LAW - BROCKTON

Carol Rosenswieg	Director
Javier Flores	Staff Attorney
Michelle Grossfield	Staff Attorney

CHILDREN AND FAMILY LAW – LOWELL

Anita Sullivan	Director
Christine Capstick	Staff Attorney
Brooke Chen	Staff Attorney

CHILDREN AND FAMILY LAW - WORCESTER

Margaret Winchester	Director
Lori Rinaldi	Administrative Assistant
Dawn Messer	Staff Attorney
Cora-Jean Robinson	Staff Attorney
Nicholas Talarico	Staff Attorney

JUVENILE PROBATION UPDATE

Following is Commonwealth of Massachusetts Juvenile Court Department Standing Order 1-07 -- Violation of Probation Proceedings as well as some commentary regarding these rules from Wendy Wolf of the CPCS Youth Advocacy Project and Juvenile Defense Network

I. Scope and Purpose

This standing order prescribes procedures in the Juvenile Court to be followed upon the allegation of a violation of an order of probation issued in a delinquency, youthful offender or criminal case after a finding of delinquency, youthful offender, or guilty, or after a continuancewithout a finding. This standing order does not apply to an alleged violation of pretrial probation, as the latter term is defined herein. The purpose of this standing order is to ensure that judicial proceedings undertaken upon the allegation of a violation of probation are conducted in a manner consistent with the Commonwealth's policy regarding children as set forth in G.L. c. 119 and in full compliancewith all applicable law, promptly and with an appropriate degree of procedural uniformity.

II. Definition of terms

In construing this standing order, the following terms shall have the following meanings:

"Continuance without a finding" means the order of a court, following a formal submission and acceptance of a plea of guilty or an admission to sufficient facts in a youthful offender case or criminal case; or, in a delinquency case, following a formal submission and acceptance of a plea of delinquency or an admission to sufficient facts or after a trial in which theallegations are proven beyond a reasonable doubt, whereby the case is continued to a date certain without the formal entry of a delinquency, youthful offender, or guilty finding. A continuance without a finding may include conditions imposed in an order of probation (1) the violation of which may result in the revocation of the continuance, entry of a finding of guilty, youthful offender or delinquency and imposition of sentence or commitment to the Department of Youth Services and (2) compliance with which will result in dismissal of the case.

"District Attorney" means the criminal prosecuting authority including the Attorney General if the delinquency, youthful offender, or criminal case in which probation was ordered was prosecuted by the Office of the Attorney General.

"General conditions of probation" means the conditions of probation that are imposed as a matter of course in every order of probation, as set forth in the official form promulgated by the Administrative Office of the Juvenile Court for such orders.

"Probation order" means the formal, written court order whereby a defendant is placed on probation and which expressly sets forth the conditions of probation.

"Pretrial probation" means the probationary status of a defendant pursuant to a probation order issued prior to a trial or prior to the formal submission and acceptance of a plea of delinquent, youthful offender or guilty, or prior to an admission to sufficient facts.

"Revocation of probation" means the revocation by a judge of an order of probation as a consequence of a determination that a condition of that probation order has been violated.

"Special conditions of probation" means any condition of probation other than one of the general conditions of probation.

"Surrender" means the procedure by which a probation officer requires a probationer to appear before the court for a judicial hearing regarding an allegation of a probation violation.

III. Commencement of Violation Proceedings: Charged Criminal Conduct

(a) General. This standing order prescribes the procedures to be undertaken upon the issuance of a delinquency or criminal complaint or youthful offender indictment against a probationer.

(b) Where Probation Order and Delinquency or Criminal Complaint or Youthful Offender Indictment Involve Same Division

(i) Issuance and Service of Notice. When a delinquency or criminal complaint is issued by a division or a youthful offender indictment is returned by a grand jury and remitted to a division of the Juvenile Court Department against a defendant who is the subject of a probation order previously issued by that same division, the Probation Department shall commence violation proceedings against that probationer. Such proceedings shall be commenced by the issuance by the Probation Department of a Notice of Probation Violation/Hearing at or before the arraignment on the delinquency or criminal complaint or youthful offender indictment. The Notice shall be served on the probationer in hand at arraignment and such service shall be recorded on the case docket, provided that if such in-hand service is not possible, the Notice shall be served on the probationer by first-class mail, unless the court orders otherwise. Service of the Notice by first-class mail shall be recorded on the case docket. Out of court service other than by mail shall require a written return of service. A copy of each Notice of Probation Violation/Hearing shall be provided to the District Attorney forthwith upon its issuance. The court, upon review of the Notice at arraignment and as a matter of its discretion, may order no further proceedings in the matter, and in such cases formal service of the Notice on the probationer shall not be required.

(ii) Contents of Notice. The Notice of Probation Violation/Hearing shall set forth the criminal conduct alleged to have been committed by the probationer as indicated in the delinquency or criminal complaint or youthful offender indictment, and shall set forth any other specific conditions of the probation order that the Probation Department alleges have been violated with a description of each such alleged violation.

(iii) Scheduling of Hearing. The probation violation hearing shall be scheduled to be conducted on the date of the pretrial hearing for the new delinquency or criminal complaint or youthful offender indictment, unless the court expressly orders an earlier hearing. The hearing shall be scheduled for a date certain no less than seven days after service on the probationer of the Notice of Violation/Hearing unless the probationer waives said seven day notice period. The hearing date shall not be later than fifteen days after service of the Notice of Violation/Hearing without the probationer's consent if he or she is held pursuant to Section V of this standing order, or in any case no later than thirty days after service of the Notice of Violation/Hearing if the probationer objects, except in extraordinary circumstances. In scheduling the pretrial hearing on the new delinquency or criminal complaint or youthful offender indictment together with the probation violation hearing, the court shall give primary consideration to the need for promptness in conducting the probation violation hearing.

(c) Where Probation Order and Delinquency or Criminal Complaint or Youthful Offender Indictment Involve Different Divisions.

(i) Issuance and Service of Notice. When a delinquency or criminal complaint is issued by a division of the Juvenile Court Department or a youthful offender indictment is returned by a grand jury against a defendant who is the subject of a probation order issued by a different division of the Juvenile Court Department, the Probation Department in the division that issued the delinquency or criminal complaint or youthful offender indictment shall issue a Notice of Probation Violation/Hearing to the probationer at or before arraignment on the new delinquency or criminal complaint or youthful offender indictment. The Notice, as provided in section (c)(ii), below, shall be served on the probationer in hand at arraignment and such service shall be recorded on the case docket. The Probation Department forthwith shall send a copy of said Notice, indicating such in-hand service, to the Probation Department of the division that issued the probation order, together with a copy of the complaint and police report on the new delinquency or criminal

complaint or youthful offender indictment that constitutes the alleged probation violation. Nothing in this standing order shall preclude the issuance and service on theprobationer of a Notice of Probation Violation/Hearing by the Probation Department of the division that issued the probation order. If in-hand service is not possible, the notice shall be served on the probationer by first-class mail unless the court orders otherwise.

(ii) Contents of Notice. The Notice of Probation Violation/Hearing issued to and served on the probationer at the division that issued the delinquency or criminal complaint or youthful offender indictment shall set forth the criminal conduct alleged to have been committed by the probationer as indicated in the delinquency or criminal complaint or youthful offender indictment and shall order the probationer to appear at a specific date and time at the division that issued the probation order.

(iii) Scheduling of Hearing; Service by Probation Division. Upon appearance of the probationer at the division that issued the probation order in accordance with the Notice served pursuant to subsection (ii), the court shall appoint counsel, if necessary, and schedule a probation violation hearing for a date certain, said date to be no less than seven days later unless the probationer waives said seven-day period. The hearing date shall not be later than fifteen days after service of the Notice of Violation/Hearing without the probationer's consent if he or she is held pursuant to Section V of this standing order, or in any case no later than thirty days after service of the Notice of Violation/Hearing if the probationer objects, except in extraordinary circumstances. The Probation Department may revise the Notice of Probation Violation/Hearing by adding to it any additional alleged violations. Such additional allegations shall set forth the specific conditions of the probation order alleged to have been violated with a description of each such alleged violation. The Notice, with amendments, shall be served on the probationer in hand while he or she is before the court. Such service shall be recorded on the case docket. A copy of the Notice, with any amendments, shall be provided to the District Attorney. The probationer shall receive either written or actual notice of the date, time and place of the hearing.

The court, upon review of the Notice at the outset of the hearing and as a matter of its discretion, may order no further proceedings in the matter, and in such cases no hearing shall be scheduled nor further Notice served.

Commentary
Notice to District Attorney
This standing order requires that a copy of the Notice of Probation Violation and Hearing be provided to the District Attorney. The relevant law, G.L. c. 279, §3, gives the District Attorney the right to receive a copy of the notice and appear at such hearings only when the original conviction for which the probationer is on probation involves at least one felony. However, this standing order reflects the position that the District Attorney should be allowed to appear at all such hearings. It allows the District Attorney to decide which hearings to attend and provides as an alternative the submission of a written statement. This is appropriate, given the fact that some misdemeanor charges may have greater public safety implications than felony charges, e.g., assault and battery. Also, the District Attorney has certain obligations to victims of crime regarding probation violation hearings that can be met only if the District Attorney is informed of the scheduling of such hearings.

IV. Commencement of Violation proceedings: Violations other than Criminal Conduct

(a) General. This standing order prescribes the procedures to be undertaken regarding alleged violations of probation that do not involve or include criminal conduct charged in a delinquency or criminal complaint or youthful offender indictment. (b) Issuance and Service of Notice. When a probation officer of a division that has issued a probation order determines that a probationer has violated any condition of that order other than the alleged commission of a crime as charged in a delinquency or criminal complaint or youthful offender indictment, that probation officer shall decide whether to commence probation violation proceedings. Such decision shall be made in accordance with the rules and regulations of the Office of the Commissioner of Probation, provided, however, that probation violation proceedings shall be commenced (1) upon the issuance of a criminal complaint or indictment, (2) when the judge issuing the

probation order orders that such proceedings are to be commenced upon an alleged violation of one or more conditions of probation, or (3) when the commencement of such proceedings is required by statutory mandate. In any case, a judge of the division may order the commencement of violation proceedings. The Notice of Probation Violation/Hearing as provided in section (c), below, shall be served on the probationer in hand or by first-class mail, unless the court orders otherwise. Service of the Notice in hand or by first-class mail shall be recorded on the case docket. Out-ofcourt service other than by first-class mail shall require a written return of service. A copy of each Notice of Probation Violation/Hearing shall be provided to the District Attorney forthwith upon its issuance.

(c) Contents of Notice. The Notice of Probation Violation/Hearing shall set forth the conditions of the probation order that the Probation Department alleges have been violated and shall order the probationer to appear at a specific date and time.

(d) Scheduling of Hearing. Upon appearance of the probationer in accordance with the Notice required by section (c), the court shall appoint counsel, if necessary, and schedule a probation violation hearing for a date certain, said date to be no less than seven days later unless the probationer waives said seven-day notice period. The hearing date shall not be later than fifteen days after said appearance without the probationer's consent if he or she is held pursuant to Section V of this standing order, or in any case no later than thirty days after said appearance if the probationer objects, except in extraordinary circumstances.

V. Preliminary Violation Hearings

(a) Purpose. A preliminary probation violation hearing shall be conducted when theProbation Department seeks to hold a probationer in custody or to request an order of release with terms on the basis of an alleged violation of probation pending the conduct of a full probation violation hearing. The issues to be determined at a preliminary probation violation hearing are whether probable cause exists to believe that the probationer has violated a condition of the probation order, and, if so, whether the probationer should be held in custody, or whether an order of release with terms pending a final probation violation hearing is appropriate. An order of release with terms shall issue only with the consent of the probationer.

(b) Notice of Hearing. When a probationer is before the court having been arrested on a new delinquency or criminal complaint, or youthful offender indictment for a probation violation, or for any other reason, and the Probation Department seeks to hold the probationer in custody or request an order of release with terms, he or she shall be given notice of the alleged probation violation and advised that the purpose of the hearing is to determine whether there is probable cause to believe that he or she committed that violation.

(c) Conduct of Hearing. Preliminary probation violation hearings shall be conducted by a judge or, if a judge is not available, a clerk-magistrate, in a courtroom on the record. The probationer shall be entitled to counsel. After the probationer has been advised of the alleged probation violation; that a preliminary probation violation hearing will be conducted as provided in section (b), above, and counsel has been appointed, if necessary; the probationer shall be allowed a reasonable time to prepare for the hearing. At the hearing, the probation officer shall present evidence to support a finding of probable cause. The District Attorney may assist in the presentation of such evidence. The probationer shall be entitled to be heard in opposition. Testimony shall be taken under oath. The court shall admit such evidence as it deems relevant and appropriate. The proceeding shall be limited to the issue of probable cause to believe that the alleged violation of probation has occurred. If probable cause is found, a final probation violation hearing shall be scheduled, the probationer shall be served in hand a Notice of said hearing, and the court may order the probationer to be held in custody, or issue an order of release with terms with probationer's consent to such order, pending the conduct and completion of the scheduled final violation hearing. The court's decision whether to release the probationer or issue an order of release with terms pending the conduct and completion of the final probation violation hearing, notwithstanding a finding of probable cause on an alleged violation, shall include, but not necessarily be limited to:

i. the probationer's criminal or juvenile record;

ii. the nature of the offense for which the probationer is on probation;

iii. the nature of the offense or offenses with which the probationer is newly charged, if any;

iv. the nature of any other pending alleged probation violations;

v. the likelihood of probationer's appearance at the final probation violation hearing if not held in custody; and

vi. the likelihood of incarceration or commitment if a violation is found following the final probation violation hearing.

If no probable cause is found, a probation violation hearing may be scheduled and the probationer thereupon served with notice thereof, but the probationer may not be held in custody nor shall an order of release with terms be issued pending said hearing based on the alleged probation violation.

(d) Bail. Upon a finding of probable cause and an order of custody, the court shall not consider or impose any terms of release such as bail, personal recognizance or otherwise as an alternative to such custody. Notwithstanding such order of probation custody, the court shall proceed to determine the issues of bail and pretrial detention ("dangerousness") on any newly charged offense, as provided by law.

Commentary
Order of Release
This standing order provides two alternatives for judges to consider, after a finding of probable cause, regarding the probationer's custody status pending the violation of probation hearing: an order of release with terms with the probationer's consent or held in custody. Section V specifically allows for an order of release with terms to be issued by a judge with the consent of the probationer in lieu of ordering a probationer to be held in custody. The order of release with terms provides the Juvenile Court with the ability to release a juvenile, when custody may not be in the best interest of the juvenile, with imposed terms of release that strike a balance between issues of public safety and the best interests of the child. Examples of terms of release include shortening curfew and/or other restriction on the juvenile's activities. The term(s) of the order shall be limited and consistent with the purpose of providing judges with a mechanism for releasing a juvenile to attend school and to receive services available only in the community. Allowing for an order of release with terms with consent of the probationer, where appropriate, rather than holding in custody, is consistent with the Juvenile Court's mission to further the best interests of children who appear before the court by offering a course of rehabilitation rather than punishment, consistent with the provisions of G.L. c 119. See also *Jake J. v. Commonwealth*, 433 Mass. 70, 75 (2000). If a probationer released on an order of release with terms fails to comply with the order, the probationer may be subject to arrest and brought before the court for a review of custody status.

Order of Custody
Section (d) makes clear that bail and other terms of pretrial release have no application to a probationer's custody pending the conduct and completion of a final probation violation hearing. Bail and other conditions of pretrial release, including pretrial detention based on "dangerousness" under G.L. c. 276, § 58 and 58A, have no legal or conceptual relevance to custody on an alleged probation violation. They relate solely to a newly alleged crime. If the court finds probable cause for a probation violation, it may order the defendant into custody pending the final hearing on the violation. If the court does not find probable cause, the probationer cannot be held in custody on the alleged violation. Even if the probationer is held on the probation allegation, if he or she is also before the court on a new criminal charge, the court must address the terms of pretrial release. This issue is unrelated to custody on the probation charge. The prosecutor may want to be heard on the issue of bail or dangerousness because if the probation matter is promptly resolved, the defendant may be released from custody on the probation matter well before the criminal case is concluded. Conversely, the issue of probation custody should be addressed regardless of whether or not the prosecutor plans to ask for high bail or pretrial detention based on dangerousness.

VI. Conduct of Hearings

(a) In General. Probation violation hearings shall be conducted by a judge, on the record, with such flexibility and informality as the court may deem appropriate, consistent with the requirements of this standing order and applicable law. All testimony shall be taken under oath. The presentation of the case against the probationer shall be the

responsibility of the probation officer assigned by the Chief Probation Officer of the court. The probationer shall be entitled to the assistance of counsel, including the appointment of counsel for probationers determined by the court to be indigent.

(b) Requirement of Two Step Procedure. Probation violation hearings shall proceed in two distinct steps, the first to adjudicate the factual issue of whether the alleged violation or violations occurred, the second to determine the disposition of the matter, if a violation of probation is found by the court to have occurred.

(c) Adjudication of Alleged Violation. Probation violation hearings shall commence with testimony by the probation officer describing the violation or violations alleged in the Notice of Violation and Hearing, and shall proceed with a presentation of the evidence supporting said allegations. The probationer shall be permitted to present evidence relevant to the issue of the alleged violation. Each party shall be permitted to cross-examine witnesses produced by the opposing party. Hearsay evidence shall be admitted by the court in accordance with Section VII of this standing order, provided that the court shall enforce any statutory privileges unless waived and any legally required disqualifications. The probation officer shall have the burden of proving the alleged violations with or without the participation of the District Attorney as provided below. The standard of proof at such hearings shall be the civil standard of preponderance of the evidence. After the presentation of evidence, both the probation officer and the probationer shall be permitted to make a closing statement.

(d) Dispositional Decision. If the court finds that the probationer has violated one or more conditions of probation as alleged, the probation officer shall recommend to the court a disposition consistent with the dispositional options set forth in Section VIII(d), below, and may present argument and evidence in support of that recommendation. The probationer shall be permitted to present argument and evidence relevant to disposition and to propose dispositional terms.

(e) Continuances. Probation violation hearings shall be continued only by a judge and for good cause shown. The reason for any continuance shall be stated by the judge and recorded on the case docket. No continuance shall be ordered other than to a date certain and for a specific purpose, and as provided in Section VIII(a). The pendency of a delinquency, criminal or youthful offender action on a complaint or indictment which also constitutes an alleged violation of probation shall not be grounds for a continuance of the probation violation hearing unless a judge determines the interests of justice will be served by such a continuance.

(f) Participation of the District Attorney.
(i) In General. The District Attorney may participate in probation violation hearings as provided in G.L. c. 279, s. 3, and such participation shall be permitted in any such proceeding regardless of whether the delinquency or criminal or youthful offender case in which the probation order was issued involved a felony charge.

(ii) Coordination with the Probation Department. If the District Attorney intends to appear at a probation violation hearing, he or she shall confer prior to the hearing with the probation officer responsible for presenting the matter to the court, for the purpose of coordinating the District Attorney's involvement in the hearing with the planned presentation of the probation officer.

(iii) Presentation of Evidence. The District Attorney may present and examine witnesses at the hearing and may examine witnesses presented by the probation officer, and may crossexamine witnesses presented by the probationer. The probationer may cross-examine witnesses presented by the District Attorney. The District Attorney shall be responsible for the attendance of every witness he or she wishes to present, and for the summoning of such witnesses.

(iv) Finding and Disposition. After the presentation of evidence, the District Attorney may make a statement regarding the factual issue of whether one or more violations of probation has occurred.

Commentary
District Attorney Participation
Section (f) addresses participation by the District Attorney. Sections III and IV of this standing order require the court to provide a copy of every Notice of Probation Violation and Hearing to the District Attorney. Section (f) is intended to clarify the involvement of the District Attorney in those cases where he or she decides to participate, consistent with the statutory provisions of G.L. c. 279, § 3. It should be noted that as a constitutional matter, probation functions are within the judicial branch, and the office of the District Attorney is considered within the executive branch. *Commonwealth v. Tate*, 34 Mass.App.Ct. 446 (1993). Under the Massachusetts Constitution, Pt. 1 Art. 30, the branches must maintain a separation of governmental powers. That separateness does not, however, lead to the conclusion that a district attorney's office may not assist the probation service in presenting evidence in support of a position that the probation service had decided upon. Probation officers are only aided, not interfered with, when district attorneys, upon invitation, conduct examination of witnesses and present evidence. *Commonwealth v. Tate* at 448 and cases cited.
Thus the right of District Attorneys to present evidence and witnesses, and to examine and cross-examine witnesses at these proceedings would appear to be constitutionally acceptable as long as it does not fundamentally interfere with probation.

VII. Hearsay Evidence

(a) Admissibility of Hearsay Evidence. Hearsay evidence shall be admissible at probation violation hearings.

(b) Sufficiency of Evidence When Case Rests Solely on Hearsay. Where the sole evidence submitted to prove a violation of probation is hearsay, that evidence shall be sufficient only if the court finds in writing (1) that such evidence is substantially trustworthy and demonstrably reliable and (2) if the alleged violation is charged or uncharged criminal behavior, that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented.

VIII. Finding and Disposition

(a) Requirement of Finding. Upon the completion of the presentation of evidence and closing arguments on the issue of whether the probationer has violated one or more conditions of a probation order, as alleged, the court shall make a determination of that issue. The court shall decide the matter promptly and shall not continue the proceeding generally.

(b) Finding of No Violation. If the court determines that the probation officer has failed to prove by a preponderance of the evidence that the probationer committed a violation alleged in the Notice of Probation Violation and Hearing, the court shall expressly so find and said finding shall be recorded on the case docket.

(c) Finding of Violation; Written Findings of Fact. If the court determines that the probation officer has proved by a preponderance of the evidence that the probationer has violated one or more conditions of probation as alleged in the Notice of Probation Violation and Hearing, or if the probationer admits or stipulates to such violation, the court shall expressly so find, and said finding shall be recorded on the case docket. The court shall make written findings of fact to support the finding of a violation, stating the evidence relied upon.

(d) Disposition After Finding of Violation. After the court has entered a finding that a violation of probation has occurred, the court may order any of the following dispositions set forth below, as it deems appropriate. These dispositional alternatives shall be the exclusive options available to the court. In determining its disposition, the court shall give appropriate weight to the recommendation of the Probation Department and such factors as public safety; the seriousness of any offense of which the probationer was convicted or adjudicated; the nature of the probation violation; the occurrence of any previous violations and the impact on any victim of the underlying offense, as well as any mitigating factors.

(i) Continuance of Probation. The court may decline to modify or revoke probation and, instead, issue to the probationer such admonition or instruction as it may deem appropriate.

(ii) Termination. The court may order that the probation be considered completed and terminate the probation

(iii) Modification. The court may modify the conditions of probation. Such modification may include the addition of reasonable conditions and the extension of the duration of the probation order.

(iv) Revocation; Statement of Reasons. The court may order that the order of probation be revoked. If the court orders revocation, it shall state the reasons therefor in writing.

(e) Execution of Suspended Sentence or Commitment; Stay of Execution. Upon revocation of a probation order, any sentence or commitment to the Department of Youth Services that was imposed for the offense involved, the execution of which was suspended, shall be ordered executed forthwith; provided, however, that such execution may be stayed (1) pending appeal in accordance with Mass.R.Crim.P. 31, or (2) at the court's discretion, and upon the probationer's motion, to provide a brief period of time for the probationer to attend to personal matters prior to commencement of a sentence of incarceration or commitment to the Department of Youth Services. The execution of such sentence or commitment shall not be otherwise stayed.

(f) Imposition of Sentence or Commitment Where No Sentence or Commitment to the Department of Youth Services Previously Imposed. Upon revocation of probation in a case where no sentence or commitment was imposed following conviction or adjudication, the court shall impose a sentence or commitment as provided by law.

IX. Violation of Conditions of a Continuance Without a Finding

(a) Notice, Conduct of Hearing, Adjudication. The procedures set forth in this standing order regarding notice for, and the conduct and adjudication of, probation violation hearings shall also apply where the Probation Department alleges a violation of probation that was imposed together with a continuance without a finding.

(b) Disposition. The dispositional options available to the court following a determination that one or more conditions of probation imposed together with a continuance without a finding have been violated shall be as follows:

(i) Continuation of the Continuance. The court may decline to modify or revoke the probation order and instead may continue the continuance without a finding and issue to the probationer such admonition or instruction as it may deem appropriate.

(ii) Termination. The court may order that the continuance without a finding be considered completed, terminate the order of probation and enter a dismissal on the underlying criminal case.

(iii) Modification. If the violation consists of a criminal or delinquent act, or if the court determines that the violation constitutes a material change in circumstance, it may continue the continuance without a finding and modify the conditions of probation including the duration of the continuance.

(iv) Revocation. The court may revoke the order of probation and terminate the continuance without a finding, whereupon a finding of guilty, delinquency or youthful offender shall be entered.

(c) Execution of Sentence or Commitment; Stay of Execution. Upon revocation of probation, any sentence or commitment to the Department of Youth Services that was specified as a condition of the plea or admission and accepted by the court that ordered the continuance, shall be imposed and executed forthwith; provided, however, that such execution may be stayed (1) pending appeal in accordance with Mass. R. Crim. P. 31, or (2) at the court's discretion, and upon the probationer's motion, to provide a brief period of time for the probationer to attend to personal matters prior to commencement of a sentence of incarceration or commitment to the Department of Youth Services. The execution of such sentence shall not be otherwise stayed.

(d) Imposition of Sentence When No Sentence or Commitment Previously Specified. Upon revocation of a probation order where no sentence or commitment to the Department of Youth Services was specified as a condition of the plea or admission and accepted by the court that ordered the continuance, the court shall impose sentence or commitment as provided by law.

COMMONWEALTH V. DWYER: THE NEW AND IMPROVED PROTOCOL FOR INSPECTION OF THIRD-PARTY RECORDS

Margaret Fox, Esq., CPCS Criminal Defense Training Unit

On December 29, 2006, the Supreme Judicial Court announced a new protocol for the pretrial inspection of statutorily privileged records of a third party, in its decision in Commonwealth v. Dwyer, SJC-09563, 2006 Mass. LEXIS 771. This new protocol applies prospectively to all defendants tried after the issuance of the rescript, which should be January 26, 2007.

The Dwyer protocol is the culmination of years of work by defense lawyers to persuade the Court that the Bishop – Fuller protocol placed an unfair burden on the defense and increased the risk of unjust and erroneous convictions. It represents a huge win for the defense bar. Much of what the Court adopted was lifted verbatim from the CPCS amici brief which was chiefly authored by Carol Donovan. As Bill Leahy wrote in his memorandum about the case, "The decision is a huge vindication of an effort which CPCS as an agency and in particular Special Litigation Director Carol A. Donovan as a brilliant and relentless litigator have been waging for two decades. Its two key points of principle—that the constitutional right of persons charged with a particular category of crime to present their defense must not be sacrificed or subordinated to the statutory privileges afforded those who have leveled criminal accusations; and that the critical review of possibly exculpatory records must be made by counsel for the accused—have now been established by a unanimous SJC."

There are three major departures from previous practice under Bishop-Fuller: first, upon production of the records, judges may now presume that they are privileged without engaging in protracted procedural inspection – the judge is no longer required to determine that the summonsed records are, in fact, privileged; second, the initial determination of the relevance of the records produced, once the sole province of the judge under Stage Two of Bishop-Fuller, now belongs to defense counsel alone; and finally, if an adequate Rule 17/Lampron request is made to get the records produced in the first place, all the records will be made available to defense counsel. The only question will be whether they must be reviewed by defense counsel alone in the clerk's office under a protective order because they are presumptively privileged, or whether they can be copied and then reviewed elsewhere, and shared with others.

In the past, Commonwealth v. Fuller, 423 Mass. 216 (1996), required a defendant to demonstrate, sight unseen, that the records contain information which is material, exculpatory, admissible, and not available from any other source. This problematic aspect of the Bishop - Fuller protocol is ***GONE.***

The new protocol is intended to expedite trial proceedings under Mass. R. Crim. P. 17(a)(2), 378 Mass. 885 (1979), by summonsing documents before trial; the SJC repeatedly warns in this decision that the Dwyer protocol is not intended to be used as a discovery mechanism, so be careful not to use language that can be construed as a misuse of Rule 17.

THE PROCEDURE

STEP ONE: Motion and affidavit filing

The first step is for the Defendant to file a motion and affidavit requesting the judge to order third party records summonsed. To make a sufficient showing, the defendant must meet four requirements that were laid out in Commonwealth v. Lampron, 441 Mass. 265, 269-270 (2004).

First, the defendant must show that the records sought are relevant and have evidentiary value. It is not enough to make conclusory statements or suggest potential relevance. It should include specific facts and as much as possible the specific records sought. ***For a better understanding of what is not considered conclusory, look at Lampron and Commonwealth v. Bushway, 442 Mass. 1035 (2004).***

Second, the defendant must show that the records are not otherwise procurable reasonably in advance of trial by exercise of due diligence—that no other source likely exists for the desired records;

Third, there must be a showing that the defendant cannot properly prepare for trial without the production and inspection of the records, and that waiting to inspect the records on the day of trial would unreasonably delay the trial.

Finally, the request must be made in good faith and not as a "fishing expedition." Rule 17 is not meant to be used as a discovery tool; rather, this protocol is meant to alleviate unnecessary trial delays.

The Defendant must serve the motion and affidavit on the Commonwealth. ***It is the Commonwealth's responsibility to forward copies of the motion and affidavit to the record holder and where applicable to the third party subject and to give them notice of when the hearing will be held.***

STEP TWO: The Lampron Hearing

All parties who wish to be heard will be, including the defendant's lawyer, the prosecutor, the record keeper and the person who is the subject of the records. However, footnote 31 of the opinion states that the hearing should not be delayed if the Commonwealth cannot locate the record keeper or subject of the records. The record keeper and the subject do not need to assert that the records are privileged. If they are likely to be privileged, they will be presumed privileged. The judge will make oral or written findings regarding (1) whether the defendant has satisfied the four requirement of rule 17(a)(2), as explicated in Lampron and Dwyer, and outlined above, and (2) whether the records sought are presumptively privileged. ***A judge's determination that any records sought are presumptively privileged is not appealable as an interlocutory matter (i.e. no G.L. c. 211, §3 review), and carries no weight in any subsequent challenge that a record is in fact not privileged.***

STEP THREE: Summons and notice to record holder

Where the judge determines that the requirements of Rule 17(a)(2) and Lampron have been met, and:

- there has been no finding of privilege or the privilege has been waived, the records will be summonsed. The records will be available to defense counsel, as provided in Step Four.

- at least some of the records are presumptively privileged, the records shall be produced sealed and marked "PRIVILEGED."

- The SJC adverts to a third class of records which, "although not presumptively privileged, may contain information of a personal or confidential nature, such as medical or school records. See, e.g., G.L. c. 71B, §3 (special education records); G.L. c. 111, §§ 70, 70E (hospital records). The judge may, in his or her discretion, order such records produced subject to an appropriate protective order."

STEP FOUR: Inspection of the records

Nonpresumptively privileged records: Records that have not been designated presumptively privileged will be available to defense counsel to view **and copy**. The judge may allow the Commonwealth to also review and copy those records.

- ***NOTE that if defense counsel obtains copies of records not presumptively privileged by this process, the defendant may have discovery production obligations pursuant to Mass. R. Crim. P. 14, or other pretrial agreements. In addition, footnote 36 states that if the record holder and the subject of the records give their consent, the Commonwealth may also inspect and copy the records. However, in Mitchell, the SJC stated that even when defense counsel does get to look at records, the Commonwealth's right of access is within the judge's discretion and should only be allowed after "full consideration of any privileges, privacy concerns or other legitimate interests brought to the judge's attention in a timely fashion." Therefore, if defense counsel knows about or is concerned that the records might contain inculpatory information, the defendant should seek to limit the Commonwealth's access to the records by arguing that disclosure would violate the defendant's privilege against self-incrimination.***

- Presumptively Privileged Records: Records designated presumptively privileged will only be available to the defense counsel who obtained the summons. Counsel must first sign and file a protective order that mandates that counsel not copy, or share the documents or information in them with anyone, including the defendant, without prior application to and an order of the court. The form was promulgated by the SJC, and is available online at http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/index.html. ***The SJC repeatedly states that the protective order is an extremely serious document, and that violations of its terms are to be dealt with swiftly and strictly. Sanctions include referral to the Board of Bar Overseers and prosecution for criminal contempt.***

STEP FIVE: Challenge to privilege designation

Counsel may file a motion to release certain records from the terms of the protective order. The Commonwealth can review records in order to respond. If the judge determines that any record, in whole or in part, is not privileged, the records will be released from the terms of the protective order and may be inspected and copied as provided in Step Four.

STEP SIX: Disclosure of presumptively privileged records

Counsel can also file a motion to modify the protective order in order to share the documents or information gleaned from them with others, such as the defendant, an expert, or an investigator. The motion must be accompanied by an affidavit explaining with specificity why copying or disclosure is necessary, ***but neither the motion nor the affidavit may disclose the content of any presumptively privileged record***.

The motion and affidavit are provided to all the parties. Following a hearing, and an in camera inspection of the records by the judge where necessary, a judge may allow the motion only on making oral or written findings that the copying or disclosure is necessary for the defendant to prepare adequately for trial.

All copies of documents covered by a protective order must be returned to the court at the end of the case.

STEP SEVEN: Using presumptively privileged records at trial

The defendant must file a motion in limine at or before the final pretrial conference seeking to introduce presumptively privileged records at trial. The Commonwealth can review enough of the records to respond. The judge must make findings, and allow the defendant's motion if the judge finds that introduction at trial of a presumptively privileged record is necessary for the moving defendant to obtain a fair trial.

REMINDERS FROM THE COURT

ONLY THE COURT MAY SUMMONS RECORDS PRE-TRIAL: In its decision, the Court reminds lawyers that only a judge may issue a summons **prior** to trial. (A lawyer can summons records to court for the day of trial under Mass. R. Crim. P. 17(a)(1). Commonwealth v. Mitchell, 444 Mass. 786, 791 n. 12 (2005).

YOUR PLEADINGS MUST SATISFY THE RULES OF PROCEDURE: A judge may only issue a summons if the motion requesting the summons satisfies the requirements of Mass. R. Crim. P. 13(a)(2)[1] as applied to rule 17(a)(2)[2], in other words, an affidavit must accompany the motion. The Commonwealth has standing to challenge the issuance of the summons. Commonwealth v. Lam, 444 Mass. 224, 229 (2005).

EX PARTE MOTIONS ARE FOR EXCEPTIONAL CIRCUMSTANCES ONLY: A defendant may only file a motion ex parte if the defendant can show that the motion and/or the records fall into "clearly defined 'exceptional circumstances." Commonwealth v. Mitchell, supra, 444 Mass. at 793. In Mitchell, the SJC held that such exceptional circumstances arise only when, filing the motion and affidavit would (1) reveal potentially incriminating information about the defendant or (2) cause the records to be altered in some way. Id. at 793-794.

CONCLUSION

Dwyer proves that years of persistent and effective advocacy at both the trial level and appellate level can pay off.

(Footnotes)

[1]

Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached. Mass. R. Crim. P. 13(a)(2).

[2]

For Production of Documentary Evidence and of Objects. A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of Rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

SEX OFFENDER REGISTRY LAW CHANGES….YET AGAIN

Larni Levy, Esq, Director, CPCS Alternative Commitment and Registration Support Unit

The Massachusetts legislature recently passed Chapter 303 of the Acts of 2006 entitled "An Act Increasing the Statute of Limitations for Sexual Crimes Against Children." In addition to amending the statute of limitations for various offenses, the Act makes substantive changes to the Sex Offender Registration and Notification statute, G.L. c.6, §178C-Q. The following summarizes the changes which **took effect on December 20, 2006**.

I. AMENDMENTS TO SEX OFFENDER REGISTRY AND NOTIFICATION STATUTE

A. Registration for former offenders in custody (§178E(a))

- *Former offenders will now receive preliminary classifications from the board while in custody and at least 10 days before his/her earliest possible release date.*
- Agency with custody of former offender must send registration data to the board within 5 days of receiving any sex offender required to register (instead of 90 days prior to release).
- Agency transmits the following information: former offender's registration data including identifying factors, anticipated future residence, anticipated secondary addresses, offense history, treatment for mental abnormality, official version of sex offenses, mittimus, prior incarceration history, projected maximum release date, earliest possible release date.
- Agency must inform board immediately of any transfer of offenders so that the board may retain contact with the offender throughout the classification process.

B. Registration for homeless (§178F and F1/2)

- Former offenders who list a homeless shelter as residence shall verify registration every 45 days (instead of every 90 days).
- Homeless level 1 offenders, and those who do not yet have final classifications (known by the board as level 0), verify their address *by mail* to the board every 45 days. Homeless offenders who are finally classified as level 2 or 3 verify their address *in person* at the police station every 45 days.

C. Enhanced penalty for failure to register convictions (§178H)

- Lifetime community parole shall be imposed on any level 2 (moderate risk) or level 3 (high risk) offender convicted of failing to register.
- LCP begins after the person has served committed time OR after the person has been released from post-release supervision OR upon expiration of a continued without a finding OR upon discharge from the treatment center.

TRIAL TIPS:

- Because LCP is an enhanced penalty, it may not be imposed for conduct which occurred before December 20, 2006, the date this statutory amendment goes into effect. Imposition of LCP for conduct prior to December 20, 2006 would violate state and federal constitutional prohibitions against ex post facto laws. See *Commonwealth v. Talbot*, 444 Mass. 586, 597 (2005).

- The only dispositions that clearly do not require the LCP penalty are: *filed without a change of plea* or *pretrial probation*.
- It is not clear whether a disposition of *guilty filed* requires the imposition of LCP. It can be argued that the statute does not require the imposition of LCP for a G filed where it does not expressly say so. The statute mandates that LCP shall commence after release from custody, release from post-release supervision, upon expiration of continuance without a finding or upon discharge from a treatment center commitment. Although G filed is a conviction, the statute does not specify that LCP shall commence after a G filed is imposed. See *Youngworth v. Commonwealth*, 436 Mass. 608, 611 (2002); *Commonwealth v. Roucoulet*, 413 Mass. 647, 652 (1992) (rule of lenity requires that defendant be given benefit of statutory ambiguity).
- Counsel should object on the record to the imposition of LCP after a disposition of a continued without a finding (CWOF). It can be argued that the statutory language allowing for the imposition of LCP "upon expiration of a continued without a finding" is unconstitutional pursuant to *Apprendi v. New Jersey*, 530 US 466 (2000). *Apprendi* holds that the due process clause of the federal constitution requires proof beyond a reasonable doubt of the facts supporting an enhanced penalty. A CWOF is a finding of sufficient facts, not a finding of guilt beyond a reasonable doubt.
- That the defendant is a level 2 or level 3 offender must be charged in the complaint or indictment and proved beyond a reasonable doubt. *Commonwealth v. Pagan*, 445 Mass. 161 (2005). See also *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (sentencing for enhanced penalties must meet constitutional requirements).
- Presumably, this provision does not apply to juveniles since the statute refers only to persons "convicted" of failing to register.

A. <u>Criminal penalties for elderly or infirm former offenders who move to nursing homes</u> (§178K)

- It is now a criminal offense for any level 3 sex offender to "knowingly and willingly establish living conditions within, move to, or transfer to any convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded which meets the requirements of the department of public health under section 71 of chapter 111."
- Violation of this statute is punishable by not more than 30 days HOC (1st offense); not more than 2 ½ yrs HOC or 5 yrs state prison or fine (2nd offense); and not less than 5 yrs state prison (3rd and subsequent).
- Charges may not be placed on file or continued without a finding.

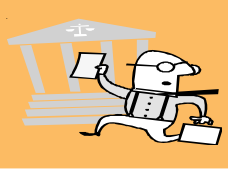
II. GPS MONITORING SYSTEM FOR ALL INDIVIDUALS PLACED ON PROBATION OR PAROLE FOR A SEX OFFENSE

- Any person on *parole* for a sex offense, sex offense involving a child or sexually violent offense, as defined in c.6, §178C, shall wear a global positioning system ("GPS") device. c. 127, §133D.
- Any person on *probation* for a sex offense, sex offense involving a child, or sexually violent offense, as defined in c.6, §178C, shall wear a GPS device. c. 265, §47.

- "Geographic exclusion zones" include, but are not limited to, areas around victim's home, job and school and other areas defined to minimize contact with children, if applicable.
- If a probationer/parolee enters an exclusion zone, the location data is transmitted to the local police and to the parole board/commissioner of probation by "telephone, electronic beeper, paging device, or other appropriate means."
- A parolee shall be taken into temporary custody. A probationer shall be arrested or summonsed with a notice of surrender.
- Probationers/parolees are required to pay the costs of this system unless the fees are waived due to an inability to pay.

NOTE:

- The statute does not require GPS monitoring for individuals who have a sex offense conviction on their records but are not on probation or parole for a sex offense.
- It can be argued that the mandatory imposition of a GPS device as a condition of probation is punative. As such, requiring a probationer, whose offense occurred before the passage of the statute, to wear a GPS device would violate the constitutional prohibition against ex post facto laws. See *The People v. Delgado*, 140 Cal.App. 1157 (4th Cir. 2006)(mandatory conditions of probation for domestic violence cases, including a mandatory probationary term, community service conditions and a fine, are punative and cannot be imposed for conduct which predates the passage of the statute).



NEW FEDERAL LAW GOVERNING SEX OFFENDER REGISTRATION AND NOTIFICATION

Carol Donovan, Esq, Director, CPCS Special Litigation Unit

In late July, 2006, new federal legislation took effect, repealing the federal Wetterling Act. The Wetterling Act governs the enactment of sex offender registration and notification laws by the states. The new law is called the Walsh Act. Sec. 129.[1]

BACKGROUND

1. The new law is complicated. It is currently referred to as "HR 4472 EAS" and can be found online at http://thomas.loc.gov. My copy contains 94 pages.

2. The purpose of the law is to "protect children" and the safety of "judges, prosecutors, law enforcement officers and their family members;" "to reduce and prevent gang violence;" and "for other [undesignated] purposes." Preamble.

3. Former sex offenders are divided into tiers I, II, and III, with tier I the least problematic category and tier III the most problematic. Sec. 111. No individual is offered an opportunity under this law to challenge the imposition of a tier designation. Tier designations are determined on the basis of conviction(s).

4. Juveniles adjudicated delinquent by reason of sex offenses are included under the provisions of the Act, if the offense is committed when the juvenile is 14 years or older and the offense is comparable to or more severe than aggravated sexual abuse (as defined federally). Sec. 111.

5. All state jurisdictions "shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this title." The U.S. Attorney General will issue guidelines and regulations to interpret the statute. Sec. 112a-b.

REGISTRATION

6. Former sex offenders must register where they reside, are employed, or where they are students (including secondary school students). Sec. 113. Registration is required before release from custody or within 3 days of receiving a non-custodial sentence. Sec. 113. Each state is required to impose a criminal penalty with a maximum term that is greater than one year for failing to comply with this requirement. Sec. 113. There is, however, no requirement that the maximum term be imposed.

7. States are required to obtain DNA samples from each former sex offender. Sec. 114.

8. Length of time for which an offender must remain registered is 15 years for tier I former offenders; 25 years for tier II former offenders; and life for tier III former offenders. Sec. 115. Reductions are possible in certain narrowly-specified circumstances. Sec. 115.

9. Renewal of registration is required once per year for tier I offenders; once every six months for tier II offenders; and once every three months for tier III offenders. Sec. 116.

METHODS OF NOTIFICATION

Internet dissemination.

10. Each state must make all registration information available for inclusion on a national Internet site. All offenders, no matter the designated tier level, are included. Exceptions are allowed only in certain narrowly-defined circumstances. Sec. 118. Any person with computer access can obtain this information through the nationally-maintained website.

(Footnotes)
[1] References are to the relevant section of the new law.

10a. Sec. 118 contains an "optional exemption" which permits exemption from disclosure on the national internet site of "any information about a tier I sex offender convicted of an offense other than a specified offense against a minor." ("Specified offenses" include any conduct "that by its nature is a sex offense against a minor.") So, in the event that Massachusetts passes a law consistent with the federal statute, Massachusetts must decide whether offenders who have not committed offenses against children can be exempted from disclosure of information through the national website.

11. Website users are informed of criminal penalties for "unlawfully injur[ing], harass[ing], or commit[ing] a crime against any former offender." Sec. 118.

12. The United States Attorney General is required to maintain a national database at the FBI, entitled National Sex Offender Registry, which includes all persons required to register under the Act in every jurisdiction. Sec. 119.

Community dissemination

13. Information must be disseminated to law enforcement agencies, social service agencies, volunteer agencies and other organizations in the community where the person lives, works and attends school. Sec. 121. This apparently includes tier I and II former offenders, as well as level III former offenders.

Development of software

14. The U.S. Attorney General and the states must develop software to enable jurisdictions to create uniform registries and Internet websites. Sec. 123.

IMPLEMENTATION

15. Each state is required to implement the Act within 3 years of its date of enactment or 1 year after creation of software. The U. S. Attorney General may authorize two one-year extensions of these dates. Sec. 124.

STATE FAILURE TO COMPLY

16. State jurisdictions are punished for failure to comply with this law by stoppage of certain federal crime-fighting funds. Sec. 125. This is the requirement that has caused all fifty states to enact some form of sex offender registration and notification under the Wetterling law.

17. **In evaluating whether a state has failed to comply with the provisions of the Act, the United States Attorney General shall consider any opinion of the state's highest court indicating that compliance would**

violate state constitutional requirements. Consultation between the U.S. Attorney General and the state's chief executive and chief legal officer are required. Sec. 125.

18. "Reasonable alternative procedures" consistent with the Act may be implemented. Sec. 125.

FEDERAL ENFORCEMENT

19. Federal law enforcement agencies are authorized to assist the states in "locating and apprehending" sex offenders who violate requirements of the Act. Sec. 142.

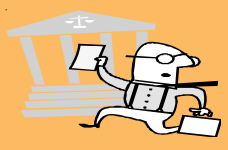
SUMMARY

This summarizes the first 30 or so pages of a 94 page document. Remaining pages deal primarily with federal crimes, federal programs and federal funding. See *inter alia* Sec. 212 regarding habeas corpus proceedings; Sec. 301 regarding civil commitment of sexually dangerous persons; and Sec. 401 regarding "failure to register a deportable offense."

In summary, **the bad news is the content of the law**, which reaches far more broadly that the previous Wetterling Act.

In summary, **the good news is that the law will not take effect for a period of years. The good news is also that when a state constitution is inconsistent with provisions of the act, the U.S. Attorney General (or his/her designee) is required to negotiate a settlement with the chief judicial and executive officers of the state.**

The good news is that states need not comply with the law for three years and the U.S. Attorney General may authorize an additional two years for compliance. Sec. 124.



IMMIGRATION NEWS AND VIEWS

Wendy S. Wayne, CPCS Immigration Law Specialist

U.S. Supreme Court holds that a state felony conviction for possession of a controlled substance, which would be prosecuted under federal law as a misdemeanor, is not a "drug trafficking" aggravated felony (reprinted from memo distributed to staff and private counsel attorneys in December 2006).

On December 5, 2006, the U.S. Supreme Court issued a decision in *Lopez v. Gonzales*, 2006 U.S. LEXIS 9442, holding that a state felony conviction for simple possession of a controlled substance does not constitute a "drug trafficking" aggravated felony. The decision clarifies an area of law that has been in conflict among the federal circuit courts for a number of years. The *Lopez* decision will have the greatest impact for noncitizens with convictions for possession of controlled substances from states that treat possession as a felony (in Massachusetts, simple possession is a misdemeanor offense). With a few exceptions discussed below, *Lopez* does not significantly change the immigration consequences of convictions on Massachusetts drug offenses, especially if subsequent immigration proceedings occur in the First Circuit.

A conviction on any controlled substance offense will cause a noncitizen to be deportable from the U.S. and inadmissible into the U.S., but a waiver or other relief may be available unless the person is in the U.S. illegally. If the controlled substance offense is considered a "drug trafficking" aggravated felony, however, no relief is available to the client. She is automatically deportable, will be held in mandatory detention until her removal from the U.S., and she will be barred from returning to the U.S. for the rest of her life. The *Lopez* decision clarifies when a state conviction on a controlled substance offense will be considered a "drug trafficking" aggravated felony.

The Immigration and Nationality Act (INA) defines aggravated felonies at 8 U.S.C. 1101(a)(43). Subsection (B) states that one type of aggravated felony is a conviction for "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." Section 924(c)(2) of Title 18 defines drug trafficking as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)…" (the definition includes reference to two additional federal statutes not at issue in the case). The federal circuit courts of appeals have been divided over whether federal law or the law of the prosecuting state should be applied when determining if an offense is a "felony" under the Controlled Substances Act (CSA).

The respondent in *Lopez* was convicted in South Dakota of helping another person to possess cocaine. The offense is equivalent to possession of cocaine and is a felony under South Dakota law. Under federal law, however, possession of cocaine (less than five grams) is a misdemeanor. The Eighth Circuit applied state law and found the respondent's offense to be a felony punishable under the CSA, therefore, a drug trafficking aggravated felony. Other circuit courts have applied the "hypothetical federal felony" test to similar situations and have found that because the offense would be prosecuted under federal law as a misdemeanor, it would not qualify as an aggravated felony under 8 U.S.C. 1101(a)(43)(B).

With a few exceptions,[1] federal law treats simple possession of controlled substances as misdemeanors and trafficking offenses as felonies (under federal law, a felony is any offense punishable by more than one year). The Supreme Court in *Lopez* held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conductpunishable as a felony under that federal law." The decision thereby adopts the hypothetical federal felony test to determine if a controlled substance offense is a drug trafficking aggravated felony.

(Footnotes)

[1] Under federal law, repeat offenders, possession of more than five grams of cocaine, and possession of flunitrazepam are felony offenses (known colloquially as the "date rape" drug, flunitrazepam is a class A controlled substance under M.G.L. 94C, §31). Federal treatment of subsequent possession of controlled substances is discussed later in this memo.

Note that *Lopez* directly addresses only the "drug trafficking" part of the definition, not "illicit trafficking." Dicta from the decision strongly suggest that any controlled substance offense involving commerce (trafficking, intent to distribute) constitutes illicit trafficking and, therefore, an aggravated felony (even if the prosecuting state treats the offense as a misdemeanor, as Massachusetts does for some controlled substances).

Pursuant to the *Lopez* decision, defense counsel should advise noncitizen clients charged with Massachusetts controlled substance offenses as follows:

- Any trafficking, distribution, or possession with intent to distribute a controlled substance is an aggravated felony, regardless of whether it is a felony or misdemeanor under Massachusetts law. [Although the Massachusetts offense of distribution of a controlled substance can include conduct that may not be covered by analogous federal law, such as transfer of a small amount of marijuana without remuneration, the First Circuit held recently in Berhe v. Gonzales, 464 F.3d 74 (2006), that possession with intent to distribute marijuana is an aggravated felony];

- A first-time Massachusetts conviction for possession of any controlled substance is not an aggravated felony, unless it is possession of flunitrazepam or possession of more than five grams of cocaine. [Note that if the record of conviction does not establish that the controlled substance is flunitrazepam (i.e., if the docket sheet only states possession of a class A substance, but does not specify the drug), or if it does not specify that the cocaine weighed more than five grams, an immigration prosecutor can not establish that it is equivalent to a federal felony and, therefore, an aggravated felony.];

- *Lopez* did not decide whether a subsequent conviction for possession of a controlled substance is an aggravated felony, but dicta from the case offer some guidance. Under federal law, a prior conviction for possession must be charged and proven for a defendant to receive an enhanced penalty for subsequent possession. Subsequent possession of a controlled substance is a federal felony. Massachusetts law contains the same notice and proof requirements under M.G.L. 94C, §34 as under federal law. The First Circuit held in Berhe v. Gonzales, 464 F.3d 74 (2006), that a second Massachusetts conviction for possession of cocaine, which was not charged as a subsequent offense, does not constitute an aggravated felony. Berhe held that if the prior conviction had been pled and proven, it would have been equivalent to the federal felony of subsequent possession and, therefore, an aggravated felony. The Lopez decision does not address this issue directly and the federal circuit courts of appeals are divided on it.

- Counsel should attempt to reduce a subsequent possession offense to straight possession. Nothing in the complaint or indictment, docket sheet, plea colloquy, admission or jury instructions should refer to a prior drug conviction. Counsel should advise a noncitizen client that whether the conviction will be considered an aggravated felony depends on the law of the federal circuit court of appeals in which the resulting immigration proceeding occurs. If it is within the jurisdiction of the First or Third Circuit, it will not be considered an aggravated felony. If it is within the jurisdiction of the Fifth or Second Circuit, it might be.

- Even if the offense is not considered a drug trafficking aggravated felony, all controlled substance offenses are deportable and inadmissible offenses (there is an exception to deportability for one conviction of possession of thirty grams or less of marijuana). If the offense is not considered an aggravated felony, however, there may be a waiver or other form of relief available, unless the defendant is in the U.S. unlawfully.

U.S. Supreme Court holds that aiding and abetting a theft constitutes a theft offense under 8 U.S.C. 1101(a)(43)(G); therefore, a sentence of one year or more on a conviction for aiding and abetting a theft is an aggravated felony.

Another category of aggravated felony under 8 U.S.C. 1101(a)(43)(G) is "a theft offense (including receipt of stolen property) . . . for which the term of imprisonment [is] at least one year." In *Gonzales v. Duenas-Alvarez*, 2007 U.S. LEXIS 1153, issued on January 17, 2007, the U.S. Supreme Court considered whether this category of aggravated felonies includes "aiding and abetting" a theft.

The respondent in the case was convicted in California of violating the following statute:

> "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense."

Cal. Veh. Code Ann. §10851(a).

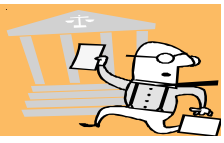
In analyzing the California statute, the Supreme Court adopted the generic definition of theft that has been broadly accepted by circuit appellate courts and by the Board of Immigration Appeals (BIA). The generic definition is "'the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.' (citation omitted)."

The Court found that every jurisdiction, state and federal, has done away with the distinction between principal actors and aiders and abettors in determining liability for a criminal offense. Aiders and abettors are now treated as principals in criminal law. S*ee, e.g.*, M.G.L. ch.274, §2. The Court held that because someone who aids and abets a theft is treated as a principal, "aiders and abettors of a generic theft must themselves fall within the scope of the term theft" in 8 U.S.C. 1101(a)(43)(G).

By including accessory before the fact in the definition of theft in *Duenas-Alvarez*, the Supreme Court has further increased the number of Massachusetts offenses that qualify as aggravated felonies. When representing noncitizen criminal defendants, counsel should consider that the following offenses may be treated as aggravated felonies as a result of *Duenas-Alvarez*:

- Accessory before the fact for any offense that would be an aggravated felony if charged under the principal statute. Some common examples are accessory before the fact to: any crimes of violence, burglary or theft offenses where the defendant is convicted and receives a sentence of one year or more; drug trafficking offenses (see discussion of these above); fraud in which the loss to the victim exceeds $10,000;

- The Court in *Duenas-Alvarez* declined to address whether "joyriding" falls within the definition of theft under §1101(a)(43)(G) because the issue was not considered by the lower court. The respondent asserted that joyriding "involves so limited a deprivation of the use of a car that it falls outside the generic 'theft' definition." It is unclear after *Duenas-Alvarez* whether use without authority under M.G.L. ch.90, §24(h)(2)(a) constitutes a theft offense. However, after *Duenas-Alvarez* and a recent BIA decision, *In re Brieva*, 23 I.&N. Dec. 766 (BIA 2005) (finding a Texas crime of unauthorized use of a motor vehicle to be a crime of violence), counsel should assume that use without authority will be treated as an aggravated felony if the client receives a sentence of one year or more.



SEX OFFENDER REGISTRY BOARD DECISIONS: THE DOE TRILOGY

Larni Levy, Esq, Director, CPCS Alternative Commitment and Registration Support Unit

On December 5, 2006, the SJC issued three decisions summarily quashing several challenges to the Sex Offender Registry Board's classification proceedings. While the decisions were overwhelmingly dismissive of petitioners' claims, there remain several important issues which should be preserved for appellate litigation as they arise in individual cases.

1) In *Doe No. 10216 v. Sex Offender Registry Board*, 447 Mass. 779 (2006), the court held that the Sex Offender Registry Board ("SORB") is not required to present expert evidence to meet its burden of proof in classification proceedings, and that the board's decision was supported by substantial evidence without this testimony. In addition, the court found that the hearing examiner is not required to consider reports by two qualified examiners who found the petitioner not sexually dangerous, since the reports were prepared in contemplation of an SDP rather than classification proceeding.

Tips for Practitioners

(a) It should still be argued that expert testimony is necessary to support the board's classification level in cases where the board's decision is NOT supported by substantial evidence absent such testimony.

(b) The court did not address the denial of plaintiff's motion for funds for an expert, although Chief Justice Marshall expressed concern at oral argument about the potential violation of plaintiff's equal protection rights. Practitioners should continue to move for funds on behalf of indigent clients on the grounds that the requested funds are "…reasonably necessary to prevent [him] from being subjected to disadvantage in preparing or presenting his case adequately, in comparison to one who could afford to pay…". G.L. c.261, §27c(1); Commonwealth v. Bolduc, 383 Mass. 744, 748 (1981); Commonwealth v. Lockley, 381 Mass. 156, 160 (1980). See also Ake v. Oklahoma, 470 U.S. 68 (1985)(violation of due process to deny indigent defendant funds for expert witness where mental health and future dangerousness were at issue). Furthermore, failure to provide funds for an expert violates plaintiff's right to a fair hearing, presentation of his defense, and to due process of law pursuant to the Sixth and Fourteenth Amendments and Article 12 of the Massachusetts Declaration of Rights and Doe v. Attorney General, 430 Mass. 155 (1999), Doe v. Sex Offender Registry Board, 428 Mass. 90 (1998), and Doe v. Attorney General, 426 Mass. 136 (1997).

2) In *Doe No. 1211 v. Sex Offender Registry Board*, 447 Mass. 750 (2006), the court held that the hearing examiner did not err in requiring plaintiff to register as a level one offender even though his conviction for indecent assault and battery on a child was over ten years old, he was successfully involved in treatment, and an expert testified that his likelihood to recidivate is "negligible." The court left open the opportunity to challenge the constitutionality of the mandatory registration requirement in G.L. c.6, 178K(2)(d) and 803 CMR 1.37A as it applies to plaintiffs who pose "no risk at all" and for whom a level one classification is unsupported by the evidence.

Tips for Practitioners

(a) It can be argued that the statute and regulations, which require registration for certain enumerated offenses, are unconstitutional as applied to a client who poses no risk of reoffense and whose level one classification is unsupported by the evidence. See G.L. c.6, 178K(2)(d) and 803 CMR 1.37A.

3) With great deference to the "expertise" of the SORB, the court held in *Doe No. 3844 v. Sex Offender Registry Board*, 447 Mass. 768 (2006) that due process does not require the board to establish an objective actuarial approach to classification decisions. The court refused to find any error in a system that classifies as a level 2 (moderate risk of reoffense) a man who received a suspended one year sentence 11 years ago for indecent assault and battery on a twenty year old woman, and has been sober for the past ten years with no new sex offenses.

Kudos to Bill Smith, Stephen Kaplan and Brandon Campbell for zealously litigating these important issues, and to Carol Donovan, Peter Onek and Carlo Obligato for their amicus support.

GPS IMPOSED ON PROBATIONERS

Beth Eisenberg, Esq., CPCS Appeals Unit
Larni Levi, Esq, Director, CPCS Alternative Commitment and Registration Support Unit

Following this article is a one-page memo (re-typed), dated Dec. 20, 2006, distributed by the Second Deputy Commissioner of Probation to all chief probation officers in all court departments detailing the Probation Department's interpretation of G.L. c. 265, s. 47 (requiring all sex offender probationers to wear a GPS device for the term of probation). See Chapter 303 of the Acts of 2006, effective December 20, 2006, http://www.mass.gov/legis/laws/seslaw06/sl060303.htm.

The Commissioner of Probation holds the logic-defying view that G.L. c. 265, s. 47 requires a GPS bracelet to be worn by individuals on probation as a condition of a CWOF or who are placed on pre-trial probation, and not solely by those individuals on probation as a result of sentencing. The memo recognizes "that courts may view this interpretation differently."

Practitioners seeking a disposition of pre-trial probation or a supervised continued without a finding for a client should object to GPS monitoring as a condition of probation. The essential argument here is that the statute effectively brands the affected probationer as a public danger; yet those who are on pre-trial probation are entitled to the presumption of innocence, and in those cases which have been continued without a finding, both the trial judge and parties apparently viewed a disposition short of conviction as consistent with the best interests of justice. Thus, the risk of an erroneous deprivation of the defendant's liberty and privacy rights outweighs the value, if any, to the government in "tracking" the movements of persons who have not been adjudicated guilty or delinquent for a sex offense.

Since the statute appears unconstitutional as written as well as applied, counsel should continue to object to the imposition of a GPS device as a condition of probation for *all* clients on probation for a sex offense, arguing that the State's exercise of regulatory authority through this statute is arbitrary, capricious, and overly broad because it bears no reasonable relation to a permissible legislative objective; that in the ambiguity of the statute's reach and intent, it is void for vagueness; that it constitutes cruel and unusual punishment; that ex post facto prohibitions are violated; and that procedural due process under the federal and state constitutions is triggered when governmental action interferes with liberty and privacy interests.

In addition, the monthly maintenance fee for the GPS bracelet is staggering: $9.45/day or $287.44/month. For unconvicted defendants, this is punitive. Counsel should ask the court to waive the GPS maintenance fee for all indigent clients.

Beth Eisenberg is spearheading the challenge to this law and gathering information about clients aggrieved by the statute. She will be circulating a memo laying out specific objections to the statute more fully. In the meantime, Beth can be reached at 617-988-8343 or beisenberg@publiccounsel.net.

SEE MEMO NEXT PAGE

FIELD SERVICES DIVISION

MEMORANDUM

TO: All Chief Probation Officers - All Court Departments

FROM: Elizabeth Tavares, Second Deputy Commissioner

DATE: December 20, 2006

RE: GPS

During the last month or so, this office has been working with legislators and their aides to amend portions of Chapter 303 of the Acts of 2006, AN ACT INCREASING THE STATUTE OF LIMITATIONS FOR SEXUAL CRIMES AGAINST CHILDREN. Although we have been somewhat successful in our discussion, we are hopeful that a change may take place sometime in January of '07. In the meantime, we must comply with the statute as written. Specifically, effective December 21, 2006, section 8 requires any person who is placed on probation [guilty and/or cont. w/o finding and/or pre-trial] for any offense listed within the definition of section 178C chapter 6 wear a GPS device for the term of probation. We recognize that courts may view this interpretation differently. Additionally, the statute requires the commissioner to set geographic exclusion zones. This requirement is delegated to the individual probation departments and imposed as a condition of probation. Such exclusion zones may include, victim's home and/or work, schools, place of employment and other such areas as deemed appropriate.

In order to comply with the letter of the law, if a probationer enters an exclusion zone, the electronic monitoring unit will notify the police department wherein the violation occurred and will notify the probation department exercising jurisdiction over the probationer. During the hours of the court, the probation officer shall bring the matter before the court and inform the court of the circumstances. The statute does not provide for discretion , therefore, the matter must go before the court for direction. The court may allow the probation to remain on probation, direct the probation officer to issue a seven day notice of surrender, the court may issue a warrant for the probationer's arrest or take whatever action the court deems appropriate. If the violation of the exclusion zone occurs after hours, the Programs Division CPO will be contacted.

The statute includes a fee to be imposed and appears to reflect the cost of installation, maintaining and operating the GPS. That fee is $9.45 per day or $287.44 per month to be collected monthly. However, the court may waive the fee if the offender establishes his inability to pay. These fees are to be collected by the probation department. We are working with the Trial Court to establish an offense code for receipt of these fees. In the meantime, please identify these fees on the ledger as GPS fee. The fees are forwarded to the general fund.

We will keep you informed of additional information

Hope you and your family have a healthy and happy holiday season.

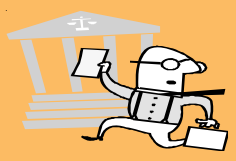
RAISING INEFFECTIVENESS ON DIRECT APPEAL: COMMONWEALTH V. ZINSER

David Nathanson, CPCS Private Appeals

In Commonwealth v. Zinser, 446 Mass. 807 (2006) the SJC held that there is no obligation to raise on direct appeal a claim of ineffective assistance that is not clearly presented by the record. There, the defendant filed a post-direct appeal claim raising ineffective assistance of trial counsel for failure to present a defense based on the defendant's mental illness. The trial court denied the motion, treating the issue as waived because it could have been raised on direct appeal. The SJC reversed because the mental health records upon which the claim was based were not part of the record on direct appeal. Therefore, the claim could not have been raised on direct appeal.

The SJC rejected the argument that the defendant had an obligation to raise all claims, including claims of ineffective assistance, on direct appeal.
The SJC held that it considers claims of ineffective assistance on direct appeal, but only in the rare circumstance where the factual basis of the claim appears indisputably on the trial record. That was not the case here.
In all other cases, the SJC expressed its strong preference that claims of ineffective assistance be raised via a motion for a new trial.

PRACTICE TIP: Some appellate counsel refuse defendants' requests that they seek authorization from CPCS to pursue a motion for a new trial based on ineffective assistance, reasoning that the motion would depend on matters outside the record and that the filing of the motion would be outside the scope of their assignment. But assigned appellate counsel should always consider whether there are meritorious grounds to litigate a new trial motion, either before or after the direct appeal. If such grounds are present, counsel should seek authorization from CPCS to file a motion for new trial.



CASE NOTES

This section of the Zealous Advocate contains a list of every Supreme Judicial Court and Appeals Court opinion concerning criminal law that was handed down in May, June, July, August, September, and October of 2006. Following each citation is a list of key words relating to all of the issues discussed in that particular opinion. These key words do not necessarily correspond precisely with the keywords listed in the opinion's headnotes. In addition, this section contains a brief discussion of the issues in these cases, but not of every opinion and not of every issue in a particular opinion. We have selected only those cases and only those issues within those cases which appear to be of some significance. Where appropriate, we have also included criticism, analysis, and/or practice tips.

Commonwealth v. Zorn, 66 Mass. App. Ct. 228 (2006): search warrant, motion to suppress, hearsay, reliability, basis of knowledge

Commonwealth v. Brown, 66 Mass. App. Ct. 237 (2006): aggravated rape, kidnapping, confinement

Commonwealth v. Clark, 446 Mass. 620 (2006): required finding of not guilty, distribution, buyer, seller, constructive possession, false name, dishonest purpose, jury instructions, jury, for cause challenge, peremptory challenge, impartial

Commonwealth v. Matis, 446 Mass. 632 (2006): crime scene, private residence, discovery, notice

Commonwealth v. Belcher, 446 Mass. 693 (2006): dissemination, purposeful, intentional, jury instructions (no write-up)

Commonwealth v. Leneski, 66 Mass. App. Ct. 291 (2006): digital, best evidence, limiting instruction, probative value, prejudice

Commonwealth v. Hudson, 446 Mass. 709 (2006): murder, second degree, ineffective assistance of counsel, impeachment, alibi, discovery, exculpatory

Commonwealth v. Lender, 66 Mass. App. Ct. 303 (2006): resisting arrest, pat frisk, probable cause, reasonable suspicion, sentencing (no write-up)

Commonwealth v. Harvey, 66 Mass. App. Ct. 297 (2006): mittimus, jail credit, consecutive

Commonwealth v. Cahill, 446 Mass. 778 (2006): accosting, annoying, offensive, disorderly, physically offensive condition

Commonwealth v. Zinser, 446 Mass. 807 (2006): direct appeal, ineffective assistance of counsel (See Article on p. 31)

Commonwealth v. Brazie, 66 Mass. App. Ct. 315 (2006): confrontation, motion to strike, jury instructions, ineffective assistance of counsel, fresh complaint

Commonwealth v. Militello, 66 Mass. App. Ct. 325 (2006): dissemination, matter harmful to minors, photograph, required finding of not guilty, First Amendment, obscenity, sexual conduct, prurient interest, open and gross lewdness, alarm, shock, furnishing alcohol, control, jury instructions, knowledge, mens rea, specific intent, voluntary intoxication

Commonwealth v. Herring, 66 Mass. App. Ct. 360 (2006): no-knock warrant, announce, purpose, chain of custody (no write-up)

Commonwealth v. Hall, 66 Mass. App. Ct. 390 (2006): credibility, prior bad act, state of mind, closing argument, sympathy

Commonwealth v. DePeiza, 66 Mass. App. Ct. 398 (2006): stop, pat frisk, search, firearm, high crime area, license

Commonwealth v. Candelario, 446 Mass. 847 (2006): murder, first degree, deliberate premeditation, extreme atrocity or cruelty, motion for new trial, ineffective assistance of counsel, criminal responsibility (no write-up)

Commonwealth v. Tanner, 66 Mass. App. Ct. 432 (2006): required finding of not guilty, distribution, circumstantial evidence, school zone, Pythagorean theorem, hearsay

Commonwealth v. Guthrie G., 66 Mass. App. Ct. 414 (2006): motion to suppress, exigent circumstances, consent, statements, interested adult, Miranda (no write-up; see "The Public Safety Exception to the Interested Adult Rule," Zealous Advocate at 9 (July 2006))

Commonwealth v. Santiago, 66 Mass. App. Ct. 515 (2006): search warrant; nexus (no write-up)

Taylor v. Commonwealth, 447 Mass. 49 (2006): murder, first degree, felony-murder, home invasion, joint venture, required finding of not guilty, double jeopardy (no write-up)

Commonwealth v. Ramos, 66 Mass. App. Ct. 548 (2006): murder, second degree, ineffective assistance of counsel, opening statement, closing argument, conscience of the community, self-defense, excessive force (no write-up)

Commonwealth v. DeOliveira, 447 Mass. 56 (2006): confrontation, testimonial, child, doctor, testimonial per se, testimonial in fact

Commonwealth v. Dasilva, 66 Mass. App. Ct. 556 (2006): reasonable suspicion, probable cause, stop, anonymous tip, informant, prior recorded testimony (no write-up)

In the Matter of a Grand Jury Subpoena, 447 Mass. 88 (2006): grand jury, spousal privilege, trial, criminal proceeding

Sliech-Brodeur v. Commonwealth, 447 Mass. 1004 (2006): moot (no write-up)

Commonwealth v. Abramms, 66 Mass. App. Ct. 576 (2006): unlawful assembly, riot, facial challenge, overbroad, vague, First Amendment

Norris v. Commonwealth, 447 Mass. 1007 (2006): interlocutory appeal (no write-up)

Ray v. Commonwealth, 447 Mass. 1008 (2006): discovery, protective order, interlocutory appeal, ineffective assistance of counsel

Commonwealth v. Draheim, 447 Mass. 113 (2006): DNA, buccal swab, probable cause, relevance, third party

Commonwealth v. Gaouette, 66 Mass. App. Ct. 633 (2006): murder, second degree, voluntary manslaughter, jury instruction, heat of passion, reasonable provocation, sudden combat, self-defense, excessive force, ineffective assistance of counsel

Commonwealth v. Clemmey, 447 Mass. 121 (2006): Wetlands Protection Act, grand jury, integrity, nondelegation doctrine (no write-up)

Commonwealth v. Gilbert, 447 Mass. 161 (2006): motion for new trial, murder, first degree, second degree, lesser-offense, jury instructions, premeditation, malice, ineluctably inferred

Commonwealth v. Frongillo (No. 1), 66 Mass. App. Ct. 677 (2006): required finding of not guilty, constructive possession, intent

Commonwealth v. Toledo, 66 Mass. App. Ct. 688 (2006): motion to suppress, interlocutory appeal, search warrant, probable cause, particularity, ambiguous

Commonwealth v. Chermomcka, 66 Mass. App. Ct. 771 (2006): required finding of not guilty, larceny, false pretenses, stealing, expert, opinion (no write-up)

Commonwealth v. Martin, 447 Mass. 274 (2006): motion to suppress, due process, identification, showup, suggestive, good reason, mug shot, required finding of not guilt, intent

Commonwealth v. Pasteur, 66 Mass. App. Ct. 812 (2006): murder, second degree, joint venture, jury instructions, malice, intent to kill, self-defense, provocation, peremptory challenge, race, expert, prior bad acts, closing argument (no write-up)

Commonwealth v. Hoyle, 67 Mass. App. Ct. 10 (2006): motion to withdraw plea, colloquy, trial de novo, waiver, jury trial

Commonwealth v. Chhim, 447 Mass. 370 (2006): murder, first degree, involuntary manslaughter, motion to reduce verdict, required finding of not guilty, joint venture, extreme atrocity or cruelty

Commonwealth v. Petersen, 67 Mass. 49 (2006): operation, required finding of not guilty, circumstantial evidence, jury instructions, element, colloquy

Commonwealth v. Tofanelli, 67 Mass. App. Ct. 61 (2006): required finding of not guilty, distribution, counterfeit substance, knowledge (no write-up)

Commonwealth v. Melo, 67 Mass. 71 (2006): ineffective assistance of counsel, license, impeachment, limiting instruction, credibility, inconsistent defenses, jury instructions

Tavares v. Commonwealth, 447 Mass. 1011 (2006): interlocutory appeal (no write-up)

Commonwealth v. Namey, 67 Mass. App. Ct. 94 (2006): receiving, possession, knowledge, joint venture, passenger

Commonwealth v. Bankert, 67 Mass. App. Ct. 118 (2006): reporting questions (no write-up)

Commonwealth v. Wallace, 67 Mass. App. Ct. 901 (2006): motion to suppress, search warrant, scope, required finding of not guilty, joint venture

Commonwealth v. Bryant, 447 Mass. 494 (2006): motion to suppress, standing, expectation of privacy, employee, computer, jury selection, mistrial

MacDougall v. Commonwealth, 447 Mass. 505 (2006): pretrial detainee, jail, correctional facility, Superior Court, transfer, interlocutory appeal

Commonwealth v. Fling, 67 Mass. App. Ct. 232 (2006): speedy trial, motion to dismiss, docket (no write-up)

Commonwealth v. Nestor N., 67 Mass. App. Ct. 225 (2006): motion to suppress, stop, reasonable suspicion, pat frisk

Commonwealth v. Christopher Piersall, 67 Mass. App. Ct. 246 (2006): access, computer, login

Milton v. Commissioner of Correction, 67 Mass. App. Ct. 253 (2006): jail credit, fairness

Commonwealth v. Drew, 67 Mass. App. Ct. 261 (2006): required finding of not guilty, intent, specific intent, maim, disfigure, mayhem, duplicative convictions

Commonwealth v. Bell, 67 Mass. App. Ct. 266 (2006): motion to dismiss, victim, impossibility, attempt, overt act

Commonwealth v. McKay, 67 Mass. App. Ct. 396 (2006): no contact, mistake, accident, jury instructions, motion to dismiss, lost evidence, best evidence, tape recordings, hearsay

Commonwealth v. Ewing, 67 Mass. App. Ct. (2006): required finding of not guilty, rape, threats, motion to suppress, DNA, expectation of privacy, cross-examination, closing argument

Marrero v. Commonwealth, 447 Mass. 1013 (2006): interlocutory appeal, motion to dismiss, speedy trial (no write-up)

Commonwealth v. Vives, 447 Mass. 537 (2006): intent, robbery, debt, burden of proof, burden of production, jury instructions, self-defense, provocation, duplicative convictions, murder, first degree

Commonwealth v. Miozza, 67 Mass. App. Ct. 567 (2006): indecent, required finding of not guilty, vague, mistrial, exculpatory, fresh complaint (no write-up)

Commonwealth v. Dagraca, 447 Mass. 546 (2006): motion to suppress, statements, Miranda, harmless error, circumstantial evidence

Commonwealth v. Bowden, 447 Mass. 593 (2006): operating under the influence, prior conviction, required finding of not guilty, identity

Commonwealth v. Maloney, 447 Mass. 577 (2006): operating under the influence, prior conviction, ex post facto, due process, confrontation, prima facie

Commonwealth v. Rodriguez, 67 Mass. App. Ct. 636 (2006): communication, electronic recording, warrantless, expectation of privacy, motion to suppress, statements, Miranda, invocation, required finding of not guilty, trafficking, general verdict

Commonwealth v. Zorn, 66 Mass. App. Ct. 228 (2006)
Reversing a suppression order in an indecent assault and battery on a child prosecution, the Appeals Court concludes that the totem pole hearsay contained in the search warrant affidavit—the alleged victim's statements to her mother relayed to both a DSS investigator and a therapist—was sufficiently reliable to establish probable cause to search the defendant's home.

Commonwealth v. Brown, 66 Mass. App. Ct. 237 (2006)
Affirming this aggravated rape conviction where a kidnapping was the aggravating factor, the Appeals Court rejects the defendant's argument that there was no evidence of confinement beyond that used to facilitate the sexual assault. The Appeals Court resolves that the defendant's acts of confinement both before and after the assault were sufficient, noting that "the offense of aggravated rape also may encompass a confinement of the victim that takes place after the rape itself, but during the same criminal episode."

Commonwealth v. Clark, 446 Mass. 620 (2006)
The SJC reverses these convictions for drug offenses and giving a false name to a police officer because the trial judge failed to seek clarification of a potential juror's ambiguous statement suggesting potential racial prejudice and denied the defendant's for cause challenge to that juror. The juror had indicated she believed African-Americans more likely to commit crimes because of their economic status, and when asked if she could be impartial, said she could but then said "it would depend on the person's circumstances."

The Court does conclude that the evidence presented at trial was sufficient to support guilty verdicts for distribution of heroin, possession with intent to distribute heroin and possession with intent to distribute cocaine. Most significantly, the SJC rejects the defendant's argument that where the police observed some transaction, the evidence was equally consistent with the defendant being the buyer not the seller, because the police observed the purported buyer pass money to the defendant. Additionally, the SJC holds that in a prosecution for providing the police a false name, the Commonwealth need not prove what the person's "true" name is, but only that the name given to the police was given "for a dishonest purpose." Such purposes include concealing one's criminal record for purposes of being charged or for purposes of bail, concealing one's identity to avoid an outstanding warrant, or creating a new identity with the intent to default and avoid prosecution. The jury is permitted to infer that that the defendant had such a dishonest purpose if the defendant had previously provided a different name to the police and does not alert the police to the fact of providing that other moniker. **The appendix includes a recommended jury instruction for prosecutions under G.L. c. 268, s. 34A.**

Commonwealth v. Matis, 446 Mass. 632 (2006)
The SJC concludes that a trial judge has authority to allow a defense motion seeking access to a crime scene in a private residence, "on the basis of a showing that the information obtainable at the scene [is] relevant to the defense, provided that the owner of the residence [is] served with notice of the motion and has] an opportunity to be heard." Specifically, the defendant's motion must meet the Lampron requirements, showing that (1) the scene is evidentiary and relevant, (2) it is not otherwise accessible prior to trial by exercise of due diligence, (3) the defendant cannot properly prepare for trial without access and denial of pretrial access may unreasonable delay the trial, and (4) the motion is made in good faith and not as a fishing expedition.

Commonwealth v. Leneski, 66 Mass. App. Ct. 291 (2006)
Concluding that the trial court judge did not err in admitting a CD showing surveillance footage of the defendant employee taking scratch tickets from the store where he worked, the Appeals Court holds that "digital images placed nad stored in a computer hard drive and transferred to a compact disc" are "not subject to the best evidence rule, as such images are not writings."

Commonwealth v. Hudson, 446 Mass. 709 (2006)
After the Appeals Court reversed this second-degree murder conviction and ordered a new trial, based on the grounds that trial counsel was ineffective for failing to impeach the prior recorded

testimony of a witness with an affidavit he signed recanting that testimony, the SJC affirmed the conviction, concluding that trial counsel's tactical decision not to use the affidavit was not manifestly unreasonable. Specifically, the SJC found that trial counsel was aware that impeachment with the affidavit would have led to rebuttal evidence indicating that the affidavit had been obtained through duress and was thus false, which could have weakened the already potent attack launched by the defense against the credibility of this particular witness.

While rejecting several other claims of ineffective assistance, the SJC did conclude that the trial attorney "fell measurably below" the standards of an ordinary fallible lawyer by failing to notify the Commonwealth, as required by Mass. R. Crim. P. 14(b)(1)(A), that the defendant's girlfriend would provide an alibi, which led the trial judge to exclude this alibi testimony. However, because of the "obvious weakness" in alibi testimony from the defendant's girlfriend which was not revealed until several years after her boyfriend "languished in state prison serving a life sentence" (following conviction at his first trial), the Court concluded the defendant did not demonstrate that he was "deprived of a substantial ground of defense."

Commonwealth v. Harvey, 66 Mass. App. Ct. 297 (2006)

The Appeals Court concludes that "[w]here a defendant is sentenced to two consecutive sentences arising from separate criminal episodes, and where he was unable to make bail on each case," he is not "entitled to be credited on both sentences with the overlapping time spent in pretrial detention." Noting that "[f]airness is the basic touchstone" for deciding issues of jail credit, the Appeals Court states that "it would be contrary here to the ultimate goal of fairness to allow the defendant to earn two days of credit for every day in jail."

Commonwealth v. Cahill, 446 Mass. 778 (2006)

Affirming this conviction for being "a person who with offensive and disorderly acts or language accosts or annoys a person of the opposite sex," G.L. c. 272, § 53 (after the Appeals Court had reversed), the SJC concludes that the defendant's "physically grabbing the victim [co-worker] from behind 'really tight,' which had sexual overtones . . ., thus invading her personal privacy at the workplace" was both "offensive" and "disorderly."

Commonwealth v. Brazie, 66 Mass. App. Ct. 778 (2006)

Concluding defense counsel was ineffective for failing to move to strike the testimony, the SJC reverses this rape conviction because the defendant's constitutional right to confrontation was violated when the jury was expressly permitted to consider testimony of a second alleged victim who could not complete her direct testimony and was never cross-examined. The defendant faced two indictments charging him with raping his two daughters. The younger daughter began her direct testimony but was unable to finish and was never cross-examined. Though a required finding motion was granted on that indictment, during deliberation on the other indictment relating to the other daughter, the jury asked if they could consider the testimony of the younger daughter, and without objection, the judge answered in the affirmative. Because of this violation of the defendant's right to confrontation, reversal was required.

Commonwealth v. Militello, 66 Mass. App. Ct. 325 (2006)

The Appeals Court reverses the defendant's convictions on four counts of disseminating matter harmful to minors, concluding that the Commonwealth did not prove sufficiently that photographs in a Playboy magazine, which were not introduced into evidence but merely described by the minor alleged victims, amounted to Matter harmful to minors." The Commonwealth failed to prove that the photographs were "obscene, because "nothing in the testimony suggests that the photographs shown to the boys depicted or described sexual conduct in any way." Nor did the Commonwealth meet the "alternate prong of the dissemination to minors definition," because the evidence did not prove beyond a reasonable doubt that the photographs either (a) "appeal[ed] solely and numbingly to the obsessively sexual (i.e. prurient) interest" of the minors or (b) "lacked serious literary, artistic, political or scientific value for minors."

The Appeals Court also reverses the defendant's convictions for open and gross lewdness, because the testimony of the minor alleged victims did not establish that their reactions to seeing the defendant

swim naked constituted a "serious negative emotional experience," but merely that they were nervous and uncomfortable with his conduct.

The Appeals Court also reverses the defendant's convictions for furnishing alcohol to minors. While the court concludes that the defendant did sufficiently "control" the campsite where the drinking occurred, the statute requires proof of a specific intent and the trial judge thus erred in refusing the defendant's requested voluntary intoxication instruction. **The Court affirms the convictions for contributing to a delinquency of a minor, however, because that statute, in contrast, does not define a specific intent crime and the defendant was therefore not entitled to an intoxication instruction on those charges.**

Commonwealth v. Hall, 66 Mass. App. Ct. 390 (2006)

Affirming this rape conviction, the Appeals Court holds that the trial judge permissibly allowed the complainant to testify that the defendant mentioned having "Day Day" Boone "take care of" a man who had been causing him trouble, in order to explain the complainant's seven year delay in reporting the assault. This prior bad act was admissible to explain the complainant's state of mind when her credibility for not reporting the alleged rape for seven years had been attacked in opening statement by the defense. **Nor did the prosecutor err in referring to the complainant's young age (seventeen at the time of the alleged rape) in closing argument, as the Appeals Court concludes these references "were made for reasons other than to evoke sympathy or emotion."**

Commonwealth v. DePeiza, 66 Mass. App. Ct. 398 (2006)

Concluding that the firearm and ammunition seized from the defendant should have been suppressed, the Appeals Court reasons that the defendant's manner of walking in a high crime area—"with an arm rigid and pressed against his right side" coupled with his nervousness when approached by police—avoiding eye contact, shifting from side to side, and shielding his right jacket pocket which appeared to contain a heavy object did not justify stopping and pat-frisking him. "An individual's manner of walking . . . is by itself too idiosyncratic to serve as the basis for a reasonable suspicion of criminal activity." Further, "it was the defendant's right to ignore the officers." Finally, the Commonwealth presented no evidence that the officers had reason to believe the defendant lacked a license to carry a gun, even if they had a basis to suspect he was carrying one, at the time they searched him. Nor was there sufficient evidence that the officers had a reasonable apprehension of danger justifying the search, particularly where they "placed themselves in . . . proximity to the defendant" based on their initial "hunch."

Comment: Most impressive in this opinion is Justice Brown's concurrence, in which he states, "After thirty years on the bench I think I have finally discerned an underlying rationale for 'stops' of persons of color . . . . It is motion." He then goes on to cite three categories of motion—running, driving, and now walking—which officers use to justify stops of minorities. He concludes, "I can only hope that these practices will not degenerate into stops based upon 'breathing while black.'"

The SJC has granted further appellate review. 447 Mass. 1105 (2006)

Commonwealth v. Tanner, 66 Mass. App. Ct. 432 (2006)

The Appeals Court first finds that the evidence that the defendant distributed cocaine and did so within a school zone was legally sufficient, though "by no means overwhelming." The evidence was that the defendant met briefly with the purported buyer in a high crime area, they stood close to each other "in a manner consistent with displaying small items" during which time the defendant "kept a careful lookout," the defendant was then seen moments later "surreptitiously counting money," and the purported buyer was then seen purchasing cocaine from someone else, and in possession of additional cocaine. Moreover, a detective's testimony that he utilized two measurements and the Pythagorean theorem to determine the point of sale to be 902 feet from school property was sufficient, even though there was no evidence that the two legs measured "were straight or that their intersection formed an exact ninety degree angle."

Nonetheless, the court reverses the conviction because the trial judge impermissibly allowed a police officer to testify that he asked the purported buyer where he got the drugs and, after hearing the response, went directly to the defendant and

arrested him. This testimony was "the functional equivalent of telling the jury that [the purported buyer] had identified the defendant as the man who had sold him cocaine," inadmissibly hearsay whose prejudicial impact was severe, as it "ran to the principal question before the jury and filled a key gap in the Commonwealth's proof."

Commonwealth v. DeOliveira, 447 Mass. 56 (2006)
The SJC holds that a seven year old's statement regarding sexual abuse made to a doctor during a medical examination, which was prompted by a report to the police, is not "testimonial" and thus falls outside the protections of the Sixth Amendment right to confrontation. The Court applies the test it articulated in Gonsalves, first concluding that the statement—that someone had put his penis "here, here, and here" while pointing to her mouth, vagina, and rectum—was not testimonial "per se" as it was not made in response to police interrogation. Though the police were present at the hospital, "nothing in the record would support a determination that the doctor acted as an agent of law enforcement." The Court then resolves that the statement was not "testimonial in fact," as "a reasonable person in [the complainant's] position, and armed with her knowledge, could not have anticipated that her statmetns might be used in a prosecution against the defendant." The Court does reject a categorical determination that statements made by children of a young age can never be deemed testimonial per se. While the Court acknowledges that such children likely never anticipate that statements they make might later be used for criminal prosecution purposes, the Court is "hestitant to believe that the Supreme Court would indorse a rule of such encompassing latittute, given Crawford's repeated admonitions reminding us of the importance of honoring the right to cross-examination." Nonetheless, the Court does say, in footnote 11, that it's "reasonable person standard takes into account all of the facts in a given situation" including "a particular declarant's lack of knowledge or sophistication that is attributable to age."

In the Matter of a Grand Jury Subpoena, 447 Mass. 88 (2006)
The SJC holds that the spousal privilege established in G.L. c. 233, § 20, Second, does not apply to a witness summonsed to testify before a grand jury. Interpreting the statutory language—"neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other"—the Court concludes that the language "other criminal proceeding" is modified by the preceding language ("in the trial of") and the subsequent language ("against the other"). Thus, the Court reasons that one spouse may assert this statutory privilege at a trial in which the other spouse is the criminal defendant, but that the words "other criminal proceeding" cannot encompass a grand jury hearing. The Court notes that when the statute was enacted, criminal proceedings could be initiated by way of "information," as well as indictment or complaint, and therefore, this interpretation does not render the language "other criminal proceeding" superfluous.

Comment: The Court explicitly refuses to answer the question of whether the privilege could be invoked at other pretrial proceedings, such as hearings on motions to suppress or dangerousness hearings. Interestingly, while the rationale of the decision seems to suggest that the privilege would not apply at these hearings, the Commonwealth argued in this case that the privilege could in fact extend to such proceedings.

Commonwealth v. Abramms, 66 Mass. App. Ct. 576 (2006)
The Appeals Court rejects the defendant's facial constitutional challenges based on overbreadth and vagueness to the statute criminalizing the failure to obey the order of a police officer to disperse from an "unlawful assembly." Specifically, the Appeals Court notes that it has an obligation to impose a constitutional construction on a statute which is challenged on its face, and it does so here by holding the following: "the term 'unlawful assembly' should be defined, for the purposes of G.L. c. 265, § 2, as any gathering otherwise meeting the requirements of that provision, the members of which have formed a common intent to 'engage in a common cause . . . to be accomplished with violence and in a tumultuous manner' or 'through force and violence' that is, where there is an 'imminent danger . . . [of] violence.' Thus, an 'essential element' of . . . 'unlawful assembly' is 'the intent to commit an act of violence.'" Because the transcript was not made a part of the record on appeal and the defendant did not raise an as-applied challenge or sufficiency of the evidence claim, the Court does not decide whether the evidence presented met that particular definition.

Ray v. Commonwealth, 447 Mass. 1008 (2006)
The SJC refuses to address the merits of the defendant's appeal pursuant to G.L. c. 211, § 3, in which the defendant challenges a protective order precluding defense counsel from disclosing to the defendant names or addresses of civilian witnesses identified in discovery materials. The SJC states, "We are not persuaded at this preliminary juncture that preventing counsel from sharing the identities of the witnesses with the defendant places this case in the category of those where even competent counsel cannot render constitutionally effective assistance, and thus ineffectiveness is presumed. . . . Ray's counsel can comply with the protective order without Ray's incurring irreparable harm; Ray can, in the event he is convicted, challenge the propriety of the protective order on appeal."

Commonwealth v. Draheim, 447 Mass. 113 (2006)
The defendant faces indictments charging that she raped two teenaged boys. The Commonwealth moved to compel the defendant, two children whom she birthed and alleged to be the product of the rapes, and the complainants to submit to buccal swabs in order to perform DNA testing on their saliva. A superior court judge denied the motions, solely based on concerns for the first-born of the two children and the defendant's former husband, who is listed as that child's biological father and presently has sole legal and physical custody of that child.

Regarding the defendant, the SJC held that the Commonwealth had met its burden, via the indictment, of establishing probable cause to believe she had committed the crimes but remanded for a further hearing to enable the motion judge to make findings as to whether the biological sample sought "will probably provide evidence relevant to the question of the defendant's guilt."

Regarding the complainants and the two children born to the defendant, the SJC faced a novel issue: "whether or in what circumstances the Commonwealth can obtain a sample of physical evidence from the body of a third party." The SJC holds that the Commonwealth can accomplish this if it can demonstrate "probable cause to believe a crime was committed," which it satisfied by way of the indictments, "and that the sample will probably provide evidence relevant to the question of the defendant's guilt." "Additional factors concerning the seriousness of the crime, the importance of the evidence, and the unavailability of less intrusive means of obtaining it are germane." Further, the third party "must be given notice and an opportunity to be heard at an adversary hearing," and in this case, the SJC suggested the appointment of guardian ad litems for the children. Finally, the Court stated that "[r]esolution of the motions does not hinge on, nor should it be influenced by, the extraneous considerations relied on by the judge below."

Commonwealth v. Gaouette, 66 Mass. App. Ct. 33 (2006)
The Appeals Court holds that a defendant "who shows up at a predetermined location for the specific purpose of fighting, and arms himself with a gun for the occasion, is [not] entitled to a [voluntary manslaughter based on] provocation or sudden combat instruction when that fight escalates into even more violence and he uses the gun to shoot and kill his victim."

Commonwealth v. Gilbert, 447 Mass. 161 (2006)
The SJC concludes that a trial court judge, entertaining a Rule 30(b) motion for a new trial following a first degree murder conviction, had the authority instead to enter a finding of guilt on the lesser offense of second degree murder, pursuant to Rule 25 (b)(2). Both the Commonwealth and the defendant agreed that the trial judge had given flawed jury instructions on premeditation and malice. The defendant, however, argued that the motion judge was thus required to order a new trial and lacked authority to reduce the verdict to murder in the second degree; alternatively, the defendant asserted that even if the judge had such authority, the presence of malice could not be so "ineluctably inferred" that a finding of guilt on second degree murder was appropriate. The SJC disagreed, first noting that Rules 30 and 25 "overlap in significant respects," that this particular motion could have been filed under either or both rules, and that "the defendant's selection of one particular remedial vehicle . . . does not permit him to dictate the relief that is appropriate and just." The SJC further found that the motion judge appropriately considered the harm to the Commonwealth—an inability to prosecute after many

years—which would result from granting a new trial. Finally, the SJC concluded that, viewing the evidence in a light most favorable to the defendant and recognizing that the jury's verdict constitutes a finding that the defendant did inflict the fatal injury, third prong "malice sufficient to support murder in the second degree[] can be ineluctably inferred from the evidence."

Commonwealth v. Frongillo (No. 1), 66 Mass. App. Ct. 677 (2006)

Reversing convictions for unlawful possession of two firearms and ammunition, the Appeals Court concludes the defendant's required finding motion should have been granted because the evidence presented at trial was insufficient to establish constructive possession—specifically, the defendant's intent to exercise dominion and control—over the items found in closets in an apartment. Though the jury could reasonably infer that the defendant either lived in or spent a great deal of time in the apartment, which was rented to his girlfriend and from which her husband had moved out, and thus an inference that the defendant knew about and had the ability to exercise dominion and control over the guns and ammunition, the presence of unidentified men's clothing in the closets and the defendant's involvement in a shooting unrelated to these firearms was insufficient to prove the intent element.

Commonwealth v. Toledo, 66 Mass. App. Ct. 688 (2006)

Affirming the denial of a motion to suppress (on an interlocutory appeal by the defendants), the Appeals Court concludes that although the address to be searched was ambiguous in the search warrant, the executing officer's personal familiarity with the target location made up for the ambiguity. The search warrant application and the warrant itself both listed the address to be searched as 80 West Newton Street, apartment #11310, while the application and affidavit in support repeatedly describe the address as 80 West Dedham street, #1310. The Commonwealth failed to establish an evidentiary record of how or why this discrepancy occurred. Nonetheless, because the affiant's investigation, as detailed in the affidavit, made clear that he determined the target address to be 80 West Dedham Street, and the affiant was part of the search team, the Appeals Court concluded there was "no reasonable possibility, much less probability, that . . . any premises other than 80 West Dedham Street" would be searched, "the one address for which [the affiant] was aware probable cause to search had been established."

Commonwealth v. Martin, 447 Mass. 274 (2006)

The complainant, while walking near the beach, was grabbed from behind and briefly physically assaulted, before a bystander arrived, causing the assailant to flee into a bog area. The complainant described her assailant to the police and was then shown a number of mugshots, including the defendant's, without identifying anyone. Over the next four days, the police drove her around, stopping possible suspects and asking her if any were the attacker. For some of these, the police took photographs which they then showed to the complainant. On the fifth day, her father saw the defendant, whom he thought might be the assailant, and called the police, who then detained the defendant while they brought the complainant to view him. This was the first instance in which her father was present for such a show-up and the complainant acknowledged that she believed her father had alerted the police to this suspect. When she asked the police to bring the defendant closer, she identified him as the attacker, stating that she recognized a particular mark on his forehead, a mark which she had never previously mentioned. The police then photographed the defendant, placed that photo in an array, and showed the array to the complainant, who again identified him. Years later at trial, she identified him in the courtroom as her attacker.

Affirming convictions for assault to rape, assault to kidnap, and assault and battery, after the Appeals Court had reversed these convictions, the SJC concludes that the police had "good reason" for the show-up identification procedure conducted five days after the assault and thus the procedure was not shown to be unnecessarily suggestive. The SJC rejects the defendant's argument that the police could have utilized less-suggestive alternatives, stating, "The question is whether the police acted permissibly. The answer is not governed by the availability of another approach." The Court goes on to state that the police had insufficient evidence to compel the defendant to participate in a line-up or subject himself to photographing, and there was no evidence presented to show that he would have agreed to such procedures (though the dissent aptly points out that there was no

such evidence because the police never asked the defendant if he would agree to do so). Because the police had previously asked the complainant to view individuals in show-up type procedures, the SJC characterizes the show-up at issue (despite the fact that it was inherently different from the previous viewings) as "one in a continuum of events" which was "the equivalent of a continuous nonsuggestive lineup." Finally, the Court relies on the motion judge's finding, based on both the complainant's conduct at the scene of the show-up and her demeanor on the witness stand, that the father's presence did not create a suggestive situation.

The SJC explicitly states that it is following the "good reason" to justify a show-up test, articulated in Commonwealth v. Austin, 421 Mass. 357 (1995), but rejects the position that the show-up procedure be shown to be "necessary." "The question is whether the procedure used was permissible, not whether an alternative would have been better."

Comment and Practice Tip: As forcefully stated in the dissent, this opinion "erodes the test [the SJC] insisted on in Johnson [Commonwealth v. Johnson, 420 Mass. 458 (1995)], suffers from the defects [the Court] pointed out in rejecting the Brathwaite decision, and risks similar results." Among the many good points made in Justice Cordy's dissent, he takes issue with the majority's argument that the show-up was justified because of the lack of evidence permitting the police to take the defendant to the police station for a line-up or photographing. "Such a rule would lead to an odd result: the less evidence there is to suspect a person of a crime, the greater the ability of the police to subject that person to an inherently suggestive identification procedure, which we have acknowledged often leads to misidentification." Further, the dissent notes that the majority's reliance on the motion judge's having credited the complainant's credibility amounts to an apparent return to the Brathwaite reliability test which the SJC had rejected in Johnson. "[T]he proper question for the court is whether there was good reason to use an inherently suggestive procedure in the circumstances, not whether the witness was reliable or credible in making her identification." **The silver lining to this aspect of the majority's decision, however, is that defense counsel who seek to call the identification witness(es) at a motion to suppress hearing now have an argument that these witnesses' entire testimony about the incident and the identification procedure is relevant, given that the complainant's reliability now seems to be a factor again.**

Commonwealth v. Hoyle, 67 Mass. App. Ct. 10 (2006)
After a motion judge allowed the defendant to withdraw a guilty plea he tendered in 1984 in the "first tier" in District Court, the Appeals Court reverses that order, following case law that established that prior to the Commonwealth v. Mele, 20 Mass. App. Ct. 958 decision in 1985, no colloquy was required in the first tier, as the remedy for "any perceived unfairness in this procedure [was] to appeal to the jury of six session and obtain a new trial."

Nor did the defendant meet his burden of establishing that he had never executed a written jury trial waiver. Because the defendant waited fifteen years to file his motion to withdraw the plea, the court records regarding a written waiver no longer existed, "the presumption of regularity" applied, and the defendant did not adduce any evidence to overcome that presumption.

Commonwealth v. Chhim, 447 Mass. 370 (2006)
The defendant was convicted of first degree murder, based on a theory that he was a joint venturer with the principal who committed first degree murder via extreme atrocity or cruelty. The trial judge, though denying the defendant's motion for a required finding of not guilty, nonetheless allowed his motion under Rule 25(b)(2) and reduced the verdict to involuntary manslaughter as "more consonant with justice." **The SJC concludes that there was sufficient evidence presented from which the jury could have found the defendant guilty, as a joint venturer, of first degree murder under a theory of extreme atrocity or cruelty, and that the trial judge acted within his discretion to reduce the verdict to involuntary manslaughter.** The facts were, in short, the following: The defendant teamed up with the principal and another individual to beat the victim outside the victim's car. At some point, the defendant got into the victim's car, at which point the victim, leaning into the car, and the defendant continued to hit one another. The principal was pulled away from the car and continued to be beaten by the principal and the third individual, and at some point

during this beating, the principal stabbed the victim a total of eleven times, including the fatal wound to the chest. The defendant drove away from the scene in the victim's car, according to one witness before the beating concluded and according to others, after it was over.

On the required finding question, the SJC finds that the principal's act of beating and then stabbing the victim eleven times constitutes first degree murder by extreme atrocity or cruelty. Further, the SJC concludes the defendant bore joint venture liability, because he was present for and participated in the beating and remained in a position to assist the other attackers, and he possessed the requisite mental state—participating in "a vicious beating of one man by several assailants creates an inference of an intent to do grievous bodily harm or, at the least, to do an act which would create a plain and strong likelihood of death."

Over a three justice dissent, the majority concludes that the trial judge acted within his discretion in reducing the verdict, agreeing that "the defendant's role was a much more 'passive participation' than that of most other defendants convicted of murder in the first degree on a theory of extreme atrocity or cruelty."

Commonwealth v. Petersen, 67 Mass. 49 (2006)
Affirming the defendant's conviction for operating under the influence, the Appeals Court concludes there was sufficient circumstantial evidence of operation to satisfy that element of the offense. Specifically, the evidence was (1) the car's engine was still warm when police arrived, (2) the car was registered to the defendant, he lived in the neighborhood, and appeared at the accident scene shortly after police, stating he came to pick up his car, (3) the defendant had the keys to the car on him, (4) the defendant appeared intoxicated, confirmed he'd been drinking, and a consumed alcohol bottles were in the car, (5) the defendant agreed to and complied with field sobriety tests, (6) there was no evidence indicating any one else was the drive, (7) and his statement to police contradicted the testimony of an eyewitness.

The Appeals Court does reverse the conviction for minor in possession of alcohol, as the judge utterly failed to instruct the jurors on this offense, a particular problem given that the alleged possession was constructive.

Commonwealth v. Melo, 67 Mass. 71 (2006)
The Appeals Court rejects the defendant's contention that his trial counsel, because he was not licensed to practice in Massachusetts nor specially admitted for this case, should be deemed "per se" ineffective. Because trial counsel was "an attorney of apparently established training and competence" licensed in Rhode Island, the Appeals Court concludes this situation "falls well within the category of cases not requiring automatic vacating of the conviction." **Nor does the Court find that trial counsel was in fact ineffective.**

Commonwealth v. Namey, 67 Mass. 94 (2006)
The Appeals Court concludes that the Commonwealth adduced sufficient evidence to prove that the defendant knew that the motor vehicle he was riding in as a passenger was stolen, that he had dominion and control over that vehicle, and that he had knowledge of the burglarious instruments within that vehicle. Noting that the defendant's presence as a passenger is insufficient alone to prove these elements, additional evidence here was the following: "(1) the car's ignition had been 'popped,' leaving a hole in the dashboard; (2) the door lock on the front passenger side where the defendant sat was 'either out or damaged'; (3) visibly located in the back seat of the car were two disguises, a dent puller, and other tolls, including screwdrivers and pliers; (4) in the front seat of the car was a map of the local area. Additionally, there were hypodermic needles found near the defendant's feet and also in the car's trunk, "demonstrating some degree of access to and control over the car by the passenger," as well as "an abundance of consciousness of guilt evidence," namely, the defendant's flight from the police. "It was not a leap of conjecture to conclude on the basis of all of these factors that the driver and passenger of the stolen motor vehicle were in league together, staking out the area in preparation for committing another crime . . . ."

Commonwealth v. Wallace, 67 Mass. App. Ct. 901 (2006)
Concluding that the motion judge properly found that the attic containing a large stash of cocaine was "functionally part of the second-floor apartment" for which the police had a search warrant, the Appeals Court resolves that the search of the attic did not exceed the warrant's scope. The search warrant authorized a search of "the entire second floor,"

and given the building's layout, "neither the public nor other tenants [had] access to the rear hallway and landing area, only the second-floor occupants had control over that area and, consequently, to the padlocked attic space itself."

Commonwealth v. Bryant, 447 Mass. 494 (2006)
Affirming convictions for conspiracy to commit larceny of insurance companies, the SJC concludes that the defendant, a lawyer at a firm from which computer files were seized and analyzed and ultimately used as evidence, lacked standing to challenge the seizure. "As an employee of the law firm, he had no reasonable expectation of privacy in the law firm's premises or the files seized" which were " freely accessible to others in the law firm, including the owners and secretaries." The Court thus declines to address the merits of the defendant's claim—that the analysis of these files took more than seven days in violation of c. 276 s. 3A.

MacDougall v. Commonwealth, 447 Mass. 505 (2006)
The SJC concludes that under c. 276, s. 52A, a pretrial detainee previously incarcerated in a state correctional institution may be transferred from a county jail to a state correctional facility while awaiting trial, without the approval of a Superior Court judge. The Court also denies the defendant relief for his claims that his incarceration violates state and federal constitutional standards for a pretrial detainee, reasoning that a civil action rather than a motion in conjunction with the defendant's criminal matter is the appropriate avenue for such relief.

Commonwealth v. Nestor N., 67 Mass. App. Ct. 225 (2006)
The Appeals Court first concludes that an officer's "initial actions—driving the [unmarked police] van around the block so as to encounter the youths face-to-face after they had walked away from the van, exiting the van, approaching the group, identifying himself as a police officer, and saying 'hang on a second . . . can I talk to you?'—did not constitute a stop" under either the federal or state constitutions.

While a "stop of the defendant did occur under art. 14 when [the officer] grabbed the defendant's hands as the defendant reached toward, and perhaps into his waistband," the Appeals Court held that this stop was premised on a reasonable suspicion that the defendant was "armed and potentially dangerous." "The defendant's limping gait in this case, with his right hand clenching something on his right hip and holding his right elbow close to his waist, while not alone sufficient to create a reasonable basis for the officer's concern, was followed by the defendant's stepping back and reaching towards his waist, a gesture that in the circumstances would have justified a reasonable officer's belief that the defendant was about to pull out a weapon. That the officer was outnumbered and the encounter occurred in a high crime area, late at night, added to the totality of the circumstances to provide a reasonable basis for [the officer] to conclude that the defendant was potentially armed and dangerous, justifying the stop and search."

Commonwealth v. Piersall, 67 Mass. App. Ct. 246 (2006)
Agreeing with both parties that "each unauthorized 'login' to a computer system constitutes a separate offense" of unauthorized access to a computer system under c. 266, s. 120F and "that the number of documents accessed upon any given 'login is not relevant in determining the number of convictions," the Appeals Court concludes that the evidence adduced at trial was only sufficient to support a conviction on one count of this offense, not the fifteen convictions the jury reached. The Court rejects the Commonwealth's argument that thirteen different dates printed on the corners of e-mails, which the defendant illegally accessed and printed, supported thirteen convictions. "At trial the corner dates were never mentioned by the prosecutor, the defendant, the judge, or by any of the witnesses." Further, there was no testimony, "expert or otherwise," as to the import of the corner dates, and "each corner date may not reflect a separate 'login' to the victim's e-mail." Finally, "the jury were never instructed as to how to determine the number of violations."

Milton v. Commissioner of Correction, 67 Mass. App. Ct. 253 (2006)
The defendant served a one year house of corrections sentence, actually serving 218 days, from which he was released on June 21, 1988, on a case out of Middlesex County (Middlesex I). On June 22, 1988, he was arraigned on another Middlesex case (Middlesex II), pleading guilty to those charges and receiving a 4 ½ to 10

year Cedar Junction sentence on August 15, 1988. On April 12, 1990, while serving the Middlesex II sentence, the defendant committed further crimes (the Norfolk case), for which he received concurrent 8 to 10 year sentences, from and after the Middlesex II sentence, on December 5, 1990. On October 10, 1994, he completed the Middlesex II sentence, but then on July 6, 2000, the Middlesex II conviction was vacated, he was granted a new trial on that charges, and the indictment was later dismissed. On November 22, 2002, the defendant's motion to withdraw his guilty plea on the Middlesex I case was allowed and those charges were then nol prosed.

The issue in this appeal was how much of the time the defendant served on the two Middlesex cases, where those convictions were vacated and the charges dismissed or nol prosed, should be credited to the sentence the defendant received on the Norfolk crimes committed while serving the Middlesex II sentence. Recognizing the potentially competing principles that (1) a prisoner should not be left having served dead time and (2) prisoners should not be permitted to "bank time" "to grant [them] license to commit future criminal acts with immunity," the Court concludes the defendant was properly denied credit for time served on the Middlesex I case, as he had completed that sentence before committing the Norfolk crime, but "general principles of fairness" dictate that he should have received credit for all the time served on the Middlesex II case.

The Court affirms the decision denying the defendant statutory good time on the Norfolk sentence on the ground that c. 127, s. 129(9) precluded good time for offenses committed "during a term of imprisonment," even though the sentence the defendant was serving at the time of the offenses was later vacated.

Commonwealth v. Drew, 67 Mass. App. Ct. 261 (2006)
The Appeals Court concludes that evidence the defendant beat the victim unconscious with a baseball bat, continued beating him with the bat as the victim's head moved closer and closer to a space heater, and left him unconscious with his face against the heater being burned by it, was sufficient to prove a specific intent to maim or disfigure. "In circumstances involving a victim who was already completely disabled, it could be inferred that the blows were administered simply for the purpose of inflicting serious injury." "Even if the defendant had entered the cabin unaware that a space heater was present . . . , there was sufficient time for him to grasp the role it might play in his plan to punish the victim."

While the Appeals Court holds that the assault and battery by means of a dangerous weapon (baseball bat) was not duplicative of the mayhem conviction, as "there was a break between the initial assault and battery . . . and the later attack involving the space heater," the assault and battery by means of a dangerous weapon (space heater) was duplicative of the mayhem conviction.

Commonwealth v. Bell, 67 Mass. App. Ct. 266 (2006)
Answering reported questions after a Superior Court judge denied a motion to dismiss, the Appeals Court holds that an individual can "commit the crimes of attempted rape of a child and solicitation of sexual conduct for a fee [even] when there is no actual intended victim, because unbeknownst to the perpetrator, he is negotiation with an undercover police officer to arrange for sexual intercourse with a child." The Court reasons that the inability of the defendant actually to commit the charged crimes is a result of faculty impossibility, not legal impossibility, which is no defense to a crime. "The defendant's actions would have resulted in the successful completion of the crime, but for factual circumstances not known to him. That the child did not exist does not diminish the evidence, as alleged, that he attempted to victimize a child he believed existed."

The Appeals Court also concludes that the evidence presented to the grand jury was sufficient to establish probable cause that the defendant committed an overt act and thus "attempted" to commit rape of child, as that evidence demonstrated "both a detailed plan and an agreement to commit the rape" and "[a]ll that was left to do was to drive to a nearby location and get the child."

Commonwealth v. McKay, 67 Mass. App. Ct. 396 (2006)
Reversing the defendant's conviction for violating a no contact order, the Appeals Court concludes the

defendant was entitled to an instruction that he should be found not guilty if his phone call to his former fiancée, the alleged victim, was made accidentally. The defendant testified that while he was in his car, having just picked up his belongings from the alleged victim's home, he intended to call a friend whose speed dial entry in his cell phone contact list was just above that of the alleged victim. The message the defendant left on the alleged victim's answering machine was not preserved, and there was conflicting testimony—from the defendant and a police officer who listened to the message—about the content of the message. Although the defendant did argue that the phone call was accidental, "without instruction on the point the jury were not informed that mistake or accident would absolve the defendant of criminal liability for the call he indisputably made to his former fiancée.

Commonwealth v. Ewing, 67 Mass. App. Ct. 531 (2006)

The Appeals Court reverses the defendant's rape conviction because the prosecutor improperly cross-examined the defendant—eliciting from the defendant (1) that he had reviewed the discovery prior to trial, thus inviting an inference that he tailored his testimony to that discovery, and (2) that he never went to the police to tell the story he told on the witness stand—and improperly argued that second of these two points. "[I]t is error for a prosecutor to invite the jury to draw the inference that he defendant had used his access to the Commonwealth's evidence before trial to conform his testimony falsely to fit the evidence against him." Further it was error for the prosecutor to "urg[e] the jury to discredit the defendant's testimony because he did not seek out the police prior to trial to report his exculpatory version of the incident." "[T]he imperimissible questions and comments went directly to the heart of the defendant's defense" and "the error was compounded by the failure of the judge to cure the error in his instructions" by "never inform[ing] the jury explicitly that closing arguments of counsel are not evidence."

Comment: The SJC has taken further appellate review of this case. 447 Mass. 1113

Commonwealth v. Vives, 447 Mass. 537 (2006)

The SJC holds that a defendant's honest and reasonable belief that he is collecting a debt constitutes an affirmative defense to the intent element of armed robbery. Thus, assuming the defendant meets his burden of production, i.e., "if any view of the evidence would support a factual finding that the defendant was acting as creditor to the victim's debtor," the Commonwealth must then disprove this defense beyond a reasonable doubt, and one way of doing so would be to show that the "subject debt is the result of an illegal transaction." The Court affirms the defendant's first degree murder conviction, premised on a felony-murder theory, rejecting that defendant's argument that the jury instructions relieved the Commonwealth of this burden of proof, as the judge informed the jury that the intent element must be proven beyond a reasonable doubt and that the defendant would lack such intent if he had the honest and reasonable belief he was collecting a debt.

Commonwealth v. Dagraca, 447 Mass. 546 (2006)

The SJC reverses this trafficking conviction because the defendant's inculpatory statements should have been suppressed, as the Miranda warnings given failed to inform the defendant that any statement he made could be used against him, and the admission of these statements was not harmless beyond a reasonable doubt. All of the drugs were located in a house which was in the midst of renovations. A police officer testified that the defendant stated (after the incomplete Miranda warning) he did live in the house though someone else owned it; in contrast, the defendant, his girlfriend, and the home owner testified that the defendant was planning on moving in when the renovations were complete, had visited the home to deliver some belongings, but was still staying with his girlfriend. "The defendant's statements . . . were of particular importance to the Commonwealth's case – and were especially damaging to the defendant's case – because they ewre the only direct evidence in an otherwise purely circumstantial case that the defendant lived in the house. . . . By introducing the defendant's improperly procured admissions twice during trial and then highlighting them in closing argument, the prosecutor unmistakably relied on them in a significant way."

Commonwealth v. Bowden, 447 Mass. 593 (2006)
Affirming the defendant's conviction for OUI fourth offense, the SJC rejects the defendant's argument that prior to the enactment of Melanie's law, the Commonwealth was required to prove the prior convictions via certified copies of each conviction, probation records showing the defendant's biographical information, and live witness testify proving the defendant in court is the same person named in those documents. In advancing this argument, the defendant relied on the language of c. 90, s. 24(4), prior to its amendment, which stated that certified copies of the court papers and certified copies of probation records containing the defendant's biographical information constitute prima facie evidence of the prior convictions. Thus, the defendant argued, the statute precludes the Commonwealth from proving the prior offenses through other means, such as RMV records as were used in this case. The SJC, however, concludes that the statute simply establishes one way by which the Commonwealth can meet its burden, but not the exclusive way to do so. Further, the SJC rejects the defendant's claim that prior case law—specifically Commonwealth v. Koney, 421 Mass. 295 (1995)—ever required live testimony to prove the issue of identity. Thus, the SJC concludes that the Commonwealth sufficiently met its burden of proving the prior convictions.

Comment: Although it's not entirely clear, the Court seems to suggest that a certified copy of *one* prior conviction for, for example, an OUI 3rd offense, would be sufficient to prove *all three* of the prior convictions in an OUI 4th trial, assuming evidence is presented that the defendant named in that document is the same person on trial.

Commonwealth v. Maloney, 447 Mass. 577 (2006)
The SJC concludes that "the amended OUI statute [known as 'Melanie's Law'], as applied to the defendant in this case, does not violate the ex post facto, due process, or confrontation clauses of the Federal or State constitutions."

The Court finds that the Legislature intended Melanie's Law, which became effective after the defendant was initially charged but before his trial, to operate retroactively, because the Legislature did not explicitly state that the law only applies from the effective date of the amendment. Further, the Court resolves that applying Melanie's Law to the defendant's case does not "constitute an impermissible ex post facto law." This is so because the amendment at issue—altering the means by which the Commonwealth can prove prior convictions—"does not reduce the Commonwealth's burden of proof or the sufficiency of evidence required to prove a prior conviction." In reaching this conclusion, the SJC notes that while Commonwealth v. Koney, 421 Mass. 295 (1995) held that court records showing a prior conviction for someone with the same name as the defendant are not necessarily sufficient to prove that the person named in those records was the defendant, the SJC in Koney did not require proof of live testimony to prove the issue of identity nor does the amendment at issue absolve the Commonwealth of that burden of proof. Because the Court interprets Melanie's Law in a manner consistent with the Koney requirement that the Commonwealth must prove more than "mere identity of name," the Court concludes that the amendments offend neither the due process clause nor the defendant's right to confrontation.

Commonwealth v. Rodriguez, 67 Mass. App. Ct. 636 (2006)
Affirming a trafficking conviction, the Appeals Court concludes that the trial court properly permitted a police officer to testify about the contents of a conversation, which the officer was monitoring via an electronic listening device and absent a warrant, between the defendant and another individual, because the defendant lacked an objectively reasonable expectation of privacy in the communication. The Appeals Court reasons that the defendant lacked such a privacy expectation because "the intercepted conversation exclusively concerned a business transaction, was engaged in by two individuals who were not close friends, and took place in a residence over which the defendant did not have control." To reach this result, the Appeals Court distinguishes the facts of this case from those in the seminal Article 14 case concerning warrantless electronic monitoring of communications, Commonwealth v. Blood, 400 Mass. 61. In Blood, the SJC held that "in circumstances not disclosing a speaker's intent to cast words beyond a narrow compass of known listeners, . . . it is objectively reasonable to expect that conversational interchange in a private home will not be invaded

surreptitiously by warrantless electronic transmission or recording." Here, the Appeals Court states, "The indicia of an expectation of privacy that were present in Blood, including lengthy conversations that took place over a period of days at the homes of longtime friends and business associates, are absent . . ." The Appeals Court further concludes that even if the testimony of this conversation was admitted in error, "the outcome of this case would remain unchanged" as the officer's "recollectiosn of the intercepted conversation added little to the other substantial evidence of the defendant's guilt."

The Appeals Court further concludes that the defendant's motion to suppress a post-Miranda statement—"If you think I am going to cooperate, don't waste your time. You chose to be a police officer, you chose to be a cop, that is your job. I chose my job, I will do my time"—as an invocation of the right to remain silent was properly denied. Rejecting the argument that the admission of this statement violated the principles outlined in Doyle v. Ohio, 426 U.S. 610 (1976), the Appeals Court resolves that these statements were "not enough to qualify as the invocation of a right to cut off questioning" and "could properly have been understood as saying, not that he would not talk to [the officer] , but that he would not assist the police by implicating his suppliers or accomplices . . .." The Appeals Court further states that even if the defendant initially sought to cut off questioning, his later "remarks were spontaneous and without provocation and were therefore properly admitted," and even if there were error, that error was cured by the judge's limiting instruction that the jury could draw no adverse inference from the defendant's statement that he did not wish to speak to the police.

Comment: The SJC has granted further appellate review in this case. 448 Mass. 1101. Beth Eisenberg's application to the SJC for further appellate review convincingly critiques the Appeals Court decision for wrongly creating a "quick business" exception to the Blood rule, in violation of Article 14 rights, and she effectively distinguishes this case from the ones relied on by the Appeals Court—Commonwealth v. Price, 408 Mass. 668 (1990) (approving a surreptitious audio and video recording of a drug deal in a *hotel room*, not a private residence, rented by undercover officers) and Commonwealth v. Collado, 42 Mass. App. Ct. 464 (1997) (upholding a *4th Amendment challenge*, not an Article 14 claim, to the videotaped drug transaction at the apartment of an undercover officer where the officers had obtained a warrant to audiotape the transaction).

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May 3, 2007 at the DCU Center (formerly the Centrum) in Worcester, Massachusetts. for registration form go to http:// www.mass.gov/cpcs/training/ Registration_Form.pdf

CPCS Jury Skills Training Program
March 26, April 5, 6, 9, 10, 11, 2007 at CPCS Boston. Application deadline: February 9, 2007.

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