

DELINQUENCY DECISIONAL LAW/LEGISLATIVE UPDATE

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The following is a synopsis of some of the important appellate decisions rendered in the past year that bear on the practice of juvenile delinquency law. It is important to note that this is by no means a comprehensive review of the last year's decisional law in criminal cases. Rather, this compendium is an idiosyncratic compilation of cases that the writer believes bear on issues that are seen with some frequency in the practice of delinquency law. As has been emphasized before, the practice of delinquency law is criminal law. There is no substitute for regular review of the advance sheets to stay abreast of the decisional law.²

As in years past, probation violations continue to be one of the main roads to a DYS commitment. Several decisions, discussed below, offer some assistance when client's are charged with a probation violation. See, Commonwealth v. McDonald, 50 Mass. App. Ct. 220 (2000); Commonwealth v. Emmanuel E., 51 Mass. App. Ct. 451 (2001). Of course, the best defense to a probation violation remains winning at trial and avoiding probation altogether. Attorneys who work in the Boston Juvenile Court should be aware that when a client who is supervised by one of the outlying courts (Dorchester or West Roxbury for example) is believed to be in violation of his/her probation, the supervising probation officer sends a "Return of Supervision/Probation" form to the BJC probation officer. Upon receipt of this form, the BJC probation officer sends out the notice of violation. The return of supervision form contains the supervising probation officer's recommendations for arraignment (hold or release) and for disposition. Counsel should always request discovery of this form, as well as any other probation records, including the probation officer's running record of case contacts. A sample motion for obtaining probation records follows these materials. The decisions in Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973) and Commonwealth v. Maggio, 414 Mass. 193, 197 (1993) provide that a probationer is entitled to receive this discovery.

In the BJC the probation officer who handles the case in the courtroom often recommends a harsher disposition than recommended by the supervising probation officer. In this circumstance, the supervising probation officer should be subpoenaed to the violation hearing to offer testimony on disposition or in mitigation of the violation. The probationer's rights to put on such evidence is guaranteed by Morrissey v. Brewer, 408 U.S. 471, 488 (1972) and Gagnon, supra, 411 U.S. at 786. See also,

¹ Synopses of the Quincy Q., Emmanuel E., and Ulysses H. cases were prepared by Mark Zanini, Chief of the Suffolk County District Attorney's Juvenile Unit and are included in a separate document.

² The quarterly CPCS Training Bulletins contain highly readable, concise and comprehensive casenotes. These bulletins are a good source for quick updates on the decisional law.

Commonwealth v. Smith, 38 Mass. App. Ct. 324, 327 (1995).

The MBTA continues to be a trouble spot for juveniles. Recent organizing efforts have brought light to bear on some of the T's abusive arrest practices. These efforts and last summer's public hearings held by the Black Legislative Caucus, which contributed to dismantling the MBTA so-called "anti-crime unit," appear to have helped rein in some of the T's worst practices. Nonetheless, unnecessary and unlawful arrests continue. Following these materials is a Motion To Dismiss and supporting Memorandum of Law for use when a client is charged with trespassing on T property. The basic argument is that the trespass law is void for vagueness as applied to arrests of persons lawfully on T property who are not interfering with another person's use of the property. See, Papachristou v. City of Jacksonville, 405 U.S. 156, 163-164 (1972); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-91 (1965); and, Commonwealth v. Carpenter, 325 Mass. 519, 521 (1950). Please note, however, that this argument may also be raised as a motion for a required finding. See, Commonwealth v. Chou, 433 Mass. 229, 237-238 (2001).

DECISIONAL LAW UPDATE

Prior Delinquency Convictions–Enhanced Penalties

In two decisions, the SJC partially eroded the protection offered by the Juvenile Court, ruling that, in the circumstances of the particular cases, prior delinquency adjudications could be treated as convictions to enhance later sentences. Commonwealth v. Connor C., 432 Mass. 635 (2000); Commonwealth v. Valiton, 432 Mass. 647 (2000). The Court did, however, emphasize that the policy of the Commonwealth remains to treat, rather than punish, juveniles and that delinquency proceedings are not criminal proceedings.

In Connor C., a juvenile who had once been adjudicated delinquent on a complaint charging illegal possession of a firearm, G.L. c. 269 § 10(a), was indicted as a youthful offender for illegal possession of a firearm, subsequent offense. G.L. c. 269 § 10(d). The district court judge allowed a motion to dismiss the indictment reasoning that an adjudication of delinquency on a complaint charging illegal possession of a firearm is not a conviction within the meaning of 269 § 10(d).³ The SJC granted the Commonwealth's application for direct appellate review, vacated the dismissal of the indictment and remanded the case for further proceedings.

In holding that the juvenile could be indicted as a subsequent offender under c. 269 § 10(d), the Court considered the interrelationship of G.L. c. 119 § 54, which authorizes the

³ There was no dispute that the Commonwealth could seek an indictment of the juvenile as a youthful offender under G.L. c. 119 §54. 432 Mass. at 639.

indictment of some juveniles as youthful offenders, c. 269 § 10, which prohibits illegal weapons possession, and c. 119 § 58 which defines dispositions in delinquency cases. Section 58 of c. 119 provides for mandatory periods of confinement in a DYS facility of six months for a first adjudication of delinquency for a violation of c. 269 § 10(a) and twelve months for a subsequent violation of § 10(a). Under c. 269 § 10(d) a person convicted of a second violation of § 10(a) may be sentenced to state prison for five to seven years and to seven to ten years for a third conviction.

The Court reasoned that the 1996 amendments to c. 119 were “addressed primarily to those children who commit violent or gun-related acts.” 432 Mass. at 637-638. The amendments allowed a juvenile judge to sentence juveniles indicted under § 54 as adults and required mandatory terms of confinement in DYS facilities for juveniles adjudicated delinquent on complaints charging firearm offenses. *Id.* The 1996 amendments were intended to “reduce or eliminate certain protections previously available to all juvenile offenders in an effort to address growing concern about violent crimes committed by juveniles.” 432 Mass. at 641, quoting, Commonwealth v. Clint C., 430 Mass. 219, 227-228 (1999). Accordingly, the Court concluded that the apparently conflicting provisions of c. 119 and c. 269 must be construed consistently to further the legislative intent. The legislative intent can be advanced only if adjudications of delinquency on a complaint brought under c. 269 § 10 are treated as a conviction when a juvenile is indicted under c. 119 § 54 for a subsequent violation of c. 269 § 10. The Court noted that the legislative determination that some children who are “found to imperil the public safety,” should be sentenced to lengthy periods of incarceration would be frustrated if an adjudication of delinquency on a complaint for violating c. 269 § 10 was not treated as a conviction for purposes of § 10(d). 432 Mass. at 642.

The Court also rejected the argument that the specific sentencing provisions in the seventh and eighth paragraphs of c. 119 § 58, which establish mandatory minimum sentences for juvenile’s adjudicated delinquent for violations of c. 269 § 10 (a), (c), or (d), govern the disposition of all children (“delinquent children” and “youthful offenders”) who violate § 10(d). 432 Mass. 643-646. The Court noted that construing § 58 to apply to all children would eliminate the option of sentencing a child convicted on an indictment charging a violation of c. 269 § 10 to adult prison and that result would be contrary to the intent of the 1996 amendments. Further, § 58 as written applies only to children “adjudicated delinquent” and makes no mention of youthful offenders. Therefore, the court concluded that § 58 did not limit the juvenile court’s sentencing options for youthful offenders. 432 Mass. 645-646.

In the concluding paragraphs of the Connor C. decision, the Court emphasized that the holding “is a narrow one, limited to these specific statutory provisions.” 432 Mass. at 646. It wrote that it, “adhere[d] to our long standing jurisprudence that an ‘adjudication’ that a child has violated a law generally is not a ‘conviction’ of a crime. [Citation omitted.] It remains the law that the goal of our juvenile system of justice is to act in the best interests of children by encouraging and helping them to become law-abiding and productive members of society, and not to label and treat them as criminals.” 432 Mass. at 646 (citations omitted). The 1996 amendments did not “eviscerate the longstanding principle that the treatment of children who

offend our laws are not criminal proceedings.” 432 Mass. at 641 (citation omitted). The Court reiterated that, “[s]ections fifty-two to sixty-three [of chapter 119], inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance.” G.L. c. 119 § 53. See also, 432 Mass. at 642 & n. 9.

In Commonwealth v. Valiton, 432 Mass. 647 (2000) the Court held that an adult defendant who, as a juvenile was adjudicated delinquent on a complaint charging OUI under G.L. c. 90 § 24, and sentenced to a period of probation which included counseling and evaluation at an alcohol treatment program, G.L. c. 90 §§ 24 (1)(a)(1) and 24D, could be subjected to the second offender provisions of the § 24. The Court reached this result in reliance on the language of § 24, which requires increased punishment if the defendant has been previously “convicted or assigned” to a treatment program. Because the defendant had been “assigned” to a program previously, he was subject to enhanced punishment as a second offender. 432 Mass. at 650 - 653. Nonetheless, the Court agreed, however, that the prior adjudication was not a conviction. 432 Mass. at 651, n. 4.

In United States v. Silva, 133 F.Supp.2d 104 (D. Mass. 2001), the U.S. District Court considered whether prior adjudications on complaints charging delinquency offenses could support a request that a defendant be detained by reason of two or more prior convictions for crimes of violence. See, 18 U.S.C. § 3142(f)(1)(D). Relying on the SJC’s analysis in Connor C, which, as noted above, acknowledged the remedial nature of the juvenile justice system, the District Court concluded that the prior delinquency adjudications were not convictions for purposes of the federal detention statute. 133 F. Supp. at 114-115.

Youthful Offender

Commonwealth v. Quincy Q., 434 Mass. 859 (2001)

Commonwealth v. Ulysses H., Mass. App. Ct. (2001)

New Trial, Ineffective Assistance of Counsel

The decision in Commonwealth v. Wheeler, 52 Mass. App. Ct. 631 (2001) concerned whether the defendant, who had been adjudicated a delinquent on a complaint charging statutory rape should be granted a new trial when, twenty five years later, he lost his job as a police officer in the town of Franklin due to amendments to G.L. c. 140 § 131 which made him ineligible for renewal of his license to carry a firearm. Although the Appeals Court recognized that the amendment to c. 140 § 131 “appear[ed] to work a harsh result for a youthful transgression” it found no legal error in the denial of the new trial motion. 52 Mass. App. Ct. at ____.

The defendant sought a new trial alleging that his trial counsel labored under a conflict of interest and performed inadequate pretrial preparation and postconviction representation. In

support of his motion, the defendant filed only his own affidavit. The trial attorney and the defendant's mother and father, who hired the attorney, had all died in the intervening twenty five years; the trial judge had retired. While recognizing the Rule 30 allows a defendant to bring a motion for a new trial at any time, the Appeals Court nonetheless relied upon principles of regularity in proceedings and finality to uphold the denial of the motion. 52 Mass. App. Ct. at _____. See, Commonwealth v. Lopez, 426 Mass. 657, 661-665 (2998); Commonwealth v. Grant, 426 Mass. 667, 671 (1998) and Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 49-50 (1997). "The fact that mere passage of time does not invalidate a new trial motion does not mean that the passage of time is irrelevant to its consideration. 'The desirability of finality in the adjudication of cases and the Commonwealth's interest in the fair and efficient administration of justice are factors to be considered along with the ever-present concern that justice not miscarry for the defendant.'" 52 Mass. App. Ct. at _____, quoting, Commonwealth v. Curtis, 417 Mass. 619 (1998). Further, the court wrote that "[t]he presumption of regularity and the principle of finality are particularly applicable when, as here, adverse consequences appear, especially adverse consequences not contemplated or considered possible at the time of the proceeding." The burden is on the moving party to "present some articulable reason which the motion judge deems a credible indicator that the presumptively proper trial proceeding was constitutionally defective or created a manifest injustice, above and beyond credulity straining contentions." 52 Mass. App. Ct. at _____. In other words, defendants' affidavits are inherently self-serving and suspect. To be successful, new trial motions, particularly those filed long after trial, must be supported by some evidence beyond the defendant's word. Here, the defendant's affidavit did not present a credible factual showing.

Schools and Threats

In two cases arising in the school setting the SJC held that drawings prepared by students could be prosecuted as threats, Commonwealth v. Milo, M., 433 Mass. 149 (2001), or as disorderly conduct Commonwealth v. Chou, 433 Mass. 229 (2001). The decision in Chou contains a discussion of the distinction between expressions that are protected by the First Amendment and those which have no expressive content; so called, "true threats," that can be prosecuted without running afoul of the First Amendment. The Court wrote that speech that "harasses" or is a "true threat" can be prosecuted. "Such speech is unprotected: its purpose is to cause injury rather than to add to, or to comment on, the public discourse." 433 Mass. at 236. For a case that reached a different conclusion on facts similar to those before the Court in Milo M., see, In the Interest of Douglas D., 626 N.W.2d 725 (Wisc. 2001).

In Milo M., a student, who had been sent to the hall by his classroom teacher, drew a picture of himself shooting his teacher. This drawing was confiscated by a second teacher and shown to the student's teacher. A short time later, the student drew another picture in which he was pointing a gun at his teacher, entered the classroom and, "in a defiant tone said, '[D]o you want this one too?'" The teacher recognized that the student was very upset and angry and instructed him to give the picture to another student who in turn gave it to the teacher. As a result, the student was immediately suspended for three days and sent home. At the end of the school day, the teacher found the student "loitering" near where her car was parked. The student

was charged with threats, G.L. c. 275 § 2, based on this conduct. He went to trial jury waived and was convicted.

“The elements of threatening a crime include an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.” 433 Mass. at 151, quoting, Commonwealth v. Sholley, 432 Mass. 721, 725 (2000). The standard for evaluating threats is objective; that is, did the circumstances reasonably justify apprehension on the part of an ordinary person. Id. The SJC held that the evidence supported a finding that the juvenile expressed an intent to commit a crime based on the circumstances of his conduct, which included the content of each drawing, that the juvenile made two drawings not one, and, his angry and defiant demeanor. 433 Mass. at 155. Although the Court acknowledged that there was no direct evidence that the student had the ability to carry out the threat, it held that there was sufficient circumstantial to uphold the conviction. In support of this conclusion, the Court again looked to the student’s angry and defiant manner when he gave the second drawing to the teacher, and, to the fact that he was in the hall when he drew the pictures. Although the student’s presence in the hallway was unexplained, the court inferred that the student was being disciplined. 433 Mass. at 156.

Although there was no evidence that the student had access to a gun, the Court held that the apparent ability to “inflict the crime” element of threats was nonetheless satisfied as the juvenile might obtain a gun in the future. That is, there need be no proof that the juvenile has the present ability to inflict the crime threatened. It suffices that he may be acquire such ability in the future. According to the Court, the juvenile’s ability to carry out the threat could be, “inferred from the fact that the juvenile was seen loitering near [the teacher’s] car later the same day.”⁴ Id. Finally, the court considered the “‘climate of apprehension’ concerning school violence” and the recent highly publicized school shootings to conclude that the teacher’s fear that the juvenile could carry out the threat was reasonable. 433 Mass. at 158.

In Chou, the defendant was charged with disorderly conduct for violating that portion of G.L. c. 272 § 53 that criminalizes, “persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex.” The defendant, who was eighteen years old at the time of the events in question, was in a brief dating relationship with a young woman, high school student. During the course of this relationship the defendant threatened to hit the young woman once. Several weeks after the woman broke up with the defendant he produced a number of flyers that were captioned “MISSING,” and included the young woman’s name and a large photograph of her beneath the caption. The flyer listed the young woman’s race as “white slut” and the description of her contained graphically sexual language. 433 Mass. at 230 - 231. The defendant sneaked into her high school one evening and hung several of the flyers. At trial, the

⁴ The record evidence from which the Court concluded that the juvenile was “loitering” near the teacher’s car, consisted of the fact that the student was seen on a public street across from the school and evidence that the teacher’s car was parked on the same street. There was no evidence of how long the juvenile had been on the street, that he knew what car his teacher drove or where it was parked, how close he was to the car, or even that he knew the car was on that street.

defendant did not deny creating or posting the flyers. Rather, he argued that neither his acts nor his language were disorderly within the meaning of the statute. He was convicted and appealed raising the same legal arguments. The SJC upheld the conviction

In its decision, the Court canvassed the history of “tortured” judicial constructions of G.L. c. 272 § 53 that had saved the statute from First Amendment challenges. 433 Mass. 232 - 233. It noted that the “disorderly person” prong of the statute had been construed to permit prosecutions only of those who, “with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . : (a) engage[] in fighting or threatening, or in violent or tumultuous behavior; or . . . (c) create[] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.” 433 Mass. at 232, quoting, Commonwealth v. Sholley, 432 Mass. 721, 727 n. 7 (2000). Analyzing the defendant’s conduct against the backdrop of the decisional law construing the statute, the court considered whether the term “disorderly” in the annoying and accosting prong of the statute would be given the same construction as in the “disorderly person” prong and, if so, whether the statute could be applied to language that is personal and private and has no public impact. It construed “disorderly” as used in the “annoying and accosting” prong of the statute to apply to, “acts or language . . . that involve fighting or threatening, violent or tumultuous behavior, or that create a hazardous or physically offensive condition for no legitimate purpose of the actor, whether the resulting harm is suffered in public by the public or in private by an individual.” 433 Mass. at 233.

The Court then analyzed the flyers to determine whether the content met this definition. It quickly concluded that the fliers did not involve fighting, violent or tumultuous behavior, and that the defendant’s conduct in hanging the fliers did not create a hazardous or physically offensive condition as those terms have been defined by the decisional law. 433 Mass. at 234. As to threats, however, the Court held that the content of the fliers could be construed as threatening. It wrote that, “sexually explicit language, . . . directed at particular individuals in settings in which such communications are inappropriate and likely to cause severe distress, may be inherently threatening.” 433 Mass. at 234. Although the flyers contained no explicit threats, the Court wrote that “language properly may be understood and treated as a threat even in the absence of an explicit statement of intention to harm the victim as long as circumstances support the victim’s fearful or apprehensive response.” Id. Here, the circumstances which the Court found to support the young woman’s fearful response, included the “sexually charged language,” the use of the word “missing” with the young woman’s picture on the flyers which suggested that she may become a “missing person” or “suffer sexually violent harm;” the defendant’s prior threat to hit her, and, the fact that the defendant sneaked into the school to hang the flyers. 433 Mass. at 235.

The Court also upheld the conviction against a First Amendment challenge, finding that the “defendant’s language had no expressive purpose but was instead, intended to ‘get back’ at the victim by placing her in fear that she might suffer some sexual harm or wind up among the ‘missing.’” 433 Mass. at 237. Finally, the Court dismissed the defendant’s challenge to the statute on equal protection grounds as it criminalizes only those who annoy and accost persons of the opposite sex. 433 Mass. 238 - 239.

In the Douglas D., *supra*, case a student had been given a creative writing assignment by his teacher Mrs. C. Instead of starting the assignment, the student disrupted the class resulting in his being sent to the hall, like the student in Milo M. While in the hall the student wrote an essay about an old woman named Mrs. C who beat children and became a teacher. In the student's story, Mrs. C kicked a student "Dick" out of class and, "[t]he next morning Dick came to class & in his coat he consoled [sic] a machedy [sic]. When the teacher told him to shut up he whiped [sic] it out cut her head off." The teacher, Mrs. C., considered the story to be a threat that if she disciplined Douglas again he would harm her. The trial court convicted Douglas on a complaint charging threats. On appeal, the Wisconsin Supreme Court reversed the conviction holding that Douglas' story was not a "true threat" and could not be prosecuted.

School Records
Schools, Search

In Commonwealth v. Bucella, 434 Mass., 473 (2001), the Court considered whether the defendant's Fourth Amendment rights⁵ were violated when school officials turned samples of his schoolwork over to the local police and requested that they compare handwriting on the schoolwork with graffiti found in a class room and hallway. The graffiti in question contained racial slurs and obscenities. The defendant was a suspect in the graffiti incident based on his refusing to work with his special education teacher and disruption of her classroom. He had referred to this teacher as "Tituba," a reference to a black slave in "The Crucible." 434 Mass. at 474. Some of the graffiti was written on the board in this teacher's classroom. As to the graffiti in the hallway, the defendant had been identified as the only student in that part of the building when the graffiti was written. In the District Court the defendant successfully moved to suppress the results of handwriting analyses that suggested that he was the author of the graffiti arguing that the seizure of his school work was unlawful under the Fourth Amendment and state and federal law providing for the confidentiality of student records. 434 Mass. at 474.

To complain of an unlawful search, a defendant must "show that there has been a 'search,' and, to show that he has been subjected to . . . [a] 'search,' he must show that the police have intruded on a reasonable expectation of privacy." 434 Mass. at 476. The Court held that the defendant had no expectation of privacy in his handwriting because, "[h]andwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." *Id.* (Citation omitted.) See, Commonwealth v. Beauchemin, 410 Mass. 181, 185 (1991), (no privilege protecting school records from disclosure pursuant to lawfully issued subpoena).

The defendant argued that regulations promulgated by the state Department of Education pursuant to G.L. c. 71 § 34D which protect the confidentiality of "student records," created a

⁵ There was no argument that the defendant's Article 14 rights were violated.

reasonable expectation of privacy. See, 603 CMR § 23.00, et seq. (1995). See also, the Family Education Rights and Privacy Act of 1974 (FERPA) 20 U.S.C. § 1232g. The regulations prohibit disclosure of “student records” without the consent of the student or the student’s parents. 434 Mass. at 477 - 478. The regulations define student records as “the transcript and the temporary record, including all information . . . or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student’s name or in a way that such student may be identified, and that is kept by the public schools of the Commonwealth. “ 434 Mass. at 479, quoting, 603 CMR § 23.02. The Court rejected the defendant’s argument that the regulations should be interpreted to cover tests, homework and other documents that come into a school’s possession; however briefly, reasoning that papers that are graded and returned are not “kept” by the school. The Court wrote that accepting the defendant’s broad and literal interpretation of the regulations would lead to “multiple layers of absurd consequences.” 434 Mass. at 482. The Court found support for the conclusion that homework papers and tests are not student records because they are not expressly mentioned in the regulations. 434 Mass. at 479.

Even though the Court held the papers in question were not protected by the DOE regulations, it took note that, “[a] student would, even without reference to the regulations reasonably expect that any written work handed in to a teacher would be used solely for educational purposes, i.e., that the teacher would review, correct, and grade the paper or test and return it to the student. A student would not expect, for example, that a teacher would turn over copies of student homework, papers, tests, or quizzes to the media. “ 434 Mass. at 483-484. The court distinguished cases holding that a person does not have a reasonable expectation of privacy in materials voluntarily entrusted to a third party; United States v. Miller, 425 Mass. 435 (1976) (bank records); Commonwealth v. Cote, 407 Mass. 827, 833-836 (1990) (telephone message slips), on the grounds that schools are a governmental entity not a private party; school attendance is compulsory; and students are not acting voluntarily when giving homework to teachers. 434 Mass. at 485. The Court wrote that, “[i]t would appear reasonable to expect that a government agency, to which a citizen is required to submit certain materials, will use those materials solely for the purposes intended and not disclose them to others in ways that are unconnected with those intended purposes. Thus a student may reasonably expect that papers handed in to public school teachers will be used solely for educational purposes and not disclosed outside the educational setting.” Id. Based on this reasoning, the court assumed that the student had a reasonable expectation of privacy in the school papers notwithstanding that he had given them to his teachers. Id.

The delivery of the defendant’s school work to the police invaded his reasonable expectation of privacy, therefore, it was a search within the meaning of the Fourth Amendment. The Court next assessed the reasonableness of the search. 434 Mass. at 485-486. Under the Fourth Amendment, a search by school officials is lawful if it is reasonable under all the circumstances. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). Here, based on specific information linking the student to the graffiti, the Court concluded that the search was reasonable. 434 Mass. at 486-487.

The investigation in this case, up to the request that the police conduct handwriting analysis on the student's homework, was conducted entirely by a vice principal at the school. Had the police asked for the homework or otherwise initiated the handwriting comparison, the result may well have been different. See, Commonwealth v. Neilson, 423 Mass. 75 (1996) (when there is police involvement in either the decision to search or in the conduct of the search, the constitutional limits on police searches will be applied in full).

Chief Justice Marshall dissented from that portion of the majority opinion that held that the schoolwork in question, homework assignments and tests, is never a student record because it is not "kept" by the school. 434 Mass. at 488-490. The Chief Justice wrote that the determination of whether a particular test or homework assignment is a "student record" requires determining whether the "written work is 'kept' in a school's administrative files." Under the Chief Justice's analysis schoolwork that is kept in administrative files, as distinguished from a teacher's files, are student records. Id. The Chief Justice would nonetheless have reversed the grant of the defendant's motion to suppress as the defendant did not "make any showing . . . that school officials 'kept' the school work papers at issue." 434 Mass. at 488. That is, failing to prove that the school work was "kept" by the school, precluded the defendant from establishing that it was part of his "student record" and hence that he had a reasonable expectation of privacy in the school work. Counsel must bear in mind that when arguing suppression motions the defendant bears the burden of proving that there was a "search;" that is, an intrusion on a reasonable expectation of privacy.

Schools, Search

In Commonwealth v. Damian D., 434 Mass. 725 (2001), the Court held that the search of a juvenile who had violated school rules by skipping classes and being tardy was unlawful at inception because there was no evidence supporting a belief that he possessed contraband. 423 Mass. at 729. The court wrote that, "Damian was not searched for evidence of his uncontested truancy; he was searched for contraband. It was pure speculation to conclude that, because Damian was out of class for a period of time during the day, he was likely to have contraband." 434 Mass. at 730. Because the Court decided that this search was unlawful at inception under the Fourth Amendment, it did not reach the question of whether the scope of the search, which included removal of the student's shoes and socks, was overbroad. The Court also did not reach the issue of whether Article 14 of the Massachusetts requires a quantum of suspicion greater than reasonable suspicion--the Fourth Amendment standard--for school officials to search a student in school. The Court's decision makes it clear that even when there is reason to believe a student has violated school rules, the student may be searched only if there is also a reasonable belief that the search will yield evidence of the violation or contraband. 432 Mass. at 729 - 730.

Stop and Frisk

In Commonwealth v. Barros, ___ Mass. ___ (2001), (Appeals Court decision reported in last years update), the Supreme Judicial Court upheld the Appeals Court's decision that the stop of a Cape Verdean man based on a report from an anonymous informant that he was carrying a

gun was unlawful under Article 14. Critical to the Court's decision was its determination of when the defendant was stopped. The SJC agreed that the stop occurred when the police officer got out of his cruiser, walked up to the defendant, pointed his finger at the defendant and told him to "Come here." This statement, when considered with the fact that two other police officers had arrived on the scene, communicated to the defendant that he was not free to leave. Thus, the defendant was seized when the officer told him to "come here." The Court next considered whether the anonymous tip provided a reasonable suspicion to justify a brief stop of the defendant. When a stop is made on the basis of an informant's tip, the Court evaluates the tip's indicia of reliability by focusing on the informant's reliability and his or her basis of knowledge. Police corroboration can make up for deficits in one or both factors. The Court concluded that the tip, which merely accurately described the defendant, and the officer's corroboration of it did not "provide sufficient indicia of reliability for suspecting that the defendant had a handgun." Moreover, possession of a handgun alone is not illegal. The crime is carrying a firearm without a license. Nothing in the tip suggested unlicensed possession. Justices Sosman and Cordy concurred in the Court's result but wrote separately to suggest that the stop would have been upheld had the record been better. They opined that the officer likely did have an objective basis for suspecting that the defendant was not licensed to carry a firearm—the defendant's youth—but lamented that no evidence on this factor was put before the trial court.

Juvenile Judge, Power to Grant Immunity

In Commonwealth v. Russ R., 433 Mass. 515 (2001), the Court held that: 1. juvenile court judges are not authorized to grant immunity to witnesses appearing in proceedings before the juvenile court; and, 2. no court is empowered to grant immunity to a witness testifying in a proceeding in the juvenile court. In Russ R., as in Connor C., supra, and Valiton, supra, the Court applied well established rules of statutory construction to determine the intent of the legislature. The three cases together are a good primer on the law of statutory construction.

G.L. c. 233 § 20E, (subject to conditions not relevant to this discussion), authorizes judges of the Supreme Judicial Court, the Appeals Court and the Superior Court to grant immunity to witnesses who are testifying in proceedings before the grand jury or one of the three named courts. Section 56 of c. 119 provides that judges presiding over jury sessions in the juvenile court, "shall have and exercise all the powers and duties which a justice sitting in the superior court department has and may exercise in the trial and disposition of criminal cases." Relying on c. 119 § 56, the Commonwealth sought a grant of immunity for a witness who was to testify in a youthful offender prosecution pending in a District Court, Juvenile Session. The District Court judge denied the request for immunity and the Commonwealth appealed. Although the appeal arose out of a district court proceeding, the holding and reasoning are fully applicable to proceedings in the juvenile court. 433 Mass. at 517, n.3.

The Court acknowledged that the statutes could be construed in "two conflicting ways." 433 Mass. at 520. The legislature is "presumed to be aware of existing statutes when it amends statute or enacts a new one." Id., (citation omitted). Thus, the legislature was presumed to be aware of the provisions of c. 119 § 56 granting Juvenile Court judges the authority of Superior

Court judges in the trial of delinquency cases when it amended c. 233 § 20E to allow Superior Court judges to immunize witnesses in criminal cases. “If the Legislature were aware that § 56(d) gave the Juvenile Court the same powers, there was no need to refer specifically to the Juvenile Court in the immunity statute.” Id.

Other rules of statutory construction however, led to a different conclusion. First, chapter 233 § 20E had historically allowed only a justice of the SJC to grant immunity to witnesses. In 1998 (two years after c. 119 § 56 was last amended) § 20E was amended to significantly broaden the procedures for granting witnesses immunity and to expressly give this power to Appeals Court and Superior Court judges. The Court considered the omission of Juvenile Court judges from the 1998 amendment to be purposeful. 433 Mass. at 522. Moreover, § 20E was considered to be a clear and “unambiguous statute,” as well as a “specific statute” to which the more general c. 119 § 56 must yield. 433 Mass. at 520 - 521. The Court also considered that if the legislature intended to authorize the juvenile court to grant immunity, it could “easily have included the Juvenile Court in the statute[.]” 433 Mass. at 522.

Finally, the Court noted that the plain language of § 20E authorized grants of immunity only to a witness in a criminal proceeding in the Supreme Judicial Court, Appeals Court or Superior Court. Id. Because the statute does not authorize grants of immunity to witnesses appearing in the juvenile court, the SJC reasoned that the legislature did not intend to authorize the juvenile court judges to grant witnesses immunity. Id. The Court recognized that this holding could make it more difficult to deal with juveniles accused of violent crimes, and recommended a legislative solution. 433 Mass. at 523. See also, 433 Mass. at 524, (Ireland, J. concurring) and 433 Mass. at 524 (Greaney, J. dissenting).

Mistake of Fact; Not a Defense To Rape

In Commonwealth v. Lopez, 433 Mass. 722 (2001), the SJC rejected a defendant’s argument that an “honest and reasonable belief as to a complainant’s consent” is a defense to the crime of rape. 433 Mass. at 722. Because rape, as defined in Massachusetts, is a general intent crime the defendant need not have a specific intent to engage in intercourse without the victim’s consent. 433 Mass. at 728. “Although the Commonwealth must prove lack of consent, the ‘elements for rape do not require that the defendant intend the intercourse be without consent.’” 433 Mass. at 727, quoting, Commonwealth v. Grant, 391 Mass. 645, 650 (1984). The relevant inquiry is, “limited to consent in fact, and no mens rea or knowledge as to the lack of consent has ever been required.” Id. Proof that the defendant “intended sexual intercourse by force [or threat of force] coupled with proof that the victim did not in fact consent is sufficient to maintain a conviction.” 433 Mass. at 728. In rejecting a defense based on the defendant’s intent, the Court expressed concern that such a defense would “tend to eviscerate the long-standing rule in this Commonwealth that victims need not use any force to resist an attack. [Citations omitted.] A shift in focus from the victim’s to the defendant’s state of mind might require victims to use physical force in order to communicate an unqualified lack of consent to defeat any honest and reasonable belief as to consent.” 433 Mass. at 729. This, the Court reasoned would be inconsistent with the evolution of the law in the Commonwealth. Id.

Evidence

Sleep Talk

In Commonwealth v. Almeida, 433 Mass. 717 (2001), the Court reversed the defendant's conviction on two counts of indecent assault and battery where out-of-court statements, "Jorge, get off me. Jorge, get off me," made by a child complainant while sleeping were admitted at trial. The Court held that, "[a]dmitting hearsay evidence of statements made while a person is sleeping, . . . would run counter to one of the central principles governing the admissibility of evidence, namely, that the proffered material is reliable." 433 Mass. at 719, citing, Liacos "Massachusetts Evidence" § 8.41 at 477 (7th ed. 1999).

Impeachment By Conviction

In Commonwealth Kalhauser, 52 Mass. App. Ct. 339 (2001), the defendant testified and on cross examination was impeached with a prior conviction. When the conviction was introduced, the trial court admitted evidence of the sentence imposed on the conviction. The Appeals Court held that admission of the evidence of the sentence was error. 52 Mass. App. Ct. at 342. When a party uses a prior conviction to impeach a witness, that party is limited to establishing the identity of the witness as the person named in the record. If the witness answers in the negative or equivocates on the answer then the questioner can use the facts contained in the record of conviction to establish the identity of the witness as the person named in the record of conviction. Those facts, however, do not include the details of the conviction, e.g., the victim's name or circumstances surrounding the event." 52 Mass. App. Ct. at 344. Due to trial counsel's failure to object to the evidence of the sentence, the Appeals Court analyzed this claim under the substantial risk of miscarriage of justice standard and found that there was no such risk. 52 Mass. App. Ct. at 346.

Prior Inconsistent Statement Adopted by Declarant Admissible For it's Probative

Value

In Commonwealth v. Jones, 432 Mass. 623 (2001), the Court held that when a witness "unequivocally adopts an earlier inconsistent statement as true, the adopted statement acquires full probative value." 432 Mass. at 627, citing, Commonwealth v. Fiore, 364 Mass. 819, 823-824 (1974). But, when the witness "later contradicts his adoption of the prior inconsistent statement, the prior statement does not acquire full probative value" and is admissible only for the limited purpose of impeaching the witness. Id., citing, Commonwealth v Campbell, 352 Mass. 387, 395 (1967). When the earlier, inconsistent statement is unequivocally adopted by the witness as true, the judge must instruct the jury that the prior statement may be given full probative effect. In this case, the witness did not unequivocally adopt the prior statement as true. Accordingly, there was no error in the trial judge's refusal to instruct the jury that the prior inconsistent statement could be considered for its probative value.

Competence of Child Witness

In Commonwealth v. Monzon, 51 Mass. App. Ct. 245 (2001), the Appeals Court reviewed the trial court's determination that two child witnesses, ages five and six at the time of trial were competent to testify. Under G.L. c. 233 § 20, any person of "sufficient understanding" may testify as a witness. Competence is evaluated with reference to a two prong test. First, "whether the witness has the general ability or capability to 'observe, remember and give expression to that which she has seen, heard, or experienced'; and [second] whether she has 'understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment.'" 51 Mass. App. Ct. at 248, quoting, Commonwealth v. Brusgulis, 398 Mass. 325, 329 (1986). The party who offers a child witness has the burden of establishing that the child is competent to testify. Id.

In this case, the trial judge's colloquy with the children was inadequate to establish their competence to testify under the first prong of the test. For this reason, the Appeals Court examined their trial testimony to determine whether this test could be met. Based on questions asked of the children about who they lived with, their friends, school and activities, the Appeals Court was satisfied that they were competent to observe, remember and express that which they have observed. 51 Mass. App. Ct. at 249-250. As to the second part of the test—that the child understand the difference between the truth and a lie and the obligation to tell the truth—the Appeals Court upheld the determination that the five year old was competent based on the judge's colloquy in which the five year old evinced a clear understanding of the difference between the truth and a lie. The six year old's answers to the judge's questions however, demonstrated that she had "difficulty with understanding the difference between the truth and a lie." 51 Mass. App. Ct. at 250. Therefore, when the cross-examination of the six year old ended with her answering "no," upon being asked whether she knew the difference between the truth and a lie, the trial judge was obligated to reconsider his competency decision and conduct a further inquiry. 51 Mass. App. Ct. at 252. The Court wrote that, "Judges must carefully craft questions posed to child witnesses to ensure that they are indeed competent. That did not occur here." 51 Mass. App. Ct. at 253. The defendant was granted a new trial on the indictments charging offenses against the six year old.

Police Opinion

At the trial of the case before the Appeals Court in Commonwealth v. Ortiz, 50 Mass. App.Ct. 304 (2000), an undercover police officer twice testified to his opinion that the defendant was a "runner, i.e., 'someone who brings customers to somebody who is selling [drugs].'" 50 Mass. App. Ct. at 306. The Court wrote that while "it was certainly permissible for [the undercover officer] to explain what function a runner performed in the street level sale of drugs, his testimony that he 'believe[d]' the defendant was a runner "amounted] to a personal assurance by the witness that the crime charged had occurred, and thereby constitute[d] an improper intrusion into the fact-finding function of the jury." 50 Mass. App. Ct. at 307, quoting, Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 580 (1998). However, because defense counsel failed to object to this testimony, the Court reviewed the error only to determine whether it created a substantial risk of a miscarriage of justice. It found that there was no such risk and

affirmed the conviction. Id.

Bias, Evidence of Police Brutality

In Commonwealth v. Hall, 50 Mass. App. Ct. 208 (2000), the Appeals Court found error in the exclusion of evidence, (testimony and medical records), offered by the defendant tending to prove that he was beaten by police officers following his arrest. The Court reasoned that such evidence was relevant to the officers' bias, and was admissible to impeach their testimony. 50 Mass.App.Ct. At 212. The Court wrote that, "[i]f on the facts, there is a possibility of bias, even a remote one, the judge has no discretion to bar all inquiry into the subject." [Commonwealth v. Bui, 419 Mass. 392,400 (1995).] The defendant must 'make a plausible showing that the circumstances existed on which the alleged bias is based.' Id. [Additional citation omitted.] 'It is of course clear that the range of evidence that may be elicited for the purpose of establishing bias of a witness is quite broad and that accordingly evidence of police brutality is admissible for such purposes.'" Id. In this case there was a direct credibility battle between the police witnesses and the defense witnesses. Hence, evidence tending to show that the police witnesses were biased was highly relevant. Because it was error to exclude this evidence a new trial was ordered.

Use of Defendant's Post-Miranda Silence

In Commonwealth v. Senior, 433 Mass. 453 the Court held that a defendant who is subjected to a custodial interrogation cannot "pick and choose" the questions he will answer and the questions he will not to answer. Once a defendant begins to answer questions, unless he unequivocally exercises his right to terminate questioning, his silence in response to a specific question or questions may be admitted against him. In this case, the defendant after being Mirandized answered all of the interrogating officer's questions except where he had been drinking on the day of the crime. The Court first considered whether the trial court was correct in ruling that the defendant had, "'voluntarily, knowingly, and intelligently' waived his right to remain silent by indicating that he understood his Miranda rights and by answering [the interrogating officer's] questions after receiving those warnings." 433 Mass. at 462-463. Finding no error in the ruling, the Court next considered whether the defendant's refusal to answer the question was an assertion of his right to cut off questioning. The court analyzed the refusal "'in the context of his willingness to talk both immediately prior to and subsequent to' this particular question." 433 Mass. at 463, quoting, Commonwealth v. Pennellatore, 392 Mass. 382, 387 (1984). The Court held that the defendant's silence in response to one question did not "constitute an affirmative indication 'that he [was] invoking the right he previously waived.'" Id., quoting, Commonwealth v. Roberts, 407 Mass. 731, 734 (1990). If a defendant talks, "what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to." 433 Mass. at 463.

Improper Cross-Examination of Defendant

In Commonwealth v. Francis, 432 Mass. 353 (2000), the Court found error in the use of a non-testifying co-defendant's statements to cross examine the defendant. The statements were

not admissible as statements against the co-defendant's penal interests because, even though the statements contained incriminating material, they sought to shift the blame to the defendant while exonerating the co-defendant. "It was improper for the prosecutor to cross-examine the defendant about incriminating material that derived exclusively from the inadmissible extrajudicial statements of a separately tried co-defendant who did not testify at the defendant's trial." 432 Mass. at 325, citing Douglas v. Alabama, 380 U.S. 415, 419-420 (1965); Robbins v. Small, 371 F.2d 793, 794-795 (1st Cir.), cert. den. 386 U.S. 1033 (1967). Although the cross-examination of the defendant was error, the SJC held that the error was harmless. 432 Mass. at 364-366. Trial counsel did not object during the cross-examination, but did move for a mistrial the following day.

Hearsay, Police Testimony of Results of Registry Check

In Commonwealth v. Randall, 50 Mass. App. Ct. 26 (2000), the Appeals Court found reversible error in the admission over the defendant's objection of a police officer's testimony that a registry check on the license plate of a van showed that it belonged to the defendant. At trial, the defendant argued that this testimony was inadmissible hearsay. The Appeals Court agreed. Because the prosecution used this testimony to argue that the defendant's van was used in the commission of the B&E being tried, the Appeals Court reversed the conviction. The Court reversed even though it acknowledged that the officer's testimony was admissible to prove why he looked at a photograph of the defendant immediately after his pursuit of the van. The error came in the use of the testimony to prove the defendant's ownership of the van. 50 Mass.App.Ct. At 27-28.

Expert

In Commonwealth v. Frangipane, 433 Mass. 527 (2001) the Court found error in the admission of testimony that exceeded an expert witness's field of expertise. In this case, the Commonwealth sought to introduce the testimony of a clinical social worker with extensive experience in working with trauma victims to explain how they may repress the traumatic event and remember it years later. The Commonwealth elicited testimony from this witness establishing that memories can be repressed and recovered later as well as testimony about how the brain functions for this to happen. The SJC found that the expert was qualified to offer an opinion on the fact of dissociative memory loss and recovered memory, 433 Mass. at 533-535, but not to testify "about *how* a trauma victim stores and retrieves or dissociates, a traumatic event." The witness's testimony on how this happens contained, "pronouncements concerning the physical functioning of the brain, a scientific and medical matter" on which the witness had not been qualified to testify. 433 Mass. at 535 (emphasis in original). Because the complainant's credibility was "pivotal" to the Commonwealth's case and the witness's improperly admitted testimony served to "bolster the complainant's credibility" the Court held that this error required a new trial. 433 Mass. at 537.

Discovery

Victim Witness Records

In Commonwealth v. Liang, 434 Mass. 131 (2001), the SJC considered the circumstances under which a defendant may obtain discovery of the records of a victim/witness advocate. The Court held that although advocates' records are generally protected as "work product," 434 Mass. at 134-135, to the extent that they contain exculpatory information, 434 Mass. 135-136, or witness statements as defined in R. 14, Mass. R. Crim. P., they are discoverable. 434 Mass. 137-138. The court placed the "primary burden" for determining whether the advocates' records contain exculpatory information on prosecutors. 434 Mass. at 136. Prosecutors are responsible for "asking advocates about their conversations with victims or witnesses, reviewing the advocates' notes and disclosing any exculpatory evidence therein." Id. Defenders need to be alert specifically to request statements or exculpatory evidence found in the victim witness advocate's records when filling out the pre-trial conference report.

Loss of Potentially Exculpatory Evidence

In Commonwealth v. Harwood, 432 Mass. 290 (2000), the Court upheld up a Superior Court judge's order suppressing the testimony of a Commonwealth witness as a remedy for losing a document that the defendant asserted was exculpatory. 432 Mass. at 290. In so holding, it attributed mishandling of the file by the insurance fraud bureau--an independent insurance industry funded investigatory group--to the Commonwealth. Id. "When a defendant claims he is prejudiced by missing evidence, a judge must weigh the materiality of the evidence and the potential prejudice to the defendant, as well as the culpability of the Commonwealth and its agents." 432 Mass. at 295. The defendant argued that the lost documentary evidence was material and the loss prejudicial as it deprived him of the ability to impeach the credibility of a key Commonwealth witness. 432 Mass. at 296-298. The Court agreed with the defendant's assessment of the value of the lost evidence. It then turned its attention to the culpability of the Commonwealth, writing, "[t]he prosecutor's obligations for proper handling of exculpatory evidence extends to material in the possession or control of members of the prosecutor's staff and 'any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.'" 432 Mass. at 298, quoting, Commonwealth v Woodward, 427 Mass. 659, 679 (1998). The trial court reasoned that the Commonwealth had negligently failed in its duty to preserve evidence that was needed to cross-examine the witness effectively; therefor, the appropriate remedy was suppression of the witness's testimony. The trial court declined to dismiss the indictment due to the conclusion that the Commonwealth had not acted in bad faith. The SJC agreed with the trial court's reasoning and sanction. 432 Mass. at 302-303.

Disposition

CWOF, With Unsupervised Probation and Payment of Money--Not Calculated

As Rest

In Commonwealth v. Rotonda, 434 Mass. 211 (2001), which came before the Court on the Commonwealth's appeal, the Court reviewed a district court order continuing a case without

a finding and conditioning the CWOFF on payment of a sum of money, not documented as restitution, to the complaining witness. The Commonwealth argued that the disposition was unlawful because probationary period was not supervised and was conditioned on payment to the victim. The Court found no error in imposing unsupervised probation as a term of a CWOFF. 434 Mass. at 218-219. However, the payment of money, which was not restitution, to the complaining witness as a condition of the CWOFF, was held to be against public policy. The Court wrote that, “[p]rivate payments exchanged for releases from criminal responsibility erode, if not completely erase, the demarcation between the criminal and civil systems of justice and ‘benefit the individual at the expense of defeating the course of public justice.’” 434 Mass. at 220, quoting, Partridge v. Hood, 120 Mass. 403, 405 (1876). The Court also held that if the trial court complies with G.L. c. 278 § 18, it need not follow the procedures set out in Commonwealth v. Brandano, 359 Mass. 332, 337 (1971), to impose a CWOFF over the Commonwealth’s objection. 434 Mass. at 216. (The Brandano decision sets out the procedure to be followed when requesting that the trial court place a defendant on pre-trial probation over the Commonwealth’s objection.)

Dismissal Over the Objection Of The Commonwealth

In Commonwealth v Peterson, 51 Mass. App. Ct. 779 (2001) the Appeals Court vacated a trial court’s dismissal of complaints and remanded for further proceedings. The Court emphasized that when a trial court seeks to dispose of a case “in the interest of public justice” without trial and over the Commonwealth’s objection it must follow the procedures set forth in Commonwealth v. Brandano, 359 Mass. 332, 335-357 (1971). 51 Mass. App. Ct at 782-783.

Probation

As in years past, a significant proportion of the children committed to the DYS are committed after a probation violation hearing; not upon adjudication as a delinquent child or as a youthful offender. One SJC and two Appeals Court decisions are significant to probation matters. Jake J. v. Commonwealth, 433 Mass. 70 (2000); Commonwealth v. McDonald, 50 Mass. App. Ct. 220 (2000) **review granted** 432 Mass. 1111 (2001) and Commonwealth v. Emmanuel M., Mass. App. Ct. (2001).

In Commonwealth v. Jake J., the Court considered whether a Juvenile Court can release a juvenile with pretrial conditions, and if so, what remedy is available when the juvenile violates the conditions of his release. In Jake, J., the juvenile was before the Juvenile Court on complaints charging shoplifting and assault and battery. He was arraigned and released on \$250.00 cash bail which was posted by his mother. On the day of his release, the juvenile and his mother signed a form, witnessed by a probation officer containing “conditions of release.” The conditions included reporting to a probation officer as well as other, standard conditions. Later, at the pre-trial conference an additional condition requiring the juvenile to “attend school daily on time and obey all rules” was added to the conditions of release. Ultimately the juvenile was found to have violated this condition and was ordered to be held in the custody of the DYS pending disposition of the delinquency complaints.

In reviewing the conditions of release and the eventual jailing of the juvenile, the Court first considered whether, following the decision in Commonwealth v. Dodge, 428 Mass. 860, 864-866 (1999), conditions may be imposed on pre-trial release. It concluded that G.L. c. 276 § 87 “enables a judge, with the defendant’s consent, to place the defendant on pretrial probation and then to set conditions, again with his consent, for his release on personal recognizance or bail.” 433 Mass. at 71 (emphasis added). In this case, the juvenile assented to the conditions of his release. When the Court became aware of a violation of the conditions of pretrial release, it promptly gave the juvenile and his counsel notice of the violation and scheduled a hearing to determine whether the juvenile had in fact violated the conditions of release. The juvenile judge, conducted the violation hearing pursuant to the procedures set out in G.L. c. 276 § 58B, reasoning that there was no express provision for revoking pretrial probation under § 87 and that the provisions in § 58B would protect the juvenile’s due process rights. (By its terms § 58B applies only to the revocation of conditions of release set by the Court after a dangerousness hearing held pursuant to § 58A.)

While upholding the procedure followed in this case, the SJC wrote that in future cases when a Juvenile Court releases a juvenile on conditions, the record must clearly reflect whether the release is on bail or personal recognizance under c. 276 § 58 and that with the juvenile’s consent and agreement he is simultaneously placed on pretrial probation pursuant to § 87. The conditions must be set out in writing and the judge must explain the consequences of violating any of the conditions. 433 Mass. at 76. The Court stressed that these requirements are “matters of substance, not merely of form. Placing a juvenile on conditions of release under § 87 should be more than ‘[a]rtful nomenclature.’” 433 Mass. at 76-77 (citation omitted). In the absence of any statutory procedure for revoking conditions of pretrial release imposed pursuant to § 87, the Court reasoned that the Juvenile Court had the “inherent authority” to revoke such conditions. 433 Mass. at 77. Further, the Court held that the Juvenile Court could properly look to the procedures set out in § 58B. To revoke conditions of pre-trial release, there must be clear and convincing evidence that the juvenile violated the previously established conditions and the judge must conclude that the juvenile is unlikely to abide by any other conditions or combination of conditions. 433 Mass. at 78-79.

In Commonwealth v. McDonald, 50 Mass. App. Ct. 220 (2000) **review granted** 432 Mass. 1111 (2001) the Appeals Court held that conditions of probation must be set by the sentencing judge; not the probation officer. 50 Mass. App. Ct. at 222-223. In McDonald, the docket sheet reflected that as a condition of probation the defendant was to stay away from the victim, who was also the mother of his children. When the probation officer reduced the conditions to writing, he wrote that the defendant was to have no contact with the victim. The defendant signed conditions of probation containing the no contact provision. Later, the defendant sent a letter to the victim about an upcoming care and protection hearing concerning their children. The victim reported this contact to the probation officer who issued a surrender notice alleging that the defendant had violated the no contact order. Prior to the hearing, the defendant moved to dismiss the violation arguing that he had been ordered only to stay away from the victim; not to have no contact with her. The motion to dismiss was denied, the hearing

judge reasoning the terms of the probation constituted a contract which the defendant had accepted. At the subsequent hearing, the defendant was found to be in violation of the no contact condition of probation. On appeal, the Appeals Court reversed the finding of violation and remanded the case for further proceedings to determine whether the judge had ordered that the defendant stay away from the victim or have no contact with her. 50 Mass. App. Ct. at 224. It reasoned that under G.L. c. 276 § 58, it is the sentencing court that sets the probationary conditions that are deemed proper. Therefore, if the judge imposed only a stay away order, the probation officer's no contact directive was not enforceable. 50 Mass. App. Ct. at 222-223. The Appeals Court rejected the argument that the probation conditions are a contract, which the defendant had accepted by signing the conditions, noting that there is "no mutuality of agreement or obligation." 50 Mass. App. Ct. at 223. And, that defendants and judges are not "equal contracting parties." Id.

Commonwealth v. Emmanuel E., 51 Mass. App. Ct. 451 (2001)

Required Finding

In Commonwealth v. Brown, 50 Mass. App. Ct. 253 (2000), police were called to a residence in response to reports of shots being fired outside the house. One witness described three persons who generally looked like the defendants and testified that she had seen three persons running down the street. This witness did not make any in-court identifications. She also testified that after seeing three persons enter an apartment, she saw two of persons leave the apartment, approach a dumpster and the area of a shed, then re-enter the apartment. Police responded to this apartment and heard noises inside, but no one answered the door. A lady and a small child who were identified as residents of the apartment left through the backdoor. When the police entered the apartment they found the defendant and two companions. Upon searching the apartment a 9mm handgun was found under a couch on which two of the defendants were seated. A second gun was found in the dumpster and a third in the shed. All three defendants were convicted on complaints charging possession of a firearm and possession of ammunition. At trial the Commonwealth proceeded on the theory that the defendants either possessed the firearms or were joint venturers in the possession of the firearms. The Appeals Court reversed the convictions.

"To convict on a theory of accessorial responsibility, it is not necessary to show that the defendant himself possessed the [contraband], either actually or constructively, . . . but it is frequently said that it is necessary to show that the defendant aided in the possession and in each other element of the substantive offense." 50 Mass. App. Ct. at 256, quoting, Commonwealth v. James, 30 Mass. App. Ct. 490, 498-499 (1991). Establishing joint venturer liability for possession of a firearm does not require proof that a defendant had actual or constructive possession of the firearm, but does require proof that an identified defendant was an accessory to another identified defendant in possessing a firearm. 50 Mass. App. Ct. at 256. In this case, there was no evidence that any specific defendant aided another defendant in possession of the guns and thus no basis for proving joint venture liability. 50 Mass. App. Ct. at 256-257. As to actual possession, there was no direct evidence of actual possession "such as by observation,

fingerprints or paraffin tests.” 50 Mass. App. Ct. at 257. Further, because there was no evidence identifying the men who were near the shed and the dumpster there was no proof which two of the three may have had actual or constructive possession of the guns found there. “The logical inference that two of the three defendants may each have possessed a gun is not a substitute for proof beyond a reasonable doubt that an identified defendant possessed a specific gun. . . . As juries long have been instructed, ‘it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty.’” 50 Mass. App. Ct. at 258, quoting, Commonwealth v. Webster, 59 Mass. 295, 320 (1850). As to the gun found under the couch, the Court held that the evidence did not prove that any defendant had knowledge that the gun was there. The police did not find the gun until they lifted and moved the couch and none of the defendants made any unusual moves suggesting knowledge of a concealed gun. 50 Mass. App. Ct. at 258.

Jury Issues

Jurors, Bias and Extraneous Influence

Several decisions on issues relating to juries and jurors raise the question, “Does fairness matter?” Or, is the mantra of the appellate courts of the Commonwealth “Finality uber alles.” Commonwealth v. Guisti, 434 Mass. 245 (2001), Commonwealth v. Duran, 435 Mass. 97 (2001) and Toney v. Zarynoffs’ Inc., ___ Mass. App. Ct. ___ (2001). See also, Wheeler, *supra*.

In Guisti, a juror who was hearing evidence in a rape case sent an e-mail in which she stated, “stuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and getting less pay because of it! Just say he’s guilty and lets [sic] get on with our lives!” 434 Mass. 249-250. This message was posted on a “listserv” and read by an attorney who worked for the Legal Aid Society of New York. This attorney sent a letter to CPCs including copies of the juror’s e-mail, as well as a second e-mail in which she asserted that she was only joking. The defendant subsequently moved for a post verdict voir dire of the juror to determine whether the juror was the woman who posted the e-mail message and if so, whether she conveyed this or similar sentiments to other members of the jury. The trial judge denied the motion ruling that the e-mails did not show that the juror was biased or subjected to any extraneous influence.

“An extraneous matter is one that involves information not part of the evidence at trial ‘and raises a serious question of possible prejudice.’” 434 Mass. at 251, quoting, Commonwealth v. Kater, 432 Mass., 404, 412 (2000). The SJC reasoned that, “[a] juror comment regarding the strength of the evidence or his or her opinion of the defendant’s guilt . . . is not an extraneous matter.” 434 Mass. at 252. Therefore, the e-mail merely “reflect[ed] the juror’s subjective view of the defendant’s guilt at that time.” *Id.* Although the comment was improper, it could not be used to impeach the verdict. However, the possibility that the juror received responses to her e-mails, which may have been extraneous influences, required that the case be remanded for a voir dire of the juror. “Where a case is close, as here, a judge should exercise discretion in favor of

conducting a judicial inquiry.” 434 Mass. at 253. The case was remanded for a limited voir dire on whether the juror was in fact the woman who posted the e-mail messages, and, if so, whether she received any responses; the content of the responses; and, whether she had communicated the substance of any responses to any other jury members. At the hearing, the defendant has the burden of proving that the juror was subjected to an extraneous influence. If the defendant meets his burden, then the burden shifts to the Commonwealth to prove beyond a reasonable doubt that the defendant was not prejudiced by the extraneous matters. Id.

The defendant has also sought a new trial arguing that the juror’s e-mail demonstrated juror bias. Although juror bias is “not an extraneous matter, a postverdict inquiry may be appropriate where there is evidence of bias in order to ensure that the defendant received a fair trial.” 434 Mass. at 253-254, citing, Commonwealth v. Laguer, 410 Mass. 89, 97 (1991). On this issue, the SJC held that the defendant did not make “the requisite showing of juror bias to warrant a postverdict inquiry of the juror.” 434 Mass. at 253-254.

Disturbingly absent from the court’s “analysis” in Guisti is any consideration of the fairness or the appearance of fairness in a trial where one juror expresses she has decided the defendant is guilty before the evidence closes. While it may be that jurors “formulate impressions as they hear evidence,” shouldn’t we expect better from the SJC than merely shrugging off those rare cases that come to light in which a juror not only formulates an opinion prematurely but also expresses that opinion in unequivocal terms. Remarkably, the Court concluded that the juror’s e-mail “does not suggest that her mind was closed or that she was influenced by personal feelings or prejudice against this particular defendant.” 434 Mass. at 254. Wouldn’t it have been refreshing if the Court had expressed concern about the fundamental fairness of this proceeding rather than merely busying itself with the nice neat boxes of extraneous influence and bias?

In Commonwealth v. Duran, 435 Mass. 97 (2001), the Court upheld the defendant’s conviction of first degree murder over the defendant’s argument that his trial counsel, who conducted no pre-trial investigation, 435 Mass. at ___, was ineffective. Counsel also failed to use a peremptory challenge on a correctional officer who worked at the facility where the defendant was held pre-trial. Again, the court found no error in allowing the defendant’s keeper to sit as a deliberating juror. The fact that a juror is a correctional officer alone does not disqualify him for jury service or create a presumption of bias. 435 Mass. at ___. Still, is that the only concern. When people are on trial for their life, as they are in a first degree murder case, can’t we do better than this? In this case, there were four alternate jurors. The deliberating correction officer could have easily been designated an alternate or could have been excused. Doesn’t fundamental fairness demand at least this much? As in the pre-trial phase, where defense counsel did nothing, defense counsel acquiesced in the correctional officer’s continued presence on the jury and was content with an order that the officer not report to work for the balance of the trial.

The decision in Toney v. Zarynoff’s Inc., ___ Mass. App. Ct. ___ (2001), concerns a negligence and wrongful death action brought against a restaurant/bar for injuries suffered when

patrons were attacked just outside the premises. Albert Toney, one of the plaintiff's was a , Worcester policeman who was dining at the Ding Ho restaurant in Worcester when he observed an argument between the operator of the restaurant and several patrons. Toney intervened when one man, Johnson, spit in the operator's face. After displaying his badge, Toney convinced Johnson's companions to get Johnson out of the restaurant. Toney and his companions left soon thereafter and were confronted by Johnson immediately upon leaving. Johnson pulled a gun, shooting and badly injuring Toney and one companion and killing a third. Prior to trial the plaintiffs' sought jury voir dire on bias against homosexuals. They argued that the evidence would make it clear that the plaintiffs were homosexuals and accordingly, needed to determine if any potential jurors would be biased against them due to their sexuality. The trial judge refused to question the jury about bias against homosexuals, concluding that this was a "totally extraneous issue' which he would 'hate to inject' into the case."

G.L. c. 234 § 28 first paragraph sets out the questions that a judge is required to ask of potential jurors. In addition to the statutory questions, the judge may, in an exercise of discretion, ask additional questions either upon a party's motion or sua sponte. "A judge's refusal to ask questions beyond those mandated by [§] 28 and Rule 47(a), [Mass. R.Civ.P.], will be upheld unless the judge is shown to have committed an abuse of discretion." When additional questions are requested that raise issues of bias, "the litigant must demonstrate that there is a substantial risk that the case will be decided in whole or in part on the basis of an extraneous issue." Citing, Commonwealth v. Estremera, 383 Mass. 382, 287-289 (1981). Because the SJC has yet to determine "that there 'exists an 'indurated and pervasive prejudice' against homosexuals as a class [citation omitted] and that prospective jurors must be questioned on the subject to determine their bias even in those cases where the homosexuality of one of the parties may be a central issue in the case," the Appeals Court held that there was no error in the trial judge's refusal to ask any questions about bias against homosexuals. The Appeals Court did observe that, "where there was the possibility of prejudice against homosexuals among prospective jurors, we think that the better practice would have been to ask the question." Mass. App. Ct. , quoting, Commonwealth v Ramos, 31 Mass. App. Ct. 362, 364 (1991). Trial judges are encouraged to "respond generously" to motions for individual voir dire about possible prejudice. __ Mass. App. Ct. at . ____. Nonetheless it did not find an abuse of discretion in the trial judge's refusal to inquire about possible bias against homosexuals.

When judges are asked to pose questions about juror bias, they are required to "make a brief examination of the facts of the case to determine if the question is relevant and important and whether sufficient prejudice is manifested to warrant such an inquiry. A judge may also assume that the party who desires the inquiry has evaluated the risk that the inquiry may activate latent bias in some jurors and insult others without uncovering bias in those jurors who refuse to acknowledge their bias. The ultimate decision as to whether the question should be asked lies within the judge's sound discretion, but the judge must be assisted in this decision by the party seeking the inquiry. That party bears the burden of demonstrating the importance and relevance of the question and the risk of prejudice inuring from its omission by furnishing the judge with a brief summary of the evidence to be presented and an affidavit or other means indicating the manner and means by which the subject will be introduced or play a role in the case." If the

judge decides to ask the question, the inquiry may be made of the venire collectively, individually or by incorporation into a preliminary statement about the case. __ Mass. App. Ct. at ____.

The Court commented that it was not persuaded that the outcome would have been any different had the question been asked due to the plaintiff's difficult burden of proof.

Specific Unanimity

In Commonwealth v. Zane Z., 51 Mass. App. Ct. 135 (2000), the Appeals Court held that a juvenile charged with rape was entitled to a specific unanimity instruction where there was evidence of two incidents either one of which could have formed the basis for the conviction. "A general unanimity instruction informs the jury that the verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged. 51 Mass. App. Ct. at 138, quoting, Commonwealth v. Keevan, 400 Mass. 557, 566-567 (1987). The failure to give the specific unanimity instruction requested by the juvenile was reversible error. It is important to note that counsel for the juvenile both requested the instruction in writing and objected to the trial judge's refusal to give it, arguing that some of the jurors might believe that first incident of possible rape occurred and others might believe that the second incident occurred leading to unanimous agreement that there was a rape, but no unanimity on which rape occurred. By specifically requesting the instruction and objecting to the failure to give it, the record was preserved for appeal.

Jury Instructions

Commonwealth v. Davis, 52 Mass. App. Ct. 75 (2001)--trial court's erroneous answer to jury question on laws of leniency, which was asked with respect to evaluating the testimony of a cooperating witness (the only witness to implicate the defendant) was reversible error.

Misjoinder

Commonwealth v. Jacobs, 52 Mass. App. Ct. 38 (2001)--error found in joinder of two unrelated complaints, both charging indecent assault and battery upon different victims for trial. In Jacobs, the gravamen of the complaints was that the defendant, a licensed chiropractor, had acted impermissibly in massaging one complainant's buttocks and in touching the second complainant's breast tissue. The two incidents occurred more than three years apart. The Commonwealth argued that joinder was appropriate as the two complaints were "related" as that term is used in Rule 9(a)(1), Mass.R.Crim.P. The Appeals Court disagreed noting that the more than three year gap between the two incidents was inconsistent with the idea that the defendant had engaged in a continuing or connected series of episodes that were parts of a single scheme. 52 Mass. App. Ct. at 40-42. The two incidents did not demonstrate a pattern of distinctive conduct or the cohesion of repeated incidents. 52 Mass. App. Ct. at 43. Additionally, the Court reasoned that evidence of the one incident would not be admissible at the trial of the other

incident. “The time interval, lack of connectedness, absence of any markedly distinctive method of operation, would speak as strongly against the admission of bad acts as they do against allowance of joinder of the offense for trial under the rule.” 52 Mass. App. Ct. at 44. Because the joinder was improper, the convictions could stand only if the misjoinder was proven to be harmless. 52 Mass. App. Ct. at 46-47. Here, the Commonwealth could not show that error was harmless and a new trial was ordered on both complaints.

LEGISLATIVE UPDATE

There has been little legislative activity this year. The roundtable bill is before the legislature again. The current version of the roundtable legislation is included in the materials that follow. (2000, Session Laws, Appropriations for FY 2001; Senate 968.) Citizens For Juvenile Justice has again proposed legislation that would authorize incarcerating some CHINS kids. (Senate 876.) A copy of this legislation is also included in the materials that follow. Finally, a chart of legislation that includes many of the bills affecting children that were filed in the current legislative session is included in the materials that follow. It is this writer’s understanding that none of the bills referenced herein, including the CHINS proposal have not advanced very far. Most have either died in committee or been referred for study. The CHINS legislation may be considered in December. To track specific bills follow the instructions below.

Specific bills can be tracked by going to the state web site as follows:
<http://www.state.ma.us/legis/bills/st00876.htm> (this address will get you to bill number “876,” to get to bill number 968 or another bill, substitute “968” or the appropriate bill number for “876” in the address above).