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TRANSMITTAL NO. 1018

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# Legal Update

*New Cases and Statutes of Interest  
to the District Court*

No. 34

Covering materials since June, 2008

JUNE 22, 2009

ADMINISTRATIVE OFFICE OF THE DISTRICT COURT

that he was ultimately acquitted does not alter the terms of the pretrial agreement to which the defendant voluntarily agreed." *Commonwealth v. Rezvi*, 73 Mass. App. Ct. 299, 897 N.E.2d 1021 (2008).

#### **CRIMINAL—PRIVILEGE AGAINST SELF-INCRIMINATION—IN CAMERA EXAMINATION OF WITNESS**

When a witness, directly or through counsel, intends to invoke the privilege against self-incrimination and that invocation is challenged, the judge must determine whether the witness has established a real risk that testifying might incriminate him. The general rule is that this should be done in open court, but *Commonwealth v. Martin*, 423 Mass. 496, 668 N.E.2d 825 (1996), determined that, after obtaining all relevant information from the parties, in rare circumstances a judge may need to conduct an in camera hearing with the witness (and, in most cases, the witness's counsel) and compel the witness to disclose to the judge the minimal amount of additional information necessary to verify the claim of privilege. In a *Martin* hearing, the determination is to be made by the judge alone, without disclosing the content of the hearing to the parties or their counsel, and the judge is to seal the transcript of the hearing. (This should properly be characterized as "sealing" rather than "impounding" the transcript, since the parties and counsel as well as the public are to be excluded from access.) On appeal, the transcript is available only to the appellate court and not to the parties or counsel. "[T]he reason for conducting the *Martin* hearing in camera in the first place . . . was not simply to delay disclosure until appeal but to prevent disclosure entirely." *Pixley v. Commonwealth*, 453 Mass. 827, 906 N.E.2d 320 (2009).

#### **CRIMINAL—PROBATION CONDITIONS—DURING INCARCERATION**

When a judge sentences a defendant to incarceration followed by probation, if the judge wishes to make the defendant subject to any probation conditions during that incarceration, the judge must "state explicitly . . . that probation and some or all of its attendant conditions are to commence during the period of incarceration," at least for any conditions that involve activity that is not itself illegal. In dicta, the decision indicates that "no additional or special notice is required" when the violation involves avoiding illegal activity since the defendant, "like all members of society, is on notice that he may not violate the criminal law at any time." Noting only that "a judge may have [such] authority," the decision did not reach whether *Commonwealth v. Phillips*, 40 Mass. App. Ct. 801, 805, 668 N.E.2d 361, 363 (1996) was correctly decided, which held that a judge may revoke probation "based upon criminal conduct occurring after the imposition of the sentence to probation but before the commencement of the probationary period." *Commonwealth v. Ruiz*, 453 Mass. 474, 903 N.E.2d 201 (2009), rev'g 71 Mass. App. Ct. 578, 884 N.E.2d 539 (2008).

#### **CRIMINAL—PROBATION CONDITIONS—RANDOM DRUG OR ALCOHOL TESTING**

A judge may not require random testing for drugs or alcohol as a condition of probation for an adult defendant unless the random testing "is reasonably related to recognized probationary goals for this particular defendant," including punishment, deterrence, retribution, protection of the public, or rehabilitation. This turns on the circumstances and characteristics of the particular defendant and offenses. As a matter of law, such a condition was impermissible where the defendant was placed on probation for firearms offenses, none of which involved drugs or alcohol, and there was no indication that the defendant had ever used drugs or alcohol. *Commonwealth v. Gomes*, 73 Mass. App. Ct. 857, 903 N.E.2d 234 (2009).

#### **CRIMINAL—PROBATION VIOLATION HEARING—DOCUMENTARY EVIDENCE**

[1] **URINALYSIS CERTIFICATE.** In a probation violation hearing it was reversible error for the judge to admit a hearsay certificate reporting that the probationer had failed a drug and alcohol urine test without any showing or written findings concerning reliability and good cause, as required by Rule 6 of the District Court Rules for Probation Violation Hearings. *Commonwealth v. Joseph Johnson*, 73 Mass. App. Ct. 1128, 903 N.E.2d 605, 2009 WL 744048 (No. 08-P-654, March 24, 2009) (unpublished decision under Appeals Court Rule 1:28).

[2] **GPS ACTIVITY REPORTS.** In a probation violation hearing the judge did not err in admitting a map of the GPS exclusion zone to which the probationer was subject and GPS activity reports listing the times when the defendant entered and exited that zone on certain dates. The documents were admissible under the business records exception (G.L. c. 233, § 78; Mass. G. Evid. § 803[6][A]) and therefore were not hearsay, so the judge was not required to make any written findings on reliability and good cause under Rule 6 of the District Court Rules for Probation Violation Hearings. *Commonwealth v. Christopher Cushna*, 73 Mass. App. Ct. 1129, 903 N.E.2d 606, 2009 WL 763743 (No. 08-P-5, March 25, 2009) (unpublished decision under Appeals Court Rule 1:28).

#### **CRIMINAL—RECKLESS ENDANGERMENT OF A CHILD**

The offense of reckless endangerment of a child (G.L. c. 265, § 13L) is not unconstitutionally vague. It is not limited to physical or sexual abuse and applies to any wanton and reckless conduct that creates a substantial and unjustifiable risk of serious bodily injury to a child. Since the conduct must create a "substantial risk" of "serious bodily injury," the risk "must be a good deal more than a possibility, and its disregard substantially more than negligence" and "the harm at risk must be of a very serious nature." Here, the defendant was properly convicted under § 13L for leading the