

The Zealous Advocate

CPCS Training Bulletin



CHIEF COUNSEL'S MESSAGE

William J. Leahy, Esq.

COLLABORATION AND CIVIL LIBERTIES, CONTINUED

In the last newsletter, I described the collaboration between then-CPCS assigned private counsel Geri Laventis and then-Special Litigation Director Carol Donovan, and the ACLU of Massachusetts in the person of Bill Newman, which resulted in the landmark ruling declaring drug interdiction roadblocks unconstitutional in *Commonwealth v. Rodriguez*, 430 Mass. 577 (2000). Furthermore, I noted that *Rodriguez* showed that CPCS, in the course of protecting the legal rights of its indigent clients, also safeguards the civil liberties of all Massachusetts residents.

No sooner had I written those words, than I became aware of the solicitation by the SJC of *amicus* briefs in the case of *Commonwealth v. Lora*, and received a compelling recommendation from Special Litigation Director Beth Eisenberg that CPCS should submit a brief in support of private appellate counsel William Smith's position that Judge McCann was correct in allowing Lora's motion to suppress, based upon, as the SJC described it, "expert statistical evidence, unrebutted by the Commonwealth, that raised an inference of selective law enforcement based on race or ethnicity." The SJC went on to say that "[t]he issue presented, among others, is in what circumstances may a court properly conclude that the stop of an automobile was unconstitutionally based on the driver's or passenger's race."

(continued on page 2)

IN THIS ISSUE:

Chief Counsel's Message

Message from The Training Unit

Indigent Defense News

Practice Notes and Updates

Failure to Register Practice Tips

Juvenile Law Update

Casenotes

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

I soon discovered that Murray Kohn of our Private Counsel Post-Conviction Unit was already working with Bill Smith, and was also reminded that private counsel Ian Stone was producing an *amicus* brief for CPCS in a companion case, *Thomas*, in which a defendant's right to discovery of the statistical data concerning a police officer's automobile stops was at issue. I also came to realize that Thomas's trial and appellate counsel, Steven Epstein, had been working with CPCS Chief Appellate Attorney Brownlow Speer in his defense against the Commonwealth's interlocutory appeal from the allowance of his motion to discover the police citation books concerning traffic stops. Meanwhile, in the *Lora* case, our Committee quickly gave its approval for an *amicus* submission, and Murray went to work and produced the CPCS brief *amicus curiae* urging affirmance of Judge McCann's order. Finally, I became aware of a third case, *Betances*, in which the Commonwealth appealed from the trial judge's order granting discovery of all stops by the arresting officer within a six-month period. Justice Cowin denied the Commonwealth's application for interlocutory appeal, and the appeal to the full bench ensued. In *Betances*, attorney Joseph Shields filed the motion seeking discovery of the relevant data, and after attorney Stephen Wright became defense counsel, the motion was allowed. CPCS then assigned private counsel Leslie Feldman-Rumpler to represent the defendant on the appeal.

These cases all reinforce the message that we enforce the rights of all people when we defend the poor with vigor, passion and skill. The close collaboration between public staff and private counsel which characterizes these cases also optimize our influence, enhance our litigation prospects, and fulfill our goal of working together as cooperatively as possible to achieve the best results for our clients.

Lora, *Thomas* and *Betances* were argued at the SJC on February 8, 2008, so it is too early to predict results. But whatever the outcome, we can say once again with pride that private and public lawyers working together not only provided our clients with first-rate representation; but that their advocacy also preserves and protects the fundamental individual rights of every person in the Commonwealth.



INDIGENT DEFENSE NEWS

SORB TRAINING REQUIRED TO MAINTAIN DISTRICT COURT OR JUVENILE DELINQUENCY CERTIFICATION

As a result of the decision of Roe v. Attorney General 434 Mass. 418 (2001), the Commonwealth requires the registration of all people defined as sex offenders in G.L. c.6, §178C-P, the Sex Offender Registry Statute. This law, together with St. 1999, c. 74, §3-16, amending G.L. c.123A to allow new “sexually dangerous persons” commitments, has significantly changed the legal landscape for all criminal defense practitioners, creating drastic collateral consequences to the disposition of many cases.

The Committee for Public Counsel Services responded to these developments by presenting in-depth training on these issues for all attorneys handling case assignments. **All CPCS District Court and/or Juvenile Delinquency certified attorneys who have not yet done so are required to attend a one-day training regarding Sex Offender Registration & Notification. The training will take place on Thursday, March 20, 2008 from 9:00 a.m. to 5:00 p.m. at MCLE, 10 Winter Place, Boston, MA. The training is offered at a reduced tuition rate of \$95.00 payable to M.C.L.E. Attendance at this program is required to maintain certification for District Court Criminal or Juvenile Delinquency case assignments.**

Since this is a required training program, attorneys may receive compensation for attendance (The annual CLE compensation is limited to eight hours per fiscal year).

This is a one-time training requirement in order to maintain your certification. If you have already attended one of the Sex Offender Registration and Notification Training Programs offered previously by CPCS through MCLE, you are not required to attend this program. Of course, all are welcome to attend to get a refresher and to learn about current developments in this practice area. Just be aware that if your attendance is not required, it cannot qualify for compensation.

To register for the program, contact MCLE at 617-482-2205 as soon as possible. Thank you for your ongoing commitment to the defense of our indigent clients.

CPCS ANNUAL TRAINING CONFERENCE

The CPCS Annual Training Conference will take place on **Thursday, May 8, 2008** at the DCU Center in Worcester, MA. To register, go to <http://www.publiccounsel.net/Training/pdf/Registration%20Form08.pdf> and download the 2008 Conference Registration form. Send the completed registration along with your check payable to CPCS Training Trust and mail to CPCS Training Unit, 399 Washington Street, 5th floor Boston MA 02108. Criminal Law, CAFL, Appellate as well as Mental Health Litigation programs will be offered. The cost for the conference is a \$95.00 contribution to the CPCS Training Trust. This entitles participants to attend all seminars and the awards luncheon and receive all conference materials. **Enrollment is limited and slots will be filled on a first-registered first-served basis.** The conference is only open to those attorneys who accept assignments through CPCS.

CPCS ACCEPTS NOMINATIONS FOR AWARDS

The “**Edward J. Duggan Award for Outstanding Service**” is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy — the central principle governing the representation of indigents in Massachusetts.

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

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

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

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

Nominations for the public and private attorney Duggan awards, the Thurgood Marshall, the Mary C. Fitzpatrick and the Paul J. Liacos awards should be submitted to William J. Leahy, Chief Counsel, Committee for Public Counsel Services, 44 Bromfield Street, Boston, MA 02108, **no later than Friday, March 28, 2008**. Nominations for the Blitzman award should be submitted by the same date to Joshua Dohan, Director, Youth Advocacy Project, Committee for Public Counsel Services, 10 Malcolm X Boulevard, Suite 2-1, Roxbury, MA 02119. Faxed nominations are acceptable: Leahy—617-988-8495; Dohan—617-541-0904.

NEW BAR ADVOCATES

CPCS would like to welcome the following attorneys who have recently completed the CPCS Zealous Advocacy in the District and Juvenile Courts program held January/February 2008

BARNSTABLE

Herbert Lach
Michael Turner

BERKSHIRE

Andrea Harrington
Edmund St. John IV
Christine A Ford

BRISTOL

Paul J. Whelan
Lori OBrien-Foeri
Sandra R. Ferreira

HAMPDEN

Kristin Riddell
Lauren Follett

HAMPSHIRE

Judith Phillips
David Rock

MIDDLESEX

Kerry Ahern
Erich Bryant

NORFOLK

Francis DeMento
Richard McLeod
Joseph Moynihan
John J. O'Connor
Scott Martin

SUFFOLK

Patrick Troy
Christopher Donahue
Audrey Murillo
Vikas Dhar
Jeffrey Chapdelaine
Royston Delaney
Leonard Milligan

WORCESTER

Peter Gentile
Robert George
Kara Colby

PILGRIM

Rachel Seeley-Ruel
Christine Coughlin
Marc Lucas

Failure to Register Practice Tips

Michael A. Nam-Krane, Staff Attorney

Alternative Commitment and Registration Support Unit

Defending homeless individuals accused of failing to register under G.L. c. 6 § 178H

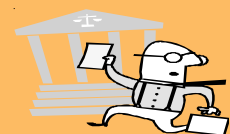
The SJC found in *Commonwealth v. Rosado*, 2008 Mass. LEXIS 34 (2008) that a homeless man had not knowingly failed to register as a sex offender when he listed the address of his homeless shelter as his permanent address, crossing out both any temporary and mailing address. The Commonwealth submitted the defendant had knowingly given false information and knowingly failed to provide a change of address since his mail to that address was returned “undeliverable” and his presence at the shelter was “sporadic.”

The SJC rejected the notion that a homeless person cannot leave a shelter, in which beds are not guaranteed and only obtained by lottery, in order to use it as a registered address. The Court recognized the impermanence of a homeless person’s living situation; that this defendant may have lost the lottery; and that he did return to the shelter, thus defeating a claim of having knowingly provided a false address or having changed it. The SJC admonished the Sex Offender Registry Board for its “ambiguous” registration forms. The SJC suggested the Sex Offender Registry Board change its registration forms to better acknowledge an individuals’ homeless status.

The *Rosado* case demonstrates that defenses are available to failure to register charges against a homeless person. Attorneys should note that to satisfy the elements of this charge the individual must know the information he provides upon registration is false. This can be difficult to prove given that a homeless person’s information, almost by definition, changes without notice to or fault of the homeless person. The Court seems to recognize that a homeless person who has made an honest effort lacks scienter.

The SJC in this case has also aided the defense by recognizing the “ambiguous” quality of literature and forms the Sex Offender Registry Board has given to homeless clients. Until those documents are improved, counsel may use the SJC’s admonishment of the Board in defense of the homeless client’s actions to comply with registration.

As a practical matter attorneys should advise homeless clients to mark “homeless” on the form and not make up an address.



Juvenile Court Must Honor Grant of Immunity: Commonwealth v. Austin A.

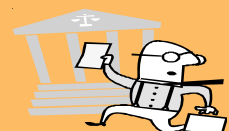
Wendy Wolf, CPCS Youth Advocacy Project

In Commonwealth v. Austin A., 2008 Mass. Lexis 33, the SJC held “that a proper grant of immunity protects a witness from prosecution on the basis of the immunized testimony in any court in the Commonwealth, and must be recognized in the Juvenile Court.”

This case involved co-defendants; 2 adults and 2 juveniles. The adult cases were in superior court and the juveniles were indicted as youthful offenders in juvenile court. One of the juveniles was granted immunity in superior court. The Commonwealth sought, through a motion in limine, to have the juvenile court “honor” the immunity order from superior court. The juvenile court judge denied the motion in limine. The Commonwealth filed an interlocutory appeal and the case was reported to the SJC.

The court discusses Commonwealth v. Russ R., 434 Mass. 515 (2001) (juvenile court judge can not grant immunity) and G.L. c. 233 § 20E (justices in Supreme Court, appeals court and superior court can grant immunity). While acknowledging that §20E is ambiguous, the court looked to the purpose of the statute, which is to protect witnesses who have been granted immunity. The court stated, “once immunity is granted ... achievement of the statutory purpose requires that immunity be enforced so that the witness is protected from prosecution in any court. The Juvenile Court judge is bound by the immunity order and is without discretion to disregard it.”

The court did not address the issue that juvenile judges, in the first instance, can not grant immunity; and what happens if the immunized witness does not testify and which court would hear the contempt.



CASENOTES

By Paul Rudof, Staff Attorney, CPCS Training Unit

This section of the Zealous Advocate contains a list of every Supreme Judicial Court and Appeals Court opinion concerning criminal law that was handed down in December of 2007 and January of 2008. Following each citation is a list of key words relating to all of the issues discussed in that particular opinion. These key words do not necessarily correspond precisely with the keywords listed in the opinion's headnotes. In addition, this section contains a brief discussion of the issues in these cases, but not of every opinion and not of every issue in a particular opinion. We have selected only those cases and only those issues within those cases which appear to be of some significance. Where appropriate, we have also included criticism, analysis, and/or practice tips

Commonwealth v. Robidoux, 450 Mass. 144 (2007): murder, first degree, extreme atrocity or cruelty, ineffective assistance of counsel, competence to stand trial, criminal responsibility, diminished capacity, Miranda, right to remain silent, state of mind, closing argument, malice, jury instructions

Cousino v. Commonwealth, 2007 Mass. LEXIS 794 (Dec. 6, 2007): third party, records, interlocutory appeal (**no write-up**)

Glawson v. Commonwealth, 2007 Mass. LEXIS 795 (Dec. 6, 2007): interlocutory appeal, speedy trial, mistrial, voir dire (**no write-up**)

Commonwealth v. Hilton, 450 Mass. 173 (2007): motion to suppress, statements, interlocutory appeal, voluntariness, competence to stand trial, Miranda, wavier

Commonwealth v. Webb, 2007 Mass. LEXIS 799 (2007): gaming, required finding of not guilty (**no write-up**)

Commonwealth v. Lao, 450 Mass. 215 (2007): motion for new trial, ineffective assistance of counsel, direct appeal, hearsay, excited utterance, confrontation, motive, circumstantial evidence

Commonwealth v. Powell, 450 Mass. 229 (2007): murder, first degree, grand jury, blood sample, expert testimony, bloodstain analysis

Commonwealth v. Stone, 70 Mass. App. Ct. 800 (2007): statements, voluntariness, Miranda, waiver, jury instructions, custody, ineffective assistance of counsel, motion for new trial

Commonwealth v. Morales, 70 Mass. App. Ct. 839 (2007): probation, conditions, modify, sentence, sexually dangerous person

Commonwealth v. Chase, 70 Mass. App. Ct. 826 (2007): right to remain silent, invocation, motion to strike, jury instructions, circumstantial evidence, consciousness of guilt, restitution, ability to pay

Commonwealth v. Rodriguez, 450 Mass. 302 (2007): search, wire communication, wiretap, expectation of privacy, probable cause, exigent circumstances, service

McDonald v. Commonwealth, 450 Mass. 1020 (2008): interlocutory appeal, single justice, speedy trial

Commonwealth v. Smith, 450 Mass. 395 (2008): murder, first degree, motion for new trial, gang, motive, joint venture, jury instructions, voir dire, jury selection, hearsay, opinion, prior bad acts, required finding of not guilty, peremptory challenge, sexual orientation, gender, equal protection, impeachment, conviction, closing argument, discovery, exculpatory

Commonwealth v. Pierre, 71 Mass. App.Ct. 58 (2008): motion to suppress, reasonable expectation of privacy, basement, search warrant, scope, curtilage, plain view

Commonwealth v. Pelletier, 71 Mass. App. Ct. 67 (2008): assault and battery, required finding of not guilty, hearsay, confrontation

Commonwealth v. Murungu, 450 Mass. 441 (2008): first complaint, substitute, bias, motive

Commonwealth v. Stuckich, 450 Mass. 449 (2008): jury instructions, consciousness of guilt, first complaint, voir dire, relevance, admission, character, prior bad acts, closing argument, ineffective assistance of counsel, sentencing, uncharged conduct

Commonwealth v. McCulloch, 450 Mass. 483 (2008): revise, revoke, sentence, guilt, continuance without a finding, restitution

Commonwealth v. Bush, 71 Mass. App. Ct. 130 (2008): motion to suppress, search warrant, knock and announce, intent to distribute, required finding of not guilty

Drayton v. Commonwealth, 450 Mass. 1028 (2008): transcript, reconstruct, appeal (**no write-up**)

Commonwealth v. Eddington, 71 Mass. App.Ct. 138 (2008): recusal, ineffective assistance of counsel, waiver, jury trial

Commonwealth v. Duncan, 2008 Mass. App. Ct. 150 (2008): required finding of not guilty, possession, constructive possession, motion to suppress, expectation of privacy, search, sequestration, closing argument, severance (**no write-up**)

Commonwealth v. Robidoux, 450 Mass. 144 (2007)

The defendant's ten month old son died of malnutrition caused by starvation, after the defendant and his wife restricted his diet to water and breast milk, claiming to follow a dictate from God. He was convicted of first degree murder by reason of extreme atrocity or cruelty.

The SJC rejects the defendant's claim that his trial counsel was ineffective for failing to raise the issue of his competency, because the defendant had no history of mental illness or impairment and neither his decision to forego an insanity defense or psychiatric examination nor the pro se motions he filed raised a question of competency, particularly where the trial judge herself found him competent, having conducted an extensive colloquy with him.

Nor can trial counsel be deemed ineffective for failing to raise an insanity defense, because the defendant himself did not wish to do so, and a "a defendant may refuse to label himself as criminally insane, even if that precludes his most effective defense, as long as he is competent and does so with knowledge of the

consequences.” “It cannot be considered error for counsel to heed a competent defendant’s informed refusal to pursue an insanity defense.”

The Court also finds no violation of the defendant’s right to remain silent in the admission of the defendant’s jailhouse interview with police, during which he discussed many things but refused to answer questions about his family. “His unwillingness to answer questions about his family in these circumstances did not manifest an expressed unwillingness to continue with the interview. Where a defendant has not reasserted his right to remain silent, he cannot pick and choose which questions to answer,” and his refusal to discuss his family “was relevant evidence of his state of mind.”

Finally, the Court finds harmless the prosecutor’s misstatement of the law on third prong malice when, in closing, the prosecutor “failed to address the subject element of third prong malice, namely, Robidoux’s actual knowledge of the circumstances at the time he acted.” Because the judge properly instructed the jury on third prong malice, the unobjected-to error did not create a substantial likelihood of a miscarriage of justice.

Commonwealth v. Hilton, 450 Mass. 173 (2007)

The SJC reverses a motion judge’s ruling that post-arraignment statements the defendant made to a court officer were not made voluntarily, concluding that this ruling was based on erroneous subsidiary findings, and the Court remands for further consideration of the issue of voluntariness. The motion judge’s ruling was based on three principal findings: (1) that “due to her mental condition the defendant failed to make a knowing, voluntary, and intelligent waiver of her Miranda rights on February 27, 1999,” when she was questioned by the police; (2) “the defendant was incompetent to stand trial on March 1, 1999,” the date of her arraignment and the statements to the court officer; (3) the defendant “remained incapable of rendering a voluntary statement on March 1, 1999, because of her tenuous mental state three days before and six days after her March 1 statement” when she was examined by mental health experts retained by the defense.

As to the first of these findings, the SJC does not find any error, but notes that “a finding that the defendant was unable to make a knowing, voluntary, and intelligent waiver of her Miranda rights is not enough, standing alone, to support the finding that her statements were involuntary.” In fact, the motion judge had actually found the February 27 statements were made voluntarily. The SJC concludes the second subsidiary finding was erroneous, because although a court clinician stated “there was a doubt” about the defendant’s competency, the clinician never opined that the defendant was in fact incompetent. As to the third finding, “[b]ecause the judge never found that the defendant was incapable of making a voluntary statement prior to March 1, it is not reasonable to infer that she ‘remained incapable’ on March 1.”

Commonwealth v. Lao, 450 Mass. 215 (2007)

The SJC reverses this first degree murder conviction based on ineffective assistance of appellate counsel, who failed to challenge on direct appeal the admission of certain hearsay which should have been excluded under Crawford v. Washington, 541 U.S. 36 (2004). As the SJC noted in affirming the conviction at the direct appellate level, the Commonwealth’s case was “wholly circumstantial,” but nonetheless affirmed the conviction “based, in significant part, on evidence that the defendant had a motive to kill his estranged wife, namely the termination of their marriage and [her] new relationship with Ramon Rodriguez.” The sources of that motive evidence, however, were the following: a 911 call from the victim to police in which she describes “the defendant’s alleged attempt to run over her with his vehicle;” testimony from the officer who responded to that call, describing the victim’s statements to him that she had just informed the defendant she was divorcing him, that her boyfriend would be moving in the next day, and that the defendant attempted to run her over; and testimony from the victim’s daughter, recounting a similar conversation she had with the victim before she called the police, and also describing the victim’s conversation with the responding officer.

First, the SJC rejects the Commonwealth’s argument that because Crawford, which was decided after this trial but before the direct appeal, did not provide a comprehensive definition of “testimonial,” it was not ineffective for the defendant’s initial appellate counsel to fail to raise these claims. “[T]he Court provided sufficient guidance on confrontation clause concerns to warrant exploration by the defendant’s counsel on direct appeal, notwithstanding the fact that the exact contours of what constituted a ‘testimonial’ statement for admissibility purposes remained somewhat unclear.”

Then, the SJC concludes that the 911 call “in all likelihood, . . . would have been inadmissible pursuant to the principles enunciated in Crawford” because the victim, at the time she made the call, “was not in imminent personal peril.” Similarly, the victim’s statements to the officer (which were admitted through testimony of both the officer and the victim’s daughter) “would have qualified as testimonial,” as they were made in response to “routine questioning by law enforcement . . . to gather thorough and complete information about the possible commission of a crime.” Finally, the victim’s statements to her daughter “likely would not have been considered testimonial,” as they were “remarks to a relative” and nothing indicates the victim “had any reasonable expectation that these particular comments to her daughter would be used prosecutorially at some later date.”

Because such significant motive evidence would have been deemed inadmissible under Crawford, the Court is “unable to conclude, with certainty, that the admission of the statements at issue did not affect the outcome of the defendant’s trial,” and thus the SJC grants the defendant a new trial.

Commonwealth v. Powell, 450 Mass. 229 (2007)

Affirming this first degree murder conviction, the SJC concludes the trial judge was within her discretion in finding expert testimony concerning bloodstain analysis was reliable and thus admissible. “Because both bloodstain analysis and the use of the string method to determine the area of original of blood stains are generally accepted by a sufficiently broad community of experts, we affirm the judge’s conclusion finding this evidence reliable.”

Commonwealth v. Stone, 70 Mass. App. Ct. 800 (2007)

Affirming this arson conviction, the Appeals Court holds it was not error for a trial judge to allow testimony that the defendant had previously received Miranda warnings in an unrelated investigation, because the testimony was probative of the voluntariness of the defendant’s statements in this case, where defense counsel “introduced the subject of the defendant’s ability to understand Miranda warnings.”

Commonwealth v. Morales, 70 Mass. App. Ct. 526 (2007)

Reversing this second degree murder conviction, the Appeals Court holds that the trial judge erred by telling the jury, in response to a question about what constitutes reasonable provocation or sudden combat, that “there would need to be physical contact.” In the instant case, the evidence, in a light most favorable to the defendant, showed that the defendant was surrounded by three larger men intent on jumping him, that the defendant said he “did not want any trouble,” but the victim still “threw some punches, although not hitting the defendant, before the defendant lunged at him with a knife.” “In these circumstances, a properly instructed jury could have concluded that a reasonable person in the defendant’s position would have felt an immediate and intense threat and responded as he did.” Although there was no objection to the judge’s instruction, because the Commonwealth’s case was “not overwhelming” and the questions asked by the jury demonstrated a focus on mitigation and reasonable provocation in particular, “the incorrect answer to the jury’s . . . question created a substantial risk of a miscarriage of justice.”

Affirming convictions for burning personal property, breaking and entering, and malicious destruction, the Appeals Court concludes that although it was error for a police officer to testify about two instances in which the defendant asserted his constitutional right to remain silent, the error was harmless beyond a reasonable doubt. The officer first described an interview with the defendant where, at one point, he said “Get the fuck out of my house. I ain’t talking to you anymore.” When the defendant objected, the judge struck the second sentence, instructing the jury to disregard it. The officer then testified that when the police went to execute a search warrant, looking for the defendant’s shoes, the officer asked the defendant to produce the shoes, at which point the defendant responded, “Do whatever you want to do. I’m not talking.” Defense counsel again objected, and again the judge told the jury to disregard the second sentence.

The Appeals Court agrees with the trial judge that the second sentences in those two statements were both inadmissible invocations of the right to remain silent, while the first sentences of the two statements were not, specifically noting that even though the second statement was made “when the defendant was neither under arrest nor in custody” and not after Miranda, “we still consider the defendant to be exercising a right protected at least by the State Constitution.”

Nonetheless, the Court concludes that the officer’s testimony about these invocations of constitutional rights does not warrant reversal for the following reasons: “There was very strong circumstantial evidence of the defendant’s guilt and significant evidence of consciousness of guilt on the part of the defendant that did not involve his assertion of his right to remain silent. The struck statements were confined to one officer’s testimony and were not echoed by the prosecutor in his questions or opening or closing.”

The Appeals Court rejects the defendant’s claim that the order of restitution in the amount of \$43,421 was impermissible because the judge did not consider the defendant’s ability to pay, as the defendant never suggested an inability to pay at the restitution hearing and the issue may be considered at any future probation revocation hearing based on nonpayment of restitution.

After the police intercepted a shipment of cocaine, hidden in a bicycle frame, they allowed it to be delivered to the addressee, Pedro Tirado (as it turns out, at his wife’s address). The police then obtained an anticipatory search warrant for that address, delivered the package, and then entered and searched, “finding” the package with the bicycle frame. When Tirado told the police that he had been paid by the defendant to accept delivery of the package, the police had Tirado phone the defendant so the defendant could come to Tirado’s wife’s home to pick it up. Via a listening device, the police then electronically monitored the conversation between Tirado and the defendant, after the defendant arrived. At trial, after the defendant testified that Tirado had asked him to hold the package, the officer who monitored the conversation testified in rebuttal.

Affirming the defendant’s trafficking conviction, the SJC concludes that the admission of the officer’s testimony about the conversation between the defendant and Tirado, which was electronically monitoring absent a warrant, did not violate Article 14 of the Massachusetts Declaration of Rights, because probable cause and exigent circumstances existed, but not necessarily because the defendant lacked an objectively reasonable expectation of privacy in the communication, as the Appeals Court had reasoned. The SJC assumes, without deciding, that the defendant possessed such an expectation of privacy. The SJC rejects the defendant’s argument that no exigency existed because the police controlled the timing of the defendant’s arrival at the residence where the conversation occurred, and thus could have obtained a warrant, stating “[o]nce Tirado placed the

telephone call to the defendant and the defendant indicated that he would be arriving in a taxicab, . . . there was no time to obtain a warrant.”

Note: This rejoinder to the defendant’s lack of exigency argument focuses on the period of time *after* Tirado called the defendant, but ignores the fact that the police could have asked Tirado to wait to call the defendant or to ask the defendant to come over at some later time (enough time to obtain a warrant).

The SJC then concludes that although the Commonwealth failed to comply with service requirements of the Massachusetts wiretap statute, pursuant to G.L. c. 272, § 99 O 2, the defendant did not object on this ground at trial, and the admission of the evidence did not result in a substantial risk of a miscarriage of justice, because of “the strength of the evidence against the defendant and the sketchy and cumulative nature of [the officer’s] testimony” about the conversation.”

Practice Tips:

- (1) Counsel should always move to suppress conversations electronically intercepted without warrant in a home, as the Court “assumes, without deciding” that the defendant here had a reasonable expectation of privacy in the conversation.
- (2) Counsel facing the possible admission of intercepted conversations must become familiar with the provisions of GL c. 272, s. 99, subsection O, which provides strict requirements upon the government of notice and service as conditions precedent for offering the evidence at trial. The statute provides that failure to comply results in the exclusion of such evidence from trial, “notwithstanding the provisions of any other law or rules of court.”

McDonald v. Commonwealth, 450 Mass. 1020 (2008)

After a February 2005 complaint charging OUI 5th offense was dismissed on the trial date, because the Commonwealth could not produce a necessary witness, the Commonwealth took out a new complaint charging the same in April of 2007. The defendant moved to dismiss that complaint on speedy trial grounds. That motion was denied, and the defendant appealed pursuant to M.G.L. c. 211, § 3. **Affirming the single justice’s denial of the defendant’s petition for relief under c. 211, § 3, the SJC first concludes that the defendant has an adequate post-conviction remedy, as “an appellate court can order that the complaint be dismissed” if it then agrees that the prosecution violated the defendant’s speedy trial rights. “[T]he right to a speedy trial, unlike the right against double jeopardy, does not concern a right not to be tried at all.” Further, the Court notes that the defendant failed to file a memorandum, separate from the 211/3 petition itself, setting forth the reasons why review of the trial court decision cannot adequately be obtained on appeal or by other means, as required by SJC Rule 2:21.**

Commonwealth v. Smith, 450 Mass. 395 (2008)

Affirming this first degree murder conviction, the SJC first concludes that the admission of evidence concerning the defendant’s gang-affiliation was proper, as it was relevant to prove the defendant was part of a joint venture and possessed a motive to kill the victim, a rival gang member.

Relatedly, testimony from a Detective that the defendant and other named individuals were part of a particular gang and about the alleged activities and rivalries of that gang, “even if [such testimony] constituted arguably improper opinion evidence and may have been based on hearsay sources,” “was harmless because the evidence was cumulative,” as “other witnesses testified from personal knowledge essentially to the same effect.”

The Court does note that “it would have been preferable” for the trial judge to conduct a voir dire of potential jurors to ferret out biases related to the gang evidence and to give a limiting instruction “at the time the evidence was introduced during the trial,” but the failure to take such steps did not warrant reversal.

The Court also rejects the defendant’s challenge on appeal to the Commonwealth’s exercise of a peremptory challenge of a juror either because the juror was gay or transgendered, claiming the defendant did not object to this challenge or assert that a pattern of improper exclusion had been established. The prosecutor initially moved to strike the juror for cause, stating that the juror had some “identification issues,” “seemed to be a man dressed as a woman, and appeared to have breasts.” After the judge denied the for-cause challenge, the prosecutor immediately exercised a peremptory, at which point defense counsel stated, “I’m beginning to see a pattern on the basis of the Commonwealth with the exclusion of a homosexual, white male. So I want to put that on the record as well.” When the judge responded, “Okay. You’ve put it on the record,” defense counsel said, “For the Court’s consideration.” According to the SJC, these statements did not amount to an objection or claim of a Soares violation.

Practice Tip: That the SJC finds trial counsel’s statements were insufficient to preserve the Soares claim demonstrates how clearly trial attorneys must articulate their objections. Also, the SJC recognizes that “the question whether the exercise of a peremptory challenge to remove a juror because of his or her sexual orientation or because the juror was transgendered would violate the guarantees of art. 12 or the equal protection clause” is an open question. This is a particularly interesting question in light of the Court’s decision in Goodridge.

Commonwealth v. Pierre, 71 Mass. App. Ct. 58 (2008)

On the defendant’s Rule 15 appeal of the denial of a motion to suppress counterfeit CDs, seized from a basement storage locker when the narcotics officers had a warrant to search a second floor apartment in a multi-unit building, the Appeals Court affirms the motion’s denial, holding that the search of that location was within the scope of the warrant and the seizure of the CDs was justified under the plain view doctrine.

First, though the Appeals Court agrees the defendant possessed a reasonable expectation of privacy in the locked storage locker, because the Court reasons the locker was within the “curtilage” of the second floor apartment, the warrant authorized a search of that location. The court finds the basement was within the curtilage both because the stairs in the second floor apartment’s kitchen “linked the apartment to the basement” and because the storage locker was designated as belonging to that particular apartment. As the police were authorized to search any container that might hold drugs and records of drug transactions, a search of the locker and the boxes containing the CDs was permissible under the warrant.

Second, the Appeals Court concludes that the seizure of the CDs themselves was lawful as a plain view seizure, because the police were legally in the area when they saw the CDs (as permitted by the warrant) and because the incriminating nature of the CDs was immediately apparent to the officer who seized them.

Factors that gave the officer a reason to believe the CDs were counterfeit were the following: his knowledge of a prior seizure of counterfeit or pirated CDs by his police department, “the absence of markings on the CDs, the photocopied covers on the cases, the organization of the CDs into like groups (some of which were covered in plastic), the presence of the CDs amidst ammunition and electronic scales, and the quantity of the CDs.” That the officer later conferred with someone from the Recording Industry Association of America “merely confirmed, rather than wholly created” the officer’s suspicion.

Affirming this assault and battery conviction, the Appeals Court holds that because a statement made by the alleged victim to the responding officer—that she fell down the stairs—was not admitted for its truth, its admission did not implicate the confrontation clause. The Appeals Court relies on footnote 9 in Crawford v. Washington, which states that “The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”

Note: At trial, when this statement was objected to on hearsay grounds, the trial judge ruled that the statement was admissible “to explain and put in context what the officer’s investigation was.” While the Appeals Court agrees that this statement was not offered for the truth, since the Commonwealth’s theory was clearly that the statement was false and that the defendant in fact caused the declarant’s injuries, **the court does state that “[c]aution must . . . be taken in admitting out-of-court statements on the rationale that they provide context for the investigation.”**

The Appeals Court also concludes that the evidence presented at trial—contradictory statements by the defendant to the police about how and when he found his wife with the injuries, the officer’s testimony that he saw a cut on the defendant’s knuckles which the defendant could not explain, and blood on his face and clothing, the officer’s opinion that the blood was not consistent with someone trying to console his wife (which was not objected to), the defendant’s angry demeanor, and observations of blood in the defendant’s and wife’s room and a bathroom—was sufficient to sustain this conviction.

Affirming a youthful offender conviction for statutory rape, the SJC concludes that the trial judge was permitted to allow the complainant’s mother to testify as the first complaint witness, even though the complainant first discussed the incident with the defendant’s sister, who also testified at trial. In so doing, the SJC carves out two new exceptions to the first complaint rule, that is two instances when a trial judge may permit a “substitute” for the first complaint witness: (1) “when the encounter that the victim has with the first person does not constitute a complaint, when, for example, the victim expresses to that person unhappiness, upset or other such feelings, but does not actually state that she has been sexually assaulted”; and (2) “when there is such a complaint, but the listener has an obvious bias or motive to minimize or distort the victim’s remarks.”

The SJC does caution that “[b]y permitting these exceptions . . ., we do not suggest a relaxation of [the first complaint] doctrine so that the Commonwealth may pick and choose among various complaint witnesses to locate the one with the most complete memory, the one to whom the complainant related the most details, or the one who is likely to be the most effective witness. . . . The substituted witness should in most cases be the next complaint witness, absent compelling circumstances justifying further substitution.”

The SJC also recommends trial judges conduct a voir dire of the relevant witnesses when such a request for substitution is made.

Finally, the SJC notes that this exception does not preclude the defendant from calling the witness who was “substituted for,” “to show that the first person to whom the complainant made a complaint was in fact someone other than the proffered first complaint witness, or that the complainant did not complain at the time, to the person, or in the detail one would expect.”

The SJC reverses the defendant’s convictions on four counts of indecent assault and battery of his daughter because of a host of trial errors. First, the trial judge gave a consciousness of guilt instruction when “there was no evidence on which to base the instruction.” The assaults allegedly occurred between January 1995 and December 1997. The investigation of the assaults was initiated in April of 2000, when the alleged victim wrote of the purported assaults to her high school guidance counselor, but no charges were brought until 2002, when the lead detective obtained complaints against the defendant. At that time, the detective contacted the defendant, then living in Illinois, notified him of the complaints, and asked him to contact the DA’s office. Though the defendant said he or his attorney would call the detective back, they never did. This was the basis for the consciousness of guilt instruction. Particularly given the length of time between the initial complaint of abuse and investigation and the fact that the defendant had earlier relinquished his parental rights to the daughter, “[t]hat the defendant said he would call [the detective] back or have his attorney do so, and that [the detective] never heard again from anyone,” is not a sufficient evidentiary foundation to support the [consciousness of guilt] instruction.”

Second, the trial judge impermissibly permitted the guidance counselor to testify as the first complaint witness, when the judge “should have conducted a voir dire” to determine what the true first complaint was in light of evidence that the alleged victim told others about the alleged abuse prior to the guidance counselor. Specifically, the letter first informing the guidance counselor itself said that the alleged victim had already spoken to her mother and another counselor about the purported abuse. Additionally, defense counsel informed the judge that in the SAIN interview, the alleged victim said she had made a “vague” report to a family friend living in her household. Even though the prosecutor “represented [to the trial judge] that neither [the alleged victim] nor her mother recalled any disclosure prior to the letter to” the guidance counselor, given the other information presented to the judge “there was no way to decide who was the first complaint witness without a hearing.”

To compound the error, the trial judge actually admitted evidence of multiple complaints, contrary to the SJC’s decision in Commonwealth v. King. “If, in fact, the letter was the first complaint, that is the end of the matter. The letter would be the first complaint evidence and the further disclosures are not admissible as first complaint evidence.”

The SJC finds that further and related error occurred when the following evidence was admitted: that after the alleged victim told the guidance counselor, the counselor “believed” the allegations and filed a 51A report; that the alleged victim’s mother then engaged her in counseling; that the mother then brought her to the DA’s office for an interview; and that the alleged victim then sat for a SAIN interview with “a trained forensic interviewer and members of the police department and the district attorney’s office.” Not only did this evidence violate the first complaint rule of King, but “the description of the investigative process . . . creates the imprimatur of official belief in the complainant,” which is “unnecessary and irrelevant to the issue of the defendant’s guilt, and is extremely prejudicial.” “The jury did not need to know how the complaint of abuse evolved into the case before them.”

The SJC also finds error in the admission of evidence—in the form of testimony and a stipulation from care and protection proceedings—that in April of 2001, the defendant voluntarily relinquished his parental rights to the alleged victim. Not only was the evidence irrelevant, as it was “not an admission of abuse” but “merely an acknowledgement by the defendant that his parental rights were being terminated because of the allegations of abuse,” but the court document itself contained further irrelevant and prejudicial information, such as references to DSS reports and a court investigator.

Additionally, the SJC concludes that the alleged victim’s grandmother should not have been permitted to testify that the defendant did nothing around the house and “had a bad habit” of “just standing around and scratching himself, but not in the usual manner.” Nor was it relevant that the defendant told the detective “that at one time he had two adult pornographic magazines in the house.”

Further, it was improper for the prosecutor to ask the defendant, on cross-examination, if the alleged victim was lying about the accusations and whether the detective was lying about his interview with the defendant, as it is not proper to ask one witness to comment on the credibility of another.

The prosecutor also erred by arguing that the police had to “track [the defendant] down” in Illinois, as the implication was that the defendant attempted to evade police detection when there was no basis in the evidence for such suggestion.

Finally, the SJC expresses concern that the sentencing decision may have been based on conduct for which the defendant was not charged or convicted, since the judge referred to “the long period of time over which the conduct occurred,” and such reference could have been to a ten year period the prosecutor described but which went beyond the period of the conduct on which the convictions were based.

Commonwealth v. McCulloch, 450 Mass. 483 (2008)

The SJC holds that Rule 29, which governs motions to revise or revoke sentences, does not authorize a judge to vacate a guilty finding and impose, in its place, a continuance without a finding.

Commonwealth v. Bush, 71 Mass. App. Ct. 130 (2008)

Affirming the denial of a motion to suppress evidence, the Appeals Court concludes that, in the circumstances present here, it was permissible for the police to wait only five seconds after knocking and announcing their presence before executing a forced entry into the defendant’s apartment. “An interval spanning only seconds may be sufficient depending on the particular facts presented to the officers executing the warrant.” “The reasonableness of the delay is evaluated based on the perspective of a reasonable officer at the scene. . . Here, given the darkened hallway, the ‘scurrying’ sounds without a verbal response, and the officers’ awareness that there might be a firearm in the apartment, it was reasonable for the police to fear a threat to their safety within five seconds.” The Appeals Court, however, does state the following in footnote 9: “That the danger increased once the police determined the door was barricaded plays no role in the reasonableness of the officer’s determination to begin ramming the door after five seconds.”

Additionally, the Appeals Court affirms the conviction, concluding that the evidence presented at trial was sufficient to prove an intent to distribute, even though the police found only 2.4 grams of crack cocaine and none of the items typically associated with distribution, and the Commonwealth’s expert even acknowledged that amount could be consistent with personal use. In concluding the evidence was sufficient to prove the intent to distribute, the Appeals court relies on the testimony that one smokes crack cocaine and the police did not find any smoking paraphernalia, as well as testimony about police observations of significant foot and car traffic at that building and testimony that barricaded doors are common for drug dealers in Brockton.

Affirming these convictions, after a bench trial, based on the defendant's and his wife's physical abuse of their four children, the Appeals Court rejects the defendant's claim that the trial judge should have recused himself because he had previously accepted the wife's guilty plea when he heard the Commonwealth's prospective evidence and viewed photographs of injuries. Noting that recusal is "left to the discretion of the judge," the Appeals Court concludes that the judge properly conducted the "two prong analysis for determining recusal." First, the judge determined that he could pass "the internal test," which asks the judge to search his own conscience to determine if he can remain free from "disabling prejudice." After spending two and a half hours considering the Commonwealth's request for recusal, which the defendant's attorney had opposed, the judge specifically stated that he had not made any decisions about the defendant's guilt or innocence or about the credibility of any witnesses and that the photographs he had viewed as part of the plea colloquy did not elicit an emotion response that would preclude him from judging the case fairly. Second, the judge "attempt[ed] an objective appraisal of whether this [was] a proceeding in which his impartiality might reasonably be questioned." The Appeals Court agreed that this was not such a situation, as the judge had not been exposed to any "extrajudicial source" of information that might cause bias or prejudice.

