# An Overview of the the Law: Youthful Offender

## YOUTH ADVOCACY DIVISION[1]
## COMMITTEE FOR PUBLIC COUNSEL SERVICES

**I. Overview.**

A. Who is eligible to be indicted as a Youthful Offender (Y.O.) G.L. c. 119, §54?[2] Any child who is between the ages of **14 and 18** and is charged with a crime that carries a state prison sentence (for adults) where one of the following exists:

- The individual was previously committed to DYS; or
- The current offense involves the infliction or threat of serious bodily harm; or
- The individual is charged with a violation of G.L. c. 269, §10 (a), (c) or (d) or G.L. c. 269, § 10E, (firearm offenses).

i. Infliction or threat of serious bodily harm. To determine whether the charge involves the "infliction or threat of serious bodily harm" the court looks to the particular facts of each case.

1. Statutory rape charge where juvenile was 15 and complainant was 6 involved the "infliction or threat of serious bodily harm." In *Commonwealth v. Clint C.,* 430 Mass. 219 (1999), the SJC considered whether the charge of statutory rape (G.L. c. 265, § 23) which does not have as an element lack of consent, force, or threat of bodily injury involves the infliction or threat of serious bodily harm sufficient to sustain a Y.O. indictment. The Court stated that the "infliction or threat of serious bodily harm" does not necessarily have to be an element of the crime charged and went on to look at the facts of the case. The Court determined that the invasive nature of the penetration constituted the infliction or threat of serious bodily harm and the juvenile's position of authority (he was the complaining witness's uncle and babysitter), the age

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[2] As of September 18, 2013, 17 year olds are included the jurisdiction of the juvenile court by Chapter 84 of the Acts of 2013 "An Act Expanding Juvenile Jurisdiction." The cases cited herein were decided prior to the effective date and refer to the pre-amendment law where the Court's jurisdiction stopped at age 17. Logically, the reasoning in the cases cited herein would apply to post-amendment cases as well.

difference (15 and 6), and the vulnerability of the complaining witness, supported a Y.O. indictment.

2. Indecent assault and battery charge did not involve the "infliction or threat of serious bodily harm." In *Commonwealth v. Quincy Q.,* 434 Mass. 859 (2001), the juvenile was adjudicated a Y.O. on the charge of indecent assault and battery under 14 and he was found not guilty on other charges. The juvenile was between the ages of 15 and 16 and the complaining witness was between the ages of 3 and 5. Prior to trial, the juvenile filed a motion to dismiss the indecent assault and battery charge on the ground that no evidence was presented to the grand jury as to "the infliction or threat of serious bodily harm" which was denied. The SJC reversed holding that the Commonwealth must present sufficient evidence to the grand jury that the requirements of G.L. c. 119, § 54 have been met. It was alleged that the juvenile touched the complaining witness's vagina and buttock and had her touch his penis. The court compared this case with *Clint C.* and found that the touching in *Clint C.* was more invasive and, while the age differences were similar, the touching in this case did not involve the infliction or threat of serious bodily harm.

3. Facts asserted in an accessory after the fact charge did not involve the "infliction or threat of serious bodily harm." In *Commonwealth v. Hoshi H*., 72 Mass. App. Ct. 18 (2008), the juvenile was indicted for accessory after the fact, GL c. 274, § 4, for allegedly helping a murder suspect escape and avoid arrest. The Juvenile Court dismissed the indictment holding that the alleged actions of the juvenile did not "involve the infliction or threat of serious bodily harm." The Appeals Court agreed and in affirming the dismissal held: "In determining whether any particular offense 'involves the infliction or threat of serious bodily harm,' it is necessary to determine whether the 'conduct constituting the offense itself' involves the form of harm described in the statute. . . That is to say, it is necessary to determine actual conduct undertaken by the defendant, rather than merely the elements of the underlying crime, in determining whether an indictment is authorized under § 54."

ii. Age of the juvenile.

1. Offense must have been committed prior to the juvenile's eighteenth birthday. G.L. C. 119, §§ 52, 54. See also, *Commonwealth v. Ulysses H.*, 52 Mass. App. Ct. 497, 499-500 (2001). A prosecutor seeking a Y.O. indictment must present sufficient evidence as to all the requirements of that statute, including age, or the indictment will be dismissed. *Commonwealth v. Quincy Q.*, 434 Mass. 859 (2001). See also *Commonwealth v. Hampton*, 64 Mass. App. Ct. 27 (2005).

B. Open to the public. Youthful Offender cases differ from delinquency cases in that Y.O. records are open to public inspection and the courtroom is open to the public. G.L. c. 119, § 60A.

C. Juvenile court hears the case. When the Commonwealth intends to indict a juvenile, the case is presented to the grand jury and if an indictment is issued, the indictment is sent to the clerk of the juvenile court which has jurisdiction over the case. G.L. c. 265, § 4. *See infra Section III D, where, in certain circumstances, a juvenile charged with a YO can be tried with adult co-defendant in superior court.*

## II. Grand Jury Proceedings.

A. The Commonwealth must present probable cause to the grand jury on each element of the crime charged including the identity of the juvenile.

"[A]t the very least the grand jury must hear sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him" (citations omitted). *Commonwealth v. McCarthy*, 385 Mass. 160 (1982) See also *Commonwealth v. Stevens*, 362 Mass. 24, 26 (1972), quoting *Beck v. Ohio*, 379 U.S. 89 (1964) (describing probable cause to arrest as "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense").

B. The Commonwealth must also present probable cause to the grand jury on the § 54 elements and must prove them beyond a reasonable doubt at trial. *Commonwealth v. Quincy Q.*, *supra*, 865.

C. The Commonwealth may not present misleading evidence to the grand jury.

In *Commonwealth v. Washington W.*, 462 Mass. 204 (2012), the SJC, upheld the dismissal of two Y.O. indictments for rape of a child on the grounds that the Commonwealth omitted potentially exculpatory evidence from its presentation to

the grand jury. *Commonwealth v. O'Dell*, 392 Mass. 445, 446-447 (1984) (grand jury proceedings were impaired by unfair and misleading presentation).

In *Washington W*. , the complainant told his parents that he had engaged in various sexual acts with the juvenile that were initiated by the juvenile. A detective interviewed the complainant's parents and the complainant participated in a SAIN interview. The juvenile was indicted on two counts of rape of a child. The complainant did not testify before the grand jury and the SAIN videotape was not played. The detective testified before the grand jury and stated what the complainant told his parents and what the complainant said in the SAIN interview. The detective omitted from his presentation the complainant's statement that clarified that the juvenile did not use physical force.

In its decision, the SJC held that the complainant's statement that the juvenile never used physical force against him was exculpatory and that this evidence was critical to the grand jury's determination of whether there were facts present to allow them to find that the offense involved the "infliction or threat of serious bodily harm." Thus the omission of the statement, the SJC held, "likely influenced the grand jury's decision to issue the indictments."

D. <u>If the grand jury does not issue an indictment, the Commonwealth may proceed by way of a delinquency complaint</u>.

The Commonwealth was allowed to proceed on a delinquency complaint charging the juvenile with rape of a child by force after a grand jury returned a "no bill." *Commonwealth v. Dale D*., 431 Mass. 757 (2000). A different interpretation, the Court reflected, would clearly be contrary to the purpose of § 54 as the "legislature could not have intended the Commonwealth to attempt to indict a juvenile at the peril of losing its ability to prosecute." *Id*. at 760.

E. <u>Commonwealth cannot indict a misdemeanor</u>.

In *Commonwealth v. Lamont L*., 438 Mass. 842 (2003), the juvenile was indicted as a Y.O. on charges of assault and battery and assault and battery by means of a dangerous weapon (ABDW). After trial, he was adjudicated a Y.O. on two counts of assault and battery, one being the lesser included offense of ABDW. The Appeals Court reversed the judgments on the two misdemeanor charges of assault and battery and remanded the case to juvenile court with an order dismissing the indictments. The SJC found that while it was improper for the Commonwealth to indict an assault and battery, the juvenile was not prejudiced. The SJC reasoned that

if the juvenile had filed a motion to dismiss the assault and battery indictment it would have been dismissed and the delinquency complaint of assault and battery joined for trial with the Y.O. indictment. Accordingly, the SJC ordered that delinquency findings enter on those two charges.

F. Grand Jury instructions in murder cases.

If the Commonwealth is seeking to indict a juvenile for murder, "[w]here there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) presented to the grand jury, the prosecutor shall instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses. The instructions are to be transcribed as part of the transcription of the grand jury proceedings." *Commonwealth v. Walczak*, 463 Mass. 808, 810 (2013). Justice Lenk authored a concurring opinion in which she opines that because kids are different they should be entitled to greater protection at the grand jury. "While we have never required instruction without a request, we have also never been faced with the unique circumstances presented in this case, where the Commonwealth seeks a murder indictment against a juvenile, a class of defendants long given special consideration, despite significant evidence of mitigating circumstances that a grand jury reasonably may credit. The question before us is whether legal instructions should be provided to the grand jury where the return of a murder indictment against the juvenile will deprive him of all protections typically accorded juveniles."

## III. **Trial Issues.**

A. Joinder of misdemeanor for trial.

A juvenile cannot be indicted for a misdemeanor. In cases where the misdemeanor and felony arise out of the same criminal conduct, the complaint and indictment can be joined for trial before a jury of twelve. *Commonwealth v. Ulysses H*., 52 Mass. App. Ct. 497 (2001), G.L. c. 119, § 54 (indictments and other criminal offenses, if properly joined under Mass. R. Crim. Pro. R. 9(a)(1), may be tried together).

B. The trial judge must instruct the jury that they must determine whether the Commonwealth has proved the requirements of G.L. c. 119, § 54 beyond a reasonable doubt.

*Commonwealth v. Quincy Q., supra*, is instructive as to what elements the Commonwealth must prove to obtain a Y.O. adjudication. In *Quincy Q*, the court held that "[t]he judge must instruct the jury that, in order to adjudicate the defendant a youthful offender, they must determine first whether the Commonwealth has proved beyond a reasonable doubt the elements of the underlying offense, and, if they so conclude, they must also determine whether the Commonwealth has proved beyond a reasonable doubt the requirements of G. L. c. 119, § 54." Since the youthful offender statute calls for increased sentencing, the Commonwealth must prove beyond a reasonable doubt the requirements of c. 119 §54 at trial. See, *Apprendi v. New Jersey*, 530 U.S. 466 (2000)(facts that increase the penalty of a crime must be presented to the jury and proved beyond a reasonable doubt).

The Court went on to say that "[c]ertain components of the statute will be met as a matter of law by conviction of the underlying charge (i.e., its status as a felony, and, in some cases, as one of the enumerated firearms violations). (The judge should not instruct the jury regarding such components)." The court also stated that the parties can stipulate to some of the factors i.e. age. "Any fact not so established" the Court concluded "must be resolved by the jury."

In footnote 9, the court considered how the verdict slip might look and opined: "Any issues regarding the requirements of [§54] which remain in dispute must also be included on the verdict slip. For example, the slip should ask: (1) whether the defendant is guilty or not guilty of the underlying offense charged; and (2) if the defendant is guilty, whether the Commonwealth has proved the infliction or threat of serious bodily harm (assuming that other issues have been resolved either by stipulation [such as age] or because the jury verdict itself indicates the necessary finding [of felony and, in certain cases, enumerated firearms violations." *Id*. at 866-877.

C. Jury trials. Youthful offender cases are tried before a jury of twelve people as opposed to six people in a delinquency case. G.L. c. 119, § 55A.

D. Joinder of trial with adult co-defendant.

The chief justice of the trial court has the authority to join for trial a youthful offender case with an adult co-defendant's case in superior court. This authority is set out in G.L. c. 211B, § 9 which relevant sections are set forth here:

> **"(ii)** the responsibility to monitor and to assist in the case processing and case flow management capabilities of the trial court departments;"
>
> "**(x)** the power, where in different departments of the trial court there are pending cases involving the same party or the same issue, and where a request for consolidation is made to the chief administrative justice to consolidate such cases for hearing by 1 justice, and to assign said justice to sit as a justice of other departments and exercise the powers of justices of other departments, in order to dispose of such cases with efficient use of judicial resources;"
>
> **"(xiii)** upon the joint request of the chief justices of 2 or more departments of the trial court, authorize the transfer of cases from one department to another."

## IV. Sentencing Procedures.

A. Possible Dispositions G.L. c. 119, § 58.

- Any sentence provided by law; or
- Combination sentence "which shall be a commitment to the department of youth services until he reaches the age of twenty-one, and an adult sentence to a house of correction or to the state prison … [t]he adult sentence shall be suspended pending successful completion of a term of probation, which shall include, but not be limited to, the successful completion of the aforementioned commitment to the department of youth services." The aggregate sentence imposed on the combination sentence shall not exceed the maximum adult sentence provided by law; or
- Commitment to DYS until the age of 21, said commitment can be suspended.[3]

[3] Under a statutory construction argument a suspended sentence is allowed because it is not specifically precluded.

B. Sentencing recommendation hearing shall be held prior to sentencing and judge considers the sentence "by which the present and long-term public safety would be best protected." G.L. c. 119, § 58.

At this hearing, the court considers the following factors: "the nature, circumstances and seriousness of the offense; victim impact statement; a report by a probation officer concerning the history of the youthful offender; the youthful offender's court and delinquency records; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender; the nature of services available through the juvenile justice system; the youthful offender's age and maturity; and the likelihood of avoiding future criminal conduct. In addition, the court may consider any other factors it deems relevant to disposition." G.L. c. 119, § 58(c).

"No such sentence shall be imposed until a pre-sentence investigation report has been filed by the probation department and made available to the parties no less than seven days prior to sentencing." *Id*.

The court must make written findings.

C. A juvenile can receive a CWOF on a Y.O. indictment if the statutory language for the charged offense does not expressly forbid it.

Unless "the statutory language for the charged offense expressly forbids it," a Superior Court judge can place an indicted matter on a continuation without a finding and dismiss at the end of the successful completion of the probationary period. *Commonwealth v. Powell,* 453 Mass. 320 (2009). In *Powell*, the SJC acknowledged that because Y.O. indictments under G.L. c. 119, §54 are tried in juvenile court that "some of these offenses will be disposed of in juvenile proceedings outside the superior court."

D. Can a juvenile receive a CWOF after a jury trial in a Y.O. case?

Massachusetts appellate courts have not decided this issue. In *Commonwealth v. Magnus M.,* 461 Mass. 459 (2012), however, where the SJC held that under G.L. c. 119, § 58 juveniles may receive a continuation without a finding (CWOF) after a trial before a judge and after a trial before a jury in a delinquency case, the Court stated

in footnote 6 that "[b]ecause the statute does not provide for a continuance without a finding after an adjudication as a youthful offender, we need not discuss the third paragraph [of § 58]."

E. Where a combination sentence is imposed, the adult sentence must be suspended pending successful completion of the DYS commitment. The suspended sentence may be ordered to run concurrently or consecutively with the DYS commitment.

In *Commonwealth v. Lucret*, 58 Mass. App. Ct. 624 (2003), the juvenile received a combination sentence of commitment to DYS until age 21 with a 2 year house of correction sentence, on and after, to be suspended for 2 years. This sentence was imposed on three Y.O. indictments to run concurrently. The juvenile was subsequently found in violation of probation and the original sentence was imposed; 2 years in the house of correction to be served after completion of the DYS commitment to age 21. The juvenile appealed the imposition of the sentence and argued that the house of correction sentence should have commenced at the time he was found in violation of probation. He further argued that the statute regarding a combination sentence is ambiguous since it does not specify whether the suspended portion is to be served concurrently or consecutively when there is a violation. In upholding the sentence, the court reasoned that it was the legislature's intent to give judges discretion in sentencing, and the suspended portion could have been imposed concurrently or consecutively. Additionally, when a combination sentence is imposed the adult sentence must be suspended pending successful completion of the DYS commitment.

## VIII. Other Issues.

A. Jurisdiction when apprehension is beyond age 19. G.L. c. 119, § 72A.[4]

The Commonwealth cannot obtain a direct indictment against a defendant who was between the ages of 14 and 18 at the time of the alleged offense but who was not apprehended until after his 19th birthday. In *Commonwealth v. Nanny*, 462 Mass. 798 (2012), the SJC affirmed the Juvenile Court judge's dismissal of Y.O. indictments against the defendant holding that for those persons alleged to have committed a crime when they were juveniles but who were not apprehended until after their eighteenth birthday, the Commonwealth cannot directly indict them as youthful offenders under G.L. c. 119, § 54. The prosecution, the court held, must proceed by way of G.L. c. 119, § 72A whereby the juvenile court must hold a two-prong transfer hearing to determine if: 1) there is probable cause; and 2) whether the interests of the public require that the person be discharged or tried for the offense.

B. Y.O. adjudications used as penalty enhancements.

i. Y.O. adjudication must involve the use of a weapon to be used as a predicate for enhanced penalties under the "armed career criminal" act.

In *Commonwealth v. Anderson*, 461 Mass. 616 (2012), the SJC held that a Y.O. adjudication was not a "crime" but rather an "act of juvenile delinquency" requiring the Commonwealth to prove the additional element that the act involved the use or possession of a dangerous weapon in order for the prior adjudication to serve as a predicate for enhanced penalties under 269, §10G(c). Accordingly, the defendant's previous Y.O. adjudication for unarmed carjacking could not be used as a penalty enhancement. In its decision, the Court reiterated that the Y.O. statute "'did not eviscerate the longstanding principle that the treatment of children who offend our laws are not criminal proceedings

[4] Prior to the 2013 amendments to Chapter 119, § 72(a), addressing the continuing jurisdiction of the juvenile court, read as follows: "If a child commits an offense before 17 and is not apprehended until between 17 and 18" the case continues as if he has not reached 17. This provision now reads: "If a child commits an offense before 18 and is not apprehended before his 19 birthday, the court shall deal with such child in the same manner as if he has not attained his 18th birthday." (emphasis added). This appears to be an error because as the way it reads presently, juveniles apprehended after age 19 who are alleged to have committed a crime prior to age 18, could fall under §72(a) or §72A. Furthermore, there is no provision about extending jurisdiction of the juvenile court to include those apprehended between the ages of 18 and 19 and, as it reads now, no court has jurisdiction over them.

. . . the distinction our law recognizes between child and adult adjudication exists partly to avoid the infringement of a child's constitutional rights, and partly to avoid the attachment of criminal stigma to children who may be amenable to rehabilitation.'" *Id*. at 630, quoting *Commonwealth v. Connor C.*, 432 Mass. 635, 641-642 (2000).

In *Commonwealth v. Foreman*, 63 Mass. App. Ct. 801 (2005), the defendant's prior delinquency adjudication for armed robbery did qualify as a predicate leading to sentencing enhancement under the armed career criminal statute, G.L. c. 269 § 10G(a). *Foreman* was indicted for possession of a firearm, G.L. c. 269, §10(a) and armed career criminal. The Court rejected the defendant's argument that a prior delinquency adjudication did not qualify as a "conviction" because G.L. c. 119, § 53 states "[p]roceedings against children . . . shall not be deemed criminal . . ." The Court followed its holding in *Furr* that G.L. c. 269, § 10G explicitly incorporates the definition of "violent crime" as defined in G.L. c. 140, § 121 and delinquent acts are included in that definition of "violent crime." Because the Legislature included delinquency adjudications in this definition, the court reasoned, they intended delinquency adjudications to count as prior "convictions" under the armed career criminal statute.

In *Commonwealth v. Furr,* 58 Mass. App. Ct. 155 (2003), the court examined the armed career criminal statute and concluded that *Furr's* prior Y.O. adjudications for armed carjacking, armed robbery, and assault and battery with a dangerous weapon were properly considered predicates leading to enhanced penalties under G.L. c. 269, § 10G, the armed career criminal statute.

ii. <u>Delinquency adjudication for possession of a firearm considered a "conviction" for the purposes of a second and subsequent firearm charge.</u>

The juvenile's prior delinquency adjudication for possession of a firearm under G.L. c. 269, §10(a) was considered a conviction and the juvenile could be indicted as a Y.O. for possession of a firearm, subsequent offense under G.L. c. 269, § 10(d). *Commonwealth v. Connor C.*, 432 Mass. 635 (2000). In its decision, the SJC considered the 1996 amendments to G.L. c. 119 (which added the Youthful Offender provisions). These amendments specifically included G.L. c. 269, § 10(d) (the subsequent offense provision) as one of the enumerated charges upon which the Commonwealth could seek direct indictment of a child as a Y.O.

The SJC held that, because the legislature included § 10(d) in its Y.O. statute, then it intended for a finding of delinquency to count as a conviction for the purposes of this statute. Otherwise, the SJC reasoned, that provision would have no meaning. *Id.* at 643-643. The SJC noted that its holding was to be narrowly construed and applied to only these specific statutory provisions and that it still adhered to its "long-standing jurisprudence that an adjudication that a child has violated a law generally is not a conviction of a crime." *Id.* at 646.

iii. A Y.O. adjudication for armed robbery did not count as a "career offender" predicate pursuant to U.S.S.G §4B1.1(a).

The U.S. First Circuit Court of Appeals held that a defendant's prior adjudication as a youthful offender for armed robbery did not count as a "career offender" predicate pursuant to U.S.S.G §4B1.1(a). *U.S. v McGhee*, 651 F.3d 153 (2011). The career offender statute mandates enhanced penalties for defendants with two prior drug or felony convictions and reads in relevant part: "A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted." Because "Massachusetts' nomenclature clearly distinguishes between youthful offenders and adults, and to the extent that objective criteria apply, the treatment accorded under state law is significantly different than that given adult offenders." *Id*. at 158. The Court concluded that McGhee's Y.O. adjudication did not count as a career offender predicate because Massachusetts has classified Y.O. adjudications differently from adult convictions. *Id*.

iv. Application of "three strikes" law.

In August, 2012, the Governor signed Chapter 192 of the Acts of 2012, *An Act Relative to Sentencing and Improving law Enforcement Tools*. This Act, commonly referred to as the "three strikes" act, makes significant changes to many different statutes including the Habitual Offender Statute, G.L. c. 279, § 25. Section 25 (b) of the amendment to this statute creates a new category of habitual offender and establishes forty-one predicate offenses. Persons prosecuted under this section still receive the maximum sentence as they did before the amendment, but the amendment eliminates parole, probation, good time, furlough, or work release for these persons. **Delinquency and Y.O.**

**adjudications are explicitly precluded from being used as predicate offenses**. G.L. c. 279, § 25(c).

C. Discovery in selective prosecution cases.

In *Commonwealth v. Washington W*., 462 Mass. 204 (2012), the SJC ruled that the juvenile was entitled to discovery relative to selective prosecution and affirmed the dismissal of two Y.O. indictments for rape of child with prejudice for the Commonwealth's failure to provide the ordered discovery.

The juvenile court allowed the juvenile's motion for discovery seeking "statistical data concerning the Norfolk County District Attorney's prosecution of juvenile sexual assault charges, asking the gender and age of the juveniles and complainants." See *Commonwealth v. Bernardo, B*., 453 Mass. 158 (2009)(where the court held that in a case where both the defendant and the complainant were under the age of consent the juvenile was entitled to discovery to investigate a potential claim of selective prosecution). Said order allowing the discovery motion was affirmed with minor modification in the first *Commonwealth v. Washington W*., case 457 Mass. 140, 149 (2010). The Commonwealth continued to fail to provide the ordered discovery and the juvenile filed a motion to dismiss the indictments with prejudice. The Commonwealth arrived at the hearing on this motion with the requested discovery, but argued that it no longer considered itself obligated to produce it because the Y.O. indictments were dismissed and a *nolle prosequi* was entered on the remaining delinquency complaints. (The indictments had been dismissed without prejudice on other grounds). The juvenile court dismissed the indictments **with** prejudice and found that the Commonwealth's refusal to provide the ordered discovery was "deliberate, willful and repetitive" and that this "egregious conduct gave rise to a determination of presumptive prejudice" and warranted dismissal. The juvenile court also found that the juvenile sustained actual prejudice due to the "prolonged and repeated failure" of the Commonwealth to provide the discovery because it denied him the opportunity to obtain the information necessary to "assess, explore and mount a claim of selective prosecution."

The SJC affirmed the juvenile court's dismissal of the indictments with prejudice. The SJC held that "no party is entitled to disobey a court order based on its contention that it is no longer necessary" and "the opportunity to eventually present this claim would not cure the loss of the earlier opportunity to present it." Even if

he were to ultimately prevail on his claim of selective prosecution, the SJC reasoned, "the juvenile would have suffered the anxiety and uncertainty arising from the renewed prosecution." The SJC went on to state that in the event the juvenile is later convicted, the sentencing options available to the judge would be more limited because the court would no longer have the option of sentencing the juvenile to DYS. (The juvenile was 16 and 3 months at the time the allegation was reported to the police and 21 years old at the time of the SJC decision).