

The Zealous Advocate

CPCS Training Bulletin



CHIEF COUNSEL'S MESSAGE

William J. Leahy, Esq.

The Governor's Anti-Crime Council:

After a seventeen year hiatus, the Governor's Anti-Crime Council (ACC) was recreated this spring by executive order of Governor Patrick. The Council meets monthly. The first two meetings, which were led by the Governor himself, were held in Worcester (May) and Springfield (June), with the next one scheduled for July 26 in Fall River.

CPCS advocated for the reinstatement of the ACC, because it offers a forum in which criminal justice policy issues may be discussed more privately and frankly than is generally possible, and ideally while policy positions are still being debated. Its revitalization may have come too late to influence one disappointing and arguably unconstitutional proposal in the Governor's previously filed Act to Reduce Gun Violence, House Bill No. 3978: that is the proposal in section seven of the bill which would amend the pretrial detention law, G.L. c.276 sec. 58A by adding a **presumption of dangerousness** in certain gun-related cases, as follows:

“Subject to rebuttal by the person, in a case involving any felony offense that has as an

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

element the use, attempted use, or threatened use of physical force against the person of another and involves the use of a firearm, it shall be presumed that no condition or combination of conditions will reasonably assure the safety of any other person or the community if the judicial officer finds that there is probable cause to believe that the person committed the offense.”

(emphasis added)

By setting out a category of defendants whose dangerousness is presumed and whose liberty is taken simply by an initial determination of probable cause, we believe that this proposal undermines dueprocess and the presumption of innocence much more egregiously than did the federal preventive detention law upheld in *United States v. Salerno*, 481 U.S. 739 (1987), or the above-referenced Massachusetts statute upheld in *Mendonza v. Commonwealth*, 423 Mass. 771 (1996). But even if it were to survive constitutional scrutiny, we say that it is a bad policy which will inevitably cause the unjust deprivation of liberty and will undermine the ability to present a proper defense in many cases.

Please send me your thoughts about this legislation, and your ideas for positive criminal law and sentencing reforms on any criminal or juvenile justice topic, to me at wleahy@publiccounsel.net There are very few voices on the Council which represent the interests of individuals whom the state has chosen to prosecute: your thoughts and insights will help make my voice more persuasive.



MESSAGE FROM THE EDITOR

Cathleen Bennett, Esq.

On behalf of Paul Rudof, Margaret Fox and Kristen Munichello, I am sincerely grateful to the many CPCS Public Defenders and Bar Advocates who have so generously and graciously donated their time, skill, knowledge and experience over the past year to help us train one another to be better advocates for our clients. We are indebted to all of you. Thank you!!



INDIGENT DEFENSE NEWS

2007 CPCS ANNUAL CONFERENCE

Over 500 people attended the CPCS Annual Training Conference on May 3, 2007 at the DCU Center in Worcester, MA. Vince Aprile of Louisville, KY delivered the keynote presentation. Attorney Aprile discussed how to identify and handle the most common ethical issues that arise in cases involving the use of experts. He gave concrete advice about how to select and work effectively with expert witnesses.

We also presented programs on Diminished Capacities; Attachment and Bonding for CAFL Attorneys; Federal Habeas Corpus Basics; Gangs, Delinquency and Recidivism; Fundamentals of Toxicology; Interviewing Witnesses and Report Writing; as well as Hot Topics in Criminal Law. We are very grateful to all of those who generously shared their insights, strategies, and knowledge with us by teaching at the conference. We also thank the many private lawyers and CPCS staff attorneys who attended the conference this year. Thank you all for making the day a success.

2007 Conference Presenters and Panelists: Vince Aprile, Esq. (Louisville, KY); Eric Mart, PhD (Boston, MA); David Rosmarin, MD, PhD (Boston, MA); David Nathanson (CPCS Boston); Cathryn Neaves, Esq. (Boston, MA); Stephen Maidman, Esq. (Springfield, MA); James Sultan, Esq. (Rankin & Sultan); John Thompson (Thompson & Thompson); Barbara Kaban, Esq. (Children's Law Center); Reverend Claire Sullivan (Straight Ahead Ministries); Manny Keo (Cambodian Youth Reentry Project); David Benjamin, PhD (Boston University); Brendan Wells (Washington, DC); Susanna Murphy, Esq. (CPCS Dedham); Beverly Cannone, Esq. (CPCS Dedham); Thomas Estes, Esq. (CPCS Northampton); Carlene Pennell, Esq. (Rubin & Rudman LLP); Beth Eisenberg, Esq. (CPCS Boston); Julie Buszuwski, Esq. (CPCS Salem); Professor Stanley Z. Fisher (Boston University Law School); Linda Thompson, Esq. (Thompson & Thompson); Paul Rudof, Esq. (CPCS Boston); Wayne Murphy, Esq. (Boston, MA); Stephanie Page, Esq. (CPCS Boston).

AWARDS PRESENTED AT 2007 CPCS ANNUAL CONFERENCE

In Recognition And Gratitude For Outstanding Dedication And Performance On Behalf Of Indigent Clients. The following awards were presented at the CPCS Annual Conference in May. The speeches were inspiring, entertaining, and moving:

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 2007 Duggan Award for a Public Defender Attorney was presented to: JOHN OSLER, ESQ.

John Osler has devoted his entire legal career to the representation of vulnerable and indigent persons in Massachusetts. A 1978 graduate of New England School of Law, John worked from 1979 to 1987 as a staff attorney for Massachusetts Correctional Legal Services (MCLS). His work at MCLS included significant appellate victories (see, e.g., *Commonwealth v. Burkett*, 396 Mass. 509 [1986] and *Commonwealth v. Zezima*, 387 Mass. 748 [1982]). He also became known for his mastery of the intricacies of sentencing credit, parole eligibility and release calculations.

In 1987, John joined the CPCS Public Defender Division, first working in the Boston and Roxbury offices, and for the last eight years, in the Cambridge office. In his positions as trial attorney and Attorney-in-Charge, John has been a role model for what it means to be a zealous advocate and an extraordinary human being.

As a trial attorney, John is equal parts scholarship, strategy, and empathy. An eternal student, he is always reading, questioning, and deciphering. John spots the subtlest issues. He is also a master strategist who, like an expert chess player, anticipates the moves of others and is always several steps ahead. Finally, John has tremendous empathy for his clients. He knows and understands the people he represents, but he does not purport to judge them. When John presents his client's history to a judge or prosecutor, it is as though he has observed his client at each stage of life.

John is also an incredibly generous colleague. He shares his experience and expertise with defense attorneys, public and private, from across the state. An e-mail or telephone call to John about an issue never goes unanswered. At the same time, this deeply modest man would never consider himself an expert, but simply a learner.

As the leader of the Cambridge Superior Court office, John has had an impact on every attorney with whom he works. He demands excellence, but he does so in a way which is supportive and encouraging. John trains new lawyers to be aggressive litigators and he helps them overcome hurdles that may, at first, seem insurmountable. He fosters an environment where attorneys leave no stone unturned, and he sets the example of zealous advocacy with his own inspirational devotion to his clients and their cases. John's compassion, his integrity, and his understated presence are at the foundation of the Cambridge office. He is a zealous advocate because that is who he is to the very core.

The 2007 Duggan Award for a Private Counsel Attorney was presented to: JAMES B. KRASNOO

James Krasnoo is an Essex County attorney with a large successful private practice, whose longstanding dedication to excellence in indigent defense work has earned him the respect of lawyers throughout the criminal justice system. Not only defender colleagues, but also judges and even prosecutors praise James Krasnoo's provision of outstanding legal services to the poor.

A graduate of Harvard University and the University of Chicago Law School, after admission to the Massachusetts Bar in 1964 James Krasnoo practiced with private firms in California and Boston. After working as an

Assistant U.S. Attorney from 1969 to 1973, James Krasnoo practiced criminal defense at the trial and appellate level, accepting assigned indigent cases through the C.J.A. panel and through C.P.C.S. for over 20 years. He has authored articles in the Boston University law review and other legal publications, and taught at Suffolk University Law School, New England School of Law and Massachusetts School of Law.

Although certified by C.P.C.S. for murder cases, James Krasnoo has consistently handled as well district court criminal assignments in the Lawrence District Court through the Essex County Bar Association Advocates. For many years he has mentored less experienced attorneys in that program and taught the very numerous seminars required of its members. Due to his unflagging commitment to assisting and training his fellow defenders, and his famously tenacious advocacy on behalf of his clients, James Krasnoo is seen as the elder statesman of the Essex County Bar Advocates.

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 2007 Blitzman Award was presented to:
RICHARD BOWEN**

After what most people would have considered a full career as a city manager, Richard Bowen began the practice of law in 1985. Since then he has devoted his entire legal practice to providing representation for indigent people in Lawrence. Richard has handled a large number of adult criminal cases, Care and Protection cases, and CHINS cases. For the past ten years he has devoted himself exclusively to the representation of children and youth in Delinquency and Youthful Offender cases. Richard is an outstanding practitioner and leader, who provides both support and inspiration to all of the families and practitioners who appear in Lawrence Juvenile Court. Richard is "Abuelito" to kids and lawyers alike.

Richard is the epitome of zealous advocacy. He is known for thoughtful litigation, as well as for building strong supportive relationships with his clients. In addition to routinely going the extra mile for each of his young clients, Richard is generous, considerate and imaginative in finding other ways to enhance the quality of Juvenile Justice in Lawrence. He spends hours each month mentoring and advising other lawyers practicing in Juvenile Court. He never tires of studying state and federal law, research on adolescent development, or client cultural issues. He has even been known to repair and refinish the furniture in the court room to assure that his clients' cases are conducted in an appropriately dignified setting.

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.

The 2007 Mary C. Fitzpatrick Children and Family Law Award was presented to: JOAN KATZ

Joan Katz is a tireless and dedicated advocate for parents and children in Franklin County. She is a 1970 graduate of New York University and received her J.D. in 1995 from Western New England College School of Law. Since her admission to the bar, Joan has worked as a sole practitioner. She has been a member of CPCS's Mental Health panel since 1995 and a member of the Children and Family Law trial panel since 1997. She has also been part of CAFL's mentor program since 2002.

Joan is a relentless advocate, often on the most difficult cases and in the face of what appear to be overwhelming odds. She is a skilled trial lawyer; she is passionate in her advocacy and compassionate toward her clients; and her preparation and attention to detail serve as a model for all of our attorneys. Her expertise in mental health advocacy and her knowledge about medication

in particular make her an excellent advocate for mentally ill CAFL clients. Moreover, she consistently and persistently pursues the stated wishes of her child clients. Her commitment to her clients is evident in her zealous in-court and out-of-court advocacy, as well as in the time she spends meeting with her clients.

In addition to her work on behalf of individual CPCS clients, Joan has been a valuable resource for other attorneys, as a mentor, trainer, and trusted colleague. She has also provided countless hours of pro bono advocacy to children in divorce, paternity, adoption, and abuse prevention cases. Joan is active in a variety of organizations that are committed to providing legal services and other assistance to individuals and families in Franklin County, including the Volunteer Lawyers Project, Safe Passage (which provides services to battered women), New England Center for Women in Transition, and Franklin County Bar Advocates for Women and Children. She is also an active member of the Franklin County Bar Association.

Through all of her work, Joan is a zealous advocate who is very committed to her clients. The Children and Family Law Program is extremely fortunate to have her as a member of its trial panel.

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 2007 Paul J. Liacos Mental Health Advocacy Award was presented to: DEBRA BEARD BADER

Debra Beard-Bader, Director of CPCS's Alternative Commitment Unit, is a *cum laude* graduate of the New England School of Law, where she served as Lead Articles Editor on Law Review and was the recipient of the Amos L. Taylor Award for Excellence in Achievement. After clerking in the Superior Court Department, Debra began a distinguished career in criminal defense. She has served on the faculty for several training programs, is a contributing author of Massachusetts Criminal Practice, and is a member of MACDL and NACDL.

Deb is among the most knowledgeable and respected SDP defense attorneys in the commonwealth. Her dedication to the defense of persons subject to this most pernicious of laws is evident – in the passion she brings to her own cases; in her willingness to mentor and advise other attorneys whenever needed; and, by agreeing to oversee the Alternative Commitment Unit, in leaving behind her beloved criminal practice. Assignments to sexually dangerous person cases are not the most sought-after. Perhaps because of commonly held misconceptions about the dangers posed by sex offenders. Perhaps because of a mistaken belief that these cases cannot be won. Despite the misconceptions, and in the face of overwhelming resistance, Deb won, and won again, and again. She not only chose to continue the fight, she chose to do so exclusively.

The Paul J. Liacos Mental Health Advocacy Award is dedicated to those whose work best exemplifies zealous advocacy on behalf of CPCS’s clients. Debra Beard-Bader is all that, while working to ensure that others are as well.

The Thurgood Marshall Award was established by CPCS in 1994 to honor a person who champions the cause of zealous representation for the poor, and the right to effective assistance of counsel for all.

The 2007 Thurgood Marshall Award was presented to: CATHLEEN BENNETT

Cathleen L. Bennett has served as Criminal Defense Training Director for CPCS since 2000. Cathy is also an outstanding trial lawyer who throughout her twenty year career as a public defender has represented indigent criminal defendants with the highest levels of passion, preparation and skill.

As Training Director, Cathy has provided inspiring and challenging training to well over a hundred public defenders and over a thousand bar advocates to prepare them for the enormous task of advocating vigorously and successfully for indigent defendants in our criminal courts. She understands better than anyone that the trial court is not a level playing field, and the trial of criminal cases not a parlor game. She knows how to motivate, how to inspire, and how to build both confidence and steely determination in the lawyers whom she prepares for battle. A colleague describes her “unique ability to push

lawyers outside of their comfort zone without making them feel uncomfortable, enabling them to try new techniques and approaches that allow them immediately to see their own vast improvements.”

Cathy’s accomplishments have won her national recognition, and ever-expanding requests for her involvement. She is an esteemed member of the faculty at the National Criminal Defense College in Macon. She has taught at the National Institute of Trial Advocacy, and has trained public defenders in states such as Kentucky, New Hampshire, Pennsylvania, New Jersey, North Carolina, Washington, Wisconsin and Georgia.

Within the past year, Cathy has surpassed even her own exalted expectations by seizing upon the challenge of leading skills training for seventy new CPCS staff attorneys, and management training for the leaders of the new CPCS District Court offices: all in addition to her full spectrum of training responsibilities. Recently, Cathy received a letter from a bar advocate who had just achieved a jury acquittal and thus avoided his client’s deportation, only hours before a scheduled immigration hearing. The lawyer related to Cathy that the verdict had a tremendously positive impact upon his client, and the client’s mother whom he supported, and noted that “a guilty verdict would have been a disaster.” He went on to say that “I could not have won that verdict without the training, advice and materials you and your colleagues have provided me over the years.”

Cathy Bennett has done more than any person to ensure that poor people in Massachusetts get the high quality of representation that they deserve, and which the Constitution requires. She has *earned* this year’s Thurgood Marshall Award.



NEW BAR ADVOCATES

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

BARNSTABLE

Elisa Zawadzkas
James Connors
Carolyn Lynch
Susan Lin
Joseph Cavaco

BERKSHIRE

Jerrold Trehey
Jennifer Breen Kirsch

BRISTOL

Amy Valente
John-Paul Thomas
James Hanley
Speare Christos

FRANKLIN

Alexandra Flanders
Judith Moman

HAMPDEN

Sergio Caravajal
Luke Ryan
Lawrence Allen
Randy Milou

MIDDLESEX

Joseph Hodapp
Charles Fasoldt
Benjamin Falkner
Jeffrey Perkins

NORFOLK

John Greene
Margaret Bulger
Terrance Noonan

SUFFOLK

Michael Tumplosky
Stan Helenski
Jennifer Clark
Jennifer Doherty
Robert Glotzer
Graham Bengen
Christopher Kenney
Sheelagh Corcoran

WORCESTER

Quesiyah Ali
Alicia McKinley
Padgett Berthaiume
James F. Connors
Carron Pinkins

CPCS STAFF

Carlton Williams
Olubunmi Olotu
Scott Rankin

KUDOS

The following CPCS private counsel and public defender attorneys have successfully completed or will soon complete the National Criminal Defense College, Trial Practice Institute in Macon Georgia held in June and July 2007:

JUNE 2007:

Michael Phelan, Esq. (Lynn, MA)
Marcy Levington, Esq. (Cambridge, MA)
Shira Diner, Esq. (CPCS Boston)

JULY 2007:

Joanne Daley, Esq. (CPCS Lowell)
Christopher Todd, Esq. (Springfield, MA)
Jason Thomas, Esq. (CPCS Cambridge)
Anna Olver, Esq. (CPCS Brockton)

The following CPCS Private Counsel and Public Defender Attorneys have successfully completed the CPCS Jury Skills Program held June 8, 19, 20, 21, 25 and 26, 2007 at Boston College Law School:

David Bae, Esq. (Dorchester, MA)
Bruce Brady, Esq. (Springfield MA)
Joseph Keegan, Esq. (Quincy, MA)
Sean Connolly, Esq. (Marblehead, MA)
Susana Faria, Esq. (Acushnet, MA)
Nicholas Grefe, Esq. (Yarmouthport, MA)
Terrance Stone, Esq. (Boston, MA)
Nikolas Andreopoulos (CPCS Springfield)
Theo Beery (CPCS Springfield)
Jay Carter (CPCS Cambridge)
Amanda Barker (CPCS Salem)
Laurel Singer (CPCS Worcester)
Eva Vekos (CPCS Cambridge)
Benjamin Selman (CPCS Cambridge)
Michal Mokryn (CPCS Salem)

SORB Defaults Pursuant to 803 CMR 1.13

Pasqua Scibelli, Esq., CPCS Alternative Commitment & Registration Support Unit

Background

The Sex Offender Registry Board (“SORB”) has been defaulting petitioners who do not show up for the hearing pursuant to 803 CMR 1.13. This has been happening even when the petitioner’s attorney comes to the hearing and states that his client has waived his appearance and is ready to proceed. SORB has maintained this default posture with regards to Petitioner’s Motion to Relieve Registration Obligation pursuant to 803 CMR 1.37A, and refused to allow argument or evidence relative to this motion on the hearing date.

Arguments

A. Regulatory Language Requires Default only if Both Client and Attorney Fail to Appear at Hearing

803 CMR 1.13 (2), states as follows, “[f]ailure of the sex offender to appear at the scheduled hearing without good cause shown shall result in the waiver of the right to a hearing and the registration determination and, if applicable, the recommended classification becoming the final Sex Offender Registry Board decision and shall not be subject to judicial review.”

The term “sex offender” as used in the regulation should be read to include the offender and his attorney, i.e. agent. Any other interpretation of this regulation would be unconstitutional, beyond the scope of the statutory authority granted to the Board, arbitrary and capricious and would result in a decision that is unsupported by substantial evidence. See G.L.c. 30A, section 14 (Board decision can be overturned if it is (a) violation of the constitution; (b) in excess of statutory authority; (d) unsupported by substantial evidence; and (g) arbitrary and capricious and an abuse of discretion.)

Other sections of the Board’s regulations that use the term “sex offender” exclusively include the rules governing Motions to Relieve Registration Obligation, Motions to Terminate Registration Obligation and Motions for Reclassification, See 803 CMR 1.37A, 1.37B and 1.37C. The Board’s regulation at 803 CMR 1.37A states that “a sex offender may submit to the Board a written motion for relief from a registration obligation...” The Board’s rules at 1.37B and 1.37C likewise allow “a sex offender” to file such motions, but do not mention that an attorney or other authorized representative may also file such motions on behalf of the client.

Nevertheless, the Board has interpreted these rules to allow an attorney for the sex offender to file such motions on behalf of the client. Therefore, the Board’s unwillingness to allow an attorney to present the evidence at the trial without the presence of his client constitutes an arbitrary and capricious interpretation that is not consistent with its interpretation of other regulations with the same language and is an act that deprives the client of his due process rights under the constitution.

B. The Board’s Narrow and Misguided Interpretation of Regulation 1.13 Exceeds the Statutory Authority Granted to the Board and Violates the Requirements of G.L.c. 6, section 178L

Recognizing the serious deprivations associated with a final classification decision, the legislature in G.L.c. 6, section 178L provides that a petitioner must have the right to a hearing before he is finally classified. See *Doe v. Attorney General*, 426 Mass. 136, 143 (1997) (Article 12 entitles a former offender to due process before he is required to register and before information is disseminated about him). J. Fried concurring, p. 149 (Registration is a continuing, intrusive and humiliating regulation of the person).

Recognizing the intrusive nature of the registration requirement, the legislature provided for the unusual grant of a right to an attorney for indigent clients. Most civil or administrative law statutes do not give an indigent petitioner or respondent any right to an attorney. The sex offender statute is unusual in that respect and this requirement reflects the legislature's intent to ensure each individual a meaningful and fair hearing in the context of the substantial invasion of individual privacy and liberty occasioned by the classification system.

There is no provision in the statute that allows for or implies the default procedure envisioned by the Board's regulation. See *Dept. of Labor and Industries v. Boston Water and Sewer Commission*, 18 Mass. App. Ct. 621, 625 (1984) (State agency lacked authority to promulgate rule not authorized by legislature). *Morello v. Boston Rent Control Board*, 14 Mass. App. Ct. 27, 31-32 (1982) (Section of Board's regulation was declared invalid – Board limited to only those powers expressly conferred by statute or necessarily implied from those conferred); See also, *Levy v. Board of Registration and Discipline in Medicine*, 378 Mass. 519, 524 (1979) (Regulation is valid if it is reasonably related to the purposes of the enabling legislation).

The statute allows for a default only when the petitioner waives his right to a hearing in the circumstances outlined in section 178L of the statute. It states that a sex offender will be informed by SORB of a preliminary classification and the right to a hearing. The former offender must petition the board for a hearing within 20 days of receiving such notice. If the former offender does not so petition the board, the recommended classification becomes the final classification and is not subject to judicial review. Thus, if an offender fails to request a hearing within 20 days, he waives his right to a hearing or an appeal. G.L.c. 6, §178L.

However, if an offender has requested a hearing, has an attorney, and his attorney appears at the hearing to present his case, there exists no language in the statute that would allow the Board to default the petitioner and deprive him of his statutory and due process right to a hearing. Absent a clear waiver of his right to a hearing, the Board may not, by regulation, deprive the petitioner of such right.

The Board's interpretation of its regulation is ultra vires the authority granted to it by the statute. See *Greater Boston Real Estate Board v. Dept. of Telecommunications & Energy*, 438 Mass. 197 (2002).

The statute requires a hearing and the Board may not promulgate a regulation or interpret a regulation in such a way as to abrogate or diminish this statutory right. An administrative agency cannot "further regulate [] by the adoption of a regulation which is repugnant to the statute." *Mass. Hospital Association v. Department of Medical Security*, 412 Mass. 340 (1992) quoting *Commonwealth v. Johnson Wholesale Perfume Company*, 304 Mass. 452, 457 (1939). See also *Kszepka's Case*, 408 Mass. 843, 847 (1990) (An incorrect interpretation of a statute by an administrative agency is not entitled to deference.)

Furthermore, it is the practice in civil litigation that an attorney and his client may decide to waive the client's presence at a court hearing or trial. A client is not defaulted if his attorney answers or appears. The SORB administrative process is civil, not criminal, and the same broad interpretations, favoring the client, should apply here. See Superior Court Rule 3 and District Court Supplemental Rules of Civil Procedure, Rule 102 (the right of an attorney to appear for any party shall not be questioned by the opposing party except in limited circumstances).

The general rule requiring the presence of the defendant applies to criminal cases involving a felony. *Commonwealth v. Robichaud*, 358 Mass. 300, 302 (1970); G.L.c. 278, section 6 (person indicted for a felony shall not be tried unless he is personally present). The reason for this rule is to protect the defendant's constitutional right to a fair trial and to confront witnesses. *Commonwealth v. Bergstrom*, 402 Mass 534, 544 (1988); *Commonwealth v. McCarthy*, 163 Mass 458, 460 (1895) (defendant will have an opportunity to exercise his right of challenge and other rights which cannot be exercised as well by his counsel in his absence). At no time, however, does the defendant's default

compromise his right to a jury trial. *Robinson v. Commonwealth*, 445 Mass. 280, 284 (2005) (“even a ‘solid default’ at a scheduled trial date does not constitute a waiver of the defendant’s right to a jury trial.”).

Consistent with protecting a defendant’s right to a fair trial, the Supreme Judicial Court has held that a defendant’s absence from a scheduled hearing on a motion to suppress does not result in the defendant’s automatic waiver of the suppression motion. *Robinson v. Commonwealth*, 445 Mass. 280, 283-85 (2005). Likewise, a defendant may waive his presence at hearings on motions for new trial, pre-trial motions or motions for change of venue or continuances. *Commonwealth v. Robichaud*, 358 Mass. 300, 302 (1970). The defendant may also voluntarily absent himself after the trial has begun. *Commonwealth v. Flemmi*, 360 Mass. 693, 694 (1971) (defendant waived right to be present and court may proceed without him); See also Mass. R. Crim. P., Rule 18 (1).

As for criminal misdemeanors, the Massachusetts Rules of Criminal Procedure allow the defendant, “at his own request, with leave of court, [to] be excused from attendance if represented by counsel or an agent authorized by law.” Mass. R. Crim. P., Rule 18(2). The Massachusetts Rules of Civil Procedure do not require the presence of the client at civil proceedings.

If Massachusetts law and practice allows even criminal defendants in misdemeanor cases to waive their right to be present if they are represented by counsel, then it is clearly outside the Board’s authority to prohibit a civil petitioner in an administrative case from waiving his presence at a hearing when he is represented by counsel.

C. Board’s Narrow and Misguided Interpretation of Regulation 1.13 Deprives a Petitioner of his Constitutional Right to Due Process

The Supreme Judicial Court has held that SORB must hold an evidentiary hearing, prove the appropriateness of a classification by the preponderance of the evidence and that SORB must make particularized, specific and detailed findings to demonstrate that close attention was paid to each individual offender. The Board must make *explicit findings* in determining the *proper weight* each factor should receive in the classification process for each offender. *Doe v. SORB*, 428 Mass. 90, 102 (1998) (emphasis added).

Specifically, the SJC has held that constitutional due process requires that SORB “demonstrate that close attention has been given to the evidence as to each offender and that the classification for each is appropriate.” *Id.* How can SORB demonstrate that it has given *close attention to all* the evidence when it refuses to allow the petitioner’s attorney to present any evidence at a hearing? In the event of a default pursuant to 803 CMR 1.13, SORB refuses to hear any evidence or argument relevant to the petitioner’s classification and proceeds to make a decision based upon the SORB’s presentation of evidence only. This violates the strict due process required by the SJC for sex offender classification proceedings.

The Court has held that summary judgment proceedings in an administrative context do not transgress statutory and constitutional rights to a hearing only where “those procedures are such that they allow the agency to dispense with a hearing *only when papers or pleadings filed conclusively show* on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision.” *Mass. Outdoors Advertising Council v. Outdoor Advertising Board*, 9 Mass. App. Ct. 775, 785-86 (1980) (emphasis added); See also *Monahan v. Washburn*, 400 Mass. 126, 128-129 (1987) (“Involuntary dismissal is a drastic sanction which should be utilized only in extreme situations. . . . The law strongly favors a trial on the merits.”).

In the SORB context, the papers or pleadings filed by the SORB attorney do not “conclusively show on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision.” The hearing and the presentation of evidence and/or argument by the petitioner or his attorney is instrumental in SORB’s determination as to how to weigh certain factors in each individualized case. SORB cannot dispense with a hearing simply because it would be more administratively efficient for it or because it could more easily and generally classify offenders if it did not have to weigh individualized evidence. See *Doe v. SORB*, 428 Mass. 90, 102 (1998) (“risk of error in these cases is that the board will apply general factors to offenders that may not correctly predict their propensity to reoffend....[but] this risk is minimized because *both* parties will have the opportunity at an evidentiary hearing to present evidence....”) (emphasis added)

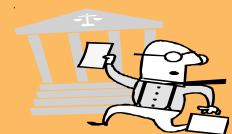
Failing to allow the petitioner, through his attorney, to present his particularized and individualized evidence, violates the petitioner’s constitutional right to due process as required by *Doe v. SORB*, 428 Mass. 90 (1998).

D. The Board’s Interpretation of This Regulation Denying Petitioner Due Process is Arbitrary and Capricious and an Abuse of Discretion

The Board’s interpretation of the regulation depriving the Petitioner of his due process rights is arbitrary and capricious for several reasons. First, the Board interprets its other regulations with the same term “sex offender” to mean either the sex offender or his attorney. See 803 CMR 3.17A, 3.17B and 3.17C.

Second, the Board is not prejudiced by the petitioner waiving his presence at the hearing. If the Board wanted the petitioner to be present at the hearing for any reason, the Board could have subpoenaed the petitioner. See G.L.c. 30A, section 12 and 803 CMR 1.17.

However, in this circumstance, the Board failed to subpoena the petitioner and yet entered a default judgment against him even though his attorney was present and ready to offer evidence and present the case. Thus, the Board’s action resulted in a serious deprivation of the petitioner’s right to due process for no rational reason.



Defending Failure to Register Cases

Pasqua Scibelli, Esq. and Larni Levy, Esq. CPCS Alternative Commitment & Registration Support Unit

Failure to register cases (G.L.c. 6, §178H) are being prosecuted with great fervor by the District Attorneys' offices. The consequences of a guilty finding can be severe with the possibility of long sentences followed by lifetime community parole ("LCP"). This article is in response to the many calls we receive from attorneys seeking guidance on defending these important cases with far reaching consequences.

Often we encourage counsel to vigorously defend rather than accept the sometimes enticing pleas offers from the prosecution. A recent victory in the Appeals Court, *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9 (2007) illustrates the importance of a strong defense.

Lack of Knowledge

In Ramirez, the Commonwealth failed to prove that the defendant had actual notice of his obligation to register. The court held that evidence of knowledge required under this statute must be specific and personal to each defendant and that "absent a defendant's conscious disregard of the information necessary to provide him with the requisite knowledge, the Commonwealth cannot meet its burden by establishing that the knowledge was available to the defendant." Id. at 12.

In this case, the Commonwealth charged the defendant with failing to register for a 1984 sex offense. The date of the offense listed in the complaint was the date of his arrest. The Commonwealth argued, among other theories, that the defendant received actual notice of his duty to register at the time of his arrest and that this satisfies the statute's knowledge requirement. The Appeals Court held that there was no evidence that the defendant received notice of registration on the date of his arrest – the mere fact of arrest "without evidence that he was informed that day precisely what he was arrested for, is not enough." The Court also found that the complaint only alleged the failure to register on the date of the arrest and that the defendant did not gain knowledge of the reasons for the arrest until the following day at his arraignment. Therefore, the Commonwealth had failed to prove the offense as charged.

Congratulations to Elaine Fronhofer, appellate counsel for Mr. Ramirez, and Steve Newman, trial counsel, for their excellent advocacy.

Trial Tips:

- **Often the strongest defense to a charge of failure to register is that the Commonwealth failed to prove that the defendant had *knowledge* of his registration obligations.**
- **Consider drafting a jury instruction requiring proof of "conscious disregard" of notice in addition of actual receipt of notice.**
- **Move for a Required Finding on grounds that the Commonwealth has not proved facts necessary to support the offense on the date charged.**
- **Bill of Particulars is very important. You need to know the exact date or dates of offense(s) alleged by the Commonwealth.**
- **Advise clients to register immediately to avoid charges for failing to register following arrest.**

Lifetime Community Parole

The statute requires the mandatory imposition of lifetime community parole following a conviction for failure to register and can be imposed after the defendant has served committed time OR after he has been released from probation or parole supervision OR upon expiration of a continuance without a finding OR upon discharge from the treatment center pursuant to section 9 of chapter 123A, whichever occurs first. The requirements imposed by Parole Board on sex offenders subject to LCP can be very restrictive and onerous and last a lifetime. Your client may have a hard time complying and any violation may result in the increase of his underlying sentence. For this reason, avoiding the imposition of this enhanced sentence is crucial. The following summary offers some guidance on how to avoid this sentence.

1. Does it apply to your client?

LCP applies to:

- Any level 1, 2 or 3 offender who is convicted of failing to register and has been convicted or adjudicated of any of the following offenses: chapter 265, sections 13B, 13F, 22A, 23, 24B and 26 (indecent assault and battery on a child, indecent assault and battery on a mentally retarded person, rape of a child under 16 with force, rape and abuse of a child, assault of a child with intent to commit rape, and kidnapping of a child) and conspiracy to commit, being an accessory to, or a like violation in another state of these offenses. §178H(a)(1)
- Any level 2 (moderate risk) or level 3 (high risk) offender convicted of a second and subsequent failure to register, regardless of underlying index offense. §178H(a)(2)
- *May also apply to any level 2 or 3 offender convicted of first offense of failure to register. (Section 178H (3) appears redundant and interpretation of this section is unclear)* §178H(a)(3)

LCP does not apply to:

- Presumably, this provision does not apply to juveniles since the statute refers only to persons “convicted” of failing to register.
- Because LCP is an enhanced penalty, it may not be imposed for conduct which occurred before December 20, 2006, the date this statutory amendment went into effect. Imposition of LCP for conduct prior to December 20, 2006 would violate state and federal constitutional prohibitions against ex post facto laws. See *Commonwealth v. Talbot*, 444 Mass. 586, 597 (2005).

2. What dispositions preclude imposition of LCP?

- The only dispositions that clearly do not require the LCP penalty are: *filed without a change of plea, pretrial probation or G filed*. See *Doe No. 1211 v. SORB*, 447 Mass. 750 (2006) (G filed is not a judgment of conviction where no sentence was imposed).¹

(Footnotes)

¹ Note that the SJC permits courts to remove guilty filed dispositions from the file and to impose a sentence. *Commonwealth v. Simmons*, 448 Mass. 687 (2007).

3. Should you object to the imposition of LCP after a CWOFF despite statutory language which suggests LCP can be imposed upon expiration of a CWOFF?
- Counsel should object on the record to the imposition of LCP after a disposition of a continued without a finding (CWOFF). It should be argued that the statutory language allowing for the imposition of LCP “upon expiration of a continued without a finding” is unconstitutional pursuant to *Apprendi v. New Jersey*, 530 US 466 (2000). *Apprendi* holds that the due process clause of the federal constitution requires proof beyond a reasonable doubt of the facts supporting an enhanced penalty. A CWOFF is a finding of sufficient facts, not a finding of guilt beyond a reasonable doubt.
 - An argument can be made that this section does not apply to CWOFFs unless there has been a violation of conditions of a CWOFF and a guilty finding has been imposed. Even then, it can be argued that a guilty finding is constitutionally insufficient to support the imposition of LCP absent a record that shows the elements of the charge were proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 US 466 (2000).

The statute states that LCP applies to “any person convicted,” and later mentions that LCP applies upon “*expiration* of a continuance without a finding.” This language is unconstitutionally vague. What does *expiration* mean since cases with CWOFF dispositions are often dismissed? The two sections of the statute are contradictory and can only be read in harmony if “expiration” is defined as a violation of the terms and the imposition of a guilty finding after a finding that the elements of the crime charged were proven beyond a reasonable doubt. *Commonwealth v. Richards*, 426 Mass. 689 (1998) (criminal statutes are strictly construed in favor of defendant) (rule of lenity); *Wilson v. Comm’r of Transitional Assistance*, 441 Mass. 846 (2004) (contradictory provisions of a statute must be harmonized and interpreted as a whole); *Wardell v. Director of Division of Employment Security*, 397 Mass. 433 (1986) (admission pursuant to a CWOFF is not a conviction).

4. What must be charged in the complaint in order for LCP to be imposed?
- The underlying conviction and that the defendant is a level 1, 2 or level 3 offender must be charged in the complaint or indictment and proved beyond a reasonable doubt. *Commonwealth v. Pagan*, 445 Mass. 161 (2005). See also *Apprendi v. New Jersey*, 530 U.S. 466. (2000) (sentencing for enhanced penalties must meet constitutional requirements) A second and subsequent violation must also be charged and proved.
5. Must LCP be imposed by a Judge and how much discretion, if any, does the Judge have?
- a. As an enhanced penalty, LCP must be imposed by the court. *Commonwealth v. Talbot*, 444 Mass. 586 (2005) (LCP is an enhanced penalty); *Sheehan v. Superintendent of Concord Reformatory*, 254 Mass. 342 (1926) (imposition of sentences upon those convicted is a function of the courts).
 - b. It can be argued that the district court lacks jurisdiction to impose LCP where the cumulative penalties for a violation of parole could amount to more than 2½ years in the house of correction. G.L.c. 279, §23 and G.L.c. 218, §26. See also G.L.c. 127, §133D(c) (1st violation – 30 days HOC, 2nd violation – 180 days HOC, and 3rd violation – 1 year HOC on and after). Be aware that this argument could inspire the prosecutor to indict the case in order to moot the legal issue.



Delinquency Law Update

Wendy Wolf, Esq., CPCS Youth Advocacy Project

Commonwealth v. Dillon D. 448 Mass. 793 (2007) – the SJC held that the public safety exception to the *Miranda* rule applied where a 13 year old possessed over 50 bullets at school. The juvenile prevailed, at the trial level, on a motion to suppress. The Commonwealth appealed and the appeals court reversed the suppression order. The juvenile’s application for further appellate review was granted.

A school administrator saw the juvenile, in a middle school, with a clear plastic bag containing over 50 bullets, and observed the juvenile show this plastic bag to other students. The administrator took the bullets from the juvenile and told him to go to the main office. This information was conveyed to a school police officer, who arrived at the main office and conducted a pat down of the juvenile for weapons. No weapon was found. *Miranda* warnings were given to the juvenile in front of the administrator, and the juvenile stated he did not have a gun.

Approximately 25 to 30 minutes later the juvenile’s mother and grandmother arrived at the school. Neither of these women were provided an opportunity to be alone with the juvenile and were not informed of the juvenile’s *Miranda* rights. On this same day the juvenile was expelled from school. After the expulsion hearing the juvenile showed the school police officer where the gun was. The gun was in an outdoor electrical box in a residential area approximately 25 yards from the school and two feet from a home.

The long -standing rule that juveniles under the age of fourteen must consult with an interested adult before a waiver of *Miranda* can be valid did not apply in this case. The court reasoned that there was an emergency situation and the school police officer had to protect all the children in the middle school and the residents in the neighborhood. “The juvenile’s possession of over 50 bullets alone was enough to support the inference that a gun was in close proximity and to invoke the public safety exception to the requisite *Miranda* warnings.”

Commonwealth v. Ogden O. 448 Mass. 798 (2007) – Ten year old could form the requisite intent for the crime of mayhem and trial counsel was not ineffective for failing to present evidence to the jury that the juvenile lacked the capacity to form the specific intent to commit mayhem.

While the juvenile and a friend were on a front porch, the victim walked by and asked the juvenile if he had seen a particular friend. The juvenile responded “no,” whereupon the victim turned and walked away. The victim then felt liquid on his leg and told the juvenile and his friend to “stop wetting” him. The juvenile then threw a flaming piece of paper on the victim. As a result the victim suffered serious burns, required several months of treatment and was left with a large scar on his lower leg.

The SJC rejected the argument that there was insufficient evidence to prove that the ten year old juvenile acted with the specific intent to maim. The court referenced a number of Massachusetts cases that state specific intent can be inferred from the evidence from which the injuries arose and the nature of the injuries; these were all adult cases. In this case, the court found that the jury could infer the juvenile’s specific intent from the juvenile’s actions and the victim’s injuries. The court discounted the juvenile’s age as a factor to consider in forming the requisite intent for a crime. Counsel for the juvenile raised the issue that Massachusetts has never clearly decided whether the common law presumption that children under age fourteen are presumed incapable of committing particular crimes. While the SJC agreed that this issue has not been definitively decided, the court stated that our juvenile code (G.L. c. 119 § 52-84) was enacted to address delinquent children in a way that affords them greater protections than adults. “This system has rendered a defense of incapacity based on youth, to the extent that it ever may have existed in the Commonwealth, inapplicable to current juvenile proceedings.” According to the court, our statutes dealing with delinquent children are to be liberally construed and children brought before the court should not be treated as criminals but as children in need of aid and encouragement. “The law presumes different levels of responsibility for juveniles and adults and, realizing that

juveniles frequently lack the capacity to appreciate the consequences of their actions, seeks to protect them from the possible consequences of their immaturity.” Citing Commonwealth v. A Juvenile, 389 Mass. 128, 132 (1983). The court further stated that a juvenile might not have the maturity to fully appreciate the consequences of his actions, but that does not mean he can not form the specific intent. The court notes in footnote six that expert testimony based on “scientific evidence” can be presented on this issue.

The court also rejected the juvenile's claim that his trial counsel was ineffective for his failure to present to the jury the issue of the juvenile’s incapacity and his failure to seek funds for a psychological evaluation regarding the juvenile’s ability to understand the consequences of his actions. The juvenile did have a competency evaluation conducted by the juvenile court clinic and he was found competent and on appeal no information from that evaluation was offered to suggest that the juvenile could not form the specific intent.

In addressing an ineffective assistance of counsel claim, the court noted “that a claim of ineffective assistance of counsel raised on direct appeal, rather than through a motion for a new trial, is a claim in its "weakest form" because it is bereft of any explanation by trial counsel for his actions and suggestive of strategy contrived by a defendant viewing the case with hindsight. Only in exceptional circumstances will an appellate court be able to resolve an ineffective assistance claim on direct appeal, where the factual basis for such a claim is indisputable from the trial record.”



Collateral Consequences: Public Housing

Richard Whitehill, Esq., Marblehead, MA

One corollary issue of concern for criminal defendants is possible eviction from public housing. The strategies for defending a client from eviction depend on a multitude of variables, which include, inter alia, the following:

- (1) Is your client going to be receiving another form of publicly supported housing for the next few months or years?
- (2) If so, or if they will lose the eviction case, are there other people who could remain on the lease?
- (3) Is the criminal charge actually an evictable violation of a lease?
- (4) If so, what evidence does the Local Housing Authority (LHA) possess?
- (5) If there is sufficient evidence, what is the skill level of the attorney representing the PHA?

1 and 2. If your client is not going to lose either the criminal or eviction case, there is still the possibility he can save the unit of public housing for his family. Your client needs to convince the PHA that the remaining family members were neither aware of, nor capable of preventing, the criminal acts that are the basis for the two cases. Your client also needs to be removed from the lease and have a remaining adult take over the lease. If a violent act is alleged, it would also help the remaining family members if they took out a restraining order against your client. The remaining family members should be able to get Legal Services to defend them.

3. If you can win the criminal case, is the charge one that can cause your client to be evicted, as some housing authorities go forward with an eviction despite the lack of a criminal conviction due to the significantly lower civil standard? In a case decided May 3, 2007 - Lowell Housing Authority v. Melendez - the SJC broadened the interpretation of a standard lease provision allowing evictions for criminal activity “on or near any LHA housing...” to uphold the eviction of a person who assaulted and attempted to rob another individual at a convenience store located one mile from the housing development where the defendant lives. 449 Mass. 34 (2007). However, the court took pains to note that whether the criminal activity is cause for termination will vary depending on whether the activity would “reasonably inspire a significant level of fear on the part of tenants forced to live in close proximity to the offending tenant” and distinguished the case from Boston Housing Authority v. Bryant, 44 Mass. App. Ct. 776 (1998), a case where the tenant committed credit-card fraud.

4. Check the evidence. Some LHA’s go forward based on a newspaper article or blurb, without a witness, or a police report without the reporting officer. Despite the compacted nature of evictions, the Uniform Summary Process Rules allow for discovery of the name and testimony of every witness, as well as a list of every document the plaintiff plans to introduce and a list of those documents, similar to a civil trial (See U.S.P.R., Rule 7). Be careful, because the discovery must be received by the court and by plaintiff’s counsel on the date the answer is due (which will be on the Summary Process Summons your client receives) or the absolute right to discovery is lost. A Motion to Allow Late filing of discovery is up to the discretion of the court.

5. Check the LHA’s attorney. DHCD regional counsel probably know better, but can get caught up letting the LHA local manager run the show, and they may have evidence that is inadmissible in court (see above). Often the LHA hires a local attorney - friend of the Mayor, and they are not at all familiar with all the ways they can screw up. Run them around the yard a while, see how much you can delay things, and wait for them to make an error. There are significant restrictions based on statutes and case law. For instance, the Summary Process Summons can’t rely on information not provided in the Notice-to-Quit. Feel free to call me on this one, but know there are potholes that can result in a dismissal of a case, just like on the criminal side.



Commonwealth v. Colturi, 448 Mass. 809 (2007):

SJC Rules On Admissibility Of Breath Tests Absent Expert Testimony

Edward Sharkansky, Esq., Brockton, MA

The Supreme Judicial Court decided the question of whether, or under what conditions, the result of a breathalyzer test is admissible in a criminal trial on a charge of OUI in violation of G.L. c.90 §24(1)(a)(1). The issue arose after the district court allowed the Defendant’s motion to exclude breath test results to prove the “per se offense” when the Commonwealth failed to provide expert testimony regarding retrograde extrapolation to prove the Defendant’s blood alcohol level at the time of operation as opposed to more than an hour after the Defendant’s last operation of the motor vehicle.

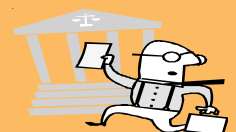
The district court further ruled that the Commonwealth may not offer a specific blood alcohol level to prove the “impaired ability” offense without expert testimony establishing the Defendant’s blood alcohol level at the time of operation AND the significance of that level as it pertains to impairment.

The SJC ruled that in a “per se” prosecution, expert testimony was not necessary on the subject of retrograde extrapolation so long as the test is conducted within “a reasonable period of time” after the driver’s last operation of the motor vehicle. The court further ruled that in an “impaired ability” prosecution, the Commonwealth must present expert testimony when offering a blood alcohol level of .08 or above on the significance of that level as it pertains to impairment.

This ruling does not change the Commonwealth’s burden of complying with the relevant CMRs and Commonwealth v. Barbeau, 411 Mass. 782 (1992) regarding machine and operator certification and periodic testing documentation. Defense counsel should argue against the admission of test results that are not properly certified or offered by the proper witness.

Furthermore, while the admission of blood alcohol levels may become more prevalent at trial, defense counsel should continue to argue against the reliability of these results as the jury must be convinced beyond a reasonable doubt that the Defendant’s blood alcohol level was .08 or greater “at the time of the offense.”

Finally, counsel must become educated on all aspects of breath testing as this case shifts the pretrial focus from admissibility of breath test results to reliability. There are many areas of reliability regarding machine technology and human physiology that can be explored with breath test operators and provide reasonable doubt for a jury.



CASENOTES

CASE NOTES INTRO

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 January, February, March, and April of 2007. 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.

Ferrari v. Commonwealth, 448 Mass. 163 (2007): dissemination, matter harmful to minors, required finding of not guilty, videotape, motion to dismiss, double jeopardy

Commonwealth v. Thomas, 448 Mass. 180 (2007): murder, first degree, extreme atrocity or cruelty, strategic decision, prison clothes, criminal responsibility, jury selection, individual voir dire, view, competent to testify, child, witness, lay opinion, prior bad acts, hearsay, confrontation, intoxication, mental impairment, jury instructions

Commonwealth v. Gallagher, 68 Mass. App. Ct. 56 (2007): search warrant, nexus

Cohen v. Commonwealth, 448 Mass. 1005 (2007): joinder, interlocutory appeal, extraordinary relief (**no write-up**)

Letendre v. Commonwealth, 448 Mass. 1006 (2007): joinder, severance, interlocutory appeal, extraordinary relief (**no write-up**)

Commonwealth v. Davidson, 68 Mass. App. Ct. 72 (2007): indecent assault and battery, touching, required finding of not guilty

Commonwealth v. Berry, 68 Mass. App. Ct. 78 (2007): voluntary manslaughter, required finding of not guilty, circumstantial evidence, ineffective assistance of counsel, strategic decision, consciousness of guilt, cross-examination, bias, closing argument (**no write-up**)

Commonwealth v. Gonzalez, 68 Mass. App. Ct. 91 (2007): joint venture, possession, knowledge, burden of proof, jury instructions, constructive possession

Commonwealth v. Lawrence, 68 Mass. App. Ct. 103 (2007): required finding of not guilty, indecent assault and battery, posing, ineffective assistance of counsel, expert (**no write-up**)

Commonwealth v. Roland R., 448 Mass. 278 (2007): motion to suppress, administrative search, court house, reasonable suspicion, seizure

Commonwealth v. Considine, 448 Mass. 295 (2007): motion to suppress, search, private, school, state action

Commonwealth v. Diaz, 448 Mass. 286 (2007): murder, first degree, ineffective assistance of counsel, severance, view, bias, hearsay (**no write-up**)

Commonwealth v. Murphy, 68 Mass. App. Ct. 152 (2007): operation, suspension, hardship license

Commonwealth v. Kirwan, 448 Mass. 304 (2007): murder, first degree, deliberate premeditation, required finding of not guilty, motion to suppress, Miranda, custodial, motion for new trial, ineffective assistance of counsel, silence, consciousness of guilt, closing argument, humane practice instruction, voluntariness, intoxication, felony-murder

Wilborn v. Commonwealth, 448 Mass. 1010 (2007): extraordinary relief (**no write-up**)

Commonwealth v. Barboza, 68 Mass. App. Ct. 180 (2007): notice of appeal, timeliness, good cause

Commonwealth v. Gaylardo, 68 Mass. App. Ct. 906 (2007): motion to suppress, community caretaking

Commonwealth v. Isaiah I., 448 Mass. 334 (2007): motion to suppress, search, seizure, reasonable suspicion, findings of fact, clearly erroneous, credibility (**no write-up**)

Commonwealth v. Walker, 68 Mass. App. Ct. 194 (2007): required finding of not guilty, assault with intent to rape, indecent assault and battery, lesser included, joint venture, jury instructions, reasonable doubt

Ewing v. Commonwealth, 448 Mass. 1012 (2007): extraordinary relief (**no write-up**)

Commonwealth v. Braica, 68 Mass. App. Ct. 244 (2007): harassment, alarm, First Amendment, speech

Commonwealth v. Casimir, 68 Mass. App. Ct. 257 (2007): motion for new trial, immigration warning, plea

Commonwealth v. Brown, 68 Mass. App. Ct. 261 (2007): motion to suppress, search warrant, person, general search, particularity

Commonwealth v. Perez, 68 Mass. App. Ct. 282 (2007): search warrant, probable cause, person

Chandanais v. Commonwealth, 448 Mass. 1013 (2007): constructive possession, required finding of not guilty, intent

Commonwealth v. Murphy, 448 Mass. 452 (2007): motion to suppress, statements, right to counsel, informant, agent

Commonwealth v. Bly, 448 Mass. 473 (2007): murder, first degree, deliberate premeditation, DNA, reliability, discovery, motion to suppress, abandonment, expectation of privacy, statements, Miranda, custodial, identification, cross-racial identification, expert, jury instructions, prior bad acts, motive

Commonwealth v. Carlson, 448 Mass. 501 (2007): murder, first degree, extreme atrocity or cruelty, remorse, state of mind, voluntariness, prior bad acts, motive, foundation, jury instructions, hostile relationship, intent, cunneen factors (**no write-up**)

Commonwealth v. Costa, 448 Mass. 510 (2007): stop, pat frisk, reasonable suspicion, anonymous tip, basis of knowledge, reliability

Commonwealth v. Bourgeois, 68 Mass. App. Ct. 433 (2007): motion for new trial, ineffective assistance of counsel, records, privilege, pretrial production, credibility, in camera inspection, relevant, bias, motive to lie, exculpatory

Commonwealth v. Raedy, 68 Mass. App. Ct. 440 (2007): required finding of not guilty, identification, hearsay, circumstantial evidence

Commonwealth v. Trussell, 68 Mass. App. Ct. 452 (2007): notice of appeal, enlargement of time, good cause, excusable neglect, motion for new trial

Commonwealth v. Rodgers, 448 Mass. 538 (2007): speedy trial

Commonwealth v. Anderson, 448 Mass. 548 (2007): murder, first degree, deliberate premeditation, extreme atrocity or cruelty, right to counsel, statements, waiver, prior bad acts, relevance, reliability

Commonwealth v. LeClair, 68 Mass. App. Ct. 482 (2007): motion to suppress, statements, voluntariness, prior bad acts, joint venture, required finding of not guilty (**no write-up**)

Fuentes v. Commonwealth, 448 Mass. 1017 (2007): extraordinary relief, mistrial, deadlocked jury, double jeopardy, manifest necessity

Commonwealth v. LaGuer, 448 Mass. 585 (2007): motion for new trial, exculpatory, fingerprints, lost evidence

Commonwealth v. Bourdon, 68 Mass. App. Ct. 526 (2007): motion to dismiss, speedy trial

Commonwealth v. Jarvis, 68 Mass. App. Ct. 538 (2007): subsequent offense, double jeopardy

Commonwealth v. Ferrer, 68 Mass. App. Ct. 544 (2007): statements, interrogation, required finding of not guilty, knowledge

Commonwealth v. Laro, 68 Mass. App. Ct. 556 (2007): required finding of not guilty, school zone, circumstantial evidence, elementary school

Commonwealth v. Simmons, 448 Mass. 687 (2007):
sentence, file, due process, speedy sentencing

Commonwealth v. Silva, 448 Mass. 701 (2007):
impoundment, good cause, juror, First Amendment

Commonwealth v. Hernandez, 448 Mass. 711 (2007):
motion to suppress, reasonable suspicion, probable cause,
flight, ineffective assistance of counsel, threshold inquiry,
cross-examination

Commonwealth v. Mahoney, 68 Mass. App. Ct. 561
(2007): embezzlement, lesser included, larceny,
duplicative convictions

Commonwealth v. Gonzalez, 68 Mass. App. Ct. 620
(2007): murder, second degree, excited utterance,
confrontation, testimonial, required finding of not guilty,
joint venture, unanimous verdict, motion to suppress,
statements, wiretap, cross-examination, impeachment,
admission by silence, closing argument

Commonwealth v. Pring-Wilson, 448 Mass. 718
(2007): self-defense, first aggressor, prior bad acts,
character evidence, propensity, motion for new trial,
unavailable, privilege, self-incrimination, waiver

Commonwealth v. McDermott, 448 Mass. 750 (2007):
murder, first degree, deliberate premeditation, extreme
atrociousness or cruelty, motion to suppress, search,
warrantless, exigent circumstances, closed containers,
computer, nexus, probable cause, particularity, overbroad,
mistrial, jury instructions, unneeding factors, unanimous
verdict, involuntary intoxication, intent

Commonwealth v. Butler, 68 Mass. App. Ct. 658
(2007): motion to dismiss, speedy trial, complaint,
indictment, arraignment, preindictment delay, prejudice
(**no write-up**)

Commonwealth v. Dillon D., 448 Mass. 793 (2007):
See Article on p. 15.

Commonwealth v. Ogden O., 448 Mass. 798 (2007):
See Article on p. 15.

Commonwealth v. Colturi, 448 Mass. 809 (2007):
See Article on p. 18.

Commonwealth v. Burts, 68 Mass. App. Ct. 684
(2007): murder, ineffective assistance of counsel,
motion for new trial, closing argument, prejudice

Commonwealth v. Fortini, 68 Mass. App. Ct. 701
(2007): murder, second degree, voluntary
manslaughter, motion for new trial, jury instructions,
provocation, burden of proof, ineffective assistance of
counsel

Commonwealth v. Thomas, 448 Mass. 1034 (2007):
operating under the influence, breathalyzer, expert
testimony, retrograde extrapolation, impairment (**no
write-up** – follows the decision in Commonwealth v.
Coluturi, 448 Mass. 809; see Article on p. 19)

Commonwealth v. Robinson, 449 Mass. 1 (2007):
murder, first degree, felony murder, motion for new
trial, expert, interrogation, confession, voluntariness,
jury instructions, humane practice, coercion, discharge,
deliberating, juror

Commonwealth v. Cextary, 68 Mass. App. Ct. 752
(2007): breaking, required finding of not guilty.

Ferrari v. Commonwealth, 448 Mass. 163 (2007)

After a jury was unable to reach a unanimous verdict on the charge of dissemination of matter harmful to minors, the defendant moved for dismissal on double jeopardy grounds, arguing that the evidence at trial, which did not include the allegedly offending videotapes, had been insufficient to prove that indictment. **The SJC affirmed the denial of the defendant's motion for dismissal, concluding that the alleged victim's testimony "in graphic detail" that the videotapes depicted sexual conduct, even absent admission of the actual videos, was sufficient to permit a jury to find beyond a reasonable doubt that at the videotapes "as a whole" "lacked literary, artistic, political, or scientific value."**

Commonwealth v. Thomas, 448 Mass. 180 (2007)

Affirming this conviction for first degree murder based on extreme atrocity or cruelty, the SJC concludes that **defense counsel's decision to have the defendant wear prison clothing at trial, with consent of the defendant, was a reasonable strategy to attempt to allay juror fears that a verdict of not guilty by reason of insanity would result in the defendant's release into the community.**

The SJC also concludes that **the trial judge acted within his discretion in denying a request to individually question potential jurors on issues relating to violence against women**, as "the standard questions were adequate in the circumstances to ferret out possible bias or prejudice."

The SJC also resolves that **"the prosecutor did not act improperly in examining [an eight year old witness] about her understanding of the differences between telling the truth and lying, and the importance of telling the truth,"** and the court properly permitted her to testify.

Nor was it error for the victim's parents to testify that the defendant "seemed normal" and did not "appear to have anything wrong with his mental faculties," as that testimony "fell within the boundaries of observed appearances."

Commonwealth v. Gallagher, 68 Mass. App. Ct. 56 (2007)

Reversing a motion judge's order allowing the defendant's motion to suppress physical evidence seized from her apartment, the Appeals Court concludes that the information contained in the search warrant affidavit established the requisite nexus between the objects sought and that residence. Specifically, the nexus was established by documenting police observations of two controlled buys, in which the defendant left her apartment "only minutes" after the undercover buyer telephoned her, drove directly from her apartment to deliver the drugs, and returned directly to her apartment after completing the transaction. Based on these observations, "it was reasonable to infer that the delivery service was based out of her apartment." The Appeals Court distinguishes the instant case from Commonwealth v. Smith, 57 Mass. App. Ct. 907 (2003), in which "a single police observation of the defendant leaving his home to conduct a drug transaction" was deemed insufficient to establish a nexus between the drug activity and the defendant's home justifying a search of that home.

Commonwealth v. Davidson, 68 Mass. App. Ct. 72 (2007)

The Appeals Court holds that a defendant may be convicted of indecent assault and battery on a child for inducing the child to touch the defendant's penis, even though the defendant "did not himself commit the touching" and absent the use of any force.

Commonwealth v. Gonzalez, 68 Mass. App. Ct. 91 (2007)

Affirming convictions for possessing a firearm without a license and ammunition without an FID card, the Appeals Court rejects the defendant's two alternative arguments concerning joint venture liability for these charges: (1) that the defendant should not bear the burden of proving that the coventurer who actually possessed the gun and ammunition had the requisite license and identification card; (2) that these offenses cannot be premised on joint venture liability. "Compared to the Commonwealth, the defendant is in a better position to know if his accomplice is armed and to know whether that person has a proper license. If he or she is ignorant in that regard, he or she assumes the risk that the accomplice does not have a license." Given the evidence

permitting an inference that the defendant knew his accomplice was armed, along with evidence meeting the elements for joint venture, the Appeals Court affirms these convictions.

Commonwealth v. Roland R., 448 Mass. 278 (2007):

The defendant was entering a court house when a court officer informed him he would search the defendant's back pack, at which point the defendant said he did not want his bag searched, took the bag and left the court house, and then ran from the court house steps when a police officer said, "Hey, come here." After a foot chase, the defendant was handcuffed and his bag was searched, revealing nine bags of marijuana. **Reversing a motion judge's order allowing the defendant's motion to suppress the marijuana, the SJC concludes that "the search was justified as a lawful administrative search." The defendant "implicitly demonstrated his consent" to have his bag searched when he entered the court house, where signs stated that all bags were subject to search, and placed his bag on a table, and he "was not entitled to withdraw his consent after . . . he became aware that a manual search of his bag would in fact take place."** The policy of searching bags serves a "necessary" "regulatory purpose" of preventing "the smuggling of weapons and other dangerous materials . . . into the building." Moreover, even if the policy underlying these searches included an intent to search for illegal drugs, "there exists a strong public interest in keeping the public building that house our court rooms free from illegal drug trafficking or ingestion."

The SJC further concludes that the actions of asking the defendant to "come here," chasing him, and handcuffing him before searching the bag were all "justified in the circumstances," as the defendant's effort to avoid a search of the bag created reasonable suspicion that the bag contained contraband and a "reasonable belief that the juvenile could have been armed and thus potentially dangerous."

Commonwealth v. Considine, 448 Mass. 295 (2007)

The SJC reverses an order granting a motion to suppress physical evidence and statements obtained as a result of private school officials searching the hotel room of private school students on a ski trip, concluding that "because, as a private entity, the

school's activities cannot be 'fairly attributable to the state,' there is no State action to serve as a predicate for application of either the Fourth Amendment or art. 14."

Relatedly, the head of security for the hotel was "[a]cting in a private capacity" and thus not a state agent, even though he was also a part-time police officer.

Commonwealth v. Murphy, 68 Mass. App. Ct. 152 (2007)

The Appeals Court affirms a trial court's order allowing a motion to dismiss an indictment charging operating a motor vehicle after suspension, where the defendant had been issued a "hardship license," even though he was driving outside the hours permitted by that license. The Appeals Court concludes that the statute, G.L. c. 90, § 23, is unambiguous, as it only criminalizes operation after license suspension "prior to the . . . issuance . . . of a new license" and G.L. c. 90, § 24(1)(c)(3) describes a hardship license as a "new license."

Commonwealth v. Kirwan, 448 Mass. 304 (2007)

Affirming this first degree murder conviction, on a theory of deliberate premeditation, the SJC rejects numerous challenges raised by the defendant, including an argument that statements he made in his home in response to questions from a police officer should have been suppressed because they were obtained without the officer's first providing Miranda warnings. The SJC concludes that Miranda warnings were not required because the interrogation was not custodial, deferring to the motion judge's findings that the questioning was "investigatory rather than accusatory," "brief, polite, and courteous," occurred in the defendant's own home with his father present. That a reasonable person in these circumstances would not have felt free to leave or end the interrogation did not render the situation "custodial," because the interrogation "was brief and in the nature of a preliminary investigation" "similar to a Terry-type stop" and not at the "level of a deprivation of freedom associated with formal arrest."

Nor did the SJC find reversible error in the interrogating officer's testimony that when he asked the defendant how the victim received a hole in his chest, the defendant did not respond. Because the

officer had twice previously testified that the defendant's answer to that question was "I don't know," the prosecutor did not intend to elicit evidence of prearrest silence, nor did the prosecutor use this evidence impermissibly, as he did not seek a consciousness of guilt instruction or argue such an inference, and in fact "tried to rectify the situation, but he was prevented from doing so by the judge in response to a defense objection." Moreover, because the "actual answer" to the question was "in fact a lie" and the defense was one of self-defense, "the evidence did not harm the defendant."

Commonwealth v. Barboza, 68 Mass. App. Ct. 180 (2007)

The Appeals Court holds that a single justice of the appeals court did not abuse his discretion in extending the defendant's time for filing a notice of appeal, where appellate counsel timely drafted and mailed the notice but failed to follow up to insure the clerk had received and docketed the notice.

Commonwealth v. Gaylardo, 68 Mass. App. Ct. 906 (2007)

Reversing an order allowing the defendant's motion to suppress, the Appeals Court concludes that an officer who approached a lone car parked idling with a door open in front of a closed business on a night in February after a recent snow appropriately exercised his community caretaking role.

Commonwealth v. Walker, 68 Mass. App. Ct. 194 (2007)

After a jury convicted co-defendants of, among other charges, assault with intent to rape, the trial judge granted Rule 25(b)(2) motions on those particular indictments. For defendant Walker, the judge "reduce[d] the finding . . . to the lesser included finding of indecent assault and battery," but because the jury had also convicted the defendant on that charge in a separate indictment, the judge entered a finding of not guilty on the assault with intent to rape indictment. **The Appeals Court reverses the judge's decision to enter a not guilty verdict on the assault with intent to rape indictment, "because the crime to which the judge reduced the conviction [indecent assault and battery] was not a lesser included offense of assault with intent to rape" and thus the judge abused his discretion and committed an error of law.** For defendant Broberg, the Appeals

Court concludes that, contrary to the trial judge's view, the evidence did support a guilty verdict as a joint venturer to the assault with intent to rape indictment.

Over the objection of both defense counsel and the Commonwealth, the judge provided the jury with an abbreviated instruction on reasonable doubt in the middle of the trial, both orally and in writing, but then read the traditional Webster instruction in its entirety at the end of the trial. **Because the Appeals Court concludes that on the whole the preliminary reasonable doubt instruction was "incomplete" but not incorrect or inconsistent with the later Webster charge, there is no basis for reversal. However, the Appeals Court cautions that "the procedure employed by the trial judge here unnecessarily courted confusion and should not be used in future cases. . . . Whenever jurors are instructed on the crucial concept of reasonable doubt, they should receive a full and accurate instruction."**

Commonwealth v. Braica, 68 Mass. App. Ct. 244 (2007)

Reversing this conviction for criminal harassment, the Appeals Court concludes that the defendant's complaints to government officials about the alleged victim's activities, some of which led to citations and a cease and desist order, could not constitute criminal harassment, and that although "the nasty remarks [the defendant] yelled from his window" could amount to harassment, there was no evidence that those remarks in particular "seriously alarmed" the alleged victim.

Commonwealth v. Casimir, 68 Mass. App. Ct. 257 (2007)

After a District Court allowed the defendant's motion to vacate his plea (an admission to sufficient facts on a possession of cocaine charge), based on the defendant's claim that his conviction will prevent him from becoming a lawful permanent resident and subject him to removal from the United States, the Appeals Court reversed. **"Because there has been no showing that the defendant is actually facing any of the enumerated consequences that trigger the allowance of a motion to withdraw a guilty plea pursuant to G.L. c. 278, § 29D, i.e., deportation, exclusion from the United States, or the denial of naturalization, his claim is not ripe."**

Commonwealth v. Brown, 68 Mass. App. Ct. 261 (2007)

Affirming a motion judge’s order allowing the defendant’s motion to suppress evidence seized from his person, the Appeals Court agrees that because the search warrant for the defendant’s residence did not specify that the defendant himself could be searched, that search constituted an unlawful general search. First, the Appeals Court concludes that although the box on the warrant authorizing a search for “any person present” was checked, the affidavit in support of that warrant did not “provide probable cause ‘to believe that all persons present are involved in the criminal activity afoot.’” Thus, the search could not be justified under that provision of the warrant. Second, although the box on the warrant was also checked which authorizes seizure of the target items “on the person or in the possession of (identify any specific person(s) to be searched) _____,” that blank was not filled in with the defendant’s (or any one else’s) name, and the court rejects the Commonwealth’s argument that “the remainder of the warrant can be read to supply that inadvertently omitted information.” **Because the record does not indicate that the affidavit was physically attached to the search warrant when issued or executed, “[w]e cannot, then, construe the search warrant with reference to the supporting affidavit.”** The fact that the warrant itself states that the target apartment was “occupied by and/or in the possession of” the defendant does not provide any indication that the defendant was himself involved in the alleged illicit activity, and thus the warrant fails the particularity requirement of the Fourth Amendment.

Commonwealth v. Perez, 68 Mass. App. Ct. 282 (2007)

Affirming this possession of cocaine with intent to distribute conviction, the Appeals Court concludes that the defendant’s motion to suppress cocaine seized from his person during the execution of a search warrant was properly denied, as the affidavit established probable cause to search “any person present” and the defendant’s arrival in the midst of the search brought him within that clause of the warrant. That the affidavit documents a confidential informant’s having conducted two controlled buys of marijuana from two individuals and observing a large number of individuals on the premises for short periods of

time, some of whom had drug convictions, was sufficient to show probable cause “that all persons present are involved in the criminal activity afoot,” thus justifying a search of “any person present.”

Chandanais v. Commonwealth, 448 Mass. 1013 (2007)

Rejecting the defendant’s argument that following a mistrial due to an allegation of juror intimidation during deliberations by the defendant, retrial on a charge of possession of marijuana with intent to distribute is barred on double jeopardy grounds, the SJC concludes that the evidence presented at the first trial was sufficient. “The circumstantial evidence here that tips the scale in favor of sufficiency is the large amount of marijuana [47 plants] growing in plain view in the defendant’s back yard and surrounding property, and the presence of wire mesh protecting some of the plants.” Photographs of the plants also supported “the reasonable inference that . . . weeds were used in an attempt to conceal the marijuana plants” and “[t]hat persons other than the defendant lived on the property is of no consequence” as “possession may be joint.”

Commonwealth v. Murphy, 448 Mass. 452 (2007)

Reversing this first degree murder conviction, the SJC concludes that postindictment statements the defendant made to a jailhouse informant who had signed a cooperation agreement with the U.S. Attorney’s office were obtained in violation of the right to counsel under both the Sixth Amendment and Article 12, even though the informant’s cooperation agreement had not specifically targeted the defendant. First, the Court affirms what it said previously in Commonwealth v. Reynolds, 429 Mass. 388 (1999)—that under the Sixth Amendment, “‘an articulated agreement containing a specific benefit’ creates an agency relationship” between an informant and the government, whether or not that agreement targets a specific individual. “A bright line rule that requires targeting a specific defendant no matter what the agreement between the informant and the government would allow the government to circumvent its affirmative obligation to protect the rights of the accused by creating what one court has called an ‘informant at large.’” The SJC goes on to conclude that even if this interpretation of the Sixth Amendment is incorrect, Article 12 of the Massachusetts Declaration of Rights “requires us to protect defendants from ‘informants at large’ where . . . the informant has an

articulated agreement with the government that contains a specific benefit or promise, and then trolls the jail for victims.” Finally, the SJC resolves that the informant in this case did “deliberately elicit” the incriminating statements the defendant made to him, both by asking a “direct question” that triggered the incriminating response and by “creat[ing] an environment that lured the defendant into a false sense of trust” (i.e., doing various favors for the defendant).

Commonwealth v. Bly, 444 Mass. 640 (2005)

In this opinion, the SJC abandons “the power of resurrection” doctrine in criminal cases, meaning that a trial court judge, when ruling on a motion for a new trial prior to the defendant’s direct appeal, may no longer resurrect issues not raised and properly presented at trial. The Court reasons that this doctrine is no longer necessary because when it was adopted, the appeals courts had no power to consider unpreserved issues, whereas now such issues are considered on appeal, just under a different standard of review than preserved issues.

Affirming this first-degree murder conviction, the SJC holds that although defense counsel “may well have succeeded” on a motion to exclude the defendant’s prior murder conviction, failure to file that motion and introduction of the conviction and the resulting life sentence were consistent with the defense strategy, which was not “manifestly unreasonable,” of showing that certain Commonwealth witnesses would falsely accuse the “expendable” defendant rather than the real shooters. Nor was the judge obligated to exclude this evidence sua sponte. Finally, although the SJC concluded that the prosecutor did improperly elicit details concerning that murder conviction, specifically the identity of the victim, on cross-examination of the defendant, this unobjected-to error did not create a substantial likelihood of a miscarriage of justice.

Similarly, while it was not erroneous for the prosecutor to impeach a key defense witness, who testified that he and not the defendant killed the victim, with evidence that the witness was presently serving a life sentence for murder, as such evidence was relevant to his motive to lie, the prosecutor improperly elicited details

concerning that conviction, though again, this error did not create a substantial likelihood of a miscarriage of justice.

Practice Tip: This case reminds us that although evidence concerning penalties or potential consequences for convictions are generally not admissible, such evidence may be relevant and thus admissible in a particular case. We therefore should think creatively about how, for example, a police officer’s knowledge of the potential penalties a defendant faces if convicted might be relevant to that officer’s motive to lie.

Commonwealth v. Costa, 448 Mass. 510 (2007)

The SJC reverses a motion judge’s order allowing the defendant’s motion to suppress evidence seized from him during a stop and pat-frisk at a public park, based on an anonymous tip. As the defendant concedes the tipster, who called via cell phone, sufficiently articulated her “basis of knowledge” for the tip, the issue is whether the Commonwealth demonstrated the reliability of that informant. **“By providing information to the police after knowing that her call was being recorded, and that the number she was calling from had been identified, we conclude that the caller placed her anonymity sufficiently at risk such that her reliability should have been accorded greater weight than an anonymous informant.”** The Court distinguishes the instant case from Florida v. J.L., as the tip provided the informant’s basis of knowledge, the informant was not wholly anonymous, and the police corroborated the tip within minutes of the call.

Commonwealth v. Bourgeois, 68 Mass. App. Ct. 433 (2007)

After the defendant prevailed on a motion for a new trial, on the claim that trial counsel was ineffective for failing to obtain and use at trial certain privileged treatment records of the alleged victim, the Appeals Court reverses that order and affirms the convictions, concluding that the defendant has not shown either that trial counsel would have been entitled to view those records or that the records would have been helpful. Applying the standard articulated in Commonwealth v. Fuller, 423 Mass. 216 (1996), the Appeals Court states that “defendant’s proffer does not provide a factual basis for demonstrating that the privileged materials in either the victim’s pediatric record

or the UMass [mental health] evaluation were relevant and material to any issue in the case. For example, the defendant does not advance any specific, substantiated allegations concerning either the victim's bias or motive to lie or her stepmother's motive to downplay the victim's purported behavioral issues. He relies only on . . . a generalized claim that such evidence would have aided the defense at trial in discrediting both witnesses” Even examining the records at issue, the Appeals Court concludes they would not have proven useful, since the psychiatric problems experienced by the alleged victim all “could be viewed as a consequence of the defendant's abuse and the trauma of having to testify at trial, rather than as an indication of possible bias or motive to lie.”

The Appeals Court further states, in footnote 10, that even under “the new, less stringent protocol” of Commonwealth v. Dwyer, 448 Mass. 122 (2006), “the defendant has not met the threshold requirement for obtaining access to the records at issue here.”

Commonwealth v. Raedy, 68 Mass. App. Ct. 440 (2007)

Concluding that the hearsay identification testimony was properly admitted and that the identification evidence was sufficient to survive the defendant's required finding motion, the Appeals Court confirms this conviction for assault and battery by means of a dangerous weapon. First, although no one actually saw the face of the person who reached into a darkened bedroom and hit the victim over the head with a bottle, the circumstantial evidence—that the former girlfriend of the defendant heard his angry voice from outside the home just before someone barged into the house, that she then saw him inside the house, and that the arm of the perpetrator was white as is the defendant—created a reasonable inference that the defendant “was motivated by jealousy to attack whichever man he found sequestered” in the bedroom with his former girlfriend.

Second, following Commonwealth v. Le, 444 Mass. 431 (2005), the Appeals Court concluded it was appropriate for the responding police officer to testify that the former girlfriend stated the defendant had committed the attack, even though the girlfriend denied doing so. **The Appeals Court rejects the defendant's attempts to distinguish the instant case from Le because in the instant case the girlfriend merely stated that the defendant was the perpetrator rather than selecting him in some**

identification procedure witnessed by the officer.

“[T]he judge and the jury could permissibly infer that [the girlfriend's] extrajudicial statement (as testified to by [the officer]) was based upon her own perception.”

Moreover, “[r]equiring the police to observe such a declarant undertaking an essentially pointless exercise of examining a photographic array to pick out a picture of someone the declarant knows well in order to qualify subsequent police testimony regarding the declarant's identification . . . would add little, if anything to the reliability of the identification, exalt form over substance, and ‘constitute a restraint on the police that neither the Federal nor State Constitution requires.’”

Commonwealth v. Trussell, 68 Mass. App. Ct. 452 (2007)

The Appeals Court holds that when a defendant fails to file a timely notice of appeal, he may obtain an enlargement of time via Rule 4(c) (up to thirty days, from the trial court) or Rule 14(b) (up to one year, from a single justice of the appeals court) if the judge to whom he applies “finds that the lack of a timely appeal resulted from an act or omission of counsel, whether or not amounting to ineffective assistance, to which the defendant did not knowingly assent.” The Appeals Court rejects the Commonwealth's position that the defendant may only obtain relief by moving for a new trial and demonstrating ineffective assistance for the failure to file the timely notice, reasoning that such an approach would merely result in “a resource-consuming procedural tour destined almost inevitably to return [the defendant] to the same door a year or so later with essentially the same issues he had when he was there the first time.”

Commonwealth v. Rodgers, 448 Mass. 538 (2007)

Affirming the defendant's conviction for a violation of an abuse prevention order, the SJC concludes that the defendant's motion to dismiss for a speedy trial violation was properly denied, but utilizing different time calculations than those relied upon by the motion judge. Although the time between the defendant's arraignment in Superior Court up through seven days after filing the pretrial conference report “is ordinarily included in the calculation of elapsed days” for purposes of Rule 36(b), here the defendant, in his pretrial conference report, agreed to additional time for the filing of pretrial motions, and thus, those days beyond the seven days post-pretrial conference “are to be excluded

from the calculation.” “[A]n additional eighteen days should have been excluded from the [motion judge’s] computation.” Additionally, all of the time during which the Commonwealth was supposedly pursuing DNA testing (to investigate the rape indictment) should have been excluded from the calculation, because the defendant’s attorney had agreed to these continuances, constituting “acquiescence” to the delay. “The 239 days of delay encompassed by this period should have been excluded from the [motion judge’s] calculation of elapsed time.” Finally, the motion judge improperly included in the calculation of elapsed time a period which post-dated the defendant’s pro se motion to dismiss his attorney, a motion which inexplicably was never docketed or heard, during which time defense counsel supposedly was pursuing the DNA testing. “We agree with the defendant that he should not be bound by his counsel’s agreement to continuances in the wake of his motion for new counsel, . . . as he did not acquiesce in that delay.” The Court further notes that “[w]here . . . the defendant submits a clearly titled and articulated motion to discharge counsel, such a motion must be docketed and processed in the usual course.” In sum, under the SJC’s calculation of time, the defendant’s motion to dismiss was properly denied.

Commonwealth v. Anderson, 448 Mass. 548 (2007)
Affirming this first degree murder based on deliberate premeditation and extreme atrocity or cruelty, the SJC concludes that the admission of the defendant’s post-indictment statements to police, made while he was serving a lengthy sentence in Maine and after he requested to speak with the police but also after a public defender had notified the Commonwealth that he was representing the defendant, did not violate his constitutional right to counsel. “The judge found that Anderson initiated contact with [Detective] Nagle after learning of his indictment; was advised fully of his Miranda rights, including his right to consult with counsel and to have counsel present, before speaking to Nagle (indeed before Nagle would speak to him); and was appropriately advised both that [the public defender] had been assigned by CPCS to represent him in the matter, and that [defense counsel] was advising Anderson not to speak to the police about it. In these circumstances, the judge’s conclusion that Anderson intentionally, knowingly, and voluntarily waived his Fifth and Sixth Amendment rights to

counsel for purposes of his postindictment questioning . . . was constitutionally sound.” The Court does not decide whether the defendant was actually represented by counsel, as CPCS had assigned a particular attorney but the court had not determined the defendant’s indigency and approved the appointment, because the statements were not made during a police-initiated interrogation and the defendant was fully informed of the defense attorney’s involvement and preference that the defendant not be interviewed.

The Court also found that testimony of three inmates that the defendant demonstrated skill with a knife in cutting leather in the prison workshop was properly admitted because “a reasonable juror could infer that the killer possessed some degree of skill with a knife, and was capable of wielding it with precision and strength.”

Similarly, these inmates properly testified that the defendant made certain statements—one admiring a poster of a woman in his cell which he had altered by cutting out the breasts and vaginal areas and slicing the throat, a second about killing and burying a woman on Cape Cod, and a third about cutting some people on the street who “almost died”—because the jury could have concluded that these statements “were admissions by Anderson concerning his involvement in the murder” in this case.

Fuentes v. Commonwealth, 448 Mass. 1017 (2007)
 In response to the foreperson’s note asking the trial judge “At what point is a jury hung?”, the judge, with both parties consent, gave the Tvey-Rodriguez charge, and when the foreperson later returned a second note to the judge stating the jury was deadlocked, the judge declared a mistrial, before informing defense counsel of the note’s contents or consulting with the attorneys. **Affirming the trial judge’s order denying the defendant’s motion to dismiss on double jeopardy grounds, the SJC concludes that the trial judge acted within her discretion in granting the mistrial, as nothing in the case law or G.L. c. 234, § 34 required the judge to ask the jury if they wished to continue deliberations and although “the more prudent course would have been to consult with counsel, . . . the record does not show that such consultation would have produced any fruitful alternatives.”**

Commonwealth v. LaGuer, 448 Mass. 585 (2007)

Affirming the denial of the defendant’s new trial motion, the SJC concludes that “fingerprint evidence that was not produced by the Commonwealth” prior to trial—a report stating that three fingerprints on the telephone whose cord was used to bind the victim did not match the defendant— has not been shown to have any bearing on the defendant’s guilt or innocence.” First, it was disclosed that one fingerprint on the base of that phone did not match the defendant “and the defense attorney made this fact abundantly clear to the jury.” “That there could have been one, four, or more fingerprints on the telephone does not render that fact more exculpatory than informing the jury that one fingerprint did not match the defendant.” Second, “it is entirely speculative to assume that the fingerprints on the telephone belonged to a third party suspect rather than to the victim, her daughter, or the police who were in the room the day following the crime” “In addition, it is clear that, even if trial counsel had known about the additional fingerprints, he would not have attempted to identify them.” Finally, the Court concludes “that the undisclosed fingerprint evidence is not exculpatory” because the evidence does not establish when the fingerprints were left on the phone.

Commonwealth v. Phinney, 448 Mass. 621 (2007)

The SJC holds that private counsel representing a defendant in the Commonwealth’s appeal from a trial court ruling in the defendant’s favor is entitled to an award of attorney’s fees and costs incurred in defending the appeal. In this case, the defendant prevailed in the trial court on his motion for a new trial in this capital case and the Commonwealth appealed from that ruling. The SJC ultimately affirmed that order, but deferred ruling on the defendant’s motion for appellate attorney’s fees and costs. The SJC now rejects the Commonwealth’s argument that because the Administrative Office of the Trial Court “sometimes” pays these types of awards, the defendant was required to serve the AOTC with his fee request and give the AOTC an opportunity to be heard. The Court points out that the legislative budgetary language directing AOTC to pay a portion of such fees and costs encompasses only fees covered by Rules 15(d)—Commonwealth appeals from orders granting motions to suppress—and 30(c)(8)—Commonwealth appeals from orders granting motions for new trial in non-capital cases, but not Rule 30(c)(9)—Commonwealth appeals from orders granting motions for

new trial in capital cases. **Further, the SJC rejects the Commonwealth’s argument that the award of appellate fees to private counsel “should be calculated at the hourly rate paid to court-appointed counsel,” but instead the award must be “reasonable for privately retained counsel.”** “It is widely recognized and accepted that the rates set by the Legislature for the representation of indigent defendants do not equal the rates that privately retained counsel can and do reasonably charge for their representation.” **The Court does, however, reduce the award from the \$24,325 in fees and \$766.62 in expenses requested by the defendant to “\$19,325 in fees and \$380.52 in costs, because appellate counsel was “able to draw heavily on [the] knowledge and . . . written work product from the trial court” in defending the appeal and because the defendant made more copies of the brief and record appendix than required by the rules.**

Commonwealth v. Bourdon, 68 Mass. App. Ct. 526 (2007)

The defendant, arraigned on October 1, 2002, moved to dismiss based on a violation of his speedy trial rights, pursuant to Rule 36, on January 9, 2004. The motion was argued on March 18, 2004, taken under advisement, and then allowed seventeen months later, on August 30, 2005. **The Appeals Court looks only at the time following argument on the motion to dismiss, concluding that “the period during which time was tolled under rule 36 ended thirty days after the March 18, 2004 hearing” and that the Commonwealth failed to meet its burden of objecting to the delay after that point and bringing the case to trial.** “Of the seventeen months that the motion to dismiss was under advisement, thirty days were excludable under rule 36(b)(2)(A)(vii). The remaining sixteen months exceed the twelve-month timetable set forth in rule 36. We need not consider the preceding periods, as the March 18, 2004 to August 30, 2005 period of delay determines the outcome of the case. The dismissal of the charge against the defendant was warranted.”

Commonwealth v. Jarvis, 68 Mass. App. Ct. 538 (2007)

After the defendant was convicted of operating under the influence of alcohol, he moved to have the trial judge recuse himself for the prior conviction portion of the trial, which the trial judge agreed to do. The trial judge then sentenced the defendant to two years in the house with

one year to be served, and then the prior conviction portion of the trial proceeded in front of a separate judge. At the conclusion of that hearing, the defendant was convicted and the case remanded to the first judge for resentencing, at which point the judge imposed the same sentence as earlier, but marking the conviction as a “fourth offense.” **Although the Appeals Court agrees that this procedure violated G.L. c. 278, § 11A, the defendant was not subjected to double jeopardy as he was on notice, via the complaint and his own counsel’s motion for recusal, that he had been charged with a subsequent offense.**

Commonwealth v. Ferrer, 68 Mass. App. Ct. 544 (2007)

After the defendant had been arrested for trespassing but before the police had found a gun which formed the basis for these convictions, “the defendant suddenly blurted out, ‘Your boys are dumb. They could have me for seven or eight years instead of this trespassing bullshit.’ Officer Celester responded, ‘They are pretty smart and they are good at what they do.’ The defendant then said, ‘They’ll never find it. You’re just wasting my time. I could be out doing sticks.’” **Concluding that this exchange did not amount to custodial interrogation, the SJC states, “The exchange was initiated by the defendant spontaneously and voluntarily” and “the officer’s reply was responsive purely to the subject raised by the defendant . . . and was not reasonably likely to elicit the further incriminating remarks which followed.”** Thus, the statements were properly admitted at trial.

Commonwealth v. Laro, 68 Mass. App. Ct. 556 (2007)

The Appeals Court concludes that circumstantial evidence that the school in question was an elementary school—testimony from people familiar with the school about kids carrying books, arriving on school buses, and being helped by parents and crossing guards—was sufficient evidence to prove the school zone charge. “From the standpoint of common sense, the evidence illustrated many of the trappings” of an elementary school.

Commonwealth v. Simmons, 448 Mass. 687 (2007)

The SJC holds that when a criminal charge is “placed on file,” that is done “with the understanding that . . . the defendant [can] avoid

sentence on [that charge] so long as he [does] not subsequently give the Commonwealth cause to move for removal of the [charge] from the file.” Removal of the charge from the file and the imposition of a sentence on that charge, as a result of a later arrest, offends neither the defendant’s substantive due process rights, nor his right to a speedy sentencing as the defendant initially “benefited from the largesse of the court” by originally avoiding a sentence and “consented to the filing” and thus “consented to the delay in sentencing.” In this case, however, the SJC concludes that the sentence imposed on the indictment which was removed from the file—eighteen to twenty years in prison—was not in accord with the original sentencing scheme, in which the defendant received six concurrent terms of eight to twelve years in prison, thus creating a “substantial miscarriage of justice” because the sentencing judge failed to consider that original sentencing scheme.

Comment: The Appeals Court had originally ruled in this case, see Commonwealth v. Simmons, 65 Mass. App. Ct. 274 (2005), that a charge placed on file could only be removed under two circumstances: (1) when the defendant “successfully appealed from a parallel conviction”;

or (2) when the defendant “violated some express condition of the filing.” Now, “the court retains the ability, at any time, to remove the indictment from the file” and impose a sentence, and not just for the two reasons noted in the Appeals Court decision.

Commonwealth v. Silva, 448 Mass. 701 (2007)

The SJC affirms a trial court judge’s order impounding the names of jurors who deliberated, and acquitted, the defendant on murder charges, reasoning that “considerations of juror safety warranted impoundment of the jury list.” Specifically, one of the Commonwealth’s witnesses was the victim of an armed assault before the trial and just two hours after the acquittal, someone fired shots at the defendant’s mother’s home, perhaps in response to the not guilty verdict. These circumstances demonstrated “good cause” to deny the press access to these records, and thus did not deprive the press of either its common law right to public access to judicial records or its First Amendment right to such access.

The SJC further concluded that “appellate review of an impoundment order in an ongoing criminal proceeding should conform to the Uniform Rules on Impoundment Procedure, and should be sought in the first instance before a single justice of the Appeals Court.” Additionally, “the Attorney General must receive notice of, and an opportunity to be heard on, any motion filed in any court by a nonparty to obtain access to impounded documents in a criminal case.”

Commonwealth v. Hernandez, 448 Mass. 711 (2007)

The SJC concludes that the defendant’s motion to suppress drugs was properly denied, because police observation of the defendant’s handing an object from his shoe to another individual in a high drug trafficking area, which appeared consistent with a drug transaction, provided reasonable suspicion justifying the officer’s initial approach of the defendant, and the defendant’s response, an attempt to flee, provided probable cause for an arrest and search.

Commonwealth v. Mahoney, 68 Mass. App. Ct. 561 (2007)

The Appeals Court holds that simple embezzlement is a lesser included offense to embezzlement by a county, city or town officer (G.L. c. 266, § 51), and thus, conviction for that lesser offense was proper even though the trial judge granted a required finding of not guilty on the greater offense for failure to prove that the defendant was a county, city, or town officer. “The elements of the ‘embezzlement’ portion of the crimes are the same whether the embezzlement is the theft of property by a government officer under G.L. c. 266, § 51, or a form of larceny actionable under G.L. c. 266, § 30,” and the elements “are set forth effectively in the District Court model jury instructions.” The Appeals Court rejects the defendant’s argument that the victim of a simple embezzlement, “another,” must be an individual rather than a governmental entity or some other organization.

However, the Appeals Court concluded that conviction of simple embezzlement “rendered the conviction of larceny under G.L. c. 266, § 30 duplicative,” and thus dismissed the larceny conviction. “Once the Commonwealth obtained a conviction of embezzlement as a lesser included offense

under G.L. c. 266, § 51, it could not permissibly obtain a larceny conviction on an embezzlement theory under G.L. c. 266, § 30, on the same facts.”

Commonwealth v. Gonzalez, 68 Mass. App. Ct. 620 (2007)

Despite finding two errors of constitutional magnitude, the Appeals Court nonetheless confirms the defendant’s second degree murder conviction, concluding that the errors were harmless or nonprejudicial.

First, the Appeals Court concludes that a statement by a witness to the charged murder—answering a police officer’s question by declaring that the defendant was driving the car from which the fatal shots were fired—did not constitute an excited utterance and its admission violated the defendant’s confrontation rights, as the declarant did not testify at trial. That the declarant told the officer at the time “that he would deny the statement” if the officer told anyone “indicates that [his] statement was a product of reflection and . . . was not an excited utterance.” Moreover, the officer’s question which prompted this statement was not “directed at securing the crime scene or obtaining medical care” but instead at “investigating the crime,” thus rendering the statement “testimonial.”

Nevertheless, the Appeals Court finds that the erroneous admission of this evidence was harmless beyond a reasonable doubt” due to the “substantial” “quantum of proof against the defendant.”

Second, after the defendant testified that he was in Rhode Island during the murder and received a phone call that night from his girlfriend informing him that the police were looking for him, the prosecutor improperly cross-examined him about his failure to go to the police. “Although a defendant’s pre-arrest silence may be used as an adoptive admission, the ‘impeachment of a defendant with the fact of his pre-arrest silence should be approached with caution,’” and in this case, the prosecutor not only failed to establish a foundation “that it would have been ‘natural’ for the defendant to contact the police,” the defendant had testified that he consulted with his lawyer after speaking with his girlfriend.

Commonwealth v. Pring-Wilson, 448 Mass. 718 (2007)

The SJC concludes that the trial judge did not abuse her discretion in allowing the defendant’s motion for a new trial based on the trial judge’s own exclusion at trial of prior acts of violence by the alleged victim and his brother which were unknown to the defendant at the time of his altercation with the brothers. After the defendant was convicted but before his appeal “and thus before his conviction became final,” the SJC decided Commonwealth v. Adjutant, 443 Mass. 649 (2005), announcing a new rule “granting trial judges the discretion in self-defense cases to admit prior bad act evidence of victims—even if unknown to the defendant—for the purposes of illuminating the identity of the first aggressor.” In Adjutant, the SJC stated that its newly-announced rule “shall apply only prospectively,” but nonetheless gave Adjutant herself the benefit of the rule and granted her a new trial. In this case, the SJC affirmed the trial judge’s order granting the defendant a new trial, despite the prospective-application only language in Adjutant by pointing out that the Court’s decision “is limited to whether [the trial] judge abused her discretion.” Further, “[t]he defendant was in the same shoes as Adjutant in that, in both cases, the defendants attempted to introduce evidence of the victims’ violent propensities, and both pursued the matter before the convictions had become final through direct appeals. As in Adjutant, in this case the identity of the first aggressor was essential, and the defendant sought aggressively and repeatedly . . . to introduce evidence of [the brothers’] violent histories to illuminate the matter.” “Where the defendant had persistently attempted to introduce evidence of [the brothers’] violent histories to support the central issue at trial—whether he acted in self-defense—and where the defendant’s conviction had not yet become final when he moved for a new trial, we cannot say that the judge’s conclusion . . . was an abuse of her broad discretion to see that justice is done.”

The SJC further concludes that at retrial, evidence not just of the alleged victim’s propensity for violence but also evidence of his brother’s propensity for such is relevant. “Although [the brother] is not a victim in this case, [he] assisted the victim in the fight. In fact, according to the defendant’s view of the evidence, [the victim’s brother] might have started it. . . [N]othing in Adjutant precludes a judge from admitting

evidence of prior acts of violent conduct of a victim’s cohort.” **“Before admitting evidence of specific examples of a third party’s violent acts, the judge should determine, whether in the light most favorable to the defendant, the third party was acting in concert with or to assist the victim.”**

Commonwealth v. McDermott, 448 Mass. 750 (2007)

After the defendant shot and killed seven people at his place of employment and was arrested on those premises with at least two weapons and a large amount of ammunition, the police were justified in conducting a brief entry into his apartment “to check briefly . . . for additional victims, who . . . may not have been conscious or able to seek help on their own.” “The officers had no information whether the defendant was married, had a friend or partner, had children, or had anyone staying with him at his apartment for the Christmas holiday” and due to “Lieutenant Foley’s knowledge of past cases, and personal experience with a former case, in which victims of violent crimes were found both at a suspect’s residence and at his place of work, reasonable grounds existed” for the warrantless entry. Thus, the SJC concluded that the portion of the affidavit in support of the search warrant obtained for a more extensive search, which detailed observations made during that initial warrantless entry, was properly considered by the issuing magistrate. **Moreover, “the actions of the officers who entered the defendant’s apartment without a warrant were reasonable” as “[t]he officers looked only in places where a person could be found, they did not pick up or remove items, and they remained in the apartment for a very short time, approximately five minutes.”**

After concluding that the affidavit established probable cause to believe evidence of the crimes would be found in the defendant’s residence, the SJC rejects the defendant’s argument that there was no basis to seize “documents reflecting the defendant’s mental state and functioning,” pointing to the affidavit’s description of comments the defendant made after the shooting about not speaking German as a reason to investigate the defendant’s criminal responsibility.

Further, the SJC holds that the seizure of the defendant’s computer and computer disks was

authorized by the language in the warrant permitting seizure of certain documents, as the computer and disks are analogous to closed containers that may contain these documents. “We join those courts adopting the approach that a warrant that authorizes a search for records (properly delineated in a warrant) permits the seizure of computers and disks that electronically may hide and store such records.”

The Court also rejects the defendant’s argument that a search of computer files requires a separate showing of probable cause as to each individual file, reasoning (1) that the affidavit in support of the warrant to search the computer “was sufficiently particular” in identifying the type of information relevant to the investigation for which the police would search and (2) that the police were not required to obtain advance approval from the court to conduct a cursory examination of certain computer files to determine if they contained relevant information. The Court does note “that care must be taken to minimize the intrusion of the search and the search conducted must be reasonable,” but finds that in this case, the production of a duplicate copy of the computer’s hard drive and storage media and the keyword search which resulted in a cursory inspection of merely 750 out of 100,000 files were reasonable.

Commonwealth v. Dillon D., 448 Mass 793 (2007):
See Article on p. 15.

Commonwealth v. Ogden O., 448 Mass 798 (2007):
See Article on p. 15.

Commonwealth v. Colturi, 448 Mass 809 (2007):
See Article on page 18.

Commonwealth v. Burts, 68 Mass. App. Ct. 684 (2007)

Concluding that the prosecutor’s closing argument was improper in numerous respects, the Appeals Court nonetheless finds that these “unnecessary and regrettable” errors, “standing alone” are “not such as to cause us to disturb judgment.” First, the prosecutor improperly attacked defense counsel for the manner in which defense counsel argued, thereby

impugning “two basic constitutional rights, that of counsel, as well as the right of a defendant to make his defense.” Second, the prosecutor improperly “urged the jurors to be infuriated and angry as a consequence of the testimony of an expert presented by the defense.” Third, “the prosecutor, at least inferentially, urged the jurors to trust the police witnesses because they were police witnesses.” Fourth, the court was “troubled by the prosecutor’s repeated use of the pronoun ‘we,’ which, when considered in light of the substance of some of those statements and phrases, conveyed, at least inferentially, the prosecutor’s belief or opinion about certain evidence or the credibility of certain witnesses.” Finally, it was also improper for the prosecutor to “insert[] himself into the jurors’ deliberative process” by stating “‘I saw some of your faces during the [defense counsel’s] closing argument’ . . . [and] [t]he looks on your faces told me, at the least, that you didn’t agree.’” **In concluding that these erroneous arguments did not require reversal, the Appeals Court explicitly considered “the absence of objections during or after” the closing as “some guidance as to whether a particular argument was prejudicial in the circumstances.”**

Moreover, while the Appeals Court refused to entertain the defendant’s ineffective assistance of counsel claims because these claims should first be raised in a motion for a new trial, the court did note that upon such a motion, if ineffective assistance is established, the trial court can also consider the improper closing arguments in assessing the overall prejudice to the defendant.

Commonwealth v. Fortini, 68 Mass. App. Ct. 701 (2007)

Because (1) the defendant was entitled to a jury instruction on voluntary manslaughter based on provocation, viewing the evidence in a light most favorable to the defendant, (2) the trial judge’s instruction on provocation was erroneous, and (3) the failure to object at trial or raise this issue on direct appeal was manifestly unreasonable, the Appeals Court allowed the defendant’s motion for a new trial. At trial, the evidence viewed in a light most favorable to the defendant demonstrated that after a car drove by his house from which the occupants were swearing at him and yelling racial epithets, the defendant went to his front porch to try to see the car’s license plate,

but because he was scared, armed himself with a shotgun, and then when a person ran onto his porch and failed to heed his warning, fired his gun out of fear for his life. Rejecting the Commonwealth's argument that the confrontation "was not sudden and unexpected" and that the defendant "lay in wait" and "armed himself in advance with a firearm," and thus, provocation was not an issue, the Appeals Court concludes that "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." Thus, a provocation instruction was required. Further, based on this evidence "a verdict of guilty of manslaughter based on reasonable provocation was not outside the realm of possibility." **Here, the judge improperly instructed the jury three times "that the Commonwealth must prove beyond a reasonable doubt 'that a defendant acted with reasonable provocation'" to justify a manslaughter verdict, instead of the correct formulation—that "where the evidence raises the possibility that the defendant may have acted on reasonable provocation, the Commonwealth must prove . . . beyond a reasonable doubt that the defendant did not act on reasonable provocation."**

Commonwealth v. Robinson, 449 Mass. 1 (2007)
In affirming this first degree murder conviction, the SJC concludes that the trial judge acted within her discretion in precluding a defense expert from testifying about the psychology of interrogations and confessions. "As the [trial] judge noted, [defense expert Saul] Kassin conceded that his opinions are not generally accepted, require further testing, and are not yet a subject of 'scientific knowledge.' . . . Accordingly, his proposed testimony that certain interrogation techniques have previously produced false confessions does not meet either the general acceptance or reliability criteria established by the Lanigan case." **"That said, the subject of psychological manipulation of a defendant and its relation to false confessions presents a serious issue. Competent scientific evidence that satisfies the Lanigan standard may well be useful to a fact finder in this area . . ."**

The SJC also concludes that in answering the jury's questions whether a coerced confession must be

disregarded and whether "something can be coerced and true," the trial judge did not abuse her discretion by repeating the initial humane practice instruction and adding a dictionary definition of coercion ("to bring about by force or threats to nullify individual will"). The Court rejects the defendant's argument that the trial judge was required to list specific factors for the jury's consideration on the issue of the voluntariness of the defendant's confession. Further, the Court finds that the dictionary definition "was sufficient."

Nor did the trial judge abuse her discretion in discharging a deliberating juror who refused to return to court one day claiming that both her child and the alternative caregiver were sick. Under G.L. c. 234A, § 39, the trial judge has discretion to dismiss a juror who fails to appear "on a finding that there is 'a strong likelihood [of] unreasonable delay'" if the court waits for the juror's return. The Court concluded that the judge here "conducted an adequate inquiry," that the defendant's proposed alternatives were "impractical," and that the juror had already created an "unreasonable delay" by keeping the jury from deliberating for over two hours. Moreover, "there was no showing of prejudice to the defendant" since the alternative seated had heard all the evidence, had been agreed to by the defendant, and the judge instructed the newly constituted jury to begin deliberations anew.

Commonwealth v. Cextary, 68 Mass. App. Ct. 752 (2007)

The Appeals Court holds that a defendant's entry into an open sunroof of a car constitutes a breaking, under G.L. c. 266, § 18 (breaking and entering a motor vehicle with intent to commit a felony). "[T]he statutory element of 'breaking' is broadly defined," including the common law concept of "constructive breaking" as well as the "open window doctrine." Under these theories, a defendant commits a breaking by entering a home through a chimney or a building through an open window "not intended or ordinarily useable as a means of entry." The Appeals Court finds the defendant's entry into a car through an open sunroof "as surreptitiously intrusive" as "crawling down a chimney or scaling a wall to clamber through a window high above the ground."

