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Municipal Police Training Committee

In-Service Training

Legal Updates

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MANUAL

The Municipal Police Training Committee (MPTC), an agency of the Executive Office of Public Safety and Security (EOPSS), serves the Commonwealth by establishing training standards, oversight, and policy guidance for policing professionals.

This document is intended to serve as a training tool for police officers to review relevant legislation and case law that has been issued from the United States Supreme Court, the Supreme Judicial Court, and the Appeals Court of Massachusetts over the course of the past year. This manual is not intended to serve as a criminal law or criminal procedure book. For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor. Additionally, please remember that many cases are fact specific and contain variations that make it difficult for the courts to establish bright line rules for policing. Please direct questions and comments to:

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This manual incorporates cases decided through June 2022. Relevant legal updates are posted throughout the year and available for review on the MPTC website: mass.gov/MPTC.

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CONSTITUTIONAL LAW

FIRST AMENDMENT: FREEDOM OF SPEECH

HONKING IN TRAFFIC JAM WAS NOT PROTECTED SPEECH

Burlington Police Department v. Hagopian, 100 Mass.App.Ct. 720 (2022).

FACTS

On October 16, 2017, Burlington Police officers were working a detail at a construction site along Middlesex Turnpike in Burlington. This is a busy public road and the construction caused major traffic delays that day. Mr. Hagopian was in that traffic delay and, growing impatient, honked his horn and yelled at officers. The honking "startled construction workers." Hagopian then drove closer to one of the officers, honked again and insulted the officer. Hagopian was issued a civil motor vehicle infraction (CMVI) citation in the amount of $55.00 for a violation of MGL c 90 § 16 for unnecessarily honking his horn.

Hagopian requested a hearing to appeal the citation before a clerk-magistrate of the District Court. In January 2018 the hearing was held at which a police prosecutor appeared on behalf of the Commonwealth. Mr. Hagopian was found responsible.

Mr. Hagopian appealed that decision to a judge in the District Court. At that hearing in February 2018, the citing officer testified as did Mr. Hagopian. Mr. Hagopian testified that he was in traffic through two or three cycles of the traffic light. He felt the officer "did not appear to notice or care." p. 722. He admitted honking his horn three times. The first two honks were to get the officer's attention. He testified that he honked the third time "at the officer and yelled at him to do something to manage the traffic." p. 722. The judge found Hagopian responsible.

Mr. Hagopian then appealed to the Appellate Division of the District Court. The citing officer prosecuted the appeal and filed a brief. Hagopian filed a motion to strike the brief and requested that the officer be disqualified from prosecuting the appeal as it constituted the unlawful practice of law. That motion was denied. The responsible finding was affirmed.

Hagopian appealed further to the Appeals Court. This time the appeal was prosecuted by an attorney hired by the City. On appeal the defendant first argued that the citing officer engaged in the unlawful practice of law when he prosecuted the appeal and filed a brief on the matter. He also argued that the statute was unconstitutionally vague and intruded upon his First Amendment right to free speech.

DISCUSSION

Participation of Police Prosecutor in the Appellate Process

The court looked at each court appearance individually to determine whether the police engaged in the unlawful practice of law when prosecuting the CMVI appeals. With respect to the hearings before the clerk magistrate and the District Court judge, the court noted that the general practice in the vast majority of CMVI citation cases is for a police officer, either the citing officer or a police prosecutor, to act as the prosecutor before the clerk-magistrate or a judge. Hagopian argued that an officer cannot represent a municipality in such hearings without a law license. Hagopian is correct in that an individual must have a license to practice law in order to represent a corporation or other party in a civil action. "A civil motor vehicle infraction proceeding, however, is not a civil lawsuit, nor is the municipality truly a party." pp. 723-724. The court found that a dispute about a CMVI is between the operator and the Commonwealth, not the municipality.

> The police prosecutor represents not the municipality but the Commonwealth's interest in the enforcement of the applicable law regarding its public ways. Accordingly, a police officer does not engage in the unauthorized practice of law by prosecuting a civil motor vehicle infraction. p. 724.

There is also nothing that prohibits an officer from prosecuting a CMVI in the Appellate Division of the District Court. Hagopian argued that the brief filed by the officer should be stricken from the record because it constitutes the unlawful practice of law. The court disagreed. The court first pointed out that MGL c 90C § 3(A)(5) requires that CMVI hearings be "governed by a simplified method of appeal..." In this simplified process, for example, the Appellate Division will listen to the recording made by the District Court rather than requiring an official transcript of that proceeding. Because there is no transcript, there is an efficiency in having a brief written by someone, like the officer, who was present at the District Court hearing. As a practical matter, the court is also more likely to get a brief from an officer than an attorney in these situations.

> Municipalities are unlikely to incur the expense of hiring private counsel to prosecute a civil motor vehicle infraction, and those with law departments may be reluctant to divert the attention of staff attorneys away from the numerous duties of town counsel. p. 724.

Briefs are also helpful to the court and are not to be discouraged. Requiring that briefs only be submitted by licensed attorneys would be counterintuitive to the legislative directive of a simplified appeals process. For all these reasons, the motion to strike the brief was properly denied.

In a footnote the court stated that CMVIs that proceed to the Appeals Court do require an attorney to prosecute the appeal. These appeals are not governed by a simplified process

and are very rare. Therefore, requiring a municipality to incur the expense of an attorney in these appeals would not be overly burdensome.

Constitutional Arguments

The defendant argued that the statute is unconstitutional because it is too vague and did not put him on notice of what conduct was prohibited.

A law is not vague if its meaning is ascertainable by looking at related or similar statutes or if the statute itself is given a reasonable construction. The court can look to regulations or other sources to determine if there is a common understanding of what acts are prohibited by the statute.

MGL c 90 § 16 states, in pertinent part:

> No person operating a motor vehicle shall sound a bell, horn, or other device, nor in any manner operate such motor vehicle so as to make a harsh, objectionable or unreasonable noise.

The court found that the Massachusetts Driver's Manual produced by the RMV and readily available online or in print serves as a relevant source of interpretation of this statute. The manual states:

> Use your horn to:
> - Warn pedestrians or other drivers of possible trouble
> - Avoid crashes
>
> Do not use your horn to:
> - Show anger or complain about other drivers' mistakes
> - Try to get a slower driver to move faster
> - Try to get other vehicles moving in a traffic jam.

The court found that the driver's manual was an "authoritative source of information" and that it confirms the common understanding of what uses of horns are objectionable under MGL c 90 § 16. "Accordingly, the prohibition of using a horn to make a harsh, objectionable, or unreasonable noise is not unconstitutionally vague." p. 726.

It did not matter whether drivers in Massachusetts actually followed the guidance of the RMV driver's manual regarding the use of the vehicle's horn. It is enough if there is a common understanding of the statute.

> We cannot say that the actual practices of drivers on the roads in Massachusetts comport with this advice, although common practice seems to confirm that the recipients of honking consider such prohibited uses of horns to be objectionable. p. 726.

The court found there was sufficient evidence that Hagopian honked the horn out of anger, as a complaint about the jam, and an effort to get traffic moving faster. "This falls well within the mainstay of unreasonable, objectionable honking." p. 727.

The defendant next argued that the statute is overly broad and therefore violated his freedom of expression as protected by the First Amendment.

An overly broad statute is problematic because it may cause people to refrain from exercising their rights of free speech and expression for fear of prosecution. A statute is not vague or overbroad if it provides notice of what conduct is prohibited and is narrowly tailored so that it does not prohibit a "substantial amount of protected expression." Commonwealth v. Kenney, 449 Mass. 840, 858 (2007). The deterrent effect on protected expression must be real and substantial.

The statute here, as narrowed by the language of the driver's manual, does not create a real and substantial deterrent to protected speech. The statute "prohibits only harsh, objectionable, or unreasonable honking construed to prohibit honking out of anger or to try to get other motorists to move." p. 728.

A statute that is not overly broad on its face, can still be unconstitutional as applied. The court must look to the context of a given action to determine whether the conduct was expressive speech. The court will look at whether the conduct was done with an intent to convey a particular message and, if so, whether the likelihood was great that the message would be received and understood by others.

Honking a horn may be protected speech in some circumstances, such as someone honking in support of protestors holding signs along the road. Honking intended to embarrass, annoy or harass is not protected speech.

In this case, the honking was done out of impatience and to express anger at the officer. People present would not have perceived a particularized message in the excessive honking. The application of MGL c 90 § 16 in this case was not unconstitutional.

In footnote 10, the court states, "By contrast, where the context demonstrates that a person is conveying to others his views regarding police practices, even directing profanity and hostile gestures toward the police are protected by the First Amendment. We have little doubt that this could include honking under appropriate circumstances." (citations omitted).

The CMVI citation was affirmed.

FOURTH AMENDMENT: SEARCH AND SEIZURE

The Fourth Amendment and art. 14 protect people from unreasonable searches. For the Fourth Amendment and art. 14 to apply, there must be some state action that constitutes a search. A search is a governmental intrusion on a person's reasonable expectation of privacy.

An individual has a reasonable expectation of privacy where

1. the individual has manifested a subjective expectation of privacy in the object of the search and

2. society is willing to recognize that expectation as reasonable. Commonwealth v. Perry, 489 Mass. 436, 444 (2022) (internal quotations and citations omitted.)

STANDING TO CONTEST SEARCH

STANDING NO LONGER REQUIRED TO CONTEST A SEARCH

Commonwealth v. DeJesus, 489 Mass. 292 (2022).

FACTS
As part of an ongoing investigation, an officer saw a video recording on a social media platform that showed the defendant holding a firearm with an extended magazine. The video led officers to a multi-unit building that was not the home of the defendant. Upon arrival, officers found the defendant and others outside the building. Police entered the building through a partially open door at the rear of the house. This door led to the basement which appeared to be where the videos had been filmed. Officers seized a firearm in the basement that appeared to be the same firearm the defendant was seen holding in the videos. The defendant was arrested.

The defendant was charged with unlicensed possession of a firearm and unlicensed possession of a large capacity feeding device. The defendant filed a motion to suppress the evidence arguing that the warrantless entry into the basement was unlawful. The motion was denied and the defendant was convicted. The defendant appealed the case to the Appeals Court. The Appeals Court affirmed the convictions. (The Appeals Court decision was covered in last year's in-service legal update.) The defendant then appealed to the Supreme Judicial Court.

DISCUSSION

Standing

To contest a search, the Fourth Amendment requires a defendant to establish that they had a reasonable expectation of privacy. Prior to this decision, a defendant in Massachusetts also had to establish that they had standing to contest the search. A defendant has standing if they have a possessory interest in the place searched or in the property seized or if they were present when the search occurred. If they could not establish one of these requirements, they could not contest the search.

The SJC expressed its concern that the standing requirement of Massachusetts could produce a Constitutional dilemma where the US Constitution provides more protection to the individual than the Massachusetts Declaration of Rights. The court noted this would most likely happen in the context of electronic data. For instance, if an individual sends a text message to someone using encryption technology and that text was retrieved from the recipient device by the police, the sender could arguably establish a reasonable expectation of privacy in the text message. If they establish a reasonable expectation of privacy, they would enjoy the protection of the 4th Amendment. However, it would be difficult for the individual to establish standing because they would likely not be able to establish that they had a possessory interest in the recipient's device and they were not present when the search occurred. Without standing, they would have no protection under the Massachusetts Declaration of Rights.

> Because the Massachusetts Constitution may not provide less protection to defendants than the Federal Constitution, we hereby abandon the separate standing requirement and conclude that under art. 14, as under the Fourth Amendment, a defendant need only show a reasonable expectation of privacy in the place searched to contest a search or seizure. p. 296.

Reasonable expectation of privacy

Typically, a defendant must show they have their own personal reasonable expectation of privacy in the place searched in order to contest a search. There is one limited exception.

> [W]here the defendant has been charged with possessing contraband at the time of the search, and, also at the time of the search, the property was in the actual possession of a codefendant or in a place where the codefendant had a reasonable expectation of privacy, the defendant may assert the same reasonable expectation of privacy as the codefendant. p. 296-297.

In this case, another person was charged with offenses related to the video that led officers to the building that day. The defendant cannot rely on this codefendant's reasonable expectation of privacy for a couple of reasons. First, the defendant was charged with possessing the firearm at the time the video was filmed, not during the search. Second,

there was no evidence that the codefendant possessed the gun at the time of the search or that he had a reasonable expectation of privacy in the basement.

The defendant failed to establish his own reasonable expectation of privacy in the basement. He did not live there and the only evidence connecting him to the basement was the video itself.

The motion to suppress was properly denied.

ADMINISTRATIVE SEARCHES

SEARCH OF INDIVIDUALS PRIOR TO ENTRANCE TO PROTEST LOCATION WAS REASONABLE WHEN PRIOR NOTICE OF SEARCH WAS GIVEN

Commonwealth v. Mizrahi, 100 Mass.App.Ct. 690 (2022).

FACTS

The city issued a permit for a "Free Speech" rally to be held at the rotunda on the Boston Common on April 19, 2017. In addition to the protesters, the police department anticipated 40,000 counter protesters to attend the event as well. Officers were concerned about the safety of all attendees at the rally, especially considering recent events. More specifically, a counter protester was murdered after violence erupted at a protest in Charlottesville, VA the week before and the New England Holocaust Memorial in Boston was vandalized just days prior to April 19, 2017.

To address the "serious public safety concerns" of the police department, it established a buffer zone around the rotunda area to separate the protesters from the counter protesters. In advance of the rally police also "made multiple public statements to the news media and on social media to alert the public of security protocols that would be in place to ensure a safe and peaceful rally." Two days prior to the event, the department issued a community advisory notifying the public that there would be a large presence of officers both in uniform and plainclothes at the rally and that there would be fixed and mobile video cameras. The advisories also notified attendees that large bags and backpacks would be subject to search and provided a list of prohibited items, including firearms.

Prior to entrance into the permitted area, attendees were required to submit to a search and a screening of their bags, had to walk through metal detectors, and scanned via handheld wands. Both entrances to the permitted area had a strong police presence. The rally was scheduled to begin at noon. By 9AM there were approximately 10,000-15,000 counter protesters present, significantly outnumbering the protesters. The counter protesters taunted the protesters, shouted profanities, and threw projectiles at them.

The defendant traveled from New York to Boston to attend the rally. As he and another man approached the entrance, counter protesters began yelling at them and tried to grab them. Both men were wearing Army fatigues, steel-plated tactical body armor, and military helmets. A Boston Police captain saw the men and believed that they were in danger from the counter protesters. Six officers surrounded and separated the men from the counter protestors. The captain asked the men if they intended to go into the permitted area. When the defendant said they did, he was told by the captain that they could not enter that area while wearing the helmets and vests. The defendant was told that the police would confiscate the vest if he wanted to go into the permitted area. The vest, weighing 15-20 lbs., was removed and the defendant was told he could get the items at the area A-1 station after the rally. The men were then brought to the permitted area.

The captain had an officer transport the vest back to the station for safekeeping. An inventory was conducted pursuant to the department's rules and procedures for safeguarding personal property. A loaded firearm was located inside the front compartment of the vest.

After the rally, the defendant went to the police station to retrieve his belongings. He confirmed that the vest belonged to him and when asked for his license to carry, he produced one from New York. He was not properly licensed in Massachusetts.

The defendant was charged with various firearm offenses. The question was whether the firearm was discovered as part of a reasonable administrative search.

DISCUSSION

Administrative searches are non-investigatory and must have a purpose that is separate and apart from a criminal investigation. In this case, the court found that the purpose of the search was to ensure a safe and peaceful rally at that Boston Common. The court found this purpose "satisfied the threshold requirement for a lawful administrative search."

An administrative search must also be reasonable. To be reasonable an administrative search must minimize the intrusiveness of the search while still satisfying the administrative need for the search. "In order to minimize the intrusiveness, there typically must be prior notice of the search."

> In analyzing the reasonableness of the search, the judge considered whether the department implemented measures to reduce the intrusiveness of the search without compromising the administrative goals of the search, and whether the defendant was given notice that he could decline to be searched.

In this case, the police notified the public of security measures via multiple statements and the use of social media prior to the event. There were also signs at the Common, including signs indicating firearms are not permitted, and the defendant was told by the police that he could not enter the protest area with the vest and the helmet. Based upon these facts

the court found that the defendant had both actual and constructive notice of the security requirements in place for the event.

The defendant also knew that he had to turn the vest and helmet over to the officers before he could enter the permitted area and that they would be kept at the station for safekeeping. Because the defendant chose to enter the permitted area, he essentially consented to the search.

> [T]the department policy that resulted in seizure of the vest was the most minimally intrusive way to ensure public safety while protecting the defendant's rights under the First Amendment to the United States Constitution.

For the foregoing reasons, this was a reasonable administrative search.

SEIZURE OF INDIVIDUAL

REASONABLE SUSPICION TO STOP AN INDIVIDUAL MUST BE SPECIFIC ENOUGH TO IDENTIFY THE PERSON AS A SUSPECT OF A CRIME

Commonwealth v. D.M., 100 Mass.App.Ct. 211 (2021).

FACTS

On Monday, September 21, 2015, a confidential informant (CI) contacted a police detective of the drug control unit to report a young Black male was in possession of a firearm. The male was dressed in a black hoodie and blue jeans and was on Columbia Road in Dorchester between Devon Street and Stanwood St. The CI also indicated that this male was with another Black male wearing an off-white hoodie. Several officers responded to the area.

Officers first stopped a Black male in that area who was wearing an off-white hoodie. This individual was known by officers to be an associate of the Columbia Road gang, and officers knew he had previously been charged with firearm offenses. Officers stopped and frisked him but did not find a firearm.

Officers next stopped another Black male wearing a black and gray hoodie standing on the sidewalk outside a barbershop on Columbia Road. Officers stopped and frisked this person. Again, they did not find any weapons. As officers passed the barbershop, they noticed a Black male wearing a black sweatshirt and blue jeans seated inside the shop talking on the phone. Officers recognized him from prior encounters, knew he was under 18 years old, and knew he was a "close associate" of a member of the Columbia Road gang. Officers entered the barbershop and approached the juvenile. The juvenile was told to hang up the phone and to stand up. When he asked why, he was pulled up out of the chair by the officers. At that point, officers observed a bulge at his waist area on the right side. Officers believed it was a gun and frisked him, ultimately retrieving a firearm from his waistband.

The juvenile was indicted as a youthful offender for unlicensed possession of a firearm (MGL c 269 §10(a)). The defendant moved to suppress the seizure of his person arguing that officers did not have reasonable suspicion to stop him.

DISCUSSION

A stop of someone is constitutional if the police have a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. That suspicion must be based on specific and articulable facts and the reasonable inferences that can be drawn from those facts. A hunch will not suffice. The juvenile was seized in this case when he was ordered by the officers to stand up. The key questions are:

1. What was known by the police at the time of the stop?
2. Were those facts enough to establish reasonable suspicion?

At the time of the stop, the officers had the information they received from the CI, but the Commonwealth must prove the reliability of that information before it can be used to establish reasonable suspicion. Reliability is established by proof of the veracity of the source of the information, in this case, the CI, and the basis of knowledge.

In this case, there was testimony that the CI was known to the detective and had provided information in the past that resulted in the arrest of four individuals and the seizure of guns. The court notes there was less information provided about the basis of the CI's knowledge but that, for purposes of establishing reasonable suspicion, this prong was satisfied as well. The court notes that a more rigorous standard would be required if the court was determining probable cause and not reasonable suspicion.

Even though officers were warranted in relying on the information from the CI, this was not enough to establish reasonable suspicion. The problem is that the information provided by the CI lacked particularity. The Commonwealth has the burden to show that the description given by the CI was sufficiently detailed that it was reasonable for officers to stop anyone that matches that description. Information that would result in the police stopping a large number of people in the area would be too general. The court found that the description here, a young Black male in a black hoodie and blue jeans is quite general. The CI's description did not include other physical characteristics such as facial features, hairstyles, height, or weight which would have allowed officers to distinguish the target from other young Black males wearing similar clothing in the area.

There are circumstances in which additional information can be used to narrow and particularize the description. For instance, if the time of day was such that it is unlikely there will be other people in the area that match the description. Such circumstances are not present here. The area in question was a busy commercial area, it was 5PM on a Monday in September and the description of the person with the target was also generic (Black male in an off-white hoodie). The fact that two other Black males in the area who

were wearing hoodies were frisked before officers stopped and frisked the juvenile in this case was also evidence of the generic nature of the description.

> Our case law is clear that this type of bare-bones description, without more, is insufficient to give the police reasonable suspicion to stop anyone who fits the description. p. 217.

The court looked for other facts and circumstances which would bolster the bare-bones description. The factors the court looked at included the nature of the criminal activity, the actions of the juvenile, and the physical and temporal proximity of the juvenile to the criminal activity.

The nature of the crime being investigated is a relevant factor in the reasonable suspicion analysis. Investigation of a serious crime or one that poses a present danger to public safety is a relevant factor to consider. The court recognized that a prompt investigation is warranted when officers receive information about someone with a gun but reminds us that carrying a concealed firearm alone is not a crime. Information that someone is in possession of a firearm, without more, does not provide reasonable suspicion of a crime and will not justify a stop of that person. In this case, the CI described the person as young, but did not specify that they were a juvenile. In this case, the tip alone did not provide reasonable suspicion and could not justify the stop. Police needed to investigate more to determine if the CI was reporting actual criminal activity.

There was also nothing the juvenile did in this case to bolster the CI's tip in favor of reasonable suspicion. There was no indication of furtive movements or any attempt to conceal anything prior to being stopped. Even though the officer knew, from prior interactions with him, that the juvenile was in fact under 18 years old and therefore could not lawfully possess a firearm, this added little to the court's analysis because the original tip was not particular enough to identify the juvenile as the suspect.

Geographic and temporal proximity between a stop and a reported crime are also relevant factors in the reasonable suspicion analysis. These factors were of little significance in this case. Even though the juvenile was located on the same block as the location reported by the CI and he was stopped likely within 30 minutes of the tip, the tip did not involve a recent crime, and the juvenile's presence there "did not help to single him out from any other [B]lack male in the area' wearing similar clothing." P. 217 *quoting* Commonwealth v. Cheek, 413 Mass. 492, 496 (1992).

> Viewing all the facts and circumstances in their entirety, we conclude that the police lacked reasonable and individualized suspicion that the juvenile had committed or was committing a crime prior to his seizure. pp. 220-221.

The motion to suppress should have been allowed.

SHOTSPOTTER ALERTS ARE RELEVANT FACTOR IN REASONABLE SUSPICION ANALYSIS

Commonwealth v. Ford, 100 Mass.App.Ct. 712 (2022).

FACTS

At 2:20AM on May 5, 2019, an officer was on patrol on Central Avenue in Chelsea. He was dispatched to 185 Shurtleff Street on a reported ShotSpotter alert in the area. The officer activated his cruiser's blue lights and as he turned onto Shurtleff Street he received information about two more ShotSpotter alerts on Bellingham Street, a cross street of Shurtleff Street. As he turned onto Bellingham Street and was approaching 70 Bellingham Street, the address of the third ShotSpotter alert, the officer heard what he believed to be gunshots. Almost simultaneously, he received information about a fourth ShotSpotter alert at 92 Bellingham Street.

The officer began scanning the area for shooters or victims. The only person in the area was the defendant who was standing at the top of the landing of the building that was attached to 92 Bellingham Street.

The officer stopped and exited his cruiser to investigate the possible shootings. He unholstered his firearm, keeping it at the low, ready position. The defendant approached the officer "stumbling down the steps" toward the street. "He appeared to be intoxicated." p. 714. The officer ordered him to the ground and placed him in handcuffs. The officer testified that he did so to control the scene until backup officers could arrive. The defendant was patfrisked and a firearm was recovered from his pocket.

The defendant was charged with various firearm offenses and filed a motion to suppress arguing that the stop and patfrisk were not supported by reasonable suspicion. The motion judge allowed the motion. This appeal followed.

DISCUSSION

The Stop

The defendant was stopped when he was ordered to the ground. For that order to be lawful, the officer must have had reasonable suspicion, based upon specific, articulable facts and the reasonable inferences that can be drawn therefrom, that the suspect has committed, is committing, or is about to commit a crime.

The motion judge found that the ShotSpotter lacked reliability and could not be relied on for determining whether a shot was fired or where it was fired. The defendant argued that the court should not consider the evidence of the ShotSpotter alerts because the Commonwealth did not prove that a single ShotSpotter alert is conclusive evidence of gunfire in the area. This argument failed to recognize that the court must look at the totality of the circumstances of each case. Even though an individual fact might not suggest

criminal activity, it can be considered with the other facts and circumstances in the reasonable suspicion analysis.

In this case, the officer testified that even though he knew that the ShotSpotter could be activated by something harmless, he had a responsibility once he knew of the alerts to investigate the possibility that someone was discharging a firearm in the residential area.

It was also reasonable for the officer to consider the quick timing and close proximity of multiple ShotSpotter alerts that occurred around 2:20AM in a residential neighborhood.

> Each successive report of a ShotSpotter alert, combined with the officer's own hearing of apparent gunshots, made it increasingly reasonable for the officer to infer that the ShotSpotter devices were activating in response to consecutive gunshots. These factors, taken together, supported a reasonable inference that a crime was being committed, namely the discharge of a firearm within 500 feet of a dwelling. p. 717.

The court found that the timing and location of the alerts created "an acoustic trail of breadcrumbs" which the officer reasonably inferred would lead to the potential shooter. p. 717. The information about the multiple ShotSpotter alerts together with the fact that the officer encountered the defendant within a minute of the last alert at the location of the last alert, and the fact that the officer was scanning the street looking for people and only saw the defendant support a finding that it was reasonable to suspect that the defendant was connected to the shots fired.

The defendant argued that the actions of the officer were tantamount to an arrest and therefore required probable cause. The court disagreed stating that officers conducting a threshold inquiry are allowed to take reasonable precautions for their safety. The pertinent question is whether the actions were reasonable. In this case, the officer has reasonable suspicion to believe that the defendant had fired multiple gunshots in a residential neighborhood just moments before the officer's arrival.

> Ordering the defendant to the ground until additional officers arrived was reasonable in light of the threat to the safety of the public and to the officer. p. 718.

<u>Patfrisk</u>

Officers who have reasonable suspicion to stop a suspect do not automatically have the authority to conduct a patfrisk. To conduct a patfrisk, officers must have reasonable suspicion that the suspect is armed and dangerous. There are situations in which the facts that justify a stop of an individual also justify a patfrisk. This case presents such a situation.

> Because we conclude that the officer had reasonable suspicion to believe that the defendant had just repeatedly discharged a firearm in a residential neighborhood, it was also reasonable for the officer to believe that the defendant was armed with the instrumentalities of that crime at that time. p. 719.

The order allowing the motion to suppress was reversed.

PATFRISK

BEHAVIOR OF AN INDIVIDUAL MAY BE USED TO SUPPORT REASONABLE SUSPICION TO PATFRISK A COMPANION

Commonwealth v. Sweeting-Bailey, 488 Mass. 741 (2021). (petition for certiorari docketed 5/17/22)

FACTS

At 7PM on an evening in February gang unit detectives for the New Bedford police department saw a sedan make an abrupt lane change, causing another car to slam on its brakes to avoid colliding with it. Detectives followed the sedan into a fast-food restaurant parking lot and initiated a traffic stop by activating their lights. As soon as the sedan stopped, a passenger, Raikwan Paris, got out of the car. Paris began pacing between the sedan and officers "angrily confronting" officers asking why they were stopped.

The detectives involved in this stop were familiar with Paris from prior encounters, including arrests for firearm charges. Two of the detectives had been involved in an arrest back in 2016 in which Paris was charged with possessing a firearm. Paris was out on bail on that charge when this incident occurred.

One of the detectives had conducted two traffic stops in the past with Paris. Detective Fortes was also familiar with Paris from his prior assignment as a school resource officer and reported having a good rapport with Paris. All the detectives reported that, during prior encounters with the defendant, including the 2016 arrest, the defendant was cooperative, respectful, and cordial with officers.

On this date, Paris was told three times to get back in the car, but he refused. Two officers focused on Paris while the other attempted to approach the driver's window. This officer was concerned by the "escalating" situation involving Paris and the other officers. The court found that officers were not able to address the reason for the stop with the driver because of Paris' behavior. Officers noted that Paris was "becoming more angry" and that he took a "bladed stance" and had a clenched fist. Detective Fortes testified that Paris was

"sizing him up" and he was unsure if Paris was going to attack him. This behavior was "very uncharacteristic" of Paris. Paris was taken to the rear of the sedan, cuffed, and patfrisked. Once Paris was in custody, officers were able to turn their attention to the other occupants of the car. The driver and the remaining two occupants were ordered out of the car and patfrisked. Only 90 seconds had elapsed from when Paris got out of the car to the exit order for the other occupants. Officers recovered a firearm from the defendant's waistband.

The detectives were familiar with each of the occupants of the car. The defendant had a juvenile adjudication for a firearm offense three years prior to this stop and belonged to one of the gangs that Paris belonged to. The rear seat passenger, who had posted pictures of a firearm on social media within the last month, belonged to a different gang.

The defendant was indicted on multiple firearm offenses. He filed a motion to suppress arguing that the patfrisk was improper because police did not have reasonable suspicion to believe that he was armed and dangerous.

DISCUSSION

> A patfrisk is permissible only where an officer has reasonable suspicion that the stopped individual may be armed and dangerous. p. 744.

Reasonable suspicion that someone is armed and dangerous must be based on specific and articulable facts and the reasonable inferences that can be drawn from those facts. A court will consider the totality of the circumstances, including the training and experience of the officers, when determining whether officers had reasonable suspicion. Each factor the court considers does not need to particularly point to the defendant individually. To require that would defeat the totality of the circumstances analysis.

> It is entirely possible that even where a defendant did not him- or herself behave in a suspicious manner at the time of the stop, other factors, including a companion's behavior, might be sufficient in light of the other factors to create specific, articulable facts that warrant a reasonable suspicion that the defendant may be armed and dangerous. p. 753.

In this case, the court relied heavily on the actions of Paris in determining whether detectives had reasonable suspicion to believe that the defendant was armed and dangerous.

> Generally, the acts of a suspect's companion are not enough to establish a reasonable suspicion without more, but they may be considered in assessing whether a reasonably prudent person would be warranted in concluding that a suspect may be armed and dangerous. p. 750.

When looking at the totality of the circumstances present in this case, the court, in addition to the actions of Paris, also looked at the criminal history of the occupants, their gang membership, and the high crime area of the stop.

The court cautioned that having a criminal history alone is not suspicious. The relevancy of a suspect's criminal history will depend on how remote in time it is and whether it is similar to the activity involved in the present case. Despite the age of the defendant's prior adjudication (3 years before the stop), the fact that it involved a firearm makes it a relevant factor for the court to consider here. It was also important that all the male occupants of the car had a history involving firearms. For these reasons, the prior criminal history was a relevant factor for the court to consider in this case.

The court also noted that it is not necessarily reasonable to infer that someone is armed and dangerous based on their gang membership alone. For instance, evidence of gang membership is more relevant in circumstances in which officers are investigating ongoing gang violence in the area. While that was not the case here, the gang affiliation of the three male occupants of the car when considered with their known prior involvement with firearms made it a relevant factor to consider in this case.

The court found that the high crime area was relevant but contributed minimally to the reasonable suspicion analysis in this case. The relevance of the area was established because the stop occurred in what is known to be the territory of one of Paris' gangs and the 2016 firearm arrest took place within 1.5 miles of the stop.

> Although this is a close case, Paris's erratic, uncharacteristic behavior, combined with the officer's knowledge of the three male passengers' prior involvement with firearms, their gang affiliations, and the high crime area in which the traffic stop occurred, and the fact that the officers were in jeopardy of losing control of the scene, created a reasonable suspicion that the defendant might have been armed and dangerous. pp. 755-756.

NOTE: This decision was rendered by a highly divided court and received much criticism. Officers should keep be mindful that none of the factors in this case, standing alone, would have justified the patfrisk. Each case will be determined based upon the totality of the circumstances of that case and that the ruling here does not mean that every occupant of a vehicle can be patfrisked after an exit order based on the conduct of a companion.

UNUSUAL BEHAVIOR AND STALE CRIMINAL RECORD WERE NOT ENOUGH TO JUSTIFY PATFRISK

Commonwealth v. Garner, 490 Mass. 90 (2022).

FACTS

Three State troopers were on patrol in Taunton when they saw a motor vehicle with tinted windows make two abrupt turns. The troopers activated their blue lights and pulled the car over. Upon approaching the defendant, Trooper Dunderdale recognized the defendant from having pulled him over four times in the past several years. The first stop resulted in the defendant being arrested for unlawful possession of a firearm. The last two stops did not result in the issuance of a citation or an arrest and the trooper described the interactions as "friendly." FN 3. During one of the previous stops the defendant's legs were shaking and he was trying to call someone on his cell phone as he talked to the trooper. Trooper Dunderdale was also aware that the defendant had been convicted twice for unlawful possession of a firearm.

During the stop at issue here, the defendant told the troopers, when asked, that he was on his way to buy some marijuana from a friend but that he got lost and said several times, "Come on, Dunderdale." The trooper asked him if he "messed with firearms anymore." The defendant said "no" and that the troopers could "take a look if you want." Trooper Dunderdale responded, "Okay. Hop out."

The defendant got out of the car and was instructed by a second trooper to go to the rear of the vehicle. At that point "the defendant called out for someone to come out of a nearby home but received no response." The second trooper then grabbed the defendant and conducted a patfrisk. The trooper located a firearm in his waistband and the defendant was arrested.

The defendant filed a motion to suppress. The motion judge allowed the motion finding that the patfrisk was unlawful. The Commonwealth appealed.

DISCUSSION

> A patfrisk is permissible only where an officer has a "reasonable suspicion," based on specific articulable facts, "that the suspect is [both] armed and dangerous." *quoting* Commonwealth v. Torres-Pagan, 484 Mass. 34, 36 (2020).

"[A] suspect's criminal record alone will not justify a patfrisk." Knowledge that a suspect's prior criminal record included weapons-related offenses may be a factor relevant to the reasonable suspicion analysis, but the weight to be given this knowledge will vary depending on the totality of the circumstances.

In this case the defendant had been convicted twice in the past for unlawful possession of a firearm and Trooper Dunderdale was aware of that fact at the time of the stop. In footnote 5 the court states that the most recent conviction occurred six years prior to the stop at issue here. Trooper Dunderdale was also familiar with the defendant from prior motor vehicle stops and testified that he and the defendant had a "really good rapport." During one of those stops the trooper arrested the defendant without incident for possessing a firearm. "In these circumstances, the defendant's somewhat stale criminal records carries little weight."

The Commonwealth also argued that the defendant's behavior was "unusual and suspicious and that he was preparing to flee the scene." The motion judge found that the defendant was "possibly" nervous but did not find he was excessively so. The judge, citing Commonwealth v. Cruz, 459 Mass. 459 (2011) also noted that, "nervousness in dealing with police is 'common' and does not indicate a threat." FN 10.

The judge did not find that the defendant's answers to the troopers as suspicious. "Instead, the judge found that the defendant was 'not confrontational or belligerent' and that he 'made no threats,'" and that he made no furtive gestures and did not reach for anything.

> Relying solely upon the judge's findings, including that the defendant was not confrontational or belligerent, made no furtive gestures, or threats and was known to the police, had a really good rapport with the police and had never engaged in or threatened violence against the police, we agree with the judge that the defendant's behavior did not create reasonable suspicion that he was armed and dangerous. (internal quotations omitted.)

Based upon the facts and circumstances here, the "defendant's seemingly uncharacteristic behavior did not raise a reasonable inference that he was armed and dangerous."

The motion to suppress was properly allowed.

STRIP SEARCHES

RELIABLE DOG SNIFF CAN PROVIDE PROBABLE CAUSE TO CONDUCT A STRIP SEARCH

Commonwealth v. Judge, 100 Mass.App.Ct. 817 (2022).

FACTS

At 1:45AM on June 25, 2018, a Barnstable police officer was on patrol in Hyannis passing a hotel. The hotel was considered a "problem property" by the Barnstable police and this officer had personally participated in narcotics investigations at this hotel in the past. On this early morning, the officer noted a group of five or six individuals in the parking lot of

the hotel. The officer parked his cruiser and, with the aid of binoculars, began surveillance of the group.

Over the next hour, the officer watched members of the group occasionally enter two vehicles to retrieve an object or to sit inside. At 3AM the officer observed a woman exit the passenger seat of one of the cars, an Impala. She walked to the trunk where she was met by the defendant. The woman retrieved what appeared to be a small handbag while they both appeared to be conducting counter surveillance by looking around. The woman handed the item to the defendant who then got into the driver's seat while the woman stood outside the door. The defendant and the woman then exchanged places. The officer believed that he observed a drug transaction and radioed for backup.

Before backup arrived, the group began to disperse. The officer drove his marked cruiser into the lot, parked near the Impala, and illuminated the area with the cruiser's white lights. The officer approached the Impala on foot and saw a white powdery substance on the center console. The officer ordered everyone to stop and those who were standing outside of the cars to put their hands on the hood. The defendant was one of the individuals outside the cars.

Shortly thereafter, backup arrived and everyone was cuffed, frisked, and placed in separate police vehicles. A canine officer was called to the scene and the dog alerted to the defendant's backside. The defendant was brought back to the station where he was asked to remove all his clothing. Officers saw what "looked like drug packaging material" and what officers believed to be cocaine "protruded from the area between the defendant's buttocks." p. 819.

The defendant was charged and, after losing a motion to suppress, pled to possession of a Class B substance. He appealed the denial of his motion, arguing that the police lacked reasonable suspicion to conduct an investigatory stop and that they lacked probable cause to conduct a strip search.

DISCUSSION

<u>The Stop</u>

The defendant argued that he was seized when the officer "swiftly" approached the group and parked his marked cruiser in the parking lot and illuminated the area. The court recognizes that how an officer approaches a suspect may constitute a seizure; however, the facts here were not "sufficiently confrontational" to amount to a seizure for two reasons.

First, the cruiser did not block in the Impala. Even if it did, the defendant was not in the Impala when the officer parked the car so the defendant's movements were not hindered by the actions of the officer.

Second, the use of the white lights was not "coercive police power."
The court found that the defendant was seized when he was ordered to place his hands on the hood of the Impala.

> At that point, a reasonable person would understand the officer's instruction as a command that would be enforced by the police power. p. 820-821 *quoting* Commonwealth v. Barros, 435 Mass. 171, 176 (2001) (internal quotations omitted).

Police need reasonable suspicion of criminal activity to stop an individual. In this case, at the time of the stop, the officer knew the hotel was "a common location for suspected drug transactions," had seen the defendant and the woman engaging in "counter surveillance" while retrieving something from the trunk, then watched as each took turns sitting in the driver's seat with the item they got from the trunk. p. 821.

> Based on this unusual sequence of events, it was reasonable for the officer to believe that he had just witnessed a drug transaction. p. 821.

Reasonable suspicion transformed into probable cause in this case when the officer saw the white powder on the center console of the vehicle the defendant and the woman had just taken turns sitting in.

> At that time, the facts known to the officer established probable cause to believe that the defendant had engaged in a street-level drug transaction. p. 821.

Strip search
Having probable cause to believe that the defendant was engaged in a street-level drug transaction, the officer was justified in conducting a search incident to the defendant's arrest. To conduct a strip search, police need more than just probable cause because a strip search is a "substantial intrusion" into a person's personal privacy right.

> Thus, art. 14 requires the police to possess probable cause to believe that the defendant is concealing contraband that the police 'could not reasonably expect to discover without forcing the arrested person to discard all of his or her clothing." p. 822 *quoting* Commonwealth v. Agogo, 481 Mass. 633, 637 (2019).

Officers must have an "affirmative indication" that the contraband is concealed in private areas such as the crotch or groin to justify a strip search.

> As the Supreme Court noted, 'a well-trained dog's alert establishes a fair probability – all that is required for probable cause – that either drugs or evidence of a drug crime…will be found. p. 826 *quoting* Florida v. Harris, 568 U.S. 237, 246 (2013).

Whether an alert by a canine establishes probable cause for a strip search depends on whether the alert was reliable. The defendant argued that there were no certification or training records introduced into evidence to establish the reliability of the dog and, therefore, the reliability had not been established. While the court agreed that the reliability of the dog sniff could be established by such records, the court disagreed that such records were the only way to establish reliability.

In this case, the reliability of the dog was established by the testimony of its handler, Officer Fullam. Officer Fullam testified that he and his canine partner completed over 480 hours of training at the Alpha Canis program which included training the canine to recognize narcotics odors and to indicate to those odors. The program certified that the canine could detect drugs and that Officer Fullam could recognize the dog's indications. After the Alpha Canis program, they attended bimonthly training through the police department. The dog was also trained daily through a food reward. She did not eat unless participating in a controlled search for narcotics. The dog was not fed during live searches because those are not controlled settings.

Officer Fullam worked with the canine for three years prior to the search at issue here. In this case, Officer Fullam followed the same protocol to begin the search that he does every day to feed her. The dog gave no indication when she sniffed the first individual. When she was presented with the defendant, she alerted to his waistband and midsection and finally to his buttocks area.

> As the Commonwealth produced proof from controlled settings that the dog performed reliably in detecting drugs, and the defendant did not contest that showing by way of cross-examination or independent proof, the judge was warranted in finding probable cause. p. 825-826 (quotations and citations omitted.)

NOTE: The best practice is for officers to provide any certifications and training records for the canine to the prosecutor in advance of any motion.

The defendant's motion was properly denied.

SEARCH WARRANTS

SECURING THE PREMISES PRIOR TO OBTAINING A WARRANT

TO SECURE THE PREMISES FROM THE INSIDE, POLICE NEED AN OBJECTIVELY REASONABLE BELIEF THAT EVIDENCE WILL BE REMOVED OR DESTROYED IF ENTRY IS DELAYED

Commonwealth v. Soto-Suazo, 100 Mass.App.Ct. 460 (2021).

FACTS

On December 4, 2015, officers applied for and obtained a search warrant related to a drug investigation. The search warrant authorized the search of four apartments and four vehicles for evidence of drug trafficking and the use of false identities. The defendant was arrested at an apartment in Medford during the execution of one of the search warrants. When he was arrested, officers saw a keychain with two apartment keys and a Gold's Gym membership tag on the kitchen island. Gold's Gym confirmed that the tag belonged to Josue Torres, an alias known to be used by the defendant. This alias was used to rent some of the target apartments and was also used on fraudulent documents, including a New Jersey driver's license. The Medford apartment was rented in the name of Josue Torres and a female name.

At 6:30AM officers also arrived at a Malden apartment to execute the search warrant. Jennifer Vasquez lived there. Vasquez called the defendant's wife to tell her about the search. Vasquez also told officers that the defendant's girlfriend, identified as Maudelyn Cordero, lived on the fourth floor of the building. A detective who was shown a picture of Cordero immediately recognized her as someone that was "part of the investigation." Cordero's apartment was rented in the same female's name as the Medford apartment where the defendant was arrested. Officers also learned from a maintenance man that Cordero had friends who lived on the first floor of the building.

Believing that there might be a fifth apartment involved in the criminal enterprise, the keys from the Medford apartment were brought to Malden. Officers knocked on Cordero's door and announced themselves and then used one of the keys to gain access to the apartment. Cordero came out of a bedroom and had a conversation with detectives in Spanish. She was told that she could consent to a search or officers could get a search warrant. Officers also told her that, if they got a search warrant, she "might be held responsible for what they found in the apartment." Cordero signed a consent form. She also directed officers to a dresser and a closet where officers found bundles of cash and drugs.

After being charged with offenses related to the investigation, the defendant moved to suppress the evidence seized during the warrantless search of Cordero's apartment. He argued that the entry into the apartment was unlawful and that Cordero's subsequent consent to search was involuntary.

DISCUSSION

"[A]ll warrantless entries into a home are presumptively unreasonable." Commonwealth v. Alexis, 481 Mass. 91, 97 (2018). There is an exception to the warrant requirement when officers enter the residence to secure it while they apply for a search warrant. This exception only applies when officers have probable cause to believe that there is evidence of criminal activity in the home and they have "specific information to support an objectively reasonable belief that evidence of the illegal activity would be removed or destroyed unless the police entered and secured the apartment prior to seeking a warrant." Commonwealth v. Streeter, 71 Mass.App.Ct. 430, 436 (2008).

Probable cause

In this case, the defendant had used the alias for fraudulent documents and to rent some of the apartments that were the subjects of the original search warrants. The Gold's Gym tag found with the keys in the apartment where the defendant was arrested was under the same alias. The same female's name was used to rent Cordero's apartment and the apartment the defendant was arrested in. All this information, together with the information contained in the search warrant affidavit for the other apartments provided officers with probable cause to believe that evidence of the defendant's use of a false identity would be found in Cordero's apartment.

Destruction of evidence

To secure a home from the inside, officers must have an objectively reasonable belief, based on specific information, that evidence will be removed or destroyed if they do not secure the premises. To establish such a belief, officers must have an objectively reasonable belief that someone is inside. In this case, police executed the warrants in the early morning hours. During the investigation officers saw a woman with small children driving a car registered to Cordero so officers reasonably and correctly expected that a mother and child lived there.

> Given this information, it was objectively reasonable to believe that the apartment would be occupied in the early morning hours. p. 466.

With respect to the issue of whether evidence would be destroyed, officers knew that Vasquez, who lived in the same building as Cordero, had called the defendant's wife, who was believed to be involved in the criminal activity, and told her the police were searching the apartment. Officers also had information that Cordero had friends on the first floor of the building.

> It was reasonable to believe that, because the defendant's alias was being used in connection with the drug operation, there may be efforts to destroy any evidence of the alias's existence in Cordero's apartment, especially where she may have been tipped off about the search by other members of the organization. pp. 466-467.

Consent to search

Consent to search must be free and voluntary to be valid. In this case, Cordero testified at the motion hearing. She indicated that officers were "correct and respectful." They spoke to her in Spanish and provided her with Miranda warnings which she said she understood. She also testified that the statement that evidence in the apartment may be attributed to her if officers had to get a search warrant did not influence her decision to give officers consent to search the apartment. She testified that she wanted them to search the apartment. Her consent was deemed voluntary.

The motion to suppress was properly denied.

STALENESS

TIP THAT DEFENDANT HAD A FIREARM 45 DAYS PRIOR NOT TOO STALE WHEN CONSIDERED WITH OTHER INFORMATION KNOWN TO THE POLICE

Commonwealth v. Suggs, 100 Mass.App.Ct. 102 (2021).

FACTS

On November 27, 2017, the Boston police received a 911 call for a domestic disturbance. Upon arrival at the apartment, officers spoke to the defendant and a female, both of whom lived in the apartment. The female provided her name, date of birth, and telephone number to the officers. Both parties indicated the argument was only verbal.

On May 18 and 19, 2018 police received two more 911 calls from the same phone number that was provided by the female on November 27th. The unnamed female caller reported that "the defendant was in a possession of a handgun and had guns inside the apartment," but indicated that she was not in the apartment when she made the calls. Officers responded to the apartment and spoke to the defendant.

In June 2018, the police received information from a confidential informant (CI) that they had seen "D Suggs", a black male, inside that apartment holding a black semiautomatic handgun within the past 45 days. The officer began an investigation to identify "D Suggs." Police department records led the officer to the November 2017 incident and the 911 calls from May 2018. The officers obtained the defendant's RMV photograph and showed it to the CI who identified the photo as that of "D Suggs." Officers confirmed that no one in the apartment building had a license to carry and that the defendant did not possess a license to carry, a firearm identification card, or had any firearms registered to him.

Within 24 hours of receiving the information from the CI, the officer applied for two search warrants: one for the defendant's person and the other for the apartment. The same affidavit was used for both warrants. In addition to the information set forth above, the

affidavit also demonstrated the reliability of the confidential informant by indicating they had provided information in the past that led to the seizure of narcotics and firearms, to the arrest of people for firearm violations, and to criminal convictions. The warrant authorized officers to search for firearms, ammunition, and any keys that would show dominion or control over the apartment.

During the execution of the search warrant police recovered a loaded firearm from the defendant's person. He was indicted on firearm charges and filed a motion to suppress. He argued the search warrant lacked probable cause because the informant's tip was stale, the 911 calls from May were unreliable, and there was no nexus to believe the gun would be found on his person.

DISCUSSION

The defendant argued that the information that the CI had seen the defendant with the handgun within the past 45 days was too stale. In support of his argument, the defendant relied on Commonwealth v. Hart, 95 Mass.App.Ct. 165 (2019) in which the court found that "a single observation of a firearm in a residence sixty days prior to the application for a search warrant does not establish probable cause that firearms, ammunition, and related materials would be found at that residence. Id at 169.

In both this case and Hart, the affiant opined, based upon their training and experience, that firearms are "valuable" and "not easily acquired" when they are possessed illegally, and are "often retained for a long period of time." p. 105. "However, standing alone, a gun's durability does not adequately support a belief that the firearm will still be in the home two months later. Hart at 168.

This case was different from Hart because the affidavit here contained other information that would suggest that the possession of the firearm was continuous, specifically the 911 calls from May 18 and 19th. The defendant argued that the 911 calls from May 18th and 19th were unreliable and could not be used to corroborate the CI's tip because the caller was not named in the affidavit. The court found that it was reasonable to infer that the caller was the same female from November. In November, she was living in the apartment with the defendant and provided her identifying information. The calls from May were from that same telephone number, were about the defendant, and were about a gun being inside the same apartment.

Even if the caller was truly anonymous and could not be identified by the police, the affidavit established her basis of knowledge and veracity under Aguilar-Spinelli. Her firsthand knowledge was "apparent from the promptness, specificity, and detail of her tip: in calls on two successive days, she described a 'black handgun' in the defendant's possession and said that he had guns inside the apartment." p. 106. The veracity of the information was confirmed by police investigation. Officers found the defendant in the apartment after the two 911 calls. The police observations back in November of the

identified woman and the defendant in that same apartment also corroborated the May 911 calls which came from the same telephone number.

The defendant also argued that the affidavit failed to establish a nexus between the firearm and his person. The officer included in the affidavit his "opinion, based upon his training and experience, that illegal firearms are often acquired 'for the purpose of personal protection,' and are 'kept in close proximity to the owners of said firearms.'" p. 107-108. The affidavit also described the weapon as a handgun, something that could be carried or secreted on the defendant's person.

The motion to suppress was properly denied.

MOTOR VEHICLES AND THE FOURTH AMENDMENT

MOTOR VEHICLE STOPS

STOP OF MOTOR VEHICLE WITH NO INSPECTION STICKER WAS UNREASONABLE

Commonwealth v. Jones, 100 Mass.App.Ct. 600 (2022).

FACTS
On November 18, 2017, two State troopers were on patrol when they noticed the defendant driving a vehicle that did not have an inspection sticker displayed on its windshield. Believing that a vehicle cannot be driven on the roads without an inspection sticker, the troopers activated their lights and pulled the car over. The trooper in the passenger seat queried the plate on the mobile data terminal (MDT). The court found that the trooper accessed information about the car, including its registration status.

The troopers approached the driver and smelled the odor of an alcoholic beverage on his breath. After further investigation, the driver was arrested for operating under the influence of alcohol.

After the stop, the troopers used the MDT to gather additional information, including the fact that the car was registered within the past seven days.

The defendant filed a motion to suppress arguing that the stop of the car was unlawful.

DISCUSSION
It is well established that officers may stop a vehicle when they observe a traffic violation. Because a stop of a motor vehicle implicates the Fourth Amendment and art. 14, officers must have reasonable suspicion to conduct such a stop.

Under Massachusetts law, motor vehicles must undergo safety inspections and the results must be displayed by affixing an inspection sticker to the windshield of the vehicle. 540 CMR 4.03(1)(a) requires

> [e]very owner or person in control of a motor vehicle which is newly acquired in the Commonwealth [to] submit such motor vehicle for a required inspection within seven days of the date on which the motor vehicle is registered to said owner in the Commonwealth.

Vehicles are required to be inspected each year thereafter on or before the prior inspection expires.

The court found that the regulations essentially establish a seven-day grace period for inspecting newly acquired vehicles. This means that newly purchased or registered vehicles may be lawfully operated during that seven-day period without an inspection.

The court distinguished this case from Commonwealth v. Rivas, 77 Mass.App.Ct. 210 (2010). In Rivas, officers stopped a car that had a red inspection sticker. A red inspection sticker indicates that the vehicle failed inspection because of a safety defect. The CMRs give owners sixty days to fix a safety defect and have the vehicle reinspected. The regulations also allow owners to drive the vehicle during that sixty-day period if all safety defects are rectified prior to driving the vehicle. Because of this, the court in Rivas found that while "a certificate of rejection does not automatically prohibit a car from being driven; a certificate of rejection does indicate that the car may have failed a safety test and has not passed another since the failed test." Rivas at 215. It was critical in the court's analysis that the officer could not have known whether the safety defects have been rectified without pulling the car over. For these reasons, the court found the stop in Rivas was justified.

> [W]here the police could not have known whether the safety defects precipitating the vehicle's rejection has been remedied, the police had reasonable suspicion to stop the defendant's vehicle. p. 604.

This case is different from Rivas because the information the troopers needed was readily available to them via the MDT in their cruiser. The troopers had access to the registration data which showed that the car was still within the seven-day grace period for getting an inspection sticker.

> We conclude that whether the troopers' suspicion was reasonable in this case depended on all of the information reasonably available to them through the MDT in the cruiser before the stop, including information about the vehicle's registration and inspection status. To the extent that the troopers overlooked information that was reasonably available to them and which would have dispelled their initial suspicion that the car was being operated unlawfully, they acted unreasonably. p. 605.

There was some dispute in the case about the exact timing of the MDT queries. The court did not have to resolve the dispute because the court's analysis was not affected by the disputed times.

> The Commonwealth does not argue that the trooper's ability to access any of the information ultimately available through the MDT was limited by the speed at which the events here unfolded. FN 5.

The court found that the troopers had acted in good faith when they pulled over the car. "Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional." Rivas at 216.

The stop was an unconstitutional seizure. The motion to suppress should have been allowed.

POLICE CANNOT STOP A MOTOR VEHICLE AFTER THE PURPOSE OF THE STOP HAS BEEN RESOLVED

Commonwealth v. DaViega, 489 Mass 342 (2022).

FACTS

Two Boston Police officers were on routine patrol in a plain clothes capacity in an unmarked car in the early morning hours of August 2017. They were driving in the Uphams Corner area and at 4AM found themselves on Monadnock Street. This street is a one-way, narrow street in this area and cars are permitted to park on both sides of the street. Officers came upon a Chrysler Pacifica that was double-parked, largely blocking the road, which is a violation of Boston Traffic Rules and Regulations. There were four people in the Pacifica.

There was not enough room for the unmarked car to pass so Officer McDonough pulled alongside the Pacifica as far as he could. His driver's window was within inches of the rear passenger window. Officer McDonogh had a conversation with the occupants of the car about the fact that the Pacifica was blocking the street and asked the driver how he expected the officers to get by. The occupants said they were waiting for a friend and the driver asked the officer what he wanted them to do.

At this point Officer McDonough noticed the defendant sitting in the rear seat of the car behind the driver. He was staring straight ahead. Officer McDonough knew the defendant from at least 30 prior encounters, including at least three arrests, one of which was for a firearm offense in July 2016. The officer characterized their relationship as cordial, noting that the defendant referred to him by his nickname "Baldy." Officer McDonough had seen the defendant walking just hours before this and the defendant had smiled and nodded at

him. Based on his prior encounters with the defendant, he found the defendant's actions at this time to be unusual.

Officer McDonough spoke to the defendant: "How are you, pal? Are you doing good today?" The defendant responded in a low tone that he was OK. At this point, the driver told Officer McDonough that he would move the Pacifica and gestured toward several open parking spots. Officer McDonough said "Yeah, sure, all right" and then backed his car up to give the Pacifica more space to move forward.

The Pacifica continued down Monadnock Street, passing the open parking spaces, and turned left onto Dudley Street. This drew the officers' suspicions because taking a right turn would be a more direct route back to Monadnock Street.

> McDonough then changed his mind about pulling over the Pacifica. After about ten to fifteen seconds, he activated the unmarked vehicle's blue lights, pursued the Pacifica, and pulled it over. p. 344.

The officers approached the Pacifica on foot and Officer McDonough asked for the driver's license and registration. "The defendant then asked McDonough, "Baldy, what are you doing? Why are you doing this? Are you really going to do this now?" p. 344. Officer McDonough told them that he was conducting a motor vehicle stop. The other officer was at the passenger window and looking into the vehicle with a flashlight. Officer McDonough ordered everyone out of the car after he believed his partner may have seen a firearm in the car.

A gun was recovered on the floor near where the defendant's feet had been. Officer McDonough, knowing the defendant did not have an LTC, arrested the defendant.

The defendant was charged with unlicensed possession of a firearm MGL c 269 § 10(a), unlicensed possession of a loaded firearm MGL c 269 § 10(n), and unlicensed possession of ammunition MGL c 269 § 10(h). The driver was never issued a traffic citation. The defendant filed a motion to suppress the stop arguing that the stop was unreasonable. The motion was denied and he was convicted of unlicensed possession of a firearm. This appeal followed.

DISCUSSION

The defendant argued that he was stopped twice; first on Monadnock Street and then on Dudley Street. He argued that the stop on Dudley Street was unreasonable because the police had no authority to detain him after the first stop was resolved by the police allowing the driver to leave the area. Alternatively, the defendant argued that, even if the initial interaction was not a stop, the stop on Dudley Street was unreasonable because any authority the police had to stop the car was resolved by the police before the stop on Dudley Street occurred.

Monadnock Street

> The pertinent inquiry is whether "an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." p. 327 *quoting* Commonwealth v. Matta, 483 Mass. 357, 362 (2019).

The court will look to the totality of the circumstances when making its determination, but any seizure must be the result of some action of the officer. When determining whether a seizure of someone in a vehicle has occurred there are several factors the court has looked at:

> Did the officer stop the vehicle?
> Was the officer in a marked cruiser?
> Did the officer use cruiser lights or sirens to effectuate the stop?
> Was the police cruiser deliberately used to block the movement of the vehicle?

This list is not exhaustive. As in most Fourth Amendment inquiries, the court will look at the totality of the circumstances.

Based upon the facts and circumstances as they existed on Monadnock Street, the initial encounter between officers and the occupants of the Pacifica was not a seizure. The Pacifica was stopped before officers arrived, the officers were in an unmarked car, the officers did not activate their lights or sirens, and it was physically impossible for officers to pass the Pacifica because it was double parked and blocking the narrow road. It was also relevant that the conversation between the officers and the occupants of the other car was cordial and calm.

The defendant argued that he was stopped on Monadnock Street because the Pacifica was blocked in by the officers. In support of his position, the defendant pointed to the fact that the officers had to back up to allow the Pacifica to pull forward safely. In Commonwealth v. Thompson, 427 Mass. 729 (1998), the court found that a seizure occurs when an officer intentionally parks a cruiser to block a vehicle and prevents it from leaving. In Thompson, the officer intentionally stopped his cruiser behind a parked car and blocked it from exiting the parking lot. The facts here are distinguishable. The officers here pulled alongside the other car and did not have enough room to pass by it. The officer then asked, "how am I going to get by?" The cruiser came within inches of the other car; however, that was not done with the intent to block the other car in. The officers here pulled up to tell the driver of the other car that they were blocking the street and to encourage them to move along.

> A reasonable person would not have believed that McDonough was asking the driver to stay where he was and continue blocking the street, where McDonough expressly indicated that he wanted the driver to move. Thus, without more, the proximity of the vehicles does not establish that a seizure occurred. p. 349.

Dudley Street

There is no dispute that the stop of the Pacifica on Dudley Street was a seizure. It is also undisputed that no traffic violations occurred between when the driver pulled away after the first interaction with the officers and when they were pulled over. The defendant argued that this stop was an unreasonable seizure because the police had addressed the underlying traffic violation prior to the stop.

The "authorization rule" allows an officer who sees a traffic violation to stop that vehicle to address the violation. This rule serves the government interest of ensuring the public safety of the roads. The authority to stop a vehicle is not without limits. A traffic stop cannot extend beyond what is necessary to address the traffic violation. It is a question of proportionality – balancing the need to make the stop against the intrusion of the individual.

> If objective circumstances exist showing that the government's interest in ensuring traffic safety has ended, the individual interest prevails, and police authority to conduct a traffic stop must terminate. Two circumstances that mark the end of the government's interest in ensuring traffic safety are
>
> > 1. Where an officer unreasonably prolongs a traffic stop after having addressed the underlying traffic violation, and
> > 2. When an officer observes a traffic violation but unreasonably delays initiating a traffic stop on the basis of that violation. p. 351.

There have been several prior cases that have dealt with the authorization rule in the context of unreasonable delays in making the stop and unreasonably prolonging a motor vehicle stop.

Commonwealth v. Torres, 424 Mass 153 (1997): a car was pulled over for speeding. The trooper approached the passenger side door and knocked on the window. The passenger got out of the car and was told to stand by the back of the car. The driver produced a valid license and registration. The trooper then asked the passenger for identification. When the passenger turned over his wallet, the trooper saw papers that appeared to have notes of drug transactions on it. The trooper then began investigating his suspicion of drug activity. The court held that the purpose of the stop, the speeding, was effectuated when the driver produced a valid license and registration. Extending the stop beyond that was unconstitutional.

> [A] police inquiry in a routine traffic stop must end on the production of a valid license and registration unless the police have grounds for inferring that either the operator or his passengers were involved in the commission of a crime…or engaged in other suspicious conduct. Torres at 158.

Commonwealth v. Cordero, 477 Mass. 237 (2017) a car was pulled over after the trooper believed the windows were illegally tinted. The trooper confirmed that the owner was properly licensed and the car was registered before the car was pulled over. During the stop, the trooper tested the tint and talked to the driver about the broken tail and brake lights. At this point, the stop should have ended, but it did not. The trooper then questioned the driver about suspected drug activity. Prolonging the traffic stop in this case was unreasonable.

Rodriguez v. United States, 575 US 348 (2015): this case was decided under the 4th Amendment because it was a federal case. The officer pulled the car over for a marked lanes violation. The governmental interest ended when the officer gave the driver a written warning. The officer then conducted a K-9 sniff of the car. This violated the 4th Amendment.

United States v. Mendonca, 682 F.Supp.2d 98 (D. Mass. 2010). DEA agents were investigating an individual for trafficking in marijuana. While under surveillance at 11AM, an agent saw the car make some minor motor vehicle infractions. The car was not stopped until after it had stopped at a motel for about an hour. The court found that the government's interest in the traffic violation had lapsed.

> [A] completed misdemeanor cannot hang over a suspect indefinitely until a time at which he has engaged in some other suspicious activity that officers believe warrants a pretextual stop. Mendonca at 104.

The court found that this case did not involve either a prolonged stop or an unreasonable delay.

> [T]his case presents a third set of objective circumstances demonstrating that once the government's interest in traffic safety has been met, the individual interests prevail, and police authority to conduct a motor vehicle stop on the basis of an observed traffic violation terminates. pp. 353-354.

In this case, the officers had the authority to conduct a motor vehicle stop when they first approached the Pacifica. The officers chose not to do so. Instead, they elected, within their discretion, to not issue a citation. The Pacifica moved along and no longer blocked the street. This concluded the encounter and completed the "mission" of the investigation.

> Because the driver of the Pacifica did not commit any further traffic violations, the government's interest in ensuring traffic safety was met once the violation on Monadnock Street was resolved.
>
> It is significant here that the traffic violation resulted from the manner in which the Pacifica was parked. Unlike, for example, reckless driving, any safety hazards were addressed once the driver moved the vehicle. p. 354.

Remember that a traffic stop must balance the government's interest in public safety against the individual's interest in not being stopped. Because this was not a continuing offense, the government's interest had lapsed on Monadnock Street. The only interest at play on Dudley Street was the defendant's interest.

The court found the defendant's interests "particularly compelling" because it was obvious, and the parties agreed, that the traffic stop was a pretext. The defendant here, where the traffic violation was resolved by the time the stop occurred, had "even more reason to expect that police would not extend their intrusion than had the defendants in Torres and Cordero." p. 354. The court also recognized that the defendant's reasonable frustration was compounded where he was a passenger and not the driver who actually committed the traffic violation.

> In sum, like unreasonably prolonged traffic stops and unreasonable delays in stopping a vehicle for a motor vehicle violation, this case presents a third situation in which the government's interest in ensuring traffic safety ended prior to subsequent improper action by the officers. Here, the government interest ended when police resolved the illegal parking by the Pacifica on Monadnock Street. The defendant's individual interests thereafter prevailed, while the officer's authority to stop the Pacifica for the resolved traffic violation terminated. Because police otherwise lacked the authority to conduct a traffic stop on Dudley Street, the stop was unreasonable under art. 14. p. 355.

The traffic stop was unreasonable and the motion to suppress the stop should have been allowed. The conviction was overturned.

AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT

Commonwealth v. Pereira, 100 Mass.App.Ct. 411 (2021).

FACTS
On February 15, 2015, a confidential informant (CI) gave information to a New Bedford police detective about a man with a firearm. The CI was known to the detective and had provided information in the past that led to the seizure of narcotics and the arrest and conviction of an individual. On this day, CI said that within the last hour a man known to CI as Louie was driving a blue pick-up truck trying to sell a black firearm on Acushnet Avenue in the North End of the city. CI was able to provide a physical description of Louie, the license plate number for the car and said that it had "Tabor Village Remodeling" written on the side of it. The CI did not believe that Louie had a license to carry the firearm.

The police ran the registration number and learned that the owner of the truck had an expired license to carry a firearm, a different suspended license to carry a firearm, and a

revoked driver's license. Approximately 90 minutes later, detectives located the truck and followed it. Officers boxed it in and stopped the truck. The defendant was the driver of the truck, but he was not the owner. The defendant agreed to get out of the car and was patfrisked. No weapons were found. The defendant was asked if there was anything in the truck that officers needed to be concerned about for their safety. The defendant denied knowing what the detective was talking about. The defendant was cuffed and brought to the back of the truck.

Officers located a metal toolbox in the bed of the truck. They found a black firearm wrapped in a sweatshirt, a holster, and ammunition in the toolbox. The defendant did not have a license to carry and his driver's license was revoked.

The defendant was charged with unlicensed possession of a firearm in violation of MGL c 269 §10(a) and other charges. The defendant filed a motion to suppress arguing that the police did not have probable cause to search the truck because the Commonwealth had not established the CI's basis of knowledge for the tip. The motion was denied and the defendant appealed on various grounds, including the warrantless search.

DISCUSSION

Under the Fourth Amendment and art. 14, warrantless searches are presumed unreasonable. There are numerous exceptions, including the automobile exception. In general, when officers have probable cause to believe that a vehicle contains evidence of a crime, they can search it without a warrant. This exception exists because the court has recognized that the inherent mobility of vehicles creates an exigency in that a vehicle, and the evidence inside, can be moved during the time it would take officers to seek a warrant.

The question here was whether officers had probable cause to believe the truck contained evidence of a crime. Probable cause is defined as "reasonably trustworthy information…sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense." Commonwealth v. Stevens, 362 Mass. 24, 26 (1972).

When probable cause is based upon information police receive from a tip from a CI, police must satisfy the two-pronged Aguilar-Spinelli test:

(1) the basis of knowledge of the CI; and
(2) the veracity of the CI.

In this case, the defendant did not contest the veracity of the CI, but instead focused on the basis of knowledge prong. The defendant argued that the fact that the CI did not believe Louie had a license to carry a firearm was insufficient to establish the CI's basis of knowledge that a crime was being committed.

Knowledge that someone possesses a firearm alone is not probable cause to believe that a crime is being committed. Possession of a firearm is a crime only if the person is not properly licensed.

The court found that the information provided by the CI in this case contained a lot of specificity, including the registration number of the truck, the color and lettering on the truck, the area where the truck was when Louie was trying to sell the firearm, and a physical description of Louie. Based upon the specificity of the information provided, it was reasonable to infer that the information the CI provided was based on CI's own personal observation.

Based upon the specificity of the information and the fact that officers were able to corroborate that information in a relatively short period of time by locating the vehicle matching the detailed description in the area where the CI said Louie was trying to sell the weapon, it was reasonable for officers to rely on the tip and believe that Louie was trying to sell a firearm. It was also reasonable for officers to believe that the firearm was not lawfully possessed.

> We think it reasonable to infer that a firearm being sold on the street is more likely to be possessed illegally and that the attempted sale did not comport with the statutory requirements for a sale. p. 416.

The short time frame between when the CI saw the gun and when the police stopped the truck was also relevant to the probable cause analysis as was the fact that they conducted a patfrisk and did not find a gun.

The court found that this was a close case but that, based upon the facts known to the officers, the immediate threat to public safety posed by a potential sale of an illegal gun, and the inherent mobility of the truck, the warrantless search of the truck was justified.

The motion to suppress was properly denied.

TECHNOLOGY AND THE FOURTH AMENDMENT

> It would be foolish to contend that the degree of privacy secured by citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. Kyllo v. United States, 533 U.S. 27, 33-34 (2001).

With the ongoing evolution of technology, the courts are seeing more and more cases where individuals claim that the police are infringing on their privacy rights in situations where there has been no physical intrusion on the person or their property.

> As society continues to change in the face of evolving technologies, we seek to assure the same level of privacy against government intrusion that existed when the Fourth Amendment and art. 14 were adopted. Commonwealth v. Carrasquillo, 489 Mass. 107, 112 (2022).

As we always do when looking at the Fourth Amendment, we begin by determining if there was a reasonable expectation of privacy. If there is no reasonable expectation of privacy, there is no search.

SOCIAL MEDIA

DEFENDANT HAD NO REASONABLE EXPECTATION OF PRIVACY IN SNAPCHAT VIDEOS

Commonwealth v. Carrasquillo, 489 Mass 107 (2022).

FACTS
In April 2017 a Boston Police officer sent a friend request to a Snapchat account with the username "Frio Fresh." The officer used an "undercover" account that had a random name and a default profile picture assigned by Snapchat. The friend request was accepted by Frio Fresh which then allowed the officer to view the stories posted to that account.

The officer was familiar with the defendant through his work with the youth violence strike force and, based upon the videos he saw on Frio Fresh's Snapchat account, believed the account belonged to the defendant. The officer also knew that the defendant could not lawfully carry a firearm because of a prior criminal conviction.

On May 10, 2017, the officer saw a story showing someone from the waist down wearing distinctive clothing displaying a silver revolver. Half an hour later another story was posted showing the defendant inside a weightlifting gym that the officer recognized. The officer was able to record the first story, but the second was deleted before he could record it.

Surveillance was established near the gym and shortly thereafter officers saw the defendant wearing the same distinctive clothing seen in the story. The defendant was seized and a revolver was recovered from his pants pocket.

The defendant moved to suppress the video the officer recorded arguing that the officer performed an unconstitutional search when he viewed and recorded the Snapchat stories.

DISCUSSION
As in all cases, the defendant has the burden of proving that a search in the Constitutional sense occurred. To do so, the defendant must prove that there was some governmental action that infringed on his subjective expectation of privacy and that society is willing to accept this expectation of privacy as reasonable.

There are two types of privacy that are implicated when there is government surveillance of social media: conversational privacy and associational privacy. "Conversational privacy protects private conversations from unreasonable government surveillance." p. 113. Conversational privacy is protected by the Fourth Amendment and art. 14 and as well as the First Amendment and art. 16 protections of free speech.

"[A]ssociational privacy protects the ability to develop and maintain personal relationships." p. 114. The freedom of association is protected by the First Amendment and art. 19 of the Massachusetts Declaration of Rights.

> Protection of associational privacy also plays a crucial role in maintaining a democracy, for instance, it enables individuals to amplify their voices by joining with like-minded others, and encourages civic participation by reducing isolation without fear of government interference or reprisal. p. 114.

The court recognized that more and more personal relationships are being developed via technology as opposed to face-to-face interactions.

> For better or worse, the momentous joys, profound sorrows, and minutiae of everyday life that previously would have been discussed with friends in the privacy of each others' homes now generally are shared electronically using social media connections. Government surveillance of this activity therefore risks chilling the conversational and associational privacy rights that the Fourth Amendment and art. 14 seek to protect. p. 115.

The court also recognized the importance of protecting individual privacy rights even in the face of evolving technology.

The court is hesitant to establish bright line rules regarding whether privacy rights are infringed by certain technology.

> We also are mindful that we cannot know the ways in which technology inevitably will change in years to come, and we do not wish to "embarrass the future" by adopting bright-line rules or drawing analogies that might prove ill fitting for the technology of tomorrow. p. 112.

Each case must be resolved based upon the totality of the circumstances present in that case, keeping in mind the privacy rights protected by the Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights.

In this case the court had to determine whether an undercover officer viewing and recording a video on the defendant's Snapchat account was a search. To properly analyze the case, we must first understand the basics of how Snapchat works.

Snapchat

Snapchat is an application that allows its users to create accounts and share texts, photographs, and video recordings with other users. Snapchat accounts are set as private by default but can be changed by the user to be public. Information that is posted to private accounts is only visible to individuals the user chooses to add as friends. Friends can be added in one of 3 ways:

(1) the user giving Snapchat access to their phone's address book

(2) manually adding a username

(3) accepting a request by someone.

Users can share information via direct snaps or stories.

> Direct snaps are sent directly to another user's inbox, remain visible for ten seconds or less after they are opened, and can be viewed only once. Stories, on the other hand, by default are shared with a larger audience, remain visible for up to twenty-four hours, and can be continuously replayed. p. 109 (internal citations omitted.)

Snaps and stories cannot be saved by the recipient on the Snapchat app, but it is possible to save them by using technology outside of Snapchat, such as screenshots.

Subjective Expectation of Privacy

In this case, the defendant's Snapchat account was set to private. While that is one factor for the court to consider, it is not dispositive. The court will look to the totality of the circumstances to determine whether there was a reasonable expectation of privacy.

In United States v. Chaves, 423 F.Supp.3d 194 (W.D.N.C. 2019) the defendant, like the defendant here, had a private account. Chaves is different from this case because in Chaves the defendant was aware of the settings and explained to the judge why he chose the particular settings he chose. The defendant here was unaware of the privacy settings of his account. It was set to private, but that is because that is the default setting for all Snapchat accounts and not a result of any affirmative action taken by the defendant. The court noted that it has inferred a subjective expectation of privacy in cases in which an individual purposefully took steps to ensure privacy, but it cannot make such an inference when the individual is unaware of protections that exist. The court also found that sharing a video with 100 people, which is the number of people the defendant says were his friends on Snapchat, "was not …a reasonable preservation of his privacy in the video." p. 119. For these reasons, the defendant in this case did not meet his burden of demonstrating a subjective expectation of privacy in the snaps and stories he posted to his Snapchat account.

Objective expectation of privacy

Finding that the defendant did not have a subjective expectation of privacy could have ended the inquiry; however, the court went on to look at whether such an expectation of privacy would have been one that society would have accepted as reasonable. Factors that the court will consider include, "precautions the individual took to protect his or her privacy; the character of the item searched; and the nature of the government intrusion." p. 118.

There are certain features of Snapchat that favor a finding of an objectively reasonable expectation of privacy. For example, the limited amount of time that direct snaps and stories are available, the fact that snaps are deleted after 10 seconds, the additional steps a friend would have to take to share a snap or a story, and the ability of the user to delete a story before the 24-hour mark.

The court did draw a distinction between content a user puts on Snapchat and text messages that are sent to someone else. In Commonwealth v. Delgado-Rivera, 487 Mass. 551 (2021) (covered in legal updates last year) the court found that the defendant had no reasonable expectation of privacy in texts he sent to another person because of the lack of control a person has over text messages once they are sent. Stories and direct snaps are different because, unlike text messages, friends who receive Snapchat stories have a short period of time to see the video and distributing the content is more complicated than a text message because a user would have to use technology outside of Snapchat to do so.

> Thus, if a text message is akin to a letter, a Snapchat story is akin to a letter written in disappearing ink. In this way, too, the defendant retained a level of control over his stories. p. 122.

In this case, the defendant himself took some steps to protect his privacy. His username was a pseudonym which was not a nickname he used, and friends had to be added to his account deliberately.

Despite the features of Snapchat and the efforts the defendant took to protect his privacy, his failure to adequately control access to the content on his account substantially diminished those privacy rights. The officer was able to view the content because the defendant accepted a friend request from him. The officer used a random username and a default profile picture when he sent the friend request.

> Once the possibility of an undercover officer being able to view virtually all of the defendant's Snapchat content materialized, the defendant's privacy interest was further diminished. p. 124.

It was significant that the governmental intrusion was made with the defendant's permission. The information the officer saw and the video he recorded was controlled by the defendant and was accessible to the officer only with the defendant's express or

implied authorization. The fact that officers used a ruse to obtain the defendant's permission to access the account did not make the permission involuntary.

NOTE: The court mentions in a footnote that the result may have been different if the officer had posed as a friend or family member of the defendant.

Based upon the totality of the circumstances here, the court found that the defendant had no reasonable expectation of privacy in the Snapchat videos he posted on his Snapchat account. For that reason, no search in the constitutional sense occurred.

The motion to suppress was properly denied.

BODY-WORN CAMERA

REVIEW OF BODY-WORN CAMERA FOR UNRELATED INVESTIGATION IS A SEARCH

Commonwealth v. Yusuf, 488 Mass. 379 (2021).

FACTS
On February 10, 2017, Boston police were dispatched to an address for a domestic disturbance. The defendant's sister, a resident of the home, was requesting help to remove her brother's girlfriend from the residence. Multiple officers responded, including one officer wearing a body-worn camera. The camera began recording when the officer was dispatched and continuously recorded until he left the residence. The camera recorded all the areas of the home that the officer traversed as well as his interaction with the defendant and others on scene. While inside the home, the officer spoke to the defendant as the defendant stood in the doorway to a bedroom. The bedroom windows had distinctive floral-printed curtains that were captured on the video. The officer with the body-worn camera left the area after the defendant and his girlfriend exited the home.

The video was uploaded to a computer system owned and managed by the Boston police where it was available to other officers. An officer downloaded the video onto a DVD which he then put in his desk. This officer then told a detective assigned to the youth violence strike force that he had the video footage in his desk. The strike force had been involved in a firearms investigation of the defendant for the past 6 months. This detective was tasked with collecting information about the defendant with the goal of obtaining a search warrant for the defendant's home.

As part of the firearms investigation, the detective was monitoring the defendant's social media. Two weeks after the domestic call, the defendant posted a recently created video showing him holding a firearm in a bedroom with a floral-printed curtain. The detective retrieved the DVD, viewed it, and recognized the same distinctive floral-printed curtains. This was significant because the curtains established the social media video was recorded in the defendant's home. The detective applied for and received a search warrant for the

defendant's home. During the execution of that warrant officers recovered narcotics, a firearm, and ammunition.

The defendant filed a motion to suppress arguing that recording the interior of a home by the body-worn camera was an unconstitutional search and that the later review of that footage for an unrelated investigation was another unconstitutional search.

DISCUSSION

Use of body-worn camera in the home

The court recognized that a person's home is expressly protected by both the Fourth Amendment and art. 14 and is "first among equals" when looking at the protection of an individual's privacy rights. Despite the sanctity of the home, the court found that there was no search when the officer utilized the body-worn camera and recorded inside the defendant's home. The court found that the officer entered the home at the request of the defendant's sister, a resident of the home, in response to a call for help. The officer was, thus, lawfully in the home. Because the officer was lawfully present, his observations while in the home effecting the purpose of his visit are permissible plain view observations.

> So long as the officer confined his actions and stayed within the locations of the home that were required to perform his duties, such plain view observations did not constitute an independent search in a constitutional sense, because they produced no additional invasion of the defendant's privacy interest beyond that resulting from the officer's initial, justified entry into the home. p. 387 (internal quotations and citations omitted.)

In prior cases, courts have found that photographs memorializing an officer's observations at a crime scene do not raise constitutional concerns. A video is essentially a string of still photographs, so the answer is the same. These photos and videos, like plain view observations, are not an additional intrusion on an individual's privacy.

> We conclude that, where, as here, the officer was lawfully present in the home and the body-worn camera captured only the areas and items in the plain view of the officer as he or she traversed the home, in a manner consistent with the reasons for the officer's lawful presence, the recording is not a search in the constitutional sense and does not violate the Fourth Amendment or art. 14. p. 390.

The court also noted that there are legitimate purposes for photographing plain view observations of officers when they enter homes and in other interactions with civilians such as protecting the officers from allegations of damage, memorializing and preserving events as they happen, and to "advance interest in police accountability." p. 390. The same purposes are served by officers using body-worn cameras.

The court cautioned that there are limits. The photographic or video preservation may only invade places necessary for the officer to perform the lawful purpose of their presence. Much like the plain view doctrine will not apply to actions of officers that are unrelated to why they are lawfully present, recording of similar activities will not be allowed.

In this case, the officer was invited into the home and confined his presence and actions to the areas he needed to go to fulfill the purpose of his presence which was to address the domestic situation. The camera, mounted on the officer's chest, only captured what was in plain view of the lawfully present officer. For these reasons, the body-worn camera recording was not a search in the constitutional sense.

Review of the body-worn camera footage for an unrelated investigatory purpose

The court found that the subsequent review of the footage by the detective could not be justified under the plain view doctrine.

> The home is not a place to which the public has access, or where an individual might expect a recording made during a lawful police visit would be preserved indefinitely, accessed without restriction, and reviewed at will for reasons unrelated to the purposes of the police visit. p. 392.

The court again recognized the value body-worn cameras have in "protecting the police from false allegations of damage, promoting police accountability, and serving as a record of police-civilian interactions." p. 392. However, the subsequent review of such footage for an unrelated investigation does not further any of these legitimate reasons that justify the use of body-worn cameras. The court also noted that the unregulated use of body-worn cameras also "has the potential to invade privacy in a manner inconsistent with society's reasonable expectations." p. 393.

The plain view doctrine cannot be expanded to include the subsequent review of the footage for reasons unrelated to the original call.

> The ability of police officers, at any later point, to trawl through video footage to look for evidence of crimes unrelated to the officers' lawful presence in the home when they were responding to a call for assistance is the virtual equivalent of a general warrant. p. 395.

The review of the footage in this case was the equivalent of allowing the detective to peer into the defendant's home looking for evidence for an unrelated criminal investigation.

> Because protecting the home from such arbitrary government invasion always has been a central aim of both Constitutions, we decline to extend the plain view observation doctrine to the subsequent, unrelated review of body-worn camera forage of the defendant's home. p. 396 (internal quotations and citations omitted.)

The review of the footage was a search in the constitutional sense and was presumptively unreasonable.

The motion should have been allowed.

NOTE: The testimony indicated that the practice of the Boston police allowed officers unlimited access to body-worn camera footage for unrelated, investigatory purposes. There was no written policy entered into evidence at the motion hearing. Whether officers complied with their department's policy regarding body-worn cameras would be a relevant factor for the court to consider.

NOTE: The legislature established a body camera task force to propose regulations establishing a uniform code for the procurement and use of body-worn cameras by law enforcement officers to provide consistency throughout the commonwealth.

CELL PHONE DATA

SEARCH WARRANTS FOR CELL PHONE DATA MUST SPECIFY FILES TO BE SEARCHED

Commonwealth v. Dorelas, 473 Mass. 496 (2016).

NOTE: This is not a new case. It is an important case and briefly summarized here as a reminder for officers.

In Dorelas, the police were investigating a violent crime and had probable cause to believe that the defendant's iPhone contained information linking the defendant to the crime. The detective obtained a search warrant for the cell phone listing all the files he wished to search, including photographs. In this case, the court recognized the difference between searching a physical place and a cell phone.

> "In the physical world, police need not particularize a warrant application to search a property beyond providing a specific address, in part because it would be unrealistic to expect them to be equipped, beforehand, to justify which specific room, closet, drawer, or container with the home will contain the objects of their search…However, in the virtual world, it is not enough to simply permit a search to extend anywhere the targeted electronic objects *possibly* could be found, as data possibly could be found anywhere within an electronic device." p. 502 (emphasis in original.)

When officers are seeking to search a cell phone, they must be clear as to what they are looking for and must "conduct the search in a way that avoids searching files of types not identified in the warrant." p. 502 *quoting* United States v. Walser, 275F.3d 981, 986 (10th Cir. 2001.) This means that search warrants for the content of a cell phone must "satisfy a more narrow and demanding standard." p. 502. The courts have interpreted Dorelas to stand for the proposition that "it is not enough that the object of the search *may* be found in the place subject to search. Rather, the affidavit must demonstrate that there is a reasonable expectation that the items sought *will* be located in the particular data file or other specifically identified electronic location that is to be searched." Commonwealth v. Broom, 474 Mass. 486, 496 (2016) (emphasis in original, internal citations omitted.) Any search of file types beyond those specified in the warrant may be beyond the scope of the search warrant.

SEARCH WARRANTS FOR CELL PHONE DATA MUST INCLUDE TEMPORARAL LIMIT

Commonwealth v. Snow, 486 Mass. 582 (2021).

NOTE: This case was covered in last year's legal updates in-service training. It is an important case and briefly summarized here as a reminder for officers.

As part of the investigation of a shooting death in Boston, the police obtained a search warrant for the defendant's cell phone. The warrant did not specify any time limitation or restriction on the information to be searched because it was unknown when the weapon that was used to shoot the victim was acquired or when any potential conspiracy between the defendant and his co-defendants may have been formed.

To minimize the intrusion of an individual's privacy, all search warrants must state with particularity the place or area to be searched and the item(s) to be seized. A warrant that fails to do so is improper in scope. The court has recognized the immense amount of information that can be obtained from a cell phone. "The magnitude of the privacy invasion of a cell phone search utterly lacking in temporal limits cannot be overstated." p. 593.

To address this serious concern the court in this case announced a new rule with respect to search warrants for cell phones:

> "Consequently, to be sufficiently particular, a warrant for a cell phone search presumptively must contain some temporal limit." p. 594.

The court did not give any guidance on what an appropriate temporal limit might be because each case requires a fact intensive inquiry. The court did note that the temporal restriction in an initial search warrant should err on the side of narrowness because nothing precludes officers from seeking an additional warrant based upon information they obtain from the first warrant.

SEARCH WARRANT AFFIDAVIT ESTABLISHED NEXUS BETWEEN TEXT MESSAGES AND SEX TRAFFICKING INVESTIGATION

Commonwealth v. Lowery, 487 Mass. 851 (2021).

FACTS

The Southern Middlesex regional drug task force and the FBI were conducting an investigation in Woburn in an attempt to identify and assist victims of human trafficking. The investigation began with a search of the website "Backpage.com" for commercial sexual services. A detective with Woburn police found an ad with sexually suggestive pictures and a telephone number. Acting in an undercover capacity, the detective called the number and arranged for an hour-long session of sexual services with a woman referred to by the court as Jane. They agreed to meet at a hotel in Woburn.

NOTE: Jane's name was impounded in the court record pursuant to MGL c 265 § 24C which requires that the names of victims of rape or human trafficking be withheld from public inspection.

Surveillance was established at the hotel and the defendant and Jane were observed as they drove into the parking lot. Jane got out of the car and walked into the hotel while talking on a cell phone. The defendant stayed in the car and pulled out of the parking lot a short time later. Surveillance units followed the defendant.

The detective met with Jane in a hotel room. After agreeing on a price for oral sex, the detective gave Jane the money. Jane then began a text exchange on her phone. After she appeared to get a response, she put the phone down. When Jane began unwrapping a condom, a predetermined signal was given, and backup officers entered the room. Jane was read her Miranda rights and was searched. Officers recovered a cell phone, $260 she received from the detective, and a Lifestyles brand condom.

Surveillance units followed the defendant and pulled him over after a few minutes. The defendant, the only occupant of the car, was holding an identification card that belonged to an unidentified woman. He was arrested and the car was towed. During an inventory search of the car officers recovered a temporary Massachusetts identification card belonging to Jane, five cell phones, a purse, two different types of business cards for "Independent Entertainment Services", business cards for numerous men's entertainment clubs, Massachusetts identification cards for two different women, and a package of marijuana. The purse was found on the front passenger seat and it contained an empty box of condoms, loose Lifestyles brand condoms, and personal lubricating gel.

The detective wrote one affidavit and used it to obtain search warrants for Jane's phone as well as the five cell phones recovered from the car. Investigators found relevant information on two of the phones. Both phones had received several texts addressed to

"Roe" or "Ro." Jane testified at trial that the defendant was known as "Roe" or "Ro". One of the phones contained sexually explicit conversations with Jane's cell phone.

The defendant filed a motion to suppress the text messages from the six cell phones. He argued that the affidavit in support of the search warrants did not establish probable cause to search the phones.

DISCUSSION

The court reminds us that when it is reviewing a search warrant affidavit for probable cause, it is limited to the four corners of the document. To establish probable cause, an affidavit must set forth enough facts, and the reasonable inferences drawn from those facts, to demonstrate a nexus between the criminal activity under investigation and the place or items to be searched.

Jane's cell phone

The affidavit stated that the cell phone recovered from Jane was associated with the Backpages.com ad, was used to communicate with the detective, and was used by Jane to respond to clients. In addition, Jane was seen talking to the detective on the phone as she entered the hotel and had used the phone in the detective's presence to text someone after getting paid. The affidavit also had information from Jane that she used GPS technology to find the hotel and to provide the detective with arrival estimates. The officers did not find any GPS device in the car, so it was reasonable to infer that she used the telephone's GPS capabilities.

> Taken together, these facts establish both a substantial basis and a clear nexus between the cell phone that was in Jane's possession at the time of her detention and the suspected offense of sex trafficking. p. 858.

Cell phones found in the defendant's car

In addition to the observations made by the detective of Jane using a phone to text someone after receiving payment from him, the affidavit also contained statements from the detective that this conduct was consistent with sex workers who are required to check in with their "pimps" to assure the pimp gets paid in full for services rendered by the sex worker. The affidavit also indicated that Jane told the detective that she paid the defendant to drive her to "commercial sexual activity appointments" and that both her personal cell phone and her driver's license were in the car.

The court also relied on information in the affidavit about the various items found in the defendant's car and information that was printed on one of the "Independent Entertainment Services" business cards. More specifically, the card stated the company was looking for new escorts/strippers, named "RO" as the business manager, and listed a phone number that was registered to the defendant.

> Taken together, the averments in the warrant affidavit support the inference that Jane was communicating with the defendant while she was in the hotel room with [the detective], which in turn supports a finding of probable cause to search the cell phones for evidence of sex trafficking. p. 858.

On appeal the defendant also argued that the texts between Jane and the defendant should not have been admitted at trial because they were impermissible hearsay. "Out-of-court statements by joint venturers are admissible against the others if the statements are made during the pendency of the criminal enterprise and in furtherance of it." Commonwealth v. Winquist, 474 Mass. 517, 520-521 (2016). This exception to the hearsay rule exists because these statements are considered inherently reliable. Before the court can admit such statements, it must find by a preponderance of the evidence that a joint venture exists.

The defendant contended that there was no joint venture because Jane cannot be both a coventurer and victim of sex trafficking. The court was not convinced.

> As in many cases of sexual exploitation, sex trafficking often involves complex dynamics between the sex trafficker and the exploited individual that belie neatly defined categories of "victim" or "coconspirator." pp. 63-864.

It does not matter that the Commonwealth did not charge Jane as a coventurer. Jane was a victim of human trafficking and was treated as such by the prosecution team, including the police. This does not make statements she made in furtherance of the criminal enterprise inherently unreliable.

> Here, the jury could have found that Jane, in close coordination with the defendant, knowingly participated in the defendant's commercial sexual enterprise and shared a common interest with the defendant in profiting from the enterprise… Given Jane's shared interest with the defendant in furthering the commercial sexual enterprise, and notwithstanding her status as a victim of sex trafficking, the jury could have found that Jane's statements were reliable as those of a coventurer and 'equivalent to a statement by the defendant. p. 865 *quoting* Commonwealth v. Stewart, 454 Mass. 527, 535 (2009).

The motion to suppress was properly denied.

LOCATION DATA

There are two doctrines or theories that are used by the court when dealing with technology that identifies the physical location of a suspect - the third-party doctrine and the mosaic theory. An overview of these doctrines/theories are provided here to help frame the issues raised in the cases that were decided this year.

Third-party doctrine

This doctrine applies to information about an individual that is held by a third-party, typically a business such as a bank or a telephone company. The doctrine holds that individuals do not have a reasonable expectation of privacy in information they voluntarily convey to a business, even if the information is given to that party on the assumption that it will only be used for a limited, legitimate, business purpose.

> The central tenet of the third-party doctrine is that when an individual voluntarily conveys information to a third party, for instance a telephone company, that individual does not have a reasonable expectation of privacy because he or she knows that the company records information for legitimate business purposes and assumes the risk that the company may disclose that information to others, including the government. Commonwealth v. Henley, 488 Mass. 95, 107 (2021).

Mosaic theory

Under the mosaic theory, the court does not look at the individual actions that the government took to determine whether a search has taken place. Instead, the court looks at the actions of the government as a whole and the entirety of the data collected to see whether the actions gave the government "otherwise unknowable details of a person's life." Commonwealth v. Mora, 485 Mass 360, 272 (2020). Under this theory, it is possible that individual actions of the government in collecting information will not be a search in the Constitutional sense, but that, because of the cumulative data collected, the actions as a whole are a search.

The court will look at the totality of the circumstances of the specific case when applying the mosaic theory to determine whether the individual had a reasonable expectation of privacy in the data collected. The amount of data retrieved, the length of time involved, and whether the data collected were from public spaces are all relevant factors to consider, but none are dispositive.

The mosaic theory is relatively new. Thus far, the cases have focused on three general concerns:

> the extent to which the surveillance reveals the whole of an individual's public movements
>
> the character of the information obtained
>
> whether the surveillance could have been achieved using traditional law enforcement techniques. Commonwealth v. Perry, 489 Mass. 436, 445 (2022).

Under the mosaic theory, information gained will be considered comprehensive if "it has sufficiently voluminous and detailed information from which investigators can derive a relatively complete picture of an individual's 'comings and goings' over time, even if there are gaps in the record." Commonwealth v. Perry, 489 Mass. 436, 447 (2022) *quoting* Carpenter v. United States, 138 S.Ct. 2206, 2219 (2018).

The longer someone is under surveillance, the more likely it is they have a reasonable expectation of privacy because such surveillance can reveal patterns of behavior, associations they may have, places they go, or other information that could not be learned from an isolated incident of surveillance. For instance, consider the information an officer can gain and the inferences that can be made by an officer seeing someone go to the liquor store on one occasion versus officers observing that person make daily trips to the liquor store over a month of surveillance.

While lengthy surveillance is an obvious concern, less comprehensive surveillance can still reveal "highly intimate" details about a person and their life. This is particularly concerning when people are in private settings as opposed to public settings. The court is sensitive to the fact that giving law enforcement access to this type of personal information "risks chilling the associational and expressive freedoms that our State and Federal Constitution strive to protect." Commonwealth v. Perry, 489 Mass. 436, 448 (2022).

> Privacy in one's associations, whether political, religious, or simply amicable, plays a crucial role in maintaining our democracy, and therefore is protected under art. 14. Commonwealth v. Perry, 489 Mass. 436, 448. (2022)

The courts use the mosaic theory to try to preserve the level of privacy that individuals enjoyed when the Constitution was first enacted. That is why the court has found that individuals likely have a reasonable expectation of privacy in information that could not be gained through traditional law enforcement techniques.

> To this end, we have examined whether the surveillance allowed the government to "track and reconstruct a person's past movements, a category of information that never would be available through the use of traditional law enforcement tools of investigation." (emphasis in original) Commonwealth v. Perry, 489 Mass. 436, 449 (2022) *quoting* Commonwealth v. Augustine ("Augustine I"), 467 Mass. 230, 254 (2014).

The court will also consider, assuming the surveillance was theoretically possible, whether it would have been prohibitively expensive or otherwise impractical to have accomplished it. The court has also found it significant that electronic surveillance does not have the fallibility of human notetakers and memory so the level of precision and detail is often better than human observation as well.

Under the mosaic theory, each case must be determined based upon the totality of the circumstances of each particular case.

In the next section, we look at cases that involved the use of technology to identify the location of individuals. Please note that some of the cases were covered in prior in-service programs. These cases are covered briefly this year because they are significant cases in this area of law and provide officers with valuable rules or guidance for investigations dealing with this type of technology.

VIDEO SURVEILLANCE

AUTOMATIC LICENSE PLATE READERS

Commonwealth v. McCarthy, 484 Mass. 493 (2020).

The Bourne and Sagamore Bridges have automatic license plate readers (ALPRs) on either ends of the bridges. ALPRs are cameras and software that photograph license plates and records the date, time, location, and direction of travel of the vehicle. As part of a drug investigation, officers added a license plate to an alert system so that officers would be alerted anytime the vehicle crossed the Sagamore or Bourne Bridges. The court held that this was not a search. There were a limited number of ALPRs, they were on public roads and ultimately did not allow the police to "monitor the whole of the defendant's public movements" or "track enough of his comings and goings so as to 'reveal the privacies of life.'" p. 509 (citation omitted.)

The court noted the use of such ALPRs may constitute a search in different situations. For instance, if the devices were located near a "constitutionally sensitive location" like a home or a place of worship, that could reveal more about a person's life and associations and might constitute a search. If more information was gathered by the devices, that could be a search as well.

> A detailed account of a person's movements, drawn from electronic surveillance, encroaches upon a person's reasonable expectation of privacy because the whole reveals far more than the sum of the parts. p. 504.

POLE CAMERAS

OFFICERS MUST OBTAIN A WARRANT BEFORE ENGAGING IN PROLONGED VIDEO SURVEILLANCE

Commonwealth v Mora, 485 Mass. 360 (2020).

As part of an ongoing drug investigation that ultimately led to the arrest of 12 defendants, officers installed cameras on public utility poles in various places. Two of those cameras were aimed at the front of the homes of two of the defendants. Those cameras recorded the front of the homes for over two months.

With respect to the cameras that were not directed directly at a residence, the court found that, even though the cameras recorded 24 hours a day/7 days a week, the limited pole camera surveillance of individuals away from their homes was not a search because they only captured the defendants on a few occasions when they were viewable to the public. Pole cameras directed at the defendant's homes were different.

> These cameras videotaped not only [the defendants], but also every person who visited their homes, and every activity that took place in the immediate vicinity. Because of the focused and prolonged nature of this pole camera surveillance, investigators were able to uncover the defendants' private behaviors, patterns and associations. pp. at 373-374.

The court found that this surveillance "provided the police with a far richer profile of those defendants' lives than would have been possible through human surveillance." Id. at 375. In Mora, the court announced a new rule:

> In the future, before engaging in this kind of prolonged surveillance, investigators must obtain a warrant based on probable cause. p. 376.

POLE CAMERA DIRECTED AT RESIDENCE FOR 15 DAYS WAS A SEARCH

Commonwealth v. Comenzo, 489 Mass. 155 (2022).

FACTS
In 2013 police received information from the National Center for Missing and Exploited Children that there were "concerning" images posted to Tumblr. The detective determined that two of the images constituted child pornography. The blog's IP address was traced to a Verizon Account. The detective obtained an administrative subpoena and determined that the account belonged to the defendant and a street address that was a three-level, multifamily house.

Police established surveillance of the building and found a relationship between the comings and goings of the defendant and the operation of lights in certain areas of the building. They were able to narrow the defendant's apartment down to two units. Despite their best efforts using conventional surveillance techniques, officers were unable to determine which of the two apartments the defendant lived in. (The apartment number National Grid had was different from what Verizon had, none of the mailboxes had the defendant's name on it and the United States Postal Service indicated that the defendant did not receive mail at that address.)

A pole camera was installed across the street from the residence. It had a live feed that also recorded for approximately 15 days. The camera offered a view that could have been seen by anyone physically present at the scene and showed the front entrance, the left side of the building, and the driveway. When watching the live feed, officers could move the camera 45 degrees in both directions and could zoom in or out. The recordings were searchable by date and time.

NOTE: the camera was installed without a warrant, a practice that was customary at the time. The surveillance occurred before Commonwealth v. Mora,485 Mass. 360 (2020) which established the rule that investigators need to get a warrant for such prolonged video surveillance.

Based upon the pole camera video footage officers were able to identify the unit/apartment the defendant resided in. This information was used to apply for a search warrant for that unit. During the execution of the search warrant, the defendant's computer and hard drives were seized.

The defendant was indicted on child pornography charges. The defendant filed a motion to suppress arguing that the pole camera footage was an unconstitutional search.

DISCUSSION

> Whether the use of a pole camera without a warrant is unconstitutional depends on (1) whether it was a search under art. 14 and, if so, (2) whether there was probable cause to conduct the search at the time it began. p. 158.

The burden is on the defendant to prove that the governmental action was a search in the constitutional sense. A search occurs when there is government conduct that intrudes upon an individual's reasonable expectation of privacy. To establish a reasonable expectation of privacy, the defendant must show two things:

(1) that the defendant had a subjective expectation of privacy in the object of the search

(2) society is willing to accept that expectation of privacy as reasonable.

In support of his motion to suppress, the defendant submitted an affidavit stating he was unaware that there was a pole camera monitoring the front door of the building and that he did not expect police to monitor his movements using such a camera. This was enough to satisfy his subjective expectation of privacy.

Whether society would accept an expectation of privacy as reasonable depends on the totality of the circumstances. Factors the court will consider include: whether the public has access to or might be expected to be in the area under surveillance, the nature of the place or object under surveillance, and whether the defendant took precautions to protect their privacy interests. The court has found that pole cameras directed at a person's home are of "greater constitutional significance" than those pointed at public places.

In this case, the camera was across the street from the defendant's home, and captured footage of the front door, left side of the building, and the driveway for approximately 15 days. The camera allowed officers to view the building in real time or to search the footage later.

> We conclude that under these circumstances the defendant's expectation of privacy was reasonable; thus, the pole camera surveillance constituted a search under art. 14. p. 160.

Once the defendant has met his burden of proving a search in the constitutional sense has occurred, it falls to the Commonwealth to prove two things:

1. there is probable cause to believe that a particular offense had been, was being, or was about to be committed

2. that the pole camera surveillance would either produce evidence of the offense or that it would aid in the apprehension of the suspect.

At the time the pole camera was installed in this case, the police had probable cause to believe someone in that building was engaged in the distribution of child pornography based upon the tip received from the National Center for Missing and Exploited Children, the IP address that was traced back to that building, and the Verizon account that was registered to the defendant.

> As for the second prong of the test, police had probable cause to believe that the pole camera surveillance would lead to additional evidence of the crime, including, but not limited to, determining the defendant's unit number so that they could apply for a search warrant. p. 161.

The court noted that the Commonwealth tried to identify the specific apartment using conventional techniques, including physical surveillance, but that those efforts had to be curtailed to avoid the risk of detection.

The motion to suppress was properly denied.

CELL SITE LOCATION INFORMATION

BACKGROUND AND DEFINITIONS

Cell phones connect to a cell tower or site in order to work. Cell phones connect to the strongest cell site signal, which is typically the closest one. Cell sites generate a time-stamped record when a phone connects with it to either send or receive communication. This record is known as cell site location information (CSLI).

There are 2 forms of CSLI – telephone call CSLI and registration CSLI.

> Telephone call CSLI is generated only when a cellular telephone uses cell service, such as by placing or receiving a call or a text message. Commonwealth v. Perry, 489 Mass. 436 FN3 (2022).
>
> Registration CSLI…is created without any action by the user, as cellular telephones 'regularly identify themselves to the nearest cell site with the strongest signal, through a process known as "registration." Commonwealth v. Perry, 489 Mass. 436 FN 3 (2022).

The cases we have seen involve telephone call CSLI.

CSLI notes the location of the cell site and specific sector that the device connected to when it received or placed the call or text. Service providers keep CSLI data for their own business purposes. This information has also been used by law enforcement to approximate an individual's location at a specific time. How precise the location is varies significantly depending on several factors.

Targeted CSLI is a log of every cell site an individual cell phone connected to over a period of time. With this information, investigators are able to reconstruct an individual's movements during that period.

Tower dumps are CSLI data for all devices that are connected to a particular cell site within a specific period of time. Tower dumps are useful when officers are investigating serial crimes because officers can identify individual devices that were in the area of multiple offenses at the relevant times.

INDIVIDUALS HAVE A REASONABLE EXPECTATION OF PRIVACY IN CSLI OVER A TWO-WEEK PERIOD OF TIME

Commonwealth v. Augustine, 467 Mass. 230 (2015).

As part of a murder investigation, investigators made a request under 18 USCA §2703 for CSLI for the defendant's cell phone for a 14-day period. The court found that, if this information was kept in a personal record belonging to the defendant, then it is clear that the defendant would have a reasonable expectation of privacy in it and that the Commonwealth would need a warrant to get the information. The Commonwealth argued that the third-party doctrine applied and that the defendant had no reasonable expectation of privacy in the information held by the telephone company.

The court held that the third-party doctrine does not apply to CSLI. The court has found that the third-party doctrine applies to bank records or even telephone numbers dialed by people because in those situations, the user takes affirmative steps to convey the information to the third party. CSLI is different because the user does not convey information to the cell phone company. "CSLI is purely a function and product of cellular telephone technology, created by the provider's system network at the time that a cellular telephone call connects to a cell site." p. 250.

CSLI is also different from the types of information that are covered by the third-party doctrine because it tracks the location of the device and therefore, its user. "Clearly, tracking a person's movements implicates privacy concerns." p. 246.

The court found that an individual has a reasonable expectation of privacy in CSLI data that covered a two-week period. Officers who wish to obtain this information must obtain a search warrant. The court did note that there may be a shorter period of time that would not implicate the person's reasonable expectation of privacy and therefore not be a search and not require a warrant.

INDIVIDUALS DO NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN CSLI OF SIX HOURS OR LESS

Commonwealth v. Estabrook, 472 Mass. 852 (2015).

> [T]he Commonwealth may obtain historical CSLI for a period of six hours or less relating to an identified person's cellular telephone from the cellular service provider without obtaining a search warrant, because such a request does not violate the person's constitutionally protected expectation of privacy. p. 858.

This exception to the warrant requirement only applies to telephone call CSLI and not to registration CSLI. Commonwealth v. Henley, 488 Mass. 95, FN 10 (2021).

NOTE: the best practice would be to obtain a search warrant anytime historical CSLI is sought. *See* Carpenter v. United States 138 S.Ct. 2206 (2018) ("Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one – get a warrant."

TO ESTABLISH PROBABLE CAUSE TO OBTAIN CSLI POLICE MUST ESTABLISH A NEXUS BETWEEN THE CRIME AND THE LOCATION OF THE PHONE

Commonwealth v. Louis, 487 Mass. 759 (2021).

FACTS

On September 30, 2010, three men devised a plan to rob a marijuana dealer. At 3PM the group purchased supplies for the robbery. One of the culprits, Jacobs, told the group that the defendant could secure guns for the robbery and wanted to be in on the robbery. The group then picked the defendant up. He put a black backpack with guns in the trunk of the car.

At 8PM the group was unsuccessful in robbing the intended victim because they were unable to lure her out of her apartment. The defendant was frustrated. Pierce, another member of the group, suggested they rob a different victim for Percocet pills. Pierce began texting with the new victim. As the group got close to the apartment, the defendant retrieved a gun from the trunk. The defendant, Pierce, and Jacobs approached the building at 11PM and the defendant shot and killed the victim outside his apartment. The victim's cell phone contained text messages between the victim and Pierce regarding the purchase of Percocet. The last message was received three minutes before the 911 call reporting the shooting.

The defendant was charged with murder in the first degree on a theory of felony-murder, unlawful possession of a firearm, and attempted armed robbery. Ten days after the defendant was charged, the Commonwealth filed a Rule 17 discovery motion for records from the defendant's cell phone provider seeking CSLI data. The motion initially also requested text messages; however, the Commonwealth withdrew that request at the motion hearing. Despite the withdrawal of that request, the judge mistakenly ordered that text messages be produced as well. The CSLI and text data were introduced into evidence against the defendant at trial.

NOTE: Even though the texts and CSLI data were obtained via Rule 17 and not by way of a search warrant, the court's analysis is instructive to officers who are seeking this type of information in their investigations.

The defendant was convicted and appealed. He argued that his text messages and CSLI were improperly obtained without a warrant or probable cause and should not have been admitted into evidence.

DISCUSSION

To establish probable cause, the Commonwealth must demonstrate a nexus or connection between the subject of the search and the criminal activity under investigation. In this case, there must be a connection between the attempted robbery and the defendant's text messages and CSLI data.

The courts have been clear that the Commonwealth cannot establish probable cause to search a cell phone by simply asserting that the defendant has a cell phone or that coventurers often use cell phones to communicate. Even establishing that the defendant communicated via cell phone with someone who is implicated in the crime will not be enough. The Commonwealth must establish that "the existence of particularized evidence" is likely to be found in the phone that they seek to search. p. 764 *quoting* Commonwealth v. White, 475 Mass. 583, 590-591 (2016).

The affidavit in support of the Rule 17 motion in this case established the required nexus. The affidavit included the fact that the victim's cell phone had a text conversation with Pierce on the night of the robbery. The affidavit also contained information about Jacobs talking to someone on a cell phone earlier that day about bringing a gun, how Jacobs told his coventurers that this person wanted to join them in the robbery, and how the group later picked up the defendant who brought the gun which he later used to shoot the victim. There was also information in the affidavit that Jacobs had been in telephone contact with the defendant and Pierce earlier that day.

> [T]he affidavit established that the coventurers communicated via text message and spoke to each other about and during the commission of both attempted robberies via cell phone. They made calls and sent text messages to recruit each other to assist with the robberies and to coordinate and plan the crimes. The affidavit further established that both attempted robberies were preceded by telephone communication between at least one coventurer and the intended victim. p. 764.

These facts established the required nexus between the robberies and the communication data, including text messages, on the defendant's phone.

There was also probable cause established for the CSLI data. CSLI data provides the location of the phone and not its content. To establish probable cause to get CSLI data, there must be a demonstrated nexus between the location of the phone and the criminal activity. In prior cases the court has found that it is reasonable to infer that the location of a person is the same as the location of their cell phone.

In this case the affidavit

> established in great detail that the defendant was present at and a part of the planned robberies and subsequent shooting, that he owned the cell phone subject to the desired search, and that he communicated with another robbery suspect via cell phone on the date of the murder. p. 765.

The court found that the movements of the coventurers was material to the case and that the Commonwealth had established probable cause to access the CSLI data for the defendant's phone.

The text messages and CSLI data were properly admitted into evidence.

TOWER DUMPS

CSLI TOWER DUMPS REQUIRE A WARRANT SIGNED BY A JUDGE

Commonwealth v. Perry, 489 Mass. 436 (2022).

FACTS

There were six armed robberies of convenience stores or gas stations that took place between September 22, 2018 and October 31, 2018 in Boston, Canton, and Cambridge. On October 6, 2018 there was an attempted robbery in Boston where the store clerk was shot and killed. The robberies mostly involved clerks who were robbed at gunpoint by an unidentified male who fit a similar description. Because of the similar way in which the crimes were perpetrated and the similar descriptions given of the perpetrator, the police believed that all the robberies may have been done by the same person. The police also believed the male had a coventurer in some of the robberies based upon surveillance footage and witness statements about someone acting as a getaway driver.

Boston police worked with the FBI on the investigation. The investigators wanted to request tower dumps for cell sites in the areas of the robberies and cross-reference the information to see if there were any devices that were near two or more of the robberies. There were two search warrants that issued. The FBI obtained the first search warrant for tower dumps related to the first four robberies. The warrant required four service providers to produce tower dumps including CSLI for cell sites near the scenes of the robberies within a 15-minute period surrounding the robberies.

The Boston police obtained the second search warrant for the October 6 homicide and the last two robberies. This warrant did not rely on or use any information obtained from the first warrant. This warrant required the same service providers to produce tower dumps including CSLI for cell phones that connected to cell sites in the area of the robberies within a 45-minute window before and after the robberies.

Both warrants required providers to produce the following categories of information:

1. location and sector of the cell site providing service
2. telephone number and unique identifier (distinctive series of numbers used by providers to identify a specific device or its user), either of which could be used to identify the owner of the telephone
3. The type of communication initiated or received when the connection occurred
4. The telephone number of the device initiating the communication
5. The telephone number of the device receiving the communication
6. Date, time, and duration of each communication.

The search warrants produced information on over 50,000 telephone numbers. Investigators cross-referenced the numbers to identify any numbers that appeared in two or more of the tower dumps. One number appeared in the tower dumps associated with the October 6 homicide and the October 31 robbery. Police linked that number to the defendant by searching a police database.

On October 6 the defendant's phone was in communication with another device believed to belong to the getaway driver. The getaway driver's cell phone appeared in the same tower dumps as the defendant's phone as well as the September 22 robbery.

Investigators ultimately identified the defendant as the perpetrator in six of the seven incidents. He was indicted on charges of murder in the first degree, attempted masked armed robbery, five counts of masked armed robbery, and six counts of unlawful possession of a firearm.

The defendant moved to suppress all of the evidence obtained as a result of the search warrants. He argued that the tower dumps were an unconstitutional search. The motion was denied. The defendant appealed that decision.

DISCUSSION

The court applied the mosaic theory to this case to determine whether a search in the constitutional sense occurred. The ultimate question for the court was whether the actions of the police in this case regarding the seven tower dumps, provided investigators with "otherwise unknowable details of life." p. 445 *quoting* Commonwealth v. Mora, 485 Mass. 360, 372 (2020). If it did, then those actions were a search because they intruded on the defendant's reasonable expectation of privacy.

In this case, the police obtained seven tower dumps on seven different days over the course of just over a month. Each of the dumps was limited to the time immediately before and after the incidents being investigated. After obtaining the information, the officers cross-

referenced the information to identify numbers that appeared on more than one of the tower dumps. Officers then analyzed the CSLI related to those numbers to do three things:

> 1. Approximate the location of the connecting device
> 2. Identify the phone's user
> 3. Identify who the user was communicating with when the device connected.

The court found that, "[t]hese actions, viewed in their entirety, provided investigators with information of a highly personal and private nature." p. 451. The tower dumps located individuals in public as well as private places which had the potential to pinpoint someone's location in a constitutionally protected area such as their house or place of worship. Because the tower dumps can infer the identity of someone the user was talking to at the time the device connected, this also gives investigators "significant insight into the individual's associations." p. 451.

The length of time (seven dates over the course of more than a month) also gave investigators insight into patterns of behavior because they could piece together where individuals were and who they were with on multiple occasions.

The court also noted that the information recovered from these tower dumps "would have been impossible to obtain through the use of traditional surveillance techniques." p. 451. The court specifically articulated the obvious fact that officers could not have learned the comings and goings of the defendant during these times by visual surveillance because he was not a suspect at the time the information was collected.

The court also noted that investigators received information about the location of over 50,000 people at various times over more than a month without any of them knowing that they were the target of police surveillance. The "sheer volume" of information received from the tower dumps would have been impossible to gather using traditional surveillance.

In a footnote the court stated that the closest analogy to this type of surveillance would be traffic cameras but found this was a poor comparison because those cameras only locate people in public areas.

> In light of these facts, and in the totality of the circumstances, the collection and subsequent analysis of the seven tower dumps at issue here provided investigators with highly personal and previously unknowable details of the defendant's life. Accordingly, the Commonwealth's use of the seven tower dumps intruded upon the defendant's reasonable expectation of privacy. p. 452.

The Commonwealth argued that the dumps only produced a total of three hours of CSLI and that, under the holding in Commonwealth v. Estabrook, 472 Mass. 852 (2015), this was not a search in the constitutional sense. The court recognized that there is an analogy to be

made between targeted CSLI and tower dumps because both reveal an individual's location at discrete moments in time. Despite that similarity, the court noted that there is a difference between what an officer can learn about someone from six hours of continuous CSLI on one day, as in Estabrook, and what can be learned from smaller increments of time over several days, such as the facts here. These smaller increments of time can reveal a pattern of behavior not knowable by continuously monitoring an individual's activities for six out of 24 hours on one particular day.

> Accordingly, although Estabrook enables the Commonwealth to obtain one or more tower dumps spanning six hours or less without a warrant, it provides no refuge where, as here, the tower dumps span multiple days. p. 453.

After applying the mosaic theory, the court determined that the police actions in this case regarding the seven tower dumps was a search. The next issue for the court to consider was whether the search was supported by probable cause.

An affidavit for CSLI must establish probable cause to believe a crime has been, is being, or is about to be committed and that the CSLI will either produce evidence of the crime or "aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committed, or is about to commit such offense." P. 454 (internal quotations and citations omitted.)

> Accordingly, the warrant affidavit must show "a sufficient nexus between the criminal activity for which probable cause has been established and the physical location of a cell phone recorded by the CSLI." p. 454 *quoting* Commonwealth v. Hobbs, 482 Mass. 538, 547 (2019).

The defendant here argued that the general conclusions in the affidavit about "the ubiquity of cellular telephones" were the only thing that demonstrated that the perpetrator possessed a phone during the robberies. The court agreed that such conclusions would not be enough. The court also clarified that the "more narrow and demanding standard" required when officers are seeking the content of a cell phone does not apply to searches of CSLI. The court reasoned that such cell phones contain vast amounts of private and sensitive information whereas CSLI only reveals the location of the device.

> Thus, when seeking a warrant to search CSLI, investigators need not establish that the defendant actually used or possessed his or her cell phone during the commission of the crimes which they would be required to do in order to search its contents. p. 455 (internal quotations and citations omitted.)

The nexus for CSLI information will be satisfied if there is a substantial basis to conclude that the suspect used a cell phone during the relevant time frame. If this is established, then there would be probable cause to believe that the CSLI information sought would produce evidence of the crime.

Both warrants here established probable cause to believe the robberies had been committed. The question is whether the warrant affidavits "established a substantial basis to believe that a search of the requested tower dumps would produce evidence of the crimes under investigation, or would aid in the apprehension of the perpetrator." p. 455. The warrants need to be examined individually.

First warrant

The first warrant did not provide any particularized information about the robber or getaway driver having a cell phone or communicating with each other over a distance.

> Moreover, the first warrant affidavit did not discuss the need for coventurers to communicate when committing a robbery, nor did it point to any evidence that the perpetrator and the coventurer had been separated during the commission of the crime such that they would have had to communicate from a distance. p. 458.

In the first affidavit the officer averred that "it is very common for a person to have a cellular telephone with them at all times." p. 458. There was no other information provided to support the conclusion that the perpetrator in this case had or used a cell phone to commit the crime. "Therefore, the evidence obtained pursuant to the first warrant must be suppressed." p. 458.

Second warrant

This affidavit contained more detailed information than the first affidavit. It set forth the similarities of the robberies which provided a substantial basis to believe that the same person committed each of the robberies. Those similarities included: each robbery and the attempted robbery was committed against a clerk, almost always of a convenience store, the locations were all in or around Boston within 2 – 11 miles of each other, and they all occurred between dusk and dark. Witness descriptions of the robber were consistent, including his clothing (black hooded jacket, dark-colored pants, black gloves, black shoes, and a black or red mask) and that he always brandished a black, semiautomatic pistol in his right hand. Two surveillance videos showed either a hole or a light-colored blemish on the jacket.

The second warrant also contained information that a second person acted as a getaway driver on at least three occasions. The locations were up to 11 miles apart from each other and some were not near public transportation. Police also utilized canines on October 31, 2018 that were able to track the scent along a reported flight path until coming to an abrupt end in a public area not accessible by public transportation.

The warrant also described facts to support the belief that the robber and another person communicated with each other from a distance either before or after the robberies. The detective averred in the affidavit that, "based on his experience and training, violent crimes

such as those at issue often require some level of coordination amongst coventurers." p. 457.

> This coordination could have taken place while the perpetrators were apart; the robber appeared to travel some distance on foot prior to or after most of the robberies, and therefore was at least temporarily separated from the getaway driver. p. 457.

Evidence that the robber and getaway driver communicated over a distance, together with the affiant's statement about "the over-all ubiquity of cellular telephones" was enough to establish a reasonable belief that they used cell phones to communicate with each other around the times of the robberies.

A reasonable belief that the robber used a cell phone to communicate with the getaway driver around the time of the crimes is also probable cause to believe that either telephone would have connected to the cell sites and produced telephone call CSLI that would be found in the tower dumps. The CSLI could then be used by investigators to identify potential suspects by figuring out which, if any, of the people had been near more than one of the crimes. For these reasons, the court found that the second warrant affidavit was supported by probable cause.

With respect to the second search warrant, the defendant also argued that it was unconstitutional because it lacked particularity. The defendant argued that any warrant that does not identify the targeted suspect by either name or telephone number lacks particularity because art. 14 mandates that warrants describe "with particularity" both the place that will be searched and the item(s) to be seized.

The particularity requirement serves two purposes. First, it protects people from general searches. Second, it demonstrates "that the scope of the officers' authority to search was properly limited." p. 459 *quoting* Commonwealth v. Holley, 478 Mass. 508, 524 (2017) *quoting* Commonwealth v. Valerio, 449 Mass. 562, 566-567 (2007).

How particular a specific warrant needs to be will depend on the facts and circumstances of that case. The court recognized that the scope of the search here was not entirely clear on the face of the warrant. "Thus, if read in isolation, the warrant would permit investigators to analyze, without limitation, any and all CSLI in the tower dumps." p. 460. This means investigators could select any of the 50,000 telephone numbers recovered and determine the identity of the person, their location, and whom they were communicating with "without even an iota of suspicion." p. 460. Such actions would undoubtedly violate the particularity requirements of art. 14.

The court found that the deficiencies in the search warrant here were remedied by the affidavit which, when read with the warrant, adequately limited the scope of the search.

> A supporting affidavit can remedy a particularity defect in a warrant where (1) the warrant makes specific reference to the affidavit and (2) the officer who submitted the affidavit in support of the warrant was one of the officers executing the warrant. FN 18 (quotations and citations omitted.)

The affidavit in this case explained that investigators were looking to identify commonalities within the information received in the tower dumps. Based upon this language, investigators were permitted to analyze the CSLI for numbers that appeared in two or more of the tower dumps, but no others.

NOTE: the best practice would be to include specific language in the warrant that establishes the appropriate scope of the search.

Because the warrant and affidavit, when read together, only authorized the search of a narrow subset of the CSLI collected for the purpose of identifying a common suspect, the court found that the warrant was sufficiently particular.

The court also acknowledged that tower dumps are inherently less particular than warrants for targeted CSLI.

> Although limiting a search of CSLI to an identified suspect might be the better practice where possible, it is not required where, as here, the suspect's identity is unknown and the scope of the search is appropriately limited through other means. p. 461 -462.

The court rejected the argument that every person whose CSLI was included in the tower dumps was the subject of a search in the constitutional sense. The defendant was the subject of a search because of the combination of the police possessing the anonymized CSLI and the analysis of it, "the aggregate of which provided investigators with a revealing mosaic of the defendant's private life." p. 460.

> A cursory examination of anonymized CSLI would not permit investigators to infer the identity of any given individual, where within the cell site's radius that person had been, or with whom he or she had associated; thus, such an examination would not intrude upon a reasonable expectation of privacy. p. 460.

The court did recognize the potential that CSLI disclosed in such tower dumps could invade the privacy of innocent and uninvolved people who may never know that their CSLI was turned over to the police and would not be able to exercise any control or oversight over how that data is used. "Such a situation presents far too great a risk of unwarranted invasions of privacy, whether intentional or inadvertent, malicious or innocent." p. 462. For this reason, the court set forth two new rules with respect to tower dumps.

> Henceforth, before acquiring and analyzing a series of tower dumps, the Commonwealth must obtain a warrant from a judge. Before issuing the requested warrant, the judge must ensure that it provides a protocol for the disposal of any data that falls outside the scope of the search. p. 464.

The first search warrant was unconstitutional because it was not supported by probable cause. All evidence recovered as a result of that warrant must be suppressed. The second search warrant, which did not rely on any information received in response to the first search warrant, was supported by probable cause and was a constitutional search.

POLICE REQUEST FOR CHARLIECARD INFORMATION WAS NOT A SEARCH

Commonwealth v. Henley, et al., 488 Mass. 95 (2021).

FACTS

Defendant Henley and the victim were members of rival gangs and worked at a nonprofit organization that served at-risk youth, providing them with vocational training and job opportunities. On February 11, 2015, Henley texted his supervisor on his way to work. His supervisor advised Henley that the victim was going to be at the job site and to "keep it cool." p. 98.

The program brought the group to an area in Jamaica Plain that morning to shovel snow. Henley met the group there. Around that same time, Henley exchanged texts and called his co-defendant Josiah Zachery. Zachery belonged to the same gang as Henley but was not part of the nonprofit program.

That morning, Zachery traveled via MTBA to the work site where he shot the victim in the head and ran off. The victim died from his injuries. As Zachery fled, he also shot at Boston police Officer Louberry, but missed. Officer Louberry gave chase to Zachery but lost sight of him. While chasing him, Officer Louberry gave out a physical description of Zachery, including a clothing description: "black pants, black jacket, and a gray hooded sweatshirt, with the hood over head" running with a gun in his hand. p. 100.

Within five to six minutes of the officer losing sight of the shooter, another officer saw Zachery two blocks away. He matched the physical description; except he was not wearing a black jacket. At this time he was also carrying a shovel. It was very cold that day and Zachery was wearing sneakers with low-cut socks, no jacket, and no gloves. This officer stopped Zachery for a threshold inquiry. Zachery was

> overly calm and seemed to actively avoid looking at or in the direction of the officers…, and that he appeared to act actively disinterested in all of the events around him including the saturation of police and cruisers in the area. p. 101.

Zachery told officers he was "shoveling snow for old ladies for free" but when asked why he was not wearing gloves, he had no response. p. 101. He said he heard shots but that he was far away. Officers conducted a patfrisk and found his cell phone but did not seize it at that time. No weapons were found. He was not arrested but was put in cuffs and placed in a cruiser while officers continued their investigation.

Officers recovered the gun that was used in the murder on a garage roof in the area. The black jacket that he wore at the time of the shooting was found under the porch of that house. Officers learned that a shovel Zachery had with him was taken from outside that house. Officer Louberry was shown the jacket and said it could have been the one the shooter was wearing. Footprints consistent with his sneakers were also found in the area surrounding the house.

Zachery was brought back to headquarters where he was interviewed and ultimately arrested. Police seized his MBTA CharlieCard and cell phone. The police requested certain information associated with the use of the CharlieCard from the MBTA. The MBTA provided surveillance footage and records associated with Zachery's use of the CharlieCard.

The police obtained a search warrant to review the contents of Zachery's cell phone. Police found multiple texts and calls between Zachery and Henley on the morning of the murder. Shortly after learning that the victim would be at the work site that day, Henley sent a text to Zachery saying he might need Zachery to "hold [him] down." p. 99. Henley provided his location to Zachery and Zachery started heading that way. "In the hours leading up to the murder, Henley and Zachery continued to coordinate a plan." p. 99.

At 9:29AM Henley sent a text saying, "So how we gon do it?" Zachery called Henley and they spoke for 19 seconds. Henley then sent a text with the work location and a description of the victim's clothing. At 10:20AM Zachery sent a text saying, "I see the van Cant find yall." Two brief calls followed and then the victim was shot. p. 99.

The defendants were charged with first degree murder. Zachery filed a motion to suppress arguing that the stop and frisk, warrantless search of his CharlieCard, and the search of his cell phone were all unlawful. The motion was denied and both defendants were convicted of murder in the second degree. On appeal the defendants raise several issues, including the denial of the motion to suppress.

DISCUSSION

Stop of Zachery

There is no dispute that Zachery was seized when he was cuffed and held in the cruiser, even though he was not formally arrested at the time. To stop an individual, officers must have, "reasonable suspicion, based on specific and articulable facts, that the defendant had committed, was committing, or was about to commit a crime." Commonwealth v. Depina, 456 Mass. 238, 242 (2010).

Reasonable suspicion is less than probable cause but is more than just a hunch. "The standard of reasonable suspicion does not require that an officer exclude all possible explanations of the facts and circumstances." p. 102.

The description in this case included the suspect's gender, race, height, age, and clothing worn. The court found that, "[t]he description was not so general that it would include a large number of people in the area where the stop occurred." p. 103.

At the time that Zachery was seized, Zachery fit the physical and clothing description of the suspect except that he was not wearing a black jacket, an item that could easily be removed. Zachery's demeanor was unusual considering everything that was going on in the area, his clothing was not appropriate to the extreme weather conditions and made his explanation for what he was doing – shoveling snow for elders for free – implausible. His location also made sense with the timing and location of the shooting. Geographic proximity is especially probative in cases like this where the "distance is short and the timing is close." p. 104 *quoting* Commonwealth v. Warren, 475 Mass. 530, 536 (2016).

In addition to the description and the relevant geographic and temporal proximity of the defendant to the crime scene, the court considered the circumstances of the crime itself. The severity of the crime and any ongoing risk to public safety are appropriate factors in the reasonable suspicion analysis. In this case, the police were actively investigating a fatal shooting where the shooter had also shot at an officer.

> Although, standing alone, any one of these factors might not have been sufficient to justify the stop, when viewed as a whole, we agree with the motion judge that they gave rise to reasonable suspicion. p. 103.

The manner in which Zachery was detained on scene (in cuffs and in a police cruiser) was also lawful. Police are permitted to place a limited restraint on an individual for a threshold inquiry as long as the detention is "commensurate with the purpose of the stop." p. 105 *quoting* Commonwealth v. Torres, 424 Mass. 153, 162 (1997). Officers diligently pursued the investigation while Zachery was in the cruiser and were able to confirm many of their suspicions. Officers discovered the footpath that led from where officers lost sight of the shooter to the house where the jacket and gun were found and where the shovel was taken. They also conducted show-up identification procedures with witnesses.

Patfrisk

Officers must have reasonable suspicion that the person is armed and dangerous to perform a patfrisk. The frisk in this case was justified by all the same facts that supported the stop of the defendant.

Search of the CharlieCard

MBTA patrons purchase CharlieCards and then use them to pay bus and subway fares. Each card has its own unique number, but the user is unknown unless they take certain steps to register the card. Zachery's card was an M-7 student card and usernames are not assigned to such cards. CharlieCards are used to board a bus or train, but not when the user disembarks or when they transfer subway lines. CharlieCard information is provided to the MBTA and is stored by the MBTA for 14 months. The data contains no personally identifiable information of the user, but the information can be used to access MBTA surveillance footage.

> It is kept only for ridership information and accounting purposes. The practice of the MBTA is to provide this information to law enforcement when requested. This practice is posted on the MBTA website as part of its privacy policy. p. 106.

In this case, the officers requested information from the MBTA including the travel history, video footage, and still photos related to the use of the CharlieCard found on Zachery. There was no time frame specified. In response to that request, Boston police received information regarding where the card was used and related video footage from two dates: February 11, 2015 (the day of the murder) and January 26, 2015. The data and video footage revealed Zachery's travel path on the morning of February 11, 2015 to the murder scene.

The defendant argued that the Commonwealth conducted an unlawful search when it requested and received the information about his CharlieCard. As always, the defendant has the burden of proving that a search in the constitutional sense has taken place.

> The defendant must demonstrate that he had a subjective expectation of privacy in the item and that the expectation of privacy is one that society is prepared to recognize as reasonable. p. 108.

Zachery established his subjective expectation of privacy in the data retrieved from the CharlieCard in the affidavit that was submitted in support of the motion to suppress. In the affidavit he indicated he did not know that using the CharlieCard created a record of his whereabouts and that he did not consent to the police searching his travel history that was connected to his CharlieCard.

Whether society is willing to recognize this expectation of privacy as reasonable is a tougher question. The Commonwealth argued that there was no reasonable expectation of privacy in the CharlieCard information relying on the third-party doctrine.

The court found that the CharlieCard information was similar to CSLI (addressed in Augustine I above) in that the information conveyed to the MBTA when someone uses a CharlieCard to pay their fare is "far removed" from the person's primary purpose in using the CharlieCard, which is to pay for public transportation. p. 107. Individuals using a

CharlieCard do not knowingly transmit information to a third party, and when they buy the CharlieCard they do not do so with the "purpose or expectation of sharing information about their location with the MBTA." p. 107. The court rejected the application of the third-party doctrine to the CharlieCard information finding that "the data at issue has no connection to the limited purpose for which an individual uses a CharlieCard." p. 108.

The court found that the appropriate analysis to apply to the CharlieCard information was the mosaic theory.

The court has recognized in prior cases that individuals have "a privacy interest in the whole of one's public movements." p. 109 *quoting* Commonwealth v. McCarthy, 485 Mass 493, 502 (2020). This privacy interest is implicated, for instance, when a tracking device is attached to someone's vehicle. *See* Commonwealth v. Rousseau, 465 Mass. 372 (2013).

The court found that the extensive record of someone's travel on the MBTA could constitute a search depending on the amount of information retrieved by the police and the length of time involved. Because the MBTA can retain CharlieCard data for 14 months, "[t]here is no question that such extensive data, in certain circumstances, could create a 'highly detailed profile.'" p. 110.

It was also relevant that CharlieCard data is generated only when someone pays a fare and does not track them the entire time they are using the MBTA. While it is true that when a CharlieCard is used the MBTA can connect surveillance footage to that transaction, the cameras are in plain view wherever such transactions occur.

In this case, the police requested the travel history and corresponding video footage for the CharlieCard number recovered from Zachery. The police did not specify a time frame. The MBTA provided the police with travel information for two dates, one of which was the date of the murder. The police were able to determine the travel path of Zachery on the date of the murder based upon the CharlieCard data and corresponding video footage. They also received video footage showing where Zachery exited the train.

> This short time period and the limited data generated by Zachery's CharlieCard did not constitute an aggregation of data points that revealed extensive detail about Zachery's movements, much less a profile of his life…Zachery's CharlieCard generated far less data than other types of location tracking, such as global positioning system monitoring or CSLI gathered from a cell phone. Thus, under the mosaic theory, the police investigation of Zachery's CharlieCard travel history did not constitute a search. p. 114 (internal quotations and citations omitted.)

Because the use of the data itself was constitutional, the use of corresponding video surveillance was also constitutional.

NOTE: "In this kind of case, the better course may be for police to obtain a search warrant for the data. This is especially so where they do not appear to be in control of the amount of data they receive or the time span covered by the data." FN 12.

Search of Zachery's cell phone

Police seized Zachery's phone prior to transporting him to the department and obtained a search warrant for the phone six days later. The seizure of the phone itself was not an issue, but Zachery argued that the affidavit did not establish a sufficient nexus between his cell phone and the criminal activity and that it lacked particularity.

An affidavit in support of a search warrant must set forth enough acts, and the reasonable inferences that can be drawn from those facts, to establish a connection between the criminal activity under investigation and the place or item to be searched. When the police are looking to search the contents of a cell phone, there must be a nexus between the criminal activity and the contents of the cell phone.

Nexus

The fact that cell phones are prevalent in daily life will not be enough. The opinion of the affiant alone that coventurers often use cell phones to communicate will also not be enough.

> Instead, there must be "specific, not speculative" evidence linking the device in question to the criminal conduct. p. 116 *quoting* Commonwealth v. Fernandez, 485 Mass. 172, 185 (2020).

The affidavit submitted in support of this search warrant contained information sufficient to find that Zachery shot at and killed one person, shot at an officer, and that the murder was a coordinated effort. The inference that Zachery coordinated with a coconspirator was reasonable for several reasons: there was no apparent reason for Zachery to be in the area as he lived in a different section of Boston and was supposed to be in school at the time. There was also no instigating event that preceded the shooting making it reasonable to infer that the shooting was planned. The court also noted that the type of coordination involved in this case was "improbable without real-time communication through cell phone calls or text messages." p. 118.

Zachery's statements to the police about what he was doing there were not credible and increased their suspicion. He said he was using public transportation to shovel snow for people and that he was wearing the same clothes all day and that he had the shovel the whole time. He was caught on video before the shooting walking without a shovel and wearing several layers of clothing that he was not wearing at the time of his arrest.

The affidavit also set out a motive of gang rivalry. Zachery and Henley were listed in the police gang database as active members of the Franklin Hill Giants gang. The victim, who worked on the same work crew as Henley, was listed as a primary member of a rival gang.

> Based on the information that the victim and Zachery were in rival gangs, and the fact that there was another person in the work crew with the victim who was part of the same rival gang as Zachery, police found it to be extremely unlikely that Zachery arrived there by coincidence. It was far more likely that Zachery was directed to or alerted to the work crew location in real time. The reasonable inference that Zachery used his cell phone to coordinate the murder follows logically. p. 117.

The court emphasized that this case presented "a highly unusual combination of factors." p. 118. These facts, together with the police training and experience, established the requisite nexus between the criminal activity and the cell phone.

Particularity – Dorelas requirement

As in many cases, the officers here knew what they were looking for, but they did not know where or in what format the information they were looking for would be found in the phone. The warrant specified eight types of information they were seeking: ownership of the cell phone, contacts with persons at the homicide, discussion or knowledge of the homicide, familiarity with persons involved in the homicide, familiarity or contact with locations or items associated with the homicide, communications that led Zachery to arrive at the scene of the shooting, evidence of gang activity, and discussions of firearms.

Contrary to the requirement of Dorelas, the affidavit did not list the files or areas of the phone where the officer believed these items would be found. In fact, the affidavit indicated that this information could be "found anywhere in the entire electronic contents of the phone." p. 119. The court here realized the impracticality of requiring strict compliance with Dorelas in cases like this.

> Although general or exploratory searches are not permitted, requiring a search warrant application to identify specific locations or files on a cell phone to be searched places an unrealistic burden on law enforcement and restricts legitimate search objectives, given the storage capacity and file structure of most cell phones. p. 119.

Because the officers here were specific as to what they were looking for, the court found that the warrant was particular enough to properly limit the scope of the search.

> Without knowing precisely what evidence existed, police did not know, nor could they have known, the precise location within the cell phone where the evidence would be found. In this case, and other cases where the location of evidence on a cell phone is unknowable to law enforcement, the Dorelas requirement that officers identify file types to be searched in the warrant is impractical. p. 120.

NOTE: "In a case where police know precisely where the evidence for which they are searching is stored, the Dorelas requirement limiting the parts of the cell phone or types of files on the cell phone to be searched stands." FN 16.

NOTE: The court mentions in a footnote that it is unclear whether the plain view doctrine would apply to a digital search. The court noted the proper course for officers to take if they come across evidence inadvertently during a valid search would be to stop and apply for another warrant.

Particularity - temporal limit

The warrant here contained no temporal limit which, based upon the court's decision in Commonwealth v. Snow, 486 Mass. 582 (2021) means that the warrant was impermissibly broad. "Because a cell phone can store many years of data, some temporal restriction is required." p. 121.

The court reiterated its position in Snow that officers should "err on the side of narrowness" in an initial search, as obtaining another search warrant is possible if additional information is uncovered to justify a further search. The court also noted that time is not of the essence once a cell phone is seized.

NOTE: The investigation in this case occurred before Snow, so investigators did not have the benefit of that decision when writing their affidavit. Officers are reminded that any search warrant affidavits for cell phones after Snow temporal limits are required.

The determination of what an appropriate temporal limit for a search warrant of a cell phone would be is a fact intensive inquiry. In this case, the evidence supports an inference that there was a long-standing relationship between the defendants and the victim and that the crime was gang related. There was also evidence that Henley told his mother two months before the murder that he had safety concerns about going to the program because of the rival gang member that worked there. The court found that a temporal limit of two months would be reasonable in this case.

The motions to suppress were properly denied.

EXCULPATORY INFORMATION

CALL LOGS FROM DEFENDANT'S PHONE WERE EXCULPATORY AND SHOULD HAVE BEEN TURNED OVER TO THE DEFENSE

Commonwealth v. Diaz, 100 Mass.App.Ct. 588 (2022).

FACTS

On May 17, 2014, the victim pulled up to his ex-wife's house to see his children. The victim noticed three men walk by as he approached the house. When he reached the sidewalk in

front of the house, the three men ran up to him. One pointed a gun in his face demanding his chain. All three men then started beating the victim by punching and kicking him. One of the men ripped off and took the victim's gold necklace and pendant. The victim was severely injured as a result of the attack. The victim and some witnesses chased the men but were unable to catch them.

Police arrived with a canine who alerted to a scent from a hat that was dropped by the shooter. The dog led officers through a yard and over a fence. A short distance away officers saw the defendant. Officers yelled to the defendant to stop, but he ran and was chased to his house by the police. The defendant was taken into custody before he got into the house.

The defendant was brought back to the scene for purposes of doing a show-up identification. As the defendant was getting out of the police vehicle, a witness heard "a 'metallic tinny sound' like 'something fall[ing] on the ground.'" The witness pointed to the victim's pendant which was found lying on the ground. The ex-wife had searched that area previously for the jewelry but had found nothing.

Four days later officers obtained a search warrant for the defendant's cell phone. The police extracted 2,000 pictures and videos from the phone. Officers were unable to extract any call log data due to issues with the software.

The prosecutor was aware of the seizure and search of the phone but was not aware of the pictures and videos that the police had recovered. The prosecutor mistakenly believed the phone was password protected. During discovery, the defendant specifically requested "all cell phone call data." Despite the request, the "prosecutor never asked the police for call log evidence." As part of their investigation, the defense attorney obtained records from the phone company, including the defendant's call history. The attorney determined that this evidence was not helpful to the defense and did not introduce it at trial.

The defendant was convicted of armed robbery and assault and battery with a dangerous weapon causing serious bodily injury. He filed a motion for new trial. While that motion was pending, the parties learned that the cell phone was not password protected, which meant that the data it held was readily accessible when the police seized the phone and when the warrant was obtained. The defendant amended his motion for new trial arguing that the Commonwealth had failed to disclose exculpatory evidence, that being the call log data.

DISCUSSION

To succeed on a motion for new trial because of the Commonwealth's failure to turn over exculpatory information to the defense, the defendant must establish three things:

1. the evidence was within the possession, custody, or control of the Commonwealth

2. the evidence was exculpatory

3. the defendant was prejudiced by the failure to disclose.

Possession, custody, or control of the information
In this case, the phone was not password protected, so the information was readily accessible to the police who had custody of the phone and a warrant to search it.

Exculpatory nature of the information
The Commonwealth, which includes investigating police officers, has a duty to "disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against the pending charges." Commonwealth v. Tucceri, 412 Mass. 401, 404-405 (1992). This type of information is known as exculpatory information.

The prosecutor has a duty to reasonably inquire of its prosecution team about the existence of exculpatory evidence.

> The scope of reasonable inquiry for the prosecutor, informed by the defense request for the call log data, extended to inquiring of the detectives whether that information was accessible to the government.

The court noted that the exculpatory nature of the call log would not have been readily apparent to the prosecutor or the officers. However, the defense attorney specifically requested this information which put the Commonwealth on notice that the defense considered the call log data potentially useful to its defense. The prosecutor in this case readily admitted "that she had erred in failing to inquire of the police whether they had access to the call log data when its relevance was brought to her attention."

At the motion hearing, the Commonwealth argued that the information was not exculpatory. The court noted that "exculpatory" is a low bar. It does not have to be devastating to the Commonwealth's case. "It must simply tend to negate the guilt, or to reinforce the innocence, of the accused."

> So long as there is a reasonable argument that the evidence may be useful to the defense, however, it is exculpatory. If a defendant can use the evidence to aid his case or undermine the prosecution's case, Brady requires that it be turned over.

The court also noted that evidence can also be both exculpatory and inculpatory.

> We conclude that the fact that evidence could reasonably be considered either inculpatory or exculpatory does not alter the prosecutor's duty to disclose it, especially upon request.

The call log would have assisted the defense in impeaching a witness in this case. An eyewitness who testified seeing the men wandering in the street before the attack never mentioned any of them being on the phone. The phone logs would have shown the defendant was on the phone before the attack occurred. This makes the call logs exculpatory.

Prejudice
In this case, there was no prejudice because the defense attorney was aware of the information and had determined that it was more harmful than helpful to his case.

Because the defendant failed to show that he was prejudiced by the nondisclosure of the exculpatory information, the court found that the motion for new trial was properly denied.

FIFTH AMENDMENT

INVOCATION OF RIGHT TO COUNSEL

AFTER DEFENDANT INVOKES THE RIGHT TO COUNSEL, COMMONWEALTH BEARS BURDEN OF PROVING THAT THE DEFENDANT REINITIATED COMMUNICATION WITH POLICE

Commonwealth v. Gonzalez, 487 Mass. 661 (2021).

FACTS
The defendant was arrested on May 26, 2016 for a shooting that had occurred earlier that year. The case was "high profile" as the victim was the father of a State trooper. The defendant was linked to the crime by a co-defendant who was interviewed the previous day. The defendant was arrested at 12:30AM and "courtesy" booked in Holyoke where he was given Miranda warnings. He was transported to Springfield Police headquarters 45 minutes later.

A Spanish-speaking detective and a sergeant were assigned to interview the defendant. An audio and video recorded interview began at 1:52AM. The defendant was advised he was under arrest for murder and was given his Miranda warnings in English. The defendant's primary language was Spanish; however, he told officers he could read, understand, and speak English. He waived his Miranda rights and agreed to talk to officers. Most of the interview was in English; however, when there was difficulty in the conversation, the detective asked the questions in Spanish.

The defendant denied being involved in the murder and asked to see photographs or other proof that he was there. A captain who was monitoring the interview via a live-video feed grew frustrated with how the interview was going and went into the interrogation room after 15 minutes. He yelled and swore at the defendant telling him that he might be a "big tough guy" in Holyoke but he "ain't shit" in Springfield. He told the defendant:

> I'm done with you…Either you come clean or you get booked and you go to fucking jail for murder. That's all it comes down to. That's all it comes down to dude. I don't give a fuck about you. I don't care. You're in here, sitting here, to tell a story. Either you tell it, or you don't. p. 664.

The defendant responded, "No, I ain't speaking." The captain then left the room.

Officers continued to interrogate the defendant. They used profanity and "placed increased pressure" on him to explain his involvement. p. 664. They told him it was over and that he was going to jail. The defendant asked why they were yelling at him.

A few minutes after the captain left, the following exchange occurred:

Defendant (in Spanish): Can I call my lawyer?
Detective (in Spanish): Ok? Someone put you there. Someone put you there, OK?
Defendant (in Spanish): Can I call my lawyer?
Detective: so…he's asking for the lawyer
Sgt: You want what?
Defendant: my lawyer
Sgt: You want your lawyer?
Defendant: yeah
Sgt: Ok, alright. It's 2:11AM. We're gonna conclude this investigation and …
Detective: call them, and turn it off.
Sgt: Yep. Give me a sec. I'm gonna call down, turn off the video, and you're gonna be booked for murder, OK?
Defendant: Call my – call my lawyer
Detective: OK. He's gonna turn this off
Sgt: We're gonna stop interviewing you, and you'll be booked for murder.
Detective: You're gonna be booked for murder
Defendant: alright. Call my lawyer.
Detective: you can call your murder – your lawyer- later on
Sgt: you can have them turn off Room A, please? Yep. Have them turn it off.
Defendant – because right now
Detective: Stop talking. You just said you want a lawyer and we can't talk to you.

The motion judge found the defendant said he wanted his lawyer four times before the interview ended. He also noted that the detective was frustrated and angry that the defendant had invoked his right to counsel.

The sergeant left the room and the detective remained in the room with the defendant awaiting the supervisor to authorize the defendant to be brought to the booking area. It was the practice of the Springfield police that a supervisor had to arrange a time for an individual arrested for murder to be booked with the booking sergeant and that detectives had to wait for this authorization before they could bring the individual to the booking area. It was also the practice of the department that an individual arrested for murder could not be left alone.

In this case, the request to the booking sergeant would have come from either the captain or the sergeant who had been involved in the interviews; however, there was no clear testimony as to who the booking sergeant was that night or which of the supervisors had contacted the booking sergeant. At the hearing, none of the officers could explain the reason for the delay in booking the defendant on this night.

At some point the defendant was allowed to use the restroom. When they got back into the room, the detective and the defendant began talking. The detective could not recall what the conversation was about except that it was not about "what was going on." p. 666. At one point the defendant asked what was going to happen next at which point the detective explained the booking process. This conversation was not recorded and the detective did not author a report about it.

Later on in the conversation, the defendant told the detective that he would 'talk to him but, did not want to get yelled at." p. 666. After the defendant said he would talk, the captain came back to the room and told the detective to bring the defendant down for booking. The detective then told the captain that the defendant wanted to speak to officers again. The captain testified that someone had told him that the defendant wanted to talk again while the captain was sitting in his office. He could not remember who had told him.

A second recorded interview began at 2:56AM, approximately 45 minutes after the first interview had ended. The defendant was interviewed by the original detective and a second detective. The second detective showed the defendant the Miranda waiver form he had signed before the first interview and said:

> And you signed off on this Miranda form earlier this evening. Approximately not even about a half hour ago, and I just wanna – We gave you an opportunity to go the bathroom and as we were bringing you to get booked you said you wanted to talk to us again. p. 667.

The defendant responded, "um-huh." When asked if this was correct, he again responded "um-huh." The defendant was read his Miranda warnings again and asked if he wanted to talk to the detectives about what he was being charged with. The defendant responded "um-huh". The defendant spoke to the detectives for over an hour.

The defendant filed a motion to suppress the statements he made after invoking his right to counsel.

DISCUSSION
It is undisputed that the defendant was in custody, was given proper Miranda warnings, and voluntarily, knowingly, and intelligently waived his Miranda rights. It is also undisputed that, after speaking to officers for several minutes, the defendant invoked his right to counsel. The court found that the "tenor of the interview was aggressive" and the detective was angry and frustrated when the defendant invoked his right to speak to an attorney. p. 669.

The question on appeal was a narrow one: for the 45 minutes between the two interviews that was not recorded, did the Commonwealth meet its burden of proving beyond a reasonable doubt that it was the defendant and not officers that reinitiated a conversation.

> A defendant's invocation of his or her right to counsel must be scrupulously honored. Once a defendant invokes his or her right to counsel, all questioning must cease. Questioning may not resume until an attorney is obtained for the suspect and is present, or the suspect initiates further communication, exchanges, or conversations with the police. If a defendant does reinitiate further communication, the Commonwealth has the burden of proving beyond a reasonable doubt that subsequent events indicated a voluntary, knowing, and intelligent waiver of the right to have counsel present and of the right to remain silent. p. 671 (internal citations and quotations omitted.)

Repeating the Miranda warnings alone will not be enough to meet this burden.

> The Commonwealth must establish beyond a reasonable doubt that police did not initiate the discussion that led to the defendant rescinding the invocation of the right to counsel. p. 671.

While the motion judge did not specifically find the testimony of the officers "credible" or "not credible," the judge clearly was skeptical of the testimony offered by the officers regarding what happened between the first and second interview. For instance, the judge noted that the statement at the beginning of the recording of the second interview ("We gave you an opportunity to go the bathroom and as we were bringing you to get booked you said you wanted to talk to us again") was contrary to the testimony of every other officer who testified that the defendant was never brought to the booking area.

The judge also did not seem to credit the original detective's testimony about the "general" talk that he and the defendant engaged in for 45 minutes after the first interview ended. The judge found that it was reasonable to infer, based upon the detective's obvious displeasure with the defendant's invocation of his right to counsel, that the purpose of the "general" talk was to persuade the defendant to change his mind about speaking to an

attorney. The judge also noted that the experienced officers involved in this investigation would have understood that the conversation between the defendant and the detective after he invoked his right to counsel would be important, but yet they chose not to record it and not to document it in a report.

> In sum, we discern no error in the judge's determination that the Commonwealth has not proved beyond a reasonable doubt that the events following the defendant's initial invocation of his right to counsel indicate a subsequent voluntary, knowing, and intelligent waiver of his constitutional right to counsel under the Fifth Amendment. pp. 673-674.

The motion to suppress was properly allowed.

CRIMINAL LAW

JUVENILE LAW

PROCEDURAL ISSUES IN THE PROSECUTION OF JUVENILES

JURISDICTION OF JUVENILE COURT

A CASE RESOLVED BY PRE-TRIAL PROBATION IS A PENDING CASE

Commonwealth v. Caitlin C., 100 Mass.App.Ct. 565 (2021).

FACTS
August 27, 2017 - 12-year-old juvenile was cited and charged with unlicensed operation of a motor vehicle.

May 2, 2018 - juvenile placed on pre-trial probation.

July 12, 2018 - the Criminal Justice Reform Act took effect. The act changed the definition of "delinquent child" to:

> A child between 12 and 18 years of age who commits any offense against a law of the commonwealth; provided, however, that such offense shall not include a civil infraction, a violation of any municipal ordinance or town by-law or a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than 6 months or both such fine and imprisonment.

January 25, 2019 - the juvenile violated the terms of her pre-trial probation and the case was returned to the trial list. The child was later put on probation, violated, and committed to DYS.

May 16, 2019 – Lazlo L v. Commonwealth, 482 Mass. 325 (2019) was decided. The SJC found that the definition of "delinquent child" applied to all cases pending as of July 12, 2018.

After Lazlo L. was decided, the juvenile filed a motion to dismiss arguing that her case was pending on July 12, 2018 and it should have been dismissed because she no longer fit the definition of a "delinquent child." The motion was denied and the juvenile appealed.

DISCUSSION
When the juvenile was first charged, she met the applicable definition of "delinquent child." While she was on pre-trial probation, that definition changed. Because she was charged with a misdemeanor punishable by a fine, she did not meet the new definition. The question for the court was whether her case was pending as of July 12, 2018.

The court found that the case was still pending as of July 12, 2018 because she had not been adjudicated delinquent nor had she pled delinquent. She had essentially agreed to abide by certain conditions and, in exchange, the Commonwealth removed the case from the trial list and agreed that, if the child successfully complied with the agreed upon conditions, that the case would be dismissed.

As of July 12, 2018 the Juvenile Court lost all authority to adjudicate the child as a delinquent. This means that, if there was a violation of the terms of the pre-trial probation, the court lacked any authority to do anything about it.

The motion to dismiss should have been allowed.

TRANSFER HEARINGS

AT TRANSFER HEARINGS COURT REQUIRED TO CONSIDER QUANTITY AND QUALITY OF EVIDENCE WHEN DETERMINING PROBABLE CAUSE

Commonwealth v. Irvin I., 100 Mass.App.Ct. 33 (2021).

FACTS
The juvenile, who was three years older than the victim, started dating the victim's mom. When victim was 11 or 12 years old, the juvenile and others came to the apartment to watch a football game. When it ended, everyone went to sleep except the juvenile and the victim. They sat on the couch talking until the victim fell asleep. The juvenile then got on

top of the victim and pulled down her pants and underwear, trying to have sex with her. His penis made contact with her vagina and "just the tip" entered her vagina. The victim complained that it hurt and "kept asking him to stop." The juvenile told her she sounded like her mother. The assault continued for approximately 30 minutes until the defendant got off the victim and she went to her bedroom.

The victim reported the rape in 2018 when she was 17 years old. In April 2019 a delinquency complaint issued charging the juvenile with rape of a child with force. The perpetrator was 20 years old when charges issued. A transfer hearing was held pursuant to MGL c 119 § 72A. The victim was the sole witness at the hearing. The judge did not find probable cause for the rape at the transfer hearing and dismissed the complaint.

The Commonwealth appealed the dismissal of the complaint.

DISCUSSION

MGL c 119 § 72A states:

> If a person commits an offense or violation prior to his eighteenth birthday, and is not apprehended until after his nineteenth birthday, the court, after a hearing, shall determine whether there is probable cause to believe that said person committed the offense charged, and shall, in its discretion, either order that the person be discharged, if satisfied that such discharge is consistent with the protection of the public; or, if the court is of the opinion that the interests of the public require that such person be tried for such offense or violation instead of being discharged, the court shall dismiss the delinquency complaint and cause a criminal complaint to be issued. The case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen and section eighteen of chapter two hundred and seventy-eight. Said hearing shall be held prior to, and separate from, any trial on the merits of the charges alleged.

These hearings are often referred to as "72A hearings" or "transfer hearings." A defendant at a transfer hearing has many of the procedural protections they enjoy at a trial: the rules of evidence apply; the defendant has the right to an attorney; the right to cross examine witnesses; the right to present evidence on their own behalf.

At these hearings the judge makes two determinations. First, the court will determine whether there is probable cause to believe the juvenile committed the crime. If probable cause is found, the court will decide whether the charges should be dismissed or if the juvenile should be tried as an adult. This court in this case never got to the second prong because the judge found no probable cause.

The issue of this appeal is the "precise standard" of probable cause at the transfer hearing. The court found that a transfer hearing serves the same function as a bind-over hearing in the District Court.

> "The probable cause to bind over standard requires a judge to view the case as if it were a trial and to determine whether the Commonwealth has presented sufficient legally competent evidence to send the case to a jury." Paquette v. Commonwealth, 440 Mass. 121, 132 (2003).

The court notes in Footnote 5 that it is not a directed verdict standard, as probable cause does not require proof beyond a reasonable doubt. Instead, it is more than probable cause to arrest, but less than proof beyond a reasonable doubt.

To determine probable cause, the judge employs a two-part inquiry. The first is quantitative. The judge must be satisfied that the admissible evidence, if believed, would meet each of the elements of the crime.

The second is qualitative. The judge must find that the evidence is

> not so incredible, insubstantial, or otherwise of such a quality that no reasonable person could rely on it to conclude that the Commonwealth had met its burden of proof. p. 37 *quoting* Commonwealth v. Reese, 438 Mass. 519, 524 (2003), *quoting* Commonwealth v. Blanchette, 54 Mass.App.Ct. 165, 175 (2002).

The judge is expected to exercise restraint and leave the question of credibility issues to the trier of fact whenever possible.

> Thus, the question is not whether the judge finds the quality of the evidence to be insubstantial, but rather, whether it is of such quality that "no reasonable person could rely on it. p. 38 (citations omitted).

In this case, the Commonwealth presented sufficient evidence to establish the elements of the crime. The testimony of the victim was enough to submit the case to the ultimate fact finder and to allow that fact finder to make the appropriate credibility determinations of the alleged victim.

The case was remanded for the court to determine whether it is in the interests of justice for the complaint to issue and to have the juvenile prosecuted, or if dismissing the charges is consistent with the protection of the public.

COMPETENCY ISSUES AT ARRAIGNMENT

WHEN JUVENILE RAISES COMPETENCY ISSUE PRIOR TO ARRAIGNMENT COURT HAS DISCRETION TO ASSESS THE COMPETENCY OR TO CONTINUE ARRAIGNMENT TO HAVE JUVENILE EVALUATED

Commonwealth v. Carson C., 489 Mass. 54 (2022).

FACTS

The juvenile was in the custody of the Department of Children and Families (DCF) and living at a residential program for children who have developmental difficulties, mental illness, are on the autism spectrum, or otherwise have a history of trauma or abuse. On June 21, 2018 the juvenile (12 years old) was riding on a school van. He struck the driver multiple times with his sandal and then jumped out of the van creating a disturbance on a busy road. On March 10, 2019, the juvenile (now 13 years old) discharged a fire extinguisher several times at the residential program spraying the legs and feet of two staff members.

In March 2019 complaints issued related to both incidents. The juvenile was charged with several offenses including charges of assault and battery by means of a dangers weapon for each incident. The juvenile was scheduled for arraignment on April 1, 2019. At arraignment the juvenile's attorney filed a motion to continue the arraignment so that the child could undergo a competency evaluation. The Commonwealth objected to the continuance. The judge conducted a colloquy of the juvenile. During this colloquy the juvenile said he did not understand the role of the judge or the meaning of the judge's robe, but he was able to provide information about his family, his grade in school, his favorite school subjects and said that he was learning division in math. The judge denied the motion to continue and the juvenile was arraigned. He was released on conditions and returned to the residential program.

Several months later the juvenile was evaluated for competency. The forensic psychologist concluded that the juvenile was incompetent and was unlikely to regain competency in the foreseeable future. On August 30, 2019 the same judge found the juvenile incompetent and dismissed all the charges.

The juvenile then moved for reconsideration of his motion to continue the arraignment and filed a petition for expungement. The Judge denied the motion and this appeal followed.

DISCUSSION

MGL c 123 §15 grants a judge discretion to continue an arraignment of a juvenile or adult defendant who has potential competency issues. Once the judge is put on notice of the concern about the individual's competency, the judge has the discretion to either assess

their competency prior to conducting the arraignment or to order an evaluation of competency by one or more qualified physicians or psychologist.

The court has recognized that juveniles and adult defendants have an interest in not being arraigned because the arraignment triggers an entry onto their court activity record information (CARI) for juveniles and the criminal offender recording information report (CORI) for an adult. Entries on an individual's CARI or CORI have collateral consequences for the individual regardless of the outcome of the case.

> Considering the ramifications of criminal and delinquency records, the interests of a defendant or juvenile in avoiding arraignment are significant. p. 63.

The Commonwealth also has an interest in arraigning a defendant or juvenile if the individual is a flight risk or poses a risk to public safety. The strength of the Commonwealth's interest will vary depending on the facts and circumstances of each case. The judge must balance the interests of the individual and the government's interest when determining whether to continue an arraignment.

> In sum, to determine whether arraignment of an incompetent defendant would violate due process, the key question to be resolved is whether the defendant's interests in avoiding arraignment while incompetent outweigh the Commonwealth's interest in having the defendant arraigned. Where safety and flight concerns cannot be mitigated by the imposition of prearrangement conditions of release, arraignment of an incompetent defendant or juvenile may be justified, notwithstanding the strong individual interests implicated. Where safety concerns and the risk of flight are low, and the defendant or juvenile has no prior criminal record, the calculus might be different, given the individual's interests in avoiding the consequences of a criminal record or CARI. p. 64.

Here, the judge conducted a hearing during which the juvenile demonstrated an ability to accurately recount information about his life and was able to answer questions appropriately.

> [T]he juvenile did not demonstrate any gross intellectual deficits during the colloquy that suggested that he was incompetent. p. 66.

The judge did not abuse their discretion in finding the juvenile competent prior to arraignment. The denial of the motion to continue and the denial of the petition to expunge the arraignment were affirmed.

INTERESTED ADULT RULE

MIRANDA WAIVER VALID AFTER WARNINGS TRANSLATED BY OFFICER TO FATHER WERE DEEMED SUFFICIENTLY COMPREHENSIBLE

Commonwealth v. Fernandez, 487 Mass. 770 (2021).

FACTS

The fourteen-year-old victim and his brother were riding a scooter in their neighborhood. His brother was driving as they approached an intersection and almost collided with Crisostomo Lopes who was coming off the sidewalk and into the street on a bicycle. After the near collision, the brothers continued to ride their scooter for a while until the victim's brother went inside their home. The victim continued riding the scooter but was now wearing his brother's helmet.

An off-duty officer was driving in the area and saw Lopes and the 16-year-old defendant walking along the street with a bicycle, looking like they were "on a mission." The officer pulled over and watched the two as they crouched down at an intersection and appeared to be looking for someone. When the victim scooted past the men, Lopes "darted out" and grabbed the victim. Lopes "beckoned" the defendant who then took a gun from his pocket and shot the victim three or four times at close range. The victim died from his injuries. The off-duty officer followed the defendant and, with the help of other officers, arrested him.

After the defendant was arrested, police called his parents and told them that their son had been arrested for a serious matter. It was obvious that English was not their first language, so the detective arranged to have an officer who spoke Cape Verdean Creole present for the interrogation. This officer was not formally trained as an interpreter.

The interrogation began at 10:56PM. Three officers (two detectives and the Cape Verdean Creole speaker), the defendant and his father were present. An officer read the Miranda warnings in English which were then translated for the benefit of the father. Father and son were told to initial the form as each right was read and they did so.

The Miranda warnings were translated as follows:

> "You have the right to remain silent."
>
> "Anything he says, they can use it against him in court."
>
> "You have the right to an attorney before answering any questions."

When this was read, the father seemed confused and said in Creole, “I…he said if I want to remain silent.” Officers clarified the right to remain silent and then went on to the fourth Miranda right:

> “If you don’t have the money for a lawyer they will give you a lawyer for free.”
>
> “If any questions before a lawyer being here, you can stop at any time, if he wants.”

The father was confused at this point and the officer said, “If he decides to answer any question, before having a lawyer here with you, because, here, if you start, you can stop any time, if you want.” p. 785.

Father and son both indicated that they understood. The following exchange took place between the detective and the defendant:

> Detective: “Okay, so if you understand all those things and you're willing to speak to us without a lawyer present, you just have to sign right here and then the officer will witness it."
>
> Defendant: "I'm all set."
>
> Detective: "You don't want to sign it?"
>
> Defendant: "No."

p. 785. The detective took this to mean he was refusing to sign the form, not invoking either his right to either remain silent or to an attorney.

Police then asked the father to sign the form indicating he understood the Miranda rights and had a meaningful consultation with his son. The father said, in his native language, that he did not speak to his son and then said, in English, that he did not know what had happened. At that point officers allowed the defendant and his parents to meet privately. After 10 minutes, the father opened the door and let the officers back into the room.

After the detective explained that they were “just seeing if either one of you want to talk to us. You don’t want to talk to us, you don’t want to tell us what happened,” the defendant said that nothing happened. p. 786. The detective told the defendant he was just trying to give him a chance to talk. The detective explained that a police officer had seen the shooting, that there was some "pretty good evidence" against the defendant. He told the defendant that the person on the scooter had died and that the defendant could be facing a murder charge and the possibility of life imprisonment. The defendant then said that the person on a bike came at him and tried to hit him. When asked about the gun, the defendant’s response was inaudible and the father said that “he and his son had talked, and

the defendant did not know anything about the shooting." p. 786. During the interview the defendant said he was alone, he did not recognize the victim and that he blacked out when the scooter came toward him. He did not remember holding or firing a gun. The interview ended at 11:25PM.

The defendant was convicted of murder in the first degree and unlawful possession of a firearm. He raised several issues on appeal, including the trial court's denial of his motion to suppress statements. With respect to his statement, the defendant argued that he did not have the opportunity to have a meaningful consultation with an interested adult before the interrogation and that his right to remain silent was not scrupulously honored.

DISCUSSION

Meaningful consultation with an interested adult

> "[J]uveniles between the ages of 14 and 18 must be 'afforded the opportunity to consult with an interested adult' before making a voluntary waiver of their Miranda rights. If such an opportunity is not given, a waiver is invalid unless 'the circumstances…demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile.' While a 'genuine opportunity' must be given, there is no requirement that the opportunity for consultation actually be taken. Crucially, 'the adult who is available to the juvenile must be informed of and understand the juvenile's constitutional rights.'" p. 786-787 (citations omitted).

The defendant here was given the opportunity to consult privately with his parents and did so. It was the defendant and his parents who decided how long to consult. The only real question for the court here was whether the father adequately understood his juvenile son's Miranda rights so that the consultation with his son was a meaningful one.

A valid Miranda warning must convey four substantial pieces of information to the defendant:

1. they have the right to remain silent
2. that anything that they say can be used against them in a court of law
3. that the defendant has a right to the presence of an attorney
4. if the defendant cannot afford an attorney, one will be appointed to them prior to any questioning if the defendant so desires.

The court does not require that particular words be used. What is important, is that the necessary information about the defendant's rights be reasonably conveyed to the defendant.

The court found that the translated Miranda warnings given in this case were adequate. While the warnings about the defendant's right to have a lawyer present during questioning "arguably fell short," the court found that the warnings as a whole properly conveyed the right. The court specifically found that the fact that he had a right to an attorney at no cost before any questioning began was "clearly conveyed." It was also significant that the father was told twice that if his son started answering questions without a lawyer they could stop at any time. "This was enough reasonably to convey that the defendant had the right to have an attorney present during the interview." p. 788.

Invocation of his right to remain silent

The defendant argued that he was invoking his right to remain silent when he said he was "all set" when he was asked to sign the Miranda form.

A defendant must act unambiguously when invoking his or her right to remain silent. When a defendant makes an ambiguous statement that could be an invocation of the right to remain silent, the officers should stop questioning and get clarification about whether the defendant is invoking his or her right to remain silent. The court notes that this practice ensures that the person's right to remain silent is properly protected and minimizes the risk that a statement will be suppressed if the defendant is trying to invoke their right to remain silent.

In this case, the defendant said he was "all set" when he was asked to sign the Miranda form. The detective then asked the clarifying question "you don't want to sign the form?" to which the defendant said "no." This confirmed that he was refusing to sign the form and not invoking his right to remain silent.

The motion to suppress was properly denied.

17-YEAR-OLD SHOULD NOT HAVE BEEN QUESTIONED WITHOUT THE OPPORTUNITY TO CONSULT WITH AN INTERESTED ADULT

Commonwealth v. Stanley S., 100 Mass.App.Ct. 298 (2021).

FACTS

At 11PM on Tuesday, February 14, 2017 a State police trooper got an alert from a LoJack device that a stolen Corolla was in a hotel parking lot. The trooper found the car in the parking lot, drove past it, and then parked nearby. After walking near the car, the trooper saw two people inside and then went back to the cruiser to call for backup. When he did so, the two people got out of the car and ran away.

The trooper followed the suspects in his cruiser and caught them. Both youths were handcuffed and put into separate cruisers. The juvenile was given Miranda warnings and, when asked his name, he provided his first and middle names, indicating his middle name

was his last name. When asked for his date of birth, the juvenile did not respond. The trooper then asked the juvenile about the car and who owned it. The juvenile said he bought it for $100. When the trooper doubted the veracity of that statement, the juvenile admitted to seeing the car and taking it. The juvenile denied knowing where the ignition key was.

After this conversation, the trooper entered the name the juvenile provided into his computer. The search yielded no results. The trooper then searched the juvenile's backpack and found some school papers with his full name. (The search of the backpack was not before the Appeals Court.) When the first and last names were put into the computer, the trooper learned that the juvenile was only 17 years old and that he had been charged with other crimes in the past. The trooper stopped all questioning and told the juvenile he would be summonsed to court. The juvenile was then released.

The juvenile was charged with receiving a stolen motor vehicle. He moved to suppress his statements arguing that the trooper should not have asked any questions of the juvenile without giving the juvenile an opportunity to consult with an interested adult.

DISCUSSION
Police cannot interrogate an individual who is in custody unless the individual has voluntarily, knowingly, and intelligently waived their Miranda rights. In this case, it is clear that the juvenile was subject to custodial interrogation when he was questioned in the backseat of the cruiser. It is also undisputed that the juvenile was read his Miranda rights prior to being questioned. The issue in this case was whether those rights were properly waived.

The Commonwealth has the burden of proving that a defendant in custody has waived his/her rights against self-incrimination before being interrogated. This burden is even heavier when the suspect is a juvenile because MGL c 119 § 53 requires that juveniles be treated as "children in need of aid, encouragement and guidance" by the courts, and not as criminals.

To protect the rights of juveniles, the court has created the "interested adult rule." The purpose of the rule is to protect children who may not appreciate the consequences of their actions when they waive their rights and may not understand the significance and protective functions of the Miranda rights. The "interested adult" rule "requires that prior to waiving constitutional rights, a juvenile be given a 'genuine opportunity' to consult with an 'interested adult.'" p. 301 *quoting* Commonwealth v. Alfonso A., 438 Mass. 372, 384 (2003). In footnote 4, the court reminds us that "[c]hildren under the age of fourteen cannot effectively waive their constitutional rights without actually consulting with an interested adult."

The juvenile here was not given the opportunity to consult with an interested adult before he spoke to the trooper. Statements of juveniles made after a violation of the interested

adult rule will typically be suppressed, but the Commonwealth has the option of making an alternative showing of "circumstances [demonstrating] a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile." Commonwealth v. A Juvenile, 389 Mass 128, 134 (1983). If the Commonwealth makes such a showing, the court can find that the juvenile's waiver of Miranda rights was valid despite the violation of the rule.

In this case, the Commonwealth failed to offer any evidence of such sophistication. The testimony that the juvenile had been charged with crimes in the past, without more information, such as the types of crimes and the outcome of those cases, was not enough.

The Commonwealth argued that the juvenile gave a false name and refused to provide his date of birth to the police and that the police should not be required to comply with the "interested adult rule" in such circumstances. The court was not persuaded.

The court found that, in the right circumstances, a juvenile's evasiveness with law enforcement could be evidence of a "high degree of intelligence, experience, knowledge, or sophistication." The court did not find such circumstances in this case.

The court was not convinced that the juvenile actually gave a false name because he told the trooper his true first and middle names.

> Providing incomplete information is not necessarily the same as providing false information. p. 302.

With respect to his date of birth, the juvenile did not lie to the police. He was specifically told he could remain silent as he sat in the cruiser before he was questioned and that is what he did. The juvenile was not obligated to respond to any questions, including a question about his date of birth.

It was significant that the trooper did not rely on the juvenile's misrepresentation of his name. The trooper did not check the computer database immediately after asking the juvenile his name and date of birth. Instead, the trooper asked the juvenile questions about the car, eliciting the statements about buying it for $100 and the admission to taking it after he found it in the street. The court noted that, if the trooper had immediately searched the database after getting the juvenile's name, the trooper could have explained to the juvenile that the trooper needed the information because if the juvenile was under 18 years old the trooper would need to contact a parent. That did not happen here. At the time the trooper questioned the juvenile, the trooper did not have any reason to believe that the name the juvenile provided was false or inaccurate and his date of birth was not ascertainable.

The court left open the question of whether the appearance of a juvenile might provide some support for the alternative showing necessary to demonstrate the juvenile could waive their Miranda rights without consulting with an interested adult because, in this case,

the Commonwealth did not offer any such facts. The Commonwealth only argued that it was reasonable for the trooper to believe the juvenile was over 17 because the incident occurred at 11PM on a school night.

> The prosecutor never introduced evidence of the juvenile's birthdate, which would have shown how close he was to his eighteenth birthday. The prosecutor never elicited how old the trooper thought the juvenile was, or a description of any characteristics that might have given rise to an inference about the juvenile's age, such as his height, weight, clothing, the deepness of his voice, or whether he had facial hair. Moreover, a juvenile's precocious physical development would not necessarily mean that the juvenile was intellectually capable of waiving the Miranda rights. p. 307.

The juvenile asked the court to establish a "bright line" rule that anytime an officer conducts a custodial interrogation of an individual who, unbeknownst to the officer is under the age of 18, the statement will be suppressed. The court declined the invitation.

> There may be circumstances, on facts not proved here, where evidence including a juvenile's lies or evasive answers about his or her identity may demonstrate a 'high degree of intelligence, experience, knowledge, or sophistication,' excusing police from adherence to the interested adult rule. On the other hand, a juvenile's lies or evasive answers may also evidence immaturity and lack of sophistication. On these facts, we do not reach that question. p. 307.

The statements should have been suppressed.

SUFFICIENCY OF EVIDENCE

YOUTHFUL OFFENDER STATUTE

SIGNIFICANT BRUISES OR ABRASIONS ENOUGH TO ESTABLISH SERIOUS BODILY HARM FOR PURPOSES OF YOUTHFUL OFFENDER STATUTE

Commonwealth v. J.G., 100 Mass.App.Ct. 731 (2022).

FACTS

In January 2017 the 18-year-old victim was at the juvenile's home. The juvenile was the victim's 16-year-old cousin. The victim was there drinking with the juvenile, his brother, and another male. The victim was highly intoxicated and passed out. She woke up in the juvenile's bed. The juvenile asked repeatedly to have sex with the victim, but she refused. She woke up at one point to find the juvenile touching her breast. She told him "no" and pushed his hand away. He then put his mouth on her breast. She told the juvenile to stop and turned her back to him and again lost consciousness. She awoke again to find the

juvenile on top of her, breathing heavily and telling her, "you're so tight." The victim again lost consciousness.

The next morning the victim woke up to find that she was no longer wearing underwear. When asked, the juvenile admitted to putting his mouth on her breast and putting himself "inside her." The victim reported experiencing soreness and discomfort. She had pain in her vaginal and anal areas, a "dull, throbbing pain" when she walked and it "really hurt" when she sat down. p. 732. In the morning she spoke to the brother of the juvenile and told him that the juvenile had raped her. The victim did not seek medical treatment at that time. She reported the rape to law enforcement in August 2018.

The defendant was indicted as a youthful offender on two counts of rape (anal and vaginal) and indecent assault and battery. The defendant moved to dismiss the indictments. The court allowed the motion as to the anal rape and the indecent assault and battery. The court denied the motion to dismiss with respect to the vaginal rape. The defendant argued that this charge should have been dismissed because the Commonwealth failed to prove that the offense involved the infliction or threat of serious bodily harm.

DISCUSSION
MGL c 119 §54, the youthful offender statute, requires the Commonwealth to prove three things:

1. The juvenile was between 14 and 17 years old at the time of the offense
2. The offense is a felony
3. Either:
    a. the juvenile was previously committed to the Department of Youth Services (DYS)
    b. the offense is a specifically enumerated firearm offense, or
    c. "the offense involves the infliction or threat of serious bodily harm."

The Commonwealth in this case proceeded on the theory that the offense involved the infliction of serious bodily harm. The statute does not require that the infliction or threat of serious bodily harm be an element of the offense. It will be enough if the conduct alleged involved the infliction or threat of serious bodily harm.

The statute, MGL c 119 § 54, does not define "serious bodily harm." The juvenile argued that the court should adopt the statutory definition of "serious bodily injury" in other statutes and apply it to § 54. The court and the Legislature have used the terms "serious bodily injury" and "serious bodily harm" interchangeably.

The court declined to adopt any statutory definition of the term. The court first pointed to the fact that none of those statutory definitions existed when § 54 was enacted. The court also noted that the Legislature has had multiple opportunities to add a definition to §54 and

other statutes that have interpreted the phrase "serious bodily harm" or "serious bodily injury" and has chosen not to. This implies that the Legislature only intends a statutory definition of those terms to apply to the specific statute that contains the definition.

The court used the aggravated rape statute as an example. This statute requires proof of serious bodily injury. The court has interpreted this term as it relates to the statute on multiple occasions. Please see the chart below.

Year of decision	injuries the court found were sufficient to prove the element of serious bodily injury
1986	bruises and scrapes on the victim's back
1988	abrasions on the head and pain in the lower abdominal area
1991	a swollen eye, swollen face, and facial bruises

The court found it significant that the legislature had amended the aggravated rape statute twice since those decisions were rendered and did not include a definition of serious bodily injury in the amendment.

> Instead, the Legislature left it to the courts to continue to define what constituted serious bodily injury in the aggravated rape context. Similarly, the Legislature could have, but did not, add a definition of serious bodily harm to § 54's predecessor, G.L. 119 § 61, which the Legislature amended at least four times between 1986 and 1992…or to § 54 itself, which the Legislature amended three times between 1996 and the present…Instead, the Legislature continued to leave to the courts the task of determining what constitutes serious bodily harm for purposes of § 54. pp. 737-738.

Because the Legislature has chosen not to define "serious bodily harm" in § 54, the court will continue to interpret the phrase. The court then turned to the facts of this case.

> The grand jury heard evidence that [the victim] experienced a dull, throbbing pain in her vaginal and anal areas when walking and that "'every time [she]sat down it really, really hurt." From that evidence, as well as [her] statement that the juvenile had said to her, "you're so tight" the grand jury could reasonably infer that she suffered significant bruises, abrasions, or both during the rape. p. 738.

The motion to dismiss was properly denied.

THREATS

JUVENILE KNEW OR SHOULD HAVE KNOWN THAT STATEMENTS HE MADE TO THE ASSISTANT PRINCIPAL THREATENING HIS TEACHER WOULD BE CONVEYED TO THE TEACHER

Commonwealth v. Leonardo L., 100 Mass.App.Ct. 109 (2021).

FACTS

On Wednesday, October 2, 2019, a teacher sent an email to the assistant principal asking for an intervention because a 13-year-old student was "more and more defiant and oppositional" in class. p. 110. The juvenile was called to the assistant principal's office the next day. When the juvenile was told the purpose of the meeting he became angry, saying that the teacher makes him so angry. The assistant principal tried to deescalate the situation; however, the juvenile "postured up in the chair, jammed his hands in his pockets and began rocking back and forth." p. 110. The juvenile became increasingly angry speaking louder and louder. At one point saying that the teacher, "makes me so angry! I want to kill that bitch." p. 110. At this point, the assistant principal ended the conversation.

The incident was reported to the school resource officer (SRO) on Monday, October 7, 2019. The SRO interviewed the teacher who said she felt like the juvenile "truly hates her and wants to kill her." p. 111. The teacher reported the juvenile would sit at his desk, clenching and banging his fists on his desk as she tried to provide instructions to him. The teacher appeared to be "very weary" of the juvenile and was not comfortable being in the classroom with him.

The SRO drafted a report which referenced other incidents in which the juvenile clenched his fists and was breathing heavily in the school yard. The SRO also indicated that, once the juvenile gets to a certain level, de-escalation tactics do not work and "he is very dangerous to staff and other children." p. 110. The principal had also witnessed fist clenching behavior when speaking to the juvenile about disciplinary issues.

The SRO applied for a complaint for the charge of threats. The juvenile moved to dismiss arguing that the information provided to the clerk magistrate did not establish probable cause for the charge. A judge allowed the motion. The Commonwealth appealed.

DISCUSSION

A motion to dismiss is decided on the four corners of the documents submitted at the time charges are applied for. The application must provide "reasonably trustworthy information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense." p. 111 quoting Commonwealth v. Newton N., 478 Mass. 747, 751 (2018). An application failing to establish probable cause will be dismissed.

The model jury instructions for use in the district court set out four elements the Commonwealth must prove to establish a threat:

1. That the defendant expressed an intent to injure a person, or property of another, now or in the future
2. That the defendant intended that their threat be conveyed to a particular person
3. That the injury that was threatened, if carried out, would constitute a crime
4. That the defendant made the threat under circumstances which could reasonably have caused the person to whom it was conveyed to fear that the defendant had both the intention and the ability to carry out the threat.

To discern the juvenile's intent, the court will look at the words used in the context in which they were uttered. In this case, the juvenile was called to the assistant principal's office to discuss concerns his teacher had about his behavior. The juvenile's statement was about that same teacher.

> [T]he juvenile's demeanor, escalating anger and agitation, and his increasingly loud voice during the meeting with the assistant principal, an authority figure with the power to discipline the juvenile, all place the threat in context. p. 112.

Threats do not need to be communicated directly to the target of the threats by the declarant. If a statement is made to a third party who would likely convey the threat to the target, then the fact finder can infer that the declarant intended the threat to be communicated to the target. The court found that the juvenile in this case knew or should have known that the assistant principal would relay the threat to the teacher.

The court agreed that the age of a juvenile is a factor that may be considered when looking at whether the juvenile knew or should have known that the threat would be communicated to the target; however, this is a consideration best left to the fact finder and is not appropriate as a basis for a motion to dismiss.

The target of a threat does not have to personally feel fear or apprehension. It is an objective test. The question is whether the facts and circumstances could reasonably have caused the target to fear that the defendant had both the intent and ability to carry the threat out. Again, the context is important. This was a threat made against a teacher, to an assistant principal, while at a school meeting about the teacher's concerns about that student. The court also found that these facts "cannot be divorced from the context of school violence." p. 114.

> Taken together, the juvenile's demeanor when he made the threat, his escalating behavior in school, and the specific anger he expressed toward his teacher established the requisite probable cause that the juvenile had threatened to commit a crime. p. 114.

The court noted that this was a close case and, in a footnote, questioned the wisdom of the school officials and the district attorney's office pursuing the charges here but recognized that there is a separation of powers that must be observed.

The motion to dismiss was reversed.

INTERPERSONAL VIOLENCE

ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON

STATUTES

MGL c 265 §15A - Assault and battery with a dangerous weapon (ABDW)

- Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished.
- Is a felony
- There are enhanced penalties if any of the following conditions exist:
  - Victim is 60 years of age or older
  - Subsequent offense of ABDW where victim is 60 years of age or older
  - Victim suffers serious bodily injury

    Serious bodily injury is defined by the statute as an injury which results in permanent disfigurement, loss or impairment of a bodily function, limb, or organ, or a substantial risk of death.
  - Victim is pregnant and the defendant knew or had reason to know she was pregnant
  - Defendant knows the victim has a temporary or permanent vacate, restraining or no-contact order in effect
  - Defendant is 18 years of age or older and the victim is under 14 years of age

MGL c 265 § 15B - Assault with a dangerous weapon

- Whoever, by means of a dangerous weapon, commits an assault upon another shall be punished
- Is a felony
- Enhanced penalty if victim is sixty years of age or older

MGL c 265 § 15C - Assault by means of hypodermic syringe or needle; assault and battery by means of hypodermic syringe or needle

(a) Whoever commits an assault upon another, by means of a hypodermic syringe, hypodermic needle, or any instrument adapted for the administration of controlled or other substances by injection, shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 2 ½ years, or by a fine of not more than $1,000, or by both such fine and imprisonment.

(b) Whoever commits an assault and battery upon another, by means of a hypodermic syringe, hypodermic needle, or any instrument adapted for the administration of controlled or other substances by injection, shall be punished by imprisonment in the state prison for not more than 15 years or in the house of correction for not more than 2 ½ years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

MGL c 265 § 15E - Assault and battery by discharge of firearm, large capacity weapon, rifle, shotgun, sawed-off shotgun or machine gun

Whoever commits an assault and battery upon another by discharging a firearm, large capacity weapon, rifle, shotgun, sawed-off shotgun or machine gun, as defined in section 121 of chapter 140, shall be punished by imprisonment in the state prison for not more than 20 years or by imprisonment in the house of correction for not more than 2 ½ years or by a fine of not more than $10,000, or by both such fine and imprisonment.

MGL c 265 §15F - Attempt to commit assault and battery by discharge of firearm, large capacity weapon, rifle, shotgun, sawed-off shotgun or machine gun

Whoever attempts to commit an assault and battery upon another by means of discharging a firearm, large capacity weapon, rifle, shotgun, sawed-off shotgun or machine gun, as defined in section 121 of chapter 140, shall be punished by imprisonment in the state prison for not more than 15 years or by imprisonment in the house of correction for not more than 2 ½ years or by a fine of not more than $10,000, or by both such fine and imprisonment.

ABDW CASE

PLASTIC CHAIR WAS A DANGEROUS WEAPON WHEN IT STRUCK VICTIM WITH ENOUGH FORCE TO BREAK THE SKIN

Commonwealth v. Gebo, 489 Mass. 757 (2022).

FACTS

The victim and the defendant had been married for 56 years in April 2017 when this incident occurred. The husband (76 years old) was watching television when his wife walked out onto the breezeway. After hearing a loud noise on the deck, the husband went out to investigate and discovered that his wife had thrown one of his shoes onto the deck. The wife claimed that the shoe smelled of dog feces. An argument about the cleanliness of the deck erupted, and when the husband bent down to pick up the shoe, his wife picked up a plastic chair and struck him in the wrist with it. The wife tried to strike him with the chair a second time; however, he was able to grab the chair and push it away.

The victim went into the kitchen and was followed by his wife. The wife picked up a ladle and struck the victim on the back of his head. The victim lost consciousness briefly and awoke lying on the kitchen floor. His wife told him he had suffered a heart attack.

At the hospital, the victim was treated for a 1-inch X 2 ½-inch gash on his wrist as well as injuries to his head. At the time of the attack the victim was taking anticoagulant medication so both injuries had bled profusely. He was ultimately released from the hospital after receiving medical attention.

The wife was charged with two counts of assault and battery by means of a dangerous weapon on a person sixty years of age or older. After a jury trial, she was acquitted of the charge involving the ladle, but convicted of the charge involving the plastic chair. The defendant appealed arguing that the court erroneously denied her request to waive the jury trial and that the facts were insufficient to prove that the plastic chair was a dangerous weapon.

DISCUSSION

For purposes of this statute, an item can be a dangerous weapon per se, such as a firearm, or it can be dangerous as used.

An object may be dangerous as used even if ordinarily it is innocuous.

The model jury instructions for use in the district courts provide the following instruction to be given in cases where the item used was not inherently dangerous:

> An item that is normally used for innocent purposes can become a dangerous weapon if it is used in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person.

In this case, the jury heard testimony that the defendant swung a plastic chair at the victim, striking him in the left arm with enough force to break the skin. The chair left a 1-inch X 2 ½ inch abrasion that bled profusely and required medical attention. It is no defense that the victim bled more profusely because of the anticoagulant medication he was taking because it "does not detract from the manner in which the defendant used the chair." The jury also heard evidence that the defendant tried to strike her husband with the chair a second time.

> Reviewing the evidence in the light most favorable to the Commonwealth, the jury reasonably could have concluded that the chair, as used, satisfied the requirement to be a dangerous weapon within the meaning of G.L. c 265 §15A.

For this reason and because the judge did not abuse his discretion in rejecting the defendant's request to waive his right to a jury trial, the judgment was affirmed.

HARASSMENT PREVENTION ORDERS

DIFFERENT ACTIONS OF THE DEFENDANT THAT OCCURRED IN A VERY SHORT PERIOD OF TIME WITH NO INTERRUPTION WERE ONE CONTINUOUS ACT AND NOT THREE DISTINCT ACTS

Orla O. v. Patience P., 100 Mass.App.Ct. 126 (2021).

FACTS

On August 6, 2019, the defendant and two friends confronted the plaintiff at a mall. The group told the plaintiff to go to the parking lot so they could fight. The plaintiff refused and tried to walk away. The group then started following the plaintiff who went into a family bathroom to get away from them.

When the plaintiff tried to leave the bathroom, she found the group waiting for her outside the door. They pushed her back into the bathroom, went into the bathroom with her, and locked the door. The group then kicked and punched the plaintiff. The defendant "smashed" the plaintiff's head into the wall causing her to bleed. A mall employee walked into the bathroom and called security. As the group was being removed, the defendant told the plaintiff that she would stab her if she told anyone what happened.

The plaintiff obtained an ex parte temporary harassment prevention order (HPO) pursuant to MGL c 258E. The court extended the HPO after a hearing. The defendant appealed arguing that her actions constituted one singular act and not three acts as required by the statute.

DISCUSSION
MGL c 258E §1 defines "harassment" in pertinent part as

> [three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property.

The issue here is whether the conduct of the defendant constituted three or more distinct acts or one continuous action. The court identified two critical principles to consider in its analysis:

1. one continuous act cannot be divided into multiple discrete acts in order to satisfy the requirement of G.L. c 258E § 1. p. 128 *quoting* F.K. v. S.C., 481 Mass, 325, 333 (2019).

2. harassing conduct that occurs "within a very short period of time' has been held to constitute one continuous act of harassment in certain circumstances." p. 128 *quoting* Smith v. Mastalerz, 467 Mass. 1001 (2014).

In this case, the entire incident occurred within a very short period of time, approximately 10 – 11 minutes. The conduct was also continuous in that there was no "temporal or material pause or interruption." p. 128.

The defendant arguably engaged in three different types of conduct: she pursued the plaintiff through the mall, she punched and "smashed" the victim's head against the wall in the bathroom, and she threatened her. The court was not persuaded that different types of conduct should be considered separate acts for purposes of MGL c 258E §1 and found that "the effort to separate conduct by the type of act creates an arbitrary and unconvincing distinction in the application of G.L. c. 258E." p. 129.

> Accordingly, the defendant's "conduct, troubling and offensive as it was, failed to satisfy the threshold requirement of G.L. c. 258E §1." p. 128 *quoting* F.K. at 334.

The harassment prevention order must be vacated.

ABUSE PREVENTION ORDERS

A REVIEW OF 209A ORDERS

> MGL c 209A provides a statutory mechanism by which victims of family or household abuse can enlist the aid of the State to prevent further abuse through orders prohibiting a defendant from abusing or contacting the victim, or requiring a defendant to stay away from the victim's home or workplace. MacDonald v. Caruso, 467 Mass. 382, 385 (2014) (internal citations and quotations omitted).

Abuse prevention orders, AKA restraining orders can require the defendant to do, or not do several things including:

- Have no contact with the plaintiff and minor children listed in the order
- To not abuse the plaintiff and minor children listed in the order
- To vacate and remain away from the plaintiff's home and workplace
- To provide temporary support to the plaintiff and minor children listed in the order
- To surrender any firearms, licenses to carry, and firearm identification cards

Abuse prevention orders are in writing and specify what the defendant is ordered to do or not to do. Abuse prevention orders can be obtained from the District Court, the Boston Municipal Court, the Superior Court, or the Probate and Family Court. Orders from the Probate and Family Court supersede any contradictory provisions of an initial 209A order.

Abuse prevention orders themselves are civil in nature. Violations of the orders may be criminal.

> General Laws c. 209A makes it a criminal offense to violate an order to (1) surrender firearms, (2) vacate or remain away from the household, or (3) refrain from abuse or contact. Violations of any of the other provisions of a c. 209A order are addressed through complaints for civil or criminal contempt. Commonwealth v. Dufresne, 489 Mass. 195, 200 FN 4 (2022) (internal citations omitted).

To prove a violation of a 209A order, the Commonwealth must prove three things:

1. There was a valid order in effect on the date of the alleged violation
2. The defendant violated the order
3. The defendant had knowledge of the order.

209A CASE

THERE IS NO RIGHT TO COUNSEL AT A 209A HEARING

Commonwealth v. Dufresne, 489 Mass 195 (2022).

FACTS

The victim and the defendant dated for nearly four years while they lived in separate rooms at the same rooming house. At the end of the relationship, the victim obtained a restraining order pursuant to MGL c. 209A against the defendant. The order required the defendant to have no contact with the victim, to not abuse the victim, and to vacate and stay away from the rooming house.

Less than three weeks later the defendant approached another resident as they stood outside the rooming house. After conversing for a couple of minutes, the defendant asked to enter the building so he could buy cigarettes from the resident. The resident refused the request, pointing out that there was a 209A order against the defendant. The defendant then left. The resident told the victim what happened. The victim reported the incident to the police.

The defendant was arrested and charged with violating a restraining order in violation of MGL c 209A § 7. The defendant moved to dismiss the complaint. After that motion was denied, he was convicted by a jury. The defendant appeals that conviction arguing that the statute is unconstitutional because it violates the separation of powers and that it is unconstitutional to face criminal punishment for violating a court order that was issued after a hearing where he was not afforded the right to a court appointed attorney.

DISCUSSION

Separation of powers

The defendant argued that MGL c 209A § 7 is unconstitutional because it violates the principle of the separation of powers. Article 30 of the Massachusetts Declaration of Rights mandates that the three branches of government (the legislative, the judiciary, and the executive) cannot interfere with the functions of each other. In this scenario, the judiciary makes the 209A order and the executive enforces it.

> [The defendant] asserts that, by authorizing the executive branch to prosecute violations of abuse prevention orders, the statute strips the judiciary of its inherent power to enforce judicial orders, thereby violating the constitutionally required separation of powers. p. 200.

The court disagreed. The separation of powers is only an issue when one of the branches interferes with another. Actions of the Legislature and the executive branch that are consistent with a court order do not interfere with the judiciary function, they support it.

> We have held that legislative and executive action do not interfere with the function of the judiciary when such action is consistent with a court order…Indeed, such actions clearly do not 'restrict' or 'abolish' the power of the judiciary; rather, such actions give effect to the judiciary's exercise of its own power. p. 201 (citations omitted.)

Right to counsel

The defendant also argued that the Fifth, Sixth, and Fourteenth Amendments and related articles of the Massachusetts Declaration of Rights guarantee defendants in 209A civil proceedings the constitutional right to counsel in those proceedings if they are later to be prosecuted criminally for a violation of those orders.

His argument was that the 209A hearing leads to the issuance of the 209A order. A defendant who is later criminally charged for violating that order clearly has the right to counsel during all critical stages of the criminal prosecution. The defendant's position was that, because the criminal prosecution stems from the civil 209A order, the defendant has the right to counsel at the 209A hearing.

The Sixth Amendment and art. 12 both hold that criminal defendants have the right to counsel at all "critical states of the prosecution." The right to counsel is afforded in the criminal setting when the proceedings "do or could directly lead to 'actual imprisonment.'" p. 203 *quoting* Scott v. Illinois, 440 US. 367, 373, (1979). There was no constitutional violation in this scenario because the c. 209A hearing is a civil proceeding, not criminal. The only question before the court was whether to issue a civil order requiring the defendant to do or not to do certain things. The court has no authority under c 209A to imprison the defendant at that hearing so there is no right to counsel.

The court also pointed out that there is no violation of the right to counsel when a defendant is unrepresented at a "distinct, constitutionally permissible" criminal proceeding that later serves as a predicate offense in a later, entirely different criminal proceeding.

For example, the United States Supreme Court has held that there was no violation of the Sixth Amendment when the defendant was unrepresented and had no right to counsel in a criminal operating under the influence (OUI) case that was used as a predicate offense for the prosecution of a subsequent offense. In this example, the defendant did not face the possibility of incarceration for the original OUI charge so he was not entitled to a court appointed attorney in that proceeding.

> Each proceeding arises from wholly different alleged conduct, and so the latter proceeding "do[es] not change the penalty [or other consequence] imposed for the earlier" conduct. p. 205 *quoting* Nichols v. United States, 511 U.S. 738, 747 (1994).

In footnote 8 the court mentions that Massachusetts statutes contemplate this type of relationship in the criminal context where some statutes allow for first offenses to be punishable by a fine and thus not entitling the defendant to an attorney, yet a subsequent offense is punishable by incarceration.

The court found no reason this same philosophy should not apply when the initial proceedings is civil in nature. The 209A order is issued based on conduct of the defendant before the civil proceeding. Any punishment the defendant faces for a criminal violation of the order is based upon action that occurs after the civil proceeding.

The court found that the right to counsel may also be guaranteed by the Fourteenth Amendment in civil proceedings "where necessary to satisfy the requirements of procedural due process." p. 203. For example, parties in civil proceedings dealing with the termination of parental rights have a right to counsel. In footnote 9 the court left open the possibility that the right to counsel may apply in 209A hearings where parental rights are at issue. The court did not address the issue in this case because there was no evidence or argument to suggest that the parties shared any children.

The judgment was affirmed.

SEXUAL ASSAULT

TESTIMONY OF SEXUAL ASSAULT VICTIM

CREDIBLE TESTIMONY OF VICTIM IS ENOUGH TO SUPPORT A CONVICTION OF SEXUAL ASSAULT CHARGES

Commonwealth v. Santos, 100 Mass.App.Ct. 1 (2021).

FACTS

The defendant was charged with four sexual assault crimes against the victim. After trial he was found not guilty of two offenses and guilty of rape of a child and indecent assault and battery on a child under the age of fourteen.

With respect to the two convictions, the victim testified that they occurred when she was 13 years old. The rape occurred when the defendant entered her room at night and put his penis in her mouth. The indecent assault and battery occurred when the defendant grabbed the victim's hand and put it in his pants forcing her to touch his penis while they were watching a movie in the living room.

The only evidence at trial was the testimony of the victim. The defendant appeals the convictions arguing that there was insufficient evidence to support the convictions because

there was no medical, forensic, or physical evidence and no expert testimony offered to corroborate the victim's testimony.

> He argues that "there was absolutely no conclusive evidence presented at trial that suggested the [d]efendant's guilt beyond a reasonable doubt." p. 3.

DISCUSSION
Historically there was a societal tendency not to believe sexual assault victims.

> The idea that long infected our legal system, that the victim's testimony in sexual assault and rape cases is less credible than the testimony of victims in cases involving other types of crimes – an idea that reflected nothing more than sexism and an unwillingness on the part of our courts to treat sexual crimes as the gravely serious matter that they are – has been rejected both by statute and by common law. p. 3.

The court took the opportunity in this case to affirmatively state that a victim's testimony in a sexual assault case, like any other criminal case, is enough to convict a defendant.

> Surprisingly, the Commonwealth cites no case, nor have we found one, that simply states what we now hold: The sworn testimony of the victim of a sexual assault, including rape, is evidence of the facts asserted. The testifying victim <u>is</u> a witness. We reject the defendant's contention that corroborative, extrinsic, or forensic evidence, or expert or third-party witness testimony, is required to support a conviction of rape or sexual assault where the victim testified as a witness at the trial. Of course such evidence, if properly admitted, may corroborate the victim's testimony, but it is not required to sustain a conviction. p. 3 (emphasis in the original.)

The judgments were affirmed.

AGGRAVATED RAPE AS PREDICATE OFFENSE FOR FELONY-MURDER

<u>JURY MAY INFER A LACK OF CONSENT WHEN VICTIM SEVERELY INJURED AND KILLED PROXIMATE TO HAVING SEX</u>

<u>Commonwealth v. Paige</u>, 488 Mass. 677 (2021).

FACTS
The victim left a party in Boston in 1987 with the defendant and his brother. As they were leaving, someone else offered the victim a ride; however, the defendant forcefully said that the victim was going with his brother and him. The defendant did not know the victim. Despite some hesitancy, the victim went with the defendant and his brother and they drove her to Georgia Street.

The next day, construction workers found the victim's body at an indoor work site adjacent to Georgia Street. This was a worksite where the defendant's brother and other family members worked. The victim's body was lying face up, her face was severely injured, and her clothing was down around her ankles. The cause of death was blunt force injuries to the head and strangulation. The shovel used to beat her was found beside her. Sperm found in the victim's vagina had been deposited within 24 hours of her death. No sperm was detected in her underwear.

The case remained unsolved until additional DNA testing was done in 2013. At that time, the sperm was a match to the defendant's genetic profile. The defendant was indicted and convicted of felony-murder in the first degree with aggravated rape as the predicate offense.

The defendant appeals arguing, among other things, that there was insufficient evidence to support the felony-murder conviction.

DISCUSSION

> To prove felony-murder in the first degree with a predicate felony of aggravated rape, the Commonwealth had to prove that
>
> > (1) the defendant committed or attempted to commit aggravated rape;
> > (2) the death was caused by an act of the defendant in the commission or attempted commission of the aggravated rape;
> > (3) the act that caused the death occurred during the commission or attempted commission of the aggravated rape; and
> > (4) the defendant intended to kill the victim, intended to cause grievous bodily harm to the victim or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. p. 679.

To prove the first element, the Commonwealth must prove three things:

1. The defendant had sex with the victim
2. The defendant either compelled the victim to submit by force and against her will or by threat of bodily injury
3. The sex either resulted in or was committed with acts resulting in serious bodily injury.

Evidence of sexual intercourse alongside a homicide will not, without more, be enough to prove felony murder. The issue is, what more is needed? The court expressed concerns about its prior decision in a factually similar case, Commonwealth v. Scesny, 472 Mass. 185 (2015).

The victim in Scesny died by strangulation and also suffered other injuries, including having two teeth broken off, she had blood in her mouth and various other injuries to other parts of her body. The court at that time concluded that there was not enough evidence of aggravated rape. The defendant was convicted of first-degree murder on theories of deliberate premeditation and extreme atrocity or cruelty.

> With respect to the charge of aggravated rape, we reasoned that the Commonwealth had not proved the necessary lack of consent because the victim's clothing had not been ripped, her genitalia and anus had not been injured, and the victim may have been acting as a prostitute the evening she was killed. We thus concluded that "there was no evidence favoring the inference that the defendant raped the victim before killing her over the inference that he had consensual sex with the victim and then killed her." pp. 680-681 *quoting* Scesny at 193-194 (internal citations omitted).

The court took the opportunity in this case to clarify its position on what would be needed to properly infer a lack of consent.

> We now conclude, however, that where there is evidence that the defendant severely injured and killed the victim proximate to having sex with the victim, the jury may infer that the victim did not consent to the sexual intercourse. p. 681.

In this case, there was evidence that the defendant did not know the victim, that he and his brother drove the victim to Georgia Street which is adjacent to where her body was found, the body was found at a construction site where members of the defendant's family worked, the defendant's sperm was in the victim's vagina and had been deposited there within 24 hours of her death and the defendant denied having sex with the victim. The jury could also have inferred that the victim never got up after having sex with the defendant based upon the fact that there was no sperm detected in her underwear. The jury also had evidence that the victim was severely injured and died from blunt force injuries to her head and strangulation. These facts are sufficient to satisfy the elements of felony-murder.

The judgment was affirmed.

STRANGULATION

STRANGULATION IS A GENERAL INTENT CRIME

Commonwealth v. Lahens, 100 Mass.App.Ct. 310 (2021).

FACTS

The defendant had a three-bedroom home in Brockton. He rented out two of the bedrooms, but only to women. Each bedroom has a lock and the defendant kept a spare key for each room. From June 2017 to January 2018 the victim rented a bedroom from the defendant. A few weeks after moving in, the victim heard the defendant call out the other tenant's name. After hearing no response, the victim heard a key being placed into her locked bedroom door. The victim said, "Don't you even dare." The door was not opened. The victim subsequently installed a second lock on her door to prevent the defendant from entering her room without permission.

Throughout the tenancy the defendant engaged in sexually charged behavior that made the victim feel uncomfortable. When speaking he would touch her hands and back. He sometimes tried to engage in conversation with the victim while he was wearing a "Speedo-style undergarment that exposed the outline of his genitals." p. 311. He made comments to her about not being "with" a woman in two years and asked her if she "could help him out." He asked her to get her friends to sleep with him. When the victim would shower the defendant would regularly be in the hallway which the victim found "creepy."

The defendant also sent numerous unwanted and inappropriate text messages to her. In December 2017, the defendant sent such texts on December 9th and 16th which the victim ignored. On December 17th, the following text exchange occurred:

Defendant: Are you a Nun? Or is it just a personal issue with me that you have? God won[']t forget your kindness towards me that I promise.

Victim: First of all [I] am a MARRIED WOMAN you are going to stop sending me these kind of messages and acting the way you do. . . . [I]f you continue [I] might have to go to the police and tell them you are harassing me sexually. (emphasis in original). p. 312.

The defendant texted an apology on December 20, 2017 but continued texting the victim over the following weeks.

The victim returned to the house the first week of January and told the defendant she was going to move out. They argued and the defendant forced himself into her bedroom. The victim called 911 but hung up before talking to the police. The defendant left the room but returned to put a note under the door that said:

> Your attitude I cannot stand. But; your eyes the way you look at me drains my spirit and say otherwise than what comes out of your lips. The warmth of your body I can feel when I lay down next to me. I can no longer take this torture; I am sorry. FN 4.

The victim left the house that day and did not return until January 20, 2018. During the time she was gone, the victim received several texts from the defendant asking her for help and forgiveness and asking if she wanted to rent a different room.

On January 21, 2018, the victim woke up and took a shower between noon and 1PM. When she went into the bathroom the defendant was in his bedroom and the radio in the living room was on. When she shut off the shower, the music became noticeably louder. When she opened the bathroom door, the defendant was standing near the door dressed only in a bathrobe. He grabbed the victim, forced her into his bedroom, and locked the door. He shoved the victim onto his bed, pinning her down by her throat. The victim struggled against him and pleaded for him to let her go. The victim had difficulty breathing. The defendant got on top of the victim in a "sexual position." During the struggle, the defendant put his hands "all over" the victim, including her breasts, and the victim's vagina became exposed.

After approximately two minutes the defendant asked her a question to which the victim responded that she had a medical condition and that she could not breathe. The defendant loosened the pressure he had on her neck and the victim was able to break free. She tried to scream out the window for help, but the defendant put his hand over her mouth and pulled her away from the window. The window was broken during the struggle. The victim was able to bite the defendant's hand at which point he released her. She was then able to escape and call 911.
Upon arrival, officers heard "extremely loud music" coming from the house. They described the victim as "distraught, hysterical [and] hyperventilating." p. 313. Officers observed the defendant's wrist to have a bloody bite mark.

The defendant was arrested and ultimately convicted of assault with intent to rape, strangulation, indecent assault and battery, and assault and battery. He appealed the convictions of assault with intent to rape, strangulation, and indecent assault and battery alleging that the Commonwealth did not prove the element of intent for those charges.

DISCUSSION
Most crimes are general intent crimes. "General intent requires proof that a defendant intended to perform a criminal act." p. 316. A specific intent crime requires proof that that the defendant intended the act and also intended certain consequences of the act. To properly consider whether the Commonwealth had met its burden of proof, the court must first determine whether the crimes are general or specific intent crimes. Each crime must be evaluated independently.

Assault with intent to rape

Assault with intent to rape requires the Commonwealth to prove that the defendant assaulted the victim and that they did so with the intent to rape the victim. This makes assault with intent to rape a specific intent crime.

The court found there was sufficient evidence to prove the defendant's intent to rape in this case. In the months prior to the assault the defendant had sent numerous texts with sexual undertones to the victim. After a prior physical assault he left a note for the victim describing the warmth of her body and commenting on her eyes and lips. "In addition, the attack itself was plainly sexual in nature." p. 315. It occurred as the victim left the bathroom after taking a shower when she was only covered with a towel and a bathrobe. During the assault she was physically forced into his bedroom and shoved onto his bed where he placed his body on hers in a "sexual position." As the victim struggled the defendant's hands were all over the victim's body, including her breasts and her vagina became exposed.

> In sum, the defendant's prior conspicuous sexual advances coupled with the sexual nature of the assault was sufficient evidence of intent to rape. p. 315.

Strangulation

The model jury instructions for use in the district court set forth three elements for the crime of strangulation:

1. That the defendant applied substantial pressure on the throat or neck of the victim
2. That the defendant interfered with the normal breathing or circulation of blood of the victim without having any right or excuse for doing so
3. The defendant did so intentionally

The court clarified in this case that strangulation is a general intent crime.

> Consequently, to prove the crime of strangulation, the Commonwealth need not prove that a defendant specifically intended to interfere with a victim's normal breathing; the intentional commission of an act that results in said interference is all that the statute requires. p. 318.

The defendant's intent in this case was evidenced by the fact that the defendant pinned the victim to the bed by her neck and she told him she could not breathe. This was corroborated by evidence that her neck was tender and swollen after the incident and she was diagnosed with a muscle strain. These facts are enough to show that his actions were intentional and not an accident.

> [T]he intentional act of restraining [the victim] by her neck on the bed, even if specifically intended for a purpose other than strangulation, is sufficient to satisfy the general intent requirement of § 15D(b). p. 319.

Indecent assault and battery

The model jury instructions for use in the district court set forth three elements for the crime of indecent assault and battery:

1. That the defendant committed an assault and battery on the alleged victim
2. That the assault and battery was indecent
3. That the victim did not consent to the touching.

> An indecent act is commonly understood as measured by common understanding and practices. It is one that is fundamentally offensive to contemporary standards of decency. An assault and battery may be "indecent" if it involves touching portions of the anatomy commonly thought private. Model jury instructions for use in the district court 6.500.

Indecent assault and battery is a general intent crime because the statute does not require proof that the defendant intended the touching to be indecent.

The defendant here claimed there was no evidence to show that he intentionally touched the victim's breasts. The court found sufficient evidence to show that the indecent touching was not accidental. The numerous unwanted sexual advances prior to the assault showed the defendant had a desire to have sexual relations with the victim. The defendant lingered outside the bathroom as the victim showered and the physical struggle lasted for at least two minutes during which his hands were all over the victim's body. These facts, combined with statements the defendant made during the struggle, repeatedly saying, "tell me who is the man now" was sufficient to establish that the defendant intended to commit the indecent touching. p. 320.

The judgments were affirmed.

INDECENT ASSAULT AND BATTERY BY MANDATED REPORTER

DEFENDANT WHO IS NOT WORKING IN THEIR CAPACITY AS A MANDATED REPORTER AT THE TIME OF ASSAULT CANNOT BE CONVICTED OF INDECENT ASSAULT AND BATTERY BY A MANDATED REPORTER

Commonwealth v. Kozubal, 488 Mass. 575 (2021).

FACTS

In 2003 the defendant was hired as a faculty member at a private school for grades pre-K through 12th grade. His duties included supporting technology for programs at the school's observatory. In 2016 the defendant was working in a part-time capacity in various afterschool programs, outreach programs, and occasionally worked as a substitute teacher in the middle school. The defendant also taught at the school's summer camp and

instructed the afterschool amateur radio club that was open to students, faculty, and community members.

The defendant met the 13-year-old victim in 2016 when she attended a radio course at the observatory with her father and stepmother. After the program, the defendant began exchanging text messages with all of them and began a polyamorous sexual relationship with the stepmother. This relationship ended in June 2016.

The defendant texted with the victim individually and sometimes instructed her to delete the messages they exchanged. On June 24, 2016, the victim met the defendant at the school to prepare for a radio event that was going to happen on June 25 and 26. The defendant kissed the victim and told her he was "not supposed to do that" and could "get in big trouble" and told her not to tell anyone. Later that same day, he kissed her again and touched her breasts.

During the radio event on June 25 and 26 the defendant kissed the victim at least three times and touched her breasts both over and under her clothing.

On July 6, 2016, the defendant met the victim at her home. In the basement of the home the defendant kissed the victim and touched her vagina. They left the home and walked to a park. The victim ignored her father when he tried to contact her. Upon returning home, the victim's parents were angry and took her cell phone. The stepmother discovered the text messages between the defendant and the victim and questioned the victim about the relationship. On July 16th the victim told her parents that the defendant had kissed her. The police were notified on July 18, 2016.

The defendant was convicted of multiple charges of indecent assault and battery on a person under the age of fourteen by a mandated reporter MGL c 265 §13B ½ and indecent assault and battery on a person under the age of fourteen MGL c 265 §13B. He appeals on several grounds, including arguing that the jury instruction regarding the definition of a mandated reporter was erroneous.

DISCUSSION

MGL c 265 § 13B ½ states, in relevant part,

> Whoever commits an indecent assault and battery on a child under the age of 14 and…at the time of commission of said indecent assault and battery, the defendant was a mandated reporter… shall be punished.

MGL c 119 § 21 defines "mandated reporter" in relevant part:

> A person who is a public or private school teacher, educational administrator...child care worker…person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under 15D that provides child care or residential services to children…

The defendant argued that the Commonwealth had to prove that he was employed by a facility that was funded by the Commonwealth or licensed. The court disagreed, finding that the words "funded by the Commonwealth or licensed" only applies to "home or program."

There was also a question in this case as to the defendant's exact job title – was he a teacher or not. The court determined that the exact title of his job did not matter because it was clear from the evidence that he worked at an afterschool program.

> As an adult employee working at an afterschool program, there is no question the defendant was part of the class of adults who are able to observe and detect signs of child abuse or neglect. p. 594.

For this reason, the court found that the defendant fit the definition of "mandated reporter." However, it is not enough to prove that a defendant was employed as a mandated reporter. To be convicted of the offense, the Commonwealth must prove that the defendant was acting in the capacity of a mandated reporter when the offense occurs. If a mandated reporter commits such acts outside the scope of their employment, the appropriate charge is MGL c 265 § 13B – indecent assault and battery on a child under the age of 14.

In this case the jury could reasonably have found that the defendant was "a person who is a public or private schoolteacher or a person paid to care for or work with a child in any public or private facility" for the events that occurred at the school observatory. p. 594. The same cannot be said for the events that occurred on July 6, 2016 at the victim's house.

His convictions for indecent A&B for the events on June 24 and 25 were affirmed. The court reduced the convictions associated with July 6, 2016 to indecent A&B on a child under the age of 14. Those charges were remanded for resentencing.

RAPE

RAPE CONVICTION AFFIRMED BECAUSE JURY COULD HAVE FOUND DEFENDANT HAD USED ACTUAL FORCE OR CONSTRUCTIVE FORCE

Commonwealth v. Gibson, 488 Mass. 854 (2022)

FACTS

Victim was at a hotel in Boston on a business trip and went to the hotel restaurant for soup and a drink. She was joined at the restaurant by co-workers, including the defendant. The victim had another drink and then the group went to a different bar where the victim had a third drink.

The victim started to feel dizzy and nauseous. She told her coworkers that she was going back to her room. The defendant offered to help her. When they arrived at her hotel room, the victim vomited in the bathroom. She then changed and went to bed. The defendant left the room to use the bathroom in his own room. He later came back to the victim's room using the key he had taken with him when he left her room originally. He had taken the key without the victim's consent.

During this time, the defendant was sending texts to a coworker about the victim's condition. He texted that the victim was puking again and did not want him to leave; however, he was actually back in his own room when he sent those texts. The coworker wanted to check on the victim and asked the defendant for the victim's room number. The defendant met the coworker at the victim's room where the coworker woke the victim up to ask if she was OK. She responded affirmatively and then the coworker and the defendant left to smoke a cigarette.

After leaving the coworker, the defendant again entered the victim's room with the key he had taken earlier. The victim woke up to see the defendant standing at the foot of her bed. The defendant pulled the blanket off her and got on top of her. He inserted his fingers and his penis into her vagina. Victim testified that she did not consent to these acts and that she was scared.

The victim tried to move away from him. The defendant stopped momentarily, but then again tried to insert his fingers into her vagina. The victim testified that she could not do anything physically to stop him because the defendant was considerably bigger and heavier than she was and was on top of her. The victim did not tell the defendant to stop because "she felt weak, incoherent, and dizzy, and hardly knew what was going on." p. 856.

During this time the defendant also took 16 photos of the victim. The victim testified that she did not know the pictures were being taken nor did she consent to them being taken. In some of the pictures her eyes are closed and her face is turned away from the camera.

"None of the photographs shows [the victim's] hands or body engaged with the defendant." p. 856.

The victim went to the hospital and was examined by a sexual assault nurse examiner. A toxicology report estimated the victim's blood alcohol content ("BAC") at the time of the assault to be between .08 and .20.

The defendant was convicted of penile and digital rape and photographing an unsuspecting nude or partially nude person. The defendant appealed the convictions alleging that the Commonwealth failed to prove the elements of the offenses.

DISCUSSION

Rape

> To prove the defendant guilty of rape, the Commonwealth had to show that the defendant compelled the victim to submit to sexual intercourse by force or threat of force and against the victim's will. p. 857.

The defendant argued that the Commonwealth failed to prove force.

> Force can be actual physical force, nonphysical constructive force, or threat of force. In situations where a victim lacks the capacity to consent, the Commonwealth '" has no obligation to prove the use of force by the defendant beyond what is required for the act of penetration." Rather, in addition to the act of penetration, the Commonwealth must prove that the defendant knew or reasonably should have known that the victim lacked the capacity to consent. p. 857 (citations omitted.)

The jury here heard enough evidence to prove actual force. The defendant entered the victim's room while she was sleeping, uninvited, using a key he had no permission to have. After pulling the blankets off her, he took her clothes off and lay on top of her restricting her ability to resist him. He penetrated her and continued to do so after she moved away.

The jury could have also found force based upon the digital and penile penetration coupled with the victim's lack of capacity to consent due to her level of intoxication. Evidence of her intoxication was the BAC level, the fact that she vomited, she testified she felt incoherent and "hardly knew what was going on." p. 856. The Commonwealth proved that the defendant knew or should have known the victim could not consent based upon the texts he sent lying about where he was, the fact that he accompanied her to her room and saw her vomit, the texts he sent to the coworker about the victim's level of intoxication, checking on the victim with the coworker, entering her room without permission with a key he took, and taking pictures of her while she was unconscious.

Photographing an unsuspecting nude person

To prove a violation of MGL c 272 §105(b), the Commonwealth must prove five elements:

1. The defendant willfully photographed, videotaped, or electronically surveilled a person
2. The subject was nude or partially nude
3. The defendant did so with the intent to secretly conduct or hide his photographing activity
4. The defendant conducted such activity when the other person was in a place and circumstance where the person would have a reasonable expectation of privacy in not being so photographed
5. The defendant did so without the other person's knowledge or consent.

The defendant argued that the Commonwealth failed to prove the fifth element: that the photographs were taken without the victim's knowledge or consent. The jury heard testimony from the victim that she did not know about the pictures nor did she consent to them being taken. She also testified that she never saw the pictures until trial. This testimony alone would be sufficient to prove the defendant acted without the victim's knowledge or consent.

The court noted that the pictures themselves also support that the photos were taken without the knowledge or consent of the victim as they showed the victim's eyes were closed and she was not physically engaging with the defendant.

The motions for directed verdict were properly denied.

STALKING

EVIDENCE OF MULTIPLE UNWANTED ADVANCES, GRABBING THE VICTIM BY THE ARM ON ONE OCCASION FOLLOWED BY YEARS OF CREEPY BEHAVIOR AND VANDALIZING THE VICTIM'S CAR WAS SUFFICIENT TO PROVE STALKING

Commonwealth v Lehan, 100 Mass.App.Ct. 246 (2021).

FACTS

The defendant and the victim belonged to the same gym and, beginning in the summer of 2015, the defendant began showing the victim unwanted attention. It started with the defendant offering to play racquetball with the victim and to give her pointers. The victim did not mind at first but noticed that the defendant was at the gym whenever she was and he only wanted to play racquetball with her. After 2-3 weeks the defendant began asking her out to eat. The victim declined his requests over 20 times and began trying to avoid him. By the fall of 2015 the defendant began loitering in the parking lot near the victim's car or parking his car near hers so he could talk to her when she was leaving. On one occasion he grabbed her arm while she was inside the gym and asked her to go out to the parking lot to talk to him. When the victim came outside the defendant again asked her out

to dinner which she again refused, saying she did not want to give him the wrong impression and that she had a boyfriend.

After that incident the victim felt "very unsafe" and nervous and changed her work schedule and her gym schedule to avoid him. Despite the schedule changes, the defendant would still be at the gym anytime she was. During this period, the defendant did not speak to the victim but on over 10 occasions stared at her through a glass window while she took classes. This continued for three years. These encounters made the victim fearful to the point that she got a license to carry a firearm.

In September 2018 the victim's car was seriously vandalized when it was parked outside her home. She told police that she believed the defendant was the culprit. The police began an investigation, including getting GPS data from the probation department that linked the defendant to the vandalism. At trial, the GPS evidence was entered into evidence and the officer was allowed to testify about it.

The defendant was convicted of stalking and vandalism of property. The defendant appealed arguing that the Commonwealth failed to meet the element of stalking and that the GPS evidence was erroneously entered into evidence.

DISCUSSION

Stalking is essentially criminal harassment plus a threat. The model jury instructions for district court set forth five elements the Commonwealth must prove for a criminal harassment charge:

1. That the defendant engaged in a knowing pattern of conduct or speech, or series of acts, on at least three separate occasions
2. That the defendant intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion
3. That the conduct or speech, or series of acts, were of such a nature that they seriously alarm the victim
4. That the conduct or speech, or series of acts, were of such a nature that they would cause a reasonable person to suffer substantial emotional distress; and
5. That the defendant committed the conduct or speech, or series of acts, willfully and maliciously.

To sustain a conviction of stalking, the Commonwealth must prove criminal harassment and that the defendant made a threat against the victim.

The defendant argued that his behavior in this case was "innocuous" protected speech and did not amount to willful and malicious conduct. Willful means intentional, not a mistake or an accident. Malice means the

> defendant's conduct was intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted to [the victim]. Model jury instructions for use in the district court 6.640.

The court noted that the defendant was correct when he states that asking someone out or staring at them, even repeatedly would not be a pattern of "willful and malicious" conduct. The court found that, in this case, the defendant did "considerably more" than that.

The court found that defendant's pattern of conduct began with repeated unwelcome advances, followed by him grabbing the victim by the arm. This was then followed by years during which the defendant did not speak to the victim but stared at her and "'encountered her with a frequency that the victim found alarming, particularly in light of the victim's efforts to avoid such encounters." p. 252. The defendant's behavior culminated in the vandalism of her car.

In prior cases the court has found that "malice can be inferred even in instances of largely innocuous conduct, if the entire course of conduct 'lends those acts a more sinister air.'" p. 253 *quoting* Commonwealth v. McDonald, 462 Mass. 236, 243(2012). The court here found that the Commonwealth proved three separate willful and malicious acts. The vandalism and the arm grabbing are two separate willful and malicious acts that stand out from the other behavior of the defendant.

> The vandalism was conduct, not speech, plainly intended to cause (and capable of causing) reasonable fear. We think similarly of the arm-grabbing incident, which, although the defendant was acquitted of the charged assault and battery, nevertheless represented an escalation to physical contact that was unwelcome, particularly as the victim had already repeatedly declined the defendant's invitations. And for a third act we need look no further than the defendant's conduct following the arm-grabbing incident, where throughout a period of years the defendant managed to encounter the victim frequently despite the victim's changing schedule, and where he would often stare at her while she was working out -- alarming the victim enough that she obtained a firearm for her protection. p. 253.

The defendant also argued that the Commonwealth failed to show that his conduct targeted the victim. The court found that a jury could have inferred the defendant's presence at the gym at the same time as the victim despite the efforts of the victim to avoid the defendant by varying her schedule was not a coincidence. The court also found that the pattern of conduct "was plainly targeted at the victim" and that it would cause a reasonable person "great alarm" and "severe emotional distress" and did cause such effects in the victim. p. 254.

The threat necessary to prove stalking was met by the vandalism evidence. A threat does not need to be words spoken directly to the victim. A threat is any act done with an "intent to place the victim in immediate fear that physical harm is likely to occur and the victim's fear must be reasonable." Commonwealth v. Walters, 472 Mass. 680, 693 (2015). The vandalism to the victim's car was a violent and criminal act directed toward the victim's property. The victim believed that the defendant was the one responsible for the vandalism and she was afraid and scared after her car was vandalized.

For all these reasons the court found that the Commonwealth met its burden of proof regarding the stalking charge. The convictions were vacated; however, because the court found that the Commonwealth failed to establish a proper foundation to admit the GPS evidence.

OFFICER LIABILITY

OFFICER MAY BE HELD LIABLE FOR FAILING TO PROTECT INDIVIDUALS FROM DANGER CREATED OR ENHANCED BY THE OFFICER'S AFFIRMATIVE ACTS

Irish v. Fowler, 979 F.3d 65 (1st Cir. 2020) ("Irish II").

FACTS
These events occurred over four days in 2015. The timeline is important.

July 14

??? Brittany Irish is kidnapped and raped by her former boyfriend Anthony Lord.

July 15

11:13AM Irish reports the rape and kidnapping to Bangor, Maine, PD. Bangor PD refers the case to Maine State Police. Two detectives are assigned and are advised that Lord is a registered sex offender.

2:00PM The MSP sergeant forwards Irish's written statement to the detectives. The statement includes information that Lord threatened to "cut her from ear to ear." p. 68.

3:05PM Irish meets with MSP detectives. She says she is "scared that Anthony Lord would become terribly violent if he knew [she] went to the police." Detectives "recommended not letting Lord know…reports had been made to the police." p. 68. Irish is instructed to continue talking to Lord as if nothing happened until the detectives can take his statement. Irish informs detectives that she moved her children to her boyfriend's mother's house in Caribou, Maine for safety.

4:34PM Irish meets with MSP again.

Evening Detectives find evidence corroborating Irish's allegations at one of the locations.

July 16

??? Irish provides detectives with a second written statement. The statement includes threats Lord made, including saying he would "cut her from ear to ear," abduct her children, abduct and "torture" her boyfriend to find out the truth about their relationship, to kill the boyfriend if he was romantically involved with her, and to weigh Irish down and throw her in a lake.

??? Detectives interview Irish again. Detectives tell her they intend to call Lord to get a statement.

6:17PM Detectives call Lord who does not answer. Detective leaves a voicemail in which he identifies himself as a state police detective and asks Lord to return the call. Detective does not ask Lord to meet with him.

8:05PM Detectives receive a report of a possibly suspicious fire in the town where they had found corroboration of the victim's rape.

9:24PM Irish calls detectives. The fire was in her parent's barn which is approximately 15 feet from their home. She reports someone heard Lord say he was "going to kill the fucker" as he left his uncle's home in Crystal, Maine earlier that evening. p. 69. Irish expressed fear for her children's safety and tells detectives she plans to stay at her mother's house. She says she will meet detectives there.

10:05PM Detectives search for Lord for the first time. They put out a state-wide teletype for a "stop and hold" adding a "use caution" warning advising officers that Lord could be dangerous and to take precautions.

10:35PM The sergeant sends troopers to Lord's mother's house, 40 miles away from where Irish was. MSP did not call the mother prior to driving there.

10:36PM Detectives arrive at the barn. Shortly thereafter, Irish speaks to her brother who said that Lord was irate after receiving the voicemail from the detective and had said "someone's gonna die tonight." p. 69. Irish relays this information to the detectives and asked for protection. All officers leave the scene.

11:38PM Detectives run a criminal background check for the first time. They learn that he is on probation and has an "extensive record of sexual and domestic violence." p. 69.

11:49PM Detectives contact Lord's probation officer. The probation officer tries to contact Lord. The probation officer tells detectives that Lord's last known address is at his uncle's house in Crystal, ME.

July 17

12:00AM Irish calls detective and asks again for an officer to come to her mother's house to provide protection.

12:30AM The sergeant, the two assigned detectives and another trooper go to the uncle's house (20 miles from where Irish is) to look for Lord. They do not call the uncle to see if Lord is there.

1:00AM Troopers meet in Crystal. Detective tells the sergeant for the first time that the victim has requested protection. The sergeant denies the request citing "manpower" reasons. A detective requests that Bangor police send an officer to Acadia Hospital to look for Lord. The request was not to call and inquire, but to go there.

2:00AM Irish calls the detective. She is told for the first time that his supervisor denied her request for protection. He informs her police would continue to look for Lord.

2:00AM The assigned detectives meet with two other detectives at a gas station 10 miles from the Irish home to search a dumpster for evidence of the rape.

2:30AM Officers searching near the gas station leave the area.

3:00AM Detectives searching the dumpster leave the area.

NOTE: for the next hour there is no evidence of any state police presence in the area. No one told Irish that all police units were leaving the area.

3-4:00AM Irish's mother called the Maine State Police. She wanted to go to the MSP parking lot and sleep in her car with Irish and Irish's boyfriend for protection. MSP told her not to come and that it would be "a dangerous mistake" to leave the house. p. 71. She is told that MSP have officers in the vicinity who can quickly respond to any problems.

4-4:40AM A resident 6 miles/12 minutes from the Irish home reports that someone attacked him with a hammer and stole his truck and guns. Police do not notify Irish of this incident.

4:40AM-5:40AM Lord arrives at the Irish home in the truck he stole. He uses the shotgun he stole to shoot at the front door, breaking the lock. Irish is hit in the arm in the process. Lord then kicks the door open and shoots Irish's boyfriend nine times while Irish watches. Irish runs to the bathroom to hide. Her mother is in the bathroom at the time. They are not able to lock to the door. Irish starts climbing out the window. Her mother pushes her out of the window as Lord comes through the door. Lord fires at Irish twice as she runs away. Her mother is struck in the arm.

Moments later Irish jumps into a passing truck. Lord jumps into the bed of the truck and shoots the driver three times. Lord then pulls Irish out and brings her to the truck he had stolen. He drives away.

2:00PM Police apprehend Lord after his uncle reported that Lord was in Houlton. Police rescue Irish at that time. Officers post an officer at the Irish home after Lord's capture for two days to protect the crime scene.

NOTE: Police first saw Irish and Lord at 5:41AM but Lord escaped after shooting at officers and threatening to kill Irish if police did not back off. At 6:20AM Lord and Irish encountered two people and Lord asked to use their cell phone. One lent his phone to Lord. The other asked Irish about her wound and Lord fatally shot him. The other person ran away and was also shot by Lord. During the nine hours he evaded the police Lord also stole a pulp truck, an ATV, and a Ford F-150 and he raped Irish again.

Irish, her mother and the estate of her boyfriend sued the detectives, the sergeant, and the Maine State Police. The court granted summary judgment for the officers finding that they had qualified immunity. The plaintiffs appealed.

DISCUSSION

The Fourteenth Amendment states, in part, that, "no State shall...deprive any person of life, liberty, or property, without due process of law." A state's failure to protect an individual from harm usually does not give rise to a due process claim; however, a plaintiff may make out such a claim under the state-created danger doctrine.

To establish a state-created danger claim, plaintiff must establish four things:

1. That a state actor or state actors affirmatively acted to create or enhance a danger to the plaintiff
2. That the act or acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public
3. That the act or acts caused the plaintiff's harm; and
4. That the state actor's conduct, when viewed in total, shocks the conscience.
   (i) Where officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience, particularly where the

state official performs multiple acts of indifference to a rising risk of acute and severe danger. To show deliberate indifference, the plaintiff must, at a bare minimum, demonstrate that the defendant actually knew of a substantial risk of serious harm and disregarded that risk.

(ii) Where state actors must act in a matter of seconds or minutes, a higher level of culpability is required. p. 75.

In this case, the court found that a jury could have found that the officers violated the plaintiffs' substantive due process rights under the state-created danger doctrine. In reaching this conclusion, the court found that the voicemail left for the defendant in these circumstances was an affirmative act made by the detectives that enhanced the danger to the plaintiffs. The detective himself admitted that if Lord committed the acts as Irish reported them, it would be "logical" that Lord would understand that the call from the state police was related to those actions.

Note: there is no requirement that the state actor's actions "greatly" enhanced the danger. Welch v. City of Biddeford Police Department, 12 F.4th 70 (1st Cir. 2021).

The court also found that, because the detectives had time to make unhurried decisions on what steps to take, the plaintiff did not have to show more than a deliberate indifference. A jury could find that, based upon the actions taken by detectives both before and after the voicemail was left, leaving the voicemail was "deliberately indifferent to the point of being conscience-shocking." Irish v. Fowler, 436 F.Supp.3d 362, 419 (2020)

It was also significant that there was evidence that the defendants violated MSP policies and Maine state law with respect to how they handled this matter. An expert for the plaintiffs testified that the first priority in an investigation is the victim's safety and that officers have a standard of care that requires officers to do nothing that would put the victim's safety at risk. The expert opined that the first priority in an alleged kidnapping and rape would be to find the suspect and to take them into custody and that tipping the suspect off by leaving a voicemail for the suspect "is the last thing I would consider doing." p. 72.

The expert also indicated that running a criminal history check is "absolutely fundamental" and something that you do as soon as you identify a suspect. p. 72. In this case, the background check was not done until long after the detective left the voicemail for Lord.

The detectives were also trained regarding the laws with respect to domestic violence in Maine. The court pointed out three portions of the Me.Stat.tit.19-A §4012 regarding responding to reports of domestic violence:

> (6) officer shall immediately use all reasonable means to prevent further abuse.
>
> (6)(A) remaining on scene as long as the officer reasonably believes there is a danger to the physical safety of that person without the presence of a law enforcement officer.

The MSP also had a policy which states, in part:

> In circumstances in which it is necessary for a DV victim to temporarily or permanently leave a location where he or she has been living, [an officer shall] assist the DV victim in locating lodging with family, friends, in public accommodations, or at a DV shelter/safe home.

NOTE: When responding to domestic violence reports, Massachusetts officers must comply with MGL c 209A § 6 which provides similar language to the Maine statutes and policies. MGL c 209A §6 states, in part:

> Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse. The officer shall take, but not be limited to the following action:
>
> (1) remain on the scene of where said abuse occurred or was in danger of occurring as long as the officer has reason to believe that at least one of the parties involved would be in immediate physical danger without the presence of a law officer. This shall include, but not be limited to remaining in the dwelling for a reasonable period of time.
>
> (3) assist the abused person in locating and getting to a safe place; including but not limited to a designated meeting place for a shelter or a family member's or friend's residence. The officer shall consider the victim's preference in this regard and what is reasonable under all the circumstances.

The defendants argue that violation of state law or department policy cannot serve as a basis for a state-created danger claim. The court does not address this argument directly because the plaintiffs did not make this argument. Instead, the plaintiffs argued that such violations were merely relevant to the determination of whether the actions of the detectives were conscience shocking. The court agreed with the plaintiffs on this point.

The court also found that violations or adherence to police procedures is relevant to the qualified immunity analysis. Government actors are immune from civil liability for actions taken while they are performing their work duties unless the plaintiff can establish that the government actor violated a federal statutory or constitutional right and that the unlawfulness of their actions was "clearly established at the time." p. 76 (citations omitted.)

> [W]hen an officer disregards police procedure, it bolsters the plaintiff's argument both that an officer's conduct shocks the conscience and that a reasonable officer in the officer's circumstances would have believed that his conduct violated the Constitution. p. 77 (citations and quotations omitted.)

The court found that the state-created doctrine was clearly established law. The court found that the actions of the officers, if they occurred, could "rise to a lawsuit under §1983." p. 80. In reaching this conclusion, the court pointed to several specific facts in this case: the fear Irish expressed to the police that Lord would react violently if she reported the rape and kidnapping; detectives contacted Lord in a way that a jury could reasonably infer notified Lord that Irish had reported the incident; detectives failed to convey Irish's specific request for protection to their supervisors for several hours and did not notify her in a timely fashion that the request was denied; the detectives played a role in removing all police resources from the area without telling the plaintiff which left her with a false sense of security; and

> Finally, the defendants' apparent utter disregard for police procedure could contribute to a jury's conclusion that the defendants conducted themselves in a manner that was deliberately indifferent to the danger they knowingly created, and that they thereby acted with the requisite mental state to fall within the ambit of the many cases holding that a violation of the Due Process Clause requires behavior that "shocks the conscience." p. 79.

The motion for summary judgment was reversed and the case was remanded for further proceedings.

IDENTIFICATION PROCEDURE

SHOWUP IDENTIFICATION PROCEDURE

FAILURE OF WITNESSES TO FULLY UNDERSTAND THE INSTRUCTIONS GIVEN TO THEM DID NOT RENDER THE SHOWUP IDENTIFICATION PROCEDURE UNNECESSARILY SUGGESTIVE

Commonwealth v. Travis, 100 Mass.App.Ct. 607 (2022).

FACTS

During the early afternoon of October 23, 2018, Brenda Marquez and Nilza Santos were on Dix Street in Dorchester to inquire about a cleaning job. Santos was sitting in her car while Marquez stood outside the open driver's door. The defendant approached Marquez from

behind, pointed a small gun at the women, and told Santos to get out of the car. Santos complied and the women backed away. The defendant got in the car and drove away.

Marquez immediately called 911. Spanish is her native language; however, she was able to describe the incident to the dispatcher fairly well in English, only utilizing an interpreter to provide certain details. An officer arrived on scene and spoke to Marquez in English. Marquez provided a physical description of the subject and his clothing which was broadcast to other officers.

A State trooper was working a detail a few miles away and heard the description. Within minutes, the trooper saw a car that matched the description of the stolen car. The trooper followed the car which accelerated, made several turns, ran a red light, lost control, and ultimately crashed into a telephone pole with enough force that the pole came loose and leaned partially on the hood of the car. The defendant tried to escape on foot but was quickly caught and arrested.

Within sixteen minutes of the 911 call the officers on scene with the victims told them that they had a potential suspect in custody and that they were going to bring the women to see if they could identify him. Both women understood that they were being brought over to the other location to see a person the police believed to be the carjacker. The women were brought to the scene in separate cruisers.

The detective that brought Marquez to the scene read her advisements in English from a preprinted card. The instructions were as follows:

> 1. I am taking you to look at someone.
>
> 2. This person may or may not be the perpetrator, and the investigation will continue, whether or not an identification is made.
>
> 3. It is just as important to free the innocent from suspicion as it is to identify offenders.
>
> 4. I will be asking you to make a statement of certainty, in your own words, if you make an identification. p. 610.

At the conclusion of the instructions, she was asked if she understood them. The motion judge found that Marquez only understood the first two advisements.

The same advisements were read to Santos in English. Santos is a native Portuguese speaker who understands very little English. The motion judge found that she did not understand any of the advisements.

When the witnesses were brought to the scene there were ten officers, some of whom were in uniform, as well as firefighters, and emergency medical personnel present. On scene "several police vehicles, at least one firetruck and an ambulance were also present, and a helicopter hovered overhead." p. 611. When the women arrived, the defendant was sitting or lying on the ground receiving treatment from medical personnel on the opposite side of the street from where officers had parked. The motion judge found that the defendant was "probably" cuffed from behind at the time but noted the women could not see the cuffs. Between three and six officers, some in uniform, all with badges displaced, were standing in a semi-circle around the defendant. The totaled car was 30 feet away in the same location where it had crashed.

Marquez was escorted toward the group. She immediately identified the defendant as the individual who took her car. She said she recognized him by his face and clothing. Santos also immediately identified the defendant. She said, "That's him, the guy on the floor, the sidewalk. I remember his face and black jacket." p. 611. She reported recognizing "the beard, the color, and . . . clothing." p. 611. Neither woman was asked to make a statement about how certain they were of their identification.

The defendant was indicted on multiple charges, including carjacking and armed assault. He filed a motion to suppress the identification of both Marquez and Santos arguing that the police did not have good reason to perform the showup and that the procedures used were unnecessarily suggestive. The motion was allowed and the Commonwealth brought this appeal.

DISCUSSION

The court has repeatedly found that "one-on-one showup identifications are generally disfavored due to their inherently suggestive character." p. 613. The court has also consistently found that a showup done in the immediate aftermath of a crime is not necessarily impermissible. Before a court can exclude such identification evidence, the burden is on the defendant to prove, by a preponderance of the evidence, that the procedure used was so unnecessarily suggestive that it violated the defendant's due process rights.

> In general, a defendant may prove that a showup identification procedure is unnecessarily suggestive by establishing that the police did not have good reason to undertake a showup procedure, or by establishing that the officers who did so utilized "special elements of unfairness" indicating a desire to "stack the deck against the defendant." p. 613 *quoting* Commonwealth v. German, 483 Mass. 553, 558-559 (2019).

Good reason

To determine whether good reason exists to conduct a one-on-one showup identification, the court looks at three factors which are articulated in Commonwealth v. Austin, 421 Mass. 357, 362 (1995):

(1) the nature of the crime involved and corresponding concerns for public safety

(2) the need for efficient police investigation in the immediate aftermath of a crime; and

(3) the usefulness of prompt confirmation of the accuracy of investigatory information, which, if in error, will release the police quickly to follow another track.

In this case, officers were investigating a violent crime that involved a firearm. A prompt identification of the suspect would limit the risk to the public and would avoid the escape of a dangerous suspect. The defendant here was in custody within 16 minutes of the 911 call. The court found that immediate confirmation that the defendant was the perpetrator was "useful if not critical to the investigation." p. 613. The court also noted that if the victims had ruled out the defendant as the perpetrator, the police would have needed to continue their investigation and search for the dangerous perpetrator expeditiously.

The defendant argued that the police lacked good reason to perform a showup because they had probable cause to arrest him and had arrested him. He also argued that the showup was unnecessary because there were other alternatives and less suggestive options available to the police. The court rejected both arguments.

> The question is whether the police acted permissibly and not whether another approach was available. p. 614.

<u>Unnecessarily suggestive</u>

The court addressed four facts in this case that the defendant argued showed the police utilized "special elements of unfairness."

1. the number of law enforcement and public safety personnel in the area of the showup

2. the victims were told they were going to see a suspect

3. the victims' lack of understanding of the advisements

4. The showups were done in view of Santos' damaged car

The court found that, based upon the facts and circumstances of this case, the volume of law enforcement and public safety personnel was reasonable.

> The heavy presence of police and safety officers was justified by the nature of the crime, the pursuit of an armed suspect, and the fact that the defendant was injured. More importantly, the number of persons readily identified as police officers that were surrounding the defendant at the time the victims viewed him – between three and six – was not excessive in the circumstances. p. 614.

The court also found that the fact that officers told the victims that they were going to see a suspect did not render the procedure impermissibly suggestive. It is logical that a witness would expect that they are being asked to make an identification because the person either matches the description or is suspected to have been involved in the crime. The court noted that the police here said nothing to the women to indicate the officer's degree of certainty regarding the identity of the suspect.

NOTE: the better practice would be to avoid the word "suspect" in this context.

The victims' lack of understanding of the advisements also did not render the showup procedure unnecessarily suggestive. In Commonwealth v. German, 483 Mass, 553 (2019) the court established the rule that officers must give witnesses the following instructions prior to conducting a showup identification:

> You are going to be asked to view a person
>
> the alleged wrongdoer may or may not be the person you are about to view
>
> it is just as important to clear an innocent person from suspicion as it is to identify the wrongdoer
>
> regardless of whether you identify someone, we will continue to investigate
>
> if you identify someone, I will ask you to state, in your own words, how certain you are.

Similar instructions are required when showing a witness a photo array. Commonwealth v. Silva-Santiago, 453 Mass. 782 (2009). However, this incident occurred before German so no advisements were required to be given at that time. However, even if they were required to be given, the absence of such advisements go to the weight of the identification, not its admissibility.

> NOTE: the best practice would be to give the advisements in the witness' native language and to confirm they understood them before performing the showup identification procedure.

The defendant argued that the police inserted a special element of unfairness in the identification process by conducting it within view of Santos' car. The court recognized that

the damaged car was a suggestive factor, but also recognized that this was not a situation created by the police. When the victims arrived on scene, the defendant was receiving medical attention within 30 feet of the crash location. There was no evidence presented that the police conducted the showup there because they wanted or intended to "stack the deck" against the defendant. Further, the identification by the victims were both based upon his appearance and clothing. Nothing was mentioned by either woman about the car.

The order allowing the motion to suppress the showups was reversed.

PHOTO ARRAY

Commonwealth v. Santiago, 100 Mass.App.Ct. 700 (2022).

FACTS
On April 9, 2014, the victim met with the defendant's minor son to fight in Holyoke. The victim's cousin and aunt were part of 20-30 onlookers. His cousin encouraged the fight because she felt disrespected by the defendant's son when he broke up a fight previously between her and another woman.

The defendant approached the victim trying to discourage the fight because his son was a minor. The men argued and the defendant threatened to shoot the victim. He yelled, "you're a grown-ass man, you deserve to get shot." p. 701. The defendant pulled out a silver handgun from his waistband and fired three rounds. The victim was shot in the buttocks as he tried to flee to safety.

Two days after the shooting the detective went to the victim to show him a photo array. The array was composed of eight booking photos from the Holyoke police department's database. The defendant was the only person in the array that was shirtless. The victim was not able to identify anyone. The victim's aunt was present at that time and asked to see the array. After being read instructions from the Holyoke police department "Photo Array Checklist" she looked at the array. She paused at the defendant's photo but did not make an identification at that time.

On the same day that the array was shown to the victim, his cousin went to the police station to make a statement. While she was there, she was shown a different photo array using photos from the Registry of Motor Vehicles. The detective knew that the victim, his aunt, and cousin all lived together and he did not tell them that they should not talk about the identification procedure.

> In order to reduce the chance that the witnesses had in fact talked to one another about the photographic identification, inadvertently causing them to be influenced by one another, he created the new array. p. 702.

The cousin initially chose three photos, rating one as 40% the shooter, another as 50% the shooter and the defendant as 60% the shooter. The detective took a statement from her. At the end of the interview, she looked at the array again, this time choosing the defendant's photo, writing "100%" on it. Underneath the photo she added,

> If he shot in front of a bunch of kids in front of my house, what makes you think he won't come after me and my family? p. 702.

At trial the cousin testified that she recognized the defendant as the shooter when she initially saw the array but hesitated to make the identification for fear of retaliation.

The victim's aunt went to the police station the next day to give a statement. She asked to see the photos again. The detective had shown her the first array the day before so he asked another officer to show her the array. This time she was shown the second array and identified the defendant writing, "This is the person th[e] shooter." p. 702. She testified that the identification was with 100% certainty and said she did not make an identification from the first array because she was in fear that the defendant would harm her.

The defendant was charged with armed assault with intent to murder, assault and battery by means of a dangerous weapon and illegal possession of a firearm. He filed a motion to suppress the identifications arguing they were impermissibly suggestive. After his motion was denied he was tried and convicted. He now appeals, arguing the motion to suppress was denied in error.

DISCUSSION

Under art. 12 of the Massachusetts Declaration of Rights, an out of court identification is inadmissible if the defendant proves that it is "so unnecessarily suggestive and conducive to irreparable misidentification that its admission would deprive the defendant of his right to due process." Commonwealth v. Walker, 460 Mass. 590, 599 (2011).

The defendant claimed that showing the victim's aunt the first array was unnecessarily suggestive because the defendant's photo was the only one shirtless. While the court disapproves of arrays that distinguish one photo from the others because of some physical characteristic, it does not automatically render the array unnecessarily suggestive. The court has not suppressed such arrays when the identification is not based on the distinguishing characteristic and in cases where the distinctive feature does not relate to the defendant's appearance at the time of the crime. In this case, there was no error. The defendant's bare chest had no relevance or significance to the case and, more importantly, the aunt did not make an identification from that array. This suggests that the lack of a shirt did not impermissibly draw her attention to the defendant.

The defendant also argued that the aunt should not have been shown the second array after failing to identify the defendant in the first array. The court reiterated that it discourages using repeated arrays with a suspect's photograph; however, there is no per se

exclusionary rule prohibiting it. Showing a witness multiple arrays with the defendant's picture in it will be a factor the court will consider when determining whether the process was unnecessarily suggestive.

Police are not required to use the same array throughout an investigation. They are allowed to refine the array as the investigation develops. In this case, the police made the second array specifically to reduce any suggestiveness. The court also noted that the police did not create the second array with the intention to show it to the aunt. It was the aunt that requested to see the array again.

The motion to suppress the identification was properly denied.

SPONTANEOUS UTTERANCES

Commonwealth v. Rand, 487 Mass. 811 (2021).

FACTS

The defendant and the victim were in an on-again/off-again relationship for five years. On July 25, 2015, at 12:45AM the victim called 911. The victim was sobbing and said she needed somebody to come to her house and that her boyfriend just beat her up. The dispatcher asked whether the boyfriend was still there. The victim said he left, "like two minutes ago, since I called you guys." p. 813. The dispatcher asked what happened that night and the victim reported that her sister was causing trouble, the defendant took the sister's side and then the defendant "knocked [the victim] out a couple of times." p. 813. She said he punched her in the face and tried to kill her.

Officers arrived on scene four minutes and 30 seconds into the call. Upon their arrival, the victim was in tears, "very upset," "heaving" and "kind of hysterical." p. 813. The victim seemed confused and the responding officer had to call the dispatcher to have them instruct the victim to hang up the phone and speak to the officers on scene.

Officers asked the victim what happened. She said her boyfriend Roy had beat her. She reported being punched in the head several times, being choked, and said he "used his knees to put on her throat." p. 813. She reported losing consciousness and when she woke up he began hitting her again and choked her with his hands. As a result of losing consciousness, she had urinated herself. She told police her sister slapped her, too. She complained of pain and the officers requested an ambulance. Officers observed physical injuries, including bloodshot and veiny eyes, swelling, and bruising of her cheek and jawline.

Officers spoke to the victim for approximately five minutes until the ambulance arrived. After the ambulance arrived officers only spoke to the victim "intermittently" as they did not want to interrupt the medical attention she was receiving. The medics recommended that she be brought to the hospital. The victim was reluctant to go and seemed scared.

Officers assured the victim that she would be safe and offered to accompany her to the hospital. The victim said she was still scared of the person who attacked her and again identified her assailant as the defendant. The victim ultimately agreed to be transported to the hospital. One of the officers accompanied her to the hospital and photographed her injuries. The officers were on scene at the home for 10 to 20 minutes.

The defendant was charged with assault and battery and strangulation. Shortly after the arraignment, the victim stopped cooperating with the Commonwealth. At trial, the Commonwealth filed motions in limine to admit the statements the victim made during the 911 call and the statements made to officers on scene arguing that they were spontaneous utterances. The judge allowed the motion, meaning the officers were allowed to testify as to those statements. The defendant was convicted.

The defendant appealed his conviction arguing that the admission of the statements violated his right to confront his accuser guaranteed by the Sixth Amendment and art. 12. The Appeals Court agreed with the defendant and reversed his conviction. That decision was covered in legal updates two years ago. The Commonwealth appealed that decision.

DISCUSSION
For out-of-court statements to be introduced into evidence, the court must find two things:

1. that the statements are admissible under an exception to the hearsay rule

2. that the statements are nontestimonial and therefore do not violate the confrontation clause of the Sixth Amendment.

In this case, the defendant concedes that the statements were spontaneous utterances and therefore satisfied the first prong.

> Testimonial statements are those made with the primary purpose of "creating an out-of-court substitute for trial testimony." Commonwealth v. McGann, 484 Mass. 312, 316 (2020) *quoting* Commonwealth v. Wardsworth, 482 Mass. 454, 464 (2019).

The question is whether the "primary purpose" of the conversation was to create a statement that would be used in court instead of live testimony. This is an objective standard that will be viewed in light of all the facts and circumstances of a given case.

The United States Supreme Court in Davis v. Washington, 547 U.S. 813, 827 (2006) gave us several factors to consider when determining the primary purpose of a statement:

1. Whether the declarant was speaking about events as they were "actually happening, rather than describing past events"

2. Whether any reasonable listener would recognize that the declarant was facing an "ongoing emergency"

3. Whether the questions were necessary to resolve the present emergency rather than simply to learn what had happened in the past

4. The level of formality of the interview.

In Davis, the statements were made in the context of an ongoing emergency. The court noted that, while an ongoing emergency is not required to be found, when one exists, it will take a "central place in our analysis." p. 817.

> The reason for this is straightforward: when preoccupied by an ongoing emergency, a victim is unlikely to have the presence of mind to create a substitute for trial testimony. p. 817.

Factors to consider when deciding whether an ongoing emergency exists include:

> (1) whether an armed assailant poses a continued threat to the victim or the public at large
>
> (2) the type of weapon that has been employed
>
> (3) the severity of the victim's injuries or medical conditions. Commonwealth v. Middlemiss, 464 Mass. 627, 634 (2013).

The court recognized that there may be other circumstances, other than ongoing emergencies, in which the court could find that the primary purpose of a statement was not to create a substitute for trial testimony. When the situation is not an ongoing emergency, the Davis factors may not be as helpful when trying to determine whether the statements were testimonial. The court reminds us that it is an objective test based upon the totality of the circumstances. The relevant question is whether a reasonable person in the declarant's shoes would have intended the statements to be a substitute for trial testimony. The court will look at the formality of the statements, the actions and words used by both the declarant and the interrogator, and any other relevant circumstances of the case. For instance, the age of the declarant or the identity of the interrogator, especially if they are non-law enforcement, may be relevant.

An interrogation that starts as non-testimonial can evolve into a testimonial one. This can occur if information is provided to the police that makes clear that the emergency no longer exists or was not an actual emergency at all.

911 call

All parties agree that the statements on the 911 call up until the victim told the dispatcher that the defendant had left were admissible. The court found that the rest of the statements made on the 911 call were also admissible.

In reaching this conclusion, the court relied on several facts, including the fact that the assault had taken place "like two minutes ago" according to the victim and the highly informal nature of the conversation. The questions of the dispatcher were also relevant in the analysis. The dispatcher focused on the victim's injuries and whether the assailant was still on scene. The court found that,

> the primary purpose of these questions was objectively to provide [the officers] with the information they needed to respond to the call, not be a substitute for trial testimony. p. 819.

The court noted that officers have mixed motives when they are in these situations.

> Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession. Michigan v. Bryant, 562 U.S. 344, 368 (2011).

Having multiple motivations when asking a question does not automatically make the resulting answer testimonial. The test is what the primary purpose of the question was. In this case the dispatcher may have been motivated to gather information about a potential crime, but the court found that "the more urgent motive was likely to gauge the precarious and potentially dangerous situation into which the responding officers soon would be entering." pp. 819-820.

The court found that the most important indication that the victim here did not "objectively intend" for her statements to the dispatcher to be a substitute for trial testimony was how she reacted when police arrived at her apartment. During the 911 call she was "frenzied and emotional," and when officers arrived, she did not seem to understand who they were. p. 818.

> [G]iven that the victim did not even realize the police were at her house, a reasonable person in the victim's shoes would be unlikely to have any testimonial intent at all. p. 819.

The court then turned to the question of whether there was an ongoing emergency. In this case, the defendant was not armed and there was no evidence that he posed a danger or threat to the general public. The dispatcher had to ask questions of the victim to determine whether an emergency existed as to the victim herself based upon either the injuries she sustained or because the assailant could return.

The court found that continuing questioning about the victim's medical condition after an ambulance was called was appropriate in these circumstances.

> Where the victim had lost consciousness, it was reasonable to ask follow-up questions both to keep the victim awake and talking, as well as to ascertain any further details to relay to medical personnel in the case that she lost consciousness again. The dispatcher's statements – "I want to make sure that everything's okay. All right? But I'm going to have you stay on the phone with me until I have officers that get there, okay?" – reflect the dispatcher's continuing concern for the victim's medical condition. p. 820.

The fact that there was no indication that the defendant planned to return to the scene was not dispositive. The court focused, instead, on the fact that the defendant had left two minutes before the 911 call was made and it was unclear how far away he was, how long he would stay away, whether he was on foot or left by car, and whether he left the apartment, the entire building or even the area.

> Given these uncertainties, the dispatcher's questions, "How long ago did he leave?"; "how long ago did he leave your house?"; and "Okay, so he left a little while ago?" were primarily aimed at determining whether the defendant would return. p. 821.

For all these reasons the court found that "the primary purpose of the 911 call was not to create a substitute for trial testimony." p. 821. The statements were properly admitted.

<u>Statements to the officer on scene</u>

The statements made to the officers on scene began immediately after the 911 call, so many of the circumstances that the court relied on when finding that the 911 call was nontestimonial still apply here.

Officers arrived approximately seven minutes after the assault. Upon their arrival, officers found the victim "very, very upset" and she refused to get off the phone with the dispatcher. p. 822. Much like the dispatcher, the officers' questions were aimed at assessing the situation, including the victim's injuries. She had observable injuries and did not know where the defendant was or whether he was coming back.

The court concluded that there was an ongoing emergency when officers arrived. Despite the victim's statement that the defendant had left, there was no information as to whether it was on foot or not and whether that meant he left the apartment, the building, etc. Officers were concerned that he could still be on scene, as evidenced by the fact that one of the officers swept the apartment to secure the scene upon their arrival. Officers also did not have enough information to assure that the defendant would not be returning to the apartment imminently. The victim was also scared that the defendant would return. At the

hospital, one of the officers mistakenly told the victim that the defendant had been arrested. The officer said that she seemed relieved when she heard this.

The physical condition of the victim was also important in determining whether there was an ongoing emergency.

> More importantly, the victim's medical condition bears on both whether there was an ongoing medical emergency and whether she would have been able to have "any purpose at all in responding to police questions." p. 824 *quoting* Michigan v. Bryant, 562 U.S. 344, 365 (2011).

In this case officers on scene observed visible injuries to her face and her eyes were red. The victim reported being punched and elbowed to the face and strangled multiple times, twice to the point of unconsciousness and resulting in the victim urinating herself.

> The severity of the victim's injuries - especially the fact that she had recently lost consciousness - makes her ability to have any testimonial intent unlikely. p. 825.

The defendant argued that any questions after officers knew an ambulance had been dispatched could not be for the "purpose of determining whether medical attention was necessary" because calling the ambulance was proof that the determination had been made. p. 825. The court did not agree.

> Just because an ambulance has been called does not mean that any potential medical emergency has dissolved. On the contrary, strangulation injuries can be quite serious, and if they go "unrecognized and untreated, delayed life-threatening airway obstruction or long term vocal dysfunction may result." p. 825 (citations omitted.)

Based upon the facts of this case, the officers were prudent to continue to collect information from the victim in case they had to provide the information to medical personnel when they arrived.

> Thus, given the victim's injuries and the uncertainty about whether the defendant would return, there was initially an ongoing emergency. That changed, however, once the victim was poised to leave for the hospital. p. 826.

After the medics indicated they wanted to bring the victim to the hospital, the officers tried to persuade her to go. The victim said she was scared and when an officer asked what she was afraid of, she said she was afraid of the person who attacked her and again named the defendant. The court noted that, at this point, the ongoing emergency was over. Even though officers still did not know where the defendant was, the victim was going to be transported to the hospital accompanied by an officer. Based upon these facts the court found that the defendant "was no longer a continuing threat" at that time. p. 826.

> The diffusion of the ongoing emergency, and the fact that the victim was then about to leave the scene in the company of a police officer, caused the primary purpose of the interrogation to evolve from nontestimonial to testimonial. p. 826.

For these reasons, most of the statements the victim made to officers on scene were non-testimonial and properly admitted. Statements made as she was about to be transported to the hospital were testimonial and should not been admitted.

The court found that the admission of the statements that should not have been admitted did not require reversal because they were duplicative of other properly admitted evidence. The convictions were affirmed.

Sufficiency of the Evidence

LARCENY BY FALSE PRETENSES

CONTRACTOR WHO OVERCHARGED CUSTOMERS AND LIED ABOUT WORK DONE FOUND GUILTY OF LARCENY BY FALSE PRETENSES

Commonwealth v. Watterson. 99 Mass.App.Ct. 746 (2021).

FACTS
In January 2009, the Thomases had a problem with their heating system. Mr. Thomas, who was 77 years old, called the defendant who is an oil burner technician, plumber, and drain specialist. He came to the home and looked at the furnace. He said he needed a part that would cost between $100 and $150. Mr. Thomas provided his credit card number to buy the part. The defendant came back the next day with a credit card slip for $250 which Mr. Thomas signed. The defendant worked for 45 minutes and installed the part.

The defendant provided Mr. Thomas with an updated slip or invoice. Mr. Thomas thought the slip was for the original $250 plus an additional $150. Mr. Thomas questioned the defendant, saying that $400 was a lot to charge for the work performed. The defendant corrected Mr. Thomas saying it was not $150, it was $1,500.00 and that it was a flat rate he charges. Mr. Thomas objected to that price stating he paid less for the furnace. The defendant said it was a flat rate. Mr. Thomas told the defendant not to charge his credit card because he did not agree to that price.

The heat failed after 10 minutes. The defendant's helper came to fix it, but it stopped working soon after he left as well. Mr. Thomas made several calls to the defendant but the

defendant did not respond. Mr. Thomas called his usual plumber who worked for about 45 minutes and fixed the problem. This plumber charged Mr. Thomas $296.

Mr. Thomas disputed the charges with his credit card company but was unsuccessful. He reported the defendant to the Worcester plumbing department. The inspector opined that the charges were "very high" and "excessive" and the part should cost approximately $110 - $120. p. 749.

The defendant was charged with larceny from an elderly person for these actions.

In January 2009, the DeOliviera's oil burning heating system stopped working. They contacted the defendant. He was downstairs for 15 minutes and said he was all done. He provided an invoice for $500.00. When asked if he was kidding, he said, "that's the flat rate charge that I always do." p. 749. When asked what work was performed he said he replaced the firing assembly.

The heat failed the next morning. The defendant said he could not come until the afternoon so the DeOliveiras got a referral from their oil company. Dwight Wheeler responded to the DeOliveira home and restored the heat within a minute. When shown the defendant's invoice, Wheeler laughed. He said he had worked on oil burners since 1974 and never heard of a firing assembly. He went back to see what had been worked on and the only new part was a $3.25 nozzle. Mr. Wheeler did not charge the DeOliveiras for the visit.

Mrs. DeOliveira contacted the defendant and asked for an itemized bill with a list of parts that had been replaced. The defendant agreed to provide an itemized bill but failed to ever provide one. The DeOliveiras testified that they would not have agreed to pay $500 if they had known that the only work the defendant did was change a $3.25 nozzle. He was charged with larceny by false pretenses for these actions.

At trial the Commonwealth elicited testimony from someone who worked on hundreds of jobs with the defendant. He testified that the defendant told him when pricing jobs for older customers that "they had more time to save up money for him." p. 750. The defendant also told him to look around at customer's possessions to see how they were living. The defendant also told him that he would tell customers he had to call his boss about pricing when the customer started questioning his pricing. The defendant had no boss.

DISCUSSION

<u>Larceny from an elderly person</u>
MGL c 266 §30(5) requires proof of the following:

1. The defendant took and carried away property

2. The property was owned or possessed by someone who was not the defendant

3. The defendant took the property from the person or from their control in their presence

4. The defendant did so with the intent to deprive that person of the property permanently

5. The person was 60 years of age or older.

Evidence showed that the defendant told Mr. Thomas he needed a part costing between $100 and $150 but had Mr. Thomas sign a credit card slip for $250, the defendant worked for 45 minutes and then charged them a total of $1,750. The Thomases objected to the price and the defendant said it was a flat rate and fled. Mr. Thomas also specifically told the defendant not to charge his credit card. There was also the testimony of the plumbing and gas inspector about the unreasonableness of the charge and the testimony about the defendant's practice of excessive pricing for elderly customers.

> This evidence was more than sufficient to prove that the defendant charged unreasonable and excessive fees from what he viewed as elderly, vulnerable targets, charged disproportionately beyond the legitimate price of the work, and acted with intent to permanently deprive the Thomases of their funds. p. 754.

<u>Larceny by false pretenses</u>

Larceny by false pretenses under MGL c 266 §30 requires proof of four elements:

(1) a false statement of fact was made

(2) the defendant knew or believed that the statement was false when he made it

(3) the defendant intended that the person to whom he made the false statement would rely on it

(4) the person to whom the false statement was made did rely on it and, consequently, parted with property.

The defendant argued that the Commonwealth failed to establish the second element – that he knew his statement about replacing the firing assembly was false at the time he made it.

The jury could have found that the defendant lied about the firing assembly because the evidence showed he only worked for 15 minutes and replaced a nozzle worth $3.25, not a "firing assembly." There was also evidence that he overcharged in an amount that was "manifestly unrealistic", the heat stopped working the next day and he refused to provide an itemized statement. p. 755. These facts were sufficient to prove that he knew the statement was false.

The convictions were affirmed.

PHOTOGRAPHING AN UNSUSPECTING NUDE PERSON

PICTURE OF NUDE OR PARTIALLY NUDE PERSON NOT REQUIRED TO CONVICT DEFENDANT OF PHOTOGRAPHING AN UNSUSPECTING NUDE

Commonwealth v. Cooper, 100 Mass.App.Ct. 345 (2021).

FACTS

The victim, a student at UMass medical school, was in a private stall in a bathroom on the fourth floor of the medical school. She was squatting above the toilet with her shorts pulled down urinating when she saw a man's shoe at the bottom of the stall. Upon looking up, she saw a cell phone camera aimed at her and heard a "nondistinct sound. It could have been a camera, click." p. 346. The victim screamed "what are you doing?" as she quickly pulled up her shorts. She heard someone run out of the bathroom and followed them. She saw the men's bathroom door was closing and was able to see in the mirror someone scurry into a stall. The victim stood at the doorway to the men's room and asked the defendant what he was doing. The defendant said he was on his cell phone and mistakenly went into the wrong bathroom. The victim asked to see his phone. The defendant said he did not take any pictures of her.

The defendant refused to go to security with the victim and he refused to show her his ID badge. The defendant told her, "I'm not giving you my badge and if you knew who I was, then you wouldn't be doing this." p. 346. The defendant left the bathroom and was followed by the victim who asked again for his name so that she could report him. The victim continued to follow the defendant as he went down a set of stairs and increased his speed. The victim enlisted the help of a woman who was in the stairwell and the women chased the defendant across the third floor until they lost sight of him. Surveillance footage showed the defendant, an assistant professor at the medical school and a physician with an office on the seventh floor, cross a bridge between the building and the parking garage and drive away.

The victim reported the incident to campus security. The defendant also called campus security asking for directions to the campus police department. He arrived there 13

minutes later and gave a statement. Officers checked the phone but did not find any pictures of the victim.

The defendant was convicted of photographing a person who is nude or partially nude and disorderly conduct. On appeal the defendant argued that the Commonwealth did not meet its burden of proof because it did not produce a photograph.

DISCUSSION

The defendant was charged with violating the first paragraph of MGL c 272 § 105(b) which states:

> Whoever willfully photographs, videotapes or electronically surveils another person who is nude or partially nude, with the intent to secretly conduct or hide such activity, when the other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed, videotaped or electronically surveilled, and without that person's knowledge and consent, shall be punished…

This offense has five elements which the Commonwealth must prove. The model jury instructions for use in the district courts define those elements as:

1. That the defendant willfully photographed, videotaped or electronically surveilled the victim

2. That the defendant did so without the victim's knowledge or consent

3. That the defendant intended to secretly conduct or hide such activity

4. That the victim was nude or partially nude

5. The victim had a reasonable expectation of privacy in not being so photographed, videotaped or electronically surveilled.

The defendant argued that, at best, the Commonwealth can only prove an attempt in this case because the Commonwealth did not produce a photograph of the victim partially nude. The court found that the statute does not require the Commonwealth to produce a photograph showing a nude or partially nude person. The case can be proven circumstantially.

The act that is prohibited by the statute is photographing a person who is nude or partially nude, not photographing partial nudity itself. The focus of the statute is the violation of the person's privacy. The invasion of the victim's privacy here was accomplished when the defendant pointed the camera at her and snapped the photograph. Contrast the offense of

disseminating an image obtained by a violation of this section which focuses on the distribution of the image.

The defendant argued that, without a photograph, the Commonwealth cannot meet its burden because there could have been a misfire whereby no image of the victim was actually caught on camera. The court found that the circumstances in this case, in the light most favorable to the Commonwealth, was sufficient to meet the Commonwealth's burden. Specifically, the victim was in a private bathroom stall, was in a state of partial nudity, she saw a camera aimed at her and heard a noise that she inferred was the camera taking a picture of her.

> Moreover the jury could infer from the defendant's behavior immediately thereafter that he had taken a photograph and, caught in the act, took flight so he could destroy the evidence. p. 350.

The defendant also challenged the sufficiency of the evidence of the disorderly person charge. The charge of disorderly person

> requires proof that a person, with purpose to cause public inconvenience, annoyance or alarm, or recklessly created a risk thereof, engaged in fighting or threatening, or in violent or tumultuous behavior or created a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor. p. 351 (quotations and citations omitted).

The court has found in prior cases that voyeurism or being a "Peeping Tom" constitutes disorderly conduct. The act of intruding upon someone's privacy when they have "purposely closed themselves off from public view in an enclosed space or area" creates a physically offensive condition. p. 353 *quoting* Commonwealth v. Swan, 73 Mass. App. Ct. 258, 263-264 (2008). In this case the defendant went into the women's bathroom, stood outside an occupied stall, and pointed a camera inside while the victim was urinating. These facts are sufficient to prove that he created a physically offensive condition.

The facts of this case, together with the reasonable inferences a jury could draw from those facts, were enough to satisfy the Commonwealth's burden of proof beyond a reasonable doubt.

The judgments were affirmed.

IMPERSONATING A POLICE OFFICER

POLICE OFFICER CAN BE GUILTY OF IMPERSONATING A POLICE OFFICER IF THEY REPRESENT THAT THEY HOLD AN OFFICE THEY DO NOT ACTUALLY HOLD

Commonwealth v. Nordstrom, et al., 100 Mass.App.Ct. 493 (2021).

FACTS

In October 2005 the 17-year-old victim reported to the Foxborough police that he was raped by his ex-boyfriend. The police investigated, but charges never issued. There was no activity on the investigation since 2005.

During the early morning hours of December 9, 2014, the victim was home and answered a knock at the front door. He opened the door and found the two defendants, Nordstrom and French. The victim testified that the women were not in uniform but they identified themselves as police officers and one was holding a notepad. The victim, believing them to be police officers, invited them inside. Once inside, the defendants identified themselves as the sister and mother of the ex-boyfriend. The defendants wanted the victim to sign a piece of paper saying that he lied to the Foxborough police about the rape. At some point French began recording the conversation with the consent of the victim.

Both defendants questioned the truthfulness of the victim and pressured the victim to recant. When the victim asked why this was coming up now, the defendants said that the ex-boyfriend was being "charged" in court the next day. French said she was trying to save her brother's life. She also said that she was a police officer and had been in the military police for 15 years. French's tone during the conversation could be described as aggressive. Throughout the 10-minute encounter the victim told the women that he did not lie, that the ex-boyfriend had raped him, and that he would not be signing the paper.

Both defendants were charged and convicted of impersonating a police officer and intimidating a witness.

DISCUSSION

Impersonating a police officer

Impersonating a police officer MGL c 268 § 33 requires proof of 2 elements:

(1) That the defendant falsely assumed or pretended to be a police officer, and

(2) That the defendant acted as a police officer or required a person to aid or assist them in a matter pertaining to the duty of a police officer.

French argued that she cannot be convicted of impersonating a police officer because she was, in fact, a military police officer. The court found that a police officer can violate the

statute "if by words or conduct they state, or can reasonably be understood to represent, that they hold an office that they do not in fact hold." p. 496.

> Here, the defendants' statement at the door that they were police officers could reasonably have been understood as a representation (at least, a jury could so find) that the defendants had some authority in the situation, such that the victim should give them deference, let them into his home, and speak with them. The jury also could have found that the defendants reinforced this false impression through their actions -- arriving unannounced at the victim's home early in the morning, notepad in hand, asking to talk. p. 497 (emphasis in original.)

Assuming that the defendant French was a military police officer, she would have no authority regarding the rape reported back in 2005. For this reason, a jury could reasonably find that she "falsely pretended or assumed the role of a police officer" when she questioned the victim about the rape. p. 497.

Impersonating a police officer requires an intentional deception. Both defendants denied identifying themselves as officers at the front door and argue that the Commonwealth failed to prove they intended to deceive the victim. The court found otherwise. The victim testified that the defendants identified themselves as police officers when the victim answered the door and they "presented to him an aura of authority." p. 499. The purpose of the visit was to get the victim to sign a recantation.

> The jury could infer from the circumstances that the defendants made the statements with knowledge that they were engaging in a pretense, and for the exact purpose of gaining an audience with the victim that they otherwise might not obtain. p. 499.

Witness intimidation

The defendants argue that they cannot be convicted of witness intimidation because the rape was not an ongoing investigation at the time of their conversation with the victim. The court did not decide that issue because it found that there was sufficient evidence to prove that the defendants were trying to interfere with a different court proceeding, namely the case the ex-boyfriend had the next day. French told the victim the ex-boyfriend was being "charged" the next day and that she was trying to save his life.

> Plainly, French was aware that there was a pending criminal matter, and her statement showed that she and Nordstrom were asking the victim to sign a document that could be used as that matter was being investigated or heard. p. 500.

The defendants also argue that the Commonwealth failed to establish that the victim was actually intimidated. The Commonwealth does not have to prove that the victim was

actually intimidated because the statute also prohibits harassment. MGL c 268, § 13B defines "harass", in relevant part, as

> to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress. G. L. c. 268.

The testimony of the victim and the recording in this case both prove this element. French's tone was loud and, at times, intimidating. The defendants persisted after the victim initially refused to recant and they both emphasized to the victim the potential consequences the ex-boyfriend faced in the court case.

> The victim was unduly pressured and on the defensive, and he testified that he felt "really nervous." The defendants' actions thus not only constituted intimidation but also met the definition of "harass." p. 601.

The judgments were affirmed.

ARMED ASSAULT IN A DWELLING

HALLWAY OF MULTI-UNIT BUILDING WAS VICTIM'S DWELLING FOR PURPOSES OF ARMED ASSAULT IN A DWELLING CHARGE

Commonwealth v. Rodriguez, 100 Mass.App.Ct. 663 (2022).

FACTS

The victim was attacked on July 9, 2018 by the defendant and an accomplice in the hallway of his building as he was returning to his third-floor apartment. The three men fought in the hallways of the second and third floors. During the fight, the defendant obtained the keys to the victim's apartment and tried to open the door. The victim's girlfriend was home at the time and opened the door to find the defendant and the accomplice duct taping the victim. The girlfriend also heard a gunshot in the hallway.

The accomplice and the victim remained in the hallway while the defendant entered the apartment. The girlfriend saw a gun in his hand. The defendant took several items from the top drawer of the dresser, which is where the victim typically kept his money and jewelry. The defendant and the accomplice left the scene in a white Honda Civic. The top drawer was empty after the defendant left. The victim suffered several injuries, including bleeding from his mouth and a missing tooth.

Police found a spent shell casing in the hallway in front of the apartment door. The police searched the Honda Civic the next day pursuant to a warrant and found the victim's apartment key in a cupholder.

The defendant was charged with armed assault in a dwelling, larceny from a person, assault and battery and firearm possession offenses. He was acquitted of the firearm offenses but convicted of the remaining charges. He appeals arguing, among other things, that the evidence was insufficient to prove armed assault in a dwelling.

DISCUSSION
To prove armed assault in a dwelling (MGL c 265 § §18A) the Commonwealth must prove three elements:

1. entry of a dwelling while armed

2. an assault on someone in the dwelling

3. specific intent to commit a felony inside.

The defendant argued that the assault took place in the common hallway and not inside the victim's dwelling. The statute does not define "dwelling house" but the court has interpreted the term in various burglary cases and those interpretations have been applied to cases involving armed assault in a dwelling.

In Commonwealth v. Goldoff, 24 Mass.App.Ct. 458 (1987) the court found that a "secured common hallway" in a multi-unit residential building was part of the dwelling house for purposes of MGL 266 § 14. The court reasoned that a secured hallway is part of a person's habitation because, even though the area is not within an occupant's exclusive control, it is cut off from public access.

> Applying the broad meaning of dwelling house under Goldoff to the present case, we conclude that a secured hallway accessible only to residents and building staff in a multiunit residential building is part of one's dwelling house under G.L. 265 § 18A.

Because the assault took place in a "locked hallway, an exclusive area within the residential building through which residents reached their apartments" it was considered part of the victim's dwelling house for purposes of MGL c 265 §18A.

The defendant argued that he was lawfully present in the hallway because another resident had let him in. This did not matter because the issue is whether the secured hallway was considered the victim's "place of habitation", not how the defendant gained entry.

The court refused to apply the more narrow definition of dwelling used in the context of self-defense. The court recognized in a footnote that the definition of a dwelling is more limited in situations involving self-defense and warrantless search and seizure. In those situations, the central inquiry is whether the defendant had exclusive control over a specific

place where the conduct occurred. "In contrast, whether the victim had exclusive control over the relevant area does not determine whether an area is within a dwelling house for purpose of burglary or armed assault in a dwelling." FN 2.

The defendant next argued that the Commonwealth did not produce sufficient evidence that he was armed with a dangerous weapon. He first states that, because the jury acquitted him of all the firearm possession charges, he cannot be convicted of armed robbery which requires proof that he was armed with a firearm. The court disagreed finding that inconsistent verdicts do not render a conviction erroneous. The jury had evidence of a spent shell casing found by the police, the testimony of the girlfriend that she heard the defendant fire a gun in the hallway and that she saw the defendant with a firearm when he came into the apartment. There was also testimony from another resident that they had heard a gunshot. "From this evidence, a rational jury could have found that the defendant had a firearm when he entered the victim's apartment."

The Commonwealth also succeeded on its alternative theory that the duct tape was a deadly weapon. Innocuous items may be considered dangerous weapons if they are used by the defendant in such a way that they are "capable of producing serious bodily harm." In this case, evidence was offered to show that the victim was duct taped around his face and his wrist. This "could dangerously inhibit movement and breathing, and could also inflict injuries such as bleeding, bruising, and abrasions." There was also evidence that the victim suffered injuries to the areas where he was duct taped. This evidence was sufficient for a reasonable jury to find that the duct tape was used as a dangerous weapon.

The judgments were affirmed.

FIRST DEGREE MURDER

DRIVING SHOOTER TO AND FROM A SHOOTING, WITHOUT MORE, IS NOT ENOUGH TO PROVE DRIVER SHARED INTENT TO KILL THE VICTIM

Baxter v. Commonwealth, 489 Mass. 504 (2022).

FACTS

The victim left his apartment on Howard Avenue in Boston at 9:06AM and crossed the street. He was followed down the street by the defendant who was driving his girlfriend's gold Honda Accord with his two co-defendants as passengers. The car drove by the victim and stopped by the curb where it waited for 18 seconds as the victim got closer. The car then pulled away as the victim approached and turned onto Balfour Street. The victim walked past Balfour Street 45 seconds later. At that time a co-defendant approached the victim from behind and shot him six times. The shooter than ran back down Balfour Street. The victim died as a result of his injuries.

Two residents heard shots while they were in their homes on Balfour Street and saw two men running toward a gold car on Balfour Street. Once in the car, the car sped away.

The defendant was charged with murder in the first-degree, accessory after the fact to murder, unlicensed possession of a firearm (MGL c 269 §10a), and unlicensed possession of a loaded firearm (MGL c 269 §10n). The trial resulted in a hung jury. The defendant filed a motion to dismiss the charges arguing that double jeopardy precludes a retrial here because the evidence at the first trial was legally insufficient to support a conviction. That motion was denied and this appeal followed.

DISCUSSION

First Degree Murder

To prove first-degree murder on the theory of joint venture, the Commonwealth has the burden of proving that the defendant knowingly participated in the crime charged, and that he shared the required criminal intent of the shooter. This means the Commonwealth in this case had to prove that the defendant was the driver of the car, that he knew the passenger intended to kill the victim and that the defendant shared that intent.

The defendant argued that the Commonwealth failed to show he knew of and shared the shooter's intent to kill the victim. The court found that the way the defendant drove the car on that day was not enough to prove his knowledge or intent. While the maneuvering of the car may have been enough for a jury to infer the defendant's knowledge and intent to assault the victim, it was not enough to reasonably infer, beyond a reasonable doubt, that the defendant shared the intent for that assault to be deadly. The Commonwealth offered no evidence that the defendant heard the co-defendant express a lethal intent or that he saw any actions, such as displaying a firearm, before the shooting to demonstrate a lethal intent.

> The evidence as a whole did not support a reasonable inference, beyond a reasonable doubt, that the defendant arrived at the scene with the knowledge and sharing the purpose of the passenger to kill the victim. p. 511.

Accessory after the fact

There were enough facts and reasonable inferences from those facts to sustain a conviction on this charge.

> As relevant here, to support a conviction of accessory after the fact, the Commonwealth was required to present evidence that the defendant knew the identity of the perpetrator, was aware of the substantial facts of the crime committed, and assisted the principal in his escape. p. 512.

Based upon the facts here, it was reasonable to infer that the defendant knew the identity of the shooter. It was also reasonable to infer that the defendant heard the shots being

fired because witnesses in approximately the same location as the defendant heard the shots. After hearing those shots, the defendant assisted the shooter in escaping by driving the getaway car from the scene.

Firearm charges

In addition to the facts and reasonable inferences stated above, the court also found it reasonable to infer that the defendant saw the gun before driving the shooter away because one of the witnesses saw the shooter holding a gun as he ran to the car. These facts are enough to support a reasonable inference that the defendant knew the passenger was armed with a gun when that passenger got back to the car after the shooting.

The motion to dismiss should have been allowed regarding the first-degree murder charge. The Commonwealth may retry the defendant on the remaining charges.

POSSESSION OF HEROIN

PASSENGER IN VEHICLE CONSTRUCTIVELY POSSESSED HEROIN IN CUPHOLDER

Commonwealth v. Nova, 101 Mass.App.Ct. 1 (2022).

FACTS

On April 24, 2015 police watched a Pontiac Grand Prix and its two occupants pull over to the side of Roberts Street in Quincy and watch the front seat passenger get into the backseat and the defendant, who was walking up the street, get into the front seat. After going on a "meaningless" ride around the block the defendant gets out of the car. Based upon their training and experience, the police believed the defendant and the occupants of the Grand Prix have engaged in a narcotics transaction.

The police then watched the defendant walk along the street until he entered the passenger side of a rented Ford Fusion. Police stopped both cars. They found money and four bags of cocaine in the sock of the Grand Prix's passenger.

The driver of the Fusion would not comply with multiple orders of officers to roll down the window. Based on the actions of the driver, the officer feared that the driver was going to drive away and potentially strike him with the car in the process. The officer drew his firearm and ordered the driver to unlock the door, which he did.

While this was happening, another detective had approached the passenger side of the vehicle and saw that the defendant's head was turned toward the driver. The officer also saw the cup holder closest to the defendant had a medium-sized knotted bag containing a white substance that was later learned to be 19.99 grams of heroin. The detective tried to open the door and yelled, "There it is. Open the door. Open the door." The defendant looked at the detective and then lifted his hand so that it obstructed the officer's view of

the cup holder. The defendant moved his hand as the detective moved his head in a possible attempt to prevent the officer from seeing the heroin in the cup holder.

When the officer at the driver's door opened that door, he unlocked the passenger door. The detective retrieved the heroin and searched the defendant. There were three folds of money on the defendant's person totaling $1,542.00.

The defendant was charged with various drug crimes including distribution of the cocaine that was found in the Grand Prix and trafficking 18 grams or more of heroin for the heroin in the Ford Fusion. He was acquitted of all charges related to the Grand Prix but was convicted of the trafficking charge. The defendant appeals arguing there was insufficient evidence with which to prove he possessed the heroin.

DISCUSSION
The defendant was convicted on the theory that he constructively possessed the heroin. Mere presence is not enough to prove possession. Constructive possession requires proof that the "defendant had both knowledge of the contraband and the ability and intention to exercise dominion and control over it." *quoting* Commonwealth v. Ortega, 441 Mass. 170, 174 (2004).

The court found that the "evidence in this case is plainly sufficient to support the conviction." The facts that the court relied upon in reaching this conclusion include: the defendant was the closest person to the drugs, just prior to the arrest the jury could have found that the defendant had engaged in a drug deal, and he possessed $1,542 in cash that was separated into different folds which an expert testified at trial was consistent with how a seller of narcotics keeps their money. The jury could also have found that the defendant tried to block the detective's view of the heroin as he sat in the car and that he ignored commands to open the door. These facts are enough for a jury to find constructive possession of the heroin beyond a reasonable doubt.

The judgment was affirmed.

DISORDERLY CONDUCT AND DISTURBING THE PEACE

Finamore v. Miglionico, 15 F.4th 52 (1st Cir. 2021).

FACTS
Finamore owns real estate in Douglas, Massachusetts that has a public street that runs through it. After having a survey done, Finamore believed that the part of Cedar Street that cuts through the property belonged to him. He sued the town but lost. After an appeal, the court ordered a new trial. Finamore claims that he believed the appeals court decision rescinded public access to that part of the street while they awaited a new trial.

On October 13, 2015 officers were dispatched to the area on a report that Finamore had blocked the street. Upon arrival, officers discovered that Finamore had stretched an orange snow fence across one end of the street and was in the process of blocking the other side. Lt. Miglionico told Finamore to remove the fencing and warned him he would be arrested if he did not remove it. Finamore refused and said he would rather go to jail.

While this was happening, a crowd had gathered. The crowd was yelling at Finamore, demanding that he open the street. Officers conferred with the town administrator and the highway superintendent who had both responded to the scene as well. The administrator and superintendent confirmed that Finamore had no authority to close off the street. Finamore was again told to remove the fence. When he refused, he was arrested.

Finamore was booked on charges of disturbing the peace and disorderly conduct. The court found probable cause for both charges but the charges were ultimately dismissed. The defendant now sues the officers and the municipal officials under 42 U.S.C. § 1983 on various charges including false arrest, false imprisonment, and malicious prosecution. The court granted summary judgment for the officers and town officials. Finamore then brought this appeal.

DISCUSSION

To survive summary judgment on the charges, Finamore must prove that his arrest was not supported by probable cause.

<u>Disturbing the peace</u>

The model jury instructions for use in the district court sets out three elements for this offense:

1. That the defendant engaged in conduct which most people would find to be unreasonably disruptive such as: making loud and disturbing noise, tumultuous or offensive conduct, hurling objects in populated areas, threatening, quarreling, fighting, or challenging others to fight, uttering personal insults that amount to fighting words, that is, are so offensive that they are inherently likely to provoke an immediate violent reaction

2. The defendant's actions were done intentionally and not by accident or mistake

3. The defendant did in fact annoy or disturb at least one person.

In this case, Finamore blocked a public way with plastic fencing.

> The fence plainly disturbed the public's right to pass along Cedar Street. And we need look no further than the boisterous gathering of local residents at the fence, provoked by [Finamore's] intransigence, to discern that many people found [his] makeshift blockade unreasonably disruptive. p. 59.

These facts were enough to prove that Finamore disturbed the peace.

Disorderly conduct

The model jury instructions for use in the district court set forth three elements of disorderly conduct:

1. The Commonwealth must prove that the defendant involved themselves in at least one of the following actions:

    a. engaged in fighting or threatening or
    b. engaged in violent or tumultuous behavior or
    c. created a hazardous or physically offensive condition by an act that served no legitimate purpose of the defendant.

2. The defendant's actions were reasonably likely to affect the public

3. The defendant *either* intended to cause public inconvenience, annoyance, or alarm *or* recklessly created a risk of public inconvenience, annoyance or alarm.

The blockade here created a hazardous condition. There was evidence that the portion of the road involved was "particularly dangerous" and had been the location of several accidents in the past. p. 60. Finamore also admitted in his deposition that it "absolutely" posed a traffic hazard. Placing the blockage on a public way and refusing to remove the fence after being told twice by police to remove it recklessly created a risk to the public and was probable cause to charge him with disorderly conduct.

Finamore argued that the fence served a legitimate purpose; however, the court found no support for this argument in the evidence. The court also noted that the officers, being aware of the ongoing litigation, had conferred with the town administrator and the highway superintendent prior to placing Finamore under arrest.

> As a general matter, government officials involved in an investigation are presumed to be reliable sources of credible information for the purpose of developing probable cause. It follows that, on the facts available to them at the time, the Officers reasonably could have believed – when they placed the appellant under arrest – that the appellant lacked a legitimate purpose for cordoning off Cedar Street. p. 60 (citations omitted.)

Finamore also argued that the arrest was unnecessary because the officers could have had the municipal officials remove the fence as opposed to arresting him. The court did not find that persuasive.

> When probable cause for an arrest exists, the arresting officer need not balance the "costs and benefits" of making the arrest or determine that the arrest is "in some sense necessary." p. 60 *quoting* Atwater v. City of Lago Vista, 532, U.S. 318, 354 (2001).

With respect to his malicious prosecution claims, Finamore argued that malice can be inferred under Massachusetts law when an officer makes an arrest not supported by probable cause.

> That is true as far as it goes – but it does not take the appellant very far. p. 62.

Because the court has found there was probable cause to make the arrest, malice cannot be inferred here.

The order of summary judgment was appropriate.

STATUTES

MGL C 89 §7D – MOVING A VEHICLE INVOLVED IN A CRASH FROM TRAVEL LANE

The operator of any vehicle involved in a crash in a travel lane on a public way resulting only in property damage shall immediately move or cause the vehicle to be moved to a safe area on the shoulder, emergency lane, or median, or to a place otherwise removed from the roadway when such moving of a vehicle can be done safely and the vehicle is capable of being operated under its own power, without further damage to property or injury to any person.

Whenever any state or public law enforcement agency determines that an emergency is caused by the immobilization of any vehicle in a travel lane on a public way, such agencies and those acting at their direction or request, shall have the authority to move the immobilized vehicle.

Such agencies and their officers, employees, agents, or contractors shall not be held responsible for any damages to the immobilized vehicle, its contents or surrounding area caused by the emergency measures employed to move the vehicle for the purpose of clearing the travel lane on a public way.

A violation of this section shall be punished by a fine of not more than $100. A violation of this section shall not be a surchargeable incident under section 113B of chapter 175 or under a motor vehicle liability policy as defined in section 34A of chapter 90 that is issued pursuant to said chapter 175.

NERO'S LAW

This law was passed this year in response to a shooting that claimed the life of Yarmouth police Sgt. Sean Gannon and severely injured his K-9 partner, Nero. The law authorizes emergency personnel to provide emergency treatment and transport to K-9 partners who are injured in the line of duty.

The legislation added a new definition to MGL c 111C:

> Police Dog – a dog owned by a police department or police agency of the commonwealth, or any political subdivision thereof, and used by the department or agency for official duties.

MGL c 111C §9A (effective May 16, 2022)

> (a) EMS personnel shall provide emergency treatment to a police dog injured in the line of duty and transport such police dog by ambulance to a veterinary care facility equipped to provide emergency treatment to dogs; provided, however, that EMS personnel shall not transport an injured police dog if providing such transport would inhibit their ability to provide emergency medical attention or transport to a person requiring such services.
>
> (b) The department, in consultation with the Massachusetts Veterinary Medical Association and the department of state police's K9 unit, shall develop policies and procedures for each region that shall include, but not be limited to: (i) appropriate training of EMS personnel to provide police dogs basic level first aid, cardiopulmonary resuscitation and life-saving interventions, including, but not limited to, administering naloxone; provided, however, that nothing in this section shall authorize the provision of advanced life support care to a police dog; (ii) safe handling procedures for injured police dogs, including, but not limited to, the use of a box muzzle and response coordination with a law enforcement official trained in handling police dogs; (iii) identification of veterinary facilities that provide emergency treatment for injured police dogs; (iv) decontamination of stretchers, the patient compartment and any contaminated medical equipment after a police dog has been transported by EMS vehicle; and (v) sterilization of the interior of an EMS vehicle before being returned to human service, including, but not limited to, sanitizing all allergens and disinfection to a standard safe for human transport.

(c) The department may grant a waiver of this section if the department determines that compliance poses a safety risk to the public. The department shall develop regulations regarding applications and issuance of such a waiver.

MGL c 111C §21 EMS personnel, good faith performance of duties (new language effective May 16, 2022:

Section 21. No EMS personnel certified, accredited or otherwise approved under this chapter, and no additional personnel certified or authorized under section 9, who in the performance of their duties and in good faith, render emergency first aid, cardiopulmonary resuscitation, transportation or other EMS to an injured person, a person incapacitated by illness or an injured police dog under section 9A shall be personally liable as a result of rendering such aid or services or, in the case of an emergency medical technician or additional personnel, as a result of transporting such person to a hospital or such police dog to a veterinary care facility, nor shall they be liable to a hospital or veterinary care facility for its expenses if, under emergency conditions, they cause the admission of such person or such police dog to the hospital or the veterinary care facility.