2019-2020
Legal Issues Student Guide

Municipal Police Training Committee

Legal Issues TY 2019-2020
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This document is intended to serve as a training guide for legal instructors to review new case law and legislation that has been issued from the controlling courts in Massachusetts, the Supreme Judicial Court and the Massachusetts Appeals Court over the course of the year. Some Supreme Court decisions are included in this curriculum. While this curriculum examines the impact of new cases or law by revisiting some past cases, it 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 or prosecutor. 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:

Attorney Sheila Gallagher
Legal Issues Coordinator
Municipal Police Training Committee
Telephone: (781) 437-0314
Email: sheila.gallagher@massmail.state.ma.us

Acknowledgments and Contributions for Legal Issues Curriculum

Attorney Eric Atstupenas
Massachusetts Chiefs of Police Association

Lt. John Flynn
Boston Police Department Academy

Chief Andrew "Kevin" Kennedy
Lincoln Police Department

Sgt. (Retired) George Neilson
Dedham Police Department

Joseph Pieropan, Esq.
ADA from Berkshire & Hampden Counties

Lt. William Sharpe
Lynn Police Department

Lt. John Towns
Worcester Police Department

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Chapter 1
MOTOR VEHICLE LAW

Elements Required for OUI Drug cases:

1. The driver took drugs;
2. The driver took one of the drugs classified as a controlled substance pursuant to G.L. c. 94C, § 31, (marijuana, narcotic drugs, depressants, stimulants, or vapors of glue).

   NOTE: Vapors of glue is further defined by G.L. c. 94C § 1; and
3. The drugs caused the driver to be legally impaired while operating a motor vehicle.

The Silver Lining of Davis

Conclusion: The SJC held that based on the totality of the officer's observations of the driver before and during the traffic stop, the trooper had probable cause to arrest the defendant. The SJC also affirmed that impounding the motor vehicle was reasonable and that the subsequent search of the vehicle was lawful under the automobile exception.

Commonwealth v. Davis, 481 Mass. 210 (2019): On July 2015, a state trooper stopped a gray Infiniti sedan speeding on the Massachusetts Turnpike. The sedan was traveling at speeds between seventy and eighty miles per hour, and following "dangerously close" to two other vehicles. As the sedan approached toll booths at Exit 18, to Brighton or Cambridge, it failed to slow down and continued driving seventy miles per hour in a zone with a posted speed limit of thirty miles per hour. The state trooper immediately stopped the sedan after it passed through the toll booths, approximately fifty or sixty feet away. The defendant parked the sedan to the left of the exit from the toll booths.

When the trooper approached the driver's side door, he detected a strong odor of burnt and fresh marijuana coming from within the vehicle. The defendant smelled of burnt marijuana and apologized for "moving pretty fast." He explained he had two friends visiting from New York, and that one of his friends had to be in Somerville by 1:00 PM. The trooper noticed that the defendant's eyes were "red," "glassy," and "droopy," and that he was "fighting with the eyebrows, trying to keep his eyes open." He had "dry spit" on the sides of his mouth, his tongue was dry, he was "licking his lips" when responding to questions, and "his speech was slow and lethargic." The defendant also admitted to smoking marijuana "a couple of hours ago. The two passengers within the car also appeared to have smoked marijuana and "looked high." The passengers smelled of marijuana and had difficulty staying awake during the interaction with the trooper. When the defendant stepped out of the vehicle, his coordination was slow, his head was bowing down, and he had a hard time focusing. According to the trooper, the defendant failed to follow simple instructions which included failing to take his hands out of his pockets after four requests to do so. The trooper did not administer road side assessments because he "relied upon his thirty years of training and experience with the state police which included extensive specialized training in narcotics and sixteen years in a specialized unit."

The trooper arrested the defendant for operating a motor vehicle while under the influence of marijuana, G. L. c. 90, § 24 (1) (a) (1) and impounded the motor vehicle. Neither passenger was capable of driving the vehicle because they were both impaired. The vehicle was towed to the state police barracks because it was stopped in a "precarious spot," on the highway. At the barracks, the trooper requested assistance of a canine. The canine alerted the handler to the glove compartment. The trooper used a key had to open the glove compartment and he found eleven oxycodone pills along with two plastic bags of cocaine. During an inventory search, police recovered a loaded handgun, ammunition and three bags of marijuana in a sealed container.

A jury acquitted the defendant for all charges except possession of drugs found in the glove compartment. The defendant appealed and argued that police lacked probable cause to arrest him for operating a motor vehicle while under the influence of marijuana and that the search of his automobile was an unlawful inventory search. The SJC heard the appeal and considered the following issues:

1. Was there probable cause to arrest the defendant for OUI marijuana?

2. Were police justified in impounding the motor vehicle and was the inventory search valid?

3. Was the warrantless search of the automobile justified under the automobile exception?

1st issue: Was there probable cause to arrest the defendant for OUI marijuana?

Based on his observations of the defendant's driving before and during the traffic stop, the trooper had probable cause to arrest the defendant for OUI marijuana. The defendant's demeanor, physical appearance and the manner in which he drove the sedan suggested that the defendant's consumption of marijuana impaired his ability to safely drive a motor vehicle. Even though using marijuana in Massachusetts is no longer a crime, it is still a crime to operate a motor vehicle while under the influence of marijuana. The SJC acknowledged the challenges in detecting impairment of marijuana since the effects of consumption vary among individuals and also the lack validated field sobriety tests. Despite these challenges, police can rely on other indicia when that are relevant when determining whether a driver is impaired from marijuana. For example, "any erratic driving or moving violations that led to the initial stop; the driver's appearance and demeanor, the odor of fresh or burnt marijuana; and the driver's behavior on getting out of the vehicle," are all relevant. ***Commonwealth v. Daniel,*** 464 Mass. At 756. Although the trooper did not observe any erratic driving or any marked lanes violations, he did observe the defendant speeding and driving dangerously close to the bumper of other vehicles. These observations were sufficient to stop the motor vehicle. The trooper testified he considered a number of reasons as to why the defendant was speeding. When the trooper approached the defendant's vehicle and smelled burnt and fresh marijuana, he suspected OUI of marijuana. Some other factors the trooper noted were the defendant's red and glassy eyes, his struggle to stay awake, his slow coordination, inability to focus or follow simple directions. All of this observations including the defendant's admission that he had smoked marijuana earlier in the day provided probable cause to arrest the defendant.

2nd Issue: Were police justified in impounding the motor vehicle and was the inventory search valid?

The SJC affirmed the motion judge's findings and held that the police were authorized to conduct a warrantless search of the defendant's motor vehicle as an inventory search pursuant to the State Police inventory policy. The impoundment of the motor vehicle was justified because the vehicle was located

on the side of the road after the toll booth in a precarious spot. Additionally, there was no practical alternative for police to consider other than impoundment. Both passengers appeared to be under the influence and were unable to drive the vehicle. Police may impound and search a vehicle and its contents to protect from threat of theft or vandalism, to protect the police and the tow company from false claims and to protect the public from dangerous items that might have been left inside a vehicle. ***Commonwealth v. Ehiabhi***, 478 Mass 165 (2017). The police had reasonable grounds to impound the motor vehicle due to public safety hazard.

Although the impoundment of the motor vehicle was justified, the subsequent inventory search was not. Here, the trooper's decision "to put a drug dog" on the vehicle failed to establish that it was done for non-investigatory purposes. Since there was no legitimate need to put a drug detection dog on the vehicle, the SJC found the inventory search was not valid.

3rd Issue: Was the warrantless search of the automobile justified under the automobile exception?

The SJC held that police had probable cause to believe that they would find evidence pertaining to the crime within the vehicle. Authority to search under the automobile exception exists even when police have ample time to obtain a warrant. The SJC found that the troopers had adequate grounds to secure the vehicle and promptly search the glove compartment for evidence related to the offense of operating a motor vehicle while under the influence of marijuana. Here, the trooper's interaction with the defendant and observations as well as the defendant's admission that he consumed marijuana earlier in the day suggest he had diminished to safely operate a motor vehicle. Furthermore, the trooper observed marijuana leaves scattered on the rear passenger seat. The SJC concluded that the search properly extended to the locked glove compartment, because it was reasonable for the troopers to believe it contained marijuana or related paraphernalia. Based on all these factors, the SJC found that the troopers had probable cause to search the motor vehicle under the automobile exception.

- **TRAINING TIP:** This is a pivotal case because the SJC acknowledges the challenges police encounter when arresting a person for OUI marijuana. However, this case emphasized that an officer's detailed observations of how a person was driving or how a person responded when police were interacting with the defendant, including demeanor and smell of burnt fresh marijuana, are critical when determining if a person is impaired to operate a vehicle. Although prior decisions found that the smell of fresh or burnt marijuana ALONE is not enough to establish impairment, the ***Davis*** case underscored that odor (fresh or burnt) is still a factor. Odor of marijuana along with other observations are considered together when determining impairment for OUI marijuana.

Lineage of OUI Drug Cases

Commonwealth v. Green, 408 Mass. 48, 50 (1990), requires that the substance the police suspect the driver ingested is included in the definition of a narcotic, depressant or stimulant. In ***Green***, the evidence showed that the defendant had consumed codeine, which is a derivative of opium and within the statutory definition of a narcotic. ***Id.*** at 49. However, the conviction was overturned because there was no evidence introduced at trial that identified codeine as a narcotic. ***Id.*** at 50.

Commonwealth v. Blais, 428 Mass. 294 (1998): The SJC held that an officer only needs reasonable suspicion to administer field sobriety tests. Although field sobriety tests constitute a search, under the

Fourth Amendment, the SJC concluded that police do not need probable cause to administer these tests. "The reasonableness of a particular search is a function of the degree and kind of the intrusion and the urgency of the occasion." The SJC determined that there was a significant safety concern here even though police were not searching for weapons. "A drunk driver let loose on the highway is a deadly menace, not only to the officer, but also to anyone sharing the highways with him." ***Id*** at 297.

Commonwealth v. Thomas Gerhardt, 477 Mass. 775, (2017): ***Gerhardt*** imposed limitations on what an officer can testify to during an OUI/marijuana trial, but it **DID NOT PREVENT** an officer who has stopped a vehicle for an infraction or for suspicion of OUI from administering roadside assessments. ***Gerhardt*** also does not prevent an officer from arresting a driver, if probable cause exists, for OUI marijuana nor does it prevent the officer from testifying in court. ***Gerhardt*** does not address the issue of drug recognition expert participation or testimony.

- **TRAINING TIP*: Gerhardt*** changed the nomenclature of the roadside tests administered during an OUI drug stop. Rather than calling the tests field sobriety tests which are used in OUI alcohol stops, police refer to these tests as roadside assessments. Additionally, a police officer's observations of the driver's behaviors and characteristics are the same as well as taking the jury through an explanation and performance of the roadside assessments. In addition, the prosecutor should still ask, and an officer still can testify, as to what observations he/she is watching for during the assessments—i.e. which assessments are linked to divided attention, balance, coordination etc.

- **TRAINING TIP*:*** Below highlights the changes that occurred with OUI Drug marijuana cases after ***Gerhardt.***

  - Changes nomenclature
  - Restricts what an officer can testify to during a trial. The officer would be testifying as a lay witness not as an expert.
  - ***Gerhardt*** allows officers to testify to their observations as to how a driver performed road side assessments.
  - Road side assessments are not "tests," and therefore an officer cannot testify that a driver passed or failed the road side assessment.

Examples of Permissible Testimony Post Gerhardt

- **TRAINING TIP:** Although the primary issue in this case concerned whether ***Gerhardt*** applied retroactively to pending OUI marijuana cases, the facts of this case highlight the restrictions for police when testifying during an OUI marijuana trial.

Commonwealth v. Smith, 95 Mass. App. Ct. 437, (2019): On September 27, 2015, police stopped the defendant at sobriety checkpoint in Worcester. The defendant lowered his car window, releasing a strong odor of burning or freshly burnt marijuana. The trooper noted that the defendant's eyes were red and glassy. The defendant admitted he had smoked marijuana and agreed to perform roadside assessments. Based on the defendant's statements and his performance on two (2) roadside assessments, the defendant was arrested for OUI marijuana.

During the trial, the trooper testified that he seized marijuana from the vehicle's door handle after

the defendant told him he had a bag of marijuana. The trooper recounted that the defendant appeared lethargic and laughed when he was asked to get out of the car. The defendant continued laughing as he attempted the one-legged-stand (OLS). While attempting to balance on one leg for thirty seconds, the defendant swayed, held out his arms to steady himself, and was unable to remain on one leg for the full thirty-second duration of the assessment. The defendant stated that he was "too high for this type of situation."

The trooper testified that the defendant failed to complete this test to his satisfaction. The trooper explained that the defendant complied with what he asked him to do, but the trooper was not permitted to comment as to whether the defendant passed or failed the assessment. The trooper described the defendant's performance on the nine-step walk-and-turn (WAT). The trooper relayed that the defendant failed to begin counting until the fifth step and he swayed while he walked. The trooper also testified that the defendant did not complete the assessment to his satisfaction. However, when asked whether he formed an opinion regarding the defendant's impairment, the judge restricted the trooper's testimony. The trooper was not permitted to offer an opinion as to whether the defendant was impaired by the consumption of marijuana nor could he offer an opinion about the defendant's impairment. The trooper was only allowed to testify to his observations. The jury found the defendant guilty of OUI drugs based on a number of factors. Some of those factors include: the strong odor of burnt marijuana in the car, the bag of marijuana seized from the car, the defendant's admissions that he recently smoked marijuana, and was "too high" to follow instructions about the one-legged-stand assessment. The judge did not rely on the trooper's testimony regarding the OLS and WAT assessments. The defendant appealed his conviction.

Conclusion: The Appeals Court held that the court has discretion when determining whether to apply this rule retroactively to pending cases. However, the Appeals Court also found that based on the facts of the case, there was sufficient evidence to sustain a conviction for OUI drugs marijuana. The trooper's testimony regarding his observations of the defendant, the defendant's performance of the roadside assessments, the presence and odor of marijuana in the car, and the defendant's admissions were relevant and admissible.

The Appeals Court emphasized the boundaries of ***Gerhardt*** 477 Mass. at 776. The defendant's performance on roadside assessments is admissible "to the extent that the assessments are relevant to establish a driver's balance, coordination, mental acuity, and other skills required to safely operate a motor vehicle." "In particular, observations of the performance of the OLS and WAT assessments may be admissible as evidence of a person's balance, coordination, a person's ability to retain and follow directions, a person's ability to perform tasks requiring divided attention, and the presence or absence of other skills necessary for the safe operation of a motor vehicle." ***Id***. at 783. Furthermore, police ***may not testify as to whether the defendant's performance would be deemed a "pass" or "fail***." ***Id***. at 776. Police cannot testify to "whether the performance indicated impairment" or "offer an opinion as to whether a driver was under the influence of marijuana." ***Id***. at 776-777. The jury "may use their common sense in evaluating whether there was sufficient evidence to satisfy its burden of proof." ***Id***. at 787. Roadside assessments alone are not enough to support a conviction. ***Id***. at 785, 789.

"An officer may testify to his or her observations of any erratic driving or moving violations that led to the initial stop; the driver's appearance and demeanor; the odor of fresh or burnt marijuana; and the driver's behavior on getting out of the vehicle." ***Gerhardt***, 477 Mass. at 78. Descriptive testimony not evaluative testimony is permissible. It is unlikely that the phrase "to your satisfaction" will be used after

Gerhardt, since it arguably imputes a level of expertise or authority either to the officer or the roadside assessment that the court in ***Gerhardt*** counselled against.

Medical Professions Qualifying as Experts in OUI Drug Cases

Commonwealth v. Bouley*,* 93 Mass. App. Ct. 709, (2018): The Appeals Court affirmed the defendant's conviction and held that the EMT's testimony along with the facts of the case were sufficient to prove that the defendant operated a motor vehicle while impaired. There was no testimony regarding the amount or concentration of narcotics in the defendant's system that would impair his ability to operate a vehicle safely. However, the testimony that the defendant was overdosing and the EMT used Narcan to resuscitate him. The EMT was a certified paramedic with over eighteen years of experience with training on how to use Narcan when a person is overdosing. Additionally, the EMT had responded to hundreds of calls for persons believed to have overdosed. The judge qualified the EMT as an expert and allowed the EMT to offer an opinion as to whether the defendant was overdosing. See ***Commonwealth v. Phillips*****,** 452 Mass. 617, 636 n.13 (2008). Furthermore, the defendant (1)admitted to taking fentanyl; (2)was found at the scene of an accident; (3)was unresponsive and barely breathing; (4) needed to be revived by a widely-known opioid antidote; (5)was outside a vehicle he admitted to driving and which contained a needle and syringe near the driver's seat. All of these factors supplied the jury with ample evidence to consider and evaluate the weight and persuasiveness of the EMT's opinion.

Negligent Operation

The Appeals Court holds that the defendant drove negligently so as to put the lives or safety of the public in danger when he had consumed alcohol and drove substantially below the speed limit while holding a cell phone one foot from his face even though there was no evidence of erratic driving.

Commonwealth v. Ismael Teixeira, 95 Mass. App. Ct. 367, (2019): On August 19, 2017, Trooper Gary Furtado observed a vehicle driving between five and ten miles an hour on a road that has a posted speed limit of thirty miles per hour. The defendant, Ismael Texieira, was holding a cell phone about one foot away from his face and appeared to be reading from the cell phone's screen. After running the license plate, Trooper Furtado discovered that there was no inspection results on the vehicle. Trooper Furtado followed the defendant for a block and activated his emergency lights for the vehicle to stop. Before stopping the vehicle, Trooper Furtado never observed the defendant's vehicle weave, drift, or swerve nor did it strike any curb or another vehicle. As Trooper Furtado approached the vehicle, he saw the defendant's cell phone on his lap with the "GPS" function open and the defendant smelled of alcohol. The defendant's eyes were bloodshot, his speech was slurred and he fumbled when asked to provide his license multiple times.

The defendant admitted that he drank two beers and he agreed to perform field sobriety tests. When exiting the vehicle, the defendant swayed back and forth. He was unable to keep his foot six inches above the ground for thirty seconds as the trooper instructed. When performing the nine-step walk and turn, the defendant had difficulty following instructions. The defendant did not touch his heel to his toe on some steps, stepped on his own toes, and took ten steps instead of nine.

Trooper Furtado charged the defendant with operating a motor vehicle while under the influence of intoxicating liquor (OUI), G. L. c. 90, § 24 (1) (a) (1), and (2) negligent operation of a motor vehicle. The jury acquitted the defendant of OUI liquor, but convicted him of negligent operation. The

defendant filed an appeal and argued there was insufficient evidence to sustain the conviction for negligent operation.

Conclusion: The Appeals Court held that consuming alcohol, driving below the posted speed limit and holding a cell phone one foot from his face was sufficient to establish the defendant operated his vehicle negligently under G.L. c. 90, §24 (2) (a).

In order to prove negligent operation, the Commonwealth must prove the following:

1. **operated a motor vehicle,**
2. **on a public way, and;**
3. **negligently, so that the lives or safety of the public might be endangered**. See G. L. c. 90, § 24 (2) (a).

The primary issue on appeal concerned the third element. The statute only requires proof that the defendant's conduct may have endangered the safety of the public, not that it, in fact, did. See ***Commonwealth v. Duffy***, 62 Mass. App. Ct. 921, 923 (2004). "Negligence in this context is determined by the same standard that is employed in tort law." ***Id***. at 922 n.2.

Unlike many negligent operation cases, the facts in this case do not involve a near collision, a swerve, a departure from marked lanes, or any erratic movement of the motor vehicle other than speed significantly lower than the speed limit. See, e.g., ***Commonwealth v. Charland,*** 338 Mass. 742, 743-744 (1959) (affirming negligent operation conviction after head-on collision while defendant was traveling wrong way on rotary traffic circle); ***Commonwealth v. Ferreira***, 70 Mass. App. Ct. 32, 33-35 (2007) (operating to endanger where, despite no pedestrians nearby, defendant accelerated in manner that caused tires to spin, car to "fishtail," and "screeching noise"); ***Commonwealth v. Daley***, 66 Mass. App. Ct. 254, 256 (2006) (affirming negligent operation conviction where erratic swerving while intoxicated such that defendant "nearly struck a large road sign"). Similarly, a civil infraction alone is not sufficient to constitute negligent operation. See ***Duffy***, 62 Mass. App. Ct. at 922 (evidence of speeding alone insufficient to support negligent operation conviction).

In ***Ross,*** the Appeals Court held that excessive speed at night, on a narrow residential road, after the driver had consumed alcohol, was sufficient to prove the defendant had operated his vehicle negligently and endangered the public. ***Commonwealth v. Ross***, 92 Mass. App. Ct. 377, (2017).

Here the defendant drove twenty to twenty-five miles per hour below the posted speed limit with his cell phone held one foot in front of his face, after consuming alcohol. See ***Id.*** at 380 ("The fact that the jury ultimately did not convict the defendant of OUI does not preclude their consideration of the evidence of intoxication in considering the negligent operation charge"). A defendant's driving need not have been erratic to support a conviction of negligent operation, so long as the conduct, taken as a whole, might have endangered the lives and safety of the public. See ***Commonwealth v. Sousa***, 88 Mass. App. Ct. 47, 51 (2015) ("The question is whether the defendant's driving had the potential to cause danger to the public, not whether it actually did"). Even without any evidence of erratic driving, a reasonable jury could conclude that the defendant drove negligently so as to put the lives or safety of the public in danger when he had consumed alcohol and drove substantially below the speed limit while holding a cell phone one foot from his face.

Commonwealth v. Dejon Ross, 92 Mass. App. Ct. 377 (2017): The Appeals Court affirmed the

defendant's conviction and held that excessive speed at night, on a narrow residential two-lane road lined with trees, poles, and fences along with consumption of alcohol was sufficient to establish that the defendant operated a motor vehicle negligently. Pursuant to G. L. c. 90, § 24(2)(a), the Commonwealth must prove that the defendant (1) operated a motor vehicle (2) upon a public way (3) negligently so that the lives or safety of the public might be endangered.

- ***TRAINING TIP:*** While the case below focuses on what is necessary to sustain a conviction for negligent operation, it emphasizes that the parameters of the statute. All of these cases will be driven by the officer's observations and the specific facts surrounding the incident.

Commonwealth v. Zagwyn, 482 Mass. 1020, (2019): Barnstable police stopped a vehicle after they noticed one of the headlights and a rear license plate light were not working. The officer followed the vehicle for approximately one to one and one-half miles before stopping it. While following the vehicle, the officer did not observe the vehicle speeding, swerving, or making any sudden stops. After the vehicle was stopped, the defendant moved the vehicle to a safe location. The stop itself revealed evidence that he was operating the vehicle while under the influence of alcohol. The officer charged the defendant with OUI liquor and negligent operation.

"Although evidence of an operator's intoxication is relevant to a charge of negligent operation, a conviction of negligent operation requires more than just operating a motor vehicle while under the influence of alcohol. The two crimes are separate. The charge of negligent operation has a low threshold because it only requires a showing that the defendant operated the vehicle "negligently so that the lives or safety of the public might be endangered, not that it in fact did." G. L. c. 90, § 24 (2) (a). ***Commonwealth v. Ferreira***, 70 Mass. App. Ct. 32, 35 (2007). Equipment failure such as a broken headlight and license plate light along with signs of intoxication are not enough to prove negligent operation.

Delayed Citations

- **TRAINING TIP:** The courts continue to deal with cases involving delayed citations pursuant to G.L. c.90C, §2. The ***Werra*** case emphasizes the parameters of the ""no fix"" statute but also addresses what happens if an officer charges a driver with OUI-drugs and later determines that the source of impairment may be liquor.

Commonwealth v. Werra, 95 Mass. App. Ct. 610, (2019): On July 22, 2015, Trooper Michael Donahue responded to a report that an Explorer was being driven erratically and that the driver seemed to be nodding off at the wheel. The trooper located the Explorer and attempted to stop it. The vehicle continued until the trooper moved his cruiser across the exit ramp and directed the Explorer to pull over. The defendant, Janice Werra, appeared disoriented and failed to comply with his directive. After two minutes and several requests by the trooper, the driver eventually complied. The defendant slowly responded when asked to provide her license. She looked through her makeup case even though her wallet was on the front seat. The defendant's speech was slurred and she spelled her name as "Waaarrraa." She was unable to spell her name after four attempts. When asked whether she was on any medication, the driver responded, "Medication," and she told the trooper her age when asked to provide her date of birth.

The defendant admitted to taking methadone earlier that morning. Based on his interaction with the defendant, the trooper called for an ambulance to transport her to the hospital and he towed her vehicle. During an inventory of the vehicle, police found a cup of alcohol in the center console. Trooper Donahue wrote a citation for operating a motor vehicle under the influence of drugs (OUI-drugs), G. L. c. 90, § 24 (1) (a) (1), negligent operation of a motor vehicle, G. L. c. 90, § 24 (2) (a), and three civil infractions that same day. A week after the incident, Trooper Donahue recommended in his police report that the District Attorney's Office subpoena medical records before trial. On August 5, 2015, a complaint issued charging the defendant with the offenses listed on the citation.

On October 21, 2015, the defendant was arraigned in the District Court on the complaint. Eight months after the arraignment, the Commonwealth subpoenaed the defendant's hospital records, which was allowed. The medical records were delivered to the court clerk's office on May 16, 2016, and indicated that the driver's blood alcohol content was .25 percent, over three times the legal limit. See G. L. c. 90, § 24 (1) (a) (1). The case was scheduled for trial on October 13, 2016. The day before the trial, the state police applied for a complaint against the defendant for OUI-liquor, G. L. c. 90, § 24 (1) (a) (1). The application included Trooper Donahue's police report from July 29, 2015, along with five pages from the defendant's medical records. The application also included a new citation for OUI-liquor dated October 12, 2016. **This citation issued more than one year and three months after the traffic incident occurred.**

The Commonwealth was unable to proceed on the OUI drugs charge and the case was dismissed. A new complaint alleging OUI-liquor, issued on January 25, 2017. On July 14, 2017, after the defendant had been arraigned on that OUI liquor complaint, the driver filed a motion to dismiss pursuant to the "no fix" statute, G. L. c. 90C, § 2. The motion was allowed and the Commonwealth filed an appeal.

Conclusion: The Appeals Court affirmed the dismissal of the OUI- alcohol citation because it was not given to the "violator at the time and place of the violation," and did not fall within one of the statutory exceptions.

Massachusetts General Laws c. 90C, § 2, provides that "any police officer assigned to traffic enforcement duty shall record the occurrence of automobile law violations upon a citation and complete the citation and each copy as soon as possible. A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding except:

1. **where the violator could not have been stopped; or**

2. **where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator; or**

3. **where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure.**

Citations must be delivered to an alleged offender at the time and place of the violation. See ***Commonwealth v. Correia,*** 83 Mass. App. Ct. 780, 783 (2013). There is no bright-line rule to ascertain whether a particular delay in issuing a citation is justified. Rather, "each case must be decided on its own peculiar facts." ***Commonwealth v. Provost,*** 12 Mass. App. Ct. 426 (1981).

Here the OUI-liquor citation in this case was not given to the "violator at the time and place of the violation." G. L. c. 90C, § 2. If there is **uncertainty as to the cause of a driver's impairment, the second exception to the no-fix statute gives the Commonwealth whatever time is "reasonably necessary" to determine what precisely caused the impairment.** The Commonwealth did not argue that delay in issuing the citation fell under the second exception which would allow a delay that is "reasonably necessary to determine the nature of the violation or the identity of the violator," G. L. c. 90C, § 2. Even though there was an open container of alcohol found in the car, the citation for OUI-liquor did not issue until a day before the trial.

The Commonwealth argued that the delay reasonably fell within the third exception, "where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure." G. L. c. 90C, § 2. The delay in issuing the citation appears to have nothing to do with manipulation of the use of traffic citations to charge the defendant, or to charge her more harshly. Trooper Donahue issued a criminal citation for operating under the influence of drugs not alcohol. The evidence at the scene supported the issuance of that citation. The defendant's blood alcohol level was not known at the time Trooper Donahue issued the original citation, which was consistent with the defendant's own statement that she had taken methadone prior to driving the vehicle. In any criminal case not involving an automobile, the defendant would be subject to being charged so long as the statute of limitations had not run, and would have available to her all defenses other than that in the no-fix statute. Based on this analysis, the requirements of the third exception would be met.

However, the Appeals Court recognized that recent case law has constrained their interpretation and that without prompt and definite notice of the alleged offense, dismissal of the complaint is appropriate. The late discover of OUI-liquor evidence fails to justify a new citation for someone cited at the scene with driving with a suspended license because "the defendant did not have prompt and definite notice of the offense for which he was charged." ***Commonwealth v. Burnham***, 90 Mass. App. Ct. 483, 490 (2016).

Commonwealth v. Ray, Mass. App. Ct. No***.*** 17-P-460 (2019): The Appeals Court examined whether the exceptions listed under G. L. c. 90, § 20 justified the ten month delay in issuing a citation to the defendant for causing serious bodily injury while operating a motor vehicle recklessly or negligently and while under the influence of intoxicating liquor or drugs, G. L. c. 90, § 24L (1). The initial accident occurred in January 2015. At the time, no citations or charges were issued because police were still investigating. The defendant and the driver of the second vehicle were taken to the hospital. The driver of the other motor vehicle was flown to a hospital with significant injuries.

The Appeals Court concluded that none of the exceptions listed under G. L. c. 90, § 20, excused the ten month delay for issuing new charges. There was no dispute that the first exception did not apply and with regard to the second exception, there was no evidence explaining that the defendant's medical records were unavailable to the government until December 2015. The Appeals Court examined whether the third exception to the requirements of G. L. c. 90C, § 2, excused the delayed delivery of a citation. The third exception is a "safety valve," that allows delays where "the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure.'" ***Commonwealth v. Riley***, 41 Mass. App. Ct. 234, 236 (1996).

When dealing with a serious accident, the failure to comply strictly with the requirements of G. L. c. 90C, § 2, may not be fatal to the Commonwealth's case. See ***Burnham***, 90 Mass. App. Ct. at 488-489. In such cases, implicit or explicit notice is "sufficient because the circumstances involved serious injuries to third parties, an arrest of the defendant, more serious charges requiring obvious investigation such as motor vehicle homicide or leaving the scene after causing personal injury, verbal notice from law enforcement that a citation would be forthcoming, actions or statements by a defendant evincing awareness of criminal conduct, or a combination of these factors." ***Id***. at 489. See ***Commonwealth v. Moulton***, 56 Mass. App. Ct. 682, 685 (2002) (seriousness of accident combined with officer's warning to defendant that citation would be issued was sufficient to provide defendant with implicit notice of violation); Commonwealth v. Kenney, 55 Mass. App. Ct. 514, 519-520 (2002) (seriousness of hit and run accident put defendant on notice of criminal charges despite no citation being issued); ***Commonwealth v. Barbuto***, 22 Mass. App Ct. 941, 943 (1986) (seriousness of hit and run accident, among other things, justified delay in issuing citation). There is no bright line rule to ascertain whether a particular delay in issuing a citation is justified and each of these issues must be decided by the facts. ***Commonwealth v. Provost***, 12 Mass. App. Ct. 479, 484 (1981).

The Appeals Court used the decision in ***Burnham*** to guide the analysis in the underlying matter. In ***Burnham,*** the police issued a citation to the defendant for operating after the suspension of his driver's license and a marked lanes violation. ***Burnham,*** 90 Mass. App. Ct. at 484. Four months after the initial citation, the prosecutor reopened the initial investigation after receiving the defendant's medical records. The defendant subsequently was charged with operating under the influence of intoxicating liquor. ***Id***. at 484-485. The Appeals Court in Burnham found that delivery of the new citation was not justified under the third exception because the defendant lacked notice that more serious criminal charges were forthcoming. ***Id.*** at 490.

Similar to ***Burnham***, the defendant had notice of the possibility of criminal charges arising from the accident. One of the detectives conveyed to the defendant that he could be criminally charged for the accident. However, the defendant did not have any notice that he would face more serious violations than the charges that he received citations for on March 2015 citation: negligent operation, a marked lanes violation, and failure to have the motor vehicle inspected. The issuance of a citation for an infraction or a minor criminal charge does not by itself provide implicit notice of a more serious charge. See, ***Burnham,*** 90 Mass. App. Ct. at 490 (dismissal warranted where "the defendant did not have prompt and definite notice of the offense for which he was charged"). The inaction and lack of oral notice of the new charge failed to provide notice that he should anticipate new charges. See, e.g., ***Moulton***, 56 Mass. App. Ct. at 683.

Despite the serious injuries resulting from the accident, this is not a case in which those injuries "put the defendant on notice of the potential charges against him and created an ineradicable record of the event." ***Commonwealth v. Carapellucci***, 429 Mass. 579, 581 (1999). The accident at issue here, "although not a mere fleeting traffic incident, was not so serious standing alone to confer implicit notice on the defendant pursuant to the third exception." ***Burnham***, 90 Mass. App. Ct. at 490. Cases where notice was sufficient have generally involved the analysis of many factors, including but not limited to the seriousness of the injuries. For example, in ***Kenney***, it was "inconceivable that the defendant would be unaware of the seriousness of the situation," because the defendant fled after striking a pedestrian with her car. ***Kenney***, supra at 515.

Here, there is no indication that the defendant had any reason to believe a second charge would be issued more than ten months after the accident and more than eight months after the initial citation was issued. The defendant reported that he did not remember the accident. He did not flee the scene nor express any fear of further prosecution. Moreover, it appears that the investigating detective himself thought that the cited charges would be the extent of the defendant's criminal exposure. It is unlikely that the defendant would be able to predict the issuance of a new charge, where there is no evidence that the experienced law enforcement professional predicted this outcome. Neither the citation nor the seriousness of the accident provided the defendant with implicit notice that a more serious charge would be forthcoming and therefore the Appeals Court affirmed the motion to dismiss.

Commonwealth v. O'Leary, 480 Mass 67 (2018): The SJC held that the nine (9) day delay in issuing the traffic citations was unreasonable and violated G.L. c. 90C, §2, the "no fix" statute. The "no fix" statute was enacted in 1965 in order to address concerns that traffic tickets were susceptible to manipulation. Before this change, an officer had **three days** after witnessing a motor vehicle offense to submit a citation and receive approval from police supervisors on how to proceed. Although there is no evidence of manipulation or abuse, that was not enough to justify an exception to the requirements that police issue citations "as soon as possible" and give them to the defendant at the time and place of the violation, or as soon as the nature of the violation and identity of the violator could be determined. In this case, the trooper's investigation was "complete" when he left the hospital. However, the defendant did not receive a citation at the hospital, and it inexplicably took nine (9) days for the supervisor to approve the trooper's report. The delay in issuing traffic citations was exactly what led the legislature to enact G.L. c. 90C, §2, to avoid any "**opportunity for subsequent maneuvering or pressure**." It was irrelevant that the trooper verbally informed the defendant at the hospital that a citation was forthcoming.

Admissibility of Breath Tests[1]

Evando Ananias, Christian Figueroa & Others, BMC, Docket Nos. 1248 CR1075, 1201, CR3898: Judge Brennan issued and order stating that the Commonwealth has fully complied with the Court's Orders that were issued on January 9, 2019. The Commonwealth's motion to admit breath tests is allowed and the Alcotest 9510 machines are calibrated and were certified on or after April 19, 2019.

This decision stemmed from a consolidated motion that was filed from a number of defendants who were charged with operating under the influence of alcohol. Defense counsel challenged the scientific reliability of the breath tests machines. After a ***Daubert/Lanigan*** hearing, Judge Brennan issued a Memorandum of Decision that states the following:

1. Alcotest 9510 breathalyzer device operates in a manner that produces scientifically reliable BAC results;

2. The source code underlying the Alcotest 9510 breathalyzer device was developed and implemented in a manner that produces scientifically reliable BAC results;

[1] See Memorandum of Decision on Commonwealth's Motion to Admit Breath Tests, ***Commonwealth v. Evando Anais Christian Figuero and Others***, BMC Docket Nos. 1248 CR 1075, 1201 CR 3898, and others issued from Judge Brennan's Decision issued on July 29, 2019.

3. The theory of blood-to-breath ratio underlying the algorithmic functions used by the Alcotest 9510 to produce BAC results remains sound science;

4. The methodology employed by OAT from September 14, 2014 to the present produces scientifically reliable BAC results;

5. The annual certification methodology employed by OAT from June 2011 to September 14, 2014, did not produce scientifically reliable BAC results; however, the Commonwealth may demonstrate to the trial judge, on a case-by-case basis, that a particular Alcotest 9510 was calibrated and certified using scientifically reliable methodology, and thus that a particular BAC result is scientifically reliable.

Following this decision, information surfaced in August, 2017, that the Office of Alcohol Testing had intentionally withheld 432 failed annual calibration worksheets from discovery provided to the prosecutors and defense attorneys during the ***Daubert/Lanigan*** hearing. On August 19, 2017, the consolidated defendants filed a Motion to Compel and Impose Sanctions. On November 2018, Judge Brennan adopted a joint stipulation by both parties agreeing that the Commonwealth will not seek to admit a breath test result at trial in any offense alleging a violation of G.L. c. 90 or 90B, except in cases alleging motor vehicle homicide by operation under the influence, operating under the influence causing serious bodily injury, and operating under the influence of liquor, 5th offense or greater from June 2011, when the Alcotest 9510 was first introduced in Massachusetts until the Commonwealth, upon motion to this Court, demonstrates the following:

1. That OAT has filed an application for accreditation with ANAB that is demonstrably substantially likely to succeed;

2. That OAT's accreditation application has been uploaded onto the eDiscovery portal;

3. That the ANAB Accreditation Requirements manual is available for viewing on the eDiscovery portal;

4. That OAT has promulgated discovery protocols consistent with those employed by the State Police Case Management Unit, including a definition of exculpatory evidence and an explanation of the obligations pursuant to such evidence; or, in the alternative, that the CMU is responsible for processing OAT's discovery;

5. That OAT's discovery protocol has been uploaded to the eDiscovery portal;

6. That all OAT employees have received training on the meaning of exculpatory information and the obligations relating to it; and

7. That all written materials used to train OAT employees on discovery, and particularly on exculpatory evidence, have been uploaded to the eDiscovery portal.

On July 29, 2019, Judge Brennan **allowed the Commonwealth's Motion to Admit Breath Test Sanctions for all Alcotest 9510, machines calibrated and certified on or after April 18, 2019.** The Court finds that the Commonwealth satisfied all of the requirements of the January 9, 2019, Memorandum of Decision on Consolidated Defendants' Motion to Compel and to Impose Sanctions as of

April 18, 2019 have been satisfied.

I. Motor Vehicle Stops

Traffic Stops and Exit Orders

The SJC has held that there are three (3) bases that justify police issuing an exit order to the driver or passenger in a validly stopped vehicle:

1. An objectively reasonable concern for safety of the officer;
2. Reasonable suspicion that the driver or passenger is engaged in criminal activity, or
3. "Pragmatic reasons."

With regard to the first factor, "it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." ***Commonwealth v. Cruz***, 459 Mass. 459 (2011).

Safety Concerns Safety Concerns During Motor Vehicle Stops

Safety concerns are heightened when police stop a vehicle with gang members that may be armed. Police are justified issuing an exit order when police are concerned about their safety during a traffic stop involving gang members who may be armed. The Appeals Court held that the police do not need to see the driver or passengers commit any violations in order to issue an exit order ***Commonwealth v. Stack***, 49 Mass. App. Ct. 227 (2000).

An exit order and search of a vehicle were valid based on the "totality of the circumstances."

Commonwealth v. Obiora, 83 Mass. App. Ct. 55 (2013): Viewed in the "totality of the circumstances," a lone officer, late at night, with three detained persons and false identification information had "a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." The exit order was not "an intrusion disproportionate to the seriousness of the situation with which the trooper was confronted." See ***Commonwealth v. Washington***, 459 Mass. 32, 40 (2011).

Sudden movements made inside a vehicle during a traffic stop can be perceived as a safety issue.

Commonwealth v. Demirtshyan, 87 Mass. App. Ct. 737 (2015): The Appeals Court denied the motion to suppress. The Appeals Court compared this case to ***Commonwealth v. Gonsalves,*** 429 Mass. 659 (1998), which established that "an officer need to only point to some fact or facts in the totality of the circumstances that would create a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." Here, the police officer was "faced with a specific, sudden and unexpected movement by the driver, into an area of the vehicle, containing a back-pack that could conceal weapon." The Appeals Court found that lunging towards the backseat was sufficient to raise a concern for officer safety.

Commonwealth v. Meneide, 89 Mass. App. Ct. 448 (2016): The Appeals Court restricted Terry frisks of motor vehicles in this case because the defendant was the driver and sole occupant. After police stopped his motor vehicle, the defendant was cooperative and did not appear to pose a safety risk. The Appeals Court found that based on the facts in this case, a protective sweep would not extend to the armrest located in the backseat of the vehicle. The scope of a protective search within an automobile's interior must be **limited by**, **and rationally connected to**, a safety concern about **the particular area** to be searched.

Pat-frisks can extend a protective sweep of a motor vehicle's interior if there are officer safety concerns.

Commonwealth v. Douglas, 472 Mass. 439 (2015): The SJC concluded that the protective sweep of the motor vehicle's interior was justified due to Douglas's subsequent conduct. In this case, there were a number of factors that justified the issuance of an exit order and conducting pat-frisks of the occupants. The police were familiar with the defendant, knew he was involved in a gang and had a past history of crimes, including firearms offense. Additionally, the backseat passenger and the defendant made unusual movements and their hands were not visible. The defendant's failure to comply with police orders further elevated safety concerns. All these factors provided justification for the police that one of the passengers may be armed.

Prolonging Motor Vehicle Stops

Rodriguez v. United States, 135 S. Ct. 1609, (2015): The Supreme Court holds that police violated the Constitution's shield against unreasonable seizures when they extended a traffic stop to conduct a dog sniff without reasonable suspicion. The Nebraska police officer had concluded the traffic inquiries when the dog sniff was conducted.

A routine traffic stop is more like a brief stop under ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889, than an arrest, see, ***Arizona v. Johnson***, 555 U.S. 323, 330, 129 S. Ct. 781, 172 L.Ed.2d 694. Its tolerable duration is determined by the seizure's "mission," which is to address the traffic violation that warranted the stop, ***Illinois v. Caballes***, 543 U.S. 405, 407, 125 S. Ct. 834, 160 L.Ed.2d 842 and attend to related safety concerns. The authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention, ***Johnson***, 555 U.S., at 327–328, 129 S. Ct. 781, but a traffic stop "becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission" of issuing a warning ticket, ***Id***., at 407, 125 S. Ct. 834. Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting an automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See ***Delaware v. Prouse***, 440 U. S. 648, 658–659. Lacking the same close connection to roadway safety as an ordinary inquiry, a dog sniff is not fairly characterized as part of the officer's traffic mission. A traffic stop "becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission" of issuing a warning ticket." ***Illinois v. Caballes***, 543 U. S. 405, 407 407 (2005).

Mistaken Identity during a Motor Vehicle Stop

- **TRAINING TIP:** This case reinforces some key issues that were highlighted in ***Cordero***. Police cannot detain a person longer than is reasonably necessary. Once the police realized that there were no arrest warrants for any of the occupants in the motor vehicle, the driver and his passengers should have been allowed to leave.

- Second, the police were not authorized to tow the vehicle because the driver's name was not listed on the rental contract. As the ***Campbell*** case established a few years ago, if the rental contract is still active and there are no reports that the vehicle is stolen, there is no justification to tow the car.

Commonwealth v. Paulo Tavares, 478 Mass. 1024, (2019): On May 21, 2007, the victim and his friend were shot while driving in Brockton. A witness told police that a "tannish or goldish," Chevy Malibu Max with a "sloped back," fired shots into the victim's vehicle. The victim died from his injuries and police did not locate any suspects. A witness revealed that the Chevy Malibu involved in the incident hit a curb near his house when it sped away. Later that day, police in Brockton saw a "grayish-green" Chevy Malibu driving past their cruiser. As the vehicle, passed, one of the officers mistakenly believed the rear seat passenger had an outstanding warrant. Police stopped the vehicle and realized the rear seat passenger was not the person they thought. The defendant, Paulo Tavares, was in the front passenger's seat, Eddie Ortega in the back seat and Christopher Hanson was driving the vehicle. Despite their mistake about the rear passenger's identity, the police did not allow the vehicle to leave. Upon request, Hanson gave police his license and a copy of the rental agreement. Since the driver and none of the passengers were listed on the rental agreement, police told them the vehicle would have to be towed. All three occupants left on foot. The police did not search the Malibu before towing it to the police station. After the occupants had left the scene, police thought that the vehicle might be the same vehicle involved in the prior night's shooting. Although the vehicle was "grayish-green" rather than gold or tan in color, it had a "sloped back" similar to the witness' description.

After the towed vehicle was brought to the station, police asked the witness to view the vehicle. According to the witness, he was "sure" that the Malibu was the same car he had seen the night before, and he suspected that the Malibu would have scrape marks underneath the front driver's side quarter and the rear passenger's side quarter -- where the car had hit the curb. The Chevy Malibu did have what appeared to be fresh scrape marks underneath the vehicle.

The case proceeded to trial and one of the primary witnesses was Raymond Grinion. Grinion was a friend of the defendant as well as a business associate who sold drugs in Brockton. Grinion also worked with the Brockton Police as a paid confidential informant. Grinion testified that he had stolen a .22 caliber handgun from a residence in New Hampshire and later sold it. The person he sold the gun to, gave it to the defendant. Grinion testified that he saw the defendant in possession of the gun "on numerous occasions." One day after the shooting, the defendant told Grinon to get rid of his phone because the police had "snatched up" his girlfriend and she had given his cell phone number.

The defendant told Grinion details about the "homeboy" and that he had "bodied last night." Grinion believed that the defendant meant he had killed someone the night before. Police made arrangements with Grinion to make a controlled purchase of the gun from the defendant. Before purchasing the firearm, the defendant admitted to Grinion that he had mistakenly shot the victim. On May 28, 2007, Grinion purchased the .22 caliber gun from the defendant. When the defendant gave Grinion the gun,

he told him not to "drop any of the shells" because it was connected to a murder and another shooting. Grinion asked whether the defendant killed someone with the gun and the defendant responded that "whoever bought it, they don't need to know all that." A few days later, Grinion met the defendant again and the defendant admitted his involvement in the murder. The police arrested the defendant and recovered thirteen .22 caliber live rounds from his apartment. Some of the shell casings matched the casings recovered from the controlled purchase, and fired from the gun used in the murder. A jury convicted the defendant of murder in the first degree on the theories of deliberate premeditation and extreme atrocity or cruelty and he filed an appeal. The defendant filed a motion suppress the witness' identification of the vehicle, the exterior damage to the vehicle and the fingerprints obtained from the vehicle.

Conclusion: The SJC held that police illegally seized the motor vehicle by prolonging the stop and the evidence obtained from the subsequent search of the vehicle should be suppressed.

1st Issue: Did police impermissibly prolong the motor vehicle stop?

There is no dispute that the initial stop of the motor vehicle was justified because police had reasonable suspicion to believe that one of the vehicle's occupants had an active warrant. To effect a valid investigatory stop, the police must have reasonable suspicion of criminal activity "based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience." ***Terry,*** 392 U.S. at 21. Although the officer's view of the occupants in the vehicle was brief, he had a reasonable, albeit mistaken, belief that the rear passenger had a warrant. ***Commonwealth v. Garden***, 451 Mass. 43, 46 (2008) (motor vehicle stop warranted by mistaken belief that registered owner was driving with suspended license).

Next, the Appeals Court had to determine whether the scope of the stop was justified under the circumstances. The motion judge found that the officer's request for Hanson's driver's license was a "minimal intrusion upon the operator," and that the officer also acted reasonably in requesting the rental agreement. A valid investigatory stop "cannot 'last longer than reasonably necessary to effectuate the purpose of the stop.'" See ***Commonwealth v. Sinforoso,*** 434 Mass. 320, 323 (2001). The scope of a stop may only extend beyond its initial purpose if the officer is confronted with facts giving rise to a reasonable suspicion that "further criminal conduct is afoot." ***Commonwealth v. Cordero***, 477 Mass. 237, 243 (2017). Where an officer conducts an "uneventful threshold inquiry giving rise to no further suspicion of criminal activity, he may not prolong the detention or expand the inquiry." See ***Commonwealth v. Gonsalves***, 429 Mass. 658, 663 (1999) (noting that individuals do not expect police officers conducting traffic stops to engage in "stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime").

Here the Appeals Court disagreed with the motion judge findings and concluded that the purpose of the stop was to apprehend the person they believed had an arrest warrant. Once the police realized the mistake, they had no basis to continue the stop. Thus, the officer's request for Hanson's license, coupled with his continued questioning of the occupants, including the defendant, constituted an unlawful seizure of the Malibu and its occupants. Even if police received conflicting information from the occupants, the Malibu's rental status alone fails to justify a basis for continuing the stop for the purpose of investigating. Once the defendant produced a valid driver's license and police verified that the rental agreement was active, the stop should have ended. There was no evidence that the defendant was not authorized to

have the vehicle. The purpose of the initial stop was to apprehend one of the occupants, whom police believed had a warrant. Upon verifying that they had mistakenly identified the rear passenger, the stop should have concluded. The police had no reason to continue the stop. See ***Cordero***, 477 Mass. at 242. ("Police authority to seize an individual ends when tasks tied to the detention are or reasonably should have been completed' "). Asking the driver for his license coupled with continued questioning of the occupants, including the defendant, constituted an unlawful seizure of the Malibu and its occupants.

Furthermore, police had no reason to believe that the vehicle had been stolen, or that the driver lacked authorization from the renter to drive it. There was also no evidence that the occupants appeared nervous or were evasive with the police. The mere fact that the vehicle was rented, without more, does not support reasonable suspicion that the occupants were engaged in criminal conduct. See ***Commonwealth v. Locke***, 89 Mass. App. Ct. 497, (2016) (defendant's statement that another individual rented vehicle did not contribute to reasonable suspicion of criminal activity); ***Commonwealth v. Bartlett***, 41 Mass. App. Ct. 468, (1996) (officer's knowledge that vehicle was rented by another individual did not support reasonable suspicion that defendant was engaged in drug-related activity).

Conversely, (officer's knowledge that vehicle was rented, coupled with defendant's evasive explanation as to ownership of vehicle, contributed to reasonable suspicion of drug-related activity). ***Commonwealth v. Cabrera***, 76 Mass. App. Ct. 341, (2010). The police spoke with the vehicle's occupants after the officers had already completed the purpose of the stop. Therefore, the police's knowledge of the vehicle's rental status derived solely from an "investigatory conversation for which [he] had no lawful basis." ***Bartlett***, 41 Mass. App. Ct. at 472. The initial stop was unreasonably extended and constituted an illegal seizure. See ***Commonwealth v. Cordero***, 477 Mass. 237 (2017):, (where purpose of motor vehicle stop was effectuated, and where no reasonable suspicion of additional criminal activity, police "did not have a legitimate basis to detain the defendant, and the defendant should have been allowed to drive away"); ***Commonwealth v. Torres***, 424 Mass. 153, 163, (1997) (continued detention of passengers after purpose of stop had been satisfied constituted illegal seizure). See J.A. Grasso, Jr. & C.M. McEvoy, ***Suppression Matters Under Massachusetts Law*** § 4-4[b] (2017) ("investigative detention must be temporary and must last no longer than necessary to effectuate the purpose of the stop"). The motion judge therefore erred in finding that the officers validly extended the scope of the initial stop.

2nd Issue: Was the impoundment of the vehicle justified?

Since the police illegally seize the vehicle, the impoundment and subsequent search of the Malibu were invalid as fruit of the poisonous tree. Rather than letting the occupants drive away in the vehicle, as the police were required to do, the police continued their investigatory questioning and eventually forced the passengers out of the Malibu and impounded it. Evidence resulting from a subsequent search of the vehicle including the witness's identification and the latent fingerprints belonging to the defendant obtained from the interior of the vehicle should be suppressed.

There is no question that the defendant had standing to challenge the legality of the seizure of his person when police stopped the vehicle and detained its occupants for an extended period of time. ***Whren***, 517 U.S. at 809–810 ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons'" under Fourth Amendment). He also would reasonably expect that the police would leave him and the

other passengers in the vehicle alone and let them drive away if the police had no proper reason for detaining them and the vehicle. See ***Gonsalves***, 429 Mass. at 663 ("Citizens do not expect that police officers handling a routine traffic violation will engage, in the absence of justification, in stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime." Thus, at least during the unreasonably prolonged detention of the defendant and the vehicle in which he was traveling, there is no question that he had standing to challenge the seizure. As this prolonged detention was unconstitutional, and the evidence at issue flowed therefrom, the proper focus is on fruit of the poisonous tree, not whether the defendant had standing or a reasonable expectation of privacy in the Malibu at the time of its impoundment. See ***Commonwealth v. Fredericq***, 482 Mass. 70, 78-79 (2019). "Under what has become known as the 'fruit of the poisonous tree' doctrine, the exclusionary rule bars the use of evidence derived from an unconstitutional search or seizure." ***Fredericq***, 482 Mass. at 78.

The Appeals Court found that without the illegal seizure, the police would have had no grounds to impound the vehicle and conduct a search. The SJC in ***Campbell,*** 475 Mass. at 612, determined that the police improperly impounded a motor vehicle upon discovering that the driver was of the rental car was not authorized by the rental agreement. The driver in ***Campbell*** was the son of the person who rented the car. The SJC ruled that "a renter's decision to allow a person who is not a permitted driver according to the rental agreement to drive a rental vehicle may be a breach of that agreement, but it does not result in a violation of criminal law." ***Id.*** at 620-621 Impounding a motor vehicle because the driver's name is not on the rental agreement by itself does not establish probable cause to conclude that the defendant was in violation of the statute G. L. c. 90, § 24 (2) (a)," ***Id***. at 622. In the underlying case, the police towed the Malibu because the rental agreement did not list any of the occupants as authorized operators. As in ***Campbell***, this finding alone is not sufficient to find probable cause for a statutory violation and impoundment of the motor vehicle. The driver provided a valid license and there was no information that would indicate the vehicle was stolen. There was also no other basis to seize, impound, and search the vehicle.

Commonwealth v. Gabriel Cordero, 477 Mass. 237 (2017): Police did not have a legitimate basis to detain the defendant during a routine traffic stop because the facts surrounding the stop did not give rise to reasonable suspicion of criminal activity. Once a police officer has completed the investigation of a defendant's civil traffic violations, and if there is no indication that criminal activity is underway, the officer is required to permit the defendant to drive away. When the trooper finished discussing with the defendant a broken tail light and window tint, the only information known to the trooper were the observations he made. According to the trooper, the defendant appeared nervous, gave evasive answers about his travels from a "major drug source city," and had prior convictions for firearms violations and drug offenses. None of these factors provided the trooper with reasonable suspicion to conduct a drug investigation or further detain the defendant. The trooper in ***Cordero*** lacked reasonable suspicion to conduct a drug investigation or further detain the defendant and therefore the heroin that was seized must be suppressed.

Refresher on Rental Cars

Commonwealth v. Campbell, 475 Mass. 611 (2016): The SJC held that police cannot charge a person with use without authority if the driver of a rental vehicle is not listed on the contract pursuant to **G. L. 90, § 24 (2) (a)** and the subsequent search of the vehicle was unlawful.

Based on its interpretation of **G.L. c. 90, § 24(2) (a)**, the SJC found that the police lacked probable cause to charge the defendant with use without authority. The charge of use without authority, requires that four elements are satisfied:

1. use;
2. of a motor vehicle;
3. without authority;
4. Knowing that such use is unauthorized.

Authorization to use a rental vehicle may be provided by renters as well as by the rental company in at least some circumstances. "Under standard rental agreements, the renter, not the rental company, legally possesses the right of control of the vehicle, at least during the rental period.

A renter's decision to allow a person who is not a permitted driver according to the rental agreement to drive a rental vehicle may be a breach of that agreement, but it does not result in a violation of criminal law. The SJC noted that a person who has been authorized by the listed renter to use the vehicle during the rental period "does not deprive the rental company of any short-term use to which it would otherwise have been entitled."

II. Motor Vehicle Searches

Standards for an Inventory Search

The United State Supreme Court held that the contents of a lawfully impounded vehicle may be inventoried without a warrant as part of a standardized administrative procedure. See ***Colorado v. Bertine***, 479 U.S. 367 (1987); and ***South Dakota v. Opperman***, 428 U.S. 364 (1976).

The rational for inventory searches is based upon non-investigatory reasons:

1. Protecting the person's property;
2. Protecting the police from claims of theft;
3. Protecting the police and the public from dangerous items. See ***Commonwealth v. Matchett***, 386 Mass. 492 (1982).

Commonwealth v. Tisserand, 5 Mass. App. Ct. 383 (1977): If an impoundment is proper, evidence of criminal activity will not be suppressed even if the officers conducting an inventory have a contingent suspicion that the vehicle contains incriminating evidence.

Commonwealth v. Baptiste, 65 Mass. App. Ct. 511 (2006): Officers conducting an inventory who observe items that provide probable cause to believe that the vehicle contains evidence of a crime may then conduct an investigatory search of the vehicle based upon probable cause.

Commonwealth v. Benoit, 382 Mass. 210 (1981): If the primary motive of an inventory is to conduct an investigative search for evidence rather than the performance of administrative duties, evidence uncovered during the inventory will be suppressed.

Requirements for a Written Inventory Policy

Commonwealth v. Bishop, 402 Mass. 449 (1988): The SJC ruled that an inventory procedure must be in writing and police procedures can be considered standard only if they are in writing.

***Commonwealth v. Peters*,** 48 Mass. App. Ct. 15 (1999): If the police policy is to conduct an inventory of both the vehicle and the person of the arrestee, then the written inventory policy should specifically authorize the search of both the vehicle and the arrestee.

The Scope of an Inventory Search

The written policy defines the scope of an inventory.

Commonwealth v. Caceres, 413 Mass. 749 (1992): The scope of an inventory may extend to the contents of any unlocked, but closed container.

In the absence of specific guidelines related to closed containers, such containers must be left untouched during an inventory search.

Without specific written guidelines, the contents of any closed container, even if unlocked, must be left undisturbed. See ***Commonwealth v. Muckle***, 61 Mass. App. Ct. 678, 684 (2004) (inventory procedure could have, but did not authorize the opening of closed, but unlocked containers).

Commonwealth v. Difalco, 73 Mass. App. Ct. 401 (2008): Whether an inventory policy might lawfully permit the opening of a locked container is undecided under Massachusetts law. "There is no explicit authority for the police to unlock a closed container and inventory the contents. The officer in this case was limited to inventorying a locked container as a single unit. The Appeals Court made it clear that, if police open a closed container during an inventory search in the absence of a specific written procedure requiring them to do so, then any evidence discovered in the container must be suppressed."

Commonwealth v. Figueroa, 412 Mass. 745 (1992): The SJC held that an inventory procedure could extend into an open wall panel inside a passenger compartment because the police department's policy stated, that "an inventory listing of personal items and valuables will extend to all storage areas and compartments that are accessible to the operator and/or passengers. This encompasses all open areas, including the area under the seats, the glove compartment and other places where property is likely to be held." The SJC commented, that "it is clear that the officers stayed within the confines of this language when looking into an area behind the wall panel because that was an open area at the time the officers conducted their search."

Towing Motor Vehicles and Subsequent Searches

***Commonwealth v. Garcia*,** 409 Mass. 675, 678 (1991): "The propriety of the impoundment of the vehicle is a threshold issue in determining the lawfulness of the inventory search."

Commonwealth v. Daley, 423 Mass. 747, 750 (1996): "The impoundment of a vehicle for non-investigatory reasons is generally justified if supported by public safety concerns or by the danger of theft or vandalism to a vehicle left unattended." When a defendant's vehicle is unregistered and

uninsured, the police have no alternative but to impound it and have it towed.

Commonwealth v. Brinson, 440 Mass. 609 (2003): Where an arrestee's vehicle is legally parked in a privately owned lot and represents no safety hazard or risk of theft or vandalism, an impoundment and inventory of the vehicle cannot be justified on the mere basis of the defendant's arrest.

Commonwealth v. Allen, 76 Mass. App. Ct. 21 (2009): The Appeals Court concluded that opening a closed book bag and opening an unlocked container found inside was lawful. The key factor in this case was that the inventory policy of the department specifically stated that "all unlocked containers shall be opened and their contents inventoried."

Commonwealth v. Figueroa, 412 Mass, 745 (1992): The SJC found that plain observation and seizure of drugs behind cardboard panel in vehicle door was lawful and in accordance with the Department's policy regarding inventory searches.

Commonwealth v. Alvarado, 420 Mass. 542 (1995): Using a K-9 unit, while conducting an inventory search was prohibited because it transformed an inventory search into an investigatory search. Police may conduct an inventory of the contents of the automobile in accordance with standard, written department procedures.

The SJC held that police need to consider a reasonable alternative to impounding a motor vehicle!

Commonwealth v. Oliveira, 474 Mass. 10 (2016): The SJC concluded that where the driver had offered the police an alternative to impoundment that was lawful and practical under the circumstances, it was unreasonable and thus unconstitutional to impound the vehicle and conduct an inventory search.

Under the United States and Massachusetts Constitutions, an inventory search is lawful only if the initial seizure (or impoundment) of the vehicle was reasonable, see ***Commonwealth v. Ellerbe***, 430 Mass. 769, 776 (2000) ("guiding touchstone "is reasonableness); and, second, the search of the vehicle that follows its seizure was conducted in accord with standard police written procedures, See ***Ellerbe***, supra at 773 n.8. See ***Commonwealth v. Brinson***, 440 Mass. 609, (2003) ("A lawful inventory search is contingent on the propriety of the impoundment of the car").

A vehicle may be seized for one of four (4) legitimate purposes:

a. to protect the vehicle and its contents from theft or vandalism, See ***Ellerbe***, 430 Mass. at 775;

b. to protect the public from dangerous items that might be in the vehicle, see ***United States v. Coccia***, 446 F.3d 233, 240 (1st Cir. 2006);

c. to protect public safety where the vehicle, as parked, creates a dangerous condition, see ***Brinson,*** 440 Mass. at 615-616; ***Commonwealth v. Henley,*** 63 Mass. App. Ct. 1, 5-6 (2005); or

d. where the vehicle is parked on private property without the permission of the property owner as a result of a police stop, to spare the owner the burden of having it towed. If the true purpose for searching the vehicle is investigative, the seizure of the vehicle may not be justified as a precursor to an inventory search, and must instead be justified as an investigative search. See ***Commonwealth v. White***, 469 Mass. 96, 102 (2014); ***Commonwealth v. Vuthy Seng***, 436 Mass. 537, 551-555 & n.16 (2002)

Validity of the Tow

Commonwealth v. Ehiabhi, 478 Mass. 154 (2017): The Appeals Court affirmed the denial of the motion to suppress and held that the police had reasonable suspicion for the traffic stop and probable cause to arrest the defendant for operating a motor vehicle while under the influence. With regard to the search of the motor vehicle, the Appeals Court determined that it was a lawful inventory search and conducted in accordance with departmental policy.

Although the defendant challenged the validity of the motor vehicle tow, the Appeals Court acknowledged that neither the defendant nor the passenger could safely operate the vehicle. Additionally, the vehicle could not be safely left on a public street in this section of Boston. There had been numerous thefts in the area. Lastly, this was a rental vehicle with an expired contract, and there was no lawful owner available to retrieve the vehicle. Based on all these circumstances, the Appeals Court upheld the motion findings and affirmed the convictions.

Chapter 2 CRIMINAL PROCEDURE

The Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights govern all police searches and seizures in Massachusetts.

Fourth Amendment of the United States Constitution

The Fourth Amendment states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Under the Fourth Amendment, the courts analysis on the reasonableness of the search will be based on the "totality of the circumstances."

Article 14 of the Massachusetts Declaration of Rights

Article 14 states, "every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." The court's analysis on the reasonableness of the search has two (2) aspects: (1) What is the legal standard under which the search will be justified (reasonable suspicion, probable cause, or some other standard) and (2) Is a search warrant required in all instances?

The **Fourth Amendment** and **Article 14** only prohibit unreasonable searches and seizures. In determining whether a search was reasonable, the court considers the following:

a. was a search warrant required?
b. was the warrantless search permissible by law or by school rules?
c. was the search based upon probable cause or reasonable suspicion?
d. was the suspicion particularized to a particular person or particular place? and
e. did the particular suspicion dispense prior to the search?

Reasonable Suspicion & Probable Cause

Reasonable Suspicion: Is based on specific and articulable facts upon which reasonable inferences can be drawn, that a person has committed, is committing, and is about to commit a crime, or is armed and dangerous. In ***Commonwealth v. Wren*****,** 391 Mass. 705, (1984), the court stated, "a *hunch will not suffice."*

Probable Cause**:** Is based on the belief that it is "more likely than not" that evidence will be discovered at a particular location. ***Commonwealth v. Haas,*** 373 Mass. 545 (1977)

A police officer may establish either reasonable suspicion or probable cause by either their own personal observations or from information received from other sources, such as: victim, witness, informant, anonymous tip, student, faculty, etc. However, when information is received from a source other than personal observations, police must establish the source's "basis of knowledge" and the "veracity" of the information.

I. Field Encounters and Detentions

Field Encounters

Police officers are free to talk to anyone as long as there is no seizure and the person is free to leave.

Police can use mobile data terminals (MDTs) to verify a person's license information as long as the checks are random.

Commonwealth v. Murdough, 428 Mass. 760 (1999): Police can approach any parked vehicle to check on occupants without it turning into a seizure.

Commonwealth v. Stoute, 422 Mass. 782, 789 (1996): "Not every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions requiring justification." A person is only seized by the police when, in light of all of the attending circumstances, a reasonable person in that situation would not feel free to leave. ***Id***. at 786.

Stop & Seizure

A field encounter becomes a stop or threshold inquiry when an officer uses authority to detain a person who is not free to leave. Some examples of a seizure include taking a person's identification, using an authoritative tone, physically blocking a person's path or activating blue lights.

A threshold inquiry that is based on reasonable suspicion does not automatically give police authority to conduct a frisk.

No set length of time has been designated to how long police can detain a person, but it must be reasonable under the circumstances.

Commonwealth v. Lyles, 453 Mass. 811 (2009): A threshold inquiry became a stop when police lacked reasonable suspicion to believe a crime was being committed and took Lyles' identification. The only information police had at the time was that Lyles was walking alone on a sidewalk near a housing project in Boston.

Commonwealth v. Pimentel, 27 Mass. App. Ct. 557 (1989): Police need to show some sort of authority in tone that would make an average person feel they were not free to leave in order for a seizure to occur.

Commonwealth v. Smigliano, 427 Mass. 490, 492 (1998): Activating blue lights initiated a constitutional seizure where a police officer observed erratic driving and pulled up behind the vehicle to investigate whether the defendant was intoxicated.

Frisks

Police may have reasonable suspicion that a crime has been committed, but in order to conduct a pat-frisk officers also need reasonable suspicion that the subject is armed and dangerous. Reasonable suspicion can be derived from an officer's personal observations or information received via an informant or dispatch.

The exterior search of a suspect is conducted to find weapons: NOT to locate evidence.

Frisks are allowed: when a person is under arrest, there is an officer safety issue or a protective sweep of a house or vehicle. Frisks are limited in scope.

Good Frisk: ***Commonwealth v. Torres***, 433 Mass. 669 (2001): The Court held that the police officer conducted a proper pat-frisk because there was a concern for safety during a routine traffic stop. The officer felt a hard object by the defendant's waistband, and then lifted his shirt to investigate further. It was then that he discovered that the object was a gun. This sequence comports with an appropriate pat-frisk. See ***Commonwealth v. Silva,*** 318 N.E.2d 895 (1974).

Bad Frisk: ***Commonwealth v. Narcisse***, 457 Mass. 1 (2010): The SJC held that police cannot conduct a pat-frisk of person without reasonable suspicion. Although the defendant was present in a high crime area and police were concerned about retaliatory violence after the murder in Randolph, these general, environmental factors were not enough to suggest that the defendan*t* was engaged in criminal activity or that he was armed and dangerous. Even considering these general "environmental" concerns, with the specific conduct of the defendant and his companion, the SJC concluded ***Terry*** prong was not satisfied. While such factors provided the officers with ample reason to approach the defendant to ask him about his business for being in the area, nothing the defendant or his companion did or said justified an escalation of the encounter.

Commonwealth v. Gomes, 453 Mass. 506 (2009): Although the stop of the defendant was justified by specific and articulable facts supporting an officer's belief that the defendant was engaged in drug activity, the circumstances did not warrant the pat-frisk of the defendant, as the police lacked particular facts from which a reasonable inference could be drawn that the defendant was armed and presented a danger to the police or others.

Commonwealth v. Flemming, 76 Mass. App. Ct. 632, 638 (2010): The SJC that the defendant's cooperation and non-threatening movements, failed to justify the police's decision "to lift the defendant's shirt without conducting a pat-frisk first."

Revisiting Field Encounters Involving a Firearm

- **TRAINING TIP**: Most cases involving field encounters with firearms are fact specific. However, Massachusetts Courts have highlighted some critical factors such that relevant in determining

whether the police encounter was justified. Some of the factors include familiarity with a suspect, the nature of the stop, the number of arrests that the officer has made in the area and the officer's training an experience.

The Jones-Pannell case emphasizes that police training and experience are a factor when crediting the observations of a police officer that the suspect is likely carrying a firearm.

Commonwealth v. Jones-Pannell, 472 Mass. 429 (2015): This is a **pivotal case** that courts repeatedly cite when examining **whether police had reasonable suspicion during field encounters**. The SJC highlighted a number of factors that were significant when determining whether police had reasonable suspicion:

Moment when the defendant was seized: "A person is seized by the police when a reasonable person would not feel free to leave." See ***Commonwealth v DePeiza***, 449 Mass. 367 (2007). Here the judge concluded that when the officer yelled, **"Wait a minute!"** and began chasing the defendant, the defendant was seized. While there was some dispute, as to whether the defendant walked or jogged away, the SJC found that the point when the officer told the defendant to wait and chased him, a seizure occurred.

"There is no seizure where: The defendant is free to reject the police officer's multiple requests to speak with him, just as he is free to respond to the requests by increasing his pace." Similarly, there is no seizure when a person's flight is not prompted by police commands.

Suspicion of criminal activity: At the time, the police seized the defendant, the following facts were established. The defendant had given "flight from police officers and keeping his right hand in his pants between his waist and his crotch." Second, it was after midnight when police encountered the defendant. Despite these facts, the area the police stopped the defendant was not a high crime area and the police did not know the defendant. Additionally, there were no reports or radio calls of a crime having been recently committed in the area and; the officers were on routine patrol." The absence of these factors suggested that police lacked reasonable suspicion to stop the defendant.

High Crime Area: The Commonwealth argued that the neighborhood could be characterized as a "high crime" area and that would add to the officers' suspicions. Although a characterization that an area is one of "high crime" may be relevant in determining whether a police officer's suspicion is reasonable, the accuracy of the characterization in a particular case depends on specific facts found by the judge that underlie such a determination, rather than on any label that is applied. See ***Commonwealth v. Johnson***, 454 Mass. 159, 163 (2009).

The SJC "cautioned that whether a neighborhood is a high crime area is a consideration that must be applied with care." "The term high crime area is itself a general term that should not be used to justify a stop or a frisk, without requiring the articulation of specific facts demonstrating the reasonableness of the intrusion. " See ***Commonwealth v. Gomes***, 453 Mass. 506, 513, (2009)." The judge's finding that the stop here did not take place in a "high crime" area was not clearly erroneous. Locations where firearms offenses are common, or where rival gang activity occurs, have been considered high crime areas." See, ***Commonwealth v. Pagan,*** 63 Mass. App. Ct. 780, 781-783 (2005). Isolated incidents of nearby gun activity or the mere presence of gangs in the vicinity

do not require a finding that a particular street is a "high crime area." There was no evidence regarding arrests in the area, no information that a crime had occurred, or that police were on patrol for a specific criminal incident. One officer stated that he had heard of "shots fired" about two weeks prior, and that there had been a shooting and recovery of a gun within the preceding months. There was no testimony that the area was inundated with gang activity or violence involving firearms. Based on the testimony and the facts in the record, the judge concluded that the location was not a high crime area.

Officer's training and experience: Although the record credited the officer's testimony that he had completed an eight-hour training class titled "Characteristics of Armed Gunmen." The judge did not find that "the training alone or in combination with other factors made the officer's suspicion objectively reasonable." Additionally, there were no detailed findings about the content of the course contained in the record or testimony regarding the officer's training.

Based on the facts of this case, police did not seize the defendant when they were running after the suspect.

Commonwealth v. Shane S. a Juvenile, 478 Mass. 1107 (2018): The Appeals Court held that police had reasonable suspicion to stop and subsequently seize the defendant based on trained officers' opinions that the juvenile was carrying a firearm due to the manner in which the juvenile was running with his arm by his sides.

The Appeals Court examined a number of factors such as the police surveillance of the juvenile, the timing of when the juvenile was seized, and whether there as justification for the seizure. Police surveillance and questioning of the juvenile did not constitute a seizure. Rather the police seized the juvenile when the officer placed his hand on the juvenile's chest after the juvenile stopped running. Second the evidence in the record indicated the police pursuit of the juvenile was not a seizure. The officer never called out for the juvenile to stop and there is no indication that the juvenile was aware the officer was following him. Lastly, the Appeals Court held that the seizure of the juvenile was justified because the police had reasonable suspicion to believe he was armed based on a number of factors. First, the Appeals Court credited the officer's observations the juvenile running with his arms restricted by his side was significant based on the specialized training the officers had. **There were other factors that were** considered in the reasonable suspicion calculus. There were prior shootings in the area and the fact that the juvenile knew each the person who was in violation of his GPS conditions on pending firearm charges. The combination of factors, taken together, amounted to sufficient reasonable suspicion.

Commonwealth v. Alvarado, 423 Mass. 266 (1996): An anonymous caller reported that "several Hispanic subjects" in a blue automobile in the driveway of "138 Jackson street." The anonymous caller further told police that he or she saw a gun inside the vehicle and that it was wrapped in a towel. When police arrived at 138 Jackson Street, they immediately observed a blue vehicle with six Hispanic or Black people sitting in it. When the vehicle began backing out of the driveway, police blocked its way by parking a cruiser behind the vehicle and activating its blue lights. Police informed the driver that they were investigating a complaint concerning a firearm located in a blue vehicle. The driver consented to allow police to look inside the vehicle. Ultimately, police found a firearm wrapped in a towel. The defendant filed a motion to suppress the firearm and the motion judge concluded that the anonymous caller had described "the precise location of a car and its occupants and of suspicious activity (i.e. the hiding of a firearm in a towel)." Additionally, the judge found that the police "had reasonable and articulable facts,

not just a hunch, that illegal activity was taking place." The possibility of "carrying a concealed weapon" (which, is not a crime) "or carrying an unlicensed firearm" (which is a crime) and therefore the police's threshold inquiry was proper as a *Terry* stop.

The SJC heard the case on appeal and held even if the police receive reliable information that a person is carrying a concealed weapon, without more, police still lacked reasonable suspicion that the person has been, is, or will be engaged in criminal activity. Reliable information ALONE does not provide police will justification to make an investigatory stop.

Reliability of an anonymous tip must be based on the following indicia:

1) informant's reliability and
2) a demonstration of the basis of the informant's knowledge

In the underling case, only the informant's basis of knowledge was satisfied. While the police were able to corroborate the informant's observations, the location and description of the vehicle still only amounted to mere innocent details. The SJC further explained that because the tip did not disclose any imminent threat to public safety, it was reluctant to relax the established rule that the report of the carrying of a firearm is not, standing alone, a basis for having a reasonable suspicion of criminal activity. The SJC concluded that reasonable suspicion justifying an investigatory stop cannot be grounded on an anonymous tip concerning a concealed weapon made by a person whose reliability is

Reasonable Suspicion to Pat-frisk

Commonwealth v. Maurice Jones, 95 Mass. App. Ct. 641 (2019): On April 17, 2012, Dinoriss Alston and his girlfriend Ashley Platt were shot while sitting in a vehicle stopped near a Roxbury park. After the shooting, Platt saw a black male wearing a white t-shirt and khaki pants walking away. Upon receiving the description of the shooter, Officer Brian Johnson began looking for the defendant because he knew the defendant frequented the park and the area where the shooting had occurred. Additionally, Officer Johnson had conducted many field interrogation and observations of the defendant, including the week before the shooting. The defendant did not have any firearm convictions nor was he known to carry a gun. There was no information connecting the defendant to the shooting. When Officer Johnson located the defendant, he was wearing a white T-shirt with and khaki cargo-style shorts. Officer Johnson asked, "What's up?" in a conversational, non-confrontational manner. The defendant answered in a calm and natural tone with "hey," or a similar expression. Officer Johnson patted down the defendant's waist and pockets but found nothing. When asked where he was headed, the defendant said he was going to meet his mother. The entire encounter with the defendant lasted about five minutes.

A second encounter occurred when the defendant's mother told police the defendant's whereabouts. She confirmed that the defendant frequented the area where the shooting had taken place. At this point, Platt had provided a better description of the shooter's clothing. She recalled the shooter wearing a white shirt that had red writing on it. The new details matched what the defendant was wearing. Around 5:30 PM, a third encounter occurred when the defendant told police he was home all day. Although the police did not pat frisk the, restrain or display weapons, he appeared nervous. The defendant agreed to have his photograph taken and to submit to a gunshot residue test, but he declined to be transported to the hospital for Platt to view. The second encounter with police lasted between eight and ten minutes. Subsequently, the defendant was indicted on charges of murder in the first degree, G. L. c. 265, § 1,

armed assault with intent to murder, G. L. c. 265, § 18 (b), assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A, and unlawful possession of a firearm, G. L. c. 269, § 10 (a). The defendant filed motion to suppress challenging the pat-frisk and the statements that he made as well as the statements his mother made. The motion was allowed and the Commonwealth appealed.

Conclusion: The Appeals Court held that police lacked reasonable suspicion to conduct a pat-frisk and suppressed the statements the defendant made during the initial encounter. However, the statements made during the second encounter were not tainted and should be allowed. See ***Commonwealth v. Mahnke***, 368 Mass. 662, 686 (1975).

1st Issue: Did police have reasonable suspicion to conduct a patfrisk of the defendant?

Police cannot escalate a consensual encounter into a protective frisk absent a reasonable suspicion that an individual has committed, is committing, or is about to commit a criminal offense and is armed and dangerous." ***Commonwealth v. Narcisse***, 457 Mass. 1, 9 (2010). "That suspicion must be grounded in 'specific, articulable facts and reasonable inferences [drawn] therefrom' rather than on a "hunch." ***Commonwealth v. Scott***, 440 Mass. 642, 646 (2004). When examining all the facts surrounding the pat-frisk, the Appeals Court held that police lacked reasonable suspicion based on the following factors: (i) the "match" between the defendant and the initial broadcast description of the shooter, (ii) the defendant's geographic and temporal proximity to the location of the shooting, (iii) the fact that the defendant frequented the area where the shooting occurred, and (iv) the nature of the offense being investigated.

a. Match of the shooter and the defendant:

> The description of the shooter was vague and non-specific. Police learned that the shooter was a black male wearing a white t-shirt and khaki pants. A description of a suspect does not have to be particularized but it also cannot be too general. ***Commonwealth v. DePina***, 456 Mass. 238, 245-246 (2010). The description here did not meaningfully narrow the range of possible suspects and, thus, did not substantially contribute to the reasonable suspicion analysis. See ***Warren***, 475 Mass. at 534-537. Moreover, to the extent the defendant's "match" to the general description had any value, it was largely offset by the aspects of his appearance tending to exclude him from the description: the defendant wore shorts, not pants, and wore a shirt with a distinctive unicorn graphic that was not mentioned in the initial description. See ***Meneus,*** 476 Mass. at 237 (distinctive clothing of defendant not mentioned in description of perpetrator detracted from reasonable suspicion analysis). "Unless the police were able to fortify the bare-bones description of the perpetrator with other facts probative of reasonable suspicion, the defendant was entitled to proceed uninhibited" down the street. ***Warren***, 475 Mass. at 536.

b. Geographic and Temporal Proximity to location of the shooting:

> Second, the defendant was stopped about one mile away from the scene of the crime, and about twenty-five minutes afterwards, as was the precise case in ***Commonwealth v. Warren***, 475 Mass. at 536. As in ***Warren***, which also involved a crime in the Roxbury section of Boston, we note that "given the nearly thirty-minute time period between [the offense] and the stop the suspect could have traveled on foot within a two mile radius of the crime scene." ***Id***. at 536-537. Although temporal and geographic proximity to the crime can contribute to the reasonableness of a stop, see ***Commonwealth v. Doocey***, 56

Mass. App. Ct. 550, (2002), it was not particularly meaningful here. Indeed, Officer Johnson went to look for the defendant on Cobden Street because he knew it was near the defendant's home, not because it was near the shooting. The defendant's presence on a sidewalk right around the corner from his home on a spring afternoon cannot be said to add much to the reasonable suspicion calculus. Additionally, the defendant did not appear nervous nor did he try to flee when police arrived at his home. Also, the defendant did not try to conceal himself by wearing a hoodie. He did not engage in any suspicious behavior, and he "did not make any furtive gestures or reach into his pockets in a manner that would suggest that he was carrying a weapon." ***Commonwealth v. Villagran***, 477 Mass. 71 (2018).

c. Defendant frequented the location where the shooting occurred:

Third, the fact that the defendant was known by police to frequent the area where the crime took place is of only moderate value where the area in question is a public park about one mile from his home. Although the officers knew that the defendant visited the park frequently, they had nothing connecting him to the crime or to firearms more generally, and "[he] was not known to the officers as someone having previously been arrested for criminal activity." ***Commonwealth v. Martin***, 457 Mass. 14, 21 (2010).

d. Nature of the offense being investigated:

Lastly, the Appeals Court recognized that the gravity of the situation or nature of the crime was a significant factor. However, while "[t]he gravity of the crime and the present danger of the circumstances may be considered in the reasonable suspicion calculus," ***Depina***, 456 Mass. at 247, and that where, as here, shots have been recently fired, or there is otherwise an imminent threat presented by a gun, "there is an edge added to the calculus upon which that reasonable suspicion may be determined," ***Doocey***, 56 Mass. App. Ct. at 557, the gravity of the crime is not dispositive, see ***Meneus***, 476 Mass. at 239, and cannot compensate for the absence of information connecting the defendant to

2nd Issue: Should the statements the defendant and his mom made to police be suppressed?

The Appeals Court examined whether the statements the defendant's mom made to the police during the second encounter should be suppressed due to the unlawful patfrisk during the defendant's initial encounter with police. "To determine whether the connection between the evidence and the improper conduct has become so attenuated as to dissipate the taint, the facts of each case must be examined in light of three factors: the temporal proximity of the [unlawful conduct] to the obtaining of the evidence; the presence of intervening circumstances; and the purpose and flagrancy of the misconduct**"** See ***Commonwealth v. Fredericq,*** 482 Mass. 70, 81-82 (2019). Although not much time had elapsed between the police's first encounter with the defendant and the second encounter, the Appeals Court found that there were other factors that separated them. The mother was not involved in the first encounter. And the officers did not tell the mother anything they learned from the first encounter, or even say that it had occurred. Contrast ***Fredericq***, 482 Mass. at 82 (officer used unlawfully obtained information to obtain defendant's consent to search). These intervening circumstances were sufficient to allow the mother's statements to come in without being tainted from the police's unlawful encounter with the defendant.

The Appeals Court also considered, whether the police performed the illegal act for the purpose of obtaining the evidence that the defendant seeks to suppress, and second, whether the police knew that their actions were illegal but proceeded anyway (flagrancy)." ***Commonwealth v. Long***, 476 Mass. 526, (2017). There is no evidence that the police conducted an illegal patfrisk to obtain statements made by his mother. The police were candid and truthful about the incident they were investigating and its location. The conversation with the mother took place just outside her home during the afternoon and did not involve any show of police authority, threats, confrontations, or promises. Nor did the police imply or suggest that the mother had any criminal liability or fault. In short, the record is essentially devoid of evidence suggesting that the mother's statements were not voluntary. For these reasons, the mother's statements to officers were sufficiently distinguishable from the defendant's unlawful pat frisk "to be purged of the primary taint." ***Wong Sun***, 371 U.S. at 488.

The Appeals Court examined whether the police knowingly conducted an illegal pat-frisk. Although Officer Johnson only had a hunch about the defendant being armed and dangerous, it was not unfounded. As the motion judge found "in the immediate aftermath of a deadly shooting, the defendant was encountered only about a mile from the scene of the shooting, a park he frequented, and [partially] matched the minimal description of the shooter."

Finally, the Appeals Court held that the defendant's statements that he made to police during a third encounter should not be suppressed because they do not fall under the cat-out-of the bag doctrine, which only applies if there is a violation of Miranda. Here, there was a substantial break in the stream of events between the defendant's encounters with officers: one hour during which the defendant was not in custody and had no contact with police. More importantly, the defendant's initial statement was not inculpatory. The statement "did not place him at the scene of the crime and the fact that the police had no evidence contradicting the initial statement when it was made negates the possibility that it was inculpatory because it evidenced consciousness of guilt." ***Commonwealth v. Sarourt*** Nom, 426 Mass. 152, 156 (1997). Based on all these intervening circumstances, the statements the defendant's mom and the defendant made in the third encounter should not be suppressed because they were sufficiently attenuated from the taint of the first encounter.

II. Search and Seizure

Warrantless Searches

Commonwealth v. McKoy, 83 Mass. App. Ct. 309 (2013): The Court held that based on the totality of the circumstances, the police had reasonable suspicion to conduct an investigative stop of defendant and his companion. The police had received a report that a person had been shot at a house one hundred (100) yards from where the defendant and his companion were walking; defendant and companion were only people on the street due to poor weather conditions and they were walking from the direction of the house where shooting had been reported. Lastly, the defendant dropped a large item to the ground when asked to remove his hands from his pockets, while his companion kept his hand in his pocket prior to fleeing from officers. Looking at the factors collectively along with good report writing were critical in this case.

Commonwealth v. Lyles, 453 Mass. 811 (2009): The Court held that police acted on a hunch because they lacked reasonable suspicion. In ***Lyles,*** police officers stopped the defendant after they observed the defendant walking on a public sidewalk in an area known for drug activity. Since the officers did

not recognize the defendant, they asked for his identification and checked for warrants. As soon as the police took the defendant's identification, a seizure occurred because he was not free to leave until the officers returned his identification and completed their investigation. The defendant in ***Lyles*** did not voluntarily provide his identification, but only turned it over after the police asked for it.

Commonwealth v. Fraser*,* 410 Mass. 541, 544 (1991): The Court held it was reasonable for officer to ask the man to remove his hands from his pockets because the officer had concern for his safety. Officer Columbo had sufficient information to justify the protective frisk of the defendant. In sum, the judge found that Officer Columbo was confronted with the following situation. He had received a radio bulletin reporting there was a man with a gun. After hearing this report, Officer Columbo found a group of young men at an identical location, which he knew to be a "high crime area." At this point the officers were outnumbered. Officer Columbo saw the defendant bend down behind a truck in a manner suggesting that he might be picking something up or putting something down. The defendant then approached the officer with his hands in his pockets. Examining all of these factors collectively, the Court held that there was enough to warrant and believe that a reasonably prudent person would be concerned for his safety or others.

Search Incident to Arrest

The Appeals Court holds that police cannot rely upon the doctrine of search incident to arrest where the search occurred well-prior to the defendant's arrest and that the frisk of the defendant's motor vehicle for officer safety failed because the officers did not possess reasonable suspicion that the defendant was armed and dangerous.

Commonwealth v. Darosa, 94 Mass. App. Ct. 635 (2019): Brockton police were driving on Main Street around 10AM in Brockton when they observed a minivan pull in front of a Mercedes sports utility vehicle on the side of the road. The police observed an arm extend from the minivan and hand a plastic grocery bag to someone in the Mercedes. The police did not find that this behavior was suspicious nor did they believe a drug transaction had occurred. Since the minivan was blocking traffic, the detectives sounded the vehicle's horn. The minivan began moving again, and police were following it when they observed the driver abruptly change lanes without signaling. The police stopped the vehicle without incident.

The defendant, Augustus Darosa, was the driver and only occupant of the minivan. The defendant gave the police his registration, but could not produce a license. Even though he told police he did not have his license on his person, he continued looking around the inside of the vehicle. After receiving the defendant's name and date of birth, the police confirmed that his license was revoked and that he had a criminal record for narcotics. There was no indication that the defendant was armed or dangerous. The defendant cooperated with the police and there was "nothing the defendant's manner, mood, gestures, or anything else" to suggest that he was posed a "problem." The police testified that they did not believe the defendant had a weapon. The defendant's lack of a valid license warranted an exit order and pat-frisk.

While outside of the vehicle, the defendant sat without handcuffs or restraints on the curb near the minivan. Three officers stood closely to the defendant while another officer searched the driver and passenger compartments of the vehicle. During the search, police smelled fresh marijuana and saw and smelled fabric softener sheets, which they knew from experience are often used to mask the odor of drugs. A large package of money was found under the front passenger seat. Based on these discoveries,

police requested that a K-9 unit respond to the scene. The canine alerted its handler to a bag in the rear compartment of the minivan. Inside the bag was a large amount of marijuana. The police arrested the defendant "for the license being revoked."

The defendant appealed his conviction for possession of marijuana with intent to distribute. The defendant challenged the findings of the motion judge who determined that the search was lawful and that police were permitted to conduct a "protective sweep prior to allowing the defendant to return to his vehicle." The primary issues were whether the police were justified searching the vehicle before the defendant was arrested pursuant to search incident to arrest and whether the police had reasonable suspicion to believe the defendant was armed and dangerous.

Conclusion: The Appeals Court held that the police were not justified in searching the defendant's motor vehicle and that no exceptions to the warrant requirement applied based on the facts of this case.

Search Incident to Arrest Doctrine:

The Appeals Court held the search incident to arrest doctrine did not apply because the defendant was not arrested at the time of the search. Although police can conduct a search incident to arrest preceding a formal arrest, the search and the arrest must be "substantially contemporaneous." ***New York v. Belton***, 453 U.S. 454, 465, (1981). The contemporaneity requirement is consistent with "the purpose, long established, of a search incident to an arrest," which "is to prevent an individual from destroying or concealing evidence of the crime for which the police have probable cause to arrest, or to prevent an individual from acquiring a weapon to resist arrest or to facilitate an escape." ***Commonwealth v. Santiago***, 410 Mass. 737, 743 (1991). See ***Chimel v. California***, 395 U.S. 752, (1969). "To permit a search incident to arrest where the suspect is not arrested until much later, or is never arrested, would sever this exception completely from its justifications." ***Commonwealth v. Washington***, 449 Mass. 476, 482 (2007). The defendant was not arrested until after the K-9 unit arrived, conducted a more thorough search, and discovered the marijuana in the rear of the minivan. There was no evidence establishing within a reasonable degree of certainty how much time elapsed between the initial search and the arrival of the K-9 unit, or how much additional time elapsed until the discovery of the marijuana. Based on the facts, the search prior and arrest were not substantially contemporaneous and therefore the search incident to arrest doctrine does not apply.

Additionally, the search of the vehicle was unlawful as a search incident to arrest under ***Arizona v. Gant***, 556 U.S. 332 (2009), and G. L. c. 276, § 1. According to ***Gant***, police can search a vehicle incident to an occupant's arrest, "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" such that he might gain access to a weapon, or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." ***Gant***, 556 U.S. at 343. The police arrested the defendant for operating a motor vehicle without a license. It was unlikely that police would find evidence related to operating without a license in the minivan. Furthermore, the defendant was not within reaching distance of the passenger compartment of the minivan.

According to police, the defendant was sitting on the curb near the rear bumper of the minivan where an officer was guarding him. The defendant was not within reaching distance of the minivan. The fact that the defendant was not handcuffed nor restrained inside a police vehicle, has no legal significance. The defendant was outnumbered three to one with an officer guarding him. The defendant was still

secured in a practical sense and not reasonably within reaching distance of any weapons in the minivan that would justify the search.

Possibility of the Defendant Returning to the Vehicle:

The Appeals Court also considered whether the search was justified since there was a possibility that the defendant may have to return to the vehicle. Although the facts did not fit within the search incident to arrest doctrine and are void of any *Terry* prerequisites, there were no safety concerns. Allowing police to search a vehicle for the mere possibility that the defendant may return to it would "eviscerate the limitations imposed by ***Gant***. The ***Gant*** decision sought to rein in the previously unbridled discretion of officers to rummage at will among a person's private effects based on the person's commission of an arrestable traffic offense." See ***Commonwealth v. George***, 35 Mass. App. Ct. 551, (1993) ("Given the plenary power that the police have to arrest for traffic offenses, [G. L.] c. 276, § 1, requires us to be on guard for pretext searches not based on a genuine and reasonable concern about a concealed weapon or destruction of evidence").

The Appeals Court further emphasized that if there is no police entitlement to search incident to formal arrest, then there certainly can be no entitlement to search incident to probable cause to arrest. See ***Washington,*** 449 Mass. at 482, (there is no "search incident to probable cause to arrest" exception to warrant requirement). There are other exceptions to the warrant requirement that permit police to search a vehicle when there are genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search." ***Gant,*** 556 U.S. at 347. In ***Michigan v. Long***, 463 U.S. 1032, (1983), the Supreme Court authorizes a *Terry-type* search of the passenger compartment of a vehicle when the officer has reasonable suspicion that a recent occupant is "dangerous" and might access the vehicle to "gain immediate control of weapons." The Appeals Court was not persuaded by the argument that the defendant may possibly return his vehicle and could create a genuine safety concern.

Possibility of the defendant was armed and dangerous:

The Appeals Court determined that the police were not justified searching the vehicle as a valid *Terry*-type search for weapons because there was no indication that defendant was armed or that he posed a threat to police. In order for this exception to apply, the facts would have to show that the officers "possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officers in believing that the defendant was dangerous and could gain immediate control of weapons." ***Terry v. Ohio***, 392 U.S. 1, 21. There was no evidence that showed that police had reasonable suspicion the vehicle contained a weapon.

Additionally, the police did not have interactions with the defendant prior to the stop that would suggest the defendant was armed. The initial observation of the defendant handing a grocery bag to the person in the Mercedes presented as odd, but was not an "apparent street-level drug deal according to the officers' testimony. The transfer of the grocery bag failed to signal that the defendant was engaged in a drug transaction.

Lastly, there was a question whether the defendant made furtive movements when the police asked the defendant to produce a license. The police testified that the defendant was rummaging through his car even though he relayed that he did not have his license on his person. The defendant's actions cannot be viewed as a furtive gesture attempting to reach for a weapon. See ***Commonwealth v. Daniel***, 464 Mass. 746, 752-753 (2013) ("officer's actions in allowing the occupants to move the vehicle without first

removing the knife from the dashboard suggested that the defendants' movements and actions, viewed by a trained officer on the scene, did not create a heightened awareness of danger").

The defendant's criminal history lacked any firearms or violent offenses. The remaining factors did not raise concerns that the defendant was armed or dangerous. Unlike the defendant in ***Commonwealth v. Gomes***, 453 Mass. 506 (2009), the defendant here was not an impact player and the incident did not occur at night. After considering the facts of the case, the Appeals Court concluded that police lacked reasonable suspicion to conduct a *Terry*-type patfrisk.

Limitations of Search Incident to Arrest

Commonwealth v. Aderito Barbosa, 92 Mass. App. Ct. 587 (2019): On May 7, 2015, state and federal law enforcement officers, went to the Park Plaza Hotel in Boston to locate the person who had posted an advertisement on Backpage. Around 10:00 a.m., the police met the hotel's head of security on the first floor of the hotel. One of the officers, telephoned the number listed in the Backpage advertisement. A woman answered and told him to come to the fifth floor via the service elevator. The police took the service elevator to the fifth floor and contacted the woman again. At this point, she said come to room 540. The police proceeded to room 540, knocked on the door, identified themselves as law enforcement to the woman who answered, and asked to speak with her. The woman invited them into the room. Upon learning that she was speaking with law enforcement officers, she "became very agitated." She "was visibly crying and shaking." She told the police, "You guys can't be here. He's coming." The room appeared "sort of disheveled," and police noticed that the telephone in the woman's hand was continuously ringing."

While police were speaking the woman, the defendant, Aderito Barbosa came upstairs and started walking towards Room 540. The police identified themselves and the defendant stopped walking, and said 'No.' The defendant started to put his right hand, the one holding the cell phone, in his pocket. Police told the defendant to keep his hands out of his pocket and put his own hand on the defendant's right hand, to ensure that he kept it in sight. The police told the defendant they wanted to talk to him and he responded 'No, I don't need to talk to you.' The defendant pushed one of the officer's hands and started to run back toward the elevators. The head of security, blocked the defendant and pushed him into the door. The police were able to subdue the defendant and they advised him of his Miranda rights. The police conducted a pat frisk of the defendant and recovered a hotel room key, a knife, about $500 in cash, and some prepaid credit cards. When asked what the room key was for, the defendant responded that it was for Room 540 and he said that he wanted a lawyer."

The defendant was charged and he filed a motion to suppress. The judge ruled that that the arresting the defendant for assault and battery on a police officer was lawful. The subsequent search for weapons was valid as a search incident to arrest. Additionally, the judge concluded that the room key would have been discovered under the inevitable discovery doctrine and should not be suppressed. Although the defendant's statement about the room key were deemed voluntary, the motion judge found that the police "were not entitled to inspect the hotel key, cash, and credit cards as a search incident to arrest" and, in violation of G. L. c. 276, § 1. The police improperly used the room key "for an investigatory purpose, by asking the defendant what room it went to." The defendant filed an appeal.

Conclusion: The Appeals Court held that the arrest of the defendant for assault and battery on a police officer was justified and also that the police had reasonable suspicion to believe that the defendant was participating in additional criminal activity, which justified the inquiry regarding the room key.

Issue: When police questioned the defendant about the room key did they violate G. L. c. 276, § 1?

As an initial matter, G. L. c. 276, § 1, "does not operate as a bar to the admission of all evidence discovered in the course of a search incident to a lawful arrest other than weapons or evidence of the crime for which the defendant is arrested." ***Commonwealth v. Dessources***, 74 Mass. App. Ct. 232, 235 (2009). Our appellate courts have concluded that "the limitation on admissibility of evidence expressed in G. L. c. 276, § 1, does not bar the admission of new evidence discovered during a search incident to a lawful arrest when that new evidence is immediately apparent as contraband or evidence of other criminality." ***Commonwealth v. Johnson***, 413 Mass. 598 , 602 (1992). See ***Commonwealth v. Clermy***, 421 Mass. 325 , 330-331 (1995).

Here there is no dispute that the police lawfully arrested the defendant for assault and battery on a police officer, and acted lawfully in frisking him. See, e.g., ***Blevines***, supra at 608 ("Following an arrest, the police are justified in searching a defendant. A hard object found, such as keys, may be seized"). See also ***Clermy***, supra at 327-330 (motion to suppress properly denied where officers arresting defendant on warrant conducted patfrisk that revealed electronic beeper, cash, and, subsequently, pursuant to further frisk, plastic bottle for prescription medicine located between defendant's legs). The judge's conclusion that the room key would have been found and seized, implies that that key "could be removed from the defendant."

In ***Blevines***, 438 Mass. at 605, the defendant was arrested for drinking in public. During a post arrest patfrisk of the defendant, a State police trooper recovered a key chain with five keys from the defendant's rear pocket. Ibid. The trooper subsequently gave the keys to a second trooper and told him to "see if any of the keys fit a car in the parking lot" in order to identify the defendant, whom they believed had provided a false name. ***Id***. at 605, 606. The second trooper approached a motor vehicle parked nearby and inserted a key into the trunk lock; the trunk "popped up." ***Id.*** at 606. After immediately closing the trunk, the second trooper conducted an "area search" of the motor vehicle and ultimately "observed a clear plastic bag containing what appeared to be crack cocaine partially under the front seat." ***Ibid***. "Using the key, the police then opened the door of the Chevrolet and retrieved the bag." ***Ibid***. The defendant was charged with various drug-related offenses. The SJC held that the evidence that "the police had no information suggesting that the vehicle had any connection to criminal activity" and "lacked the 'founded or reasonable suspicion' they would need to insert the key." ***Id***. at 609-610.

The Appeals Court distinguished this case from ***Blevines***. In ***Blevines,*** the defendant was arrested for public drunkenness and the police found his car key, opened the trunk and found drugs. Here the Court found that the officers did not have to ignore the fact that they were investigating a human trafficking case and the police had ample evidence of the defendant's involvement in the separate criminal activity of human trafficking before they arrested or frisked him. The evidence rose to the level of reasonable suspicion and justified the inquiry regarding the room key. See ***Commonwealth v. DeJesus***, 439 Mass. 616 , 627 n.10 (2003). The police contacted the number listed on Backpage and directed police to come to room 540. The woman was crying, shaking, and agitated and relayed that the police that could not remain in the room because "he's coming." While the police were interacting with the woman in room 540, the defendant arrived at the fifth floor and approached room 540. When police tried to speak with him, he fled. The officer involved in this case had substantial training and experience in investigating human trafficking crimes," the room key, unlike the car key in ***Blevines***, had immediate evidentiary significance vis-à-vis the crime of human trafficking. It was reasonable for the officers to view the defendant as the "he" to whom the woman referenced in fear, and further viewed the room key as

evidence related to the defendant's approach to room 540 and involvement as her "pimp." The officers were "not required to blind themselves to [this] information." ***Commonwealth v. Sullo***, 26 Mass. App. Ct. 766 , 770 (1989). Based on the totality of circumstances known to the police, there was an obvious connection between the room key and the crime of human trafficking and therefore the motion judge's findings are reversed. The motion to suppress is denied.

Validity of an Anonymous Tip

Commonwealth v Manha, 479 Mass 44 (2018): Based on the particular information, the police received, from the radio broadcast and the caller, the SJC determined that the police had reasonable suspicion to stop the motor vehicle. The Commonwealth must show that the particularity of the vehicle's description and indicia of the broadcast information satisfied the requisite indicia of reliability of the basis of knowledge and veracity prong. ***Commonwealth v Anderson***, 461 Mass. 616 (2012). As a reminder, the two ways to establish reliability include corroboration by police or an investigation of details. Here, the broadcast contained specific details that included the make, model, color and registration of the defendant's vehicle as well as a description of the driver.

The SJC applied the two-prong ***Aguliar-Spinelli*** test to determine whether the 911 calls satisfied the basis of knowledge test, that the caller's firsthand observations regarding the alleged assault, details about the vehicle's description, the location of the incident and the specifics about the caller's appearance satisfy the basis of knowledge prong. The caller was a victim of an alleged assault and in a position to view the defendant.

With regard to the second prong, the SJC found that even though the caller did not provide her name, she was identifiable if not identified by the mere fact that her call is recorded and her telephone number can be traced. ***Commonwealth v. Depiero***, 473 Mass 450 (2016). Even where a 911 caller is anonymous, the reliability of a caller can be established, "through independent corroboration by police observation or investigation of the details of the information provided by the caller," prior to the stop being initiated. Additionally, the caller's veracity can be demonstrated if the "caller just witnessed a startling or shocking event, description of the event, and that description was made so quickly in reaction to the event as reasonably to negate the possibility that the caller was falsifying the description or was carrying out a plan falsely to accuse another. ***Id*** at 624. Since it was not fully established if the caller was identified by the police in this case, the SJC treated her as anonymous caller. Based on a combination of factors listed below, the SJC determined that the police had reasonable suspicion to stop the motor vehicle. The following factors established the caller's reliability.

1. **Caller was identifiable:** The caller was the alleged victim and reported the incident through a recorded line.

2. **Police Corroboration**: The police were able to corroborate details of the report prior to stopping the motor vehicle which included the make, model, color, registration number, the driver's race and gender.

3. **Nature of the crime:** The SJC indicated that the nature of the crime which involved the defendant pointing a gun at the caller can be considered in the reasonable suspicion calculus. "Given the reported assault with a firearm, the police would have been remiss had they not conducted and investigatory stop the defendant's motor vehicle. ***Id.*** 625.

Based on the nature of crime, the police had reasonable suspicion to stop the defendant's motor vehicle and take protective measures to ensure officer safety. Where a law enforcement officer performs an investigatory stop, the officer's level of intrusiveness must be in proportion to the officer's suspicion or concern for safety. The police received information that a driver had pointed what appeared to be a firearm at another driver on a busy highway. Upon observing the vehicle matching the description, Trooper Guest stopped the vehicle with the assistance of other officers, with weapons drawn, ordered the defendant out of the vehicle. "Given the possible danger to themselves and the public, each step the troopers took was a reasonably prudent protective measure." ***Commonwealth v. Edwards***, 476 Mass 341 (2017). Taking appropriate precautions does not turn an investigatory stop into an arrest. ***Commonwealth v. Haskell***, 438 Mass 390 (2003).

Reasonable Suspicion Based on Information from a Tip

The Appeals Court held that the police lacked reasonable suspicion to stop the defendant's vehicle!

Commonwealth v. Barreto 94 Mass. App. Ct. 337, (2019): On June 9, 2014, Boston Police received a tip from an undisclosed source that a green Volvo station wagon containing a large amount of drugs would be near a certain intersection in Roxbury. Police set up surveillance in the area in response to the information they received. During this time, police observed a green Volvo turn at the intersection without using its turn signal. The police followed the vehicle until it stopped. Although police could not see the driver's hands as he leaned down toward his right side, it appeared as though he was reaching for something on the floor. A man approached the driver's window and placed his hands on the Volvo door and reached inside. The police did not see the driver or the man reach their hands towards each other or exchange anything. As the man walked away, the police did not see him place anything in his pocket or move his arm in a manner suggesting that he put anything there. Once the man walked away, the defendant drove his vehicle to an adjacent parking lot where the police pulled over his vehicle. The driver appeared nervous but was able to provide his license and registration. Police ordered the driver out of his vehicle and when he exited, police observed a roll of case in a clear plastic bag located inside the driver's door. The police conducted a patfrisk and found nothing. A drug-sniffing dog arrived on scene and alerted his handler to the passenger seat where a metal box containing cocaine and cash were found. The defendant was charged and filed a motion to suppress all the evidence that was seized from his vehicle. The judge denied the motion even though the Commonwealth did not provide any information demonstrating that the informant was truthful. The judge found that the police had reasonable suspicion to stop the defendant and issue an exit order based on the police's observations of the defendant and the man. When the police saw the rolled cash, they had probable cause to conduct a subsequent search of the vehicle. The defendant filed an appeal and the issue the Appeals Court had to consider was whether the exit order was valid.

Conclusion: The Appeals Court held that the judge was correct in not relying on the informant's tip. The police lacked reasonable suspicion to order the defendant out of his vehicle. Without a valid exit order, the police cannot rely upon their discovery of the wad of money found in the driver's door and therefore police lacked probable cause to search the vehicle. The evidence must be suppressed.

1st Issue: Did police have reasonable suspicion to stop the motor vehicle?

The Appeals Court determined that the police did not have reasonable suspicion to believe that the

defendant was selling drugs. Based on the facts of the case, the police did not observe anything exchanged between the defendant and the man who approached his vehicle. The Commonwealth maintains that police do not need to see an actually item exchanged to establish reasonable suspicion that a drug transaction occurred. However, in prior cases, police had additional information that factored into the reasonable suspicion calculus. In ***Stewart***, police had prior knowledge that the defendant had been arrested for drug dealing before and police observed three people following a woman as she counted currency walking down the street. ***Commonwealth v. Stewart***, 469 Mass 257 (2014). Here police had no knowledge that the defendant or the man were drug dealers and there was no information indicating that the area was known for high drug activity. The judge noted that the area was made up of "relatively quiet residential streets." The police only observed the driver lean towards the passenger-side floor and have a brief interaction with an unknown male party. The Appeals Court found that what the police saw could be consistent with a "broad range of other interactions," including a driver asking for directions or stopping to say hello. There was insufficient evidence to establish that an exchange of illegal drugs had taken place. All the police had was a mere hunch that a drug transaction had occurred which is insufficient to establish reasonable suspicion. ***Commonwealth v. Silva***, 366 Mass. 402 (1974). Although the judge did not rely on the identity of the informant when making his findings in this case, the officer's testimony during the motion to suppress was a factor and lead the officer to believe a drug transaction had occurred.

2nd Issue: Significance of the tip

The Commonwealth argues that the information received from the informant is only one factor contributing to the police's actions. There is nothing in the record that establishes the informant's basis of knowledge or veracity. The Commonwealth needs to demonstrate the tip's reliability and police corroboration will have to make up any deficiencies. In the underlying case, the police observations only corroborate that there would be a green Volvo station wagon in an undisclosed point in time. As the SJC has found, "corroboration of purely innocent details that are observable by any bystander such as the description of a vehicle and its location, provide only limited enhancement to the reasonable suspicion determination. ***Commonwealth v. Pinto***, 476 Mass. 361 (2017).

- **TRAINING TIP:** The dissent in this case emphasizes that the majority of the Appeals Court emphasized the principles in the ***Kennedy*** which involved probable cause not reasonable suspicion.

A number of factors gave police reasonable suspicion to stop conduct an investigatory stop of the defendant.

Commonwealth v. Erickson Resende, 93 Mass App. Ct. 56 (2018): On October 25, 2013, Brockton police received a 911 call that there was a possible domestic violence incident. The caller identified himself as Edwin and gave his address and telephone number. He relayed that a lights skinned male was yelling unspecified threats at his girlfriend and he mentioned a "gun." The caller described that male as wearing a green jacket, a hat and riding a bicycle. Brockton police responded to the area which is considered a "hot spot," for illegal activity and saw the defendant wearing a green jacket and walking in the vicinity where a bike was on the ground. Police asked the defendant if the bike belonged to him and he replied that it did. When asked to remove his hands from his pockets, he complied. The encounter with the police continued and they questioned whether the defendant heard anyone yelling in the area. The defendant responded "no," and said that he was speaking with a friend. Police requested that the defendant provide identification. Police also asked the defendant if he had any weapons on him. The defendant lifted his jacket and "exposed the grip end of a firearm that was located in his waistband." One

officer grabbed the defendant while another pulled the firearm from the defendant's waistband. The defendant was arrested for carrying a firearm after he failed to produce a valid license to carry

Conclusion: The Appeals Court held that the police had reasonable suspicion to conduct an investigatory stop of the defendant and that there were sufficient facts to prove that the defendant had knowledge that he had loaded firearm within his possession pursuant to G. L. c. 269, § 10 (*n*).

1st Issue: Did police have reasonable suspicion to conduct an investigatory stop?

The Appeals Court concluded that the police had reasonable suspicion to conduct an investigatory stop of the defendant. "An investigatory stop is justified only if the police have reasonable suspicion to conduct the stop." ***Commonwealth* v. *Pinto***, 476 Mass. 361, 363 (2017). "Reasonable suspicion exists when an officer, based on specific, articulable facts and reasonable inferences therefrom, in light of the officer's experience, has reasonable grounds to suspect a person is committing, has committed, or is about to commit a crime." ***Id.*** at 363-364. Here, the Appeals Court had to determine whether the information provided by the 911 caller satisfied the basis of knowledge program required by *Aguliar-Spinnelli*. The 911 caller identified himself by providing his name, address, and telephone number which would imply the caller was "willing to be identified." He also provided a detailed description of the suspect as well as the incident. The level of detail the caller gave suggested he was relaying his firsthand observations. After satisfying the basis of knowledge requirement, the Appeals Court had to consider whether the veracity prong was satisfied. Once receiving the information from the caller, police responded and observed a light-skinned black male wearing a green jacket and in possession of a bicycle. The police observations corroborated the information the caller had given. Lastly, the Appeals Court emphasized that a report involving a domestic violence incident in which a firearm may have been involved is concerning. Given the gravity of the crime and the potential danger to the public, "the police would have been remiss had they not conducted an investigative stop." ***Id.*** at 48. Based on all these factors the Appeals Court affirmed the motion judge's finding that the police had reasonable suspicion to seize the defendant for the purposes of conducting an investigatory stop.

2nd Issue: Was there sufficient evidence to prove the defendant knew the firearm was loaded?

The evidence presented here was sufficient to demonstrate that the defendant knew the firearm was loaded. When police stopped the defendant, the firearm was on his person, in his waistband. Additionally, the defendant admitted he had some familiarity with firearms. He was also alone in the nighttime in an area where violent crimes occurred; and the defendant referenced a firearm when threatening someone earlier. All these factors permit an inference that the defendant was aware that the firearm was loaded. (G.L. c. 269, §10 (n)). The circumstantial evidence presented in this case is distinguishable from ***Commonwealth v. Brown***, 479 Mass. 600 (2018). In ***Brown***, the loaded firearm was found in the console between the two rear seats of a vehicle during an inventory search. ***Id.*** at 602. The defendant was the driver, another occupant was seated in the front passenger seat, and a third occupant was seated in one of the rear seats. ***Id.*** The defendant acknowledged that he was aware of the firearm, but he claimed it belonged to someone else and he, the defendant, put it in the vehicle intending to dispose of it. ***Id.*** at 603. The rear seat passenger said the firearm belonged to her. ***Id.*** There was no evidence that would permit someone to know whether the firearm was loaded simply by its appearance. ***Id.*** at 608. Because it was impossible to determine from the firearm's appearance whether it was loaded, and there was no evidence that would support an inference that the defendant knew the firearm was loaded, the charge of whether the defendant knew the firearm was loaded was not sustained. While this is a close case, and the fact finder was not required to infer that the defendant was aware that the firearm was loaded, the

inference that the defendant knew that the firearm was loaded is reasonable and possible. Unlike the facts in ***Brown****, supra* at 602-603, the defendant, in the case before us, was found with the firearm in his waistband. A commonsense inference from that fact alone is that a person would check to see if the firearm was loaded before putting it in his waistband. The evidence presented included: the firearm was in the defendant's waistband; the defendant admitted he had some familiarity with firearms; the defendant was alone in the nighttime in an area where violent crimes occurred; and the defendant referenced a firearm when threatening someone earlier. The totality of these facts permit an inference that the defendant was aware that the firearm was loaded.

Constructive Possession

Commonwealth v. Rosa, 17 Mass. App .Ct. 495, 498 (1984): The Appeals Court defined constructive possession as an awareness of contraband coupled with an ability and intent to control it. The primary difference between constructive and actual possession involves the fact that "physical possession entails the ability to control, and would ordinarily entail knowledge as well, thus making it unnecessary, in an actual possession case, to list these elements as part of the definition of possession."

Commonwealth v. Crapps, 84 Mass. App. Ct. 442 (2013): The Appeals Court affirmed the convictions and emphasized that the surrounding circumstances were sufficient to prove constructive possession.

- Items recovered in the vehicle including cell phone and personal papers belonged to the defendant,
- Defendant had exclusive control of his girlfriend's vehicle, and
- Defendant engaged in suspicious activity when he picked up unknown family and drove a short distance and let the female out of the vehicle.

The defendant's actions along with the additional incriminating evidence "tip the scale" to prove that there was sufficient evidence that the defendant constructively possessed the drugs recovered from the vehicle.

- ❖ **TRAINING TIP:** This case serves as a good review of the factors courts consider when evaluating if there is constructive possession.

Commonwealth v. Woods, 94 Mass***.*** App. Ct. 761 (2019): On December 23, 2014, a team from the Massachusetts fugitive apprehension task force went to residence in Fitchburg to serve an arrest warrant on an individual they believed to be living in apartment 3 at that residence. The team entered the building through the unlocked front door and began climbing the stairs; as they reached the second floor landing they noticed an open apartment door on their left, and then heard a loud bang -- followed by a woman's screams for help -- coming from the third floor. The team raced up the stairs to the third floor. When they arrived, they found the apartment door off its hinges and lying on kitchen floor and the door appeared to be kicked in. The third floor tenant she heard a crash and saw a "dark figure" in her bedroom doorway, putting his finger to his lips while saying, "shhh." The tenant began screaming and saw the figure move towards the living room. One of the troopers she saw an individual moving quickly in the back of the living room, coming toward her. The man, later identified as the defendant, initially stopped and was cooperative; however, he quickly "threw an elbow to resist attempts to arrest him, and then attempted to run. The team was able to arrest the defendant and they recovered $ 2,293 in cash, three one hundred

dollar bills that were "smudged and off-center," a "rock in a sock" makeshift weapon comprised of a sock containing heavy metal objects and cell phones. Police found a child's blue kickball in one of the apartment closets that contained a loaded firearm. The third floor tenant did not recognize the kickball or the two smaller balls (a basketball and a tennis ball) that were in the closet. The defendant was arrested and police obtained a search warrant for the defendant's apartment. They found an empty gun holster in the defendant's apartment. The firearm that was removed from the kickball "fit pretty well" into the holster found in the defendant's apartment. Small plastic bags were found inside the basketball and tennis ball, and contained a "white-powder substance" and a "tan powder substance." Five bags of cocaine and two bags of bath salts and heroin were removed from the basketball and tennis ball.

Conclusion: The Appeals Court affirmed the defendant's conviction for **constructive possession** of the firearm and drugs.

Although the defendant did not have actual physical possession of the blue ball when he was apprehended, there was sufficient evidence to prove the defendant had constructive possession over the items. "Constructive possession' requires proof that the defendant had 'knowledge coupled with the ability and intention to exercise dominion and control." ***Commonwealth v. Sespede***s, 442 Mass. 95, 99, 810 N.E.2d 790 (2004). Circumstantial evidence can be used to prove possession." ***Commonwealth v. LaPerle***, 19 Mass. App. Ct. 424, (1985). "The defendant's mere presence in the area where contraband is found is insufficient to show 'the requisite knowledge, power, or intention to exercise control over the [contraband], but presence, supplemented by other incriminating evidence will serve to tip the scale in favor of sufficiency." ***Commonwealth v. Albano,*** 373 Mass. 132, 134, (1977). There are several factors that connect the defendant to the blue ball found in the third floor tenant's apartment closet. First, the defendant forced his way into the third floor apartment, ripping the door off the hinges and trying to quiet the tenant's screams. Second, the third floor tenant did not have any children and therefore no children's toys in her apartment. Third, police found a gun holster that fit the firearm found in the blue ball "pretty well. Baggies, digital scales were all removed from the defendant's apartment after they executed a search warrant. Lastly, the defendant and his girlfriend each had a child. His girlfriend's child lived in their apartment and the defendant's child visited on weekends. Children's toys were seen by task force members in the defendant's apartment, permitting an inference that the defendant had converted three balls previously used as children's toys into storage compartments for the drugs and handgun found in third floor tenant's apartment. All of these factors supported a finding that the defendant constructively possessed the firearm and drugs.

There was sufficient evidence to prove the defendant constructively possessed a sawed-shot gun that was recovered from a vehicle with two companions and that the facts support he had knowledge that the firearm was loaded.

Commonwealth v. Santos, Mass. App. Ct. No. 17-P-603 (2019): On the morning of January 2014, Boston Police Officer Gero was responding to a report for a "robbery involving a shotgun." Officer Gero was less than two miles where the incident occurred when he saw a white Toyota Corolla station wagon pass his vehicle, heading in the opposite direction. As the vehicle drove by, Officer Gero suspected this could be a getaway and vehicle. Officer Gero followed the vehicle for three to five minutes, until it turned into the driveway of a multifamily house and drive toward the rear of the home. Once the vehicle parked Officer Gero approached with his weapon drawn as the driver stepped out. The front seat passenger was trying to stuff a silver handgun between the seat and the door. Officer Gero handcuffed him the driver and back up arrived. Boston Police removed the front and rear seat passengers from the vehicle and arrested them. A sawed-off shotgun which was on the rear seat of the defendant's vehicle under a gray

North Face jacket and on top of a North Face backpack. There was duct tape wrapped around the shotgun to hold it closed. There were two shotgun shells loaded into the weapon. Two rolls of duct tape were found in the backpack. The defendant and the two occupants were arrested, A jury convicted the defendant on the charges of possession of a sawed-off shotgun in violation of G. L. c. 269, § 10 (c), and possession of a loaded firearm without a license in violation of G. L. c. 269, § 10 (n).

The defendant filed a motion to suppress and it was denied. The motion judge concluded that Officer Gero conducted a valid threshold inquiry based on the reports of an armed robbery and that it was a reasonable safety precaution to handcuff the defendant as he got out of the vehicle.

Conclusion: The primary issues the Appeals Court considered were whether the defendant constructively possessed the sawed-off shotgun found in the back seat of the vehicle and whether he knew it was loaded.

There was no dispute that Officer Gero had reasonable suspicion to conduct a threshold inquiry based on the nature of the incident and the Officer's observations. When assessing whether the defendant constructively possessed the sawed-off shotgun, it is not necessary to prove that the defendant's possession was exclusive. More than one person may constructively possess an item such as a firearm. See ***Commonwealth v. Jefferson***, 461 Mass. 821, 827 (2012). "Merely being present in a vehicle in which a firearm is located is not sufficient." See ***Commonwealth v. Romero***, 464 Mass. 648, (2013). However, the presence of the defendant inside the same vehicle where a firearm is located, "supplemented by other incriminating evidence, is sufficient." ***Commonwealth v. Garcia***, 409 Mass. 675, 686–687 (1991). There was ample evidence beyond the defendant's presence in the vehicle to satisfy the elements for constructive possession. First, the white Toyota Corolla station wagon was registered to the defendant's mother and controlled by the defendant at all relevant times. Second, the defendant participated with his companions in stealing duct tape from a store on the morning in question to tape the shotgun breech so that the shotgun was operable. Third, the shotgun was partially in plain view inside the vehicle with its handle within the reach of the defendant. Fourth, the defendant used his jacket to partially cover the shotgun. Lastly, the defendant gave false information to the police about his whereabouts and conduct on the day in question. All of these factors support the inference that the defendant had constructive possession of the shotgun.

The Appeals Court found that the circumstantial evidence in this case was sufficient to permit the inference that the defendant had knowledge that the firearm was loaded. Here, the defendant and his companions took steps to ensure that the shotgun would be operable by wrapping it with duct tape, and that the defendant then participated with the shotgun-wielding member of the trio to assault the victim shortly before the defendant's vehicle was stopped by Officer Gero. It is certainly a reasonable inference from that evidence that a person who plans and participates with others in an assault on a victim by means of a handgun and a sawed-off shotgun would know whether the firearms were loaded before carrying out the assault.

Protective Sweeps

The factors considered to justify a protective sweep are as follows:

1. "the violence implicit in the crime for which the defendant is sought and the violence implicit in his criminal history," ***Commonwealth v. DeJesus***, 70 Mass. App. Ct. 114, 119 (2007);

2. the location of the arrest in relation to the area to be swept, ***Commonwealth v. Colon***, 88 Mass. App. Ct. 579, 581-582 (2015);

3. the defendant's resistance or cooperation at the time of arrest, ***Commonwealth v. McCollum***, 79 Mass. App. Ct. 239, 251 (2011); and,

4. the presence, or at least the suspicion of the presence, of other individuals, including those known to be dangerous, in the area, ***Commonwealth v. Nova***, 50 Mass. App. Ct. 633, 634-636 (2000).

5. The sweep must last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."

The quantum of proof necessary to conduct a protective sweep is **reasonable suspicion**, not probable cause. Police must possess a reasonable belief based upon specific and articulable facts which, together with reasonable inferences from those facts reasonably warrant the officers in believing that the area swept harbored an individual posing a danger to the officers or others. The violent nature of the crime charged by the arrest and the suspect's criminal history can provide the articulable facts justifying a protective sweep.

Another basis for police to conduct a protective sweep upon executing a valid arrest in a dwelling for a serious crime, may involve searching the premises if they possess "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." ***Maryland v. Buie***, 494 U.S. 325, 337 (1990).

The Commonwealth does not read ***Maryland v. Buie*** "to require necessarily that the findings of 'articulable facts' justifying a protective sweep be separate from the violence implicit in the crime for which the defendant is sought and the violence implicit in his criminal history." ***Commonwealth v. DeJesus***, 70 Mass. App. Ct. 114, 119 (2007).

The search "may extend only to a cursory inspection of those spaces where a person may be found," and may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." ***Maryland v. Buie***, 494 U.S. at 335-336. ***Commonwealth v. Cruz***, 53 Mass. App. Ct. 24 (2001).

The searching officers must have a reasonable basis for believing that a dangerous individual is hiding on the premises; the mere presence of a third party does not justify a protective sweep. ***Commonwealth v. Dubois***, 44 Mass. App. Ct. 294, 296 (1988).

The scope of the protective sweep extends into closets as well beneath furniture "immediately adjoining the place of arrest from which an attack could be immediately launched." ***Maryland v. Buie***, 494 U.S. at 334.

Commonwealth v. Mejia, 64 Mass. App. Ct. 238 (2005) (police did not exceed the proper scope of a protective sweep by ripping a mattress from a bed in a frantic search for accomplices to a kidnapping);

Commonwealth v. Lopes, 455 Mass. 147 (2009) (police had reasonable grounds to conduct a protective sweep of a large passenger van in which an additional suspect might have easily hidden himself).

Commonwealth v. McDermott, 448 Mass. 750, (2007): Securing the premises often overlaps with protective sweeps. In this case, exigent circumstances existed following a mass murder that occurred at the defendant's place of employment. The SJC held that police were justifying in entry the defendant's residence without a warrant to look for homicide victims. Police limited their entry to areas where persons could be found. No items were picked up or removed from the house.

Securing a House Prior to Obtaining a Warrant

Commonwealth v. Owens, 480 Mass. 1034 (2018): A team of Boston police officers believed that a particular house in the Roxbury was being used for prostitution. The building was a two-family dwelling, and the owner, Farhad Ahmed, lived in an apartment on the first floor. The police officers learned that a woman known as "Cinnamon" worked there as a prostitute. One of the officers, posing as a prospective customer, made contact with Cinnamon, in a series of communications, described the services she offered, arranged to meet him, and gave him the address of the house. The officer arrived at the house and entered. Ahmed was present in the first-floor common hallway. The police officer was aware that Ahmed rented out one or more of the rooms on the second floor for twenty dollars per two hours. Cinnamon asked the officer for twenty dollars. On the pretext of getting his wallet from his motor vehicle, the officer opened the door and signaled other police officers to enter. They arrested Cinnamon and Ahmed. Because the officers had seen other people enter the house and because they believed that a search warrant would be sought, they decided to "freeze" the house, meaning to remove all occupants from it. One officer, hearing a noise from the second floor, ascended the stairs. In a second-floor room, he found the defendant, who was sitting in front of a black plate on which there was a white powder and holding a pipe of a type used to smoke "crack" cocaine. The substance and related items were seized later, when a search warrant was obtained and executed. The defendant filed a motion to suppress and it was allowed. The SJC heard the case on appeal.

Conclusion: The SJC held that police had no basis to secure the entire dwelling including the second floor while they obtained a search warrant. Additionally, there were no exigent circumstances that would justify police conducting a protective sweep of the apartment.

1st Issue: Was a protective sweep of the house was warranted for officer safety?

"There is a fundamental difference between securing or controlling the perimeter of a dwelling from the outside and the entry and physical surveillance of a dwelling from the inside. Police officers who secure a dwelling while a warrant is being sought in order to prevent destruction or removal of evidence may not enter that dwelling, in the absence of specific information supporting an objectively reasonable belief that evidence will indeed be removed or destroyed unless preventative measures are taken." ***DeJesus***, 439 Mass. at 621. At the time the police officers decided to freeze the house, they only knew that the house was being used for prostitution and that there were other people in the house, including

on the second floor. The motion judge specifically found that the police lacked a reasonable basis to believe that Ahmed, the owner of the house, supplied drugs or alcohol, and there was no testimony that any drugs or alcohol were in the house before the police decided to freeze it. The police officers did not identify any other physical evidence (of prostitution or of any other offense) in the house.

Second, the SJC found that police had no reasonable basis to believe that any person present in the house posed a danger to the police or to others, where "there was no evidence that the prostitution business reportedly conducted at the house or by Ahmed in the past included acts of violence" and there was no "testimony reflecting specific concerns about violence here." ***Id.*** at 199. The testimony during the suppression hearing regarding possible loss or destruction of evidence fail to amount to "specific information supporting an objectively reasonable belief that evidence will indeed be removed or destroyed," as required by ***DeJesus***, 439 Mass. at 621. Based on the facts of this case, the SJC held that there was an insufficient basis to believe that evidence would be lost or destroyed.

Exigent Circumstances

- **TRAINING TIP:** The exigent circumstances exception is broader than emergency aid and typically requires a showing of probable cause where that is not required in emergency aid situations because they are not entering the house to investigate criminal activity. See ***Commonwealth v. Entwistle****,* 463 Mass. 205, 214–215, (2012),

Destruction of evidence along with flight of suspects is sufficient to justify the warrantless entry into a home under exigent circumstances!

Commonwealth v. Ramos, 470 Mass. 740 (2015): The Court concluded that the police entry into the garage was justified based on the exigency that evidence was being destroyed. "Exigencies which may justify a procedure without warrant are a narrow category and must be established by the Commonwealth which bears the burden of proof." ***Commonwealth v. Young***, 382 Mass. 448, 456 (1981). Among the exigencies providing justification for a warrantless entry into a home is an officer's reasonable belief that the entry is necessary to prevent "the potential loss or destruction of evidence." ***Commonwealth v. DeJesus,*** 439 Mass. 616 , 619 (2003).

The SJC rules that art. 14 provides greater protection than the Fourth Amendment where the police relied on a reasonably foreseeable exigency to justify making a warrantless entry into a dwelling to arrest an occupant.

Commonwealth v. Alexis, 481 Mass. 91 (2018): On the morning of June 14, 2016, Lynn police officers responded to a report of a home invasion. The victim, Shomar Garcia, lived at the apartment with his wife and two children. Garcia told police that three African-American males had forced their way into the apartment and one of them struck him in the face with a silver handgun. The men restrained Garcia with duct tape and took his jewelry and wallet. Before leaving the house, the man with the silver handgun struck Garcia's six month-old baby in the face with the gun. Garcia recognized the man with the silver handgun, looked through a "few hundred photos" at the police station, saw a photograph of the defendant, and stated with "[one hundred] percent" certainty that the photograph was of the man who had hit him and his baby. Detective Stephen Pohle wrote a report and applied for an arrest warrant to be processed in court the next morning. Significantly, Detective Pohle did not seek an after-hours arrest warrant. The

next morning, Pohle telephoned Sergeant Michael Kenny, the supervisor of the Lynn Police Department warrant task force, and advised Kenny that he was in the process of obtaining an arrest warrant for the defendant. Sgt. Kenny recognized the defendant's name as a person with whom he had recently spoken while investigating another matter. Sgt. Kenny also knew where the defendant lived.

Sgt. Kenny and four other members of the warrant task force drove to the defendant's address **without an arrest warrant**. Based on exigent circumstances, Sgt. Kenny believed that he had probable cause to arrest the defendant. Sgt. Kenny knew the identity of the defendant and suspected that he was involved in a violent home invasion with two accomplices and a firearm. The police, who were dressed in plain clothes and driving unmarked vehicles, planned to set up a perimeter around the house because they thought the defendant may flee or destroy evidence.

As Sgt. Kenny approached the front steps, the defendant saw the officers through the glass front door. The defendant turned around and ran toward the back of the house. One of the officers who was setting up a perimeter, observed the defendant climbing through a window in the back of the house. Police told the defendant to show his hands and he retreated into the house, out of the officer's view. Because of the volatile situation and the nature of the crimes involved, the officers forced their way through the front door. As they entered, they noticed the defendant coming toward them from the back of the home. The officers ordered the defendant to the ground and handcuffed him in the hallway. After the defendant had been restrained, the officers conducted a protective sweep of the house and secured the premises. Police saw in plain view jewelry which matched the description of the jewelry taken from the home invasion.

Sgt. Kenny applied for and received a search warrant for the premises. During the execution of the search warrant, the police seized items of evidentiary significance, including jewelry, a wallet, an electrical stun gun, and various identification cards bearing the defendant's name. Also, police discovered clothing that matched the description given by Garcia of the clothes worn by the home invaders. Following the search warrant execution, Garcia confirmed that the sweatshirt and the pants were consistent with the clothing worn by the defendant during the home invasion.

Conclusion: The SJC concluded that because there were no exigent circumstances authorizing the officers' warrantless entry into the defendant's home, the entry was unlawful and evidence found in plain view during the protective sweep was suppressed.

1st Issue: Did exigent circumstances exist to justify the police making a warrantless arrest in the defendant's home?

The SJC held that there were no exigent circumstances that justified the warrantless arrest of the defendant inside his home. The defendant contended that his rights under art. 14 were violated when police entered his home without a warrant and arrested him. According to the defendant, the police created the exigency themselves by not procuring an arrest warrant before going to the defendant's residence. A warrantless entry into a home is justified only if the police had probable cause and exigent circumstances. Under the exigent circumstances exception to the warrant requirement, "there must be a showing that it was impracticable for the police to obtain a warrant, and the standards as to exigency are strict." ***Commonwealth v. Forde***, 367 Mass. 798, 800 (1975). In ***Forde,*** the SJC found that "a warrantless entry into a dwelling to arrest in the absence of sufficient justification for the failure to obtain a warrant" is impermissible and that "where the exigency is reasonably foreseeable and the police offer

no justifiable excuse for their prior delay in obtaining a warrant, the exigency exception to the warrant requirement is not open to them." ***Id***. at 803. ***Forde*** was decided solely on the basis of the Fourth Amendment. ***Id***. at 805-806. In ***Commonwealth v. Molina***, 439 Mass. 206, 211 (2003), the SJC held that "[t]he exigent circumstances requirement is not satisfied by virtue of altercations resulting from a warrantless arrest at the home, where there is no showing of exigent circumstances leading to the warrantless arrest itself." The Supreme Court subsequently ruled in ***Kentucky v. King***, 563 U.S. 452, 462 (2011), that where "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." This caused the Appeals Court to state that "***Molina*** and ***King*** thus appear inconsistent with each other as a matter of Fourth Amendment jurisprudence." ***Commonwealth v. Gentile***, 80 Mass. App. Ct. 243, 251 (2011).

The SJC had to consider whether art. 14 offers more protection than the Fourth Amendment in situations where law enforcement's lawful conduct created the exigent circumstances that they used to justify a warrantless search, a question not addressed by the SJC in ***Molina***. The SJC has repeatedly emphasized the importance of a person's right to privacy in the home. Here, "balancing the interests of law enforcement with the rights of people to be protected from warrantless searches in the home, the SJC concluded that art. 14 provides greater protection than the Fourth Amendment in these circumstances and that under art. 14 the police cannot avail themselves of the exigency exception to the warrant requirement when it was foreseeable that their actions would create the exigency, even if their conduct was lawful." ***Commonwealth v. Alexis***, 481 Mass. at 99-100.

2nd Issue: Did exigent circumstances make it impracticable for police to obtain an arrest warrant?

The SJC also had to examine whether it was impractical for police to get a warrant before arriving at the defendant's house. The police did not pursue an after-hours arrest warrant nor did they wait for a warrant before heading to the defendant's house in the morning. There was no doubt that the police had probable cause to arrest the defendant and there was also nothing preventing police from approaching his home and knocking on the door. ***Commonwealth v. Leslie***, 477 Mass. 48, 57 (2017). Foregoing multiple opportunities to procure an arrest warrant further highlighted the unreasonableness of the arrest and suggested that the police intended to arrest the defendant without a warrant.

Additionally, there was no evidence that there was a risk that the defendant would flee, destroy evidence, or be a risk to the officers' safety if the police followed the normal course and secured a warrant. The crime occurred the previous day, and there was no evidence that the defendant even knew or had reason to know that he was a suspect before the police arrived at his home. See ***Commonwealth v. Colon***, 449 Mass. 207, 217, cert. denied, 552 U.S. 1079 (2007) (exigent circumstances existed where witnesses to shooting told police that shooters had run into building and officers knocked on door and received no answer notwithstanding noises coming from apartment). The exigent circumstances that emerged during the arrest were a result of the officers' appearance at the dwelling. Based on these factors, the SJC determined that it was not impracticable for police to get an arrest warrant, and therefore the arrest of the defendant in his dwelling without a warrant was unreasonable. Because the defendant's warrantless arrest in his apartment was unlawful, the police could not rely on the plain view doctrine to allow the post-arrest observations in evidence. ***Forde***, 367 Mass. at 807.

- **TRAINING TIP:** The SJC found that probable cause to issue the search warrant remained even without the benefit of Sgt. Kenny's plain view observation of the stolen jewelry because

it was reasonable to expect that the handgun used to strike both Garcia and his infant baby would be in the defendant's home the day following the armed home invasion.

The SJC affirmed the lower court's order suppressing the evidence because the Commonwealth did not argue that probable cause justified the issuance of the search warrant even if the observations of the jewelry were redacted from the affidavit in support of the warrant.

Emergency Aid Exception

Parameters of the Emergency Aid Exception in Massachusetts:

Police can enter a home without a warrant if they have a reasonable basis to believe the following:

1. *someone inside is injured or*

2. *is in imminent danger of physical harm*.

Emergency aid does not require police to have probable cause to enter a home because the purpose for entry is not to investigate a crime, but to avert danger.

1. Domestic Violence

Commonwealth v. Gordon, 87 Mass. App. Ct. 322 (2015): Police can enter the inside of a home without a warrant if they have an objectively reasonable basis to conclude that the person who asked for police assistance may be inside the apartment and in need of emergency aid.

2. Protection for Animals

Commonwealth v. Duncan, 467 Mass 746 (2014): The SJC held that in "appropriate circumstances, animals, like humans, should be afforded the protection of the emergency aid exception and would allow police "to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be an animal inside who is injured or in imminent danger of physical harm." Despite its findings, the expansion of the *emergency aid exception* does not change "the essential framework for determining when a warrantless police search of the home is permissible under it." Police must adhere to the strict requirements under the *emergency aid exception* whether dealing with humans or animals. The two key requirements are listed below:

1. An objectively reasonable grounds to believe that an emergency exists
2. Police conduct must be reasonable under the circumstances after gaining entry

Additionally, ***Duncan*** established that some factors that should be considered when determining whether a 'pure emergency' exists for animals. Before entering a home without a warrant to assist animals in need, police should consider the factors listed below:

a. Was the animal's condition caused by human abuse or neglect?
b. What kind of species was the animal in need?
c. What was the nature of the privacy interest at issue?

d. What efforts were made to obtain the consent of the property owner prior to making entry onto the property?
e. How significant was the intrusion and was there any damage done to the property?

There are no definitive guidelines that cover every scenario involving animals but the SJC advised that when determining whether the search is reasonable, it will look at the "totality of the circumstances." Here, the police found two animals deceased and frozen to the ground in the front yard of Duncan's home. Police also noticed that there was no food or water outside and the third dog was whimpering and leashed outside in cold temperatures. All of these factors would suggest that the third dog was in imminent danger based on the conditions that the police found it.

3. Serving Warrants at a Home

Hill v. City of Taunton, 884 F. 3d 16 (1st Circuit 2018): The First Circuit had to consider whether a section 35 warrant, or any other warrant to compel attendance at a civil commitment hearing, is sufficient to justify a law enforcement officer's warrantless entry into the home under the emergency aid exception. The First Circuit acknowledged that the rule was not clearly established. As part of its examination, it examined the emergency aid exception, as outlined by the Supreme Court in ***Michigan v. Fisher***. According to the Supreme Court's holding in that case, the government does not need to establish probable cause, but only "an objectively reasonable basis" for believing that a person inside the home is in need of immediate aid, in order to enter the home without a warrant. Under this standard, the First Circuit found that given Matthew's history of overdosing and resisting the police, the subject line of the warrant (3 Eldridge Street), and the appearance of a person inside the home, a reasonable officer could have reasonably concluded that his entry was lawful under the emergency aid exception.

4. Standard for Entering a Home

- **TRAINING TIP:** This case was included in last year's materials after the Massachusetts Appeals Court heard the case. The SJC heard the case on appeal and reversed the Appeals Court's findings and held that the facts of the case did not qualify an exigency and therefore the warrantless entry into the home was unjustified.

Commonwealth v. Jose Arias, 481 Mass. 604, (2019): Lawrence police received a tip from an unnamed 911 caller who reported that she saw two, "Spanish guys" "with a gun," walking towards an apartment building at "7 Royal Street." The caller overheard one of the men "load the gun" before entering the apartment building and she was "really freaked out" because she lived at that address. The caller described to the 911 dispatcher what the men were wearing. The caller also said "there's always a little movement in that building," but she was "not really sure what's going on." Recently, the Lawrence police department was investigating "a rash of home invasions "around the area and had "received information" that "a crew out of New York," was responsible for the crimes. Lawrence police showed up at the Royal Street apartments after receiving a dispatch. The police approached the rear of the building while some of the officers were situated at the front door. After obtaining further information about the layout of the building, the police spoke with the caller. The caller told police that she saw three men, "enter the front door of apartment 5A easily because they probably had a key." When no one answered at apartment 5A, the police forcibly entered out of concern that a home invasion was taking place and there were "possibly armed subjects inside, as well as victims." Once inside the apartment, police found no one. However,

police saw narcotics, a scale, and "thousands" of plastic bags on the floor while conducting a protective sweep. The police continued down the interior back stairs looking for armed subjects or victims, where they found the defendant and two other men hiding in the basement. The men were arrested and charged.

The defendant filed a motion to suppress which was allowed and the Commonwealth appealed, arguing that the police had probable cause to enter defendant's apartment building without a warrant, or in the alternative, under the emergency aid doctrine. The Appeals Court reversed the motion judge's findings and found the warrantless entry into the dwelling was justified under the emergency aid exception. The SJC heard the case on further appeal.

Conclusion: The SJC held that the emergency aid exception did not apply because an emergency did not exist and police lacked an objectively reasonable basis to believe that a home invasion was in progress, or that some type of safety risk was posed to potential victims inside the apartment.

1st Issue: Did the police make a justified warrantless entry into the apartment under the *emergency aid exception*?

The SJC held that the police were not justified entering the apartment without a warrant under the ***emergency aid exception***. **"**Whether an emergency exists is dependent upon an evaluation of the circumstances as they appear, at the time, to the police." See ***Commonwealth v. Townsend,*** 453 Mass. 413 (2009). "Whether the police officers' response to their evaluation of the circumstances was reasonable and lawful, are matters that must be evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis." ***Id.***

There are two strict requirements that must be met in order to permit entry under the emergency aid exception to the warrant requirement:

- **First,** the police need an objectively reasonable basis to believe that an emergency exists at the time of entry.
- **Second,** once police enter the apartment, they must be reasonable under the circumstances and not exceed the scope of the search. ***Commonwealth v. Entwistle***, 463 Mass. 205, 213 (2012).

If these two conditions are met, then warrantless entry inside the home is permissible.

Here, the SJC found that the police did not have an objectively reasonable basis to believe an emergency existed. Although officers do not need an ironclad proof of a likely, serious, life-threatening injury in order for an entry, it must be reasonable. The entry is made "to prevent harm stemming from a dangerous condition, not to investigate criminal activity." ***Commonwealth v. Tuschall,*** 476 Mass. 581, 585 (2017). Once police have gained entry inside a dwelling, their conduct must be reasonable and "strictly circumscribed" by the circumstances of the emergency that justified entry. See ***Mincey v. Arizona***, 437 U.S. 385, 393 (1978). A protective sweep made pursuant to the *emergency aid exception* "must be limited in scope to its purpose," ***Commonwealth v. Peters,*** 453 Mass. 818, 823 (2009), e.g., to prevent imminent harm, protect life or property, or provide aid to one who is injured. Additionally, the officers' conduct "may not be expanded into a general search for evidence of criminal activity." If police no longer have an objectively reasonable basis to believe that an emergency exists, it is unreasonable to

continue searching. See ***Mincey v. Arizona,*** 437 U.S. 385, 393 (1978). If, after completing a protective sweep, officers continue to have an objectively reasonable basis to believe that an emergency exists, a subsequent sweep that is limited to the scope of the emergency may be justified. See ***Entwistle***, *supra* at 215-219.

When police arrived on scene after receiving the 911 call, they saw and heard no signs of disturbance, and detected no signs of forced entry. The doors to apartment 5A were closed and intact. Furthermore, the 911 caller relayed that the men had entered the building "easily." Other residents in the multi-unit dwelling indicated they had not seen or heard anything suspicious or out of the ordinary. There were no sounds coming from apartment 5A. Although police observed a man matching the description at the back of the building, their observations did not transform the situation into an emergency. There was no indication that the man was injured, in need of emergency assistance, armed, or about to harm others, or that he had harmed others. Regardless of whether the officers had sincerely held beliefs as to the existence of an armed home invasion or hostage situation, their subjective beliefs at the scene cannot justify a search under the emergency aid exception. The circumstances at the time of entry here did not establish a reasonable basis to believe that an emergency existed in unit 5A. See ***Tuschall***, *supra* at 585-587. Based on all the facts, the warrantless search of the dwelling was not justified under the emergency aid exception.

2nd Issue: Did police have probable cause and exigent circumstances to enter the apartment without a warrant?

"In the absence of a warrant, two conditions must be met in order for a nonconsensual entry to be valid" under the ***exigent circumstances exception*****:** (**1**) "there must be probable cause" and (**2**) "there must be exigent circumstances." ***Commonwealth v. DeJesus***, 439 Mass. 616, 619 (2003). Essentially, when probable cause exists to believe that a crime has occurred, is occurring, or will occur imminently, a warrantless entry is justified only if exigent circumstances also are present. For exigent circumstances to exist, police must have "reasonable grounds to believe that obtaining a warrant would be impracticable under the circumstances. ***Commonwealth v. Figueroa,*** 468 Mass. 204, 213 (2014). Impracticability arises in the context of the exigent circumstances doctrine when the delay caused by obtaining a warrant would create "a significant risk" that "the suspect may flee," "evidence may be destroyed," or "the safety of the police or others may be endangered." ***Commonwealth v. Tyree***, 455 Mass. 676, 685-691 (2010).

The SJC first concluded that there was no exigency and that police lacked objectively reasonable grounds to believe that residents of apartment 5A were in danger. When police arrived on scene, there were no indications of violence or forced entry into apartment 5A. The police also were unaware that a resident or victim inside apartment 5A was in danger. None of the residents from apartment 7A had seen or heard anything suspicious. Although the police saw one of the defendants at the rear of the building, there was no indication that he, the police, or anyone else was at risk of imminent injury. Furthermore, the police had surrounded the building which certainly minimized the risk of the suspect fleeing. Based on the facts of this case, the SJC found that police lacked a reasonable basis to believe that there was an armed home invasion or hostage situation or other exigency. The investigation of a crime, even a serious crime such as an armed home invasion, does not itself establish an exigency. See ***Mincey***, 437 U.S. at 394

The SJC also concluded that the police did not have probable cause to believe criminal conduct was at hand because they did not find any corroborating evidence to bolster the 911 caller's reliability.

After reviewing the circumstances the police encountered at the scene, the SJC found that the caller provided conflicting information. Initially, the caller reported that she saw two men "going up to the building" located at the specified address, and that she heard one of the men load the gun before he and his companion entered the building. Later, the caller said there were three men. The caller also commented that the men talked calmly before entering the building, which they entered "easily" because they likely had a key. Although the caller said that she had never seen the men before, she acknowledged that she was new to the neighborhood and was unsure of what the men were doing. The caller's description of the men who left the building also conflicted with the description the caller had provided to the police. When evaluating all the factors present in this case and the lack of independent, corroborating evidence from police, the reliability of the 911 caller's testimony was insufficient to establish probable cause under art. 14.

Consent Searches

A. Validity of Consent Searches

Commonwealth v. Fencher, 95 Mass. App. Ct. 618, (2019): On September 23, 2016, Barnstable Police officers responded to a report that there was a violent home invasion at home in Centerville. When police arrived they saw the victim, Alfred Boutiette, covered in blood and he was suffering from facial and head injuries. The victim told police multiple individuals attacked him while he was sleeping. The victim thought his niece was involved in the assault because he had an active restraining order against her. Although the victim did not see any of the attackers, he suspected his niece since he saw her "white Hyundai Sonata parked in his driveway." There was no sign of forced entry and nothing appeared to have been stolen. According to the victim, his doors were locked and his niece had a key to the house.

When the victim's niece heard that police were looking for her in connection with the victim's assault, she turned herself into the Barnstable Police. The defendant waived her Miranda rights and agreed to speak with detectives. The detectives questioned the defendant for approximately two (2) hours about her whereabouts and her relationship with the victim. The defendant told police she was drinking and had with friends that evening. The defendant stated that she arrived at a friend's house around 1:00 A.M., and left at 3:00 A.M. to "go smoke near the bridge," where she stayed until sunrise. According to the defendant, someone else drove the white Hyundai, because she was intoxicated. The defendant acknowledged that her car had been parked at the victim's house the night before and that "she had somebody get it for her because of the restraining order." When asked to provide more details, the defendant, responded, "I actually have videos of me being at the bar and stuff," and she agreed to allow police to view the videos within her phone.

While police were questioning the defendant, one of the officers discovered blood stains on the door handle of the white Hyundai Sonata. The officer notified the detective and they seized her cell phone and her keys around 10:15 PM. The defendant consented to police searching her cell phone and she "acted like she didn't care if the police had looked at her phone, "and she stated "she was willing to sign a consent form to search her phone." At 10:35 A.M., the defendant signed a Barnstable Police Department form consenting to the search of her cell phone and she provided "the password to unlock the phone and the passwords to her user accounts that are in the consent forms." The account listed on the consent form is "Snapchat." The defendant refused to give consent for police to search the white Hyundai Sonata or to take her fingerprints and fingernail scrapings.

At 10:57 A.M., the defendant asked, "Can I talk to my grandmother and a lawyer please?" When detectives responded, "are you asking for a lawyer?" The defendant state, "I just want to talk to my grandmother, so she can tell you what type of kid I am." Thereafter, the interview continued until 12:04 P.M. The defendant was indicted and filed a motion to suppress seized evidence and the defendant's statements. A Superior Court judge allowed the motion to suppress and held the police lacked probable cause to seize the cell phone that the seizure tainted the defendant's subsequent consent to search her cell phone.

With respect to the motion to suppress, the motion judge found that the defendant's request for counsel at 10:57 A.M. was unequivocal and allowed the defendant's separate motion to suppress statements as to anything the defendant said after 10:57 A.M. During the course of the interview, the defendant, a college student, was sober, communicative, and responsive to the questions. The tone of the interview was conversational. The judge concluded that, beyond a reasonable doubt, the defendant's statements prior to 10:57 A.M. were voluntary. The motion judge that the defendant's consent to search her cell phone at 10:35 A.M. was tainted by the illegal seizure of the cell phone from the defendant at 10:15 A.M.

Conclusion: The Appeals Court held that the seizure of the defendant's cell phone was supported by probable cause and that the defendant's subsequent consent to search was free and voluntary.

1st Issue: Did police have probable cause to seize the defendant's phone?

Police must have a substantial basis that an item they are seizing contains 'evidence connected to the crime "under investigation." ***Commonwealth v. Escalera***, 462 Mass. 636, 642 (2012). Additionally, there must be a timely nexus between evidence of criminal activity and the object of the seizure. See ***Commonwealth v. Holley***, 478 Mass. 508, 521 (2017). "The concept of 'nexus' means nothing more than a factually based connection between criminal activity and the particular place to be searched and things to be seized." J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters under Massachusetts Law § 8-2[e] [5], at 8-17 (2018). When police seized the defendant's phone, they knew the victim had been badly beaten by multiple assailants during a home invasion approximately six hours earlier. The defendant's vehicle was seen in the area two hours before the assault. The defendant had a key to her uncle's house. This fact was relevant since police did not see any signs of forced entry. The victim had told police that he had an active restraining order against the defendant and that her vehicle was in the area prior to the incident. Blood stains were found on the exterior of the Hyundai Sonata when the defendant arrived at the police station in that vehicle the next morning. The defendant had conflicting stories about her whereabouts the prior evening and the defendant told the detectives that she "[had] videos of me being at the bar and stuff" on her cell phone. Because such video evidence could establish where, when, and with whom the defendant was in the hours before the home invasion, the police had "a substantial basis for concluding" that video evidence stored on the defendant's cell phone contained "'evidence connected to the crime' under investigation" ***White,*** 475 Mass. at 588. See ***Commonwealth v. Jordan***, 91 Mass. App. Ct. 743, 751 (2017) (evidence of suspect's location a component of probable cause analysis if it would be helpful in proving crime). Accordingly, all these factors provide probable cause to believe that video recordings connected to the investigation would be located in the defendant's phone.

2nd: Was the defendant's consent voluntary and did police exceed the scope of the search?

The SJC held that the defendant's consent for police to search the phone was free and voluntary

and unlimited in scope. A search may be conducted without a warrant provided the search is undertaken with the free and voluntary consent of a person with the authority to give that consent. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 222 (1973). The Commonwealth bears the burden of proving consent, ***Commonwealth v. Aguiar***, 370 Mass. 490, 496 (1976), but neither probable cause nor reasonable suspicion are required to ask for consent to search, J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 11-3[b] (2018). However, "[w]hen consent to search is obtained through exploitation of a prior illegality, particularly very close in time following the prior illegality, the consent has not been regarded as freely given. Evidence gathered in a search allowed by such a compromised consent has been thought to be tainted and inadmissible." ***Commonwealth v. Midi***, 46 Mass. App. Ct. 591, 595 (1999).

In the underlying case, the police used the standard form to document the defendant's consent permitting them "to take custody of, copy, and analyze the items detailed below for evidence." The form further designated the defendant's "iPhone 6" under the heading "Digital Device Information" and her "Snap chat" account under the heading "User Accounts to be Searched." Following the signed execution of the written consent form, the police extracted "text messages, call logs, videos, pictures, device location information, and contact information" from the defendant's cell phone. The record is silent regarding what sources within the cell phone were searched to locate and extract the seized information. The consent form indicated that the defendant allowed police to search all databases within her cell phone. Since the consent form is ambiguous, it is unclear if the defendant's consent was limited to the Snapchat account.

The standard for measuring the scope of consent "is that of 'objective' reasonableness-—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" ***Id***." The focus is solely on what a typical, reasonable person would understand the scope of the consent to be," based on the "totality of the circumstances," including the words spoken and the context in which they are spoken. ***Ortiz,*** supra at 824, 826. A reasonable person would conclude that the defendant's consent to search her cell phone was without limitation. The judge found that Detective Foley communicated the police's intent to search the entire cell phone when he stated as the objective, whether by warrant or by obtaining consent, "we're taking your car and your cell phone we're going to, at some point, examine your cell phone for any potential evidence in here and that will allow us to go in there and read all your text messages and everything from last night all through this morning." The judge further found that the defendant consented to the search of her cell phone and provided passwords to both the phone and her Snapchat account. There was no limitation on the scope of the defendant's consent to search her cell phone. The defendant clearly understood what police asked. See ***Ortiz***, 478 Mass. at 826. During the interview, the defendant would not allow police to a search the white Hyundai Sonata nor would she allow police to take her fingerprints or swab her fingernails. Despite the limitations on searching or vehicle and submitting to certain tests, the defendant did no express any reluctance to police searching her cell phone or its contents.

B. Scope of Consent Searches

Police exceeded the scope of a consensual search during a motor vehicle stop when they looked under the hood and checked the air filter for weapons!

Commonwealth v. George Ortiz, 478 Mass. 820 (2018): On January 23, 2015, while on patrol in an unmarked police cruiser, Holyoke police officers stopped a vehicle for violating a city ordinance which prohibits playing excessively loud music in a motor vehicle. As the officers approached the vehicle, they

recognized the defendant from prior incidents which included breaking into an apartment and attempted murder with narcotics and firearms offenses. The officers also recognized one of the passengers, George Ortiz, who had been arrested for trafficking in cocaine after the execution of a search warrant.

When the officer asked the driver for his license and registration, he provided a Massachusetts identification card that was not a driver's license. None of the passengers had driver's licenses. One of the officers asked the defendant in English if there was anything in the vehicle that they should know about, including narcotics or firearms. The defendant responded, without hesitation and without any translation from Ortiz, "No, you can check." The officers ordered the defendant and the passengers out of the motor vehicle and placed all three in handcuffs. The police frisked the defendant and passengers and did not find any weapons. When additional police arrived with a K-9 unit, the dog did not alert the handler to anything around the vehicle. The officers searched inside the motor vehicle and proceeded to check under vehicle's hood. After removing an air filter, the police found a black bag with two (2) firearms inside. The defendant never objected to the search. The search of the motor vehicle was conducted based solely on the defendant's consent. The police did not regard the search as an inventory search nor did they believe that they had grounds to search the vehicle without a warrant.

The police arrested the defendant and the passengers and transported to a police station. At the station, the defendant admitted that the firearms found in the vehicle belonged to him and that he had given consent for the police to search the vehicle. The defendant was indicted as a habitual offender, with two counts of illegal possession of a firearm, two counts of unlawful possession of ammunition without an identification card, and one count of receiving stolen property. The defendant filed a motion to suppress statements and the evidence found.

The motion was allowed and the judge found that the defendant had given his free and voluntary consent to the search, but the scope of the consent was limited to a search for narcotics or firearms in the interior of the vehicle and did not include a search "under the hood beneath the air filter." The judge found that a typical reasonable person interpreting the verbal exchange between the police and the defendant "would believe that the defendant was limiting the scope of the search to the cabin of the vehicle." The defendant's silence when the officer expanded the scope of the search by directing the other officers to search "under the hood" was nothing more than the defendant's "mere acquiescence to a claim of lawful authority," and therefore did not expand the scope of his initial consent. The defendant's statements were suppressed as "fruits of the poisonous tree.

Conclusion: The SJC held that police exceeded the scope of a search and that the search was not supported by probable cause and was not the result of an inventory search. The SJC affirmed the suppression of the weapons found in the air filter and the defendant's subsequent statements at the police station related to his possession of those weapons is allowed.

Since the voluntariness of the defendant's consent was not an issue, the SJC focused on whether the police exceeded the scope of the search when they looked under the hood for firearms and narcotics. A search that is based on consent may not exceed the scope of that consent. See ***Commonwealth v. Cantalupo***, 380 Mass. 173, 178 (1980) ("Because consent can legitimize what would otherwise be an unreasonable and illegal search, a search with consent is reasonable and legal only to the extent that the individual has consented"). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" See ***Commonwealth v. Gaynor***, 443 Mass. 245, 255 (2005).

The standard is what a typical reasonable person would understand the scope of the consent to be, based on the words spoken and the context in which they are spoken, not on what a police officer may understand as the places in a vehicle where narcotics or firearms may be hidden. Consequently, the fact that the police knew from investigative experience that persons sometimes hide firearms and narcotics inside the air filter of a vehicle is irrelevant to a reasonable person's understanding of the scope of the driver's consent.

Here, the exchange between the police and the defendant indicated that the defendant's consent was **limited to a search of the interior of the vehicle**. The police specifically asked the defendant if there was anything in the vehicle that the police should know about, including narcotics and firearms, to which the defendant responded, "No, you can check." These words limited the scope of the defendant's consent to a search for narcotics and firearms inside the vehicle, which includes the passenger compartment, trunk, and containers within those areas where narcotics and firearms could reasonably be found. See ***Jimeno***, 500 U.S. at 251. Even if the SJC determined that the defendant's consent in this case is was ambiguous when the police asked to search under the hood, police are not allowed to take advantage of such ambiguity. Rather the police should clarify with questions the ambiguity.

The voluntariness of consent to a search must be unambiguous. ***Commonwealth v. Carr***, 458 Mass. 295, 299 (2010). "If either the officer's request or the person's response is so ambiguous that we are unable to discern whether the person voluntarily consented to the search, our inquiry will be over and the search must be deemed unlawful." See ***Rogers,*** supra at 238-239. Similarly if clarity is required when determining the voluntariness of consent, the same clarity should apply to the scope of that consent. As a matter of logic and constitutional fairness, the requirement of reasonable clarity must also apply to the scope of consent.

The SJC applied the same reasoning to a consent search, where the defendant gave consent to the police to search in his vehicle, but did not with reasonable clarity give the police consent to search beneath the hood or to dismantle the air filter as part of that search. Under the Fourth Amendment and art. 14, unless it is reasonably clear that the consent to search extends beyond the interior of the vehicle, the police must obtain explicit consent before a vehicular search may extend beneath the hood. Moreover, where such consent is not reasonably clear at the outset, the defendant's silence when the police open the hood cannot be an adequate substitute for consent. The defendant's silence, while he was in handcuffs and had been removed to the side of the street, was nothing more than "mere acquiescence to a claim of lawful authority.'" See ***Bumper,*** 391 U.S. at 549. Likewise, the defendant's failure to revoke his consent cannot be construed as consent to expand the scope of the search beyond the scope to which he had initially consented. The police exceeded the scope of the search that the defendant had given consent.

Commentary: In a dissenting opinion, some of the justices interpret the statement that the police can search in the vehicle to include "anywhere in the vehicle." The majority opinion adopts the standard of what a reasonable person would understand the scope to be. Based on this case, when receiving consent to search, make sure there is no ambiguity otherwise it is likely to be challenged.

C. Authority to Consent

Commonwealth v Jose Hernandez, 93 Mass. App. Ct. 172 (2018): The Appeals Court held that the victim who shared an apartment with the defendant as a co-inhabitant had actual and apparent authority

to legally consent to the police searching the apartment and the suitcase. In ***United States v. Matlock***, 415 U.S. 164 (1974), the Supreme Court held that the co-inhabitant could consent and that consent could be obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. ***Id***. at 171. Consent based on common authority did not arise from "property interests," but from "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." ***Id.***

Matlock establishes that additional or separate authority is not required to search a container located in the co-inhabitant's bedroom. Co--inhabitants have "assumed the risk," vis-à-vis each other, such that any of them can permit a search of a common area, including items kept in such an area. Similarly, in ***Porter P***., 456 Mass. 254 (2010), the Massachusetts SJC stated that "a third party has actual authority to consent to a warrantless search of a home by the police when the third party shares common authority over the home." ***Porter P***., 456 Mass. at 262. However, in ***Porter P***., the person who provided the consent to search was the director of the transitional shelter in which the defendant was staying. The director was not a co-inhabitant and could not able to validly consent to a search of the defendant's room. ***Id***. at 262, 266. All of these cases reflect the common understanding that co-inhabitants of a home have a greatly diminished expectation of privacy vis-à-vis each other, at least as to "common areas." Co-inhabitants accordingly can consent to searches in areas where they have "joint access or control for most purposes." ***Porter P***., 456 Mass. at 262, quoting from ***Matlock,*** 415 U.S. at 171.

Here, the victim had joint access and control over the apartment. She had authority to consent to the search of her home, her bedroom, and her closet. These were "common areas," which were readily apparent upon viewing the small apartment. The victim and her three children "had the run of the place." Based on these facts, the Appeals Court affirmed the convictions and held that the victim had lawful authority to consent to police searching the bedroom and the suitcase contained within the closet.

Interference with the Lawful Duties of a Police Officer

The SJC holds that the charge of interference of a police officer's duties is a common-law crime in Massachusetts. However, there are restrictions with this charge and it requires proof that the defendant physically acted to block or interfere with the lawful duties of a police officer!

Commonwealth v. Adams, 482 Mass. 514 (2019): Tyngsboro Police suspended Mark Adam's Class A license to carry firearms after receiving a report from the Department of Children and Families that the defendant assaulted his wife while his son was home. The police went to the defendant's home to serve him with a written suspension notice and to retrieve his firearms and ammunition. When Sergeant Charles Melanson knocked on the door, the defendant stepped outside and became argumentative with the police. The defendant began yelling and refused to turn over his firearms and said he wanted to call his lawyer. The defendant also told his wife not to allow the police inside the house. Sergeant Melanson put his hand on the front door and held it shut as the defendant attempted to go inside the house. Another sergeant spoke to the defendant's wife inside the house while the defendant remained outside. The defendant continued to yell that he would not give up his guns nor would he provide the combination to his gun safe. When the defendant tried to re-enter his house, the police told him to stop. One of the officers

tackled and arrested the defendant after he quickened his pace. The police forcibly opened the defendant's gun safe and confiscated the firearms.

The defendant was charged with failure to surrender firearms (G.L. c. 269, § 10(i)), disorderly person (G.L. c. 272, § 53), resisting arrest (G.L. c. 268, § 32B), and the common-law crime of interference with a police officer. The defendant filed a motion to dismiss all charges due to lack of probable cause. The defendant argued that he had a right, pursuant to G. L. c. 140, § 129D, to maintain possession of his firearms pending an appeal from the suspension of his firearm license. The motion to dismiss was denied.

The defendant then filed a motion to suppress the seizure of his firearms. The motion to suppress was allowed after a judge determined that the police unlawfully entered the defendant's home without a warrant. The judge found that no exception to the warrant requirement authorized the police to enter the defendant's home, forcibly open his gun safe, and confiscate his firearms and ammunition. The Commonwealth dismissed the charge for failure to surrender firearms although the other charges remained. After trial, the jury found the defendant not guilty on the charges of disorderly conduct and resisting arrest but guilty on the common-law crime of interference with a police officer. The defendant appealed his conviction and argued that pursuant to G. L. c. 140, § 129D; the order immediately to surrender his firearms violated the Second Amendment to the United States Constitution and the evidence was insufficient to prove interference with a police officer. The SJC transferred the case from the Appeals Court and heard the appeal.

Conclusion: The SJC concluded that interference with the lawful duties of a police officer is a common-law crime in Massachusetts. However, the facts in this case were insufficient to sustain a conviction against the defendant for this charge.

The offense of interference with a police officer requires the Commonwealth to prove four elements:

1. **The officer was engaged in the lawful performance of a duty**

2. **The defendant physically performed an act that obstructed or hindered the officer's performance of that duty;**

3. **The defendant was aware that the officer was engaged in the performance of his/her duty; and**

4. **The defendant intended to obstruct or hinder the officer in the performance of the duty.**

The SJC found that the illegal acts of obstructing or hindering the lawful duties of a police officer is a common-law crime, albeit subject to carefully constructed limitations to avoid criminalizing constitutionally protected activities.

The charge of interference with a police officer's duties requires proof of a physical act that a person obstructs or hinders a police officer in the lawful performance of his or her duty. It may also include a "threat of violence against the officer, which reasonably would have the effect of obstructing or interfering with the officer in the performance of a lawful duty." See ***Commonwealth v. Joyce***, 84 Mass. App. Ct. 574, 578 (2013) (interpreting willful interference with a firefighter statute to require intent to interfere). See, e.g., ***Gay v. State***, 179 Ga. App. 430, 431-432 (1986) (evidence of obstruction sufficient where

defendant threatened to get his shotgun and "blow holes in the patrol car" of officer who had called for truck to tow defendant's vehicle); ***State v. Mattila***, 77 Or. App. 219, 221, 223 (1986) (obstructing governmental function established by evidence that defendant asked his mother, in loud voice, whether he could shoot deputies who had approached house to serve eviction papers).

The SJC found that there was insufficient evidence to establish that the defendant in this case physically obstructed or hindered the police in the performance of their lawful duties. Here, the defendant's refusal to surrender his firearms and ammunition may have violated G. L. c. 269, §10(i), due to his noncompliance with the demand that he surrender his firearms. However, the defendant's refusal cannot form the basis of a charge of common-law interference with police officers. The defendant was upset and argumentative and insisted that he would not comply with the police order. He repeatedly demanded to contact his lawyer, and told his wife not to allow the police to enter their home. Although the defendant was belligerent, there was no evidence to establish that the defendant physically obstructed or hindered the officer in the performance of a lawful duty. Additionally, the defendant's protestations did not rise to the level of threats of violence against a police officer, which reasonably would have the effect of obstructing or interfering with the police in the performance of a lawful duty. Based on the above facts, the SJC reversed the defendant's conviction due to lack of evidence that the defendant had interfered with the lawful duties of a police officer.

- **NOTE:** The ***Adams*** case also raises questions regarding police response when serving a revocation or suspension notice for an individual's license to carry. These issues will be discussed in more depth in the firearms section of this manual.

Standards for Strip Searches

A. Probable Cause for Strip Searches

The SJC holds that police had reasonable suspicion to believe that the defendant was concealing contraband in his crotch, but they lacked probable cause to conduct a strip search of the defendant!

Commonwealth v. Donne K. Agogo, 481 Mass. 633, (2019): Chelsea police were conducting surveillance near Bellingham Square. While police focused their attention on a multifamily apartment building, they noticed the defendant, Donne Agogo, repeatedly try to initiate conversations with pedestrians. The defendant entered the apartment building, remained inside for approximately thirty seconds, and returned to the sidewalk in front of the building. After watching the defendant, the police became suspicious of his behavior. The police saw an individual, later identified as James Foster, approach the defendant, who was again standing outside the apartment building. Foster was "manipulating something in his hands" as he spoke to the defendant; the police believed that Foster was counting currency. Foster and the defendant then turned and walked around the corner, where they were no longer in view of the officers. Because police believed a drug transaction was about to take place, they, too, rounded the corner. At some point, the police saw currency exchanged and believed a drug transaction had occurred.

Police told Foster to remove his hands from his sweatshirt pockets and they conducted a pat-frisk of him. Police found a knife and a knotted bag that contained cocaine on Foster's person. The police approached the defendant, who appeared to be upset and animated, and he was not complying with the

police. The defendant took a "bladed" stance and began pulling away from one of the officers, when police told him they were going to a conduct a pat-frisk. The police found a twenty-dollar bill on the defendant. Both Foster and the defendant were arrested and brought to the station for booking.

Based on their training and experience, the police believed that the defendant was concealing drugs. When police told the defendant they were going to perform a strip search, he protested. The police escorted the defendant to another room and ordered him to remove his shoes and socks as well as his shirt, pants, and underwear. When the defendant was fully undressed, the police saw a red bandana and seized it from his groin area. The bandana contained what they believed to be seven small bags of cocaine.

The defendant filed a motion to suppress the drugs. He argued that (1) police lacked probable cause to conduct a strip search and (2) the strip search was not properly conducted because it deviated from departmental policy. The motion judge found that police did not have probable cause to conduct a strip search of the defendant, and allowed the motion to suppress. The Commonwealth appealed. A divided panel of the Appeals Court reversed the order allowing the motion to suppress and the SJC allowed the defendant's petition for further appellate review.

Issue: Did the police have probable cause to conduct a strip search of the defendant?

There is no dispute that the police had probable cause to arrest the defendant on drug charges and to conduct a search incident to the arrest. However, in this case, police determined that a strip search was necessary. **Probable cause to conduct a strip search requires some affirmative indication that drugs or other contraband are being concealed in areas such as the crotch or groin**. "The requisite affirmative indication that contraband or weapons are being secreted in very private parts of the body may take a number of forms, as our cases have recognized." Potentially, the sight or feel of an unusual object or protrusion that supports police suspicion of drug involvement. See, e.g., ***Commonwealth v. Clermy***, 421 Mass. 325, 330-331 (1995) (police suspicion supplemented when, during patfrisk, they felt hard plastic prescription drug container hidden in defendant's groin); ***Commonwealth v. Vick***, 90 Mass. App. Ct. 622, 624-625, 630-631 (2016) (probable cause to conduct strip search where, during patfrisk, officer felt hard object in cleft of defendant's buttocks). "When a hard object or suspicious bulge is detected, it is more likely to amount to probable cause if the confluence of factors otherwise known to police at the time of the strip search confirms their belief that the object is a weapon or contraband." And even if the touching does not alone supply probable cause, it may contribute together with other facts to a probable cause finding. The defendant's behaviors may suggest he is hiding something somewhere on his person that a patfrisk reasonably could not discover without removing the defendant's clothing. For example, if a an arrestee is seen attempting to block his or her groin, buttocks, breasts or genital area from police view or reach, during an ordinary search or patfrisk, these actions may indicate the arrestee is trying to hide something. See ***Commonwealth v. Prophete,*** 443 Mass. 548, 554-555 (2005) (police suspicion supplemented when defendant twice used hands to protect groin area during patfrisk).

The SJC examined all the facts in this case that police believed gave them probable cause to conduct a strip search. The defendant had been engaging in street-level drug distribution at the time he was arrested and police suspected that may be concealing drugs in the crotch area to avoid detection. When the police approached the defendant, he took a "bladed" stance, and displayed an animated demeanor. The defendant also pulled away from police prior to their decision to pat frisk him. Police discovered twenty dollars on the defendant's person when they conducted a patfrisk. Twenty dollars is an amount

consistent with the street value of the suspected cocaine they found on Foster's person. Later, at the police station, when police informed the defendant of his imminent strip search, he vocally protested. All these factors provided police only with reasonable suspicion that the defendant could be concealing contraband in his crotch. However, when evaluating whether a strip search is constitutionally permissible, reasonable suspicion is not enough. See ***Prophete,*** *supra* at 553 (reasonable suspicion to initiate a strip search is sufficient under the Fourth Amendment, but probable cause is required under art. 14).

In the underlying case, there was no affirmative indication that the defendant was hiding contraband or weapons in his groin area. The defendant did not attempt, at any point, to block officers from reaching or viewing his groin area. Furthermore, there was no evidence that the defendant placed anything in his crotch, reach for his crotch, or walk in a manner consistent with there being an object concealed in his crotch. "The officer's training and experience as to the general practices of street-level drug dealers without more do not constitute the requisite particularized indication of concealment." ***Commonwealth v. Amado***, 474 Mass. 147, 155 (2016). Likewise, the defendant's behavior justifying the patfrisk at the scene (taking a bladed stance) was too attenuated in relation to the later strip search that occurred at the police station. Lastly, the defendant's animated vocal displeasure at the prospect of being subjected to a strip search is not the type of behavior the courts have recognized as affirmatively indicative of concealment. "Were it otherwise, the risk is that such a reaction to being told of an imminent strip search readily could be induced, and then used to justify the search." The SJC affirmed the order allowing the defendant's motion to suppress.

B. Location

Commonwealth v. Amado, 476 Mass. 147 (2016): The SJC held that "pulling the defendant's clothing away from his body, shining a flashlight inside the clothing, and removing an object from his buttocks" qualified as an unlawful strip search because search occurred after police had dispelled safety concerns and there was no probable cause to believe defendant was concealing drugs. Without probable cause, police were not justified in searching defendant and it was therefore unreasonable. The contents of the bag that the police retrieved during the strip search should be suppressed and the conviction was vacated.

- **NOTE**: If the SJC had found that the police had probable cause, the search would have to be reasonable.

C. Partially Clothed Searches

Commonwealth v. Morales, 462 Mass. 334, 342 (2012): Strip searches may precede a formal arrest as long as probable cause existed at the time the search was made, independent of the results of the search. A strip search may also occur "when a detainee remains partially clothed, but in circumstances during which a last layer of clothing is moved (and not necessarily removed) in such a manner whereby an intimate area of the detainee is viewed, exposed, or displayed." ***Commonwealth v. Morales***, 462 Mass. 334, 342 (2012).

Commonwealth v. Prophete, 441 Mass. at 553. "Strip searches by their very nature are humiliating, demeaning, and terrifying experiences that, without question, constitute a substantial intrusion on one's personal privacy rights."

D. Manual Body Cavity Searches

Commonwealth v. Vick, 90 Mass. App. Ct. 622 (2016): The Court held that the police had probable cause to conduct as search and the search in this case did not constitute a manual body cavity search. Here, the police only needed probable cause to believe that the defendant had concealed drugs in his buttocks area to justify the search. See ***Prophete***, 443 Mass. at 556. Probable cause existed because of the following reasons:

1) one of the officers, who had 30 years of experience, felt an object in the cleft of the defendant's buttocks during the search, which he believed was drugs

2) the defendant tightened the muscles of his buttocks and pulled away when the officers touched the object;

3) the defendant resisted forcefully during the remainder of the search at the scene;

4) the defendant attempted to reach the object in the cruiser;

5) the defendant was with a known drug user, recognized by all three officers, who had what they believed to be a crack pipe on his person;

6) the defendant was in an area known for illegal drug activity, where the officer had made numerous drug arrests in the past; and

7) a drug-sniffing dog alerted in the defendant's vehicle.

After considering all these factors and the determining that the manner of the strip and the visual body cavity searches was reasonable, the Court affirmed the denial of the motion to suppress.

- ***TRAINING TIP:*** This case was included in the TY 2018-19 manual after the Appeals Court issued its decision. The SJC reversed the Appeals Court's findings and held that the removal of the plastic bag was within the scope of a strip search and not a manual body cavity search.

Commonwealth v. Stanley Jeannis, 482 Mass. 355, (2019): The FBI task force arrested the defendant, Stanley Jeannis for outstanding warrants in a Revere hotel. After the defendant was arrested, Lieutenant David Callahan of the Revere police department, brought the defendant to the Revere police station for booking. During booking, the defendant complained that he had swallowed "fifties," which Lt. Callahan understood to mean small bags worth approximately fifty dollars of heroin or cocaine, and that he did not feel well. Lt. Callahan did not believe that the defendant was under the influence of narcotics but followed protocol and requested medical assistance. Lt. Callahan noticed that the defendant "sat oddly, leaning to one side." When the defendant told Lt. Callahan, that he might vomit, the police escorted the defendant to a nearby cell with a sink and toilet. While walking towards to the holding cell, Lt. Callahan observed that he was not walking normally even though he was not restrained in shackles or handcuffs, his movement was slow, rigid, and tense. The defendant was "clenching his buttocks area," and Lt. Callahan believed that the defendant might have "something secreted in his lower half," which Callahan recognized could pose a safety risk to the defendant, the police officers, and other prisoners.

Once inside the holding cell, Lt. Callahan ordered the defendant to remove his clothing. The defendant stripped down to his underwear and he became argumentative when asked to remove it. While still wearing his underwear, he continued to clench his buttocks area and attempted to shield his backside from the view of the police. Since the police were concerned the defendant could be hiding a weapon, they handcuffed one of the defendant's arms, and restrained the other. The defendant pulled down the waistband of his underwear and told the officers, in substance, "See, I don't have anything." However the police observed a plastic bag protruding from the defendant's buttocks. The police ordered the defendant to remove the bag, and told the defendant that he would remove it himself if the defendant refused to do so. The defendant complied and, one of the officer's placed his hand on the defendant's hand, while he removed the bag from his buttocks area. It contained fifteen individually wrapped bags of cocaine and thirteen individually wrapped bags of heroin.

The defendant was indicted on charges of possession of cocaine and heroin with intent to distribute, as subsequent offenses, the defendant moved to suppress the drugs that were found in the plastic bag that was removed during the strip search. The motion was denied because the Superior Court judge found that the police had probable cause to believe that the defendant was attempting to conceal contraband "in a private area of his body," so a strip search was "proper." The judge also concluded that "[t]he strip search did not cross over to a cavity search," noting that the defendant removed the bag himself after Singer ordered him to do so.

The defendant appealed the motion judge's findings and the Appeals Court held that the police should have applied for a search warrant because the bag was seized from a body cavity. The Appeals Court concluded that the search qualified as a manual body cavity search because the police had failed to determine whether "no portion of the bag was within the defendant's rectum." Based on the facts, the Appeals Court reversed the motion judge findings and the Commonwealth appealed for further review.

Conclusion: The SJC held that the removal of the plastic bag was within the scope of the strip search and that the actions taken by the police were reasonable within the bounds of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights.

1st Issue: Was the removal of the plastic bag from the defendant's buttocks part of a strip search or did qualify as a manual body cavity search.

The SJC held that a search warrant for a manual body cavity search is always required to remove a plastic bag where the police did not or could not ascertain that the bag is located completely outside of the rectum--that is, where it did not to any degree penetrate the anus. When there is "no touching or probing or otherwise opening or manipulating of the defendant's anal cavity, and the bag of drugs was easily removed without in any way endangering the defendant's health or safety", a strip search or visual body cavity search has occurred not a manual body cavity search." ***Vick***, 90 Mass. App. Ct. at 629. This means that, where police officers are uncertain whether the bag has penetrated the defendant's anus, they have two alternatives.

First, where police have probable cause to do so, they may conduct a visual body cavity search to determine whether the bag has penetrated the defendant's anus. If it has not, they may remove the bag without a search warrant.

Second, where the bag has penetrated the anus or where the police officers have not ascertained through a visual body cavity search whether it has, they may determine whether the bag can be safely

removed without any touching, probing, or manipulation of the rectum. See ***Id.*** If it can be safely removed and if there is no touching, probing, or manipulation of the rectum, the removal of the bag is not a manual body cavity search. See id. However, if the bag cannot be safely removed without any touching, probing, or manipulation of the rectum or if there is uncertainty whether it can be, the officers must apply for a search warrant for a manual body cavity search, unless exigent circumstances justify proceeding without a warrant. See Id. at 628-629.

Often, a police officer may determine whether the bag can be safely removed without any touching, probing, or manipulation of the rectum by gently flicking the bag with his or her fingers, applying no significant pulling force on the bag. If that suffices to remove the bag without any resistance, the SJC does not find the search to be a manual body cavity search. See ***Id.*** at 625, 629. A gentle flick to remove a plastic bag protruding from the cleft of a defendant's buttocks may be safer and less intrusive than a visual body cavity search intended to determine whether the bag has penetrated the defendant's anus. It is easy to envision a defendant resisting an intrusive and embarrassing visual body cavity search, risking injury to both the defendant and the police officers attempting to restrain the defendant. And a gentle flick may be less intrusive than a visual inspection because a police officer attempting to conduct the inspection might need to place his or her fingers so close to the anus that he or she might come close to a touching or probing that would constitute a manual body cavity search.

However, if there is any resistance to the gentle flick, this may indicate that the bag is lodged or embedded within the body cavity. If police encounter those circumstances, they must release the bag and apply for a search warrant for a manual body cavity search, unless there are exigent circumstances. The SJC emphasized that a health risk that may arise if a police officer were to continue to pull on the bag where there is any resistance. In ***United States v. Fowlkes***, 804 F.3d 954, 959-960 (9th Cir. 2015), a police officer continued to pull on a bag protruding from the defendant's rectum after encountering resistance in what was described as "a difficult, abrasive procedure," where the plastic bag "went from a dime size to somewhat near a golf ball size as it was taken out," and was "covered in blood."

The requirement of a search warrant for a manual body cavity search is intended not only to ensure that a judge determines whether there is a strong showing of particularized need supported by a high degree of probable cause, ***Rodriques,*** 410 Mass. at 888, but also to ensure that any such search is conducted in a safe, reasonable manner under sanitary conditions by a trained medical professional. See ***Fowlkes,*** supra at 967 (warrantless forcible seizure of plastic bag protruding from defendant's rectum was unreasonable under Fourth Amendment where item of unknown size was removed from rectum by nonmedical personnel who "did nothing to assure that the removal was safe and performed under sanitary conditions").

According to facts in this case, the plastic bag that contained the drugs protruded from the defendant's "buttocks." The motion judge did not determine whether any part of the plastic bag was in the defendant's rectum, and the evidence on that point fails to definitely establish whether the bag penetrated into the rectum. Without more information, the motion judge found that the Commonwealth failed to prove that the plastic bag did not to some degree penetrate the defendant's anus.

2nd Issue: Did police encounter any resistance when the bag was removed?

The SJC also had to determine whether the removal of the bag was conducted in a manner permissible for a strip search -- that is, whether the removal of the bag met with any resistance that suggested that it was lodged or embedded in the victim's rectum. There is nothing in the judge's findings

to suggest that the bag required more than minimal force to remove, and therefore the bag was safely removed without any touching, probing, or manipulation of the rectum. Additionally, even though one of the officer's hands was on top of the defendant's hand while the defendant pulled out the bag, the facts did not indicate that more than minimal force was used to remove the bag. The defendant testified that "with my free hand I just retrieved it," when asked how the bag was removed from his buttocks. The size of the 275 pound defendant compared to the small plastic bag at issue--a photograph of which was admitted in evidence--supported the finding that the bag, which was apparently visible outside the intergluteal cleft as soon as the defendant pulled down his waistband, did not extend so far down as to be lodged or embedded in his rectum. The SJC concluded that based on the facts, it is likely the bag was not lodged or embedded in the defendant's rectum but was easily removed, and therefore the defendant's rectum did not need to be "manipulated" in order to remove it.

III. Miranda and Other Issues

Recitation of Miranda Rights

Commonwealth v. LaJoie, 95 Mass. App. Ct. 10, (2019): On November 7, 2012, the defendant, William LaJoie, was taken into custody at the Fall River police station, where he was interviewed by Detective Brian Cordiero about an incident that had occurred fifteen years earlier, involving sexual intercourse with a girl under the age of sixteen. The interview was audio and video recorded. The defendant admitted to having sexual intercourse with the girl but stated that she told him that she was nineteen, and that the sexual intercourse was consensual. When asked if he was the father of the woman's now fifteen year old son, the defendant stated that his name was on the birth certificate but that he was not certain he was the father.

Before the interview began, Detective Cordiero advised the defendant of his rights, which he read to the defendant from a form that the defendant later signed. Detective Cordiero stated the following:

"[1] You have the right to remain silent.

"[2] Anything you say can be used against you at trial.

"[3] You have the right to an attorney.

"[4] If you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning.

"[5] If you decide to waive your Fifth Amendment rights pursuant to Miranda, you may stop answering questions at any time if you so desire."

After reading each right, Detective Cordiero asked the defendant if he understood the right, and the defendant answered that he did. Detective Cordiero read a series of "presentment warnings," which informed the defendant of various additional rights including, for example, prompt presentment in court and the right to a bail hearing. The defendant signed the written form containing the rights that had been read to him. His signature appears under the heading "WAIVER OF MIRANDA WARNINGS."

The interview lasted thirty-one minutes and Detective Cordiero was pleasant and courteous "at all times." There was no indication that the Detective Cordiero engaged in intimidation, trickery, or promises of leniency during the interview. When Detective Cordiero asked the defendant if he would consent to a buccal swab, the defendant said he wanted to speak with his attorney. The defendant almost immediately consented after Detective Cordiero left the room.

The defendant was indicted on rape of a child with force, aggravated assault and battery by means of a dangerous weapon, assault with intent to rape, and violation of an abuse prevention order and he filed a motion to suppress the statements. The defendant argued that the Miranda warnings were defective because Detective Cordiero failed to give him the third warning which advised him of the right which is the presence of an attorney. After a motion hearing, the judge concluded the warnings "did not convey the right to the presence of an attorney during questioning," and therefore allowed the motion. The Commonwealth filed an appeal.

Conclusion: The Appeals Court concluded that the warnings were adequately conveyed and including advising the defendant that he had the right to an attorney.

The Miranda summarizes that the warnings to be given as follows: "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Here, Detective Cordiero told the defendant he had the right to have appointed counsel "prior to any questioning." The statement reasonably confirmed to the defendant that his right to an attorney, previously stated, included both the right to the presence of counsel, and the right to consult with counsel about any questioning in advance. This statement implies that the suspect has a right to a lawyer; that right obtains prior to any questioning. The warnings did not also need to say: "your right to a lawyer includes the right to consult with a lawyer before, during, and after questioning and to have the lawyer physically present at all times."

In sum, the warnings, viewed in their totality, adequately advised the defendant of his right to an attorney, including his right to consult with counsel and to have him or her present before, during and after questioning. The Miranda warnings were adequate.

"The Supreme Judicial Court has not held that more precision is required under the Massachusetts Declaration of Rights than is required by the Federal Constitution, and the Appeals Court declines to extend beyond the Federal requirements here. See ***Commonwealth v. The Ngoc Tran***, 471 Mass. 179, 185 (2015) (citing and following standards from ***Powell, Duckworth and Prysock***, and confirming that Miranda warnings need not be given word for word). The Miranda warnings are directed to preserving the right of an accused against compelled self-incrimination. In terms of the formulations of those warnings, the Federal case law has established the parameters, and has shown how to enforce their use. Certainly the facts of this case evidence none of the concerns of overbearing custodial interrogation that led to Miranda's requirements. The statements at issue should not have been suppressed.

Custodial Interrogation

Commonwealth v Cawthron, 479 Mass. 612, (2018): The SJC held that the police were not required to give Miranda warnings to the defendants because they were not in custody. The SJC applied the four factors when determining whether the defendants were in custody. The factors considered are: (1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest." ***Commonwealth v. Groome,*** 435 Mass. at 211–212 (2001). "Rarely is any single factor conclusive." ***Commonwealth v. Bryant***, 390 Mass. 729, (1984).

There was not dispute the initial encounter amounted to a Terry-type stop, with an initial, brief inquiry into the suspicious transactions that a police officer believed were a conspiracy charge. See ***Terry v. Ohio***, 392 U.S. 1, 28-29 (1968). These types of stops are permissible where an officer has a reasonable suspicion that a crime has been, is being, or is about to be committed. See***. Id.*** Miranda warnings are not necessary when the interaction is casual. See ***Commonwealth v. Borodine***, 371 Mass. 1, 4 (1976). However, the nature of the interaction may change, as officers begin to focus on a particular suspect. When the nature of the interaction changes, Miranda warnings are required to protect suspects from police-dominated environments that were "created for no purpose other than to subjugate the individual to the will of his examiner." ***Commonwealth v. Kirwan***, 448 Mass. 304, 312 (2007) freedom of movement of the degree associated with a formal arrest"). See generally Grasso & McEvoy, Suppression Matters under Massachusetts Law § 18-3[b] (2017). The crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody." ***Commonwealth v. Groome***, 435 Mass. 201 , 211 (2001).

Defendant's statements that he made to police were voluntary.

Commonwealth v. Amaral, 482 Mass. 496, (2019): The SJC held that the defendant made voluntary statements to police and that Miranda was not required since he was not in custody. The defendant voluntarily appeared at the police station with his co-defendant, to be interviewed about a murder. Both defendants were brought to separate interview rooms. However, the police did not restrict the co-defendants speaking freely before the interviews. The defendant placed telephone calls before the interview began, and he contacted his mother at a break to coordinate dinner plans. The defendant told investigators at the start of the interview that he had to "get straight" prior to speaking with police, which they believed to mean he had ingested drugs before arriving at the station. The defendant did not smell of alcohol, slur his speech, or otherwise appear to be under the influence of an intoxicating substance. The defendant was "coherent, lucid and talkative," and he "clearly manifested an understanding of the conversation" and answered questions appropriately. At one point, the defendant expressed concern that he would be labeled a "rat," by speaking to police. The tone of the interview was "cordial, polite, nonaggressive, and heavily influenced and controlled by the defendant." The defendant was a college graduate and told police that he had waived his Miranda rights in another matter. Police told the defendant he was not a suspect in the murder. The defendant cooperated and voluntarily gave police his cell phone. He even signed a consent form allowing police to search the phone and he allowed police to swab him for blood residue. The defendant never was told that he was in custody or that he could not leave the station. Although one of the officers conducted a quick pat-down of the defendant at one point,

that officer did so only when the officers observed the defendant scratching himself, which the defendant explained as a manifestation of his heroin addiction. During two breaks, the defendant was escorted to the bathroom and outside to have a cigarette.

After one break, the investigators told the defendant that Garcia had given them more information than the defendant had provided and suggested that he was not telling them the complete truth. It was then that the defendant indicated that David was the last person to see the victim alive. The defendant further offered to "set up a drug deal" so that investigators could investigate David. The investigators agreed and the defendant left the station to complete the controlled drug purchase with David. After the controlled drug purchase, the defendant accompanied police back to the station and again was seated in the meeting room, but he was not told that he could not leave the station. Shortly after 9 P.M., police held a second interview with the defendant, in which he told them that the first television had been sold to Jason McCarthy. The second interview lasted for a few minutes. Police confirmed David's alibi for the night of the murder. They also learned from McCarthy that the first television had blood on it and that McCarthy had seen the defendant with blood on him when he delivered it. After police received this information, a third interview with the defendant was conducted. At the start of that interview, the defendant invoked his right to counsel, and he was arrested.

The SJC considered four factors when determining whether the defendant's statements should be suppressed

1st Issue: Was the defendant in custody?

i. The location of the interview: The defendant was interviewed at the police station, a location that may be considered coercive; however, he arrived of his own volition. See ***Commonwealth v. Sparks***, 433 Mass. 654, 657, (2001) (interview that took place at police station was not custodial where defendant arrived and left voluntarily). The defendant argues that the fact that police were attempting to locate him prior to his appearing at the station for an interview put pressure on him to appear. Assuming this is true, it does not alter the objective circumstances of the interview discussed.

ii. Whether the police conveyed a belief that the defendant was a suspect: Investigators indicated to the defendant that he was a witness, rather than a suspect, until the third interview, at which point the defendant invoked his right to counsel and questioning stopped. Even after speaking with Garcia and confronting the defendant about his not being completely forthcoming, investigators did not tell the defendant that there was any incriminating evidence against him, or that he was under suspicion. The officers only communicated that they wanted to know more about the events leading up to the victim's death. See ***Commonwealth v. Morse***, 427 Mass. 117, 123-124, (1998) (investigator's suspicions concerning interviewee immaterial unless they influence objective conditions of interrogation).

iii. The nature of the interview. The interview was conducted in a calm and cordial manner, and the defendant heavily influenced its direction. The defendant apparently felt comfortable enough with the investigators to ask them to put in a good word with his probation officer, and later to suggest that police conduct a controlled drug purchase in which he would participate in order for the officers to investigate David. The

environment was not one in which a reasonable person in the defendant's position would not feel free to leave.

iv. Freedom to leave: Until the point at which he was arrested, the defendant never was told he was in custody, and in fact he made dinner plans during a telephone conversation with his mother. Further, he left the station without a police escort to participate in a controlled drug purchase.

2nd Issue: Were the defendant's statements voluntary?

The SJC determined that the defendant's statements were voluntary. The defendant's conduct, age, education, intelligence, and emotional stability, experience with and in the criminal justice system, and physical and mental condition," were all relevant. ***Commonwealth v. Tremblay***, 480 Mass. 645, (2018). The defendant told police that he had prior experience with police questioning in a different context. Although the defendant may have ingested heroin before the interview, he was alert and oriented. See ***Commonwealth v. Silanskas***, 433 Mass. 678, 685,(2001) (consumption of intoxicating substances without more does not render statement involuntary); ***Commonwealth v. Ward***, 426 Mass. 290, 294,(1997). The defendant was able to respond rationally and he was in control of his faculties. The defendant demonstrated his understanding by providing information to exculpate himself and inculpate another. See ***Commonwealth v. McCowen***, 458 Mass. 461, 472, (2010) (in finding voluntariness of statements, judge was entitled to consider fact that defendant attempted "to talk his way out of his predicament"). He also suggested, and then participated in, a controlled drug purchase. Based upon the facts of the case, the defendant's statements were voluntary.

Minimization, Trickery and Inducements

Commonwealth v. Gallett, 481 Mass. 662, (2019): This defendant was one of the suspects in a murder case. The SJC held that the defendant's age and low IQ did not impact his voluntary waiver of Miranda. The SJC also found that the officers did not improperly misrepresent evidence and making false assurances. Lastly, the police did not delay his arrest to prevent him from exercising his right to make a telephone call.

During the interrogation, police asked the defendant whether video footage from inside the bus that dropped him off in front of the vacant house, his public transit card, or his cell phone records might reveal his location, movements, and telephone calls on the night of the murder. The police also asked whether there could be forensic evidence found in the victim's stolen vehicle. The officers' tactics were well within permissible parameters and did not rise to the level of "intentional misrepresentations that 'may undermine "the defendant's ability to make a free choice." ***Commonwealth v. Scoggins***, 439 Mass. 571, 576, (2003). Their comments did not impermissibly maximize the apparent strength of their case. Nor did their questioning impermissibly suggest that they were in possession of incontrovertible evidence against the defendant. Likewise, the officer's use of minimization and assurances, to the extent they were employed, were not improper. The defendant contends that the interrogating officers minimized the offense and made assurances by stating: "You know, maybe there's some reason it happened"; "I sure wouldn't want to be sitting here having me thinking that you planned out a murder when maybe all you were planning out was to get a free meal"; and "It's always better if you have somebody there that can tell you the truth. It has to be the truth as to what happened up there, okay?" These questions and statements were "within the bounds of acceptable interrogation methods." ***Cartright***, 478 Mass. at 288,

84 N.E.3d 851. Finally, the defendant suggests that the officers coerced him into believing that his confession would help his girlfriend, Mathurin. The officers' questioning was as follows:

GALLETT: "What's happening to my girlfriend?"

OFFICER: "What do you think is going to happen to your girlfriend?"

GALLETT: "Nothing."

OFFICER: "Well I'm going to tell you something. Something is going to happen to your girlfriend, okay.... [S]he's been charged with murder and armed robbery and breaking into a house. I'm going to be very honest about that, okay?"

GALLETT: "Let's talk."

After this exchange, the defendant told police what happened. The police's interrogation tactics were not "rife with threats to the defendant's ability to maintain contact with his girlfriend. ***Monroe***, 472 Mass. at 469, (police interrogation characterized as psychologically coercive where defendant was threatened with loss of contact with his child). The tactics do not suggest that cooperation with police would result in leniency for his girlfriend. The defendant's will was not overborne and the tactics did not rise to the level of psychological coercion. The statement by the officer about his girlfriend was accurate and made in answer to a question posed by the defendant.

Commonwealth v Randall Tremblay, 92 Mass. App. Ct. 295 (2017): The defendant, Randall Tremblay was arrested for the murder, after he made statements to the police both at the scene and subsequent custodial interrogations. The defendant moved to suppress the statements he made to the police and all evidence seized from him. After a motion hearing and viewing contents of the videotape recording, the judge concluded that the defendant was intoxicated when he was questioned at the police station. The defendant was incapable of making a knowing and intelligent waiver of his Miranda rights. As a result, the judge ruled that all of the statements made by the defendant at the police station must be suppressed. The Commonwealth appealed and the Appeals Court considered whether the defendant was intoxicated at the time he made incriminating statements.

Did the defendant voluntarily waive his Miranda rights?

"The determination of voluntariness requires the court to consider the defendant's physical and mental condition at the time he made the statements." The defendant did not appear to be in the fragile physical or emotional state displayed by defendants in cases where the court found their statements involuntary. The videotape recording shows the defendant appearing alert, oriented, and lucid and able to speak speaks clearly when what happened. He appears to understand the questions the police asked without any confusion. The defendant also waived his Miranda rights. When examining the totality of the circumstances surrounding the defendant's statements, the Appeals Court concluded that he voluntarily spoke with the police.

Was the defendant too intoxicated to validly waive his Miranda rights?

The answer to that question depends on whether there was physical or psychological coercion on the part of the police and whether, the defendant had the capacity to make a rational choice about whether to speak or to remain silent or to request an attorney. According to the video recording, the defendant did not appear too intoxicated to be able to make a knowing and intelligent waiver of his right to remain silent. Rather the defendant made a knowing, intelligent, and voluntary waiver of his Miranda right. Additionally, there is no indication that the police engaged in any coercion or use discredited tactics such as minimization of the crime, false promises, or assurances of leniency nor did they mischaracterize the law to trick the defendant into confessing to a crime. Based on all of these factors, the Appeals Court concluded that the defendant's statements should not suppressed and that the defendant knowingly, voluntarily and intelligently waived his Miranda rights.

Use of an Interpreter

Commonwealth v. Lujan, 93 Mass .App. Ct. 95, (2018): The Appeals Court found that the defendant's statements were not voluntary due to language barrier and the intern's inaccurate translation. Although the police are not required to use certified or independent interpreters when questioning suspects, ***Id***. at 499-500, "it should go without saying that the interpreter should be competent." ***Sim, supra*** at 224 Here, there appear to have been no procedural safeguards designed to ensure the methods, accuracy, or reliability of the Russian-speaking intern acting as an interpreter for a Moldovan-native speaker. Based on all these factors, the Appeals Court found that the defendant's statements were not "his," and were not an expression of his rational intellect or free will, nor were they reliable or competent evidence.

Juvenile Miranda

JDB v. North Carolina**,** 131 S. Ct. 2394 (2011): Police interrogated a 13-year-juvenile who was enrolled in special education classes because they suspected the juvenile had committed two robberies. A police investigator interrogated the student at his middle school in a closed door conference room at the school. The juvenile was not given Miranda warnings nor was he given an opportunity to contact his legal guardian. Although the juvenile confessed to his crimes, he was allowed to return home after the interrogation. The juvenile was charged and the case went to trial. The juvenile attempted to suppress the statements he had made during the interrogation because he was not given a Miranda warning. The judge did not suppress the statements on the grounds that the juvenile was not in police custody. The case was appealed on the issue of whether a juvenile's age should be should considered in determining whether the juvenile is in custody for Miranda purposes. *The Supreme Court held that age is relevant when determining police custody for Miranda purposes because of the psychological differences between minors and adults.* In this case, age was clearly relevant since the juvenile was interrogated by a uniformed officer at his middle school without an opportunity to consult with a legal guardian.

Age is a Factor when Administering Juvenile Miranda

Commonwealth v. Eliezer Quinones, 95 Mass. App. Ct. 156 (2019): On July 21, 2015, the defendant was arrested for shooting a victim in the leg. Information police received from a witness coupled with surveillance video matched the description of the defendant. As a result, police arrested the defendant,

who was sixteen years old at the time. Another male was also arrested after police found the defendant and the male lying down inside a vehicle with the rear window "fogged up." The owner of the vehicle confirmed that neither the defendant nor the other male were authorized to be inside the vehicle. The defendant was brought to the Lynn police station for booking. The police did not question the defendant or read him his Miranda rights. After spending over one hour at the police station in booking, the defendant was transported to an alternative lockup in Lowell. Before leaving the station, the defendant asked the transporting officer why he was being locked up. The officer answered and gave the defendant advice about "the negative things that the streets bring to people." The officer told the defendant to "clean up his act," as otherwise "he's going to wind up in serious trouble." The defendant said "something about people are going to feel sorry when he comes out, relating that he had been proving himself." The officer then advised the defendant "to just get out completely. There's nothing positive about the life path that he had chosen." The officer did not ask the defendant what he meant by his statements.

The defendant was adjudicated as a youthful offender for armed assault with the intent to murder, G. L. c. 265, § 18 (b), and assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b). The defendant filed a motion to suppress the statements he made to the transporting officer. The motion was denied and the judge found that the defendant's statements were not made in response to interrogation or the functional equivalent of interrogation.

Conclusion: The Appeals Court held that for Miranda purposes, a juvenile's age must be considered in determining whether the juvenile was subjected to the functional equivalent of police questioning. The denial of the motion is affirmed because the police officer's advice to the defendant would not be perceived as interrogation by a reasonable juvenile of the defendant's age in the same circumstances.

When determining whether a juvenile was in custody, the test is how a reasonable person in the juvenile's position would have understood his situation. In this case, the officer was lecturing the defendant about "the negative things that the streets bring to people once you get into it." It is unlikely that the officer would have offered the same advice to an adult. On cross-examination, the officer testified that he was "trying to give [the defendant] advice as an adult to a child." It would be artificial to evaluate the circumstances of this case through the eyes of a reasonable adult, when the officer's guidance was premised upon the fact that the defendant was a juvenile. See ***Id***. at 275-276 (nonsensical to consider how reasonable adult would "understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer").

Based on the facts the Appeals Court found that a reasonable sixteen year old in the same circumstances as the defendant would perceive the officer's statements to be interrogation. See ***Gonzalez***, 465 Mass. at 674-675 (reasonable person would not have perceived officer's statement that detectives wished to speak with him about incident as interrogation after officer twice told defendant that "now's not the time to talk"). See also ***Commonwealth v. Foley***, 445 Mass. 1001, 1002-1003 (2005) ("Are you having a rough day, man?" was rhetorical question that was not functional equivalent of interrogation). The officer warned the defendant about "negative things that the streets bring to people," and advised him that if he didn't "clean up his act, he's going to wind up in serious trouble." "[T]here was nothing here in the nature of an accusatory inquiry or a demand for explanation." ***Martin***, 467 Mass. at 309. The officer's comments made no mention of the defendant's specific situation on that day and, constituted general advice that a reasonable juvenile would not interpret as calling for any inculpatory response. See ***Commonwealth v. Mitchell***, 47 Mass. App. Ct. 178, 179 (1999) (officer's comment that it was "[t]tough luck getting locked up this close to Christmas" would not have been interpreted as interrogation by reasonable person because it did not call for any response). ***Commonwealth v.***

Bermudez, 83 Mass. App. Ct. 46, 52-53 (2012) (child's age is not determinative of custody analysis). Accordingly, we discern no error in the motion judge's conclusion that the defendant failed to meet his burden of showing that he was subject to the functional equivalent of interrogation at the time of transport.

IV. Status of Cell Phones

Obtaining Search Warrants for Cell Phones

Commonwealth v. Onyx White, 475 Mass. 583 (2016): The SJC holds (1) that probable cause to seize a cell phone cannot rely **SOLELY** on a police officer's opinion that a cell phone is likely to contain evidence of the crime under investigation, and (2) once police make a warrantless seizure of a cell phone supported by the requisite probable cause, they must make it a PRIORITY to secure a search warrant. The Court specifically found that the simple assertion that police, based upon training and experience, know that cell phones are necessary to social interactions and therefore, contain evidence of criminal activity, does not provide the necessary nexus between the phone and the crime under investigation.

The Appeals Court holds that police had probable cause, first to seize several cell phones and then to search their digital content, and that an 85-day delay in seeking the second warrant to search the cell phones was not unreasonable because the Commonwealth's interest in preserving the evidence outweighed the defendant's possessory interest in the phones.

Commonwealth v. Anthony Arthur, 94 Mass. App. Ct. 161 (2018): On December 15, 2015, the defendant, Anthony Arthur, and two accomplices, Richie Williams and Keyarn Richardson, participated in a coordinated attack on a home in Dorchester. Boston police officers in the area observed the defendant, who was driving one vehicle, and Williams, driving the other vehicle with Richardson inside, park their vehicles on Brinsley Street. Williams and Richardson walked towards Morse Street, where they approached a house while brandishing a firearm. Police saw one of the men fire shots at the house at 7 Morse Street and take off running. The defendant, who had peered through the yards in the area of 7 Morse Street "as if he was waiting for something to occur," quickly returned to his vehicle. Police stopped the vehicle before it could leave the scene.

An officer observed two cell phones in the defendant's car--one on the driver's seat and one on the front passenger's seat. The officer observed three cell phones in the car initially driven by William -- two on the driver's seat and one in the passenger's side door handle. The police impounded both cars and their contents.

Three days after impoundment, the police obtained a warrant to search both cars and to seize all the cell phones. The affidavit in support of the first warrant set forth, among other things, the facts of the coordinated attack. The affidavit specifically identified where the cell phones were located and requested authorization to "seize" them. The warrant was executed on the same day, the cell phones were seized, and they were thereafter held as evidence for trial.

The Commonwealth did not seek to view the contents of the cell phones until 85 days after the impoundment when police applied for and received a second search warrant. The defendant was indicted

for armed assault with intent to murder, in violation of G. L. c. 265, § 18(b); attempted assault and battery by discharging a firearm, in violation of G. L. c. 265, § 15F; and possession of a firearm without a license, second offense, in violation of G. L. c. 269, § 10(h)(1). The defendant filed a motion to suppress the evidence found in the cell phones that were taken from his vehicle. The defendant argued that the 85-day delay in seeking the second warrant was unreasonable based on the ***White*** case. ***Commonwealth v. Onyx White,*** 475 Mass. 583 (2016). In ***White***, the affidavit supporting the second warrant failed to show a sufficient nexus between the cell phones and the alleged criminal activity. The Superior Court allowed the motion and the Commonwealth appealed.

Conclusion: The Appeals Court concluded that this case is materially distinguishable from the ***White*** case and held the following:

1. Police had probable cause to seize the cell phones.

2. The delay in seeking the second the second warrant was not unreasonable and there was a sufficient nexus established between the cell phones and the alleged criminal activity.

1st Issue: Did police have probable cause to seize the phones?

The Appeals Court found that police had probable cause to seize the phones because police had particularized evidence linking the cell phones to the crime. The police observed the crime in process, which appeared to be a coordinated attack carried out using separate automobiles, where one could readily infer that the occupants had been in communication. The vehicles left in sequence and the defendants left multiple cell phones on the seats of the cars, leading to the reasonable inference that the cell phones had been used to coordinate the crime. The facts suggest that the cell phones were "evidence of the crime independent of their content," and that the cell phones would be maintained as evidence regardless of whether their contents were ever searched." The cell phones also would be relevant at trial to provide details as to how the crime was planned and coordinated. The location of the cell phones could be relevant in proving joint venture of the suspects involved in the incident. Regardless of whether the cell phones might contain additional, relevant evidence through digital data, the cell phones alone possessed evidentiary value.

Unlike ***White,*** the police lacked probable cause to seize the cell phone because police did not have any particularized evidence linking the cell phone to the crime. The police seized the cell phone of a high school student who was a suspect in a robbery-murder at a convenient store involving multiple people. Police did not have any particularized reason to believe the student's cell phone was involved in the crime or that it would contain any evidence. The officer simply believed that the cell phone might contain evidence based entirely on his experience and generalized reasoning that, where the robbery was a joint venture, the cell phone might contain relevant evidence. ***Id.*** at 590.

2nd Issue: Was the delay in seeking the second warrant unreasonable?

The delay in seeking the second warrant was not unreasonable because police lawfully possessed the cell phones. There was no substantial interest under the Fourth Amendment requiring that the search of the contents of the cell phones occur expeditiously. In contrast to ***White***, police here diligently obtained a search warrant to seize the cell phones within three days of the impoundment of the vehicles.

Further distinguishing ***White***, the Appeals Court ruled that the delay in obtaining the second search warrant to search the content of the phones was not unreasonable because the police lawfully possessed the phones and could keep them for use at trial. The Court balanced the Commonwealth's substantial interest in maintaining the cell phones as evidence against the defendant's possessory interest in the phones during the delay. The Court found that the defendant showed no basis to expect the return of the phones to him prior to trial; hence his possessory interest was outweighed by the Commonwealth's need to preserve evidence.

3rd Issue: Did police establish a nexus between the crimes and the content of the cell phones?

The Appeals Court found that there was a sufficient nexus between the crimes and the cell phones. As the ***White*** court noted, the nexus "need not be based on direct observation. "It may be found in the type of crime, the nature of the evidence sought, and normal inferences as to where such evidence may be found." ***White***, 475 Mass. at 589. The particularized facts linked the cell phones to the crime in this case. Here "the factual and practical considerations of everyday life" tell us that the cell phones found on the car seats likely were used to coordinate the crime, including an exchange of calls, text messages, and perhaps other information in the days, hours, and minutes leading up to the attack. ***Commonwealth v. Gentile,*** 437 Mass. 569, 573 (2002).

- **TRAINING TIP:** This case reinforces that particularized facts are necessary to support a search of a cell phone's contents.

  - ***Commonwealth v. Cruzado***, 480 Mass. 275, 282 (2018) (probable cause to search cell phone found next to sleeping defendant, where he had been recently overheard on a cell phone confessing to crime);

  - ***Commonwealth v. Holley***, 478 Mass. 508, 522-524 (2017) (sufficient nexus to search cell phone contents where defendant telephoned victim while entering victim's residence shortly before shooting connected to drug transaction);

  - ***Commonwealth v. Perkins***, 478 Mass. 97, 104-106 (2017) (warrant established probable cause to search call logs of seized cell phones where police had knowledge of defendant's cell phone use to arrange drug transactions);

  - ***Commonwealth v. Dorelas***, 473 Mass. 496, 502-504 (2016) (probable cause to search cell phone where witness reported defendant receiving threats on his cell phone before shooting). Based on the observations of the police and the facts of the case, the Appeals Court held that there was a sufficient nexus connecting the cell phones to the crime.

Cell Site Location Information

Carpenter v. United States, 138 S. Ct. 2206 (2018):

The United States Supreme Court has decided that the gathering of cell-site location information (or "CSLI") on a criminal suspect's cell phone, requires police to get a warrant. The criminal suspect has a privacy interest in his physical location and movements which can be accessed from cell site location information.

- ❖ **TRAINING TIP:** The SJC in Massachusetts already requires police to get a warrant before gathering cell site location information.

Commonwealth v. Estabrook, 472 Mass. 852 (2015): The Commonwealth may obtain historical Cell Site Location Information (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, provided the Commonwealth has obtained a court order prescribed by **18 U.S.C. § 2703**.

> **18 U.S.C. § 2703(d)** allows a court of competent jurisdiction to issue an order requiring a cellular telephone company to disclose certain types of records of customers, including CSLI, to a governmental entity if the government establishes that "**specific and articulable facts**" show "**reasonable grounds to believe**" that the records "**are relevant and material to an ongoing criminal investigation**."

Commonwealth v. Broom, 474 Mass. 486 (2016): **The SJC defines the probable cause standard for the seizure of CSLI.** The probable cause standard applicable to cellular site location information **(CSLI)** is probable cause to believe that a particularly described offense has been committed and that the CSLI sought will produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed such offense.

Where a search of a cellular telephone offering smartphone features and access to the Internet is sought, there must be probable cause that the device contains particularized evidence relating to the crime. The properties of such a telephone render it distinct from the closed containers regularly seen in the physical world, and a search of its many files must be done with special care and satisfy a more narrow and demanding standard than exists for establishing probable cause to search physical containers or other physical items or places. In particular, 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. Chamberlin, 473 Mass. 653 (2016): A service provider may disclose customer records voluntarily to the government if the service provider believes in good faith that an "emergency involving danger of death or serious physical injury requires disclosure without delay of information relating to the emergency" pursuant to 18 U.S.C.S. § 2702(c)(1) and (4).

A. Exigent Circumstances & Cell Site Location Information

Commonwealth v Takii Raspberry, 93 Mass. App. Ct. 631 (2018): The "emergency aid exception" justified a warrantless use of cell site location information to track a woman who Boston police believed was about to carry out a shooting. Boston Police were wiretapping another individual's phone when they heard the defendant, Takii Raspberry, tell the suspect in an "angry, upset and emotional" manner that she intended to use a firearm to shoot a man, Alvin Dorsey, with whom she had been in a romantic relationship. Due to the exigency, Raspberry's cell carrier, AT&T, voluntarily provided officers her real-time CSLI information. Once they intercepted her, a vehicle search produced allegedly illegal weapons.

The defendant argued that the circumstances did not fall under the emergency aid exception and thus the use of CSLI information constituted an unreasonable search.

The Appeals Court disagreed and affirmed the Superior Court judge's denial of the defendant's motion to suppress. The police "overheard a phone call in which an angry, upset individual said she was going to get the gun and was about to go shoot up [someone] right now,'" Judge Sacks wrote for the court. "The police identified the person making the threat as the defendant and inferred that she was likely talking about shooting Dorsey. The judge, after listening to a recording of the call, found that the police were reasonable in having grave concerns about the defendant imminently causing serious bodily harm."

B. "Pinging" a Phone Qualifies as a Search

Commonwealth v. Almonor 94 Mass. App. Ct. 161 (2018): On August 10, 2012, the defendant, Jerome Almonor shot and killed the victim with a sawed off shotgun in Brockton. Police were able to identify the defendant as the shooter after obtaining information from an eyewitness and speaking with the individual who was with the defendant when the incident occurred. The police learned that the defendant's cell phone number within approximately four hours of the shooting and contacted the defendant's service provide to find his real time location. The service provider "pinged the defendant's cell phone without his knowledge or consent. Based on the information police received, they responded to the house where the defendant's girlfriend lived. Police arrested the defendant and recovered a sawed off shotgun after conducting a protective sweep. The defendant filed a motion to suppress and argued that pinging his cell phone without a warrant qualifies as an unlawful search and violated his rights under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. The Commonwealth appealed after the motion was allowed.

The SJC considered two key issues:

1. **Does pinging a phone to determine someone's real time location qualify as a search?**

2. **Is the search reasonable?**

Conclusion: The SJC held that the police action of causing an individual's cell phone to reveal its real-time location constitutes a warrantless search under art. 14. However, the search was supported by probable cause and was reasonable under the exigent circumstances exception to the search warrant requirement.

Neither this court nor the Supreme Court, however, have addressed the issue as to whether police action that causes an individual's cell phone to transmit its real-time location intrudes on any reasonable expectations of privacy. See ***Carpenter***, 138 S. Ct. at 2200 ("Our decision today is a narrow one). The SJC noted that it does not have to consider this issue under the Fourth Amendment, because article 14 of the Massachusetts Constitution "affords more substantive protection to individuals than that which prevails under the Constitution of the United States." ***Commonwealth v. Mauricio***, 477 Mass. 588, 594 (2017). Pursuant to art. 14, the SJC examined what factors determine whether the defendant has an expectation of privacy. Some of these factors include whether the public had access to, or might be expected to be in, the area from which the surveillance was undertaken; the character of the area (or object) that was the subject of the surveillance; and whether the defendant has taken normal precautions to protect his or her privacy. ***See Commonwealth v. Berry***, 420 Mass. 95, 106 n.9 (1995).

An individual does not have a reasonable expectation of privacy in his or her real-time location under every circumstance. An individual would certainly not have a reasonable expectation of privacy in his or her real-time location while standing on a public sidewalk, visible to any onlookers, including police, who would care to look in the individual's direction. See ***California v. Greenwood***, 486 U.S. 35, 41 (1988) ("police cannot reasonably be expected to avert their eyes from activity that could have been observed by any member of the public"); ***Katz v. United States***, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); **Commonwealth v. D'Onofrio,** 396 Mass. 711, 717 (1986). The SJC acknowledged that it had to determine whether the ping in this case implicates a reasonable expectation of privacy and if concluded that it did.

Second, the SJC evaluated whether the search was reasonable under article 14. The search was reasonable because of the exigency in this case. Multiple witnesses identified the defendant as the shooter, and his photograph was positively identified in several photographic arrays. Police had "reasonable grounds to believe that obtaining a warrant would be impracticable under the circumstances because the delay in doing so would pose a significant risk that [(1)] the suspect may flee, [(2)] evidence may be destroyed, or [(3)] the safety of the police or others may be endangered." ***Figueroa***, supra. Although each of these risks need not be present for exigent circumstances, each was present here. See ***Id***. As to the risk of destruction of evidence, the record reflects that police learned that the defendant still possessed the sawed-off shotgun at the time he fled the scene of the shooting. Because a sawed-off shotgun is per se illegal, it requires ongoing concealment from authorities. Finally, police also had reasonable grounds to believe that the defendant posed an immediate risk to the safety of police and others. The suspect possessed a sawed-off shotgun, a dangerous and per se illegal weapon. See G. L. c. 269, § 10 (c). The police had reasonable grounds to believe that obtaining a warrant would be impracticable because taking the time to do so would have posed a significant risk that the suspect may flee, evidence may be destroyed, or the safety of the police or others may be endangered. Cf. ***Figueroa***, 468 Mass. at 213-214. Faced with this exigency, the police acted entirely reasonably in pinging the defendant's cell phone to determine its location. Accordingly, the warrantless ping of the defendant's cell phone was justified by exigent circumstances.

Commonwealth v. Fredericq, 482 Mass. 70, (2019): Brockton police were investigating a homicide investigation that resulted in the arrest of Josener Dorisca, who was later indicted for murder. During the investigation, Brockton detectives learned that Dorsica's best friend had communicated with him moments before the shooting. Detective Kenneth Williams recognized Cassio from another incident where he is captured on videotape with others, "flashing large sums of money and discussing the movement of drugs from Florida to Massachusetts." Footage shows a gun as well as involvement in drug dealings. A month after the homicide, police learned that Cassio was on his way to New York with "Paco" and "Paquito." Further investigation revealed that Paco was the defendant and Paquito was Stevenson Allonce. After speaking with Cassio's brother the Commonwealth sought and obtained an order pursuant to 18 U.S.C. § 2703(d) (2006) requiring the cellular telephone carrier to provide the records and the so-called "running location" of that different telephone. The carrier was required to provide Detective Williams with the cellular telephone's location every fifteen minutes prospectively. The carrier "pinged" the telephone at fifteen-minute intervals, an action that is not routinely undertaken by cellular telephone carriers. The CSLI records showed that the defendant, was the subscriber of the cellular telephone that Cassio was using. The billing address on those records was 220–222 Howard Street, apartment 2. The records also reflected that the defendant had yet another cellular telephone number. After tracking the CSLI information for a period of time, the police learned that Cassio was in the area based on the pings they had received.

State police were also involved in the investigation and drove to the Howard Street building. After obtaining consent from a couple that lived in the building, the troopers went to the second floor apartment where they did not find anyone. The troopers continued to the attic where they knocked on a fourth door. The defendant answered and identified himself as Paco. He signed a consent form to search his room. During the search, police found about $2,200 in a cupboard in the defendant's bedroom. A narcotics-trained dog arrived and alerted police to a pillowcase in the crawl space that contained about two kilograms of cocaine. The pillowcase matched one that was found in the Toyota. The defendant denied any knowledge of the contraband. The defendant was indicted for trafficking cocaine in violation of G. L. c. 94C, § 32E (b), and he moved to suppress the cocaine and cash seized during a warrantless search of his residence on the third floor of a multiunit house, which included a crawl space. The motion judge held that the evidence seized during the warrantless search must be suppressed because police obtained cell site location information (CLSI) without a search warrant.

Conclusion: The police may obtain subscriber information and toll records pursuant to a court order issued under 18 U.S.C. § 2703(d), but under art. 14 of the Massachusetts Declaration of Rights, the police may not use CSLI for more than six hours to track the location of a cellular telephone unless authorized by a search warrant based on probable cause

The SJC determined that the defendant has standing to challenge the information police obtained without a warrant while tracking his movements. Even though the defendant was a passenger in the vehicle whose location was being tracked through the CSLI, he was the registered owner of the phone and therefore had a reasonable expectation of privacy in the location of that telephone. Additionally, he had a property interest in the telephone that was interfered with when the police pinged the telephone, thereby drawing power from its battery.

Pole Surveillance

United States v. Moore-Bush, 381 F.Supp.3d 139, (2019): Police had affixed a surveillance device to a nearby utility pole which faced the petitioner's driveway. The surveillance recorded who visited the petitioner over the past eight (8) months. The First Circuit Court of Appeals held that this surveillance violated the petitioner's fourth amendment rights because it invaded his expectation of privacy. "While the law does not 'require law enforcement officers to shield their eyes when passing by a home on public thoroughfares,' it does forbid the intrusive, constant surveillance here. ***U.S. v. Ciraolo.***

Conclusion: The pole used in this case qualified as a search since it continually recorded the petitioner's driveway and front of his house. Police could adjust the focus to zoom in on license plates. For eight months a digital log was created. All these features could enable the Government to piece together intimate details of a suspect's life.

First Amendment Applications to Citizens Recording Police

Today the public is demanding transparency from the police whether it involves turning over records, providing information or recording police anytime they are performing their duties. This section will review where the law stands now with respect to First Amendment protections as they apply to instances where citizens record police interactions. However, for further guidance on how this applies to departmental policies, please consult with your district attorney's office, a legal advisor, supervisor or police chief.

A. Definition of the First Amendment:

The First Amendment of the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

B. Pivotal Cases Regarding Speech

Chaplinsky v. New Hampshire, 315 U.S. 568, (1942), The Supreme Court has ruled that certain types of speech are **NOT** protected by the Constitution when it held that "there are certain well-defined and limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or **'fighting' words** – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." "Fighting words" are furthermore construed to mean words directed at a specific individual, in a face to face confrontation, likely to lead to immediate violence. Since 1942, however, no hate speech cases that have been brought before the U.S. Supreme Court have been found to include "fighting words".

Matal v. Tam, 137 S. Ct. 1744 (2017): The Supreme Court differentiated what speech is not protected under the First Amendment in this case. Simon Tam is the lead singer of "The Slants". He chose this moniker in order to reclaim and take ownership of stereotypes about people of Asian ethnicity. The group draws inspiration for its lyrics from "childhood slurs and mocking nursery rhymes" and has given its albums names such as ***The Yellow Album*** **and** ***Slanted Eyes, Slanted Hearts*****.** Tam sought federal registration of "THE SLANTS," on the United States Patent and Trademark Office (USPTO), but an examining attorney at the USPTO rejected the request, applying the USPTO's two-part framework and finding that "there is a substantial composite of persons who find the term in the applied for mark offensive. The examining attorney relied in part on the fact that "numerous dictionaries define 'slants' or 'slant-eyes' as a derogatory or offensive term." The examining attorney also relied on a finding that "the band's name has been found offensive numerous times"— that was canceled because of the band's moniker and the fact that "several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive." Tam contested the denial of registration before the examining attorney and before the USPTO's Trial and Appeal Board (TTAB) but to no avail. Tam took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the **First Amendment's Free Speech Clause**.

The majority found that the clause engages in viewpoint-based discrimination and that the clause regulates the expressive component of trademarks. Consequently, it cannot be treated as commercial speech and the clause is subject to, and cannot satisfy, strict scrutiny. The majority also rejected the Government's argument that registered trademarks constitute government speech, as well as the Government's contention that federal registration is a form of government subsidy. The majority also opined that even if the disparagement clause were analyzed under this Court's commercial speech cases, the clause would fail the "intermediate scrutiny" that those cases prescribe.

The Supreme Court affirmed the Federal Circuit's judgment holding that:

1. The First Amendment prohibits Congress and other government entities and actors from abridging the freedom of speech; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely.

2. The Free Speech Clause does not regulate government speech. The Government's own speech is exempt from First Amendment scrutiny.

3. The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing.

4. Public expression of ideas may not be prohibited merely because the ideas are offensive to some of their hearers. For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content and speaker based restrictions are permitted.

***Hate speech is speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate*.**

Conclusion: This case is important because it finally concluded that trademarks constitute private, not government speech. Such conclusion could easily be extended to other situations where we need the government's protection or authorization to conduct our business. Additionally, by issuing an opinion as to what a hate speech is, the Court is giving law enforcement more tools when they have to be in the middle of any kind of exercise under the First Amendment. Even in situations where what we hear can offend or affect us in any way, knowing what is protected and what is not, allow us to prepare better for these situations.

***Commonwealth v. Welch*,** 444 Mass. 80 (2005): Harassing speech or conduct does not qualify as protected speech; and in order to qualify as harassment, there has to be a pattern of at least three separate events.

C. Balancing the First Amendment

Issue: Does probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment

Nieves v. Bartlett, 139 S. Ct. 1715, (2019): Respondent Russell Bartlett sued petitioners, two police officers, alleging that they retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest at an extreme sporting event in Alaska. On the last night of the event, Sergeant Nieves asked Bartlett to move beer kegs into RVs because some minors were participating in underage drinking. According to Sergeant Nieves, Bartlett was intoxicated and began yelling that he did not have to speak with the police. Sergeant Nieves walked away at this point and the situation did not escalate. Later on, another officer began speaking with a minor who was drinking alcohol. At this point, Bartlett approached in an aggressive manner, standing between the officer and the teenager. The officer pushed Bartlett back to provide space. Sergeant Nieves witnessed the incident and ordered Bartlett to step away. Bartlett did not comply and the police ultimately arrested him. Bartlett

claims he was not aggressive and he was slow to comply with Nieves's orders, not because he was resisting arrest, but because he did not want to aggravate a back injury. After Bartlett was handcuffed, he claims that Nieves said: "[B]et you wish you would have talked to me now." 712 Fed. Appx. 613, 616 (CA9 2017). Police charged Bartlett with disorderly conduct and resisting arrest.

The criminal charges against Bartlett were dismissed and he filed a lawsuit under 42 U. S. C. § 1983, arguing that the police violated his First Amendment rights by arresting him in retaliation for his speech. Bartlett claims his refusal to speak with one of the officers and his intervention with the police discussion with the underage partygoer. The officers responded that they arrested Bartlett because he interfered with an investigation and initiated a physical confrontation with one of the officers. The court determined that the officers had probable cause to arrest Bartlett and held that the existence of probable cause precluded Bartlett's First Amendment retaliatory arrest claim.

The Ninth Circuit disagreed. 712 Fed. Appx. 613, and held that Bartlett had presented enough evidence that his speech was a but-for cause of the arrest. The only causal evidence relied on by the court was Bartlett's affidavit alleging that Sergeant Nieves said "bet you wish you would have talked to me now." If that allegation were true, the court reasoned, a jury might conclude that the officers arrested Bartlett in retaliation for his statements earlier that night.

Conclusion: The Supreme Court held that police had probable cause to arrest Bartlett and there was no violation of his First Amendment rights.

"[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. ***Hartman v. Moore***, 547 U.S. 250, 256 (2006). If an official takes adverse action against someone based on that forbidden motive, and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may generally seek relief by bringing a First Amendment claim. *Ibid.* (citing *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998).

The plaintiff must establish a **"causal connection"** between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury," to prevail on such a claim. ***Hartman,*** 547 U. S., at 259. It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive. ***Id.,*** at 260 (recognizing that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway").

The causal inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. ***Ibid.; Lozman***, 585 U. S., at. Officers frequently must make "split-second judgments" when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is "ready to cooperate" or rather "present[s] a continuing threat." *Id.*, **District of Columbia v. Wesby**, 583 U. S. ("suspect's untruthful and evasive answers to police questioning could support probable cause")). Indeed, that kind of assessment happened in this case. The officers testified that they perceived Bartlett to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication.

Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in "circumstances that are tense, uncertain, and rapidly evolving." ***Graham v. Connor***, 490 U.S. 386, 397 (1989). To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness. See ***Atwater v. Lago Vista***, 532 U.S. 318, 351, and n. 22 (2001); ***Harlow v. Fitzgerald***, 457 U.S. 800, 814–819 (1982). When reviewing an arrest, the Court asks "whether the circumstances, viewed objectively, justify [the challenged] action," and if so, conclude "that action was reasonable *whatever* the subjective intent motivating the relevant officials." ***al-Kidd,*** 563 U. S., at 736 A particular officer's state of mind is simply "irrelevant," and it provides "no basis for invalidating an arrest." ***Devenpeck v. Alford***, 543 U.S. 146, 153, 155 (2004).

"When Sergeant Nieves initiated Bartlett's arrest, he knew that Bartlett had been drinking, and he observed Bartlett speaking in a loud voice and standing close to one of the officers. He also saw the officer push Bartlett back. The test is whether the information the officer had at the time of making the arrest gave rise to probable cause. The Court found that a reasonable officer in Sergeant Nieves's position could have concluded that Bartlett stood close to the officer and spoke loudly in order to challenge him, provoking the officer to push him back." 712 Fed. Appx., at 615. Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law.

D. Navigating the First Amendment with Technology

Openly Recording Police

Glik v. Cunniffe, 655 F. 3d 78 (1st Cir. 2010)**:** Boston Police arrested the defendant, Simon Glik, when he recorded an incident with his smartphone where officers were taking another individual into custody on the Boston Common. Glik was charged with violating the wiretap statute, disturbing the peace, and aiding in the escape of a prisoner. All of the charges were subsequently dismissed for lack of probable cause. Glik filed suit under 42 U.S.C. § 1983 alleging a violation of his First Amendment rights.

Conclusion: The case settled, but *it was determined that as long as the police are aware that they are being recorded,* it is not unlawful for a citizen to film law enforcement officers in the discharge of their duties in a public space. The First Circuit ruled that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." The Court further advised that "such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." As a result, the Court concluded that "we see no basis in the law for a reasonable officer to conclude that such a conspicuous act of recording was 'secret' merely because the officer did not have actual knowledge of whether audio was being recorded." Notably, the Court determined that this state of the law was well-established at the time of the arrest, and therefore, denied the officers' claim for qualified immunity from Glik's § 1983 First Amendment claim.

- **TRAINING TIP:** G.L. c. 272, § 99 only prohibits the secret recording of oral communications. ***Glik v. Cunniffe***, addressed openly recording police while they were performing their public duties.

Gerick v. Begin, 753 F.3d 1 (1st Cir. 2014)**:** On March 24, 2010, at approximately 11:30 p.m. in Weare, New Hampshire, the defendant, Carla Gericke, was the trailing car of a two-car caravan on their way to

the home of Tyler Hanslin, the driver of the lead car in the caravan. Sergeant Kelley of the Weare Police Department pulled his cruiser behind Gericke's vehicle and activated his emergency lights. Both Gericke and Hanslin pulled over, and Sergeant Kelley parked his cruiser between the two. Kelley advised Gericke that she was not the one being detained and told her to move her car. Gericke moved her car to the adjacent Weare Middle School parking lot to wait for Hanslin.

Kelley approached Hanslin's vehicle and Hanslin advised Kelley that he was carrying a firearm and was properly licensed. After parking her car in the lot, Gericke got out and approached the fence that separated the lot from the road. From there, she attempted audio and video recorded the scene from approximately 30 feet away, and announced that she was doing do (it was later determined that despite her best efforts, Gericke was not actually able to record, but still pointed the camera as though she was). Gericke thereafter put the camera away and sat in her vehicle. Officer Montplaisir arrived on scene and demanded where the camera was. Gericke refused to tell him. The officer requested her license and registration. Again, Gericke refused. Gericke was subsequently arrested, her camera seized, and she was charged with disobeying a police officer, obstructing a government official, and unlawful interception of oral communications, the New Hampshire equivalent of a wiretap charge under Massachusetts law. All charges were dismissed. Gericke filed suit under 42 U.S.C. § 1983 alleging a violation of her First Amendment rights.

Conclusion: The First Circuit ruled, similar to the ***Glik*** case, that Gericke, and any citizen for that matter, has a clearly established presumptive right to videotape police activity in public. Most notable for officers, however, is that the First Circuit provided that "reasonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them." The Court explained that "such a restriction could take the form of a reasonable, contemporaneous order from a police officer, or a preexisting statute, ordinance, regulation, or other published restriction with a legitimate governmental purpose." This language from the ruling is particularly important and should provide guidance to officers as to the appropriateness of such restrictions:

The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure -- for example, a command that bystanders disperse -- that would incidentally impact an individual's exercise of the First Amendment right to film. Such an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons. However, a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.

- **TRAINING TIP:** Officers should pay attention to the behavior and conduct of the person recording them and orders should focus on that, rather than the recording itself. For instance, if someone is recording an officer at a traffic stop, the order should not necessarily be to stop recording, but to order the person to another location from which they may continue to record safely.

Recording Public Officials in Secret

The United States District Court for Massachusetts holds that the secret audio recording of police officers and government officials performing their duties in public spaces is lawful.

Procedural History:

This decision involves two consolidated cases filed in the United States District Court for the District of Massachusetts: ***Martin and Perez v. William Gross & Dan Conley*** and ***Project Veritas Action v. Dan Conley.*** Both cases challenged the Massachusetts wiretap statute, G.L. c. 272, § 99, which prohibits the willful interception or secret recording of any wire or oral communication through the use of an intercepting device. Previously, the First Circuit Court of Appeals addressed the issue of whether a citizen can **openly** record a police officer in public. The Court found that citizens have the right to film police while performing their duties in a public space. The decision below examines whether a citizen can **secretly** audio and video record government officials, including police officers, while they are performing their duties in public.

Governing Decisions of the First Circuit Court of Appeals:

The First Circuit Court of Appeals held in ***Glik v. Cunniffe***, 655 F.3d 78 (1st Cir. 2011), and ***Gericke v. Begin***, 753 F.3d 1 (1st Cir. 2014), that openly filming police in public is lawful. In ***Glik***, Boston police arrested the plaintiff after he used his cell phone to openly film police officers arresting someone on the Boston Common. Glik was charged with violating § 99 and two other state-law offenses. Although the state criminal charges were dismissed, Glik sued the police under 42 U.S.C. § 1983, claiming that his arrest for audio and video recording of the officers constituted a violation of his rights under the First and Fourth Amendments.

The First Circuit held that police can be filmed in public while performing their duties. The Court acknowledged that the right to record "may be subject to reasonable time, place, and manner restrictions." The Court did not address these limitations because Glik openly recorded the police arresting someone on the Boston Common, conduct which "fell well within the bounds of the Constitution's protections." The First Circuit held in ***Glik*** that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital and well-established liberty safeguarded by the First Amendment."

In ***Gericke v. Begin***, the First Circuit reiterated that filming police officers performing their duties carried out in public is lawful. However, filming may be subject to certain restrictions if there is a concern for public safety. Therefore, "a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering or about to interfere with his duties."

ISSUE: Can police arrest a person for secretly recording an officer while in the performance of their duties in a public space?

***Martin and Perez v. William Gross & Dan Conley*:** The plaintiffs alleged that § 99 violates the First and Fourteenth Amendments as applied to the secret recording of police officers engaged in their duties in public places. The plaintiffs recorded the police on at least twenty-six (26) occasions performing their duties in public since 2011 but refrained from secretly recording the police for fear that doing so openly will endanger their safety and provoke hostility from officers. After a lengthy analysis of the training materials that BPD officers received, the Court determined that there was sufficient basis to establish a § 1983 claim.

***Project Veritas Action Fund v. Dan Conley*:** The plaintiff ("PVA") is a nonprofit organization that

engages in undercover journalism and it alleged that § 99 violates the First Amendment because it prohibits the secret audio recording of government officials performing their duties in public. The plaintiffs recorded the police on at least eighteen (18) occasions performing their duties in public since 2011 but have refrained from secretly recording the police for fear that doing so openly will endanger their safety and provoke hostility from officers. The plaintiffs have not secretly recorded police. Since 2011, the Suffolk County District Attorney's Office ("SCDAO") has opened at least eleven (11) case files that involve a felony charge under § 99. The charges include recording a police officer while performing duties. PVA has refrained from investigating certain projects in Massachusetts due to § 99. In this claim, PVA challenged whether § 99 prohibits secret recordings of government officials engaged in their duties in public spaces. The Court found that there was sufficient basis to establish a § 1983 claim.

Conclusion: The United States District Court held that the secret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions.

The federal District Court determined that the plaintiffs had valid First Amendment challenges. Consistent with case law from the Supreme Judicial Court, the federal Court found that the purpose of § 99 is to protect privacy interests. Section 99 "was designed to prohibit the use of electronic surveillance devices by private individuals because of the serious threat they pose to the "privacy of all citizens." ***Commonwealth v. Hyde***, 434 Mass. 594, 600-601 (2001). Generally speaking, the protection of individual privacy is a legitimate and significant government interest. See ***Bartnicki v. Vopper***, 532 U.S. 514, 532 (2001).

Furthermore, § 99 is not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place. See ***Gericke*** at 8 ("In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."). The same applies to government officials performing their duties in public. However, the diminished privacy interests of government officials performing their duties in public must be balanced by the First Amendment interest in newsgathering and information-dissemination. The First Amendment prohibits the "government from limiting the stock of information from which members of the public may draw." ***First Nat'l Bank v. Bellotti,*** 435 U.S. 765, 783 (1978).

The defendants argued that secretly recording police may implicate individual privacy or public safety issues -- for instance, when an officer meets with a confidential informant or encounters a crime victim on the street. When such situations arise, police are free to "take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations." See ***Glik***, ***supra*** at 84 ("The right to film may be subject to reasonable time, place, and manner restrictions."). If an officer needs to protect the safety of an informant or her fellow officers, or seeks to preserve conversational privacy with a victim, the officer may order the recording to stop or to conduct the conversation at a safe remove from bystanders or in a private (i.e., non-public) setting. See ***ACLU v. Alvarez***, 679 F.3d 583, 607 (7th Cir. 2012) ("Police discussions about matters of national and local security do not take place in public where bystanders are within earshot."). A reasonable restriction would remove the conversation from the scope of the relief sought (and ordered) in this case.

The Court concluded that §99 does not ban all secret audio recordings of any encounter with a law enforcement official or any other government official. It applies regardless of whether the official being recorded has a significant privacy interest and regardless of whether there is any First Amendment

interest in gathering the information in question. "By legislating this broadly by making it a crime to audio record any conversation, even those that are not in fact private – the State has severed the link between § 99's means and its end." ***Alvarez***, ***supra*** at 606. The lack of a "close fit" between means and end is plain.

- **TRAINING TIP:** It is unclear whether this decision will be appealed to the First Circuit Court of Appeals. However, Judge Saris issued a memorandum regarding this case and specifically required that all public officials and law enforcement should receive notice of her memorandum within thirty days of the decision.

  - Although this case has not changed the law in Massachusetts, this decision emphasizes that the purpose of § 99 was to protect privacy rights of private citizens.

  - Although police and government officials have diminished privacy rights when performing their duties in a public, they are permitted to impose reasonable restrictions on filming if there is a concern for public safety.

  - Officers may utilize § 99 to charge those who secretly record police officers performing their duties in non-public places or those who secretly record officers while they are not performing their duties in public or in private (e.g. while off-duty).

  - Officers may continue to take action when a person is violating other statutes independent of the fact that they are recording.

  - Police should consult with their legal advisor, police chief or district attorney's office for further guidance.

E. Contemporary Issues in Recording Police Personnel

While citizens have recorded police officers performing their duties in public for years, officers should be prepared to deal with two contemporary issues related to recording. First, officers and police personnel should be prepared to deal with "First Amendment auditors" who may visit their police department, or other town facilities. Second, officers should be prepared to deal with citizens who record them while performing their duties in the field. In both instances, the recording is not usually passive. Rather, the recorder takes an active role in engaging with the personnel, challenging them on applicable laws, and in some cases, attempting to escalate the situation in order to garner support from their audience or followers.

1. First Amendment Audits

Recently, a group of individuals, calling themselves "First Amendment Auditors," have begun challenging police and gaining media exposure by filming inside of police departments and other public spaces. As a result of this new phenomenon, many departments are evaluating how to respond to these auditors. Many of these encounters do not escalate. However, there are some encounters that have become challenging for police. The concern many departments have is not necessarily how to respond to the individual's request but rather what options do police have if the encounters prevent other citizens from reporting a crime or entering a police department to conduct legitimate business. This section will review some actions that police can take when dealing with these confrontations while still following the

parameters of the law. As always, for consult with your district attorney's office, a legal advisor, supervisor or police chief to determine how this applies to your departmental policies.

What are First Amendment Audits?

By definition, a first amendment audit is a form of activism where an individual can exercise their first amendment rights.

Where do the audits take place?

The audits can take in public spaces. Public spaces can include certain areas of libraries, post offices, beaches, town halls, police departments, etc.

2. Recording in the Field

Officers have been dealing with issues related to being recorded in the field for years. However, more and more officers are facing citizens who are actively challenging them, and their actions, while recording in order to disseminate those interactions to an audience or set of followers. In some instances, not only are subjects recording and challenging officers during encounters, but citizens are stopping, recording, and challenging officers while they are attempting to perform their duties. Shortly before this manual was put into production, a group of officers was accosted by a local politician who stopped when noticed that the driver of a stopped motor vehicle was African American. The local politician claimed racial discrimination on behalf of the driver and continued to challenge the officers for nearly four minutes. During that time, officers reminded the politician that while she could record them, she could not remain standing in the roadway and ordered her onto the sidewalk for her safety and the safety of the officers. This is but one example of the type of behavior that officers may face on a daily basis across the Commonwealth.

3. General Strategies to Deal with these Encounters

- **Maintain courtesy, respect, and be tactful**: Remember that most departmental rules and regulations provide something to the effect of "Officers shall not be discourteous or inconsiderate to the public, to their superior officers, and to their fellow officers and employees of the Police Department as well as other law enforcement and governmental agencies. They shall refrain from the use of profanity, derogatory comments, ethnic or racial slurs or any other type of demeaning statements or comments. They shall be tactful in the performance of their duties and are expected to exercise the utmost patience and discretion even under the most trying circumstances."

  This rule and strategy apply to nearly everything that officers do and is not necessarily specific to only these encounters. However, officers should be reminded that this strategy should set the baseline for all encounters. It does not mean that officers must submit to every challenge, or otherwise jeopardize their safety or the safety of others, or not enforce applicable laws. Rather, the goal is that by treating everyone with respect, that most encounters can be resolved in as amicable of a manner as possible, even if arrest or charges result.

  This can be particularly challenging when officers are faced with personal insults and

derogatory comments. However, the courts have previously advised that "[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights". ***Glik, supra*** at 84.

- **Never sacrifice officer safety or the safety of others**

- **Pay attention to behavior and conduct – not necessarily the recording itself:** Officers should remember that the mere fact that someone is recording them does not immunize them from being charged with their criminal acts. If someone is committing a crime or violation, officers can take the appropriate action in connection with that conduct or behavior. Frequently officers run into an issue when they focus on the act of recording itself. However, officers should be careful to pay attention to the conduct and behavior of the person recording them. For instance, if someone is committing a disturbance, but they are recording, officers can take action to charge the individual with disturbing the peace, but should be sure to make it clear in the police report what conduct and behavior the person was engaged in, apart from mere, recording to justify the charge.

- **Reasonable, contemporaneous orders which may incidentally restrict recording:** The ***Gericke*** case is important because it suggests that police can restrict individuals filming law enforcement while performing law enforcement duties if a reasonable officer would believe safety is at risk. When the Court issued its ruling in ***Glik***, most citizens assumed that they could film police performing public duties without any limitations. ***Gericke*** highlights that citizens can film police officers carrying out their duties even during a traffic stop unless a police officer can reasonably conclude that the filming is interfering with police duties.

  If an officer has a safety concern about him/herself or others based upon the conduct or behavior of the person recording them, then the officer can certainly order the person to move from the immediate area to an area from which they can safely record. For instance, using the fact pattern in the ***Gericke*** case, it would be reasonable for the officer to have ordered Gericke to move into the parking lot so she could safely record from that location. Likewise, in the situation discussed above where the local politician recorded and challenged officers during the course of a motor vehicle stop, it was reasonable for those officers to order her to move onto the sidewalk. In that situation, the officers specifically advised the politician that since the car was being towed, a tow truck would be arriving shortly and they wanted to ensure her safety while vehicles were moving. In such instances, the officers order should not address the recording itself. Meaning, that the appropriate order is not, "Stop recording." Rather, the appropriate order would be something along the lines of, "You can continue to record, but you need to move onto the sidewalk in order to ensure your safety since there are moving vehicles on the roadway."

- **Consider speaking with witnesses, complainants, and victims privately:** Many officers are concerned about the privacy implications of having First Amendment auditors present in the police department lobby when witnesses, complainants and victims come in to discuss sensitive matters. It is important for those individuals to feel safe and it is best advised that in all circumstances, they be escorted to an area where a private conversation can be had. Many departments are equipped with a room where officers or

investigators can meet with witnesses, complainants and victims and those areas should be utilized to ensure privacy and confidentiality.

- **Provide identification upon request:** Pursuant to **G.L. c. 41 § 98D**, "Each city or town shall issue to every full-time police officer employed by it an identification card bearing the officer's photograph and identifying information. The Secretary of Public Safety and Security may adopt regulations relative to the form, content and issuance of such identification cards and to the carrying thereof by municipal police officers. Such identification card shall be carried on the officer's person and shall be exhibited upon lawful request for purposes of identification." As a general rule, if an individual asks to see an officer's ID, the officer should politely hold up their police ID so the person can read it. Keep in mind, however, that there may be times when this is not reasonable, practical, or safe. For instance, this may include situations where an officer was acting in an undercover capacity, was in the process of effecting an arrest; was directing traffic where doing so could cause a hazard to yourself or others.

- **Attempt to diffuse and de-escalate:** Officers should always attempt to avoid a situation from escalating where an officer might feel compelled to make an arrest for trespassing or disorderly conduct, for instances. Remember, the most important attribute of any police officer is their ability to communicate, and to diffuse and deescalate a situation.

- **Avoid enforcing "No Recording" Signage in Police Department Lobbies:** A police department lobby is best to be designated, in a constitutional sense, as a public area. As a result, it is highly unlikely that a "No Recording" prohibition could be enforced. In departments where sensitive information may be readily viewable from the lobby, considerations should be made to address this issue so that such information is not viewable. Particularly for CORI, it is the department's obligation, rather than the citizen's, to protect against its unlawful dissemination. In those instances, departments may want to consider window tinting, partitions, relocating or reformatting the layout of computer screens, etc.

4. Common Criminal Enforcement Applications

- **Unlawful Secret Interception (G.L. c. 272, § 99)**

Elements: The defendant

a) Without authorization
b) Willfully committed, attempted to commit, or procured any other person to commit
c) An interception
d) Of any wire or oral communication

Right of arrest: Felony

Applications

- Officers should not utilize this charge in connection with subject who secretly or openly audio or video record them while performing their duties in public.

- Officers may continue to utilize this charge in all other respects as not limited by the courts' decisions in ***Glik***, ***Gericke***, and ***Martin***.

- **Trespass After Notice (G.L. c. 266, § 120):**

Elements: The defendant

a) Without right
b) Entered or remained in or upon
c) The dwelling house, buildings, boats, or improved or enclosed land, wharf, or pier of another, or enters or remains in a school bus
d) After having been forbidden to do so by the person who has lawful control of the premises, whether directly or by notice posted thereon, or in violation of a court order pursuant to G.L. c. 208, § 34B or G.L. c. 209, §§ 3 or 4

Right of arrest: Warrantless arrest in presence (G.L. c. 266, § 120)

Applications

- A building owned by a municipality is included in the phrase "buildings of another" in G.L. c. 266, § 120. ***Commonwealth v. Egleson***, 355 Mass. 259 (1969).
- Notice of trespass may be provided in the following forms: posted sign, verbal ejection, certain privacy precautions (e.g. fencing, walls, doors, locking devices, etc.); written notice; and court order.
- Officers should not typically use the charge of trespass simply because an individual is recording inside a "public" area of a municipal building.
- If a municipal building or property has taken certain privacy precautions (e.g. fencing, walls, doors, locking devices, etc.) and the subject breaches those precautions, then the individual may be charged with trespassing.
- If a municipal building has certain posted signs advising that only authorized personnel are permitted, but the sign is not regularly and uniformly enforced, then officers should not consider charging an individual with trespass simply because they are recording in that area.
- Officers should only utilize the trespass charge where the subject's conduct, irrespective of their recording, requires it. For instance, the United States District Court for Massachusetts previously ruled use of the trespassing charge on individuals whose conduct was disruptive and which impeded and prevented normal use of a government office for the purpose for which it was dedicated, did not infringe of the individuals' First Amendment rights. ***Hurley v. Hinckley***, 304 F. Supp. 704 (D. Mass. 1970); see also ***Commonwealth v. Egleson***, 355 Mass. 259 (1969) ("The city had both a right and a duty to protect the building and its functions against any self-proclaimed need for an individual entry which could not, so far as appears, benefit the public use in any respect. 'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'")

- **Disorderly Conduct (G.L. c. 272, § 53)**

Elements: The defendant

a) Purposefully caused or recklessly created a risk
b) Of public inconvenience, annoyance, or alarm
c) By -- (i) fighting; (ii) engaging in agitated or tumultuous behavior; (iii) creating a hazard or physically offensive condition by any act that served no legitimate purpose; or (iv) threatening to use force

Right of arrest: Warrantless arrest in presence in public (G.L. c. 272, § 54)

Applications

- A subject may be charged with disorderly conduct in public areas of a police state. ***Commonwealth v. Collins***, 36 Mass. App. Ct. 25 (1994) (defendant engaged in tumultuous behavior in the corridor leading up to the booking desk, an area that the court determined to be a public place within the police station).
- The presence of police officers only is not sufficient to prove the "public" element of the charge of disorder conduct. ***Commonwealth v. Mulvey***, 57 Mass. App. Ct. 579 (2003).
- Offensive and abusive language alone is not sufficient to justify the disorderly conduct charge. ***Commonwealth v. A Juvenile***, 368 Mass. 580 (1975) (defendant's conduct of engaging in offensive and abusive language and gestures at a Boston department store for nearly 40 minutes did not justify the charge of disorderly conduct).
- Officers should be pay particular attention to the conduct and actions of subjects. Very rarely will the language, alone, justify the disorderly conduct charge. See e.g., ***Commonwealth v. Richards***, 369 Mass. 443 (1976); ***Abraham v. Nagle***, 116 F.3d 11 (1st Cir. 1997).
- Fighting words may form the basis for a charge of disorderly conduct, but only if they are directed toward citizens. ***Commonwealth v. A Juvenile***, 368 Mass. 580 (1975). Fighting words are those where "the person addressed would [most likely] make an immediate violent response." ***Gooding v. Wilson***, 405 U.S. 518 (1972).
- Recording alone is likely not sufficient to substantiate this charge, however, the subject's conduct and actions may justify the charge.

- **Disturbing the Peace (G.L. c. 272, § 53)**

Elements: The defendant

a) Engaged in conduct which tends to annoy all good citizens
b) The defendant's conduct did, in fact, annoy anyone present

Right of arrest: Warrantless arrest in public (G.L. c. 272, § 54)

Application

- Recording alone is likely not sufficient to substantiate this charge, however, the subject's conduct and actions may justify the charge.

- **Witness Interference & Obstruction of Justice (G.L. c. 268, § 13B)**

Elements: The defendant

a) Willfully
b) Either directly or indirectly –
    i. threatens, attempts or causes physical, emotional or economic injury or property damage to;
    ii. conveys a gift, offer or promise of anything of value to; or
    iii. misleads, intimidates or harasses another person who is a:
        1) witness or potential witness;
        2) person who is or was aware of information, records, documents or objects that relate to a violation of a criminal law or a violation of conditions of probation, parole, bail or other court order;
        3) judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer;
        4) person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or
        5) family member of a person described in this section,
c) with the intent to or with reckless disregard for the fact that it may;
    i. impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or
    ii. punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section

Right of arrest: Felony

Applications

- Recording alone is likely not sufficient to substantiate this charge, however, the subject's conduct and actions may justify the charge.
- The term "harass" means to "engage in any act directed at a specific person or group of persons, which seriously alarms or annoys them and would cause a reasonable person to suffer substantial emotional distress [including the use of electronic communication devices]." See G.L. c. 268, § 13B.

- **Interfering with a Police Officer (Common Law)**

  Elements:
  a) The officer was engaged in the lawful performance of a duty
  b) The defendant physically performed an act that obstructed or hindered the officer in the performance of that duty
  c) The defendant was aware that the officer was engaged in the performance of his/her duties
  d) The defendant intended to obstruct or hinder the officer in the performance of that duty.

  Right of arrest: Warrantless arrest in presence

  Applications

  - Recording alone is likely not sufficient to substantiate this charge, however, the subject's conduct and actions may justify the charge.
  - Officers must show that the defendant either physically obstructed them or threatened them with violence. ***Commonwealth v. Adams***, 482 Mass. 514 (2019).

- **Seizing and Searching Cell Phones**

  The United States Supreme Court in ***Riley v. California*** and ***U.S. v. Wurie*** ruled that absent exigent circumstances, *police cannot search* the digital evidence contained in a cellular phone incident to arrest. Some of the exigencies could include the need:

  - to prevent the imminent destruction of evidence in individual cases,
  - to pursue a fleeing suspect, and
  - to assist persons who are seriously injured or are threatened with imminent injury.

  The Court also held that "in light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address *some of the more extreme hypotheticals* that have been suggested:

  - a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or
  - a child abductor who may have information about the child's location on his cell phone."

Text Messages

❖ **TRAINING TIP:** The United States Supreme Court is currently reviewing an appeal pertaining the SJC's decision in the Michelle Carter case. Additionally, there is a bill called "Conrad's Law," pending before the Massachusetts legislation that proposes criminalizing suicide by coercion.

The SJC affirms Michelle Carter's conviction for Involuntary Manslaughter and holds that the text messages in this case provided sufficient evidence for a conviction of Manslaughter and they were not protected under the First Amendment.

Commonwealth v. Michelle Carter, 481 Mass. 352 (2019): Police found the victim, Conrad Roy, deceased in his truck. Roy had died after inhaling carbon monoxide while his truck was parked in Fairhaven parking lot. During their investigation, police learned that the defendant, Michelle Carter, met Roy in 2012. Although they did not live in the same town, they contacted each other through text messages and phone calls. The majority of the text messages focused on Roy's suicidal thoughts. Between October 2012 and July 2014, Roy had unsuccessfully tried to commit suicide through various methods. Carter initially urged Roy to seek professional help. However, Carter began to help Roy with methods of how, where, and when he could do so, and she even downplayed his fears about how his suicide would affect his family. The text message revealed that Carter encouraged Roy to kill himself and chastised him when he did not.

Carter was indicted as a Youthful Offender and charged with Involuntary Manslaughter. During a bench trial, the Juvenile Court judge found that Carter's actions constituted wanton or reckless conduct and serious disregard for the victim's well-being. Significantly, cell phone records indicated that Carter was communicating with Roy while he was in his truck committing suicide. Carter admitted that she had stayed on the phone for "20 minutes," and heard him moaning. Later, Carter texted a friend and said "I think he just killed himself." Carter sent messages claiming that she could have stopped Roy, but instead told him to get back in the truck.

The judge emphasized that Carter commanded him get back into the truck, "knowing the victim's fears, doubts, and fragile mental state." Carter also acknowledged that she could hear Roy coughing and moaning when he reentered the truck. Carter did not call emergency personnel, nor contact Roy's family, nor instruct him to get out of the truck. Roy died from carbon monoxide poisoning and the judge found that Carter's actions and her failure to act constituted, "each and all," wanton and reckless conduct that caused the victim's death.

Prior to trial, Carter filed a motion to dismiss the indictment. After the Juvenile Court judge denied the motion, the SJC found that there was sufficient evidence to support Carter's indictment for involuntary manslaughter. Although Carter was not physically present when Roy committed suicide, her words constituted wanton or reckless conduct sufficient to support a charge of manslaughter. ***Carter I***, 474 Mass. at 632-633. Verbal conduct in appropriate circumstances can "overcome a person's willpower to live, and therefore be the cause of a suicide." ***Id***. at 633. There was ample evidence to establish probable cause that the defendant's conduct was wanton or reckless under either a subjective or objective standard. Furthermore, the SJC emphasized that "an ordinary person under the circumstances would have realized the gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide." ***Carter I***, *supra* at 635. Since Carter was Roy's girlfriend, it is reasonable to infer that the she had some control over his actions. All these issues were addressed during the initial appeal in ***Carter 1***.

The issues the SJC examined in this appeal are whether the evidence at trial was sufficient to support her conviction beyond a reasonable doubt and whether Carter's actions were covered or protected under the First Amendment.

1st Issue: Was there sufficient evidence to support a conviction of Involuntary Manslaughter?

The SJC found there was sufficient evidence to support a conviction of Involuntary Manslaughter and that Carter's words contained in text messages were corroborated. Carter argued that without any physical act on her part, including her physical presence at the scene, her words alone were insufficient to support a charge of Manslaughter. ***Carter I***, *supra* at 632-633. Verbal conduct in appropriate circumstances could "overcome a person's willpower to live, and therefore be the cause of a suicide." ***Id.*** at 633. The SJC disagreed and found that "there was ample evidence to establish probable cause that the defendant's conduct was wanton or reckless under either a subjective or objective standard." ***Commonwealth v. Pugh***, 462 Mass. 482, 496-497, 969 (2012) (wanton or reckless conduct may be "determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances"). "An ordinary person under the circumstances would have realized the gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide." ***Carter I,*** *supra* at 635. Additionally, Carter was Roy's girlfriend, "with whom he was in constant and perpetual contact — on a subjective basis knew that she had some control over his actions."

Next, the SJC found that Carter's statements were critical and were corroborated by Roy's actions. Carter ordered Roy to get back into the truck after he stepped out to get some fresh air. Although Carter claimed her statement to Roy was uncorroborated, the evidence proved otherwise. Here, Carter's statement was more than adequately corroborated not only by the Roy's death, but also by text messages exchanged with the victim encouraging him to commit suicide, and by the fact that the defendant and the victim were in voice contact while the suicide was in progress — that is, despite the physical distance between them, the defendant was able to communicate with the victim, hear what was going on in the truck, and give him instructions.

Carter also argued that the judge failed to properly apply the legal principles set forth in ***Carter I***. For example, the record indicates that the judge's remarks explaining the guilty verdict contained no express finding that her words had a "coercive quality" that caused the victim to follow through with his suicide. See ***Carter I***, 474 Mass. at 634. However, the judge stated in his remarks that they were not intended as a comprehensive statement of all the facts he found or of all his legal rulings. Finally, and perhaps most importantly, **t**he judge expressly tracked the elements of manslaughter in his findings. He found: "She instructs Roy to get back into the truck, well knowing of all of the feelings that he has exchanged with her — his ambiguities, his fears, his concerns." This, the judge found, constituted "wanton and reckless conduct by Carter, creating a situation where there is a high degree of likelihood that substantial harm would result to [the victim]." The judge then further found that this conduct caused the victim's death beyond a reasonable doubt. His finding of causation in this context, at that precise moment in time, includes the concept of coercion, in the sense of overpowering the victim's will.

This finding is supported by the temporal distinctions about causation drawn by the judge. Until the victim got out of the truck, the judge described the victim as the cause of his own suicidal actions and reactions. This period of "self-causation" and "self-help," which is completely consistent with his prior behavior, ended when he got out of the truck. Roy *broke that chain of self-causation by exiting the vehicle*. He took himself out of the toxic environment that it had become. This is completely consistent

with his earlier attempts at suicide.

The judge found that once Roy left the truck, Carter overpowered his will and caused his death. The judge could have properly found, based on this evidence that the vulnerable, confused, mentally ill, eighteen year old victim had managed to save himself once again in the midst of his latest suicide attempt, removing himself from the truck as it filled with carbon monoxide. But then in this weakened state he was badgered back into the gas-infused truck by Carter his girlfriend and closest, if not only, confidant in this suicidal planning, the person who had been constantly pressuring him to complete their often discussed plan, fulfill his promise to her, and finally commit suicide. Then, after she convinced him to get back into the carbon monoxide filled truck, she did absolutely nothing to help him: she did not call for help or tell him to get out of the truck as she listened to him choke and die. Based on all the facts, the SJC held that there was sufficient evidence to affirm the conviction against Carter.

2nd Issue: Were Carter's texts protected under the First Amendment?

The SJC addressed whether Carter's conviction for involuntary manslaughter violated her right to free speech under the First Amendment. The SJC reaffirmed the conclusion it had found in ***Carter I*** and held that no constitutional violation results from convicting a defendant of Involuntary Manslaughter for reckless and wanton, pressuring text messages and phone calls, preying upon well-known weaknesses, fears, anxieties and promises, that finally overcame the willpower to live of a mentally ill, vulnerable, young person, thereby coercing him to commit suicide. ***Carter I***, 474 Mass. at 636 n.17.

The crime of involuntary manslaughter proscribes reckless or wanton conduct causing the death of another. The statute makes no reference to restricting or regulating speech, let alone speech of a particular content or viewpoint: the crime is "directed at a course of conduct, rather than speech, and the conduct it proscribes is not necessarily associated with speech. Carter cannot escape liability just because she happened to use 'words to carry out [her] illegal [act].'" ***United States v. Barnett***, 667 F.2d 835, 842 (9th Cir. 1982). Indeed, the United States Supreme Court has held that "speech or writing used as an integral part of conduct in violation of a valid criminal statute" is not protected by the *First Amendment*. ***Giboney v. Empire Storage & Ice Co.,*** 336 U.S. 490, 498 (1949) ("If there is a bedrock principle underlying the *First Amendment*, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Nothing in ***Carter I,*** or earlier involuntary manslaughter cases involving verbal conduct suggested that involuntary manslaughter prosecutions could be brought in these very different contexts without raising important *First Amendment* concerns. See ***Commonwealth v. Bigelow***, 475 Mass. 554, 562, (2016). ("In considering the *First Amendment's* protective reach, critical to the examination is the context and content of the speech at issue."). The SJC emphasized that the verbal conduct targeted here and in past Involuntary Manslaughter cases is different in kind and not degree, and raised no such concerns. Only the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live has been proscribed. This restriction is necessary to further the Commonwealth's compelling interest in preserving life. The SJC found that Carter's words contained in the text messages were not covered by the First Amendment protections.

Chapter 3
CRIMINAL LAW DEVELOPMENTS

I. Odor of Marijuana Revisited

	Key provisions of Marijuana Legislation for Police	Penalties
Consumption	Public: • Consuming marijuana or marijuana products is prohibited. • Smoking marijuana is prohibited where smoking tobacco is prohibited. Rental Property • Landlord can prohibit smoking marijuana. However rental contract may not prohibit other methods of consumption unless it would violate Federal or state regulations. Bars/ Cafes/ Public Establishments • Towns and cities will vote on whether to allow establishments for on premise consumption and Cannabis Control Commission will have to issue a license. Government Buildings/Schools • Can prohibits marijuana consumption • Also not required to provide a reasonable accommodation even if person has a medical marijuana card. Work • Employer can restrict consumption of marijuana at work even edibles.	$100 fine
Restrictions in Vehicles	• No Operating a vehicle while impaired • No open container	• G. L. c.90, §34G and other criminal penalties • $500 fine

The Odor of Unburnt Marijuana, Together with other Suspicious Factors, Provided Police with Probable Cause to Search a Warehouse!

Commonwealth v. Long, 482 Mass 804, (2019): On October 17, 2017, Amherst police officers on patrol noticed two automobiles parked at one end of a windowless warehouse building, at the far end of the driveway. There were no other vehicles in the parking lot and the building was in a remote area. Fields and trees surrounded the property and there were no close neighbors. Multiple active surveillance cameras were mounted on the exterior of the building. The police checked the registrations of the vehicles and learned that the owner of a Massachusetts-registered Toyota Tundra pickup truck had a number of convictions for possession of marijuana and possession of marijuana with intent to distribute, over a period of almost twenty years, beginning in the late 1990s.

At this point, the officers walked around the 11,000 square foot warehouse which was constructed of cinder blocks. Police noticed PVC exhaust or ventilation pipes extending through the cinder block walls, which appeared to have been recently added. Detective Gregory Wise of the Amherst police department arrived to assist. He had specialized training in narcotics and was familiar with methods utilized to cultivate and harvest marijuana. Upon walking around the building, police smelled an overwhelming odor

of unburnt fresh marijuana. The odor was coming from inside the building and there was a broken padlock on the door attached to the building. There were pry marks on the door and the interior of that building held many empty bottles of a cleaning solvent. While police were on scene, they saw a light coming from a garage door and could see through the cracks an individual leaving the garage and entering the main warehouse.

The police contacted the owner of the building, who reported that he had rented the building to the defendant. The owner's son arrived on scene and said that three or four individuals had been leasing the warehouse for the past year. The tenants paid approximately $4,000 per month; the son did not know the nature of their business.

The police checked the records of "the Medical Marijuana System" and determined that neither the defendant nor the registered owner of the Toyota had a medical marijuana card or was authorized to grow marijuana pursuant to a hardship marijuana cultivation license. A check of the defendant's criminal record indicated that it contained six entries, including possession of marijuana in 2004, 1989, and 1988.

Officers secured the area while another officer went to obtain a search warrant. Upon executing the warrant, police found, and seized, among other items, United States currency, equipment used to cultivate marijuana, and at least fifty pounds of marijuana. The defendant was placed under arrest for trafficking in fifty pounds or more of marijuana, in violation of G. L. c. 94C, § 32E (a).

The defendant moved to suppress the evidence on the ground of a lack of probable cause. He argued that, using only their sense of smell, the police were unable to exclude the possibility that the odor emanating from the windowless, 11,000 square foot, cinder-block warehouse was the product of legal marijuana use, possession, or cultivation. Before the District Court judge could rule on that motion, both parties asked the judge to report a question to the Appeals Court that would resolve the suppression motion, and the SJC transferred the case on its own motion.

The Question Reported to the Court: "Does probable cause exist where an affidavit establishes the overwhelming odor of unburnt fresh marijuana emanating from an 11,000 square foot windowless commercial building with exhaust vents that appears to be covered in plywood where the reported leaseholder has a criminal history including [four] charges of possession of Class D between 1988 and 2004 and no active license to cultivate and the registered owner of a vehicle on the property has a criminal history including charges of possession with intent to distribute a Class D substance in 2015 and possession of a Class D substance in 1999 and 1998, and also had no active license to cultivate pursuant to ***Commonwealth v. Overmyer***, 469 Mass. 16 (2014), and its progeny."

Conclusion: The SJC held that the search warrant affidavit provided probable cause to search the commercial building for evidence of illegal marijuana cultivation because, in addition to the odor of unburnt marijuana, the factors establishing probable cause included the modifications to the structure, the active surveillance cameras, the exclusion of the possibility of legal marijuana cultivation, and the leaseholder's four prior convictions for the possession of marijuana.

Issue: The Odor of Marijuana and Probable Cause:

After the 2008 ballot initiative decriminalizing the simple possession of one ounce or less of marijuana, the odor of marijuana is no longer de facto evidence of criminal activity under Massachusetts law. See ***Commonwealth v. Rodriguez***, 472 Mass. 767, 778 (2015) (police not entitled to stop vehicle based on

detecting odor of burnt marijuana); (odor of marijuana emanating from vehicle does not provide probable cause to search for illegal quantity of marijuana); ***Overmyer,*** *supra* at 21 (odor of unburnt marijuana is not reliable predictor of "the presence of a criminal amount of [marijuana], that is, more than one ounce, as would be necessary to constitute probable cause").

The ability of the police to rely upon the odor of marijuana, burnt or unburnt, as evidence of criminal conduct was even further diminished in 2012 when Massachusetts voters approved "***An Act for the humanitarian medical use of marijuana***." St. 2012, c. 369. The medical marijuana law, codified at G. L. c. 94I, §§ 1-7, provides that a qualifying patient shall not be subject to arrest for the possession of up to a sixty-day supply of marijuana necessary for the patient's personal medical use.

In November of 2016, Massachusetts voters approved a ballot initiative that legalized the recreational possession and use of marijuana by persons at least twenty-one years of age, and allowed limited, regulated commercial sale. See St. 2016, c. 334. The act, codified in G. L. c. 94G, §§ 1-14, and entitled "***Regulation of the Use and Distribution of Marijuana not Medically Prescribed***," provides, "that a person twenty one years of age or older shall not be arrested, prosecuted for possessing, using, purchasing, processing or manufacturing one ounce or less of marijuana, except that not more than five grams of marijuana may be in the form of marijuana concentrate; or within the person's primary residence, possessing up to ten ounces of marijuana and any marijuana produced by marijuana plants cultivated on the premises and possessing, cultivating or processing not more than six marijuana plants for personal use so long as not more than twelve plants are cultivated on the premises at once." G. L. c. 94G, § 7 (a) (1), (2).

As a result of these changes to the Commonwealth's marijuana laws, to obtain a search warrant for an offense involving marijuana, the police are required to establish that they are investigating **illegal** marijuana possession or **illegal** marijuana cultivation, not merely the possession, consumption, or cultivation of marijuana. Police would have to prove that the person possessing or cultivating marijuana is not sanctioned by state law. Here the SJC considered the whether the smell of marijuana would establish probable cause to issue a search warrant. In ***Overmyer,*** the SJC concluded that "a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine. In the absence of reliability, 'a neutral magistrate would not issue a search warrant, and therefore a warrantless search is not justified based solely on the smell of marijuana,' whether burnt or unburnt." ***Id***. at 2. Following that decision, the appellate courts consistently held that the odor of marijuana, burnt or unburnt, without more, is insufficient to establish probable cause that a crime is being committed. See, e.g., ***Commonwealth v. Ilya I***., 470 Mass. 625, 633 (2015). The SJC acknowledged that it did not establish a bright-line rule excluding the odor of unburnt marijuana as one factor in the probable cause calculus in all circumstances. Probable cause, after all, is a "fact-intensive inquiry and must be resolved based on the particular facts of each case." ***Commonwealth v. Morin***, 478 Mass. 415, 426 (2017).

In the underlying case, the affidavit was <u>sufficient to allow a magistrate to find probable cause</u> to search the warehouse for evidence of illegal marijuana cultivation:

> **First**, the police were searching for evidence of marijuana cultivation in a place where it was not allowed under state law. The lease holder, and at least one of the other suspected occupants, <u>did not have medical marijuana hardship cultivation licenses</u>, and <u>cultivation as a registered commercial provider had not yet been implemented under the 2016 voter initiative</u>. See G. L. c. 94G, §§ 1-14. General Laws c. 94G, § 7 (a) (2), allows a person twenty-one years of age or older

to cultivate not more than six marijuana plants for personal use "within the person's primary residence," and the commercial warehouse clearly was not a residence.

Second, the search warrant application excluded the possibility of legal marijuana cultivation. The collection of empty chemical bottles, the newly mortared PVC exhaust pipes, and multiple active surveillance cameras on the exterior of the building suggested a cultivation operation. Additionally, police had evidence of an apparent break-in, with lights emanating around the edges of a closed garage door, and two isolated vehicles suspiciously parked after ordinary business hours. One of the vehicles was owned by an automobile dealership in another state, and the second vehicle was owned by an individual who had prior convictions of possession and possession with intent to distribute marijuana over the course of several decades. Although prior convictions of a related offense does not establish probable cause that an individual is committing a similar offense. See ***Commonwealth v. Cordero***, 477 Mass. 237, 246 (2017) (knowledge of a person's arrest record may be considered in a reasonable suspicion evaluation"); ***Commonwealth v. Kennedy***, 426 Mass. 703, 709 (1998) (police officer's knowledge of the reputation for drug use or drug dealing, even though not sufficient alone, is a factor to support probable cause to arrest the defendant). Here the multiple convictions related to marijuana possession and distribution, over a lengthy period, combined with the other evidence, added an additional measure of support to the officers' probable cause calculus.

The Court noted that in ***Commonwealth v. Canning***, 471 Mass. 341 (2015), it found that the search warrant affidavit established probable cause that there was cultivation. However, the cultivation was not illegal because no license or registration check had been done. ***Id.*** at 343–344.

Here, conversely, the police had an overwhelming odor of unburnt marijuana wafting from an 11,000 square foot, windowless, cinder-block warehouse, with all its doors apparently shut, its ventilation system blocked, and new exhaust pipes installed, and the police excluded the possibility of legal cultivation. This is a different situation from the odor of unburnt marijuana emanating from the close confines of an automobile, or the front porch of a house.

- **NOTE:** The SJC specifically stated that its decision does not establish that any odor of unburnt marijuana emanating from a building other than a house, by itself, provides probable cause. "[T]he 'strong' or 'very strong' smell of unburnt marijuana" is insufficient "to provide probable cause to believe that a criminal amount of the drug is present." ***Overmyer***, 469 Mass. at 23. See ***Commonwealth v. Meneide***, 89 Mass. App. Ct. 448, 451 n.4 (2016) ("The smell of unburnt marijuana, standing alone, no longer provides reasonable suspicion," much less" probable cause"). **Based on all the factors in this case**, there was sufficient evidence in the affidavit to establish probable cause to issue the search warrant.

II. Domestic Violence and Sexual Assault Offenses

Parameters of stay-away provisions in 209A and 258E Orders

- **TRAINING TIP:** These cases are fact specific and dependent on the court's interpretation of the alleged conduct and the parameters of the orders. However, the Appeals Court did find that a defendant found in the mere "vicinity" of the location, is insufficient for a violation. A violation would occur if the defendant entered the property where the building was located; or took actions that directly intruded on the workplace or residence.

Commonwealth v. Watson, 94 Mass. App. Ct. 244, (2018): On August 25, 2015, E.C. obtained an ex parte abuse protection order against the defendant that was extended. The key provisions of the order provide for the defendant "NOT TO ABUSE [E.C.] by harming, threatening or attempting to harm [her] physically or by placing [her] in fear of imminent serious physical harm, or by using force, threat or duress to make [her] engage in sexual relations." Second, the defendant can have not contact which states that the defendant "NOT TO CONTACT [E.C.], in person, by telephone, in writing, electronically or otherwise, either directly or through someone else, and that the defendant "to stay at least 100 yards away from [E.C.]." Finally, the defendant is ordered "TO IMMEDIATELY LEAVE AND STAY AWAY FROM [E.C.'s] RESIDENCE, except as permitted in [two subsequent paragraphs that do not apply], located at [a specified street address]." Because E.C. lived in a multifamily dwelling, the order went on to specify that the defendant was required "to immediately leave and remain away from the entire apartment building or other multiple family dwelling in which [her] residence is located.

The question is whether the defendant violated the order by standing on the sidewalk outside of E.C.'s address. When an officer arrived in response to a radio call, he saw the defendant standing was approximately twenty to twenty-five feet from the front door of the apartment building in which E.C. lived. The defendant was not standing inside. However, a judge found the defendant was guilty of violating the stay-away provision of the restraining order and he appealed. The Appeals Court affirmed the conviction and held that the defendant was close enough to the front door of the building that he would have been able to contact or abuse the victim if she exited.

Commonwealth v. Telcinord, 94 Mass. App. Ct. 232, 2018: On August 3, 2016, the Brockton Court issued a G. L. c. 209A abuse prevention order directing the defendant to stay at least fifty yards away from the victim, not contact him, stay away from his workplace, and stay away from his residence located at 13 Hall Street in Randolph. The restraining order required the defendant to stay at least 50 yards away from the defendant and also included a no contact provision. The order also required the defendant to "stay away" from the victim's house located on Hall Street in Randolph. Just hours after the defendant was served with the restraining order, a police officer saw her driving on Hall Street immediately adjacent to the defendant's house. The defendant admitted she was following the victim in her car, but said she believed she was in compliance with the restraining order in light of the distance between her car and the victim's house. A Quincy District Court jury found her guilty of violating the stay-away provision of the restraining order and she appealed. The Court upheld the convictions in ***Telcinord*** (holding that the defendant clearly intended to confront the victim by driving on his street and parking near his house) ***Commonwealth v. Goldman***. The victims in this case obtained a harassment prevention order against the defendant that ordered him to stay away from their

home. One morning, the victims looked out their window and saw the defendant standing outside their house. The police were called and the defendant was arrested. He was convicted by a Lowell District Court jury of violating the harassment prevention order and he appealed. In ***Goldman***, the Court reversed the defendant's conviction because the trial judge failed to instruct the jury that being in the "vicinity" of the victims' house was insufficient to find him guilty.

Indecent Assault and Battery

Commonwealth v. Benedito, 95 Mass. App. Ct. 548, (2019): The defendant kissed his girlfriend's sister while she was sleeping. After the incident, the victim awoke and screamed for her sister's help. The defendant was unclothed at the time and argues that there was insufficient evidence to convict him of indecent assault and battery.

"To prove indecent assault and battery on a person age fourteen or older, the Commonwealth is required to establish that the defendant committed 'an intentional, unprivileged, and indecent touching of the victim.'" ***Commonwealth v. LaBrie***, 473 Mass.754 (2016). Conduct is "indecent" when it is "fundamentally offensive to contemporary moral values which the commonsense of society would regard as immodest, immoral, and improper." ***Commonwealth v. Mosby***, 30 Mass. App. Ct. 181, 184 (1991). The entire context of the offensive touching must be examined. ***Commonwealth v. Castillo***, 55 Mass. App. Ct. 563,565 (2002). "The test for indecency is objective, turning on the nature of the conduct rather than the defendant's intent." ***Cruz,*** supra. The defendant argues because there was no forced insertion of his tongue inside the victim's mouth, it did meet the definition of indecent. However, the facts suggest the defendant surreptitiously kissed the victim while he was unclothed and she was asleep. When she asked why he kissed her, his response was that could not help himself. See ***Commonwealth v. Colon***, 93 Mass. App. Ct. 560, 562 (2018). Under certain circumstances, touching of the mouth, even without insertion of the tongue, may be considered an indecent act. See ***Commonwealth v. Vazquez***, 65 Mass. App. Ct.305, 307 (2005). The defendant kissed the victim on the mouth while she was sleeping, unable to consent and he was naked. Kissing the defendant on the mouth, which is an intimate part of the body, qualifies as an intimate act. The conviction is affirmed.

Ear Licking qualifies as indecent assault and battery

Commonwealth v. Johnny Colon, 93 Mass. App. Ct. 560, (2018): On September 6, 2015, the victim was at a barbecue with her family. At some point the defendant, Johnny Colon began to make the victim feel uncomfortable. As the victim was trying to leave, the defendant encountered her in the doorway, and put his arms out for a hug. The defendant pulled the victim close to his chest and began licking the victim's ear including the piercings. .No one was present at the time the incident occurred. According to the victim, the hugging and licking, "felt like forever." The defendant was charged with indecent assault and battery pursuant to G.L. c.265 §13B and ultimately convicted. The defendant appealed and argued that ear licking and hugging does not qualify as incident and assault and battery. Second, the word "indecent," is not adequately defined.

The Appeals Court held that that it was indecent assault and battery for the defendant to lick and stick his tongue in the victim's ear. While the court has held that it is indecent to touch private areas such as a breasts, abdomen, buttocks thighs or anything that qualifies as a sexual part, the courts have found that the unjustified touching of other areas of the body qualify as indecent depending on context. For example, inserting fingers into a person's mouth coupled with sexual commentary can qualify as indecent. ***Commonwealth v. Rosa,*** 62 Mass. App. Ct. 622 (2004). Here the Appeals Court considered other

factors such as whether the victim and defendant were in a relationship. Additionally, "unlike a hug or kiss, an extended ear licking is not normal behavior between persons who are not intimate." The defendant was 58 years old and the victim 13 years age. The fact that the defendant approached the victim when no one else was around and immediately ceased his behavior when another person arrived. The defendant's behavior confirms that the conduct was improper and he knew it was. All of these factors prove that there was more than sufficient evidence to find the defendant's behavior was indecent.

Stalking

- **TRAINING TIP:** This case serves as a good review of the elements necessary to establish Pursuant to G.L. c. 265 § 43(a)*:*

Whoever

1. engages in a *knowing pattern of conduct or series of act*[2] over a period of time
2. directed at a specific person
3. which seriously alarms or annoys that person and
4. would cause a reasonable person to suffer substantial emotional distress, and
5. makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking.

Commonwealth v. Chonga 94 Mass. App. Ct. 385, (2019): The Appeals Court affirmed the defendant's conviction for stalking. The defendant physically "abused the victim and he even "tried to choke" her, using two hands and squeezing her neck. He also threatened to kill her, "all the time." On one occasion, he showed up at the victim's apartment, took her cell phone and the handset from the home telephone, threatened to kill her, and eventually hit her repeatedly with his boot. The victim managed to escape to a neighbor's house, but not before, by the defendant's own admission, he grabbed her arm while she was running out the door. After the victim escaped, her friend received calls from the victim's cell phone and from a man he did not know. The man who cursed at him and refused to tell him where the victim was. The victim's friend call police and they drove the victim's apartment. Although the defendant argued that he did not place her in imminent fear, the facts indicate contradict his version. According the victim's testimony, the defendant, pointed a knife at her neck and told her he would kill her, "he scared her." The victim's account was verified by her friend Patrick that testified the victim sounded like "somebody scared for her life.

Continuous acts rather than separate incidents can form a basis for stalking

Commonwealth v. Fox, 90 Mass. App. Ct. 1108 Unpub. (2016): Although the conduct that formed the basis for the conviction was continuous rather than separate incidents, the defendant was guilty of stalking. The court ruled that "the three different courses of conduct" had been proven beyond a reasonable doubt: (1) making the telephone calls, (2) driving by the victim's apartment repeatedly while "honking the horn and revving [the defendant's] engine," and (3) breaking and entering into the victim's house some hours later. These three acts occurred over a ten-hour period. The judge found that the element of a threat was established by the defendant's statement "to the effect of get out of that house within five minutes or something bad is going to happen." The judge further found that the defendant's actions were calculated to place the victim in fear of harm and that she did fear him.

[2] Knowing pattern of conduct or series of acts requires at least three (3) incidents for both Stalking and Criminal Harassment.

Upskirting

Commonwealth v. Wassilie**,** 482 Mass. 562, (2019): The defendant was arrested in New York for using his cell phone to secretly record people using the public bathroom. New York police secured a search warrant for the defendant's laptop. There were two (2) recordings on his laptop which involved people using the bathroom at a recreational facility in Dalton, Massachusetts. At the beginning of each recording the defendant conceals his cell phone by wrapping it in paper towels and placing the phone on the floor across from the toilet. The video captures the defendant re-entering the bathroom to reposition the cell phone so it can capture images of the "parts of the body under a person's clothing." The recordings consist of videos that show the genitalia of children and adults, male and female. One recording shows an image under the skirt of a female child in a cheerleading outfit. The recordings showed seventeen adults and five juveniles, nude or partially nude using the bathroom. The police charged the defendant and he was indicted on twenty-two (22) counts of G.L. c. 272, §105 (b), and a jury convicted the defendant of fifteen (15) counts. The defendant appealed and challenged the constitutionality of the upskirting statute.

The SJC reviewed the amended language the legislation inserted to § 105 (b) after the ***Robertson*** case. Specifically, § 105 (b) states that, "the surreptitious photographing or videotaping of a person's clothed private anatomy even when in public," is illegal. ***Commonwealth v. Nascimento***, 91 Mass. App. Ct. 665, 666 (2017). See St. 2014, c. 43, § 2. The amended language also addresses when a person secretly records the sexual or other intimate parts of a child under age eighteen (18). G. L. c. 272, § 105 (b), third par.

After § 105 (b) had been amended, the Appeals Court considered whether the amended version of § 105 (b) protected individuals in public places. ***Nascimento***, 91 Mass. App. Ct. at 665. The defendant in that case was convicted under paragraph three of secretly videotaping two teenage girls under their dresses while they were traveling on a public ferry. Id. The Appeals Court reasoned that an individual does not lose all reasonable expectations of privacy in their covered sexual or intimate parts simply by being in public, and thus held that the amended statute applies "when a reasonable person would believe that the person's sexual or other intimate parts would not be visible to the public." ***Id***. at 667.

Conclusion: The SJC held that the upskirting statute is constitutional. Furthermore, the evidence showed that the defendant's cell phone was placed on the ground "directly across from the toilet so [there was] a clear view of the toilet." After the first twenty minutes of recording, the defendant reentered the bathroom to manipulate the camera to a lower angle, seemingly to get a better view of the individuals preparing to use and using the toilet. A police officer testified that the angle of the cell phone was positioned to capture the parts of the body under a person's clothing. Moreover, at one point in the recording, the camera view is focused up a young girl's cheerleading skirt. On two other occasions, the camera view shows the private parts of two young girls, under their shirts, while they are sitting on the toilet.

The SJC also concluded that the language "under or around" is an essential element of the offense under paragraph three and is also valid. The elements of the offense are:

(1) the defendant willfully photographed, videotaped or electronically surveilled,
(2) with the intent to secretly conduct or hide his photographing activity,
(3) the intimate parts of a child,
(4) under or around the child's clothing to view or attempt to view the child's intimate parts,
(5) when a reasonable person would believe that person's intimate parts would not be visible to the public.

Rap Song Lyrics Insufficient for Threats

F.K. v. S.C., 481 Mass. 325, (2019): The plaintiffs and the defendant were seniors at the same high school when the defendant created a rap song in which he improvised lyrics pertaining to the plaintiffs. The defendant barely knew the plaintiffs and did not interact in the same social circles. There was no reason for the defendant to have any ill will against him. On an evening in March 2017, the defendant posted a song to "SoundCloud," a public Internet website on which members can share music make it accessible to members. The defendant also linked the song from SoundCloud to his "Snapchat" account. The defendant shared the song with at least six other high school classmates, who were members of the defendant's Snapchat "friend" network. He did not share the song directly with M.D. or F.K.

The song at issue contained lyrics that said, "I don't know what you are talkin' about, talking shit in class"; "I'm gonna fuck you up soon"; "I'm gonna blow your fuckin' brains out soon"; and "I'm takin' your family down one by one, boom." The song also contained lyrics about M.D.'s girlfriend and used violent language that appeared to suggest rape or sexual assault. Although the defendant never shared the song with M.D., other high school classmates told him about it. M.D. told his parents about it and the school was notified. The defendant acknowledged that he had "messed up," and said that he had had no intention of hurting M.D. or M.D.'s family. The defendant was suspended for three days and was removed from his position as captain of the school's tennis team. The school allowed the defendant to leave class five minutes early to help him avoid contact with the plaintiffs between classes.

However, after an "incidental" encounter in which the defendant and F.K. passed each other, without any conversation, in a stairwell of the school, the defendant stopped going to school for the remainder of his senior year; he opted to complete his coursework from home in order to avoid any possible contact with the plaintiff. The plaintiffs, F.K. and M.D. sought emergency ch. 258E orders which were granted. Before the orders were set to expire, the judge held a hearing where all parties were present including the defendant. The judge concluded that "the individual statements within the song" constituted "separate acts" of harassment within the meaning of G. L. c. 258E, § 1, and that those lyrics were directed at M.D. and F.K. In addition, she found that the defendant's posting of the song on two Internet websites and the fact that "at least six separate individuals" had heard the song each constituted separate acts of harassment. The defendant filed a motion to reconsider and the motion was denied. A further appeal was filed to request a stay of the order so the defendant could continue attending school. The defendant filed an appeal challenging the order and the SJC heard the case on appeal.

The defendant contended that performing the song and posting it on the Internet constituted "[o]ne continuous act," which "cannot be parsed into individual acts in order to satisfy" the requirements of G. L. c. 258E, §§ 1 and 3 (a).

Conclusion: The SJC found that the facts of this case do not support the issuance of civil harassment prevention orders, pursuant to G. L. c. 258E, §§ 1 and 3 (a). The SJC concluded that the defendant's conduct was troubling and offensive, but failed to satisfy the threshold requirement of G. L. c. 258E, § 1, that a defendant commit at least three acts of harassment. Without three acts, a civil harassment prevention order cannot issue under G. L. c. 258E, § 3 (a).

Differences between c.209A and 258 E Orders

	209 A Orders Restraining Orders	**258 E Orders**
Definition	**Suffering abuse:** ➢ Causing physical harm ➢ Or placing another in fear of imminent serious physical harm ➢ Or causing another to engage involuntarily in sexual relations by threat, force or duress **Includes Family or Household Members** ➢ Who are married or living together ➢ Related by blood or marriage ➢ Have a child together regardless of living arrangement ➢ Dating or engaged	**Harassment: 3 or More Acts** 1)Aimed a specific person 2)Was willful and malicious 3)Intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion; 4) Conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim; 5)Or one act that by force thereat or duress causes another to involuntarily engage in sexual relations 6)Or one act that constitutes one of crime of sexual assault, harassment and stalking
Jurisdiction	Family, Probate, District Courts, BMC and Superior Courts (except for dating relationships)	District Courts, Superior Court, BMC and Juvenile Court if both parties under 17 years old
Venue	Plaintiff's residence Plaintiff's former residence left to avoid abuse	Plaintiff's residence
Timeliness	No time constraints as when to file the order	No time constraints as when to file the order
Relief	No abuse the plaintiff No contact the plaintiff Vacate plaintiff's household, multiple family dwelling and workplace Pay restitution Temporary custody of minor child Surrender firearms, gun licenses and FID cards	Court can issue order that the (a) defendant refrain from abusing or harassing the plaintiff, (b) no contact with plaintiff, (c) remaining away from plaintiff's home or workplace and (d) pay restitution directly related to losses. **No Surrender of Firearms or FID Card**

Parental Privilege

Commonwealth v. Rosa, 94 Mass. App. Ct. 458 (2018): On January 17, 2017, the defendant walked with his son and five-year-old daughter to a CVS located in Northampton. A store employee testified that she recalled the children running around the store and the defendant shouting obscenities at his daughter. The daughter was laughing and hiding from her father. As the defendant stood in line to pay for a bottle of ice coffee, the daughter approached and tried to grab his legs. "The defendant shoved his daughter in the chest with his hand, causing her to take a step or two to regain her balance." The defendant shoved his daughter a second time as she attempted to cling to his lower legs. At this point, the daughter fell on her buttocks and immediately got back up. The CVS employee testified that as the defendant paid for his items, he warned his daughter to stay away from him, telling her, "[G]et the fuck away from me. Trust me, you don't want to fucking be near me right now." The daughter approached the defendant again and he responded by lifting his foot and kicking his daughter in the chest. The force of the defendant's kick knocked the daughter to the ground and caused her to briefly cry.

After the defendant left the store with the daughter and his son, the CVS employee called the police, who detained the defendant. The defendant told police he was concerned about this daughter being kidnapped and the told police he nudged her a little bit. The defendant admitted the he used his foot to make contact with his daughter and he said "I don't raise pussies." The police noted that the defendant was wearing "snow boot style boots/shoes." Although the police did not observe any red marks, bruises or injuries to the daughter and she did not need medical attention, the defendant weighed approximately three hundred pounds. The daughter was approximately three feet tall, and weighed less than fifty pounds. The defendant was charged and convicted of assault and battery by means of a dangerous weapon. The defendant appealed arguing that his conduct was protected under the parental privilege. The Appeals Court heard the case on further appeal.

Conclusion: The Appeals Court affirmed the defendant's convictions for assault and battery with a dangerous weapon and held that the defendant's conduct was unreasonable and did not fall within the parameters of the parental privilege.

The Appeals Court emphasized that certain factors should be considered when determining whether the parental privilege defense will apply. Some of the factors include "the child's 'age,' the 'physical and mental condition of the child,' and 'the nature of [the child's] offense,'" among others. ***Commonwealth v. Dorvil,*** 472 Mass. 1, 13 (2015). Additionally, the parental privilege defense balances two competing interests: (i) protection of the parental right to autonomy over the care and upbringing of children; and, (ii) safeguarding children from punishment so excessive that it constitutes abuse. ***Id***. at 12. The parental privilege allows a parent to use force to against his or her child without facing criminal liability as long as the force used meets the following criteria:

(1) the force used against the minor child is reasonable;

(2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and

(3) the force used neither causes, nor creates a substantial risk of causing, physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress. ***Id.***

The Appeals Court found that the defendant's force was not reasonable in this case. When the defendant kicked his daughter, he no longer feared she would be kidnapped. The defendant's statements indicated that the he did not even "want his daughter close by." Although the defendant testified that he only nudged his daughter, the judge expressly found the defendant not to be credible.

Reckless Endangerment

Failure to supervise a three year old daughter, both inside and outside the home qualifies as reckless endangerment.

Commonwealth v. Santos, Mass. App. Ct. No. 18-P-100, (2018): On May 13, 2016, Saugus police Officer Jeffrey Wood was dispatched to an elementary school after receiving a report that a child was wandering alone in the playground. Officer Wood learned the child was only three years old and recalled finding the same child alone in the playground almost a month ago. When Officer Wood arrived at the school around 10:55 A.M., he went to the nurse's office and saw the child was wearing a T-shirt and diaper and had bare feet. The little girl had no injuries and the school employee relayed that she found the child in the playground around 10:40 A.M. Another officer located the child's mother who lived approximately 1000 feet from the playground. The mother did not respond immediately because she was asleep. When asked if she knew where her daughter was? She replied, "At the playground?" The defendant explained that she had set the child down in the living room to watch cartoons while she went to the upstairs bathroom for approximately ten to fifteen minutes. "When she came back downstairs, the child was gone. The apartment door was open ad the key to the deadbolt had been inserted from the inside. The defendant said that she looked for the child for approximately ten minutes and "just assumed she was playing with a neighbor's child." When asked why she did not call 911, the defendant replied, "That was my mistake." The police reunited the child with the defendant and the father arrived as well. The Department of Children and Family Services was called.

Conclusion: The Appeals Court held that there was probable cause to establish that the defendant recklessly endangered her child.

The crime of reckless endangerment of a child requires proof that the defendant "wantonly or recklessly engage[d] in conduct that create[d] a substantial risk of serious bodily injury or sexual abuse to a child [under the age of eighteen] or wantonly or recklessly failed to take reasonable steps to alleviate such risk where there [was] a duty to act." G.L. c. 265, § 13L. "Wanton or reckless behavior occurs," for purposes of § 13L,"when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child." Id. See ***Commonwealth v. Coggeshall***, 473 Mass. 665, 670 (2016). To be substantial and unjustifiable, "the risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." G.L. c.265, §13L. "In other words, the risk must be a good deal more than a possibility, and its disregard substantially more than negligence." See ***Coggeshall,*** 473 Mass. at 668. "The risk also must be considered in conjunction with a particular degree of harm, namely 'serious bodily injury,'" ***Coggeshall***, 473 Mass. at 668, defined as an injury that "results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death." G.L. c. 265, § 13L.

While no reported Massachusetts decision has addressed whether, and in what circumstances, a caregiver's inadequate supervision of a child can support a conviction under § 13L. Relevant circumstances may include "the gravity and character of the possible risks of harm; the degree of accessibility of the [defendant]; the length of time of the abandonment; the age and maturity of the children; the protective

measures, if any, taken by the [defendant]; and any other circumstance that would inform the factfinder on the question whether the defendant's conduct was [wanton or reckless]." ***Barnes v. Commonwealth,*** 47 Va. App. 105, 113(Va. Ct. App. 2005). Considering the totality of the circumstances here, the Appeals Court concluded that the complaint established probable cause to believe that the defendant violated §13L. Leaving the child alone in front of a television while a parent uses the bathroom does not qualify as reckless endangerment. However, when the defendant discovered her child was missing and failed to look for her or contact police, it changed the scope. There was no indication that the child knew how to open the deadbolt or had done so before. The Appeals Court held that the defendant's failure to look for her three year old child a left unattended outdoors faces serious risks of harm --she could have "wandered out into vehicular traffic, or gotten lost outside, or injured [herself] in any number of ways that children of such a young age can." ***Barnes***, 47 Va. App. At 112. Given these dangers"[i]t cannot seriously be disputed that a parent's duty to protect [her]young child requires keeping the child from wandering around outside unsupervised." ***Greenlee***, 2012-Ohio-1432, ¶14.

The relevant issue, is not how much time passed before the child was found; it is whether there is a substantial risk that the defendant's "acts, or omissions where there is a duty to act, would result in serious bodily injury to the child." G.L. c. 265, § 13L. The act or omission here is not leaving the child unsupervised outside for five minutes. Rather, the act or omission that gives rise to probable cause is the defendant's decision to leave a three-year-old child unsupervised outside for an indeterminate amount of time, without calling the police and with no apparent plan to continue searching on her own any time soon. See ***Greenlee***, 2012-Ohio-1432, ("if the child manages to escape the parent's supervision, whether or not this is the parent's fault, the duty of protection demands that the parent make an effort to find the child as quickly as possible"). That the child was timely and fortuitously found by a responsible adult does not bear on the defendant's culpability, at least not without evidence that the defendant knew that child had been found and was in a safe place. See ***Barnes***, 47 Va. App. at 111-112 (evidence sufficient to prove that defendant acted with "gross indifference to her children's safety," even though "children exercised the good sense to walk to a neighbor's apartment"); ***Riggs,*** 2 S.W.3d at 873 ("Whether the outcome of the incident had been the child's death, his rescue or his return home, a charge of child endangerment could have been filed and the question would remain the same.")

III. Firearms and New Trends

License to Carry in Massachusetts

The Appeals Court holds that the Commonwealth must prove a defendant knew a firearm was loaded in order to sustain a conviction under G.L. c. 269 §10(n)!

A. Knowing a Firearm is Loaded

- **NOTE:** The SJC heard has reaffirmed that pursuant to G.L. c. 269 §10(n), evidence must prove that a defendant knew a firearm was loaded!

Commonwealth v. Tyriek Brown, 479 Mass. 600 (2018): The SJC examined the language of subsections (a) and (n) of G. L. c. 269, § 10, to determine whether the Commonwealth had to prove that the defendant knew the firearm was loaded. When reading G. L. c. 269, § 10(a), it is irrelevant whether the firearm was "loaded or unloaded," in order to trigger a violation. However, pursuant to G. L. c. 269, § 10(n), if the firearm that was knowingly and unlawfully possessed was loaded, then the defendant is subject to additional jail time. The SJC found that to be convicted of unlawful possession of a loaded firearm, a defendant must know that the firearm he possessed was loaded.

The facts of this case suggest that there was insufficient evidence to prove the defendant knew the firearm was loaded**.** Although the SJC has stated that "where the firearm was a revolver located in a vehicle, a rational jury could infer that those who possessed the firearm knew that it was loaded with ammunition." ***Commonwealth v. Jefferson***, *supra*. However, the statement was made with respect to a revolver, a type of handgun that one might be able to tell was loaded merely by looking at the outside of the gun (because some of the bullets might be visible in the cylinder). The handgun in this case was a pistol that relied on a magazine to feed bullets into the gun. As a result, it would be difficult for a person to discern whether the gun was loaded merely by looking at it. There was no basis where a rational juror could conclude beyond a reasonable doubt that the defendant knew the gun was loaded. The defendant therefore was entitled to a judgment of acquittal on the indictment that alleged unlawful possession of a loaded firearm.

- **TRAINING TIP*:*** Although there was insufficient evidence to prove the defendant knew the firearm he had in his possession was loaded, this case serves as a good review of the safety concerns that arise during motor vehicle stops and it highlights when protective sweeps of the motor vehicle are justified.

B. Transfer of Firearms

Commonwealth v. Harris 481 Mass. 767, (2019): The defendant had a license to carry from New Hampshire and lived in Tewksbury, Massachusetts with his girlfriend. Upon his return from a brief visit to New Hampshire, the defendant, who was intoxicated, got into a confrontation with his girlfriend in the early morning hours of September 12, 2015; she fled the apartment and called police. Officers returned to the apartment and spoke with the defendant, who admitted that he owned a Glock 43 pistol. The defendant told police that the pistol was in the trunk of his vehicle. Officers retrieved the weapon for "safekeeping" and kept the defendant overnight at the police station for his own safety after they determined he was too intoxicated to drive. The defendant told police he "had gone out drinking" before "coming home" to

Tewksbury. He also acknowledged that he did not have a Massachusetts firearm license. Instead, the defendant produced a New Hampshire firearm license.

At the scene, the defendant's girlfriend requested an emergency protection order under G. L. c. 209A. A judge issued the order, which was served on the defendant. Pursuant to the order, officers confiscated the defendant's firearm and ammunition for safe keeping. While they were doing so, the defendant commented that he "had connections" and would regain possession of the Glock. He also said that the protection order "won't stick." The defendant was not arrested. Rather, he was placed in protective custody when, after he failed multiple sobriety tests, officers determined that he would be unable to drive safely from the scene. As a result of the restraining order, the Atkinson, New Hampshire, police chief revoked the defendant's New Hampshire firearm license.

Two criminal complaints subsequently issued from the District Court charging him with unlawful possession of a firearm in violation of G. L. c. 269, § 10 (h) (1); unlawful possession of ammunition in violation of G. L. c. 269, § 10 (h) (1); and unlawful possession of a firearm in violation of G. L. c. 269, § 10 A District Court jury convicted the defendant on all charges. He appealed.

Conclusion; The Appeals Court affirmed the denial of the defendant's motion to dismiss. According to the judge's findings, the defendant was living in Massachusetts for several months and failed to comply with the requirements of residents moving to the Commonwealth with an out of state license to carry.

Pursuant to G.L. c. 269, § 10 (a), any individual who, "except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded." There are categories of persons who are "exempted by statute" from punishment under G. L. c. 269, § 10 (a). Exemptions apply to new residents of the Commonwealth, see G. L. c. 140, § 129C (j); holders of a Massachusetts firearm license, see G. L. c. 140, §§ 131 (a), (b), 131F; holders of certain firearm licenses issued by other jurisdictions, see G. L. c. 140, §§ 129C (u), 131G; those with firearm identification (FID) cards who possess firearms in their residences or places of business, see G. L. c. 269, § 10 (a) (1); G. L. c. 140, § 129C; and certain nonresidents traveling in or through the Commonwealth, see G. L. c. 140, §§ 129C (h), 131F, 131G. In addition, exemptions exist for specific types of firearms, certain persons, and specified uses

There was no dispute that the defendant lacked a Massachusetts firearm license. He told police that he did not have a Massachusetts firearm license, and agreed that he lacked such a license. However, the defendant argued that he was a resident of New Hampshire who "fit precisely within the class of exempted persons set forth" in G. L. c. 140, § 129C (h) because he was traveling through the Commonwealth. However, the judge determined that there was no probable cause to believe that the defendant was traveling in or through the Commonwealth. Rather, she found probable cause to believe that the defendant was living in the Commonwealth with his girlfriend.

At the time police discovered the defendant's firearm, a New Hampshire statute allowed a New Hampshire licensee to "carry a loaded pistol or revolver in [that] state." See N.H. Rev. Stat. Ann. § 159:6. Although the Commonwealth afforded exceptions to nonresidents who possessed certain firearm and hunting licenses issued by other jurisdictions, see G. L. c. 140, §§ 129C (f), 131G, and allowed nonresidents to obtain temporary firearm licenses, see G. L. c. 140, § 131F, no statute in the Commonwealth granted full reciprocity to holders of New Hampshire firearm licenses. Similarly, when New Hampshire's licensing requirement was in effect, the statute did not provide reciprocity to holders of Massachusetts firearm licenses. See N.H. Rev. Stat. Ann. § 159:6-d. The judge who denied the defendant's motion to dismiss

found probable cause to believe that the defendant had been living in Massachusetts when police became aware of his firearm. The facts available indicated that, at that point, the defendant had been a resident of Massachusetts for several months.

Under Massachusetts requirements, a "new resident moving into the commonwealth, with respect to any firearm then in his [or her] possession," may lawfully possess such firearms "for [sixty] days," G. L. c. 140, § 129C (j), after which he or she must obtain a Massachusetts firearm license in order to possess the firearm outside the home or place of business. See G. L. c. 140, § 131 (a), (b); G. L. c. 269, § 10 (a) (2). The defendant could have applied for a Massachusetts firearm license within the sixty-day period following his arrival in the Commonwealth, but during more than three months of residency, he chose not to do so. There was no error in the denial of the motion to dismiss.

C. Options for Seizing Firearms

The ***Adams*** mentioned earlier in the manual discusses issues police can encounter when serving a notice that a licensing authority intends to suspend or revoke an individual's license to carry. Whenever an individual is required to surrender firearms, it can result in a dangerous situation. Below are some options for police to consider if they encounter an issue.

- **TRAINING TIP:** The ***Adams*** highlights that since G. L. c. 140, §§ 129D and 131 (f), is ambiguous as to whether or not an individual deemed "unsuitable" to hold a firearms license is entitled to a hearing before surrendering his firearms or he must immediately surrender the firearms, the SJC provided two options for the licensing authority when implementing a suspension or revocation of a license

    - **Option 1:** "[T]he licensing authority has discretion to provide notice to an individual believed no longer to be suitable to possess a license, and to seek *immediate surrender* of that individual's license, firearms, and ammunition. The failure to surrender firearms "without delay," in these circumstances, could subject the license holder to criminal sanctions pursuant to G. L. c. 269, § 10 (i)"; *(**See Lincoln Police Letter for LTC Revocation**).*

LINCOLN POLICE DEPARTMENT

ANDREW K. KENNEDY
CHIEF OF POLICE

P.O. BOX 19 - 169 LINCOLN ROAD - LINCOLN, MA 01773
BUSINESS: (781) 259-8113 FAX: (781) 259-9289

BY HAND

DATE:

NAME:
STREET
Lincoln, MA 01773

RE: Revocation for Your Resident Class A Large Capacity License to Carry Firearms, License Number XXXXXX

Dear XXXXX:

Please be advised that your License to Carry (LTC) Firearms, pursuant to the provisions of *Mass. Gen. Laws ch. 140, § 131* is hereby REVOKED.

You are deemed to be an unsuitable person with regards to your license for the following reason(s):

[Insert reason(s) for unsuitability]

As a result of this suspension you shall, in accordance with *Mass. Gen. Laws ch. 140, § 129D*, without delay, deliver or surrender to the licensing authority where you reside your license(s) to carry, and all firearms, large capacity feeding devices, rifles, shotguns and ammunition which you have in your possession, or which are owned by you. **Failure to do so is a criminal offense.** These items may be transferred from you to a licensed dealer, or to another person who may lawfully take possession of such items, but only after said items are surrendered to the licensing authority.

You have the right to appeal this revocation within ninety (90) days to the District Court with appropriate jurisdiction. Please contact the Lincoln Police Department at any time (781-259-8113) if you have any questions concerning this matter.

Sincerely,

A. Kevin Kennedy
Chief of Police

CC: Commissioner of Probation,
One Ashburton Place, Room 405
Boston, MA 02108

Option 2: "[T]he licensing authority may, in the exercise of its discretion, notify the license holder of a revocation or suspension without seeking immediate surrender of any firearms. In such an instance, the commencing of an appeal would stay the obligation to surrender firearms "without delay."

- **TRAINING TIP:** In the ***Adams*** case, the defendant refused to allow police to enter his home to seize his firearms. Adam's refusal was a separate constitutional issue. Without consent or exigent circumstances, police could not enter his home. Police could have ordered anyone inside house including Adam's wife to remain outside, so the guns could not be concealed or accessed, while they applied for a search warrant before entering and seizing the guns. Police could have secured Adams' home from the outside while they obtained a warrant. ***Commonwealth. v. Blake****,* 413 Mass. 823 (1992) (securing home on basis of probable cause to search for evidence of the crime.)

Refresher on Extreme Risk Protection Orders

Massachusetts has provided another option for revoking or suspending an individual's license to carry pursuant to the Red Flag legislation which was passed last year. Extreme Risk Protection Orders, ("ERPO"), are court issue orders that allow for the immediate suspension and surrender of any licenses to carry firearms or a firearm identification card which the respondent may hold, based on a finding that the person poses a risk of bodily injury to himself or others by being in possession of a license or having in his or her control, ownership or possession of a firearm, rifle, shotgun, machine gun, stun gun or ammunition. An ERPO will not issue where there is no license to suspend. If the respondent does not have a license, then police will likely commence an investigation for illegal possession of a firearm. Depending on the circumstances surrounding the initial report, the Petitioner may pursue a 209A or 258E order if warranted. The criteria of who can file a ERPO is listed below:

Respondent: The person identified and against whom the petition is being filed.

Family or household member: A person who:

(i) is or was married to the respondent;
(ii) is or was residing with the respondent in the same household;
(iii) is or was related by blood or marriage to the respondent;
(iv) has or is having a child in common with the respondent, regardless of whether they have ever married or lived together;
(v) is or has been in a substantive dating relationship with the respondent; or
(vi) is or has been engaged to the respondent.

Substantive dating relationship: A relationship as determined by the court after consideration of the following factors:

(i) the length of time of the relationship;
(ii) the type of relationship;
(iii) the frequency of interaction between the parties; and
(iv) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

Duration of order: 1 year from date of issuance. The order may be renewed upon petition.

Who can file the petition? Either (1) a family or household member or (2) the licensing authority of

the municipality where the respondent resides.

- There is NO duty on a family or household member to file a petition.
- There is NO criminal or civil liability on a family or household member who does not file a petition.
- **NOTE:** In order to apply for an ERPO, the Petitioner does not have to definitely know whether the Respondent has a FID or LTC. Rather the Petitioner's belief that the Respondent possesses firearms is sufficient.

Requirements for filing a petition for an extreme risk protective order:
A petitioner who believes that a person holding a license to carry firearms (LTC) or a firearm identification card (FID) may pose a risk of causing bodily injury to himself or others may file a petition in court on a form furnished by the court and signed under the pains and penalties of perjury.

After Extreme Risk Protection Order Issues

- Clerk magistrate shall notify licensing authority, probation and DCJIS when an extreme risk protection order is issued and when it is terminated.
- DCJIS shall update all federal or state computer data based systems used by law enforcement including National Instant Criminal Background Check System (NICBCS).

Consequences of the issuance of an extreme risk protection order:

- Immediate suspension of the respondent's license to carry firearms or a firearm identification card.
- Police shall immediately notify the respondent of said suspension.
- Respondent shall surrender their license to carry firearms or a firearm identification card and all firearms, rifles, shotguns, machine guns, stun guns or ammunition in their control, ownership or possession to the local licensing authority serving the order. The respondent:

  (i) may transfer any firearms, rifles, shotguns, machine guns, stun guns or ammunition required to be surrendered, or surrendered, by the respondent to a licensed dealer; and

  (ii) may not maintain control, ownership or possession of any firearms, rifles, shotguns, machine guns, stun guns or ammunition during the pendency of any appeal of an extreme risk protection order.

- The licensing authority must file a receipt with the court within 48 hours once the respondent surrenders license to carry firearms or a firearm identification card and all firearms, rifles, shotguns, machine guns, stun guns, weapons or ammunition

Failure to Surrender Firearms: A sworn statement from the petition or a law enforcement officer alleging that the respondent has failed to comply with the order issued. If the court determines that there is probable cause to believe the respondent failed to surrender the firearms, a warrant will issue.

Penalty: a fine of not more than $5,000, or by imprisonment for not more than 2 ½ years in a house of correction, or by both such fine and imprisonment.

	Extreme Risk Protective Order (ERPO)
Who can File?	Family, household member or licensing authority of the city or town the respondent resides.
Duration of ERPO	1 year from date of issuance (can be extended) & Must surrender firearms including stun guns
Venue	Superior Court, District Courts or the BMC
Required Information	Petition must: • Reasons: why respondent may post a risk of causing bodily harm to self or others • Identify: the number, the types and locations of firearms under the respondent's control. • List: If there is 209A, 258E or other legal matter pending.
New Crimes	1. **Violation of an Extreme Risk Protection Order (G.L. c. 140 §131S(f)):** After ERPO is issued, a respondent who fails to surrender their LTC, firearms identification card, firearms, rifles, shotguns, machine guns, stun guns, or ammunition in their control, ownership or possession to their local licensing authority or possesses, accesses or controls these items while an ERPO is in effect. Penalty: $5000 fine or imprisonment in HOC not more than 2 and ½ years or both. ❖ **NOTE**: Additional charge of unlawfully possessing a firearm can be prosecuted under G.L. c. 269 §10. 2. **Improper Storage of firearms (G.L. c. 140S §131 (h)):** Licensing authority may give firearms to a lawful owner, other than a respondent, while an ERPO is in in effect as long as the firearms are properly stored and respondent does not have access. Penalty: $5000 fine or imprisonment in HOC not more than 2 and ½ years or both. 3. **Falsely filing a petition (G.L. c. 140 §131V)** Providing false information in a petition with intent to harass respondent Penalty: no less than $2500 not more than $5000 fine or imprisonment in HOC not more than 2 and ½ years or both.
Requirements for Licensing Authority after ERPO Issues	1. Immediate suspension of respondent's FID or LTC after receiving receipt from clerk magistrate 2. Respondent must be notified and police shall serve respondent with order in hand. 3. Respondent must surrender all firearms and the licensing authority shall provide a receipt to the court. 4. If the ERPO terminates or expires after 30 days, the licensing authority shall notify the petitioner.

RETURN OF SERVICE AFTER HOURS OF EMERGENCY EXTREME RISK PROTECTION ORDER

[DOCKET NO. (See Court Use Only)]

TRIAL COURT OF MASSACHUSETTS

RESPONDENT'S NAME:

RESPONDENT'S ADDRESS:

RESPONDENT'S DATE OF BIRTH:

After Hours Emergency Extreme Risk Protection Order (G.L. c. 140, § 131R(b))

Date of Order: Judge Issuing Order:

Notice to Law Enforcement Officer Serving the Order

You are to serve the above-named Respondent, in hand, with a copy of the Emergency Extreme Risk Protection Order and Petition, if any, and provide written certification of such service by completing the form below and providing a copy to the Clerk-Magistrate of the Court Division indicated on the Order by the next business day after service.

The Petitioner and Respondent confidential information forms are for law enforcement information only, not to be served on the Respondent.

☐ I certify that I have served a copy of the Emergency Extreme Risk Protection Order and Petition, if any, upon the Respondent named above by delivering a copy in hand to the Respondent.

☐ Items Surrendered at Time of Service. ☐ No Items Surrendered

☐ FID Card

☐ License to Carry

☐ Firearms, Rifles, Shotguns, Machine Guns, Stun Guns, or Ammunition, specifically: _____

☐ I was unable to make service because _____

PRINTED NAME OF OFFICER MAKING SERVICE	TITLE/RANK	POLICE DEPARTMENT

SIGNATURE OF OFFICER MAKING SERVICE	DATE AND TIME OF SERVICE

CS 6 (Rev. 8.13.18)

D. Miscellaneous Firearms Cases

Observation of a Firearm in a Home 60 days prior fails to establish probable cause that the firearm is still at the location!

Commonwealth v. Hart*,* 95 Mass. App. Ct. 165, (2019): The Appeals Court held that the observation of a firearm stored in the defendant's home 60 days before the application for a search warrant did not suffice to establish probable cause to believe that firearms, ammunition and related materials would be found at that location. The information regarding the observation of the firearm was stale and it lacked a timely nexus that there was evidence of a continuous illegal presence of weapons in the defendant's residence.

The Appeals Court found the affidavit that was submitted with the warrant application was insufficient. The affidavit provided minimal information about the firearm other than the description that it was a semiautomatic weapon and that the defendant stored the firearm on the floor in a bedroom area of the home. There was no mention as to why the defendant possessed the gun or how he had acquired it. There was no assertion that the gun was used to commit a recent armed offense or was linked to any ongoing course of conduct. Although firearms are said to be more durable than drugs because they are not likely to be consumed or destroyed, a gun's durability fails to adequately support a belief that the firearm will still be in the home two months later. "Here, while the defendant's criminal history is extensive, his most recent arrest for a firearm-related offense was eight years prior to the search in question. The time of the conviction is too remote in time to support probable cause that a firearm would be in his residence or on his person. Similarly, the brother's criminal history does not add more to the probable cause analysis. The Appeals 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."

Firearms Chart

Firearms Violations		
M.G.L. c. 269, § 10(a) (non-large capacity firearms, rifles, shotguns and stun guns)	**Possessing in public or in a vehicle a non-large capacity firearm (handgun), rifle, or shotgun without a License to Carry (required for handgun or stun gun) or an FID card (required for rifle or shotgun).** **§ 10(a) does not apply to possession in home or business, but it does apply in common areas of apartment buildings or businesses.**	**☐ Mandatory minimum** **☐ Mandatory minimum 18-month jail sentence.** **☐ Applies to both handguns and long guns.**
M.G.L. c. 269, § 10(m) (large capacity firearms, rifles, shotguns, and feeding devices)	**Possessing anywhere a large capacity firearm (handgun), rifle, or shotgun; or a large capacity feeding device manufactured before 09/13/1994; without a License to Carry Firearms.**	**☐ Felony** **☐ Mandatory minimum 18-month jail sentence.** **☐ FID card exempts offender from 18-mo. mandatory minimum jail sentence.** **☐ Exemption for LEO**
M.G.L. c. 140, § 131M (assault weapons and illegally possessed large capacity feeding devices)	**Possessing, selling, offering to sell, or transferring an assault weapon as defined in G.L. c. 140, § 121, or a large capacity feeding device, manufactured after 09/13/1994 under any circumstances.**	**☐ Felony** **☐ Exemption for LEO**
M.G.L. c. 269, § 10(c) (machine guns and sawed off shotguns)	**Possessing a machine gun without a machine gun license; or a sawed-off shotgun under any circumstances.**	**☐ Felony** **☐ Life in state prison**

M.G.L. c. 269, § 10(h)(1) (non-large capacity firearms, rifles, shotguns, and ammunition)	**Possessing non-large capacity firearms, rifles, shotguns or ammunition in one's house or place of business without an FID card.**	**☐ Misdemeanor** **☐ Right of arrest**
M.G.L. c. 269, § 10(n) (enhanced penalty for illegally possessing or carrying a loaded weapon)	**Violation of § 10(a) or § 10(c) with a loaded firearm, rifle, shotgun, machine gun, or sawed-off shotgun.**	**☐ "Loaded" means the ammunition is contained in the weapon or within an attached feeding device.** **☐ Must prove the defendant knew the weapon was loaded.** **☐ Cannot charge both § 10(h)(1) and § 10(n) because duplicative.**
M.G.L. c. 269, § 10G [Armed Career Criminal Act sentence enhancement for violations of § 10(a), (c) or (h)]	**(a): Previously convicted of one violent crime or one serious drug offense;** **(b): Previously convicted of two violent crimes, or two serious drug offenses, or one violent crime and one serious drug offense, arising from separate incidences;** **(c): Previously convicted of three violent crimes, or three serious drug offenses, or any combination thereof totaling three, arising from separate incidences.**	**☐ State prison for not less than 3 nor more than 15 yrs.** **☐ State prison for not less than 10 nor more than 15 yrs.** **☐ State prison for not less than 15 nor more than 20 yrs.**
M.G.L. c. 269, § 10H (carrying a handgun while Intoxicated)	**Lawfully carrying a loaded firearm (handgun) while under the influence of alcohol or marijuana, narcotic drugs, depressants or stimulants.**	**☐ Misdemeanor** **☐ No statutory right of arrest** **☐ If the person is If the person is carrying illegally while Intoxicated charge § 10(a) only.**

M.G.L. c. 269, § 10(b) (dangerous weapons)	**Carrying a dangerous weapon on one's person or under one's control in a vehicle. [See G.L. c. 269, § 10(b) for an extensive list of knives, wooden weapons, brass knuckles, etc.]**	**☐ Felony**

Chapter 4: CRIMINAL JUSTICE REFORM BILL

Last April, **S. 2371, "*An Act Relative to Criminal Justice Reform*** was signed into law. The new legislation had a significant impact on Juvenile Justice. The minimum age a juvenile could be charged with a delinquency was increased from age seven to age twelve. Additionally, there were changes to school based offenses and enhanced requirements for school resource officers. However, the most controversial piece of the legislation concerned the amended definition of delinquent child pursuant to **G.L. c. 119, §52**. After the law became effective, the interpretations varied throughout the Commonwealth. Recently, the SJC provided some clarity with respect to what the Legislature intended when it modified **§52** of the delinquent child definition. Below is a quick refresher of where the changes within the Juvenile Justice System after the passage of the Criminal Justice Reform Bill as well as the impact of the ***Wallace*** case.

A. Refresher of the Juvenile Justice Changes

- **Raises the Minimum Age of Delinquency (G.L. c.4 §7):** The minimum age a juvenile can be charged with a delinquent complaint is age twelve. The current law allows delinquent complaints to be issued for juveniles age twelve (12) through age eighteen (18) that commit delinquencies.

- **School Based Offenses:** CJRB states that an elementary or secondary student shall not be ***adjudged delinquent*** for an alleged violation of this section for such conduct within school buildings or on school grounds or in the course of school related events." Since juveniles, cannot be found delinquent, and no delinquency complaint can issue, these offenses are decriminalized.

  - ***Disturbance of a School Assembly*** **G.L. c. 272, §40**: Police cannot arrest or charge a juvenile for Disturbance of a School Assembly or for any such conduct within school buildings or on school grounds or in the course of school-related events.

  - ***1st Offense Disturbing the Peace*** **G.L. c. 272, §53**: Police also cannot arrest a juvenile for a first offense disturbing the peace within school buildings or on school grounds or in the course of school-related events.

- **NOTE:** School Resource Officers will be limited in responding to a student who is out of control within a school. There is no authority to arrest a juvenile for the above offenses. School resource officers should adhere to the parameters of the MOU.

- **Definition of Delinquent Child G.L. c. 119, §52**: "**Delinquent Child**" is defined as 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:

  i. a civil infraction,
  ii. a violation of any municipal ordinance or town by-law, or
  iii. a "first offense" 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."

There were many interpretations about whether a police officer could arrest or charge a juvenile for a misdemeanor offense with a punishment of 6 months or less or fine due to the amended delinquent child definition. After the passage of the Criminal Justice Reform Bill, a juvenile was arrested for unlicensed operation of a motor vehicle. Defense counsel for the juvenile questioned whether the Juvenile Court had jurisdiction to allow the case to proceed. An appeal was filed and the SJC was asked to clarify the meaning of "first offense" misdemeanor as it appears in the delinquent child statute (G.L. c. 119, § 52). The SJC held in ***Wallace*** case what qualifies as "first offense" misdemeanor and developed a process on how first offense misdemeanors would be tracked and determined.

B. Impact of the Wallace Case

- **TRAINING TIP:** Although ***Wallace*** did not directly address a police officer's authority to arrest on first offense misdemeanors, it established that once a juvenile has committed his or her "first offense," the Juvenile Court may exercise jurisdiction over all other offenses including misdemeanor offenses with a punishment of six months or less. **Based on the holding that the Juvenile Court would have jurisdiction over these types of offenses, police powers to arrest, summons or charge a juvenile who commits a misdemeanor offense remains intact.**

Wallace W. v. Commonwealth, 472 Mass. 56 (2019): In August 2018, police arrested the juvenile for Operating a Motor Vehicle Without a License in violation of G. L. c. 90, § 10. After the juvenile's arrest, the officer filed an application for a delinquency complaint with the Juvenile Court. The juvenile had a court history that included dismissed drug and motor vehicle charges, and an open case for Breaking and Entering in the Nighttime with the Intent to Commit a Felony. Probable cause had been found on one or more of these prior charges. The Juvenile Court issued a delinquency complaint on the new charge and scheduled the juvenile for arraignment.

Pursuant to G. L. c. 119, § 52, the juvenile filed a motion to dismiss before he was arraigned. The juvenile argued that the Juvenile Court did not have jurisdiction over the matter because he did not have any prior delinquency adjudications and that the recent charge of unlicensed operation, (G. L. c. 90, § 10), punishable only by a fine, would qualify as a "first offense misdemeanor" under § 52. The Juvenile Court denied the motion to dismiss. The motion judge determined that the unlicensed operation charge was not the juvenile's "first offense" because a clerk-magistrate had previously found probable cause on at least one of the juvenile's prior offenses.

The juvenile was arraigned and he filed an appeal. The key issues that the SJC considered were:

1. What qualifies as "a first offense misdemeanor" in Juvenile Court?

2. How can a "first offense" misdemeanor be proved?

Conclusion: The SJC concluded that the 2018 Criminal Justice Reform Bill amendment to § 52 intended to give juveniles a second chance with regard to a first offense of a misdemeanor that carries a maximum punishment of six months imprisonment or a fine. The Legislature intended to excuse a juvenile's first **isolated** instance of such misconduct by prohibiting the Juvenile Court from exercising jurisdiction over a juvenile's first offense that qualifies as such a misdemeanor.

However, once a juvenile has committed his or her "first offense," the Juvenile Court may exercise jurisdiction over all other offenses not excluded under § 52, including subsequent six months or less misdemeanors. The SJC also ruled that, consistent with the rule of lenity, the term "**first offense**" under § 52 means a first **adjudication of delinquency**. The SJC remanded the case to the Juvenile Court because there is an open case in addition to the unlicensed operation, therefore the Commonwealth may still prove that the motor vehicle complaint is not the juvenile's "first offense" under the statute.

1st Issue: What qualifies as a "first offense misdemeanor" under the amended § 52?

The plain language of § 52 refers to "***a*** first offense misdemeanor," not to a first offense of "*every*" different type of six-months-or-less misdemeanor. See ***Commonwealth v. McLeod***, 437 Mass. 286, 294 (2002).

After reviewing § 52's exclusion of "a first offense misdemeanor," the SJC concluded that it only applies to a juvenile's first offense of a single six-months-or-less misdemeanor meeting the statutory definition, not his or her first offense of every six-months-or-less misdemeanor. The Legislature intended to excuse an isolated instance of more minor misdemeanor-level misconduct, not multiple misdemeanors, or a minor misdemeanor that follows more serious misconduct. It would make little sense, and indeed contravene the Legislature's intent, for a juvenile who had previously been adjudicated delinquent on one or more felonies, or one or more serious misdemeanors, to have a six-months-or-less misdemeanor dismissed as a "first offense."

The SJC emphasized that the purpose of the juvenile justice system "is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward the correction and redemption to society of delinquent children." See ***Commonwealth v. Humberto H***., 466 Mass. 562, 576 (2013); ***Commonwealth v. Magnus M***., 461 Mass. 459, 466 (2012). The rehabilitative purposes of the act recognize the difference between an isolated act of misbehavior, for which a second chance can and should be granted, and a pattern of such misbehavior, which cannot be ignored. Allowing a juvenile to commit a first offense of every individual six-months-or-less misdemeanor would contravene these purposes.

The SJC also noted that the Legislature clearly eliminated all civil infractions and violations of municipal ordinances or town bylaws as predicates for delinquency adjudications. These categorical exclusions stand out in stark contrast from the single exclusion applicable to misdemeanors, which applies only to "a first offense of a misdemeanor" for which the punishment is a fine or imprisonment for six months or less. G. L. c. 119, § 52. The Legislature did not explicitly exclude the first offense of every misdemeanor meeting the statutory definition.

2nd Issue: Under § 52, how is a "first offense" misdemeanor established?

The SJC held that since the statute pertaining to a "first offense misdemeanor is ambiguous," the rule of lenity requires that the juvenile be given "the benefit of the ambiguity." ***Hanson H***., 464 Mass. at 813. After considering the arguments that the Commonwealth and juvenile presented, the SJC determined that the term "first offense" means a first adjudication of delinquency. However, the SJC's interpretation gives the juvenile the benefit of the ambiguity, as it requires a higher showing from the Commonwealth before the Juvenile Court may exercise jurisdiction over a juvenile who has committed a six-months-or-less misdemeanor.

Pursuant to § 52, the amendment creates an exclusion from the jurisdiction of the Juvenile Court. As there is intended to be no jurisdiction over a "first offense" of a six- months-or-less misdemeanor for a juvenile who has not previously been adjudicated delinquent for any offense, it follows that there cannot be a final adjudication of delinquency for the first charged six months or less misdemeanor in any conventional sense, as the charge would be dismissed under § 52 before ever reaching the adjudicatory stage of the proceeding. Consequently, if, as the juvenile argued, a "first offense" under § 52 cannot occur unless there is a prior adjudication of delinquency, and there can never be a final adjudication over the first offense because there is no jurisdiction, the statute would, in effect, create a "Catch-22" and effectively eliminate these misdemeanors as predicates for delinquency adjudications altogether. This is inconsistent with both the statutory language and the legislative intent to allow the Juvenile Court to exercise jurisdiction over repeat offenders.

The SJC offered a mechanism by which a juvenile who demonstrates recurrent delinquent behavior can have his or her "first offense" of a six-months-or-less misdemeanor established, <u>even if it did not result in a prior adjudication of delinquency</u>. The various circumstances in which the Juvenile Court <u>may or may not</u> exercise jurisdiction over an application for a delinquency complaint charging a juvenile with a six-months-or-less misdemeanor under § 52 are as follows:

1. Juveniles with <u>no prior record and a single new charge</u>: A delinquency complaint application charging the juvenile with a single six-months-or-less misdemeanor <u>must be dismissed</u> as a "first offense" under § 52.

2. Juveniles who have <u>previously been adjudicated delinquent for any offense</u>: The adjudications could have occurred on a felony charge, a misdemeanor with a maximum punishment of <u>more than six months</u>, or a misdemeanor charge with a punishment of less than six months that occurred prior to the amendment to § 52. The prior delinquency adjudications could also result from an out of State misdemeanor with six-months-or-less misdemeanor. Under these possible scenarios, a delinquency complaint may issue charging the juvenile with a six- months-or-less misdemeanor. The charges in this example would not be excluded under the statute because the charges would not be the juvenile's "first offense."

3. Juveniles who <u>have not previously been adjudicated delinquent for any offense</u>, but who may have engaged in multiple offenses.

    - a juvenile who has previously had a delinquency complaint application charging the juvenile with a six-months-or-less misdemeanor dismissed as a "first offense" under § 52. **(NOTE: A prior dismissal on the merits cannot provide the basis for a prior adjudication of delinquency.)**

    - a juvenile accused of committing two or more six-months-or-less misdemeanors, or a six-months-or-less misdemeanor and a greater offense or offenses

    - a juvenile who has previously had a charge of a six-months-or-less misdemeanor or a greater offense continued without a finding; and

    - a juvenile with an open case for another six-months-or-less misdemeanor or a greater offense.

In the above scenarios, a delinquency complaint application charging the juvenile with a six-months-or-less misdemeanor may issue upon a finding of probable cause on the charge. However, the Commonwealth must notify the clerk-magistrate prior to the issuance of the complaint that it intends to prove multiple offenses during any subsequent proceedings.

If a delinquency complaint issues on the subsequent six-months-or-less misdemeanor, the juvenile can move to dismiss the complaint prior to arraignment on the ground that the charged conduct is a "first offense" under § 52. See ***Humberto H.,*** 466 Mass. at 576.

A pre-arraignment evidentiary hearing shall then be ordered, and the Commonwealth would have to prove that the charge upon which the complaint has issued is not the juvenile's "first offense" under § 52. **The Commonwealth must prove beyond a reasonable doubt that the juvenile has committed a prior offense**.

If the Juvenile Court finds beyond a reasonable doubt that the juvenile has committed a prior offense, the Commonwealth may proceed to arraignment on the charge upon which the delinquency complaint is based, as such a charge would not be the juvenile's first offense under § 52.

If, the Juvenile Court concludes that the prior offense has not been proved beyond a reasonable doubt, the complaint shall be dismissed as a "first offense" under § 52.

This procedure avoids the "Catch-22" problem that there can never be a second or subsequent offense because every offense is dismissed as a first offense. It also targets repeat juvenile offenders who engage in a pattern of misconduct, not a single isolated instance, in accordance with the Legislature's intent. It also protects the juvenile by ensuring that no complaint charging a juvenile with a six-months-or-less misdemeanor will proceed to arraignment, and the negative consequences accompanying an arraignment will not attach, unless and until the Commonwealth has demonstrated that it is not the juvenile's "first offense" under § 52.

- **TRAINING TIP:** The ***Wallace*** case clarifies what police can do when encountering juveniles who commit a misdemeanor with a punishment of six months or less.

	Authority of Police Post Wallace
Minimum Delinquent Age	• Police cannot arrest, summons or charge a juvenile **under** the age of 12 for violating a bylaw, ordinance or charged any criminal law in Massachusetts. • Juvenile Court still does not have jurisdiction over any juvenile under the age of 12 who commits any civil infractions filed in District Court, violates any municipal ordinances or town bylaws.
"First Offense" Definition clarified	• First offense misdemeanors do not refer to a first offense of every different type of 6 months or less misdemeanor. • First offense misdemeanors cannot follow prior adjudications of delinquency that are dismissed on the merits • Where the juvenile's court history includes a prior dismissal of a six-months-or-less misdemeanor; open charges of either two six-months-or-less misdemeanors or one such charge and a greater offense; a CWOF on a six-months-or-less misdemeanor or a greater offense, or an open case for another six-months-or-less misdemeanor or a greater offense, the Commonwealth must file its intent to prove multiple offenses by proof beyond a reasonable doubt. If successful, the Commonwealth may proceed to arraignment on the delinquency complaint.
Misdemeanor Offenses with 6 months or less	• Police can arrest, summons or charge a juvenile between the ages of 12 through age 18 that commits a misdemeanor that has a punishment of 6 months of less or a fine.
Felonies and misdemeanors with a punishment greater than 6 months	• **NOTE:** CJRB never changed police authority to arrest, summons, or charge a juvenile between the ages of 12 through 18 that commit a felony or misdemeanor with a punishment greater than 6 months.

Decriminalizes School Based Offenses	• Police cannot arrest, summons or charge a juvenile for the following offenses
	  ○ Disturbing a School Assembly or
	  ○ Disorderly Conduct on school grounds or at a school related event.

Changes with Lockup for Juvenile and Notification Procedures	• Police notify parents, guardian or person acting in loco parentis. Police are not required to call probation. • Limits how DYS and DOC place juveniles and prohibits any contact with adult inmates.
School Resource Officer Training	• Subject to annual evaluation • Standard Operating Procedures (SPOs) will define role of SRO in schools

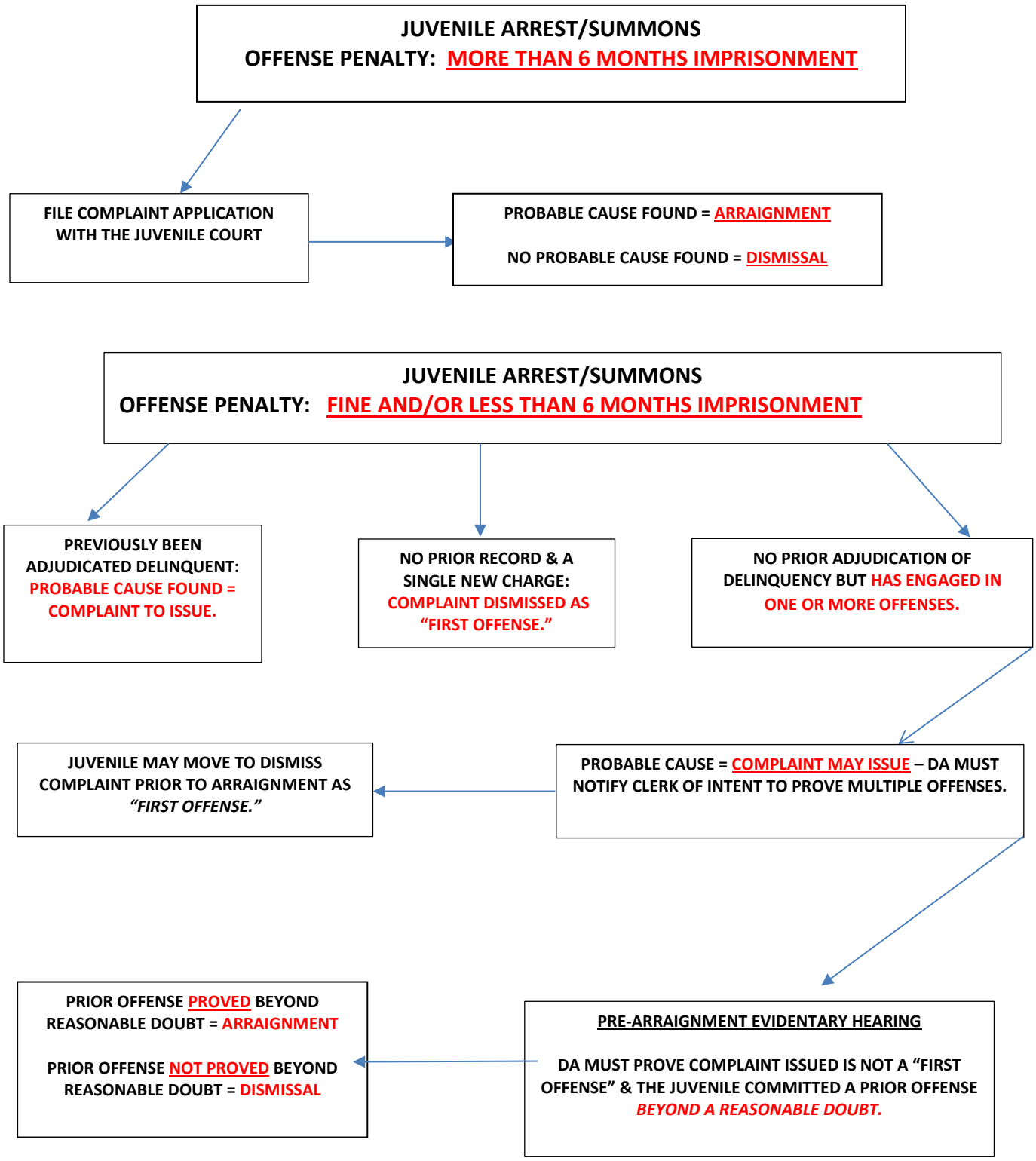
	• Memorandums of Understanding should exist with school and police at a minimum

- **NOTE:** Juvenile Court will determine whether the juvenile has committed a first offense of a misdemeanor through MassCourts.

- The Court's internal record keeping database (MassCourts) will track any charges that are dismissed as a "first offense" under § 52. The records kept internally through are essential when determining whether Juvenile Court has properly exercise jurisdiction over subsequent offenses. These records do not create a CARI record and they are not accessible to the public. **Juvenile Court Standing Order 1-84 (1984) ("All juvenile court case records and reports are confidential and are the property of the court").**

- A second issue that may arise concerns how the Commonwealth can prove that a juvenile in one county committed his or her first offense in a separate county months, or even years, prior. The Commonwealth would be responsible for tracking down evidence and witnesses from other counties. It may be challenging to require witnesses to participate in a proceeding that has no other legal effect than to establish that a first offense has occurred.

JUVENILE ARREST/SUMMONS FLOW CHART



JUVENILE ARREST PROCEDURES

I. ***JUVENILE***

A child under the age of eighteen.

A. *Under Age 12*[3]**:** A juvenile under the age of twelve (12) cannot be charged with a crime.

B. *Age 12 to Age 18*[4]*:* A summons is the *preferred* method for bringing all juveniles to court, unless there is reason to believe the child will not appear upon a summons.

C. *Arrest Warrant*[5]*:* An arrest warrant will issue if the court has reason to believe the child will not appear upon a summons, or if the child has been summoned and did not appear, or if the juvenile violated the terms and conditions of probation.

II. ***DELINQUENT CHILD***

"***Delinquent Child***[6]**"**, 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*****:**

i. a civil infraction,

ii. a violation of any municipal ordinance or town by-law, or

iii. 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.

III. ***SECURE DETENTION***

Is defined as physically detained or confined in a room, set of rooms, or a cell that have the ability to lock an individual within. Secure detention can result from either being placed in such a room and/or from being physically secured to a stationary object such as a cuffing rail/bench.

A. No juvenile between fourteen (14) and eighteen (18) years of age, shall be placed in a cell, unless the cell has been certified by the Department of Youth Services[7].

B. Juveniles that are securely detained in police custody must be separated by sight and sound from adults in custody.

C. A juvenile may not be held in police custody for longer than six (6) hours.

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[3] G. L. 119, *§ 54*
[4] *Id.*
[5] *Id.*
[6] G. L. 119, *§ 52*
[7] G. L. 119, *§ 67*

D. A juvenile should only be held long enough for police to complete the identification and booking process. Once completed, the juvenile should be: a) transported to the juvenile court (during court hours), b) released to his/her parent/guardian/custodian, or c) transported to the Overnight Arrest Program (Nights/Weekends/Holidays). Please refer to sections IV and V of this document.

E. A juvenile placed in Protective Custody, *for ALCOHOL*, ***CANNOT BE SECURELY DETAINED*** for any amount of time.

F. A juvenile placed in Protective Custody, *for Controlled Substances/Toxic Vapors,* ***MUST be transported to an appropriate emergency medical treatment facility.***

G. A juvenile placed in custody in accordance with Child Requiring Assistance (CRA) ***CANNOT be brought back to the police station.***

IV. JUVENILE ARREST – DELINQUENT OFFENSE

A. When a juvenile is placed under arrest, police shall immediately notify at least one (1) of the child's parents, or, if there is no parent, the guardian or custodian with whom the child resides or the Department of Children and Families (DCF) if the child is in their custody.

B. During Court Hours, police must complete the booking process and then transport the juvenile to the Juvenile Court.

C. After Court Hours: There is no longer a statutory requirement for police to contact a Juvenile Probation Officer, and as such, Probation has ceased its on-call program. Therefore, the OIC of the station will make a determination whether to release the juvenile or to detain the juvenile.

i. Release: If a juvenile has been *arrested without a warrant* and the OIC of the police station determines that the juvenile should be released, such release shall be done so upon the acceptance of the written promise from the parent, guardian, custodian or a representative of DCF who will ensure the juvenile's appearance in court.

- The OIC of the police station will provide a date when the court is next open and for the juvenile to appear at 8:30am.

ii. Detain: If a juvenile, between fourteen (14) and eighteen (18) years of age, has been *arrested on a warrant* or if the OIC of the police station *requests in writing for the juvenile to be detained*, the OIC shall contact the Bail Magistrate/Bail Commissioner.

- In accordance with G.L. c. 119, § 67, a juvenile age twelve (12) or thirteen (13) *who has been arrested without a warrant* is prevented from being admitted to bail and therefore must be released to a parent, guardian or custodian. Please refer to section IV(C) (i) of this document.

D. Bail: The Bail Magistrate/Bail Commissioner will set bail and/or terms and conditions of release based on the juvenile's current charge(s), circumstances of the arrest, criminal history and/or as directed by the arrest warrant.

E. A juvenile charged with delinquency offenses ***shall not be held*** in a police lockup or otherwise securely detained for any ***longer than six (6) hours*****.** If the juvenile is placed in a cell, the cell must be a certified cell by the Department of Youth Services[8].

F. The requirement not to release a defendant for six (6) hours when arrested for a violation of G.L. *c.* 209A or G. L. 265, §§ 13M (Domestic Assault or Domestic Assault and Battery) or 15D (Strangulation or Suffocation), ***DOES NOT apply to juveniles.***

G. Juveniles held in police custody must be held sight and sound separate from adult detainees.

H. Within six (6) hours of the arrest, the juvenile must be either: a) transported to the juvenile court, b) released to his/her parent/guardian/custodian or c) transferred to the custody of the Overnight Arrest Program (Nights/Weekends/Holidays).

- The best practice is for the six (6) hour clock to start when the juvenile is placed in police custody and ends when custody is: a) transferred to the juvenile court, b) the juvenile is released to his/her parent/guardian/custodian or c) custody is transferred to the Overnight Arrest Program.

V. JUVENILE – UNABLE TO MAKE BAIL / UNABLE TO BE RELEASED

A. When a juvenile has been charged with a delinquency or youthful offender offense and is unable to make bail or is unable to be released (non-bailable arrest warrant) and court is closed, police must contact the Department of Youth Services (DYS) Central Referral Line at 617-474-8150 or 617-474-8179.

B. DYS will speak with the officer regarding the juvenile's arrest and complete the Statewide Awaiting Arraignment/Overnight Arrest Referral Form. Officers will need to specify the bail amount as it relates to the Bail Fee and Bail. See attached Statewide Awaiting Arraignment/Overnight Arrest Referral Form.

- Bail Fee Only: If a juvenile is being held on a Bail Fee only ($40.00 - Personal Recognizance), DYS has no authority to hold the juvenile in their custody. The OIC of the police station shall inform the Bail Magistrate/Bail Commissioner of this and arrangements will be made to release the juvenile without imposing a Bail Fee.
    - If the juvenile is in the custody of DCF, DCF shall be notified via the DCF Hotline to take custody of the juvenile.
    - If a parent a parent, guardian or custodian refuses to take custody of a juvenile who is otherwise eligible to be released, the officer shall file a 51A and notify DCF via the DCF Hotline for placement.

C. DYS will provide the officer with the location of the Overnight Arrest Program.

[8] G. L. 119, § 67

- If the juvenile is *suffering from any medical condition(s),* (such as; under the influence drugs/alcohol, suicidal thoughts, pepper sprayed or tasered) he/she *must be medically cleared prior to placement*.

- Police are responsible for obtaining any current medications for the juvenile.

- Police must provide a copy of the Booking Sheet prior to placement.

- It is the police department's responsibility to transport the juvenile to the Overnight Arrest Program as well as transport the juvenile from the Overnight Arrest Program to the Juvenile Court.

D. ***Jenkins Hearing:*** If a juvenile is arrested without a warrant and held in custody (to include while being held at the Overnight Arrest Program), for more than twenty-four (24) hours, he/she is entitled to a *Jenkins Hearing* to determine whether or not there was probable cause to make the arrest and to continue to hold the juvenile. *Jenkins v. Chief Justice of the District Court*, 416 Mass. 221, 223 (1993).

- The bail magistrate/bail commissioner that set bail on the juvenile cannot be the same magistrate/commissioner who conducts the *Jenkins Hearing.*

- Officers must call a magistrate/commissioner, if the juvenile will be held over twenty-four (24) hours, to facilitate a *Jenkin's* determination of probable cause to continue to hold the juvenile.

JUVENILE ARREST
DELINQUENT OFFENSES

Notification

The OIC shall notify:

- One of juvenile's parent(s), if no parent, then
- Guardian/Custodian with whom juvenile resides, or
- DCF if the juvenile is in their care & custody

Release: If a*rrested without a warrant* and the OIC determines that the juvenile should be released, release the juvenile upon the written promise from the parent, guardian, custodian or DCF representative who will ensure the juvenile's appearance in court when the court is next open.

Detain: If a juvenile (between 14 & 18 years of age) has been *arrested on a warrant* or if the OIC of the police station *requests in writing for the juvenile to be detained*, the OIC shall contact the Bail Magistrate/Bail Commissioner who will set bail and/or terms and conditions of release based on the juvenile's current charge(s), circumstances of the arrest, criminal history and/or as directed by the arrest warrant.

- A juvenile age twelve (12) or thirteen (13) who has been arrested without a warrant cannot be admitted to bail and therefore must be released to either a parent/guardian/custodian.

Juveniles who are Unable to Make Bail or Unable to be Released

- Complete the Booking process.
- The juvenile must be separated by sight and sound from adults in custody.
- No juvenile between fourteen (14) and eighteen (18) years of age, shall be placed in a cell, unless the cell has been certified by the Department of Youth Services. G. L. c. 119, § 67.
- **The juvenile CANNOT be held in police custody for more than six (6) hours.**
- Police must contact the DYS Referral Line for placement of the juvenile in the Overnight Arrest Program (Nights/Weekends/Holidays): (617) 474-8150 or (617) 474-8179
    - DYS will not take custody of a juvenile being held on a Bail Fee only ($40.00 - Personal Recognizance). The Bail Magistrate/Bail Commissioner shall be notified to release the juvenile without imposing a Bail Fee.
- Transport the Juvenile to the Overnight Arrest Program as directed by DYS. Police must provide a copy of the Booking Sheet prior to placement.
- If suffering from any medical condition, the juvenile must be medically cleared prior to placement. Police must bring any prescription medications prescribed to the juvenile.
- Conduct a **Jenkins Hearing** if the juvenile was arrested without a warrant and will be held longer than 24 hours, including while being held at the Overnight Arrest Program.
- Police must transport the Juvenile from the Overnight Arrest Program to the Juvenile Court.

Statewide Awaiting Arraignment/Overnight Arrest Referral Form

Police Department: _____ Date: _____
Police Contact: _____ Time of Call: _____
Police Department Phone Number: _____
Youth's Name: _____
Youth's Date of Birth: _____ Age: _____ Sex: Male / Female
Guardian Phone Contact Information: _____
Charges:
_____
Where did charge occur? Home, School, Community or Residential Placement
If Residential Placement Name: _____ Bail Clerk: _____
Bail Amount: Fee _____ Bail _____
If fee only DYS does not take these youth. Police call Parent/Guardian or DCF hotline for placement.
If No Bail, Why? Warrant: Default, Superior Court, Violation of Probation

SCOA Screening Referral From P.D.	Questions	Screening at Placement
Yes/No	Does Youth need medical attention?	Yes/No
List All Medications:	What medications is the youth on? Police must bring medications with youth to placement.	Verify Medications:
Yes/No	Is youth suicidal or talking of hurting themselves? (If yes must be screened by MBHP personnel)	Yes/No

Yes/No	Does youth appear to be under the influence of any Drugs, Alcohol? (If yes must be screened by Emergency Room Personnel)	Yes/No
Yes/No	Is co-defendant or victim also being referred to program? (If yes, additional placement options will be considered)	Yes/No

SCOA Staff: _____ Placement Staff:_____

Time of Arrival: _____ Transporting Officer's Name: _____

Booking Sheet must be received by placement prior to accepting youth.