COMMITTEE FOR PUBLIC COUNSEL SERVICES

CPCS Training Bulletin

MARCH, 2005 VOLUME 14, NUMBER 1

Special points of interest:

- Funds for interpreter services in SORB cases
- CPCS Annual Training Conference , Thursday May 5, 2005 Worcester MA
- CPCS seeks nominations for awards

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CHIEF COUNSEL'S MESSAGE

GIDEON'S BROKEN PROMISE AND THE PROMISE OF PROGRESS IN MASSACHUSETTS— William J. Leahy, Esq.

On February 11, 2005, the American Bar Association released a major report on indigent criminal defense compiled by its Standing Committee on Legal Aid and Indigent Defendants. The report, Gideon's Broken Promise, was based on testimony adduced during 2003 from indigent defense leaders in twenty-two states, including Massachusetts, and its principal conclusion was damning:

"Forty years after Gideon v. Wainwright, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at risk of wrongful conviction."

The report identified Massachusetts as both a national model for the "effective training and oversight of private assigned counsel[,]" (at 36) – and a national disgrace in the low hourly rates it pays to assigned private counsel, and the inadequate salaries it pays to public defenders (at 10). A copy of the full sixty-two page report may be found at www.indigentdefense.org.

This year, Massachusetts has a chance to break out of this longstanding constitutional failure. We have the historic decision by a unanimous court in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004), which we litigated with counsel from the ACLU of Massachusetts, and in which our cause was powerfully supported by amicus briefs submitted by bar associations, bar advocate programs, MACDL, and law firms. We have the pendency of the Arianna litigation filed by the firm of Holland and Knight. We have the 211/3 petition filed by the courageous Rosemary Cooper. Most importantly, we have the enactment of Chapter 253 of the Acts of 2004, which created "a commission to study the provision of counsel to indigent persons who are entitled to the assistance of assigned counsel either by constitutional provision, or by statute, or by rule of court." We have presented testimony and assignment data to the Commission, and have worked closely with many other organizations and individuals to assure that it receives all the information necessary to discharge its responsibilities.

The Counsel Commission is fast approaching its April 1 deadline for submitting its findings and recommendations to the Senate and the House of Representatives. More than forty years after the Gideon decision, more than twenty years after the creation of the Committee for Public Counsel Services, and more than ten years after the urgent call for hourly rate and staff attorney salary increases by The Report of the Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation, the stage is finally set for meaningful improvement in the compensation provided to those 2,700 public and private attorneys who fulfill

the Commonwealth's responsibility to provide effective representation to the poor, on behalf of the state's 6,400,000 residents. I want to express our gratitude to every person who has presented information to the Counsel Commission, or given testimony before it

This moment is unique in the post-Gideon history of the right to counsel in Massachusetts. This opportunity must not be missed.

During the period between the release of the Commission's report, and the final enactment of the state budget in late June or July, every elected official will be under intense pressure from many constituencies to redirect funding to the task of redressing specific wrongs, or addressing unmet needs. During this decisive period your Representative, your Senator, and your Governor must hear from you, their constituent, that Massachusetts' violation of the right to counsel for the poor must end; and that adequate hourly rates and salaries must be funded in the Fiscal Year 2006 budget.

MESSAGE FROM THE CRIMINAL DEFENSE TRAINING UNIT

Cathleen Bennett, Esq., Training Director
Paul Rudof, Esq., Staff Attorney
Kristen Munichiello, Administrative Assistant

We are happy to be back in the business of publishing the Training Bulletin. We hope you find it informative and useful. On behalf of Kristen Munichiello and Paul Rudof, we would like to thank the many attorneys who took the time and effort to share with us their views about this new incarnation of the bulletin.

We are especially grateful to attorneys who contributed articles for this issue. Lawrence McGuire shared with us his "Year in Review," which we have reprinted here. He originally prepared it for an Essex County bar advocate training program. Kathleen O'Connell wrote about her experiences in appealing the denial of a motion for funds under the provisions of the recently amended Indigent Court Costs Act. David Nathanson wrote about the implications in Smith v. Massachusetts, the case he won in the United States Supreme Court. Paul Rudof summarized decisions handed down by the SJC and Appeals Court.

In coming issues of the Bulletin, we will continue to summarize cases and include brief articles and practice notes for your review. We hope to post the Bulletin online on a secure server and to make all of the issues of the Bulletin searchable by keywords.

Please take a moment to share with us any suggestions that you may have for future articles and the improvement of the Training Bulletin. We would like to hear from you. Please send your comments and suggestions to cbennett@publiccounsel.net

Finally, we thank all of you for continuing to fight for the indigent accused and the integrity of the criminal justice system.

INDIGENT DEFENSE NEWS

CPCS ANNUAL TRAINING CONFERENCE - MAY 5, 2005

The 2005 CPCS Annual Training Conference will be held on Thursday, May 5, 2005, from approximately 8:30 a.m. to 5:00 p.m. at the DCU Center **(formerly the Worcester Centrum Centre)** in downtown Worcester. Criminal Law, Children and Family Law, Appellate and Mental Health programs will be offered.

The cost for the conference is a $95.00 contribution to the Training Trust. This entitles participants to attend all seminars and the awards luncheon, and to receive conference materials from all of the programs offered. **Enrollment is limited and available slots will be filled on a first-registered, first-served basis.** The conference is only open to attorneys who accept assignments through CPCS.

Please use the registration form posted at CPCS's web site, www.state.ma.us/cpcs/training.

CPCS SEEKS NOMINATIONS FOR AWARDS TO BE PRESENTED AT ANNUAL TRAINING CONFERENCE

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

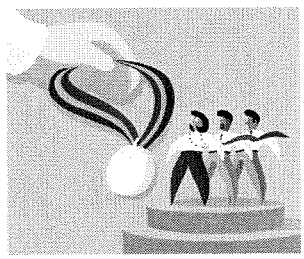
The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.

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

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

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

Nominations: Nominations for these awards should be submitted to William J. Leahy, Chief Counsel, CPCS, 44 Bromfield Street, Boston, MA 02108. **The deadline for submissions is April 8, 2005**. The Committee will present the awards at the CPCS Training Conference on Thursday, May 5, 2005.



MASSACHUSETTS LAWYERS ARE THREE FOR THREE IN THE UNITED STATES SUPREME COURT

"Congratulations!!!" is simply inadequate when it comes to crediting the work done by Massachusetts criminal defense lawyers in the United States Supreme Court. Count them, three – that's right – three wins of major significance in the last few months!

Rosemary Scapicchio represented Duncan Fanfan, the companion case to *United States v. Booker*, 543 U.S. ___ (2005). In *Booker* the Court invalidated two provisions of the federal sentencing guidelines that had the effect of making them mandatory. The Court held that those provisions violate the Sixth Amendment right to a jury trial because they required a sentencing judge to increase a defendant's sentence above the statutorily-prescribed maximum based on facts which were neither admitted by the defendant at a plea hearing nor proven to a jury beyond a reasonable doubt at trial. As a consequence of this decision, the federal sentencing guidelines are now merely advisory.

John and **Linda Thompson** won Reginald Shepard's case in the Supreme Court. *Shepard v United States*, 544 U.S. ___ (2005). The Court held that the federal sentencing court cannot look to police reports and other such documents to establish whether a prior Massachusetts offense was a "generic burglary" under the Armed Career Criminal Act. The opinion limits the sentencing judge's inquiry to: "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." As a bonus, there is an interesting concurrence from Justice Thomas, author of *Apprendi v New Jersey*, 530 U.S. 466 (2000). In it he questions the constitutionality of the federal Armed Career Criminal Act.

David Nathanson won on appeal to the Supreme Court in *Smith v. Massachusetts*, 543 U.S. ___ (2005). The opinion holds that jeopardy terminated in Mr. Smith's trial when the judge granted a motion for required finding on one charge at the end of the Commonwealth's case. The judge therefore should not have reconsidered her ruling as to that charge later in the trial. Submitting that charge to the jury for verdict at the end of the trial violated Smith's right not to be put in jeopardy for the same offense twice. Murray Kohn and Carlo Obligato were a tremendous help to David in drafting the brief and preparing the oral argument. We asked David to write a summary of the case. It appears in the casenote section of the bulletin.

It is a long, hard road to the Supreme Court. Each of these wins is a testament to the intelligence, perseverance, dedication and talent of these attorneys. We, and all of our clients, are better for their effort and success.

NOTICE TO ALL ATTORNEYS APPOINTED BY CPCS TO REPRESENT FORMER SEX OFFENDERS

In sex offender registration cases in which the client requires either a foreign language or sign interpreter, CPCS will pay for the services of an interpreter for pre-hearing preparation. The Sex Offender Registry Board provides interpreters, upon request, at its expense during classification hearings.

In order to obtain authorization for payment of an interpreter, for pre-hearing preparation, attorneys must request authorization for the funds from the CPCS SORB assignment coordinator, Cyteria Nicks. The SORB assignment coordinator will issue written authorization for payment not exceeding $500.00.

To retain the services of a foreign language interpreter, attorneys must obtain a list of certified interpreters from the Office of Court Interpreter Services and secure the services of an interpreter. The Office of Court Interpreter Services' telephone number is 617-742-8383 extension 343. To retain a sign language interpreter, attorneys should contact the Massachusetts Commission for the Deaf and Hard of Hearing at 617-740-1600.

Kathleen O'Connell was, as far as we know, the first person to file an appeal from the denial of a motion for funds in the district court. She agreed to write about the amendment to G.L. c. 261, §27D—The Indigent Court Costs Act—and her experience with her case. She filed her motion in the District Court ex parte and prosecuted the appeal on that basis as well

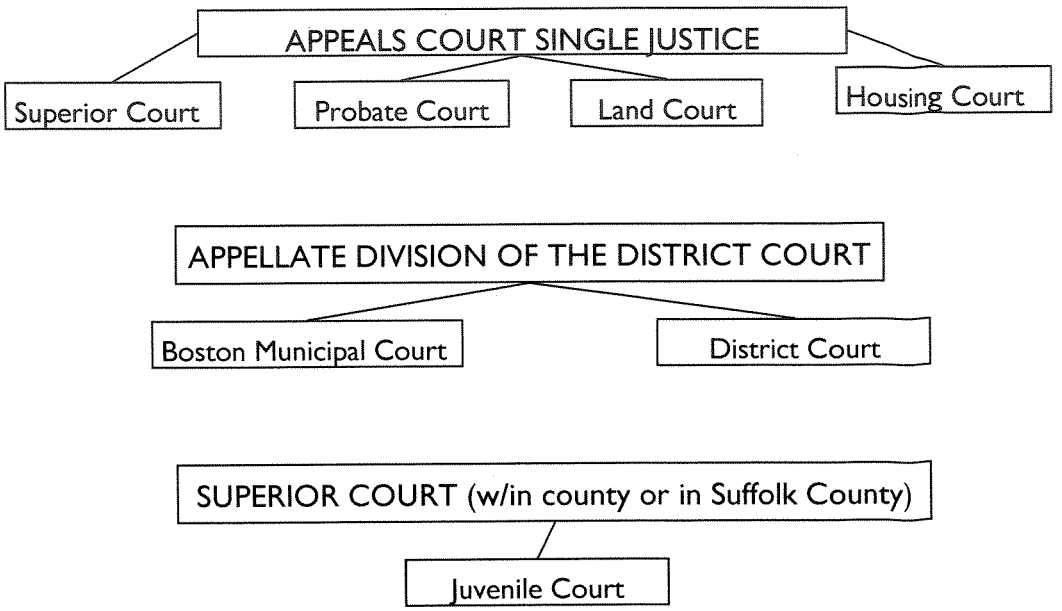
NEW APPEAL PROCEDURE FOR DENIAL OF MOTIONS FOR FUNDS

Kathleen O'Connell, Esq., CPCS Public Defender Division, Brockton Office

In September, 2004 amendments to G.L. c.261, §27D became effective restructuring the appeal process under the Indigent Court Costs Act.

Prior to September, 2004, an appeal from a denial of a motion for funds by the District Court was taken to the Superior Court and a denial from Superior Court was appealed to the Appeals Court.

Now, with the amendments, the appeal structure is as follows:



The statute requires that the defendant file a notice of appeal in the trial court within seven days of the denial. The judge then has three days to set forth his written findings and reasons (as is required by G.L. c. 261, §27C (para. 4)).

The statute does not seem to preclude any court or justice from requesting further briefing or oral argument on these appeals. However, the practice prior to the amendments was that the clerk in the trial court would assemble the record (defendant's motion and affidavit for funds, the judge's findings, and "any other documents on file relevant to the appeal"), and transmit them to the clerk of the appellate court for a "speedy decision."

I filed an ex parte motion for funds for an expert, along with an affidavit of indigence, in Brockton District Court. It was denied. Therefore, I filed a notice of appeal of the decision. At the time, no one had ever sent such an appeal to the Appellate Division and the Appellate Division had never heard one. I called Suzanne Hurley, counsel to the Appellate Division, whose office is in Cambridge. She was helpful in moving the appeal along. Because I had filed my motion for funds ex parte, it was necessary to alert the Appellate Division to *Commonwealth v Dotson*

402 Mass. 185 (1988) and its progeny. I gave Suzanne Hurley the following in support of my client's right to have the motion and appeal heard ex parte:

Standing of the Commonwealth to participate in the litigation of defendants' ex parte motions for funds.

The leading case addressing this issue is *Commonwealth v. Dotson*, 402 Mass. 185, (1988). Other recent decisions addressing various aspects of motions for funds under the indigent court costs act include *Commonwealth v. Zimmerman*, 441 Mass. 146 (2004) and *Commonwealth v. Baker*, 440 Mass. 519 (2003).

Pursuant to *Dotson*, the Commonwealth does not have standing to object to an indigent defendant's motion for funds. The Court stated in Dotson:

We recognize, however, that a case may present itself where a prosecutor's interference in a hearing on a defendant's motion for funds could improperly impair the defendant's ability to prepare a defense. **The judge is quite capable of evaluating the various factors involved in awarding funds for expert witnesses without the Commonwealth's adoption of an adversary stance. Prosecutors serve neither the judicial process not the interests of justice by impeding the indigent defendant's efforts to obtain funds pursuant to G.L. c. 261, sec 27C. We take this opportunity to state that the prosecution has no proper role to play in the defendant's motion for defense funds unless the judge requests the prosecution's participation.**

Id. at 187 (emphasis added). More recently, in *Commonwealth v. Baker*, 440 Mass. 519, 526 (2003), the Court cited with approval the above language from Dotson stating that the judge is capable of evaluating the need for motions for funds without the adversary input of the prosecutor.

Support for the notion that defendants are entitled to bring such motions ex parte is provided in both *Dotson*, *supra* and *Blazo v. Superior Court*, 366 Mass. 141 (1974), wherein the Court stated (in the context of allowing defendants to petition the court ex parte to summons witnesses without explanation), "The reason ex parte application is allowed is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summon his witnesses without explanation that will reach the adversary. . ." *Blazo, supra* at 145 n8.

The Appellate Division permitted us to proceed ex parte.

The Appellate Division has different sittings. My appeal was heard in Orleans. In vacating the denial of the motion for funds and finding for my client, the three judge panel decided the issue based upon the motion and affidavit that I had filed in the trial court. They did not request any further memoranda and I do not believe that the statute contemplates further briefs being filed. Therefore, it is especially important that the motion and affidavit filed in the trial court be as complete and persuasive as possible.

My client's appeal took about a month. The process of appealing motions for funds is supposed to be automatic and speedy. As the Appellate Division becomes more comfortable with deciding these issues, it will probably be speedier.

Clerk's offices in the various district courts, however, will probably be unfamiliar with the appellate process for these motions, so it may be necessary to give your clerk's office a copy of the statute and suggest that they call the Appellate Division with any questions.

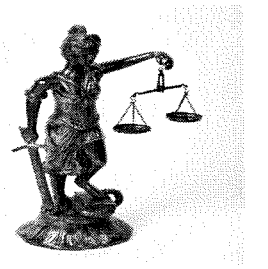
Finally, here are some tips to consider as you file motions for necessary funds in these tight fiscal times:

1. Always put the motion in writing and support it with an affidavit
2. File the motion ex parte when appropriate
3. If you file ex parte, remember to request that the court impound the motion and affidavit.

General tips for argument on the motion for funds:

1. Remind the Court that the money is paid from the Indigent Court Cost Fund that is administered by CPCS. The funds do not come from the Court budget.
2. Moreover, CPCS has set guidelines on what investigators and other "nonprofessional" service providers may charge per hour. (See "CPCS Qualifications and Rates for Investigators, Social Service Providers and Expert Witnesses" on the CPCS website: http://www.mass.gov/cpcs.)
3. Attorneys must verify that the provider performed the services described in the final bill. (See CPCS Manual for Assigned Counsel, Chapter 6).
4. CPCS has an audit and oversight unit that monitors billing activity to safeguard against abuse and overpayment.
5. As officers of the court and taxpayers, we will not spend money unless it is reasonably necessary to assure the client an effective defense - this request for funds is based on the needs and circumstances of the defense in this particular case.
6. Just because the expenditure has been authorized does not mean it will all be spent if it is not necessary to do so.
7. Remind the court about the charges against the defendant, the maxi mum penalty (and any mandatory penalties), and the host of collateral consequences she f aces if convicted.
8. Compare the resources allotted by the state for defending your client with the combined resources the Commonwealth will use to try to win its case. (For example, the number of police officers involved with the investigation and arrest, the technicians who examine evidence, the cost of the victim witness advocate and prosecutor's time spent preparing the case for trial). Of course everyone knows that the prosecution has more resources, but it sometimes helps to remind the judge about that reality.
9. Insist that the defendant's constitutional rights to due process, equal protection, effective assistance of counsel, confrontation of his accusers, compulsory process, and the right to present a defense will be violated if the motion is denied. Assert that you will never be able to answer ready for trial without the funds, nor will you be able to advise your client about whether to go to trial or plead guilty.

The purpose of the Indigent Court Costs Act, G.L. c. 261, § 27A – 27G, is to level the uneven "playing field" that indigent defendants find themselves on in criminal court. It is our job to make full use of the motion for funds to obtain the necessary resources to fully and zealously defend our clients. Our willingness to appeal the denial may discourage ill-considered rejections of our clients' motions for the funds they need to defend themselves.



2004: THE YEAR IN REVIEW

Lawrence J. McGuire, Esq., Regional Supervisor, CPCS Public Defender Division, Salem

BISHOP

Comm. v. Pelosi, 441 Mass. 257: The defendant filed a motion to compel production of the victim's treatment records, and supported that motion with an affidavit. The provider asserted privilege. Bishop required the judge to then determine if the privilege was properly asserted (the first stage of Bishop) Instead, without determining if the privilege was properly asserted, the judge denied the motion because the defendant's affidavit did not meet the relevancy requirements of the *second stage* of Bishop. The judge erred in skipping the first step. The defendant's affidavit may not have met the relevancy requirements of the second stage, but it was adequate to meet "the different and less demanding standard of relevance applicable to obtain access to unprivileged records as compared to records for which privilege has been asserted."

Comm. v. Lampron, 441 Mass. 265: Defense counsel at first summoned the victim's counseling records to his office. The providers asserted privilege. The Commonwealth found out about what the defendant had done, and moved to quash the subpoena. The judge allowed the commonwealth's motion, without prejudice to the defendant's filing a motion under Bishop for inspection of the records, which the defendant did. Counsel supported that motion with his own affidavit, filled with information he had learned from sources familiar with the victim. Among the sources was his client, the defendant. The Commonwealth complained that the affidavit was insufficient because it was not based on affiant counsel's personal knowledge. The SJC found otherwise. When the defense moves to compel production of the records, Bishop is not yet implicated. Only when a privilege is asserted is the Bishop process triggered. When counsel moves to compel production of the records, he is acting under Rule 17(a)(2), which covers the summoning of records and documents in the hands of non-party. The affidavit in support of this type of motion may contain hearsay as long as the sources are identified, the hearsay is reliable and the affidavit establishes with specificity the relevance of the requested documents. The affidavit here did that.

Commonwealth v. Maxwell, 441 Mass. 773: Defendant wanted to get the victim's AIDS treatment records. Commonwealth said that statute imposes absolute bar on disclosure. Court held that the same procedures(*Bishop-Fuller*) used to get rape counseling records (also covered by and "absolute" privilege) can be used to get AIDS records

CHARACTER EVIDENCE

Commonwealth v.Walker, 442 Mass. 185. A character witness can only testify about a person's reputation in a community. Here the defendant wanted the SJC to change the rule, and adopt Proposed Massachusetts Rules of Evidence, Rule 405(a), which would permit the witness to give his own opinion about the person. The SJC refused to alter the existing rule.

CHILD WITNESSES

ACCESS FOR INTERVIEW

Commonwealth v. Adkinson, 442 Mass. 410: The defendant, on trial for sexually abusing children, wanted his expert to interview them. They were in the custody of the DSS. DSS refused. The defendant wanted the Commonwealth to summons the children for a *Carita* hearing, to apprise them of their right to speak or not to speak to defense. The Commonwealth refused. The SJC found no error. The DSS had the right, as legal custodian of the minor children, to refuse on their behalf.

CONSCIOUSNESS OF GUILT

"REFUSAL EVIDENCE"

Commonwealth v. Delaney, 442 Mass. 604: The defendant, charged with stabbing the victim in an elevator in Boston, was not immediately caught. The police investigated, and got a (valid) search warrant from the Suffolk Superior Court to search the defendant's body for bite marks. (The victim said he had bitten his attacker on the shoulder during the affray.) The police found the defendant, told them they had the warrant to look for a bite mark. At first, the defendant agreed to go with them to the station for examination, but then walked away. The police handcuffed him, took him to the station and photographed the bite mark they found on his shoulder. At trial the Commonwealth introduced the defendant's refusal as consciousness of guilt evidence. The defendant objected, saying that evidence of his walking away violated his right Article 12 of the Massachusetts Declaration of Rights not to be compelled to give evidence against himself. The SJC ruled otherwise. When the police do not have a valid warrant or court order, and request the suspect to turn over evidence, he has the right to refuse, so no consciousness of guilt can be inferred. However, as here, when the police had a valid court order compelling the defendant to submit to a search the defendant must obey it. If he does not, his refusal can be introduced at trial as consciousness of guilt.

CONTINUANCE WITHOUT A FINDING IN SUPERIOR COURT - "BRANDANO" MOTIONS

Comm. v. Cheney, 440 Mass. 568 (2004): SJC rules that so-called "Brandano" continuances without a finding, without the prosecution's agreement, are invalid in Superior Court. Under the Massachusetts constitution's separation of powers clause, only a prosecutor can terminate a prosecution before trial or plea. Permitting a judge to do so by placing a person on temporary probation under c.276 s. 87, then dismissing the case over the DA's objection amounts to a judicial *nolle prosequi* and is unconstitutional. Remember this case applies to **Superior Court only**.

DECLARATION AGAINST PENAL INTEREST

Commonwealth v. Marrero, 60 Mass. App. Ct. 225 (2004): A declaration against penal interest is an exception to the hearsay rule which permits the declarant's out of court admission of guilt to be presented at trial as evidence exculpatory of the defendant. A statement is admissible under this exception if: (1) the declarant is unavailable (unavailability includes the exercise of a privilege); (2) the statements tends to subject the declarant to criminal liability to the point where a reasonable person would not have made the statement unless he believed it to be true; and (3) the statement if offered to exculpate the defendant, is corroborated by circumstances clearly indicating its trustworthiness. The "penal interest" however has to be relevant to the issue before the trier of fact. In *Marrero,* the defense was that a passenger in Marrero's car, not Marrero himself, shot the victim. A witness had told the police that while he was selling drugs on a street corner, a car pulled up with three men in it. One of them, Santiago, showed a gun. The car drove off. Minutes later the witness heard gunshots, and ran to the nearby Scene of the fatal shooting. The witness's description of the car fit that of the car involved in the shooting. The defendant wanted to get the whole of the statement in. At trial the witness was unavailable. The Court held however, that the only part that was against his penal interest was his admission to selling drugs. That did not implicate him in the shooting, so the statement did not qualify as declaration against penal interest. The trial judge was correct to exclude it.

DNA EVIDENCE

BUCCAL SWAB

Commonwealth v. Maxwell, 441 Mass. 773: If there has been a finding of probable cause sufficient to initiate criminal proceedings, the Commonwealth can obtain a buccal swab to use for DNA testing by showing to the judge that the sample sought would probably provide evidence relevant to the defendant's guilt by providing the court with affidavits and documentary evidence as the judge requires, in an adversary hearing in open court at which the defendant can be heard. However, an evidentiary hearing beyond the

submissions of the parties is not required.

DOMESTIC ABUSE

C.O. v. M.M., 442 Mass. 648: Two holdings of importance in this case
First, what is a "substantive dating relationship"? Chapter 209A, section 9(e)(1)-(4) sets out four factors:
(1) length of time of the relationship
(2) type of relationship
(3)frequency if interaction between the parties
(4) in a terminated relationship, how long the relationship has been over
Here plaintiff and defendant were teenage high school students who were not dating. Defendant drove plaintiff home from school one day, and according to her, raped her. Rape complaint was brought and plaintiff's mother sought the 209A for her daughter. Defendant, who denied the rape, said that one encounter does not a substantive dating relationship make. Court agrees that the judge did not consider the four factors, and based his decision granting the order on the fact that the rape complaint was pending. This was error.
Second, does the defendant have the right to present and cross-examine witnesses at the hearing? Yes he does, and the judge's refusal to let him do so was a second reason for vacating the order in this case.

EXCITED UTTERANCES

Crawford v. Washington, 124 S. Ct. 1354 (2004). This case is extremely important. It changes the landscape hearsay exceptions, not only as to excited utterances, but in other areas as well. On February 16, 2005, Bar Advocate Randi Potash and CPCS Public Defender Paul Rudof will present a complete seminar on the ramifications of *Crawford* here. Attached to this outline as an appendix is an exegesis of the case done by the CPCS Chief Appellate Attorney, Brownlow Speer.

IDENTIFICATION

Comm. v. Zimmerman, 441 Mass. 146: A very important case for two reasons. The identification was cross-racial. The defendant wanted an expert. The Superior Court denied him the funds to hire one, ruling that an average person would not go to the expense of hiring an expert given the questionable admissibility of the this type of evidence. The SJC decided that the judge was in error. When ruling on a motion for funds "a judge should consider not only the potential admissibility of the expert testimony and its cost but also the *desirability or necessity* of the testimony to the requesting party's case." The second, maybe more important, point is Justice Cordy's concurrence (in which Judge Ireland joined). Justice Cordy writes eloquently and at length about the dangers of cross-racial identification, going into detail about recent research on the subject. This is a case you really need to have with you whenever identification is the issue.

INCEST

Comm. v. Rahim, 441 Mass. 243: Consanguinity is a necessary element of the crime of incest (c.272, s.17), so that only sexual relations between persons related by blood or adoption are criminal, not those other relationships prohibited under the marriage statute (G.L. c. 207, ss.1 and 2).

JOINDER OF OFFENSES FOR TRIAL

Commonwealth v. Pillai, 61 Mass. App. Ct. 603: Reversible error to join two separate indecent assault and battery complaints for trial, where the victims were two different children, the incidents occurred four or five months apart, and there was no evidence that they arose out of a course of criminal conduct or connected episodes constituting a single plan or scheme, as Rule 9(a)(1) requires.

JURORS/JURY, PROFESSIONAL CONDUCT, CONFLICT OF INTEREST

Comm. v. Tennison, 440 Mass. 553 (2004): Tennison and her co-defendant, Young, were on trial for assault and gun charges. The jury retired to deliberate. Young told his lawyer not to worry, because he (Young) had been in contact with a jury throughout the trial so

"the fix was in." Young's lawyer called the BBO for instructions. He brought the issue to the judge's attention and moved to withdraw, but on Bar Counsel's advice, refused to reveal the juror's name, because he had learned it through a confidential communication with his client. The judge conducted an individual *voir dire* of the jurors. Each juror said that they had had no untoward contact with a party during the trial, or know anyone involved in the case. Both defendants moved for a mistrial. That was denied. The judge demanded that Young's lawyer name the tainted juror, and the lawyer did. That juror was excused. Before the *voir dire* the jury had reported that they had reached a verdict on one of the indictments. The judge had ordered that sealed. An alternate was selected. The judge instructed the reconstituted jury to begin their deliberations afresh, and he voided the sealed verdict. He allowed Young's lawyer to withdraw and appointed a new lawyer to represent him. The next day, the jury returned a split verdict. The SJC found that all the judge's actions were correct. There was no "manifest necessity" requiring an immediate mistrial. The judge correctly conducted a *voir dire*, in accord with precedent. "The defendant is entitled to a fair trial before an impartial jury. ... But we also cannot permit valid legal procedures to be frustrated by accusations, which are easily made and may well be false and may be predicated on a desire to disrupt those proceedings." Nullification of the sealed verdict was required because it could have been the product of tainted deliberations. Any problems between Young and his lawyer were brought on by Young's actions, so he was not denied effective assistance of counsel.

MALICIOUS DAMAGE OF PROPERTY - VALUE

Comm. v. Deberry, 441 Mass. 211: **Big change here!** The SJC overrules the Appeals Court (Deberry, 57 Mass. App. Ct. 93) and changes the law. "[W]here damage is caused to a portion of the property as a whole and may be replaced or repaired, the value of the property is to be measured by the pecuniary loss[.]" Here, the defendant damaged a wall in a house. The Appeals Court ruled that the value was that of the whole house. The SJC says that was incorrect; the value is the cost of repairing the wall.

Comm. v. Kirker, 441 Mass. 226: Applies Deberry rule supra, and holds that value of the damage done to the car is the cost of replacing the two tyres the defendant slashed, not the price of the car.

MIRANDA

Comm. v. Collins, 440 Mass. 475 (2003): *Comm. v. Mavredakis*, 430 Mass. 848, says that Article 12 of the Massachusetts Declaration of Rights requires that the police must tell an arrestee under custodial interrogation of an attorney's efforts to contact him to give him legal advice. In *Collins*, the police were investigating charges of sexual misconduct against the defendant. A detective arranged to meet the defendant, who was not under arrest, and interview him. Before the meeting, the defendant called and told the detective that he was going to hire a lawyer. The next day, the lawyer called the detective and advised him he represented the defendant and wanted to be present during any interview. The police got a warrant, arrested the defendant and questioned him after Miranda, but without the attorney present. The defendant was not told by the police that the attorney had said he wanted to present at any interview. The SJC holds that *Mavredakis* does not apply here. The *Mavredakis* rule was meant to make sure that the defendant knew that an actual lawyer was trying to counsel him, as opposed to the abstract right to counsel in the Miranda waiver.

Here the defendant had retained counsel, and thus knew who that counsel was. He could have but did not contact him, so his rights were not violated. That the police did not tell him of his counsel's request to be present was not fatal. The SJC distinguishes this case from *Commonwealth v. Sherman*, 389 Mass. 287. In *Sherman*, the defendant was represented by a lawyer on a pending case. The lawyer learned that the police were investigating Sherman for an unrelated crime, and told the police she wished to be present if he was questioned. The police arrested Sherman but did not tell him about the lawyer's request. Where Collins had retained a lawyer for the very case that he was being questioned about, and thus knew he had counsel on it, there was no evidence that Sherman knew of his lawyer's interest in representing him during questioning.

TAPE RECORDING OF CONFESSIONS!

Commonwealth v. DiGiambattista, 442 Mass. 423: From the date of this decision (8/16/04) forward, if the police do not tape record **completely** a defendant's statement or confession conducted at the police station or place of detention, the judge **must on request of defendant** instruct the jury that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that because of the absence of a tape recording of the interrogation in the case before them, that they should weigh the evidence of the alleged statement with great caution and care. If voluntariness of the statements is a live issue and a humane practice instruction is given, the jury also must be instructed that the absence of a recording permits, but does not compel, them to conclude that the Commonwealth has proved voluntariness beyond a reasonable doubt.

PROBATION

APPEALS AND THE DISTRICT ATTORNEY

Commonwealth v. Negron, 441 Mass. 685: Defendant was on probation. He ha a tiff with his wife which resulted in a revocation hearing. At the hearing the wife exercised her marital privilege. The judge refused to allow the police officer to testify to her "excited utterance", so the probation was not revoked. The District Attorney's office was prosecuting the hearing for the probation department, and appealed. The defendant said that the District Attorney had no right to appeal. The court held that, if the District Attorney prosecutes for the probation department, it becomes a party and can appeal

RESTITUTION

Commonwealth v. Palmer P., 61 Mass App. Ct. 230: The juvenile was charged with breaking and entering, and larceny. He was convicted of breaking and entering and acquitted of larceny. The judge ordered restitution . The juvenile appealed saying that he could not be made to pay because he had been found not guilty. The court disagreed. The judge had discretion to order the restitution because it was significantly causally related to the breaking and entering.

SEARCH AND SEIZURE

ARREST IN DWELLING, WITH AN ARREST WARRANT

Commonwealth v. Silva, 440 Mass. 772: Under Article 14 of the Massachusetts Declaration of Rights, the police need reasonable belief that the dwelling is the suspect's, and that the suspect is within, **not** probable cause to enter a dwelling house with an arrest warrant.

DOG SNIFF

Commonwealth v. Feyenord , 62 Mass. App. Ct. 200: The defendant was legitimately stopped for a motor vehicle infraction (headlight not lit). The defendant had no Massachusetts license, his story was questionable, and did not match the story his passenger gave. The police had the defendant get out of the car and called in a drug sniffing dog. The dog sniffed the air outside the car and alerted. The police searched the area of the car near which the dog alerted and found drugs and a scale. The defendant was arrested. The Court held that the brief detention to bring in the dog was permissible and that the dog's sniffing of the air around the car was not an intrusion, so no seizure occurred. The search based on the sniff was valid.

KNOCK AND ANNOUNCE

United States v. Banks, 124 S.Ct. 521: Interval of 15 to 20 seconds from the time the police knocked on the door until they forcibly entered the apartment was reasonable, because of exigent circumstances (possible destruction of drugs). That the apartment resident was in the shower at the time the police knocked was immaterial. Not was it material that the resident may not have had time to open the door in that short interval. The facts known to the officers at the time governed the reasonableness of their actions.

IMPOUNDMENT AND INVENTORY OF AUTOMOBILE

Comm. v. Brinson, 440 Mass. 609: The defendant was arrested in an apartment. His car was parked in a public lot nearby. The police had it towed. They conducted an inventory search pursuant to their policy on towed cars and found drugs. The SJC held that the search was invalid and the drugs

had to be suppressed. The defendant wasn't in the car when he was arrested. The car was legally parked and constituted no danger to public safety, nor was the car itself in danger of vandalism or other harm. Because it was in a public lot, only the owner or manager of the lot could request the police to tow it under c.266, s.122D; that statute does not permit the police to tow from private lots at their discretion.

PARTICULARITY

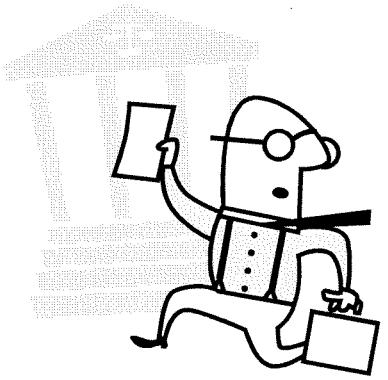
Commonwealth v. Forish, 68 Mass. App. Ct. 554: Gunshots drew the police to the defendant's house. After investigation an officer applied for a search warrant for the house. In his application for the warrant, the officer put the *address* of the search in the space proved for the *objects* of the search. The search warrant itself perpetuated the error, and did not describe the items to be searched for. The affidavit, however, was full and complete as to what the police wanted to look for. There was no evidence, though, that the police had the affidavit with them when they executed the warrant. If they had, the warrant could have been valid. The court found that the warrant was defective because it lacked particularity, and suppressed the items seized.

"PLAIN FEEL" DOCTRINE

Commonwealth v. Wilson, 441 Mass. 390: The doctrine permits a policeman to seize non-threatening contraband discovered upon a lawful pat frisk of defendant's outer clothes for weapons, if officer feels something whose "contour and mass" makes it readily identifiable as contraband. The SJC says that this doctrine is perfectly consistent with Article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment. Here, when the officer pat frisked the defendant he felt a soft object consistent with a bag of marijuana. he seized it and he was right.

THREATS

Commonwealth v. Maiden, 61 Mass. App. Ct. 433: Defendant was Romeo's new girlfriend, the victim was his old girlfriend. The old girlfriend go a 209A against Romeo. Defendant was in court and when the hearing ended with the order being issued, she stood and voiced a physical threat to the old girlfriend, who did not hear it because she was on the other side of the courtroom. However a policeperson who did hear the threat communicated it to the victim. On appeal the defendant says since the victim didn't hear the threat, it was not communicated to her, as the law requires. The court disagrees. The law says the threat has to be communicated or *intended to be communicated*, and here, since the threat was voiced in public with bystanders around, a valid inference could be drawn that the defendant intended it be communicated. The defendant also says that the judge erred when she acquiesced to the Commonwealth's request and did not use the word "communicate" in her instruction, instead using the "old" definition ("an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.") The court says that while it is true that the threat has to communicated or intended to be communicated, in the sense that it was not made idly, "there is no basis to conclude that the law requires" that the threat be actually received by the victim, so there was no error.



CASENOTES

This section of the Training Bulletin contains a list of every Supreme Judicial Court and Appeals Court opinion concerning criminal law that was handed down in January and February of 2005. Following each citation is a list of keywords relating to all of the issues discussed in that particular opinion. These keywords 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. Always Shepardize! Applications for further appellate review may have been granted after the publication date of these notes. Furthermore, opinions may be "amended" sua sponte, or upon motion of a party. The Training Unit gratefully acknowledges Paul Rudof, Esq. for writing the casenotes.

Commonwealth v. Gaynor, SJC-08807 (1/11/05): consent to search, voluntariness, trickery, scope of consent, statements, right to counsel, change of venue, joinder, DNA, admissibility, reliability, product rule, likelihood ration, database, hearsay, verbal completeness, self-incrimination, cross-examination, closing argument. **Summarized at p.15**

Commonwealth v. Walker, SJC-08492 (Jan. 6, 2005): self-defense, homicide, voluntary manslaughter, specific unanimity, inferences, burden of proof, ineffective assistance of counsel, inconsistent defenses. **Summarized at pp.16-17**

Commonwealth v. Fondakowski, 03-P-341 (Mass. App.Ct. Jan 20, 2005): sex offender registration, knowingly, First Amendment, free speech. **Summarized at p.17**

Commonwealth v. Van Winkle, SJC-07278 (Jan. 7, 2005): homicide, robbery, jury selection, race, specific intent, malice, voluntary manslaughter, intoxication, circumstantial evidence, consciousness of guilt, state of mind, duplicative convictions **Summarized at p. 17**

Commonwealth v. Cabral, SJC-0974 (Jan. 4, 2005): bail, surety, agent of surety, kidnapping, assault, affirmative defense, burden of proof, burden of production, use of force, notice **Summarized at p.17-18**

Commonwealth v. Alvarez, 02-P-875 (Mass. App. Ct. 2/8/05): ineffective assistance of counsel, continuance, prejudice per se. **Summarized at p.18**

Commonwealth v. Butler, 03-P-1397 (Mass. App. Ct. 1/28/05): assault and battery, prior bad acts, misconduct, propensity, restraining orders, bias, identification, intent, motive, pattern of conduct, sexual desire, witness, impeach, inconsistent statements, prosecutorial misconduct, vouching for credibility, opening statement, closing argument, ad hominem attack. **Summarized at p.18-19**

Commonwealth v. Constantino, SJC-09339 (2/25/05): double jeopardy, duplicative convictions, leaving the scene, unit of prosecution, ambiguous, rule of lenity, legislative history, operating to endanger, closing argument, proximate cause, intervening cause **Summarized at p.19**

Commonwealth v. Gomes, (SJC 2/22/05): murder, first degree, competent to testify, mistrial, closing argument **Summarized at p.19**

Commonwealth v. Henley, 03-P-1206 (Mass. App. Ct. 2/11/05): inventory search, rental car, impoundment, ineffective assistance of counsel **Summarized at pp. 19-20**

Commonwealth v. Jackmon, 02-P-760 (Mass. App. Ct. 2/23/05): murder, second degree, choice of law, totality of the circumstances, veracity, basis of knowledge, corroboration, probable cause, reliability, informant, fugitive, ineffective assistance of counsel, felony-murder, accident **Summarized at p.20**

Commonwealth v. McMahon, SJC-07261 (2/11/05): murder, first degree, sufficiency of evidence, malice, deliberate premeditation, closing argument, competence to stand trial, ineffective assistance of counsel, mistrial, strategic decision, opening statement. **Summarized at pp. 20-21**

Commonwealth v. Murphy, 04-P-349 (Mass. App. Ct. 2/11/05): impoundment, investigatory motive, pretext, inventory search, free to leave, show of authority, field interrogation observation, reasonable appre-

hension of danger, frisk, pat frisk, assaultive conduct, furtive gesture. **Summarized at p. 21**

Commonwealth v. Rivera, 03-P-1383 (Mass. App. Ct. 2/8/05): assault and battery by means of dangerous weapon, self-defense, vouching for credibility, closing argument, admission by silence, inconsistent statements, theory of defense, recent fabrication **Summarized at p.21**

Commonwealth v. Urrea, SJC-09056 (2/28/05): murder, first degree, deliberate premeditation, extreme atrocity or cruelty, criminal responsibility, mental impairment, mental disease, mental defect, specific intent, cumulative, autopsy photograph, closing argument, personal opinion, inference **Summarized at pp 21-22**

Mitchell v. Mitchell, 03-P-222 (Mass. App. Ct. Jan. 19, 2005): abuse prevention order, vacate, modify **Summarized at pp.22-23**

Commonwealth v. Oliver, SJC-09277 (Jan. 6, 2005): larceny, false pretenses, intent, embezzlement, confidential, fiduciary, sufficiency of evidence (**not summarized here)**

Commonwealth v. Alfred Gaynor, SJC-08807 (1/11/05)

The defendant was convicted of the aggravated rape and murder of four women killed over a five month period in Springfield. All four victims had ingested cocaine shortly before being killed, all had been anally penetrated and strangled, and the defendant's DNA was recovered from each victim or the vicinity of the body.

The trial court did not err in denying the defendant's motion to suppress all evidence derived from other use of the defendant's blood sample where defendant believed the detectives would only test his blood to compare with blood found inside Victim 4's car (which turned out not to be his). First, the trial judge properly found the police were at the time only interested in blood in connection with Victim 4. However, the detectives did not communicate to the defendant any express limitations on the use to which they would put his blood and police have no obligation to inform a defendant of all such possible uses. The SJC further held the search of D's blood did not exceed the scope of his consent, as a reasonable person would have concluded the police wanted to test the blood for DNA and once police have your DNA profile, they can then use it in investigating other cases.

The trial court should not have suppressed the defendant's statement to police, on a date after giving the blood sample, even though his attorney had instructed the police not to speak with him about Victim 4's case (the statements sought to be suppressed did not involve V 4's case). After noting the defendant's concession that under Edwards v. Arizona the 5th Amendment right to counsel did not apply because he was not in custody and the 6th Amendment right to counsel had not attached because no criminal proceeding had begun, the SJC then refused to read Article 12 more broadly in the circumstances of this case.

Moving the trial from Hampden to Berkshire County did not deprive the defendant of a jury drawn from a fair cross section of the community of Berkshire County in violation of Article 12 even though the number of potential minority jurors in Berkshire County is less than in Hampden County. Where venue is changed over a defendant's objection, he is entitled to a jury drawn from a pool constituting a fair cross-section of the initial venue's community; however, where, as here, it is the defendant who requests a change of venue (he asked for Suffolk but got Berkshire), he waives this Article 12 right.

The trial court properly admitted DNA evidence. The SJC rejected several distinct defense attacks against the reliability and thus admissibility of the DNA evidence. First, the SJC upheld the trial judge's ruling of reliability on Cellmark's practice of only testing and interpreting DNA deposits that either came from a single source or from a mixture of sources where one individual could be characterized as the primary contributor (as opposed to mixtures where a primary contributor could not be determined). Second, the SJC found the trial judge within his discretion in ruling that Cellmark adequately accounted for several specific factors that could have affected testing reliability. Third, the SJC found the

trial judge within his discretion in ruling that although the sample sizes tested fell below the manufacturer's recommendations, testing in these amounts was still shown to be reliable. Fourth, the SJC found use of the "product rule" method for calculating frequency profiles (as opposed to utilizing a "likelihood ratio") is a scientifically acceptable means of dealing with a mixed DNA sample where a primary and secondary contributor can be determined. Fifth, the SJC found the trial judge within his discretion in ruling that Cellmark's database was adequate even though it did not contain African-Americans from Springfield, as evidence presented showed that the size of the database was adequate and common within the field and that regarding the relevant DNA information, the African-American population is fairly homogenous across the U.S.

In response to defense cross-examination of the state chemist establishing that some physical evidence had not been sent for DNA analysis, the CW did not improperly comment on the defendant's failure to produce evidence by eliciting from the chemist on redirect that this evidence had been preserved and was available for testing by either the CW or defendant. The SJC held, "The testimony was admissible to bolster the credibility of the witness by showing they did not try to hide anything."

Practice Tips: The good news from this case is that it reaffirms the appropriateness of a Lanigan hearing to challenge the actual performance of the DNA analysts in their testing, something most trial judges have been trying to avoid by saying the admissibility of DNA has already been decided. The bad news is that the opinion validates the scientifically questionable deviations from recommended procedure which Cellmark has made famous (or infamous, depending upon your viewpoint). Still, as the trial judge has great discretion in deciding these issues of admissibility, we must remain vigilant in challenging these types of deviations. Finally, beware that this case approves of a CW response to a defendant's Bowden-type attack for failure to conduct some testing, even though that response sounds a lot like burden-shifting.

Commonwealth v. Donovan Walker, SJC-08492 (1/6/05)

A verbal argument between the defendant and the victim, which began inside a bar, continued in the bar's parking lot. When the unarmed victim pushed the defendant, the defendant struck the victim with a knife, once in the head and once in the chest, killing the victim with the stab wound to the head.

The trial judge did not err in refusing to instruct the jury that the right of self-defense arises when a person is put in fear of physical harm and did not thereby deprive the defendant of a possible voluntary manslaughter verdict based on excessive force in self-defense. The SJC clarified that while the right to use *non-deadly force* in self-defense arises when one has a reasonable concern over one's personal safety, **the right to use *deadly force* in self-defense does not attach unless and until one has a reasonable apprehension of great bodily harm and a reasonable belief that no other means would suffice to prevent such harm.** If the defendant's use of force cannot be characterized as either deadly or non-deadly as a matter of law, the jury is left to resolve that issue and they should be instructed on both standards. Because in this case the defendant used deadly force as a matter of law, he was not entitled to his proferred instruction, as it would have given him the benefit of the non-deadly force standard. The SJC found that the defendant's theory would "effectively eliminate murder as a possible verdict whenever a defendant responds to nondeadly force by using deadly force in self-defense." The SJC noted that its decision rejecting the defendant's proposed excessive force-manslaughter claim did not foreclose a possible voluntary manslaughter verdict, which would still be available under the provocation and sudden combat theories.

By instructing the jury that it must be unanimous as to the theory or theories supporting a conviction of voluntary manslaughter, the trial judge did not improperly foreclose a possible voluntary manslaughter verdict where all jurors could have agreed that some mitigating circumstance existed but were not unanimous as to which one. The SJC agreed that the judge erred in instructing the jury that they must be unanimous as to which of the three possible voluntary manslaughter theories (excessive force in self-defense, heat of passion on reasonable provocation,

or heat of passion induced by sudden combat) they found to support such a verdict. However, the Court concluded that because the jury was instructed that the CW had to prove beyond a reasonable doubt the absence of each of the three mitigating theories and because the jury found the defendant guilty of murder and did not report a deadlock, the defendant was not harmed by the judge's erroneous unanimity instruction regarding voluntary manslaughter.

Practice Tip: If there is any view of the evidence supporting a finding that your client utilized non-deadly force, make that view clear to the judge and ask the judge to send that question to the jury, along with instructions on both deadly and non-deadly force in self-defense. Also, this case reminds us of the availability of the other two theories of manslaughter—heat of passion killing induced by reasonable provocation and heat of passion killing induced by sudden combat.

Commonwealth v. Fondakowski, 03-P-341 (Mass. App.Ct. 1/20/05)

The defendant was convicted of knowingly providing false information to the Sex Offender Registry Board because he filled out his sex offender reregistration form by falsely listing his address as "homeless" and adding additional mocking, offensive language. **The Appeals Court denied the defendant's insufficiency of the evidence claim by rejecting his contention that the term "knowingly" encompasses an "intent to deceive."**

Comment: Though not of great significance, this is the first opinion interpreting the failure to register statute, G.L. c. 6 § 178H(a).

Commonwealth v Mark Van Winkle, SJC-07278 (1/7/05)

The judge did not err in requiring the Defendant to provide a reason for his peremptory challenge to the lone African-American juror in the jury pool.

The SJC held that the trial judge was within his discretion in these circumstances to require an explanation for the challenge.

Defense counsel was not ineffective for failing to communicate to the judge the defendant's true reason for challenging that juror. Had defense counsel communicated to the judge the defendant's true rationale—that he did not like the way the juror looked at him—the judge would have been permitted to reject that reason, and thus, counsel was not ineffective for refusing to state that rationale to the trial judge.

Commonwealth v Ryan J. Cabral, SJC-0974 (1/4/05)

The defendants in this case—the surety for the AV (in AV's own case as a criminal defendant) and the surety's associates—were charged with kidnapping and assaulting the AV after the AV had failed to appear for a scheduled court date in his case. The opinion addresses whether and to what extent defendants such as these can raise as a defense that they were merely acting in a lawful capacity as the surety or agents of the surety for the AV by apprehending, detaining, and then transporting the AV to the court where he had failed to appear.

First, the SJC held that **under the common law, a surety or an agent of a surety does possess the lawful authority to apprehend, detain, and deliver the principal to the court house** and that the legislature has not clearly expressed an intent to abrogate that common law authority.

Second, the SJC addressed issues relating to burdens of proof and production with respect to this defense. The SJC held that **for a defendant who claims to be the actual surety to the AV, that defendant only bears the burden of raising the defense, at which point the CW must prove beyond a reasonable doubt that the defendant either was not the surety or acted beyond the bounds of his lawful authority as surety.** On the other hand, **for a defendant who claims to be acting as *an agent of* the actual surety, that status would qualify as an "affirmative defense" and thus, such a defendant bears the burden of first producing some evidence of his agency status and the scope of the agency relationship before the CW would then be required to prove beyond a reasonable doubt that the defendant exceeded his lawful authority as a surety's agent.**

Third, the SJC held that **"in apprehending, detaining, and delivering a principal to a court or jailer, a surety and his agents may use only such force as an ordinary, prudent, and intelligent person with the actor's knowledge would have believed necessary in the circumstances, which may in any event never exceed the force a police officer would be justified in using in executing an arrest."** The SJC further held that **a surety or a surety's agent must insure that the target of the intended capture has notice as to the purpose of the capture.** Therefore, in attempting to prove that a defendant exceeded his lawful authority as a surety or surety's agent, the CW must prove beyond a reasonable doubt either: (a) that the defendant used more force than reasonably necessary in the circumstances; or (b) "that the defendant did not make known the purpose of the capture, did not believe that the purpose was otherwise known by the principal, and could have reasonably made the purpose known to the principal."

Commonwealth v. Alvarez, 02-P-875 (Mass. App. Ct. 2/8/05)

The Appeals Court rejected the defendant's ineffective assistance of counsel claim which was based solely on the fact that the defense counsel was appointed to represent the defendant ten days before trial and never sought a continuance. The defendant did not submit any affidavits from potential witnesses or from his trial counsel establishing any prejudice. The Appeals Court declined to accept the defendant's argument that prejudice per se exists when an attorney only has ten days to prepare for a murder trial. The Appeals Court also rejected the defendant's argument, premised on United States v. Cronic, 466 U.S. 648 (1981), that his attorney entirely failed to test the government's case, noting that the defense attorney did subject the CW's case to "meaningful adversarial testing," even obtaining a second degree murder verdict in a first degree murder prosecution. Finally, the Appeals Court pointed out that the defendant and his attorney, in two colloquies on two dates, including just before trial, declined judges' invitations to move for a continuance.

Commonwealth v. Butler, 03-P-1397 (Mass. App. Ct. 1/28/05)

The Appeals Court reversed the defendant's conviction for a domestic A and B on his girlfriend (but not the conviction for disorderly conduct, based on a separate incident and witnessed by a police officer) because the trial court erroneously admitted evidence that two years earlier the defendant assaulted the same GF and that she obtained two restraining orders against the defendant that year. The Appeals Court rejected every CW justification for the introduction of the prior bad act evidence, instead concluding "the prior bad acts were not relevant to any issue in the case and were offered merely to show the defendant's propensity to commit the crime." Most significantly, in response to the CW argument that the restraining order evidence was relevant to the AV's bias, since she testified that the defendant did not assault her, the Appeals Court noted that it was the CW who called the AV to testify, knowing she'd deny the defendant assaulted her, and thus, the very issue of the AV's bias was interjected by the CW. The Appeals Court also distinguished the instant case from sexual assault prosecutions such as CW v. Frank, 51 Mass. App. Ct. 19 (2001), where prior bad act evidence may be more relevant "to show how the relationship started and developed and to show the inclination and disposition of the defendant to commit the act charged." Finally, the Appeals Court concluded that because the prior bad act evidence was a substantial part of the CW's case, the limiting instructions given by the judge regarding this evidence did not render the erroneous admission of the evidence harmless.

It was not improper for the CW to call the AV as a witness, knowing she would testify that the defendant did not assault her and intending to introduce her prior inconsistent statements to the police. While the Appeals Court recognized that "a party cannot . . . call a witness who the party knows will offer no testimony relevant to an issue at trial solely for the purpose of impeaching that witness with prior inconsistent statements that would not otherwise be admissible," in this case, the CW did offer the AV's testimony to help prove the defendant's identity as her attacker, as AV testified the defendant was her boyfriend at the time of the alleged assault and in her prior statement to the police she stated that her boyfriend had assaulted her.

It was error to allow prosecutor, in an effort to show AV's bias, to introduce evidence that AV visited the defendant three days a week at the jail.

Practice Tip: This case is very helpful in any effort to exclude bad acts evidence, particularly in domestic violence cases.

Commonwealth v. Constantino, SJC-09339 (2/25/05)

The SJC held that a defendant who causes a single car accident which kills more than one person may only be convicted of and sentenced for one count of leaving the scene of an accident resulting in death. Here, the defendant's conviction of two such counts in these circumstances, and the imposition of consecutive sentences for these two counts, violated the double jeopardy clause. The SJC found that the statute is ambiguous, as it refers to leaving the scene after a collision with or injury to "any" person, and because the meaning of "any" is unclear, the Court applied the rule of lenity. The Court further read the statute to be "scene related, not victim related" and noted that other jurisdictions construing similar statutes "do not allow multiple punishments for leaving the scene of a single accident."

Similarly, the Court held that where the defendant was prosecuted for two counts of manslaughter but convicted on each count of only the lesser included offense of operating to endanger, those two convictions were duplicative, as the proper unit of prosecution was the defendant's single act of operating a vehicle so as to endanger, not the number of victims in the resulting accident.

The Court held the trial judge did not err in failing to instruct the jury on proximate and intervening causes, as the judge properly told the jury that the Commonwealth must prove "the defendant was in some way an actor, a partial cause of the accident" and to acquit if "some other person was the direct or substantial cause of death."

Commonwealth v. Gomes, (SJC 2/22/05)

The SJC refused to reverse the defendant's conviction for first degree murder because a fourteen-year old girl testified that prior to the altercation leading to the murder, she saw the defendant "bagging coke." The Court found that although the girl was not qualified to conclude that the white powder she saw was cocaine, the trial court did sustain a later objection to a second such conclusory statement by this witness and did then instruct the jury that this witness lacked the competence to offer this opinion. The Court found that the defendant's attorney's failure to object to the initial admission of this evidence was not manifestly unreasonable, as an objection may have highlighted the testimony. The Court further noted that the evidence was generally relevant to explain the events leading up to the murder.

Although it was error for a police officer to testify that in trying to locate the defendant after the murder he checked old police reports under the defendant's name, a mistrial was not mandated, as the judge struck "the single improper reference and . . . gave a prompt and forceful curative instruction."

While a "slip of the tongue" by the prosecutor in closing—stating that the only person to take the stand and say that the defendant did commit the murder was the defendant's attorney—may have improperly commented on the defendant's failure to testify or call witnesses, it was harmless beyond a reasonable doubt. Why? It was "an isolated slip," the Commonwealth's case was strong, and proper instructions were given on burden of proof, presumption of innocence, the defendant's not testifying, and statements of lawyers not being evidence.

Commonwealth v. Henley, 03-P-1206 (Mass. App. Ct. 2/11/05)

After stopping a car because of various motor vehicle infractions and a suspicion that the driver was impaired, a police officer then determined that the driver was not impaired but did have a suspended driver's license, though both passengers had valid licenses. Nonetheless, because the car was a rental and the rental agreement authorized one individual, who was not present, to drive the car, the officer decided to tow the car and perform an inventory search, which uncovered substantial quantities of co-

caine, heroin, and marijuana. **The Appeals Court held that where the rental car was stopped in the breakdown lane of an interstate highway at 2 a.m. without the authorized driver present, the police had no alternative but to tow the car, and thus, the inventory search was permissible.**

Commonwealth v. Jackmon, 02-P-760 (Mass. App. Ct. 2/23/05)

The defendant and co-venturer forced a group of people in a McDonald's into a back room in order to rob the establishment, but were interrupted when the police arrived. In the ensuing shootout, the defendant inadvertently shot his co-venturer, then escaped (while kidnapping two women) and fled to New York, then to North Carolina. After learning from an informant that the defendant was staying at a particular address in North Carolina, and conducting some corroborative investigation, the police obtained a search warrant for that address, where they apprehended the defendant and seized the gun used to kill the co-venturer and some ammunition. **The Appeals Court held that under North Carolina law, which utilizes the Gates totality of the circumstances test, the affidavit in support of the search warrant for the North Carolina residence did establish probable cause that the defendant was present at that address.**

The Appeals Court rejected the defendant's challenge to the jury instruction that "accident is not a defense to felony murder," concluding that this is a correct statement of the law and that the trial judge properly informed the jury that they had to find it was the defendant's gun, and not that of the police or the victim himself, which killed the victim.

Commonwealth v. McMahon, SJC-07261 (2/11/05)

Most of the defendant's challenges to his first degree murder conviction focused on the manner in which his decision not to testify was handled. **The SJC first rejected the defendant's contention that at the time he made his decision not to testify he had become incompetent to stand trial.** Although the evidence at the motion for new trial showed that the defendant's mid-trial decision not to testify came as a surprise to his attorney and followed an emotional outburst, the SJC deferred to the trial judge's determination of competence, noting in particular how the defendant "participated calmly" in two separate colloquies with the trial judge regarding his right to testify. **Because the SJC upheld the trial judge's finding that the defendant was competent when he opted not to testify, the Court also rejected the defendant's claim that his attorney was ineffective for failing to raise the issue of competency when he made that decision or failing to move for a mistrial. "A defendant's poor strategic decision contrary to counsel's advice—here, a midtrial about-face that severely undermined the defense position outlined in the opening statement—would not be ground for a mistrial." Relatedly, the Court turned back the defendant's argument that his attorney was ineffective for highlighting the defendant's expected testimony in his opening statement.** Given the defendant's pretrial determination to testify, and the extensive preparation for such testimony, the SJC found "there was nothing manifestly unreasonable in structuring the defense around the defendant's planned testimony, and nothing manifestly unreasonable about the decision to give the jury the defendant's version as part of the defense opening." The SJC held that this decision was a strategic one "that had failed through no fault of counsel."

Practice Tip: If at all possible, avoid mention of any fact in your opening statement that might suggest the defendant will testify or might commit the defendant to doing so.

Although the trial court improperly instructed the jury on all three prongs of malice, because only the first one applies to a first degree murder prosecution premised on a theory of deliberate premeditation, the unobjected to error did not cause a substantial likelihood of a miscarriage of justice where the trial judge correctly instructed, on deliberate premeditation, that the jury must find a decision to kill, "effectively require[ing] the jury to find first prong malice."

The defendant also challenged two statements of the prosecutor in closing: (1) "What witnesses did the defense call to help you answer the question of who

shot James Pierce?"; and (2) "Did the defensse produce any evidence through their witnesses in this trial . . . ?" **While the SJC acknowledged that these remarks "would, standing alone, erroneously suggest that the defendant had some obligation to put on evidence and explain who committed the murder," the Court found that the context of these statements was such that the prosecutor was merely arguing that the witnesses whom the defense did call did not present any exculpatory evidence on the critical issue in the case. "[T]o whatever extent (if any) the jury might have initially misinterpreted [these remarks], that proper context was thereafter made clear and the judge's instructions sufficed to correct any remaining misinterpretation."**

Commonwealth v. Murphy, 04-P-349 (Mass. App. Ct. 2/11/05)

Although defendant Murphy was lawfully arrested (a police officer saw him commit an assault and battery and then throw drugs as he was being apprehended), the police illegally "transformed" a booking inventory search "into an investigatory search" when they (a) "scrutinized" his car keys to learn that they belonged to a rented Nissan with a particular license plate number; and then (b) took those keys to the location where the car was illegally parked and used them to access and search the car. The Appeals Court thus upheld the trial court's decision to suppress a gun found in the car, though the above reasoning of the Appeals Court differed from that of the motion judge who found that the impoundment of the Nissan was a pretext for an investigatory motive. The Appeals Court noted that the fact that the car was illegally parked, thus otherwise justifying its impoundment and related inventory search, did not save the search, because here, the decision to impound the car was itself the product of the illegal investigatory search and seizure of the keys.

The Appeals Court further upheld the motion judge's decision to suppress drugs found on co-defendant Brown, because the discovery of those drugs resulted from two illegal pat-frisks of Brown and an illegal demand for his identification where nothing the police observed of Brown created a reasonable apprehension of danger or reasonable suspicion that he had engaged in any unlawful activity.

Commonwealth v. Rivera, 03-P-1383 (Mass. App. Ct. 2/8/05)

In a prosecution for ABDW where the defendant claimed self-defense, the Appeals Court reversed the conviction because the cumulative effect of two errors "prejudiced the defendant on the central question of the credibility of the eyewitnesses to the attack."

First, it was error to permit the prosecutor to elicit testimony from a detective that when the defendant gave his post-incident statement he failed to mention that there were witnesses to the attack. Because the defendant did not testify at trial, this was not an omission that was inconsistent with his trial testimony; nor was it inconsistent with his theory of defense. Further, there was no evidence presented that the detective even asked the defendant about witnesses and the defendant "was under no burden spontaneously to volunteer potentially exculpatory information in his statement to the police." Finally, it was not clear from the evidence that the defendant would even have known about the eyewitnesses.

Second, the prosecutor improperly argued in his closing that one of the eyewitnesses who helped establish a self-defense claim should not be believed because she did not call the police at the time of the altercation. There was simply no evidence on this point, and the prosecutor failed to establish the requisite foundation, pursuant to Commonwealth v. Brown, 11 Mass. App. Ct. 288 (1981), to inquire into whether a failure to contact the police supported an inference of recent fabrication.

Commonwealth v. Urrea, SJC-09056 (2/28/05)

The Commonwealth pursued a first degree murder prosecution on the alternative theories of deliberate premeditation and extreme atrocity and cruelty. The defendant presented a mental impairment defense, arguing for a conviction of second degree murder on the ground that his combined alcohol intoxication and mental illness rendered him (a) unable to form the intent necessary to deliberately premeditate; and (b) insufficiently aware of his actions to warrant a convic-

tion of first degree murder on the extreme atrocity or cruelty theory. The jury found the defendant guilty of first degree murder only on the theory of extreme atrocity or cruelty. **The SJC held that the trial court did not err when it permitted the prosecutor to elicit from a defense mental health expert his opinion that the defendant appreciated right from wrong when he killed the victim.** The Court reasoned that this question was probative of both the issues of premeditation, as it went to his ability to evaluate his actions, and extreme atrocity or cruelty, as it went to his ability to make a decision in the normal manner and his appreciation for the consequences of his actions. The Court also disagreed with the defendant's contention that Commonwealth v. McHoul, 352 Mass. 544 (1967) forbids the asking of this right versus wrong question, even in cases involving criminal responsibility defenses.

The Court also rejected the defendant's ineffective assistance of counsel claim, which was premised on the ground that the attorney's closing argument, in which he conceded that the attack on the victim was "disproportionate" and "excessive", effectively conceded guilt on the theory of extreme atrocity or cruelty. The Court found that these statements, where the defendant stabbed the victim twenty-three times, "was a concession demanded by the facts of the case," but did not amount to a concession to first degree murder. Rather, defense counsel was attempting to persuade the jury that the very nature of the attack itself demonstrated the defendant's mental illness and his inability to appreciate the brutality of the attack. Nor was the fact that defense counsel's argument focused more on countering the deliberate premeditation theory than the extreme atrocity or cruelty theory a basis for an ineffective assistance of counsel finding.

The Court also held that the trial judge properly exercised his discretion in precluding the admission of mental health records of the defendant's brothers, because these records would have been merely cumulative of other evidence.

Similarly, the trial court was within its discretion to admit an autopsy photograph which showed the victim to be intubated, as well as suturing across her breast, because that photograph, like every one of the twelve admitted, depicted at least one stab wound that the others did not, which was relevant to the issue of extreme atrocity or cruelty.

Mitchell v. Mitchell, 03-P-222 (Mass. App. Ct. 1/19/05)

The probate judge improperly vacated a wife's 209A order against her husband. After a hearing with both parties present, a probate court extended a wife's 209A order against her husband for one year. Approximately 6 months later, the husband moved to reconsider or terminate the order, supported by his affidavit stating that since the one year extension was granted, the wife had repeated contacts with him and spent time alone with him, showing that she does not fear him now and did not fear him in the past. After reviewing the husband's motion and affidavit, the wife's counter-affidavit continuing to express her fear of husband and explaining her contacts with him, and the husband's sister's affidavit which corroborated the wife's account, the judge allowed the motion to reconsider or vacate the 209A order but issued no written or oral findings.

The Appeals Court construed the husband's motion as putting forth two arguments: (1) that the wife's post-209A conduct constituted "new evidence" showing that when the one year extension was granted she was not really in fear of husband and thus the extension never should have been granted; (2) that the wife's post-209A conduct shows that she is not presently in fear and thus the 209A should now be terminated.

Regarding the first argument, the Appeals Court established the following standard: **"a motion that seeks to vacate retroactively an order issued under c. 209A on the ground of newly discovered evidence cannot properly be granted unless it is found that the evidence relied on was not available to the party seeking relief for introduction at the original trial by the exercise of reasonable diligence, and that such evidence is material not only in the sense that it is relevant and admissible but also in the sense that it is important evidence of such a nature that it likely would have affected the result had**

it been available at the time." The Appeals Court noted that the husband's claim that the wife's post-209A conduct constituted new evidence was "a doubtful proposition," but went on to hold that even if that conduct is considered new evidence it merely went to discredit the wife as witness which generally does not merit vacating the initial order and in this case it likely would not have affected the court's initial decision to grant the one year extension.

Regarding the second argument, the Appeals Court noted that **a judge has "broad discretion" in considering a motion to modify an existing 209A order and concluded that "the standard for determining whether prospective relief from a 209A order is warranted must be a flexible one" which hinges on the degree to which the modification request will affect the safety of the protected party. Thus, "[t]he greater the likelihood that the safety of the protected party may be put at risk by a modification, the more substantial the showing the party seeking relief must make." Where a party such as the husband here moves to terminate an existing 209A order, such request should be granted "only in the most extraordinary circumstances and where it has been clearly and convincingly established that the order is no longer needed to protect the victim from harm or the reasonable fear of serious harm" and the court's decision to terminate an order must be supported by findings of fact.** The Appeals Court held that the husband had not met this burden and thus allowed the wife to return to probate court to seek an extension of the order which was wrongly vacated, if she wished.

Practice Tip: This opinion makes it very difficult to vacate a 209A order once granted. Thus, defendants in 209A actions should be wary to agree to the initial request and should strongly consider fighting that petitioner's request for the order. In doing so, it might be wise explicitly to ask the petitioner whether her/his fear of the defendant is such that he/she would not contact the defendant in the future. If the petitioner says yes, the defendant may have a stronger argument for modification or termination down the road if the petitioner does later make contact with the defendant.

***Smith v. Massachusetts* 543 U.S. ___ (2005) (summarized by David Nathanson, Esq., Staff Attorney, CPCS Private Counsel Post-conviction Unit)**

On February 22, 2005, the United States Supreme Court ruled in *Smith v. Massachusetts* 543 U.S. ___ (2005) that a granted motion for a required finding of not guilty at the close of the Commonwealth's case (under Massachusetts Rule of Criminal Procedure 25(a)) cannot be reconsidered later in the case. Writing for a 5-4 majority, Justice Scalia held that a granted motion for a required finding of not guilty is unquestionably an acquittal under Supreme Court precedent. So the operative question became whether the grant of the motion was final and barred further proceedings under the Double Jeopardy Clause.

The Court held that the Massachusetts rules and Massachusetts precedent do not suggest that a granted motion for required finding of not guilty under Rule 25(a) represents anything other than an end to the case. General Massachusetts law to the effect that judges have the inherent power to reconsider other types of rulings does not affect the finality of an acquittal under Rule 25(a). "Much more" would be required to do that. The Court also ruled that prejudice is not to be considered. "[R]equiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause."

In dicta, the Court further stated that different state rules about when mid-trial judgments of acquittal could pass muster. However, they suggested some clear limits to what is permissible. First, appeals or interlocutory appeals of mid-trial acquittals are impermissible: "the taking of an appeal 'necessarily signals' the finality of the [acquittal]". Even the dissent agreed with that much. Second, the opinion states that a ruling on the sufficiency of the evidence, if it is to be made non-final at all, must be made non-final *prior* to the defense decision to put on a case. Third, the Court stated that if a state chooses to make mid-trial acquittals non-final, it can only do so by *expressly* establishing a *blanket* (not case-by-case) rule that all mid-trial rulings on the sufficiency of the evidence are non-final.

All this dicta about states being permitted to withhold the finality of mid-trial acquittals is expressly limited to analysis under the Double Jeopardy Clause. One can object that taking away the protections of Rule 25(a) violate the Due Process Clause. That is, the defendant has a right to request and obtain a mid-trial ruling on the sufficiency of the evidence (1) in order to prevent jurors from having the discretion to convict on constitutionally insufficient evidence, *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); *Hicks v. Oklahoma*, 447 U.S. 343 (1980), and (2) in order to prevent such tentative rulings on sufficiency from becoming a "snare" for the defendant who does not know what charges he must defend against. As the *Smith* court said, "seeming dismissal may induce a defendant to present a defense to the undismissed charges when he would be better advised to stand silent."

WATCH OUT: The Commonwealth is already arguing in some cases that the now-overruled Massachusetts Appeals Court's opinion in *Commonwealth v. Smith*, 58 Mass. App. Ct. 166 (2003) expressly establishes that granted Rule 25(a) motions are non-final under state law. That is wrong for *at least* two reasons. First, and most obviously, the *Smith* opinion has been overruled. The Supreme Court expressly rejected the Appeals Court's interpretation of Massachusetts law. Second, the Appeals Court's decision does not and cannot trump the SJC's clear directive promulgated in Rule 25(a): these motions must be ruled on at the time that they are made.

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