DELINQUENCY DECISIONAL UPDATE
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Prepared by Kenneth J King[1]
Deputy Director, Suffolk University Law School
Juvenile Justice Center

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 the practice of criminal law. There is no substitute for regular review of the advance sheets to stay abreast of the decisional law.[2] Unlike years past, no attempt has been made to include legislative activity in this update. That being said, however, there has been little significant legislative activity that bears on the rights of juveniles.

There have been significant decisions limiting the authority of a judge to place a defendant on pre-trial probation or to dismiss a case. See, Commonwealth v. Tim T., 437 Mass. 592 (2002); Commonwealth v. DiBennadetto, 436 Mass. 310 (2002). The use of spontaneous utterances has apparently increased greatly and, as in years past, conditions of probation and procedures for conducting probation violation hearings continue to generate a great deal of decisional law.

The cases discussed below are just some of the decisions that reflect trends in the practice of criminal defense generally and delinquency law more specifically.

I. PRE-TRIAL DISMISSAL

Commonwealth v. Sattelmair, 55 Mass. App. Ct. 384 (2002)–The Appeals Court reversed the trial court's dismissal of complaint for failure to follow procedures set out in Commonwealth v. Brandano, 359 Mass. 332 (1971). The Court's decision emphasizes the need for an affidavit from one having personal knowledge to support the dismissal. In this case, the affidavit filed by defense counsel was not adequate. Because dismissal over the Commonwealth's objections "implicates the separation of powers prescribed by art. 30 of the Massachusetts Declaration of Rights [citations omitted] . . strict compliance with the [Brandano] procedures is essential." At 387. See, Brandano, supra. Because the affidavit in support of the Brandano motion was signed by counsel, not "a person with personal knowledge of the factual basis of the motion[,]" id., quoting, Mass.R.Crim.P. 13(a)(2), the required procedures were not followed and the dismissal

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[1] With grateful thanks for the editorial assistance of Perry Moriearty, a clinical instructor with the Suffolk University Law School Juvenile Justice Center and an exemplary delinquency defense attorney.

[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 and are available on line at www.state.ma.us/cpcs.

was an error of law. The lower court's dismissal was therefore reversed even though the Commonwealth did not file an affidavit to counter the defendant's factual assertions. At 387-388.

Commonwealth v. DiBennadetto, 436 Mass. 310 (2002)–The SJC held that a trial judge cannot rehear de novo a clerk's determination that there is probable cause to issue a complaint. Here, there had been a clerk's hearing on a civilian application for a complaint under G.L. c. 218 §§ 35, 35A, and the complaint had issued. At the arraignment, the defendant complained of the process used to issue the complaint and the judge granted a de novo show-cause hearing at which he determined that the complaint was not supported by probable cause. On appeal, the SJC held that the proper remedy when a complaint has been issued without probable cause is a motion to dismiss. The Court wrote that "[a]fter issuance of a complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate (or judge), [citation omitted], for a violation of the integrity of the proceeding, [citation omitted], or for any other challenge to the validity of the complaint." At 313. The opinion also states that an unreasonable restriction on the opportunity of the accused to present witnesses at a show-cause hearing before a clerk-magistrate would constitute a denial of the right to be heard in opposition to process issuing, as guaranteed by the statute. See, G.L. c. 218 § 35A.

II. FIFTH AMENDMENT/STATEMENTS

A. Juvenile Statements

Commonwealth v. Leon L., 52 Mass. App. Ct. 823 (2001)–The suppression of statements made by two 14 year-old boys was upheld on appeal, although not on the same reasoning as used by the trial court. The boys, Leon and Carl, were both suspects in an arson. Both boys were recent immigrants to the U.S. and were accompanied to the interrogation by their mothers. Neither the boys nor their mothers were fully fluent in English. In separate interviews, the Miranda warnings were interpreted for the mothers and the boys by a Spanish-speaking police officer who was not involved in the investigation. The mothers and the boys each signed a Miranda waiver form that was written in either English or Spanish. On the defendants' motions, the trial court suppressed the boys' statements, reasoning that the mothers' language difficulties and lack of familiarity with the U.S. justice system prevented them from acting as interested adults. Alternatively, it ruled that the statements were not voluntarily made. On appeal, the Appeals Court reversed on the interested adult question, but affirmed the determination that the statements were not voluntarily made. As to the interested adult issue, the Appeals Court emphasized that the test for determining whether an adult is an interested adult is "narrowly tailored." At 827. Although one boy's mother testified that she did not really understand the Miranda warnings, the evidence also showed that each mother spoke alone briefly with their son and repeatedly interrupted the interrogation to ask the interpreter what was happening. Based on this evidence, the Court held that the mothers, "[v]iewed from the perspective of the officials conducting the interview, assessed by objective standards, [had] the capacity to appreciate the juvenile's situation and render advice." At 826-827, quoting, Commonwealth v. Phillip S., 414 Mass. 804, 809 (1993). On the voluntariness issue, the Court upheld the trial court's finding

based on evidence of the boys' lack of familiarity with the legal system, their emotional upset, and the conduct of the interrogating officer, who raised his voice, pressured the boys to make a statement and slapped the table during one interview. The Court noted that one boy admitted involvement in the arson only after he speaking with the officer who acted as the interpreter and encouraged him to admit any wrongdoing, while the other boy told his mother that he "would be locked up alone" if he did not plead guilty. Based on this evidence, the Appeals Court held that the "totality of the circumstances surrounding the making of the statements themselves" demonstrated that the statements "were not the product of a 'rational intellect' and a 'free will'." At 828, quoting, Commonwealth v. Edwards, 420 Mass. 666, 673 (1995), additional citations omitted. Due process requires that the Court inquire into the voluntariness of a statement separately from the validity of the waiver. Id.

Commonwealth v. Alfonso A., 53 Mass. App. Ct. 279 (2002), **FAR Granted**– In this case, the Appeals Court reversed the denial of the juvenile's motion to suppress statements, ruling that merely asking the juvenile whether he wanted the police to bring his mother to the scene of the interrogation did not provide him with an opportunity to consult with an adult who was "informed of and understood" the Miranda warnings. In the absence of evidence establishing that the juvenile was highly educated, sophisticated, experienced or mature, the Commonwealth did not meets its heavy burden of proving the validity of the waiver by proof beyond a reasonable doubt and the statement should have been suppressed. The SJC granted further review of this case and it was argued in early October. The SJC will likely issue its decision this winter.

B. Telephone Rights/Offers of Lenity

Commonwealth v. Alicea, 55 Mass. App. Ct. 505 (2002)–The defendant voluntarily accompanied a police detective to the station to give a statement about the murder of a neighbor. At the time the defendant went to the station, he was not a suspect. About one hour later, while he was making his first, exculpatory statement, he became a suspect based on a store surveillance videotape that showed him buying duct tape. (The victim was found bound with duct tape and a receipt from the store was in the victim's apartment.) From this point on, the defendant was not free to leave. Pursuant to G.L. c. 276 §33A, when a person is held in custody at a police station, the police must inform him forthwith of his right to use a telephone and allow him to do so within an hour. Here, the police failed to inform the defendant of his right to use the telephone for another eight hours, and after he had made a second, inculpatory statement. The trial judge found that the failure to inform the defendant of his telephone rights was intentional. This finding was based on evidence that the officers who questioned him were "veterans with more than 70 years' aggregate experience" and that the printed form given to the defendant to sign several hours later had his §33A rights on it. At 510. When the defendant was allowed to use the telephone, he asked that the person he was speaking it get him a "good lawyer." At 508-509. Because the police intentionally deprived the defendant of his §33A rights, "suppression [was] required." At 510, citing, Commonwealth v. Aicea, 428 Mass. 711, 716 (1999). The Commonwealth did not challenge this finding of the trial judge, conceding that the violation was intentional and that suppression was the appropriate remedy. With respect to

the lenity issue, before the defendant made the second statement, a police Lieutenant had told the defendant's wife that the defendant would be given a reduced sentence (three to five years) if he cooperated. The wife promptly conveyed this offer to the defendant. The Court concluded that the offer of lenity was, "prohibited conduct . . . the effect of which was to nullify the second statement." Commonwealth v. Brandweiz, 435 Mass. 623, 634 (2002). Further, after making his telephone call, the defendant made a third statement. The Commonwealth appealed from the order suppressing the third statement. Because the third statement was "itself the product of [the earlier] statements," it too was properly suppressed "under a 'fruit of the poisonous tree' or 'cat out of the bag' analysis." At 511, quoting, Commonwealth v. Marquez, 434 Mass. 370, 378-379 (2001). To use the later statement, the Commonwealth was required to prove that the "connection between the police misconduct and the challenged statement 'has become so attenuated as to dissipate the taint.'" At 511-512, quoting, Commonwealth v. Fredette, 396 Mass. 455, 459 (1985). Here, the Commonwealth could not meet this burden. The third statement was properly seen as the product of the unlawful inducement and necessary to receive the benefit of the promised reduction in sentence. Id.

C. Counsel

Commonwealth v. LeClair, 55 Mass. App. Ct. 238 (2002)–Where a defendant requests counsel, interrogation must cease. However, when the defendant re-initiates conversation, questioning may resume so long as a knowing, intelligent and voluntary waiver or counsel is obtained first. Here, although the defendant twice invoked his right to counsel, the Court held that his asking a police officer if he was in a lot of trouble, being told that he was, twice asking whether he needed an attorney, and being told that he had to decide this on his own, "evinced a desire for more generalized conversation at least sufficient to permit further inquiry about whether the defendant continued to stand by his earlier invocation of his right to counsel." At 245. Because the further interview was preceded by reading the Miranda warnings anew, and substantive questioning began only after the defendant freely and voluntarily waived his right to counsel and agreed to discuss the incident, the waiver was upheld. Id. The Court emphasized that the defendant was not badgered or provoked to waive counsel. Id.

Commonwealth v. Obershaw, 435 Mass. 794 (2002)–Several hours after voluntarily staying at the police station to assist in a search for his missing brother and twice being advised of his Miranda rights, the defendant made an admission inculpating himself in his brother's murder. Prior to making the admission, the defendant had been advised that he was free to leave and was allowed to play with his dogs outside the police station without an escort. Later, when the police asked that he lead them to his brother's body, the defendant asked if he could talk to a lawyer first. He was offered use of the phone to call a lawyer, but declined and again asked to go outside to play with his dogs. He was permitted to do so while under police guard. While playing with his dogs for the second time, he told one of the officers watching him that he did not plan the killing. The defendant then agreed to show the police where he had disposed of his brother's body. The defendant was advised of his Miranda rights a third time while en route and made further admissions. On appeal, he claimed that the police had not honored his request for counsel and had continued to question him after this request. He also maintained that his

statements came more than six hours after his arrest and were in violation of the "six hour 'safe harbor' rule." At 799, citing, Commonwealth v. Rosario, 422 Mass. 48, 57-58 (1996). The Court rejected both arguments. The Court held that the defendant's asking whether he could talk with a lawyer before taking the police to his brother's body was not "an affirmative request for an attorney." It wrote that "equivocal musings concerning the need or an attorney do not constitute such an affirmative request." At 800. As to the claim of a violation of the six hour safe harbor, the Court upheld the trial court's finding that the defendant was not arrested for more than seven hours after he had agreed to remain at the station and that during this time he had been repeatedly told that he was free to leave. Even though his car was seized at one time during the morning for chemical testing, the defendant's freedom of movement was not restrained as evidenced by the fact that he was permitted to walk outside with his dogs without a guard. At 802.

D. Interpreter

Commonwealth v. Seng, 436 Mass. 537 (2002)-The defendant, whose first language was Khmer, was given Miranda warnings in Khmer, followed by the standard English language warnings. The Khmer version of Miranda was neither complete nor accurate. This version failed to inform the defendant that he could remain silent and that anything he said could be used against him in court. Indeed, the Khmer version implied that the defendant must tell the truth and could choose to not answer a question only if he did not understand the question. The Khmer warnings also failed to inform the defendant that an attorney would be appointed for him if he requested and if he could not afford an attorney. At 497, n. 4. Before the English language warnings, which were full and complete, were read, the officer told the defendant that he was going to read in English what he had just read in Khmer. Evidence demonstrated that the defendant responded to questions in English appropriately and, when he was interrogated in Khmer, his answers were consistent with the answers he gave in English to questions asked in English. The Court held that where "two sets of warnings are given and one is defective or incomplete and the circumstances are such that the defendant would be confused by the discrepancy or omission, a waiver so obtained is not voluntary." At 500.

E. Waiver of Fifth Amendment Rights by Testimony

Commonwealth v. King, 436 Mass. 252 (2002)–The alleged victim of a domestic assault testified on voir dire recanting her prior accusation of abuse. Following the voir dire, the victim was appointed counsel and refused to testify at the defendant's trial, invoking her Fifth Amendment privilige against self-incrimination. The trial court upheld this refusal, noting that the victim had not been advised of her Fifth Amendment privilege prior to the voir dire. The case proceeded to trial using the victim's spontaneous utterances as substantive evidence of the defendant's guilt. (This aspect of the case is discussed below in the section on.) On appeal, the defendant argued that the victim had waived her Fifth Amendment privilege by testifying at the voir dire. The SJC remanded for further proceedings to determine whether the victim's voir dire testimony constituted a waiver. At 257-260. "It has long been the law in Massachusetts that if an oridnary witness, not a party to a cause, voluntarily testifies to a fact of an incriminating

nature he waives his privilege as to subsequent questions seeking related facts." At 258-259, quoting, Taylor v. Commonwealth, 369 Mass. 183, 189 (1975). "[T]he doctrine of waiver by prior testimony 'is not based on any true waiver theory at all in the usual sense of a voluntary, intelligent relinquishment of a known right.' Id. Rather, it is based on two pragmatic ramifications of the witness's prior voluntary, but potentially incriminating, testimony. One is that 'when a witness has freely testified as to incriminating facts, continued testimony as to details would no longer tend to incriminate.' Id. at 190. The second rationale given in support of the doctrine of waiver by testimony is that 'allowing the testimony to remain in a witness-selected posture would result in serious, unjust distortion; and the witness, having chosen to answer when he could have remained silent, 'cannot be allowed to state such facts only as he pleases to state, and to withhold other facts.'' Id., quoting Commonwealth v. Price, 76 Mass. 472, 10 Gray 472, 476 (1858)." At. 259. A waiver by testimony requires only that the waiver be voluntary; not that it be knowing and intelligent. At 259. Whether the witness knew of the Fifth Amendment privilege is only one consideration in determining whether the waiver was voluntary. Id. Because the trial judge "improperly truncated" the waiver inquiry by reducing it to a "single factor," the Court remanded this case to the trial court for a determination of whether the witness's voir dire testimony was voluntary despite the failure of the court to inform her of her Fifth Amendment rights.

III. SEARCH AND SEIZURE

A. Inventory

Commonwealth v. Seng, 436 Mass. 537 (2002)-When police officers conducting an inventory search of the defendant's wallet copied bank account numbers from the back of a bank card (not an ATM, debit or charge card), they exceeded the scope of a permissible inventory search and conducted, instead, a investigatory search for which a warrant was required.. Quoting from the Appeals Court decision in Commonwealth v. Sullo, 26 Mass. App. Ct. 766, 770 (1989), the Court wrote that, "'What the police may not do is hunt for information by sifting and reading materials taken from an arrestee which do not so declare themselves.' [Citation omitted.] Recording this information would not serve any of the generally accepted objectives of an inventory search preceding incarceration." At 553. The Court emphasized, however, that it was not deciding whether police officers conducting a lawful inventory search could copy account numbers from cards such as debit or credit cards that could be used to obtain something of value. At 554, n. 14. *N.B.*: Under Article 14, all inventory searches must be conducted pursuant to written policies that specifically set out how the search is to be conducted. Faced with a case where account numbers of such cards are recorded and used as evidence or to find evidence, counsel should consult the inventory policies to see if they address this issue.

B. Warrant Informant Information

Commonwealth v. Alfonso A., 53 Mass. App. Ct. 279 (2002), **FAR Granted**–The Appeals Court reversed the denial of the juvenile's motion to suppress the fruits of a search conducted pursuant to a warrant reasoning that the first-time informant's reliability was not shown by the affidavit and the informant's information was not so highly detailed as to qualify as a "self-verifying tip." The SJC granted further review of this case, and it was argued in early October. The SJC will likely issue its decision this winter.

C. Administrative Search/Ruse

Commonwealth v. Rosenthal, 52 Mass. App. Ct. 707 (2001)–In this case, a state trooper working at a race track received information from an informant that a person named Rosenthal was dealing in cocaine at the track, was in Barn 16 and was about to leave for the night. The informant did not say how he had come by this information and had never provided information to the police before. The trooper went to Barn 16, found Rosenthal and announced his intention to conduct an administrative search of Rosenthal's tack room. He asked Rosenthal to come with him to the tack room. En route, the trooper observed the corner of a black plastic bag sticking from Rosenthal's pocket and bulges in both pants pockets. The trooper asked the defendant to remove the black plastic bag from his sweatshirt pocket. The defendant complied and showed him two medals to be worn on a chain. The trooper then asked what was in his pants pockets, and the defendant removed a wallet from his left pocket. The trooper asked that he empty his right pocket, and the defendant declined. The trooper said he was in fear of his life and that he would have to use force to search the pocket if the defendant did not empty it. Ultimately, the defendant acquiesced and produced several packets containing cocaine. Because the informant did not reveal the basis of his knowledge and had not proved reliable in the past, the Appeals Court held that there was no reasonable suspicion to conduct a threshold inquiry. At 710. This fact, however, did not prevent the trooper from going to the barn to see what he might find or from engaging Rosenthal in a consensual encounter. At 711-712. When, however, the trooper used the ruse of conducting an administrative search, to conduct a criminal investigation, he crossed the line. The Appeals Court held that when "a search [is] initiated on the pretext of administrative authority but had as its sole purpose the investigation of criminal activity, the fruits of that search may not be used in a criminal proceeding unless an independent, constitutionally sound basis exists, at or prior to the sham invocation of such administrative authority that would justify the search." At 715. In this case, there was no such constitutionally sound basis on which to uphold the search.

D. Consent/Plain View

Commonwealth v. Hinds, 437 Mass. 54 (2002)–The SJC held that the defendant's consent to search a computer for email allowed the officer to open files that he reasonably believed contained child pornography when he found the titles to these files in "plain view" while searching the computer for email. Based on prior investigations, the officer recognized the file names as containing contraband.

E. Reasonable Suspicion

Commonwealth v. Smith, 55 Mass. App. Ct. 569 (2002)–The Court held that there was no reasonable suspicion to justify a threshold inquiry where a police officer observed the defendant, a young black male who was astride a bike, talking to a middle aged man and woman on a public street in a high crime area and motioning the two to an alleyway. After making such observations, the officer then followed the three. Once in the alley, the man put his hand into his pocket. Seeing this and believing that a drug transaction was about to occur, the officer identified himself and asked what was going on. Receiving no answer, he told the three to stop. Neither the defendant nor the middle aged man and woman were known to be drug dealers or users and the officer saw no transaction of furtive gesture. The alley was adjacent to an auto shop that was open for business. The man and woman stopped, but the defendant rode his bike toward the officer and was knocked to the ground by the officer. A struggle ensued and the defendant spit out a white powder substance which later tested positive for cocaine. The Appeals Court held that the defendant was stopped for constitutional purposes when the officer commanded him to stop. "[The] initial order to the defendant and to the man and woman who were with him to stop communicated 'what a reasonable person would understand as a command that would be enforced by police power,' and, hence, constituted a seizure fo the defendant for constitutional purposes." At 572, citing, Commonwealth v. Barros, 435 Mass. 171, 176 (2001). At the time this order was given, there was no lawful basis for the stop. That is, the officer did not have an objectively reasonable suspicion of criminal activity, based on specific and articulable facts, necessary to justify such a stop." At 572-573. Because the defendant sought to flee from and struggled to avoid a threshold inquiry and not an arrest he could not be charged with resisting arrest. At 574-575. See, G.L. c. 268 §32B.

F. Urine Screens

Board of Education of Independent School District No. 92 Of Pottawatomie County v. Earls, ___ U.S. ___, 122 S.Ct. 2559 (2002)–In a 5-4 decision, the Court reversed a decision of the Tenth Circuit Court of Appeals, 242 F.3d 1254, which stuck down a school policy requiring all students participating in "competitive" extracurricular activities to submit to random urine screens. The school's policy extended to activities such as the Academic Team, pom-pom, choir, band, and Future Homemakers of America as well as interscholastic athletics. The Tenth Circuit had struck down the policy because there was no evidence of a substantial drug problem in the school district or that a suspicion-based policy was unworkable. Before the Supreme Court, the students argued that there need be some level of individualized suspicion to justify the search. The Court disagreed, noting that it had long held that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." At 2564, citations omitted. The so-called "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment have, "in the context of safety and administrative regulations" permitted searches that are unrelated to law enforcement "when 'special needs,' beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Id., see, National Treasury Employees v. Von Raab, 489 U.S. 656,

(1989); Vernonia School District No. 47J v. Acton 515 U.S. 646 (1998). In New Jersey v. T.L.O., 469 U.S. 325, 339-340 (1985), the Court held that special needs "inhere in the public school context." At 2564. Based on generalized evidence that school aged children continue to use drugs, and the fact that the policy did not serve law enforcement ends, the Court upheld the school board's policy of random testing as reasonable, even in the absence of evidence that a suspicion-based policy was unworkable or that there was an immediate need to be addressed. This decision may mark a significant departure from the Court's prior special needs cases, which emphasized both the immediacy of the governmental interest at stake and the impracticality of a suspicion-based policy to meet this interest.

IV. PROBATION

A. Pretrial Probation

Commonwealth v. Tim T., 437 Mass. 592 (2002)-The defendant juvenile was indicted on three counts of rape of a child and three counts of indecent assault and battery on a child under fourteen. The alleged victim was his sister. The juvenile sought to dispose of the case with a two year period of pretrial probation, which included conditions of residential and outpatient treatment. He plead that his own history as a victim of sexual abuse was a strong mitigating factor. The Commonwealth objected to the proposed disposition and moved for trial. The trial judge reported three questions of law to the Appeals Court, and the SJC granted the juvenile's motion for direct appellate review. The SJC answered only the first question: whether "[p]ursuant to G.L. c. 276 § 87 and using the procedure described in Commonwealth v. Brandano, 359 Mass. 332 (1971), may a court place a criminal defendant on pretrial probation for a period of years over the Commonwealth's objection." At 592. The Court answered this question in the negative, reasoning that c. 276 § 87 does not authorize the Court to impose a "disposition" over the Commonwealth's objection. At 594. Rather, in order to dispose of a case without the Commonwealth's agreement, a defendant must tender a plea or admission to sufficient facts under c. 278 § 18. (Neither charge could be continued without a finding. See, G.L. c. 265 §§ 13B & 23.) Because a lengthy continuance as a condition of pretrial probation would unfairly prejudice the Commonwealth at trial in the event that a violation of the terms of the probationary period caused the case to be restored to the trial list, (e.g., witnesses may be lost or their memories fade, evidence could disintegrate, etc.), such a continuance could not be granted without the Commonwealth's consent. At. 596-597. The SJC noted that a "court seeking to use pretrial probation under § 87 as a form of disposition without obtaining a guilty plea or admission to sufficient fats that is required for a disposition under G.L. c. 278 § 18, thus faces the awkward dilemma of ordering a probationary period commensurate with the severity of the crime and of sufficient length to accomplish the desired rehabilitative purpose, while simultaneously avoiding the prejudice to the Commonwealth inherent in any substantial continuance of a trial." At 596. This decision casts doubt on the continued validity of a plea to pretrial probation under the Brandano procedures in all but cases where the probationary period would be quite short. See also, Commonwealth v Rotonda, 434 Mass. 211, 218 n.9 (2001).

B. Terms and Conditions

Commonwealth v. McDonald, 435 Mass. 1005 (2001)–The SJC affirmed the decision of the Appeals Court, reported at 50 Mass. App. Ct. 220 (2000), that conditions of probation must be ordered by the judge and cannot be imposed by a probation officer. Further, the Court recognized a distinction between a "no contact" requirement as a condition of probation and a "stay away" order. "An order to 'stay away'. . . is not the equivalent of an order of 'no contact' . . . . 'Pursuant to a 'stay away' order, the defendant may not come within a specified distance of the protected party, usually stated in the order, but written or oral contact between the parties is not prohibited. By contrast, a 'no contact' order mandates that the defendant not communicate by any means with the protected party, in addition to remaining physically separated. Thus, a 'no contact' order is broader than a 'stay away' order." At 1006, quoting, Commonwealth v. Finase, 435 Mass. 310, 314, 757 N.E.2d 721 (2001).

Commonwealth v. Lapointe, 435 Mass. 455 (2001)–The defendant was convicted of indecent assault and battery on a minor child, his daughter. This was the defendant's second conviction for indecent assault and battery on a minor and, during the trial, the victim testified that the defendant had also molested her sister, another of the defendant's daughters. The defendant was sentenced to a term of incarceration followed by a twenty year probationary term that included special conditions which prohibited the defendant from being alone with or residing with any minor children, including his own children or any children or grandchildren that he may have. The defendant was ordered not to be alone with his younger son even though he had no history of molesting boys. The defendant appealed the special conditions, arguing that they infringed on his rights to association and procreation and constituted cruel and unusual punishment. The Court rejected these arguments, holding that the special conditions were reasonably related to his conviction, within the "great latitude" judges are allowed when imposing conditions of probation and that the twenty year period was expressly authorized by G.L. c. 276 §87, which permits a judge to place a persons on probation "for such time and upon such conditions as it deems proper . . . after a finding or verdict of guilty." At 459. So long as probation conditions are "reasonably related " to the goals of sentencing and probation, the terms are enforceable even if they infringe on constitutionally protected rights. At 459. The Court held that in view of the defendant's multiple convictions, these conditions were reasonably related to the goals of sentencing and did not impermissibly infringe on his constitutional rights.

Commonwealth v. Lally, 55 Mass. App. Ct. 601–The defendant was convicted of several offenses, including possession of a Class D substance, and was placed on probation. As a term of his probation, he was ordered to undergo an evaluation for alcohol and drugs and "attend treatment as deemed necessary." The defendant was evaluated by a psychologist, who concluded that the defendant did not need any more treatment than he was already receiving, but recommended that random urine screens for drugs and alcohol be made a part of the defendant's probation. The probation officer presented the defendant with revised terms of probation to sign, which included the condition of random urine screens. The defendant refused to sign the revised conditions and was given a violation notice for this refusal. The defendant was found in violation of his probation and a one year suspended sentence was imposed. On appeal, the

defendant acknowledged that refusing to sign probation conditions is a violation of probation, but argued that the condition of random urine screens had not been ordered by the judge and was instead imposed by the probation officer. The Appeals Court agreed. The Court reasoned that the condition that the defendant undergo treatment as deemed necessary was too ambiguous to be read to include the requirement that he submit to random urine screens. At 603. Although random urine screens are a valid term of probation, this condition must be ordered by the judge, not the probation officer. The violation hearing could not be used to modify the conditions to include the condition improperly added by the probation officer then find the defendant in violation for failing to sign the modified conditions. At 603.

C. Restitution

Commonwealth v. McIntyre, 436 Mass. 879 (2002)–As a condition of probation on a conviction of assault and battery with a dangerous weapon, the trial judge ordered that the defendant pay a sum of restitution that included amounts for repairing damage done to the victim's car by the defendant at the time of the assault and battery. The defendant was not charged with any offense for causing property damage. On appeal, the defendant argued that an order of restitution is limited by G.L. c. 276 § 92, which authorizes "restitution or reparation to the person injured by him in the commission of his offense." Because the car was not damaged in the commission of the assault and battery, the defendant contended that the restitution award exceeded the scope of the statute. The SJC disagreed. The Court held that the source of a sentencing court's power to order restitution is found in G.L. c. 276 § 87, the general probation statute, not § 92. Section 87 gives sentencing judges "great latitude" to fashion probationary conditions. Probation conditions will be upheld so long as they are "reasonably related to the goals of sentencing and probation." At 833. The Court noted that "restitution best serves penal objectives when it bears a proper relationship to the crime of conviction, both in kind and proportion." At 833. As to the measure of restitution, the Court held that, "the scope of restitution is limited to 'loss or damage [that] is causally connected to the offense and bears a significant relationship to the offense.' [Citation omitted.] Furthermore, 'we look to the underlying facts of the charged offense, not the name of the crime [of which the defendant was convicted, or] to which the defendant entered a plea.'" (Citation omitted.) At 835. Because damage to the victim's car "bore a significant causal relationship to the crime of which the defendant was convicted," the Court upheld the restitution order. At 835.

D. Revocation

1. Failure to Make Written Findings of Evidence Relied Upon

Commonwealth v. MacDonald, 53 Mass. App. Ct. 156 (2001)–see below at 2.

2. Consideration of Inadmissible Character Evidence at The Adjudicatory

Commonwealth v. MacDonald, 53 Mass. App. Ct. 156 (2001)–The defendant was brought before the district court on a probation violation notice alleging that he had twice been

rearrested. At the hearing, the probation officer offered both police reports over defense counsel's objection. When the second report was offered, the probation officer told the judge that the victim of this offense was available to testify and asked if he should call the victim or continue with his summary. The judge told him to finish the summary. The probation officer then summarized the defendant's criminal record, "57 entries on his record, and he's all of 19 years old . . . [I]n my opinion, [the defendant] is not a candidate for probation . . ." At 158. Defense counsel objected to the summary of the defendant's record as inadmissible and highly prejudicial character evidence at the adjudicatory stage of the hearing. The probation officer recommended that the balance of a suspended sentence be imposed then called the victim as a witness. The victim of the defendant's second offense then testified that the defendant had been among a group who had jumped the victim in his yard and called him a racial epithet. As the group beat the victim, the defendant bit him on the face. The victim further testified that he was 100% certain of his identification of the defendant. On appeal, the defendant claimed error in the admission of his criminal record at the adjudicatory stage of the hearing and in the court's failure to make written findings of the reason for the violation. The record of the district court proceedings did not include either the police reports or the defendant's criminal record. On appeal, the Appeals Court assumed that no use was made of these documents. At 160. The Appeals Court agreed that the trial judge's failure to make findings of the evidence relied upon to find the defendant in violation of a condition of his probation and to provide probationer with a statement of his reasons for revoking probation were not error. The defendant had not objected to the district court judge's failure of make written findings and did not make a written request for findings. The Appeals Court held that the failure to make findings was harmless beyond a reasonable doubt due to victim's clear and unequivocal testimony that the defendant was among a group who attacked the victim in the victim's yard, calling him names and bating him. At 160. Additionally, the Appeals Court determined that the record did not support the claim that the defendant's criminal record was admitted at the adjudicatory stage of the hearing over his objection. Seen in context, the probation officer's comments were merely part of his case summary, not part of the evidence. Moreover, any error stemming from this use of the record was harmless beyond a reasonable doubt. At 161. The Court wrote that the trial judge "undoubtedly" knew that he could not consider information about the defendant's criminal record on the violations issue and "assume[d] that he correctly instructed himself on that point." At 161, citing, Cummings v. National Shawmut Bank, 284 Mass. 563, 568 (1933); Commonwealth v. Gurney, 13 Mass. App. Ct. 391, 394-395 (1982)

3. Use of Hearsay Evidence At Revocation Hearing

Commonwealth v. Harrigan, 53 Mass. App. Ct. 147 (2001)–The defendant was charged with assault and battery. At his probation revocation hearings, police officer testified to responding to the defendant's residence for a domestic disturbance call. There he interviewed the defendant's girlfriend, who he observed to be very "upset and crying." She had what appeared to be a fresh bruise on her right cheek and her sweatshirt had blood spots on the sleeve. At 147-148. The girlfriend told the police officer that the defendant had hit her, that he had "punched her in the face," that her cheek hurt, that she had been drinking and that she was worried for her son's safety. At the hearing, the girlfriend testified for the defendant that because she was drinking, she

did not remember calling the police that night and that she had hurt herself falling out of a car. Several other witnesses testified on behalf of the defendant. At the conclusion of the hearing, the trial judge made written findings crediting the officer's testimony and finding the defendant in violation of his probation. The defendant appealed, claiming that basing the finding that the defendant had violated his probation on the officer's testimony violated Rule 6(b) of the District Court Rules for Probation Violation Proceedings, which provides that hearsay alone cannot be used to prove a probation violation unless the court finds that the hearsay his "substantially trustworthy and demonstrably reliable" and, when the violation is criminal behavior, that there is "good cause for proceeding without a witness" who has personal knowledge of the evidence to be presented. At 150. The Commentary to Rule 6(b) makes it clear, however, that this Rule concerns occasions when the defendant is deprived of the opportunity to cross examine a person with personal knowledge of the facts to test the reliability of that evidence. Here, the Court held that, because the girlfriend testified on behalf of the defendant, he was not deprived an opportunity to test the reliability of the evidence. Therefore, Rule 6(b) was not applicable to this case. The Court found no error in crediting the officer's testimony to find the defendant in violation of his probation. At 150-151.

Commonwealth v. Janovich, 55 Mass. App. Ct. 42 (2002)–This case brought another probation violation based on allegations of domestic violence to the Appeals Court. Here, the defendant's girlfriend testified on behalf of the Commonwealth at the preliminary probation violation hearing, describing two incidents in which the defendant abused her. She was cross-examined at this hearing by defense counsel. Based on her testimony, the court found probable cause to believe that the defendant had violated his probation and ordered that he be held pending a final hearing. By the time of the final hearing, two weeks later, the girlfriend had recanted her testimony and appeared as a defense witness. At the final hearing, the Commonwealth introduced a summary of the girlfriend's testimony through the probation officer who had questioned her at the preliminary hearing. The defendant was found in violation of his probation based on the probation officer's summary of the testimony at the preliminary hearing. The Appeals Court considered whether the defendant's due process rights were violated by the use of the victim's recanted testimony. It noted that probation revocations may be based on reliable hearsay evidence when there is good cause for not using a witness with personal knowledge. At 44. Hearsay is considered to be reliable when it falls withing a firmly rooted exception to the hearsay rule. At. 44. Here, the Appeals Court reasoned that the probation officer's summary of the girlfriend's testimony at the preliminary hearing was admissible under the prior recorded testimony exception to the hearsay rule. Although a transcript or tape of the victim's prior testimony was preferable, due to the pragmatic difficulties in securing a transcript, the summary sufficed. At 45 and n. 4. To be admissible, the prior testimony must be from a witness who is now unavailable to testify and it must be reliable. The witness's recantation of her prior testimony made her unavailable as a matter of law. At 45-46. The preliminary hearing testimony was deemed to be reliable, because it was consistent with and corroborated by her report of the assaults to the probation department, which was closer in time to the events in question than the preliminary hearing testimony. At 46. The Appeals Court also determined that the testimony was admissible for substantive purposes as a prior inconsistent statement given under oath in a court proceeding. Because these exceptions to the hearsay rule are "firmly established," there

was no violation of the defendant's confrontation rights. At 49-50.

V. EVIDENCE

A. Spontaneous Utterance

The Supreme Judicial Court and the Appeals Court decided a number of cases in which the admissibility of spontaneous utterances as an exception to the hearsay rule was discussed. The sheer volume of cases on spontaneous utterances suggests that parties are making use of spontaneous utterances as part of their case in chief.

The general rule is that a statement is admissible as a spontaneous utterance when "the utterance was made under the influence of the exciting event it qualifies, characterizes, or explains, and before the declarant has had time to contrive or fabricate." Commonwealth v. Correa, 437 Mass. 197, 202 (2002). In Correa, a first degree murder appeal, the Court found no error in the admission of evidence that, following a shooting, an unknown person in the crowd said, "why did Sammy have to do that?" At 201-202. (The defendant's first name was Samuel.) The fact that the declarant was unidentified was not reason to exclude the testimony. In Commonwealth v. Kenney, 437 Mass. 141 (2002), another first degree murder appeal, the Court upheld the admission in evidence of statements made by two young boys who had just witnessed their mother's murder that, "daddy shot mommy." Here, the defendant claimed error in the admission of statements made by the boys since other statements made in response to police questioning "undermined any spontaneity in the children's answers." At 151. The Court held that the trial judge did not abuse its discretion in admitting the subsequent statements as spontaneous utterances, "given the children's substantial youth, the severely traumatic event that they had witnessed, and their continued reaction throughout the day to the incident." At 151. The fact that the later statements were made in response to questioning did not "necessarily render these statements inadmissible." At 151. As to the defendant's argument that testimony that the children identified him as the shooter was inadmissible because they did not testify, the Court wrote that, "because the statements were admissible as spontaneous utterances, there was no requirement that they also be admissible under the separate rule regarding extrajudicial identifications." At 152. Finally, the court held that there was no error in admitting testimony that the children called him daddy, because this testimony was not offered to prove the truth of the fact asserted; that is, that the defendant was their father. Rather, it was offered and admissible for the limited purpose of explaining the children's use of that term; that is, that they used the word "daddy" to refer to the defendant. At 152.

Commonwealth v. King, 436 Mass. 252 (2002)–This yet another case where the victim retracted her allegations prior to trial and the Commonwealth proceeded using spontaneous utterances as the sole substantive evidence of the defendant's misconduct. On appeal, the defendant argued that due to the victim's recantation, her "spontaneous utterances" were not reliable, a necessary precondition to their admission as substantive evidence. The SJC disagreed, noting that the trial judge has "broad discretion to determine whether the foundational requirements of the exception have been met." At 255. Further, it wrote that the "broad

discretion to determine whether the prerequisites of the exception are met does not suggest that a trial judge has the authority to exclude a spontaneous utterance that meets those prerequisites on the ground, that in light of other evidence, the statement no longer appears reliable." At 256. The statement is deemed to be reliable by the circumstances of its utterance. Evidence that undermines the statement's reliability goes to the weight to be accorded the statement by the trier of fact; not to its admissibility. At 256-257.

In Commonwealth v. Carter, 54 Mass. App. Ct. 629 (2002), the Appeals Court found no error in admitting a victim's statements to a police officer, who arrived on the scene shortly after the incident described in the statements. At the defendant's trial for assault and battery and threats, the only witness was the police officer, who testified to statements made by the defendant's mother at the time the police responded to her home. The mother, who appeared "guarded [and] nervous," recounted that the defendant had assaulted and threatened her. On cross examination, the officer acknowledged that the mother was not "weeping" when he spoke with her and that she appeared to be "controlled and guarded." At 630. The defendant pointed to this testimony to argue that the Commonwealth had not established that the statement was made under the influence of the exciting event. The Appeals court disagreed, writing that the trial judge has "broad discretion" to determine that a statement is made "before the exciting influence . . . lose[s] its sway and [is] dissipated. . . . There can be no definite and fixed limit of time. Each case must depend upon its own circumstances." Similarly, the trial judge has wide discretion in determining whether the declarant is still under the influence of the event when the statement is made. While conceding that the question was close, the Appeals Court found no abuse of discretion in admitting the statements in this case. At 632.

Commonwealth v. Pierowski, 54 Mass. App. Ct. 707 (2002) appears to be one of the only appellate decisions in the last year to find error in the admission of a victim's post-incident statement. In Pierowski, the "statement" was a head nod. At 708. This fact alone serves as an important reminder that out-of-court conduct which is communicative and which a party seeks to elicit through testimony is subject to an objection on hearsay grounds. The victim, the defendant's wife's first language was Polish. The police officer who interviewed her at a hospital spoke no Polish. The victim was described as being "visibly upset," had blood on her leg, and her "crying was constant." Her eyes were very red and there was an odor of alcohol coming from her breath. Id. The officer had a very difficult time interviewing the victim and testified that due to the language barrier, the "questioning period took quite a while," and that he "really couldn't get [the story] . . . clear from her." At some point, the victim told the officer a "story" about her husband killing and burying a deformed cat. The officer then asked her if that was "the reason why [the defendant] stabbed you." The victim responded by nodding her head "up and down." At 709. After canvassing the factors that have been considered by the courts in determining whether a statement has adequate indicia of reliability to be introduced as a spontaneous utterance (which include the declarant's state of mind, length of time between incident and the statement, whether the statement was volunteered or was an answer to a question, and whether the statement was made at the scene of the "exciting incident"), at 710, the Court concluded that admission of the statement was error. It noted that the head nod "occurred toward the end of forty-five minutes of questioning, in which the only narrative by the declarant was the deformed kitten story, an

event occurring one or more days prior to the stabbing incident." This coupled with the serious language barrier lead the court to conclude that the "statement" was not made under the influence of an exciting event and "does not meet a foundational requirement of the [spontaneous utterance] exception." At 711. In sum, the head nod was elicited as the result of persistent questioning and not under the uncontrolled domination of the exciting event. Id.

Commonwealth v. Joyner, 55 Mass. App. Ct. 412 (2002) upheld the admission of a victim's statement as a spontaneous utterance despite considerable evidence that the victim had a motive to lie. The Court ruled that the victim's credibility was not a permissible threshold consideration in determining whether to admit a statement as a spontaneous utterance. The Court wrote that to qualify as admissible, the trial judge must determine whether the statement "was spontaneous to a degree which reasonably negated premeditation or possible fabrication and . . . tended to qualify, characterize and explain the underlying event [Citations omitted.] At bottom, the determination is based on whether the statement [was] made [while the declarant] was under the influence of an exciting event and before the declarant has had time to contrive or fabricate the remark, and thus . . . has sufficient indicia of reliability.'" At 414-415, quoting, Commonwealth v. Zagranski, 408 Mass. 278, 285 (1990). The trial judge "should not inquire as to whether the statement is in fact credible." Id., quoting, Commonwealth v. King, 436 Mass. 252, 255-256 (2002). Determinations of the credibility of the statement are the sole province of the trier of the facts. At 416-417.

On a related point, the Appeals Court found no error in the trial court's refusal to give a missing witness instruction as requested by the defendant. The opinion emphasized that giving the instruction is left to the sound discretion of the trial judge and the trial judge's decision will be reversed only if there is an abuse of this discretion. No abuse of discretion was found based on evidence that the Commonwealth had tried to locate the victims, had sent cruisers to pick them up from their residence in Lynn, had subpoenaed them and had contacted family members all to no avail.

In Commonwealth v. Johnson, 54 Mass. App. Ct. 224 (2002), the Appeals Court held that spontaneous utterances were properly admitted where the victim claimed her 5th Amendment privilege to declined to testify at trial.

Other cases in which the spontaneous utterance exception was discussed include:

Commonwealth v. Santiago, 437 Mass. 620 (2002), (no error in admitting as a spontaneous utterance a statement made by the victim's mother which recoutned an earlier statement made to her by the defendant).

Commonwealth v. Davis, 54 Mass. App. Ct. 756 (2002), (spontaneous utterances are not subject to the same limitations on admissibility as are "fresh complaints" even though the spontaneous utterance may also be a fresh complaint; but admission of fresh complaint evidence in addition to spontaneous utterances that are fresh complaints may result in undue prejudice which was not found in this case).

Commonwealth v. Dunn, 56 Mass. App. Ct. 89 (2002), (error found in admitting as a spontaneous utterance a statement made by the victim during a preconceived plan to have the defendant arrested; the statement was cummulative of properly admitted evidence therefore there was no prejudice).

Commonwealth v. Ivy, 55 Mass. App. Ct. 851 (2002), (no error in admitting victim's statements made while at the hospital the morning after the incident where the victim continued to be under the influence of the exciting event).

B. Fresh Complaint–Videotape

Commonwealth v. Montgomery, 52 Mass. App. Ct. 831 (2001)–The defendant claimed error in the admission of a videotape of a sexual assault complainant's interview in which she described the details of the assault. In Commonwealth v. Quincy Q., 434 Mass. 859 (2001), the Court had held that admission of a videotape of the victim answering questions posed by her parents and the defendant's mother erroneously "permitted the complainant to corroborate her own testimony and bolster her own credibility." 434 Mass. at 868. See also, Commonwealth v. Peters, 429 Mass. 22, 30 (1999). Here, however, the Court found no error, ruling that the defendant opened the door to admission of the videotape by cross examining the complainant on the "numerous apparent discrepancies between her direct testimony and her videotaped statement." At 833. During a sidebar, the defense counsel affirmatively stated his desire to play the videotape for the jury and enter it in evidence. Because admission of the tape was an obvious tactical choice, the defendant could not complain of it on appeal. At 833.

C. Gang Affiliation

Commonwealth v. Correia, 437 Mass. 197 (2002)–There was no error in admission of evidence of the defendant's gang affiliation where this evidence was relevant to the defendant's motive. The Court held that admission of such evidence was within the trial judge's discretion. The trial judge had conducted individual voir dire to ensure that jurors would remain impartial notwithstanding the evidence of gang affiliation, gave a limiting instruction when this evidence was admitted and reminded the jurors that they had sworn not to be influenced by evidence of gang membership. Final instructions also included a limiting instruction on this issue. See, Commonwealth v. Maldonado, 429 Mass. 502, 504-505, 505 n. 1.

D. Hearsay–RMV Certificate

Commonwealth v. Blake, 52 Mass. App. Ct. 526 (2001)–The defendant was convicted of operating a motor vehicle after his license had been revoked pursuant to an OUI violation. At trial, the Commonwealth introduced copies of notices from the registry of motor vehicles informing the defendant that his operator's license had been revoked. The notices showed that the defendant had been convicted of "DWI Liquor" a number of times between 1990 and 1995 as well as driving to endanger and other offenses. The notices were admitted over the defendant's

objection, and the trial judge denied the defendant's request that they be redacted to exclude all references to conviction other than the DWI Liquor convictions. On appeal, the defendant claimed that the notices were, in effect, irrelevant and highly prejudicial evidence of his propensity to commit motor vehicle violations. The Appeals Court rejected these arguments, noting that the certificates were admissible pursuant to G.L. c. 90 § 30, which provides for the admissibility of registry certificates to prove the facts contained therein. The Court did agree that the "better practice" would have been to redact extraneous entries, but that there was no risk of error in this case. At 528-529.

E. Hearsay–Business Cards

Commonwealth v. Ramirez, 55 Mass. App. Ct. 224 (2002)–The Court held that it was error to admit the defendant's business cards and a health club receipt, which had a New York address, into evidence to prove that the defendant was from New York. The assertion on the cards was an out of court statement that was being admitted to prove the fact of the mattes asserted. At 227. This error was, however, harmless as it went to proof of a collateral issue. The health club receipt was admissible for the limited purpose of establishing the defendant had held himself out to be "George Lassu." At 228.

F. Medical Report

Commonwealth v. Schutte, 52 Mass. App. Ct. 796 (2001)–At a trial for OUI Liquor, the defendant offered a letter from his doctor which explained his poor performance on field sobriety tests by reference to his chronic inner ear problems. The defendant argued that the report was admissible under G.L. c. 233 § 79G, which authorizes admission of a medical report provided that the opposing party is served with a copy of the report and a written notice of intent to offer the report in evidence by certified mail, return receipt requested at least ten days in advance of the introduction of the report. An affidavit of notice and the return receipt from the mailing of the report must be filed with the clerk forthwith after the return receipt is received, and the report must be signed under the pains and penalties of perjury. The statute requires that the report be prepared by a physician who has examined or treated the person on whose behalf the report is offered. The Appeals Court reversed the conviction holding that it was error to exclude the report, which strongly bolstered the defense theory that the defendant failed the field sobriety tests due to a balance problem caused by a medical condition.

G. Privilege

In The Matter of Laura L., 54 Mass. App. Ct. 853 (2002)–Pursuant to the SJC decision in Commonwealth v. Lamb, 365 Mass. 265, 270 (1974), when a person is to be evaluated by a court-appointed psychologist, they must be informed that the evaluation is not confidential and that their communications to the psychologist will be reported to the court. In this case, the Appeals Court considered whether such statements could be reported in the absence of a finding that the subject of the evaluation made a knowing, intelligent and voluntary waiver of their psychotherapist-patient privilege. See, G.L. c. 233 § 20B. The Court held that they could not. It

wrote that the issue is not whether the Lamb warning was given, but whether it was effective when "given to an individual who might not understand it." At 861. Statements made to a psychotherapist pursuant to a court-ordered evaluation may be admitted in evidence only if the waiver of the psychotherapist privilege was knowing and voluntary. Id.

H. Prior Identification

Commonwealth v. Clements, 436 Mass. 190 (2002)– In this case, the SJC reiterated the holding of Commonwealth v. Daye, 393 Mass. 55 (1984), that a witness's grand jury testimony is admissible as substantive evidence provided that the witness can be effectively cross-examined at trial regarding the accuracy of the identification and that the identification was not coerced and was "more than a mere confirmation of denial of an allegation by the interrogator." At 192, quoting, Daye, 393 Mass. At 73-74. When the prior testimony is offered as substantive evidence of an essential element of the crime, there must be "at least some corroborative evidence if there is to be sufficient evidence to warrant a conviction." At 193. In this case, the Court discussed the corroboration requirement of Daye and held that it was met by testimony that the witness, who later recanted his identification of the defendant, had selected a photograph of the defendant as the murderer approximately five weeks after the murder. This qualified as "other evidence tending to prove the issue." At 194, quoting, Daye, 393 Mass. at 75.

Commonwealth v. Carrasquillo, 54 Mass. App. Ct. 363 (2002)–Grand jury testimony of an identification was properly admitted as substantive evidence when the witness retreated from this testimony at trial. The trial judge ruled that the grand jury testimony was not coerced. The Appeals Court also held that the trial judge properly admitted as an excited utterance the victim's statement of identification made within an hour of his shooting while at the hospital. Although the witness had had time to reflect, he was still under the influence of the exciting event when the statement was made.

I. Display of Physical Characteristics

Commonwealth v. Poggi, 53 Mass. App. Ct. 685 (2002)–The Appeals Court error found in the trial court's refusal to allow the defendant to display tattoos on his arms to the jury. The defendant was on trial for armed robbery and misidentification was the defense. Evidence demonstrated that at time of the robbery the defendant had prominent tattoos on his forearms and hands. This evidence provided the necessary foundation for the proposed demonstration. At 688. None of he identifying witnesses testified to seeing tattoos on the perpetrator. The Court held that the display of physical characteristics was demonstrative evidence and not testimonial; therefore, the defendant did not subject himself to cross-examination by displaying his tattoos and did not have to testify in order to display his arms. At 687-688. Because no physical evidence corroborated the identification witnesses' testimony and their descriptions of the perpetrator were of a person shorter than the defendant, this error not harmless and a new trial was ordered. At 689.

J. Improper Cross Impeachment by Pre-Trial Silence

Commonwealth v. Brissett, 55 Mass. App. Ct. 862 (2002)–The appeals court reversed the defendant's conviction of assault and battery and assault battery by means of a dangerous weapon where the prosecutor impeached alibi witnesses with their failure to come forward before trial without laying the proper foundation for such impeachment. Prior to allowing impeachment of a witness by pre-trial silence, there must be evidence showing that "the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, that the witness had reason to make the information available, that he was familiar with the means of reporting it to the proper authorities, and that the defendant or his lawyer, or both did not ask the witness to refrain from doing so." At 865, citations omitted.

VI.. DISCOVERY

Commonwealth v. Sheehan, 435 Mass. 183 (2001)–In a decision that resulted in a majority opinion and three concurring opinions, the Court reversed the defendant's conviction on charges of rape of a child (the defendant's ten year-old nephew). Reversal was due to the trial court's erroneous determination that the victim's counseling records did not contain exculpatory information. On appeal, the Court reviewed the records in question and determined that their production would have materially aided the defense that the complainant was a very immature child who had trouble distinguishing fantasy from reality and who fantasized to escape anxiety-provoking situations. At 186. The decision reflects the difficulty that the Court has with the Bishop/Fuller procedures for the disclosure of confidential information that may materially aid a defendant. See, Commonwealth v. Bishop, 416 Mass. 169, 179-183 (1993); Commonwealth v. Fuller, 423 Mass. 216, 226 (1996). In a separate concurring opinion, Justice Greaney took issue with the "tone" of the concurrence of Justice Sosman in which Justices Cowin and Ireland joined. At 191-192. Justice Greaney was concerned that these justices indicated too much willingness to overturn the Bishop/Fuller protocols, which he noted were "formulated after considerable deliberation by unanimous courts (assisted in the Fuller case by extensive briefing from many interested parties) in order to balance two strongly competing interests, those embodied in statutory privileges which, . . . Protect the rights of those claiming to be victims . . . and the interests of defendants in obtaining a fair trial." Id. Justice Sosman's opinion noted the irony that, had the Fuller procedures been in place at the time of the defendant's trial, the records which resulted in the grant of a new trial would have never been produced in court and would never have been reviewed. At 197. This decision may indicate the willingness of at least three members of the Court to look anew at the procedures now utilized when the defendant seeks access to privileged records in order to mount a defense.

VII. JOINT VENTURE

Commonwealth v. Colon, 52 Mass. App. Ct. 725 (2001)–In a joint venture armed robbery prosecution, the jury instructions must make it clear that the Commonwealth must prove that the defendant joint venturer knew that the co-defendant principal was armed by proof beyond a reasonable doubt and that the joint venture defendant shared the intent that the weapon be used to effectuate the robbery. At 729-730. The defendant's conviction was reversed due to an error in

the jury instructions which relieved the Commonwealth of the burden of proving that the defendant knew that the principal was armed. See, Commonwealth v. Claudio, 418 Mass. 103 (1994).

Rendon-Alvarez v. Commonwealth, 437 Mass. 40 (2002)–The defendant was convicted at trial of trafficking in cocaine as a joint venturer and acquitted of being a principal. On appeal, the Appeals Court reversed the conviction (on grounds other than the sufficiency of the evidence) and remanded the case for a new trial. After remand, the defendant moved to dismiss, arguing that there was insufficient evidence of a joint venture at the first trial and for him to be tried again would violate his right not to be placed twice in jeopardy for the same offense. This motion was denied, and the defendant filed a petition for relief under G.L. c. 211 § 3 filed. The SJC agreed and ordered dismissal of the indictment.

VIII. JOINT POSSESSION

Commonwealth v. Blevin, Mass. App. Ct., 10/7/2002–The Court reversed the defendant's conviction on charges of trafficking in cocaine due to the failure of the trial court to give an instruction on simple joint possession of a controlled substance for personal use. A trial judge is required to instruct on a lesser included offense "when the evidence permits a fining" of guilt on that offense. "An instruction of simple joint possession is warranted when the evidence permits a finding that 'two or more persons simultaneously and jointly acquire possession of a drug for their own use intending only to share it together.'" At ___, quoting, Commonwealth v. Johnson, 413 Mass. 598, 604 (1992). Here, where there was evidence that the defendant and two friends pooled their monies and went together to jointly negotiate the purchase of one and a half ounces of cocaine, the instruction on simple joint possession as a lesser included offense of trafficking was required.

IX. POST CONVICTION

A. Expungement

Commonwealth v. Gavin G, 437 Mass. 470 (2002)–Following the dismissal of complaints charging the juvenile with disorderly conduct and affray, the juvenile court on motion made by the juvenile entered an order directing the Commissioner of Probation and the police department that had arrested the juvenile to expunge the juvenile's probation and arrest records respectively. The Commissioner, but not the police department, appealed the expungement order. In an opinion that thoroughly canvassed the sealing statutes, G.L. c. 276 §§ 100A, 100B and 100C, the Court concluded that a juvenile court has no authority to order the probation department to expunge its records. The Court first distinguished the decision in Police Commissioner of Boston v. Municipal Court of the Dorchester District, 374 Mass. 640 (1978), which held that juvenile courts may order the expungement of police arrest records. The Court wrote that the holding in Police Commissioner was premised not only on the "unique goals of the juvenile justice system," but also on "the complete absence of any legislative scheme governing dissemination of the records in question." At 472-473. In contrast, the dissemination of and access to juvenile probation records is comprehensively regulated under § 100B and G.L. c. 119 §§ 65 & 60A (closing juvenile proceedings to the public and limiting the use of juvenile court records). The Court specifically noted that neither juvenile nor adult probation records are public records under § 100A and that only law enforcement agencies, courts and appointing authorities are allowed access to juvenile records. At 474. Anyone else who seeks access to juvenile probation records must be told that "no record exists." Additionally, under § 100B, a juvenile may apply to have a probation record sealed three years following the conclusion of any disposition imposed on a delinquency complaint, provided that the juvenile has not been adjudicated delinquent or convicted of a criminal offense in any jurisdiction in the preceding three years. In view of these comprehensive protections, and despite the lack of a provision that allows a juvenile whose case is dismissed or who is found not guilty to apply for the immediate sealing of such records, the Court held that sealing under §100B is the juvenile's sole remedy. Contrast § 100C, which provides for the immediate sealing of adult records if the adult is acquitted, a "no bill" is returned by a grand jury, no probable cause is found, the charges are dismissed or the charges are nol prossed.

B. 25(b)(2) Motion Post-Conviction Relief

Commonwealth v. Guy G., 53 Mass. App. Ct. 271 (2001)–The defendant was convicted by a jury on two complaints charging violation of G.L. c. 272 §16 (open and gross lewdness and lascivious behavior) and of G.L. c. 272 § 53 (lewd, wanton and lascivious person in speech or behavior). Following the trial, he filed a motion for a new trial and a motion pursuant to Mass.R.Crim.P. 25(b)(2) to set aside the verdict on the § 16 offense and enter a finding of delinquency on the included offense of indecent exposure, also described in § 53. Both post-trial motions were denied and the defendant noticed his appeal from his convictions as well as from

the denial of his post-trial motions. The basic allegations were that while being tutored by a female peer in an open study carol at his high school, the defendant told his tutor that "he hated to see sixteen-year-old girls with flat chests" and tried to throw some pens down her shirt. Then he leaned back in his swiver chair, pulled up his shirt, lowered his low-slung baggy pants and his shorts, and exposed his penis to her, saying, "Isn't that the biggest you've ever seen?" After a few moments, he pulled his pants back up. At 273. On appeal, he claimed that the prosecution had failed to prove all the essential elements of a §16 offense. In sum, a conviction under § 16 requires proof that the defendant exposed his genitals to one or more persons, that he did so intentionally and "openly" in that the intended or recklessly disregarded a substantial risk of public exposure, that the act was done to produce alarm or shock and that one or more persons were in fact alarmed or shocked. The defendant argued that there was insufficient proof of the "alarm or shock" elements of the offense. The Court disagreed, relying on the tutor's testimony she was "in shock," "didn't know what to think," was "upset," "sad," and "angry" about the defendant's actions. At 274. As to the § 53 offense, which requires proof that the defendant committed or publicly solicited another to commit a sexual act, that the act involved touching the genitals or buttocks or the female breasts, that this was done for the purpose of sexual arousal or gratification, or for the purpose of offending other people, and that the act was committed in public place. Here, the defendant argued that there was insufficient proof that the act was committed in a public place. Based on evidence that the carol was not enclosed, that a teacher rotated between the room with the carol and an adjoining classroom and that others were in the room with the carol, the Appeals Court rejected this argument. At 275. Based on his convictions, the defendant was committed to the DYS. As a result of his conviction of the § 16 offense, he was required to register as a sex offender. See, G.L. c. 6 § 178C. (G.L. c. 6 § 178C has since been amended to required registration only after a second conviction for a violation of § 16.)

Due to the registration requirement, the defendant filed his post-trial motion under Rule 25(b)(2) seeking a reduction in the conviction to the lesser included offense of indecent exposure. The trial judge apparently denied this motion, ruling that although he was uncertain that indecent exposure was a lesser included offense of the § 16 violation, because he had not been asked to instruct the jury on this offense, he did not think that the could reduce the jury's verdict and that under the rule he could only "reduce the case to any offense included within the complaint, and this was not inlcuded within the complaint." At 277 n.10. At the hearing on the post-trial motion, the defendant's counsel was frank in the desire to avoid registration requirements. Court clinic reports which documented the defendant's ADHD and concluded that he was not a sexual predator and was not at risk of becoming a psychopath were sumbitted in support of this motion. On appeal, the Court concluded that the "judge had discretion under the rule to 'ameliorate injustice,' Commonwealth v. Woodward, 427 Mass. 659, 667 (1998), and counsel for the juvenile argued that favorable action on the motion would have just such an effect." At 276. Due to the § 16, felony conviction, the defendant not only was required to register as a sex offender, but also had been expelled from school, see, G.L. c 71 § 37H1/2, "[leaving him] to the educational opportunities that could be provided by the DYS." Id. The decision acknowledges long-standing precedent that indecent exposure is a lesser included offense of the § 16 charge. At 277-278, n.13, see, Commonwealth v. Fitta, 391 Mass. 394, 396 (1984). Finally, the five day limit expressed in the first sentence of Rule 25(b)(2) does not limit the time in which a motion seeking a reduction in the degree of guilt filed under the second sentence of 25(b)(2). The Appeals Court

remanded this matter to the trial court for consideration of the merits of the Rule 25(b)(2) motion, writing that, "The discretion involved, to be carefully and sparingly exercised, is in the first instance for the trial judge." At 278.

X. IDEA

Commonwealth v. Nathaniel N, 54 Mass. App. Ct. 200 (2002)–The juvenile was charged with possession of marijuana in school. The case arose out of a search at the school which was occasioned by a teacher observing what was believed to be a drug transaction in which the juvenile was participant. The decision contains no discussion of the legality of the search. On appeal and at trial, the juvenile, a special needs student, invoked the provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., claiming the delinquency complaint should have been dismissed because it could result in a change of his educational placement (commitment to the DYS) and he had not been given the protections of the IDEA. The Appeals Court disagreed and upheld the conviction reasoning that the IDEA authorizes schools to report criminal activities to the appropriate authorities, 20 U.S.C. § 1415 (k)(9)(A), and that there was no evidence that the school called the police to avoid responsibilities under the IDEA. At 204.

XI. SUBSTANTIVE OFFENSES

A. Accessory

Commonwealth v. Perez, 437 Mass. 186 (2002)–The appropriate unit of prosecution for accessory after the fact is the underlying felony(ies). Here, although the defendant aided only one principal by assisting in his flight, he could be indicted on two counts of accessory after the fact where the principal had committed two felonies; i.e., two assault and batteries with a dangerous weapon by shooting into a crowd from close range. The decision contains a detailed discussion of the elements of the offense of accessory after the fact.

B. Assault and Battery

Commonwealth v. Cohen, 55 Mass. App. Ct. 358 (2002)–The Appeals Court upheld the defendant's conviction of assault and battery based on evidence that he spat on the victim. The Court held that spitting is an offensive touching which, if not consented to, is an assault and battery. "It cannot be gainsaid that intentionally spitting on someone is an indirect touching that is repulsive, physically offensive, and violated the victim's personal integrity." At 359.

Commonwealth v. Lamont L., 54 Mass. App. Ct. 748 (2002)–The defendant was convicted of assault and battery as a youthful offender as a lesser included offense on an indictment that charged assault and battery with a dangerous weapon. He was sentenced as a youthful offender. Because assault and battery is not an indictable offense, his conviction and sentence as a youthful offender were vacated on appeal and the case was remanded to the juvenile court for an adjudication of the defendant as a delinquent child and re-sentencing. The Appeals

Court found no error in admitting a photo array from which the defendant was identified at trial to show the circumstances under which the victim identified him, even though identity was not in issue and no error in giving a consciousness of guilt instruction even though the evidence did not clearly establish that he had fled the scene only upon the arrival of the police and not before they arrived.

C. Indecent Assault and Battery

Commonwealth v. Castillo, 55 Mass. App. Ct. 563 (2002)–The defendant was convicted on one of two complaints charging indecent assault and battery on a child over fourteen. The evidence established that on one day, in separate incidents, the defendant first forced his tongue into mouth of the victim, then a few minutes later put his hand down her shirt and into her bra and touched the victim's breast and nipple. The defendant was convicted on only one of the two complaints and appealed claiming that the forced insertion of his tongue into the victim's mouth was not an indecent assault and battery as a matter of law. He further argued that because the court could not determine which incident lead to the conviction, his conviction could not be upheld. The defendant also claimed error in the judge's refusal to instruct that an indecent touching must be proven to be a touching of the complainant's private parts such as the breasts, abdomen, buttocks, thighs or pubic area. The Appeals Court affirmed the conviction, holding that the forced insertion of the defendant's tongue into the victim's mouth was an indecent assault and battery. The Court wrote that, "[t]he test for indecent assault and battery . . . is an objective one that is bounded by 'contemporary moral values' . . . The measure of indecency is 'common understanding and practices.' [Citations omitted.] A touching is indecent when, judged by the 'normative standard' of societal mores, it is 'violative of social and behavioral expectations,' [citation omitted], in a manner 'which is fundamentally offensive to contemporary moral values . . . [and] which the common sense of society would regard as immodest, immoral and improper." At 566 (citations omitted). Considering the age disparity (the defendant was in his mid-thirties and the victim was fourteen), as well as the obvious disparity in experience, sophistication and authority, and the defendant's admonition that the victim should remain quiet about what had happened, lead the Court to conclude that an indecent assault and battery had been proved. At 567. See also, Commonwealth v. Mamay, 407 Mass. 412, 418 (1990).

D. Dangerous Weapon

Commonwealth v. Lord, 55 Mass. App. Ct. 265 (2002) –The Court held that mace is a dangerous weapon per se. Per se dangerous weapons are instrumentalities that are "'designed and constructed to produce death or great bodily harm,' and are classified in this manner 'because they are designed for the purpose of bodily assault or defense.'"At 269, quoting, Commonwealth v. Appleby, 380 Mass. 296, 303 (1980). The decision contains a good discussion of the distinction between instrumentalities that are dangerous weapons per se and instrumentalities that are dangerous weapons as used. See, 269-270.

E. Receiving Stolen Goods

Commonwealth v. Cromwell, 53 Mass. App. Ct. 662 (2002)–In a prosecution for receiving stolen goods, the Commonwealth does not have to prove the identity of the owner of the stolen goods; circumstantial evidence can be adequate to prove the goods were stolen. When the evidence of the defendant's possession of property "exhibits 'peculiarities' and 'occurs in a context fraught with suspicion,' a jury may draw inferences that the possession was not lawful, and that the defendant had received and was holding, and knew he was holding, stolen goods." At 668, quoting, Commonwealth v. Kirkpatrick, 26 Mass. App. Ct. 595, 596 (1988). The evidence which included that the defendant was walking the streets in the pre-dawn hours with a car radio concealed in his trousers, a radar detector in one pocket and a screwdriver in another and when stopped and questioned was sweating profusely and that the radio bore gouge marks consistent with the screw driver was sufficient to allow the jury to find that the defendant was in possession of stolen property. Id.

F. Threats

Commonwealth v. Troy T., 54 Mass. App. Ct. 520 (2002)–The defendant was convicted on a complaint charging threats to commit a crime, based on allegations that he had said something to the effect of, "those dumb blondes, you know, they have to go too." At 524. The statement was made this statement to a friend, not a blond, and in the context of passing around petition to "bomb the Soviets." The defendant explained the petition as a joke, noting that the Soviet Union no longer existed and denied making the "dumb blonds" comment. Id. The supposed threat was ultimately repeated to a blond student, who said she felt threatened by it. At trial the juvenile's motion for a required finding was denied and he appealed. The Appeals Court reversed the conviction, noting that the statement was not made directly to a blond student. At 525. In these circumstances it held that to sustain a conviction for threats, there must be evidence that the defendant intended that the threat be communicated to the subject of the threat. At 525-526. Further, the statement that "dumb blonds" have to "go too" is not, standing alone, an expression of an intent to inflict injury. At 528. A threat is "the expression of an intention to inflict evil, injury, or damage on another." While this intent can be inferred from the circumstances in which the statement is made, here, there was no evidence that resonably supported a conclusion that the defendant intended the statements to be a threat or had the ability to carry out his "threat." At 529-530.

G. Extortion

Commonwealth v. Cachiotti 55 Mass. App. Ct. 499 (2002)–The Appeals Court upheld the conviction of a lawyer on charges of extortion. The evidence showed that the attorney had been appointed to represent and indigent defendant and billed CPCS for costs of representation. He also and also induced the defendant's family to pay for the same representation, stating that he would pursue a reduction in the defendant's bail in exchange for payment in the amount of $3,000.00. In the context of this matter, the Court considered the defendant's demand for payment to pursue a bail appeal to be extortionate. At. 502-503.

XII. SEX OFFENDER REGISTRY

Commonwealth v. Miranda, 54 Mass. App. Ct. 502 (2002)–The defendant could not be prosecuted for failure to register as a sex offender when the statute in effect at the time of his failure to register was unconstitutional.

XIII. TRIAL RIGHTS

A. Defendant's Presence

Commonwealth v. Carey, 55 Mass. App. Ct. 908 (2002)–During his trial, the defendant failed to return to court from the luncheon recess. After waiting a one half-hour beyond the scheduled end of the recess, the trial judge resumed the trial. No effort was made to ascertain the reason for the defendant's absence beyond asking the prosecutor and defense counsel whether either could explain the absence. Although the court agreed that "before conducting the trial in the defendant's absence, the judge should have taken more time and exerted more vigorous efforts to learn the defendant's whereabouts," at 908, under the circumstances of this case, there was no error requiring reversal. The Appeals Court came to this result because the defendant did not claim, "much less show," that an effort to find him would have been successful. Accordingly, there was no evidence that the judge's finding that the defendant had voluntarily absented himself from the trial was incorrect. In future cases, the judge should hold a voir dire to "determine that the defendant's absence was without cause." Id. "There ought to be as vigorous an effort as may be feasible to find the defendant, and some formality in the presentation of the evidence that is gathered bout the circumstances of the defendant's disappearance." At 908-909.

B. Jury Instructions

Commonwealth v. Mills, 436 Mass. 387 (March 2002)–In a larceny prosecution, the court should give jury instructions on Commonwealth's theory of the case.

C. Motion For Funds

Commonwealth v. Kenney, 437 Mass. 141 (2002)–The SJC emphasized the need for an affidavit of some factual showing on a motion for funds. The Court held that there was no error in the denial of such motion where there was no showing that the defendant would be disadvantaged, when compared with one who could afford to pay, in preparation of his defense.

D. Improper Cross Examination of The Defendant

Commonwealth v. Wynter, 55 Mass. App. Ct 337 (2002)–The defendant's conviction on various firearms offenses was reversed due to prejudicial cross examination of the defendant. The Court wrote that "it is error for a prosecutor to communicate impressions by innuendo through patterned and leading questions with no demonstrated evidentiary or good faith basis, which are crafted to evoke negative and prejudicial answers leaving nothing more less than the

unsubstantiated innuendo." At 337, citing, Commonwealth v Fordham, 417 Mass. 10, 20 (1994). In this case, the prosecutor's cross examination of the defendant suggested a motive for the defendant's shooting into a house that was not supported by any evidence and was not shown to have a good faith basis in fact. By eliciting a series of negative answers, the questions left innuendo hanging in the air and violated clearly established precedent. At 339-341. "Where an examiner on cross-examination suggests new facts in an effort to impeach a witness, the examiner should be required to represent that he has a reasonable basis for the suggestion, and also to be prepared with proof if the witness does not acquiesce in the suggestion by giving a self-impeaching answer. Without such assurances, the questioning of the witness is improper, for it would amount to allowing the examiner to smear the witness by insinuation, and unfairly to cast on the other side (here the defendant-witness) a burden somehow to fend against it." At 341, quoting, Commonwealth v. Delrio, 22 Mass. App. Ct. 712, 721 (9186), additional authority omitted.

XIV. GRAND JURY

Commonwealth v. Wilcox, 437 Mass. 33 (2002)–Grand jury members who vote to indict a defendant need not hear all of the evidence presented to the grand jury in support of the defendant's indictment; that is, the twelve persons needed to vote for an indictment need not be in attendance on each day that evidence is presented to the grand jury supporting the indictment

XV. VICTIM'S RIGHTS ACT

Hagen v. Commonwealth, 437 Mass. 374 (2002)–The Court held that the so-called victim's rights act, G.L. c. 258B §3(f), does not create standing for victims in criminal proceedings and does not give victims a cognizable interest in the prosecution of another. This holding notwithstanding, the Court also said that "a victim asserting the right of prompt disposition under the statute should be provided with an opportunity to address the court when that right is jeopardized." At 375.