

Juvenile Delinquency Case/Legislative Law Update¹
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CASE LAW

Commonwealth v. Doane, 428 Mass. 631 (1999)--The defendant was adjudicated delinquent by reason of first degree murder and appealed directly to the SJC under G.L. c. 278 § 33E. The Court held that the entry of the appeal in the SJC was error as § 33E allows for direct entry of an appeal only in a case “in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree. An adjudication of delinquency, even though be reason of murder in the first degree, does not fit within this definition, nor does it receive the severe sanction of life imprisonment without possibility of parole, which is the reason for direct entry and plenary review of the record here under G.L. c. 278 § 33E.” 428 Mass. at 631. Although the Court considered Doane’s appeal on the merits, it stated that future appeals would be transferred to the Appeals Court.

As to the merits, the Court found none. The jury had found Doane delinquent of first degree murder based on both deliberate premeditation and extreme atrocity and cruelty. The evidence showed that Doane had shot the victim twice, once in the thigh and a second time in the jaw, hit the victim over the head with a rifle with sufficient force to break the rifle and dropped a rock on the back of the victim’s head. The gunshot to the victim’s head appeared to have been inflicted with the barrel of the gun pressed directly against the skin. At trial Doane admitted this conduct, but testified that he was drunk and “pilled out” and had shot and struck the victim at the direction of another person. Defense counsel sought and received a jury instruction that the jury could consider Doane’s intoxication in determining whether the Commonwealth had met its burden of proving the defendant’s mental state beyond a reasonable doubt. In closing defense counsel conceded that Doane was guilty of second degree murder but argued strenuously that he could did not possess the requisite mental state to murder the victim with either deliberate premeditation or with extreme atrocity or cruelty. The Court held that, in light of the strength of the Commonwealth’s case, this strategy did not deprive the defendant of the effective assistance of counsel. 428 Mass. at 633 - 634.

¹ The following brief case abstracts reflect the handful of decisions in delinquency appeals issued by the SJC and Appeals Court in 1999. Because the practice of delinquency defense is increasingly the practice of criminal defense no delinquency case law update is complete without including a comprehensive criminal case law update. Although a select few criminal decisions are included in the following abstract, this is not a comprehensive criminal law update. Those interested in a comprehensive update of criminal decisions are referred to the CPCS Training Bulletins which are issued quarterly. The Training Bulletins contain highly readable and comprehensive casenotes on criminal decisions as well as civil decisions that may be relevant to criminal defense.

Commonwealth v. Florence, F., 429 Mass. 523 (1999)–The Court reaffirmed the holding of In Matter of Vincent, 408 Mass., 527 (1990), that in a CHINS case a juvenile court cannot directly order a child to attend school and cannot base a criminal contempt adjudication on the failure of the child to attend school. The Court reached this conclusion based on the language of the CHINS statute which provides that CHINS proceedings are to be non-criminal and that a “child found to be in need of services shall not be committed to any county training school.” 429 Mass. at 526, G.L. c. 119 §§ 39E & 39G. The court reasoned that, “[b]ecause criminal contempt proceedings are punitive and could result in detention, charging a CHINS juvenile with criminal contempt is a remedy that directly contradicts these statutory provisions.” 429 Mass. at 527. Further, in §§ 39E - 39J the legislature set out the Court’s authority in the event that a child failed to comply with its orders and did not include criminal contempt within the options. Id. The Court did urge the legislature to remedy this “well-known and long-standing problem.” 429 Mass. at 523.

Doe v. Attorney General, 430 Mass. 155 (1999)–In this appeal (Doe No. 5) a juvenile, who in 1993 pled guilty to a complaint charging him with delinquency by reason of rape of a child, G.L. c. 265 § 23, challenged the application of the Sex Offender Registration and Community Notification Act, G.L. c. 6 §§ 178C - 178O, (hereinafter the act) to his circumstances. As part of the plea, the juvenile admitted that he had twice forced a four year old girl to perform oral sex on him. He has not been accused of committing any other offenses either prior to or since his adjudication. The Doe complaint alleged that the juvenile had relied upon statutory provisions holding juvenile adjudications confidential when he pled and that the confidentiality of his plea was a natural consequence of his decision to forego his right to seek an acquittal. Doe filed his complaint challenging the act when he received a notice that an application for a complaint had been filed seeking to commence a prosecution against him for failing to register as required by the act. Application of the act to the juvenile was voluntarily deferred pending the ruling on his motion for a preliminary injunction. (The act which the Court passed on in Doe No. 5 has since been amended by the legislature.)

The Court rejected the juvenile’s arguments that the act could not be applied to him as it violated the implied promise of confidentiality contained in his plea bargain. This argument relied entirely on the statutory scheme in effect at the time of the plea, not on any express promise made to him by the Commonwealth. The Court had earlier determined in Doe v. Attorney General (No. 1), 425 Mass. 210 (1997), that there is no right to continued confidentiality of delinquency proceedings. Relying on Doe No. 1, the court concluded that casting this argument in terms of a contractual agreement did not require a different result. 430 Mass. at 167 - 168.

Doe, did however, fare better on his procedural due process arguments. Without rehashing the decision in toto, the Court determined that the procedures of the act which require a “sex offender” to register with his local police department and make data about the offender available to members of the public without first affording the offender an opportunity for a hearing violated the sex offender’s rights to due process. The Court concluded that “an individualized hearing is required as a condition of registration as a sex offender, for persons adjudicated delinquent or convicted under G.L. c. 265 § 23.” 430 Mass. at 158. In reaching this decision, the Court reviewed its prior decisions on the registry, Doe No. 1, supra, Doe v. Attorney

General (Doe No. 2), 425 Mass. 217 (1997), Doe v. Attorney General (Doe No. 3), 426 Mass. 126 (1997), and Doe v. Sex Offender Registry Board (Doe No. 4), 428 Mass. 90 (1998). The Court reasoned that the act's requirement that citizens register with local police departments for up to twenty years in some cases and for life in others implicates serious liberty interests. When registration information is available to the public, as the act provided, the engagement of the person's liberty interest is heightened. The statutory labeling of an individual as a public danger further engages his liberty interests. 430 Mass. at 163. Balancing these liberty interests against the public safety interests protected by the act and considering the broad range of conduct that falls within the prohibition of G.L. c. 265 § 23, led the court to the conclusion that, "an individualized hearing is required, as a condition of registration as a sex offender, for persons adjudicated delinquent or convicted under G.L. c. 265 § 23, absent the promulgation of carefully tailored regulations." 430 Mass. at 157 - 158. Such a hearing may not be necessary if the sex offender board drafts narrowly drawn regulations that identify with particularity as to the offender and the offense the fit between the remedial measure sought by the Commonwealth and the danger to be averted. 430 Mass. at 158 & 164 - 166. At the pre-registration hearing, the sex offender board bears the burden of proving that the offender is a present threat to children such that registration and public notification are necessary to advance the act's remedial purposes. The sex offender can present evidence to demonstrate that he is not a threat to children and should not be required to register or that registration information should not be available to the public. If you represent a child accused of delinquency by reason of a sex offense, you must be familiar with each of the Doe decisions and the act. 430 Mass. at 168.

NB: Since the SJC decision in Doe No. 5, the legislature enacted corrective legislation. This legislation provides for dissemination of registration information to law enforcement agencies only prior to the hearing required by Doe No. 5. This legislation is included in these materials and is discussed very briefly below.

Commonwealth v. Clint C., 430 Mass. 219 (1999)—This is a bizarrely reasoned decision overturning a juvenile court judge's dismissal of an indictment brought under the youthful offender statute. G.L. c. 119 §54. In Clint, C. the fifteen year old defendant was indicted on charges of statutory rape of a six year old girl for whom he was the babysitter. The juvenile court judge dismissed the indictment after reviewing the grand jury minutes which included videotapes of interviews with the six year old and determining that the case did not involve a "threat of serious bodily harm," one of the prerequisites for indictment under the youthful offender act. The SJC, held that the trial judge erred by analyzing the facts of the case to determine whether the conduct of the defendant created a threat of serious bodily harm. The Court reasoned that the legislature did not intend to limit the reach of the act to cases in which a threat of serious bodily harm is an element of the charged offense or the conduct entails such a threat. Rather, the question is whether, on any facts, the charged offense itself includes the threat of bodily harm. 430 Mass. at 225 (1999), citing, Commonwealth v. A Juvenile, 10 Mass. App. Ct. 385, 391 (1980). After deciding that the offense of statutory rape, which requires proof of penetration, always includes a "threat of serious bodily harm," the Court overturned the dismissal of the indictment Id. at 226.

Curiously, after reversing the dismissal on the grounds argued to the Court, it then examined the facts of the offense considering, "the juvenile's position of authority, the age

difference between the juvenile and the victim, and the vulnerability of the victim,” and held that these facts are, “sufficient to support a youthful offender indictment.” *Id.* at 226. The Court thereby undertook the analysis that it had apparently ruled was unnecessary. This suggests that the Court may not look as favorably upon a youthful offender indictment for statutory rape in a case where the consenting parties are teens of approximately the same age. The problem for defense lawyers is that some juvenile court judges have interpreted the Clint, C., decision to mean that motions to dismiss can no longer be brought in youthful offender cases. This interpretation of Clint, C. is much too broad. The decision explicitly states dismissal is appropriate if there is an “error of law” and, requires that in all cases the statutory prerequisites (that the defendant be 14 and have a prior commitment to DYS or be charged with either an offense that involves a “threat of serious bodily harm” or specified firearms offenses) must be met. *Id.* at 224.

Most disturbingly, after reversing the dismissal of the indictment on the grounds that were fully briefed and argued to the Court, it reviewed the statute to determine whether it was void for vagueness. The Court did so, despite acknowledging that it does not ordinarily decide constitutional issues which, are “not strictly before [the court]” and which, “had not been extensively argued or decided” in the juvenile court. *Id.* at 226 - 227. Not surprisingly, the Court held that the statute is not void for vagueness.

Judge Ireland authored a cogent and persuasive dissent supporting the dismissal of the indictment.

Commonwealth v. Ferrer, 47 Mass. App. Ct. 645 (1999)–Prior to trial on an indictment charging a fourteen year old defendant with first degree murder, the trial judge ordered suppression of the defendant’s incriminating statements which were given to police following his arrest and without his having an opportunity to consult with an interested adult. At trial the youth testified and was impeached with the statements that had been suppressed. On the authority of Commonwealth v. Harris, 364 Mass. 236 at 238, 240 (1973), the Appeals Court upheld use of the suppressed statements to impeach the child’s trial testimony. The Court reasoned that, in the absence of a finding and evidence that the statement was involuntary in fact, it could be used for impeachment. Relevant to the voluntariness inquiry are the defendant’s age, education, intelligence, emotional maturity, and experience with the criminal justice system. 47 Mass. App. Ct. at 648, citing, Commonwealth v. Selby, 420 Mass. 656, 662 - 664 (1995). Thus, despite the trial court’s findings that the defendant “did not have a high degree of intelligence, experience, knowledge or sophistication,” the Appeals Court upheld the trial court’s finding that the statement was not the product of “inquisitorial activity;” that the defendant’s will was “overborne by violence . . . or trickery;” and, that the defendant who was not mentally ill, physically impaired, or sick at the time of questioning had not been threatened or coerced in making the statement. *Id.* At 648 - 649. The Appeals Court concluded that , “[y]outh and immaturity are relevant factors in determining voluntariness but not conclusive ones.” *Id.* At 649.

The decision in Ferrer, particularly when read with Alan, A, infra, highlights that when dealing with a juvenile’s statements, a separate argument must be made that the statement is not voluntary in fact; despite technical compliance with the requirements of Miranda and

Commonwealth v. A Juvenile, 389 Mass. 128, 134 - 135 (1983). See, Commonwealth v. Magee, 423 Mass. 381, 387 (1996), Commonwealth v. Edwards, 420 Mass. 666, 673 (1995); Commonwealth v. Selby, 420 Mass. 656, 663 (1995); Commonwealth v. Mahnke, 386 Mass. 662, 680 (1975).

Commonwealth v. Alan A., 47 Mass. App. Ct. 271 (1999)—Police, acting without a warrant, entered the home of the fifteen year old defendant’s girlfriend to arrest him for theft of property, including a handgun, that was taken from the defendant’s father. The police ordered the boy to lie on the ground face down, handcuffed him and gave him Miranda warnings, which he acknowledged he understood. They then asked, “Where’s the gun” and the juvenile replied that he no longer had it. The Appeals Court upheld the admission of the boy’s statement at trial, despite his not having an opportunity to consult with an interested adult under the “public safety exception” to Miranda. See, New York v. Quarles, 467 U.S. 649, 656 - 659 (1974). This ruling was based on the trial court’s finding that Miranda warnings had been given and in these circumstances--a handgun that may have been secreted in a private residence--the police could properly ask questions that were not designed to obtain testimonial evidence from the juvenile, and that were “limited in scope and designed to insure that any danger to the police or the public would not result from the concealment of the gun.” Id. at 274 - 275. As to the juvenile’s argument that this statement was not voluntary, the court noted that the claim was made for the first time on appeal and was unsupported by proof. Id. at 275.

The Court also upheld the use in evidence of a later statement given by the juvenile after he had been allowed to consult with his parents at the police station. Following the conference between the boy and his parents, the police were informed that, on the advice of counsel, the boy would not make a statement or answer questions, but would tell the police where the gun was hidden. While looking for the gun in a “dark , wooded area,” the boy made several comments about where he dropped the gun. The trial judge allowed these statements to be admitted at trial, finding that they were unsolicited and made voluntarily after the juvenile had the opportunity to consult with his parents and counsel. The trial judge also found that the statements were not made in response to interrogation or the “functional equivalent of interrogation.” These findings and conclusions were upheld by the Appeals Court. Id. at 276. See, Rhode Island v. Innis, 446 U.S. 291, 301 (1980) for a discussion of the concept that statements or activity that is the functional equivalent of interrogation may require suppression. See also, Commonwealth v. Mitchell, 47 Mass. App. Ct. 178 (1999), (police officer’s “observation” to defendant who was arrested on December 5th that it was, “tough luck getting locked up this close to Christmas” to which defendant replied, “I was just trying to make some money for Christmas. I got no job,” was not interrogation or the functional equivalent of interrogation; the defendant’s statements were admissible despite the fact that they were made prior to his being given Miranda warnings).

Commonwealth v. Ward, W., 47 Mass. App. Ct. 208 (1999)—The juvenile defendant was arrested after fleeing from a stolen car within minutes of a report that the car and the driver’s keys and wallet had been stolen in an armed robbery and armed carjacking. The appeals Court overturned the juvenile’s adjudication of delinquent as a joint venturer in an armed robbery and armed carjacking, holding that the evidence was insufficient to prove that the juvenile was one of two “human forms” seen by the victim hovering near the car while a third individual—who was

not the juvenile—held a sharp object to the victim’s neck and demanded his car keys and wallet. Although the Appeals Court found the question of the sufficiency of the evidence to be “very close” and reasoned that the adjudication was supported by the extremely short period of time between the carjacking and the sighting of the car, as well as the juvenile’s looking over his shoulder at a police car before the stolen car was stopped, and fleeing upon the car being stopped, it nonetheless concluded that inasmuch as the juvenile was not the principal and could not be identified as one of the two human forms near the car during the commission of the offense, the evidence did not support a finding beyond a reasonable doubt that the juvenile was present at the time of the offense, knew that the principal intended to commit the crime and was available and willing to help if necessary. 47 Mass. App. Ct. Att 212 - 213.

Commonwealth v. Dodge, 428 Mass. 860 (1999)—As a condition of his release on bail the defendant in Dodge was ordered to undergo drug and alcohol screening by urinalysis, and to participate in outpatient counseling as determined by probation, including attendance at AA or NA meetings. Defendant persistently refused to comply with these conditions, and moved to vacate them instead. The motion to vacate was denied and defendant persisted in his refusal to perform the conditions, despite acknowledging he understood the conditions. As a result of his refusal, he was charged with contempt. He defended the contempt proceedings arguing that G.L. c. 278 §58 (the bail statute) does not authorize the trial court to set conditions on a defendant’s pre-trial release. He was adjudicated in contempt and his appeal to the SJC followed. The SJC first determined that the bail order “was a proper foundation on which to base an adjudication of criminal contempt” and that “[a]ny lack of clarity regarding the judge’s order” was cured by the hearing on the defendant’s motion to vacate. The SJC noted that the defendant did not seek appellate review of the bail order. The Court then reviewed the trial court’s authority to set conditions on a defendant’s release on personal recognizance and held that a trial court does not have either the statutory authority under c. 276 § 58, (contrast G.L. c. 278 § 58A which expressly authorizes the court to set conditions on release following a so-called dangerousness hearing under the provision of § 58A), or the inherent authority to set conditions on release on recognizance.

Setting conditions on a juvenile’s pre-trial release is almost always done; i.e., attend school daily without suspension or expulsion, obey the reasonable rules of home, abide by a curfew, stay away from the evil companions who lead the juvenile astray; however, after Dodge, it appears that the Courts do not have authority to set these conditions. When representing a juvenile at arraignment, you must make a decision whether it is better to accept conditions or be stuck with a bail that the child may not be able to make. As an alternative to bail conditions, in an appropriate case, you may want to advise your client to agree to being released with conditions that are in the nature of pre-trial probation under G.L. c. 276 § 87. Release on pre-trial conditions of probation requires the assent of the defendant.

Commonwealth v. Reynolds, 429 Mass. 388 (1999)—This is one of the most important decisions on the right of a defendant to present a defense in years. The Court found reversible error in a first degree murder trial where the trial judge prevented the defense from examining the primary police detective as to information he had received that the victim was fighting with members of “Whitey Bulger’s organization” about money and that two Bulger lieutenants were

present at a pub with the victim on the night he was murdered. The defense also sought to prove that the police had not investigated this information. At trial and on appeal, the Commonwealth objected to the admission of this evidence as hearsay. The Court wrote that this argument “misses the mark.” This evidence was not offered for the truth of the matters asserted; i.e., that members of the Bulger organization had committed this murder, but rather it was offered to prove that the fact of the tips and that the tips were not investigated. The exclusion of this evidence infringed on the right of the defendant to show that the police investigation was deficient. 429 Mass. at 390 - 392. See, Commonwealth v. Bowden, 379 Mass. 472, 485 - 486 (1980). Commonwealth v. Rodriguez, 378 Mass. 296, 308 (1979); Commonwealth v. Pettie, 363 Mass. 836, 840 - 841 (1973).

In its remand order, the Court also required further hearings on whether a jailhouse informant, who testified to statements made by the defendant, was an agent of the Commonwealth. The defense argued that the informant obtained the statements in violation of the Sixth Amendment to the U.S. Constitution and art. 12 of the Mass. Constitution. Under the Sixth Amendment, the Commonwealth may not deliberately elicit statements from the defendant in the absence of counsel once formal adversary proceedings have commenced. 429 Mass. at 393. Using a jailhouse informant to elicit statements violates the Sixth Amendment if the informant is acting as an agent of the Commonwealth. Commonwealth v. Harmon, 410 Mass. 425, 428 (1991). An informant “who has not entered into any agreement with the government, and who reports incriminating evidence to police out of conscience or even ‘an unencouraged hope to curry favor’ is not acting as a government agent.” Id. (Citations omitted.) However, in this case, the Commonwealth’s promise to bring the witness’s cooperation to the attention of prosecutors was sufficient to make the informant a Commonwealth agent. An evidentiary hearing was ordered to resolve whether this promise was made after the informant had obtained all the information he testified to. 429 Mass. at 395 - 396.

The Reynolds decision is also important because it imposes an affirmative duty on defense counsel to disclose statements that may be used to impeach a Commonwealth witness. In Reynolds the defense was in possession of letters written by the informant which showed that he hoped to gain lenity by testifying and cast doubt on his assertion that the cam forward solely to protect another witness. These statements were not disclosed until the defense sought to impeach the informant at trial. Over the Commonwealth’s objection the trial court excluded the impeachment evidence. Although the SJC questioned whether the exclusion sanction was appropriate in this case, 429 Mass. at 399 - 400, it held that the defendant was obligated to disclose the impeachment evidence. The Court premised this holding on the language in the pre-trial conference report to the effect that any statement of a witness who will be called at trial will be disclosed. The defendant, relying on Rule 14(a)(3), which the pre-trial conference report references, argued that this meant only those witnesses he intended to call and did not extend to impeachment evidence. The court rejected this argument. Although the court’s reasoning strains the logic of requiring pre-trial conference reports and is contrary to the clear language of the criminal rules, it is nonetheless the law. It is suggested that his problem may be avoided by handwriting on the pre-trial conference report that you will disclose any statements of witnesses, as defined in rule 14, that you intend to call at trial. This may relieve you of turning over

statements that will be used, if at all, only for impeachment purposes.

Commonwealth v. Gonsalves, 429 Mass. 658 (1999)—In this decision, the SJC continued the tradition of providing citizens with broader protections against warrantless searches and seizures under art. 14 of the Massachusetts constitution than is provided by the Fourth Amendment to the U.S. Constitution. In Gonsalves, the Court held that a police officer who has made a routine traffic stop cannot order the driver and/or passenger out of a car in the absence of specific and articulable facts demonstrating that such an order is necessary to protect the officer's safety or to investigate further possible criminal conduct. 429 Mass. at 662. In so holding, the Court expressly rejected Supreme Court decisions that interpret the Fourth Amendment to allow a police officer to order the driver and occupants out of a car whenever a routine traffic stop is made. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977), Maryland v. Wilson, 519 U.S. 408, 415 (1997), Under Gonsalves, once a stopped driver has produced the necessary papers and the papers are found to be in order, he and his passengers are to be promptly released. 429 Mass. at 668. An exit order is justified only when a "reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger." 429 Mass. at 661, quoting, Commonwealth v. Santana, 420 Mass. 205, 212 - 213 (1995).

Commonwealth v. Murdough, 428 Mass. 760 (1999)—In Murdough, the Court upheld an inquiry of a driver in a car parked in a rest area based on the "community caretaking function" of the police. 428 Mass. at 761 - 762. See also, Commonwealth v. Leonard, 422 Mass. 504 (1996). The "community caretaking function" exception to the Fourth Amendment and art. 14 allows police officers to make such inquiry of drivers as is necessary to determine that the person is not sick or under the influence of alcohol or drugs and are a danger to themselves or the public. If the officer's initial inquiry provides a basis for further investigation, they may order a driver or passenger out of a car. 428 Mass. at 761. An officer may make an initial inquiry of a driver in a stationary vehicle under this guise even if he has no specific facts that support the need for such an inquiry. 428 Mass. at 763.

Commonwealth v. Conkey, 430 Mass. 139 (1999)—Error found in the admission, over objection, as consciousness of guilt evidence of a defendant's agreement and subsequent failure to appear for fingerprinting. Under art. 12, a defendant has the right not to furnish evidence against himself. The art. 12 right is broader than the Fifth Amendment's guarantee against self-incrimination as the latter reaches only testimonial evidence. Art. 12, however, provides that a person shall not "be compelled to accuse, or furnish evidence against himself." Art. 12 is violated if there is a testimonial aspect to the evidence sought from the defendant and if it is the State that has sought to compel the production of the evidence. Thus, although providing fingerprints can be compelled as fingerprints are real evidence--not testimony--the use of the refusal as evidence of consciousness of guilt is testimonial and is prohibited. 430 Mass. at 142. "Conduct evidence offered to show consciousness of guilt is always testimonial because it tends to demonstrate that the defendant knew he was guilty." Id. Evidence such as a false alibi or flight is testimonial and may demonstrate consciousness of guilt, but is not compelled by the state and therefore does implicate art. 12. 430 Mass. at 143.

Commonwealth v. Peters, 429 Mass. 22 (1999)–Error found in the admission of sexual assault victim’s testimony that she had complained of assault as well as the details of her complaints on direct examination. The fresh complaint doctrine does not allow admission of the victim’s “self corroborating” testimony of the details of her complaints. 429 Mass. at 30.

Commonwealth v. Brown, 46 Mass. App. Ct. 279 (1999)–911 tapes were properly admitted in evidence under the excited utterance exception to the hearsay rule with no need to demonstrate that the callers were unavailable to testify. “A statement made under the impulse of excitement or shock is admissible if its utterance was spontaneous to a degree that reasonably negated premeditation or possible fabrication and if it tended to qualify, characterize, or explain the underlying event.” 46 Mass. App. Ct. at 282, quoting, Liacos, Handbook of Massachusetts Evidence 516 (6th ed. 1994).

LEGISLATION

An Act Improving The Sex Offender Registry And Establishing Civil Commitment and Community Parole Supervision For Life For Sex Offenders--Without a doubt the most important legislative activity has been in “correcting” the sexual offender registry in an effort to comply with the SJC’s ruling in Doe No. 5. The corrective legislation is included with these materials in full and requires careful reading and analysis. A detailed analysis of this statute is beyond the scope of this update. However, some of the provisions of the act which subject juveniles to different treatment than their adult counterparts are mentioned below.

The legislation in its current form requires any juvenile adjudicated as a delinquent on a complaint charging an enumerated sexual offense, or convicted as a youthful offender on a like indictment to register as a sex offender annually with the police department in the city or town where they live and work. The only offense that is sexual in nature and not expressly included within the reach of the statute is indecent exposure. Lewd and lascivious behavior requires two convictions before registration is mandated. The legislation provides that a sexual offender registry (hereinafter “registry”) will be maintained as the repository of registration information and that the Sexual Offender Registry Board (hereinafter “Board”) will classify registrants as level 1, 2 or 3 offenders depending on the Board’s evaluation of the risk that the registrant will re-offend. The act provides for varying degrees of public access to a registrant’s “registration data,” (which includes name, alias, date of birth, place of birth, sex, race, height, weight, eye and hair color, social security number home and work addresses, photograph and fingerprints, and a description of the offense of conviction, including date of conviction and sentence), based on their classification level.

Responding to the decision in Doe No. 5, the current version of the act provides that only law enforcement agencies may obtain registration data prior to the registrant being granted a hearing at which the classification level and need for registration is determined. The act provides for representation by appointed counsel at these hearings and for funds to hire experts. Depending on the classification level, a sex offender must register for twenty years to life. In

some cases, the offender may petition for relief from registration after ten years. The act imposes criminal penalties for each failure of an offender to register.

The act's classification scheme is inextricably tied to the offense committed by the offender and whether the victim is a child or adult. Those who offend against children are denied discretionary relief from registration and are much more likely to be classified at a higher risk level required to register for a longer period or be placed on parole for life. Because juveniles are generally commit offenses against other juveniles, the act treats young people more harshly than their adult counterparts.

The act allows a person who has committed a sex offense against an adult to avoid registration if the sentencing court, on motion brought by the Commonwealth, determines that "the circumstances of the offense in conjunction with the offender's criminal history does not indicate a risk of reoffense or a danger to the public." G.L. c. 6 § 178E(e). Under § 178E(f), when a sex offender is not sentenced to immediate confinement, the Court must determine whether registration is required within fourteen days of sentencing. The relief available under § 178E(e) & (f) however, is not available if the offense of conviction "involve[s] a child." Thus, an adult who commits the an act against an adult peer, may be relieved from registration, while a child who commits the same offense against a juvenile peer is not eligible for this relief. Similarly, a juvenile who commits an offense against an adult—one who most experts agree is more dangerous than one who offends against a juvenile peer—may also be relieved from registration. The offenses which require a child to register as a sex offender are not limited to violent sexual assaults, but include lewd and lascivious conduct (second and subsequent offense); indecent assault and battery in all its myriad forms; and, statutory rape. Thus, a wholly consensual relationship could result in a registration requirement for the juvenile who is unlucky enough to be charged; typically the boy, the one who is not white or the one is who is poor.

As noted in § 178E(e), the act makes provisions for relief from registration. This relief is available however, only on motion filed by the Commonwealth. There is no provision in the act for a defendant to file a motion seeking this relief, or for the Court to consider this issue on its own motion (except under § 178E (f), when the offender is not sentenced to immediate confinement). This provision may be ripe for challenge in appropriate cases and is likely to be a potent bargaining chip in plea negotiations, particularly when the Commonwealth has proof problems.

The fact that a second conviction of lewd and lasciviousness behavior may result in registration, but indecent exposure does not, underscores the potentially arbitrary nature of the act. Urinating in public, a particularly juvenile offense, could be charged as either lewd and lascivious behavior or indecent exposure. In this way, the act gives the law enforcement officer who applies for a complaint and chooses to charge lewd and lascivious conduct instead of indecent exposure, great discretion to impose years of registration as a sex offender on a juvenile.

As the title of the act suggests, the sexually dangerous person classification has been

revived and some offenders may be placed on parole for life. Once, again, juveniles are disadvantaged by these provisions as the age of the victim is one of the main considerations in the determination of whether an offender will be placed on parole for life or determined to be a sexually dangerous person.

An Act To Enhance Inter-Agency Communication In Criminal Proceedings Regarding Juvenile And Youthful Offenders—This legislation (copy attached following the sexual offender registration) re-authorizes the so-called community justice roundtables. Basically, this act allows prosecutors to gain otherwise privileged information about children and their families from schools, DSS, DMH, DPH, and private social service providers. The act abrogates virtually all privileges contained in the statutory law of the Commonwealth. It envisions that District Attorneys will continue to convene roundtable meetings with these agencies to discuss prioritizing the prosecution of designated children. The act makes no provision to give notice of these meetings to the children or families who will be discussed, for these children or families to appear at the meetings, or for them to be represented or to object to the release of confidential information. The act also requires the Commissioner of Probation to notify the superintendent of a school district and the principal or headmaster of a school of the disposition of any criminal or delinquency proceedings against a current or potential student of the school and school district.

An Act To Prosecute Juvenile Offenders As Adults For Certain Crimes— This bill was not accepted as a late filed bill this year and will likely be re-filed in the next legislative session. As this is not yet law, little need be said. The bill lowers the age for eligibility to be indicted as a youthful offender from fourteen to thirteen and mandates that certain violent offenses, including manslaughter, robbery, assault, rape, kidnaping and vehicular homicide be indicted. Be alert for this legislation in the next year.