COMMONWEALTH OF MASSACHUSETTS

MPTC

Municipal Police Training Committee

Legal Update

In-Service Training 2025 | *The First Amendment*


HELLO
My Name
is

TOPICS TO BE COVERED

- Constitutional Law
- Criminal Law
- Criminal Procedure

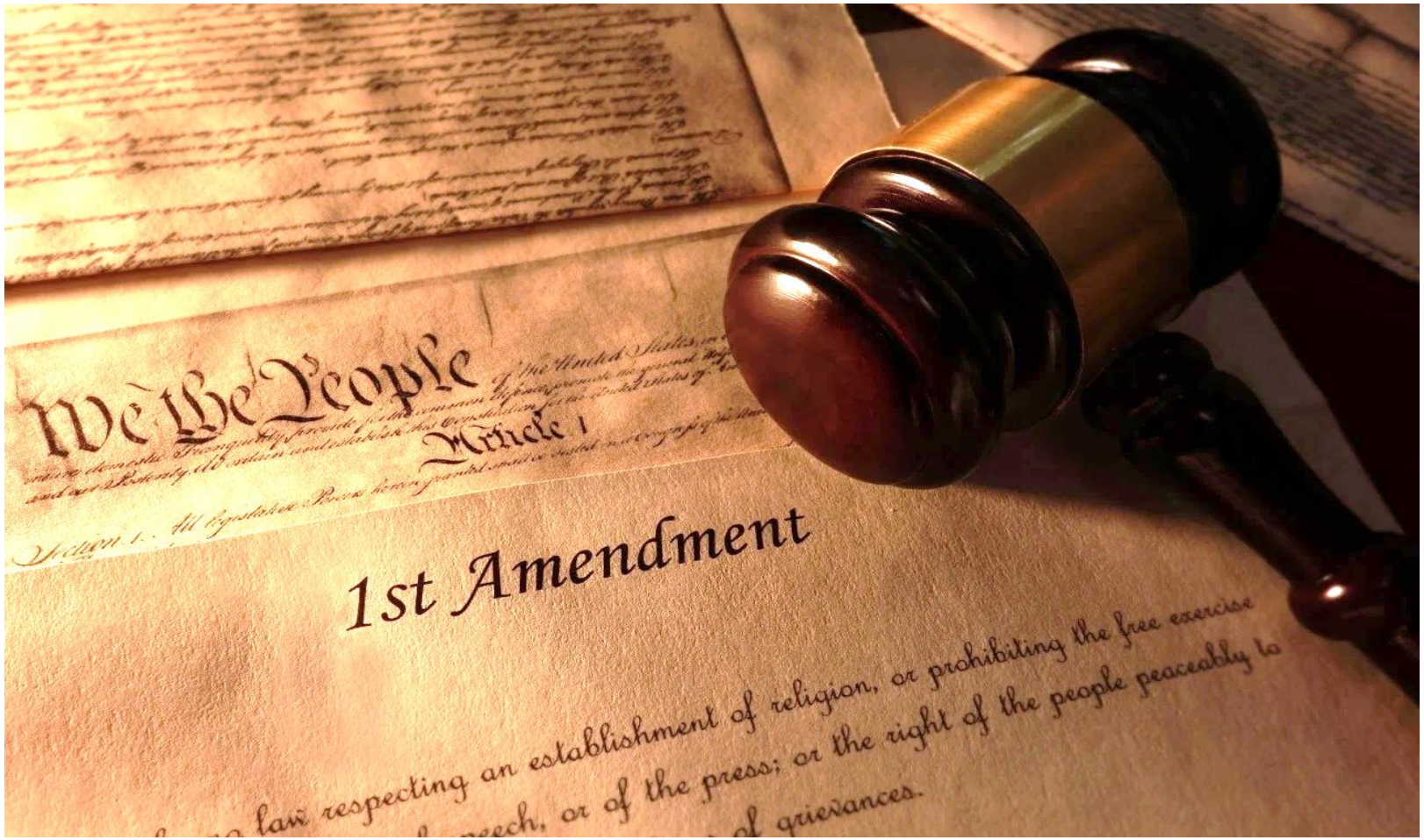


CONSTITUTIONAL LAW



- First Amendment
- Fourth Amendment
- Fifth Amendment

FIRST AMENDMENT



FIRST AMENDMENT

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.

TRUE THREATS

Counterman v Colorado

- 2014 – 2016 Counterman contacting singer over Facebook; Singer blocked him
- Charged under Colorado law

"repeatedly …make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person to suffer serious emotional distress."

Does the First Amendment require States to prove in a criminal case that a person is aware of the threatening nature of their statements?

Limiting the First Amendment's Guarantee of Free Speech

Two-part analysis:

- Is there a governmental interest served by the restriction
- Is the statute narrowly tailored so that it restricts an individual's freedom only as much as is necessary to satisfy the governmental interest

- Categories of speech not protected by the First Amendment
  - Incitement
  - Defamation
  - Obscenity
  - True threats

Does the First Amendment require States to prove in a criminal case that a person is aware of the threatening nature of their statements?

Does the First Amendment require States to prove in a criminal case that a person is aware of the threatening nature of their statements?

YES

THREATS IN MASSACHUSETTS

Four Elements:

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

VIOLATION OF POLICE ORDERS

Commonwealth v. Manolo M.

- Early release at Brockton HS
- Manolo M. tried to get by officers; “Let’s go mother F’er, let’s go;” resisted arrest
- Frederick: “I aint moving shit”; resisted arrest
- Manolo M. charged with ABPO
- Manolo M., Frederick, and Angela charged with resisting arrest

Did Commonwealth prove the charges against Manolo M.?

Were Frederick and Angela’s actions protected by the First Amendment?

DID COMMONWEALTH PROVE THE CHARGES AGAINST MANOLO M.?

Assault and Battery on a Police Officer

Resisting Arrest

1. That the defendant prevented or attempted to prevent a police officer from making an arrest of the defendant or another;

2. That the defendant did so knowingly; and

3. That the officer was acting under color of their official authority at the time.

Were Frederick and Angela's actions protected by the First Amendment?

Resisting Arrest

1. That the defendant prevented or attempted to prevent a police officer from making an arrest of the defendant or another;

2. That the defendant did so knowingly; and

3. That the officer was acting under color of their official authority at the time.

“ACTING UNDER COLOR OF LAW”



A police officer acts under “color of official authority” when,
in the regular course of assigned duties,
they make a judgment
in good faith, based on the surrounding facts and circumstances, that
they should make an arrest.

Were Frederick and Angela’s actions disorderly conduct or protected speech?

WERE FREDERICK AND ANGELA'S ACTIONS DISORDERLY CONDUCT OR PROTECTED SPEECH?

In deciding whether to arrest, police officers often make split-second judgments, and the decision whether conduct – such as standing in the street, repeatedly failing to comply with police orders to disperse, and encouraging others to stay on a chaotic scene – is afforded First Amendment protection requires a finely nuanced analysis of the particular facts.

WERE FREDERICK AND ANGELA'S ACTIONS DISORDERLY CONDUCT OR PROTECTED SPEECH?

Frederick

- Some actions were protected
- First Amendment does not entitle him to ignore "police commands reasonably calculated at ensuring public safety amid potentially dangerous circumstances."

Angela

- First Amendment protects right to record police
- Angela did more

WERE FREDERICK AND ANGELA'S ACTIONS DISORDERLY CONDUCT OR PROTECTED SPEECH?

To be sure, the ability to film police officers carrying out their official duties in public is protected by the First Amendment, and Angela was free to do so. However, such conduct may be limited by reasonable time, place, and manner restrictions, such as requiring Angela to film from a safe distance away from a chaotic and volatile scene, and in a manner that caused no interference with the officers' performance of their duties.

CRIMINAL HARASSMENT

Commonwealth v. Salvatore

- Victim applied for criminal complaint against girlfriend's ex for harassment
- Clerk's hearing; defendant showed up in town; 170 posts in 60 days; anxiety, fear, embarrassment
- Complaint issued; Court dismissed for lack of probable cause

Did testimony at Clerk's hearing establish probable cause for harassment?

CRIMINAL HARASSMENT

Elements

1. That the defendant engaged in a knowing pattern of conduct or speech, or series of acts, on at least three separate occasions;
2. That the defendant intended to target the victim with harassing conduct or speech, or series of acts, on each occasion;
3. That the conduct or speech, series of acts, were of such a nature that they seriously alarmed the victim;
4. That the conduct or speech, or series of act were of such a nature that they would cause a reasonable person to suffer substantial emotional distress; and
5. The defendant committed the conduct or speech, or series of acts willfully and maliciously.

CRIMINAL HARASSMENT AND FREE SPEECH

Based on the content, frequency, duration, and escalating obsessiveness of the defendant's statements, a fact finder could view them as objectively threatening and, as such, unprotected speech.

When it is unclear whether speech was protected, it is not appropriate to make that determination at the motion stage.

CRIMINAL HARASSMENT AND FREE SPEECH

In a prosecution for criminal harassment under § 43A based solely on a defendant's speech, if it cannot be concluded that, as a matter of law, the speech at issue is constitutionally protected speech, the question whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide.

FOURTH AMENDMENT



FOURTH AMENDMENT





- Search Warrants
- Curtilage
- Reasonable Suspicion
- Patfrisks
- Racial Profiling





FOURTH AMENDMENT

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.

SEARCH WARRANT: NEXUS

Commonwealth v. Lewis

- Drug investigation; defendant selling out of his apartment; controlled buys; SW
- Defendant moved downtown; controlled buy; SW for hotel room

Did police establish a nexus between the criminal activity and the hotel room?

SEARCH WARRANT: NEXUS

Nexus

Not required to prove items are more likely than not to be found there

It must provide merely that quantum of evidence from which the magistrate can conclude, applying common experience and reasonable inferences, that items relevant to apprehension or conviction are reasonably likely to be found at the location

SEARCH WARRANT: NEXUS

Nexus between drug dealing and apartment does not establish nexus between drug dealing and new residence

<u>Nexus between criminal activity and hotel room</u>

Three controlled buys/2 weeks = supply

selling cocaine out of apartment

3rd controlled buy – defendant went from hotel and returned to hotel

SEARCH WARRANT: NEXUS

However, where, as here, there is evidence that the defendant was conducting an illegal drug operation out of one residence, and then moved to another location from which he continued to provide an on-demand crack cocaine business using the same telephone number, nothing in our case law requires the police to ignore the earlier evidence and start over from a blank slate.

SEARCH WARRANT: ANY PERSON PRESENT

Commonwealth v. Cintron

- Drug investigation; SW for Gasper's house and any person present
- Police arrived 5:30 PM; defendant pulls up at 6:15 PM; in house 10 minutes; standing in driveway
- Gasper leaves house; gets in truck; officers converge on area
- Defendant tackled in street; 4.5 grams of fentanyl in pocket

Was the defendant "present" at the time of the search?

SEARCH WARRANT: ANY PERSON PRESENT

A search warrant authorizing the search of any person present can only be valid where the underlying circumstances presented to the issuing judge or clerk clearly demonstrate probable cause to search the named premises and to believe that all person present are involved in the criminal activity afoot…Even where the warrant authorizes the search of any person present, the police must limit such searches to those within the scope of the probable cause.

SEARCH WARRANT: ANY PERSON PRESENT

Was the defendant “present” at the time of the search?



When did search begin?

SEARCH WARRANT: ANY PERSON PRESENT

The execution of a search warrant is not a single moment in time, but rather a process, which can be lengthy depending on the scope of the search and the surrounding circumstances. As this case demonstrates, police often delay announcing a search to minimize the danger to everyone involved. Here, the police waited until the target had left the house, thus reducing the risk of violent resistance. This seems like a sensible practice, and it would be unwise for us to create disincentives to the police's executing a search warrant in the safest possible fashion.

SEARCH WARRANT: ANY PERSON PRESENT



CAUTION



"We do not decide when, if ever, a search pursuant to an any person present provision in a search warrant would be proper where a person present had left the environs of the property or the view of the police prior to the search."

SEARCH WARRANT: NEXUS

Commonwealth v. Robinson

- Barber shop closing; owner lecturing defendant; defendant shot owner
- Witness statements taken; photo arrays; defendant identified
- Defendant arrested; SW granted for his apartment for clothes, handgun
- SW executed at apartment: Polo shirt and necklace seized

Was there probable cause to believe evidence would be found at the defendant's apartment?

SEARCH WARRANT: NEXUS

To establish probable cause, the facts of the warrant affidavit and the reasonable inferences that may be drawn from them must contain enough information for an issuing judge to determine that the police seek items related to criminal activity and that the items described reasonably may be expected to be located in the place to be searched at the time the warrant issues.

SEARCH WARRANT: NEXUS

- Defendant identified by witnesses
- Clothing description given (Polo shirt, leather jacket, black pants, silver chain)
- Defendant arrested that night wearing leather jacket
- Defendant arrested near his apartment
- Clothing items of durable utility to defendant; not inherently incriminating

Reasonable to conclude clothing items would be at his home

SEARCH WARRANT: NEXUS

What about nexus to firearm and ammunition?



- Discharged firearms inherently incriminating

SEARCH WARRANT: CELL PHONE

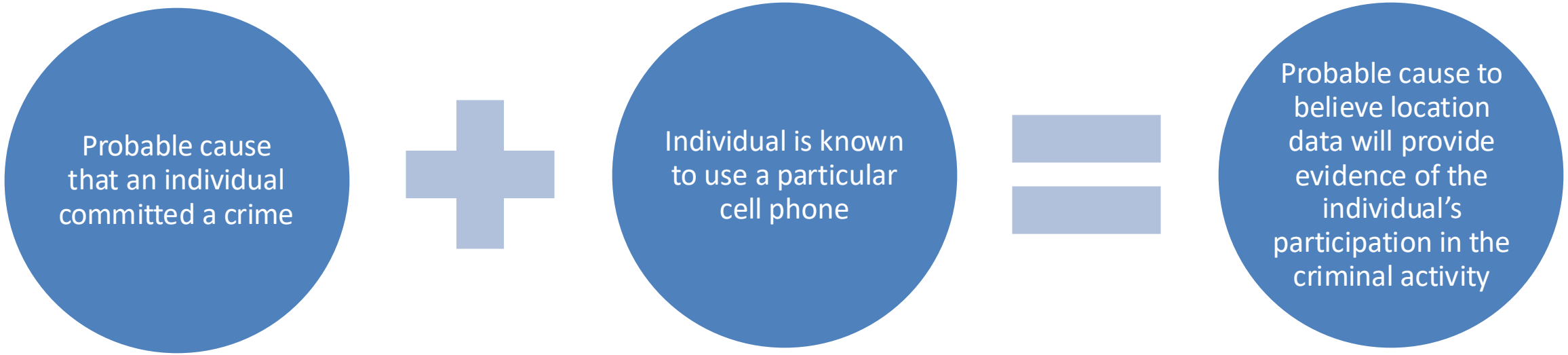
Commonwealth v. Janvier

- Nov 10, 2020 – Nov 27, 2020: string of A&Bs in Waltham; Witness recognized defendant
- Nov 22: Police contacted defendant using 781-phone number
- Dec 7: a victim recognized defendant in parked car;
- Dec. 11: arrest warrant issued; defendant arrested in car; 857-number provided
- SW for car: machete, gun, cell phone; cell phone activated by 857-number.
- SWs issued for phones (Dec: location info; Jan: content)

Was there a nexus between the cell phone numbers and the criminal activity?

SEARCH WARRANT: CELL PHONE

Reasonable to infer location of phone is location of owner



SEARCH WARRANT: CELL PHONE



Staleness

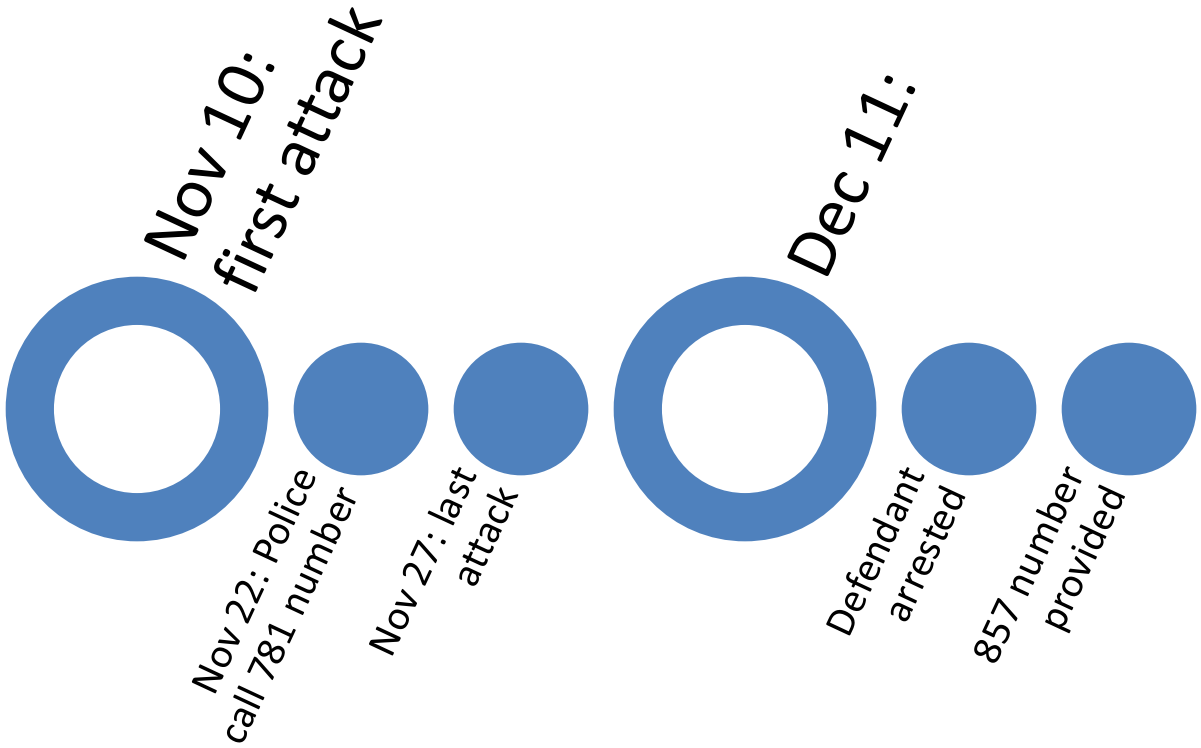
Must link number/phone to defendant at relevant time

Are cell phones perishable or durable?

SEARCH WARRANT: CELL PHONE

Cell phones are durable goods, of enduring use, and not inherently incriminating. Similarly, although there may be exceptions, it is reasonable to infer that most cell phone users retain their phone numbers for indefinite lengths of time to maintain social ties and business relationships.

SEARCH WARRANT: CELL PHONE



First SW: location data for both phones Nov 10 – Nov 28

LOCATION DATA FOR 781-NUMBER

As it can generally be inferred that people keep the same mobile phone number for extended periods of time to maintain contact with family, friends, and business associates, we readily infer that the defendant had been using the 781 number for at least twelve days before he appeared at the police station.

Defendant's financial difficulties did not change the result

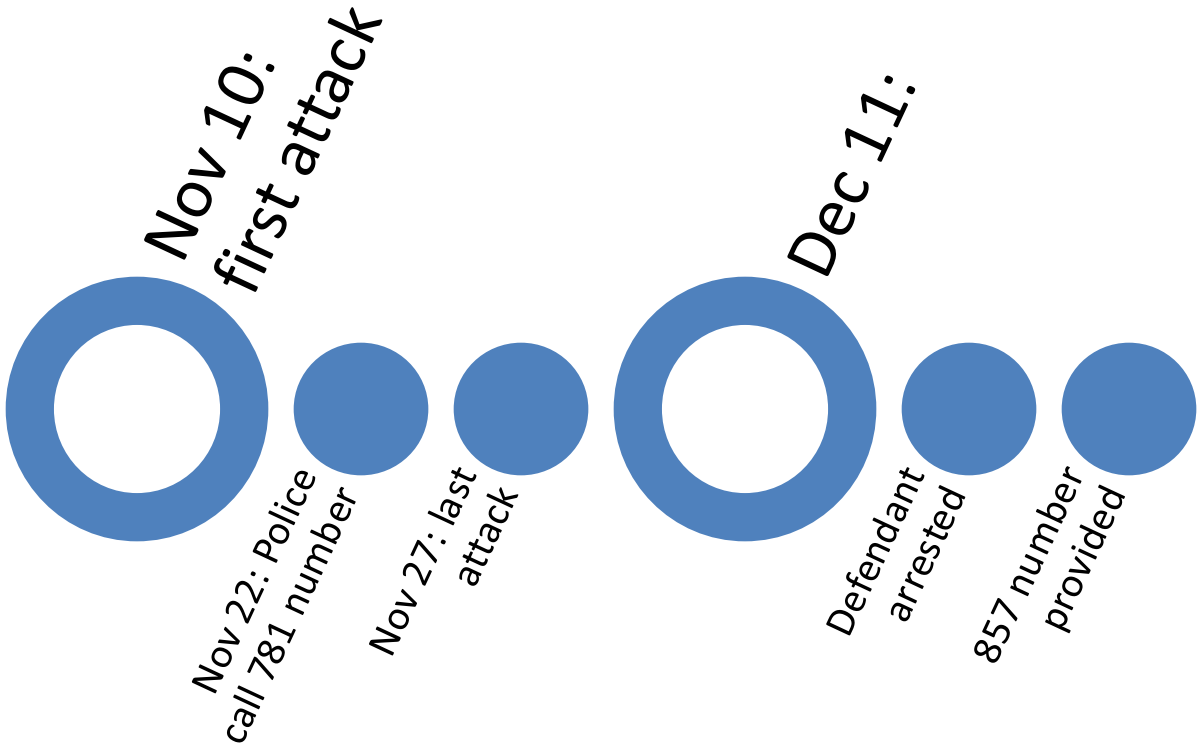
LOCATION DATA 857 NUMBER

For the purposes of this case, we need not determine the outer limit of the likely duration of use of any given mobile phone number. Considering the few cases on point [Hobbs and Lavin], and the durability of mobile phone numbers in general, as discussed supra, we think that slightly more than one month is within that limit.

SEARCH WARRANT: CELL PHONE

We conclude that the affidavit provided a substantial basis to believe that location information associated with the 857 number - or the 781 number, or both – would be reasonably likely to provide evidence of the defendant's whereabouts during the relevant time period.

SEARCH WARRANT: CELL PHONE



Second SW: content of phone including location information

SEARCH WARRANT: CELL PHONE

We have no difficulty concluding that location data associated with this cell phone would be reasonably likely to provide information about the defendant's whereabouts during the entire crime spree.

SEARCH WARRANT: CELL PHONES



CAUTION



The affiant describes Zetx as a ‘free phone look up tool.’ Zetx is not available to the general public…The term “Zetx” has not been used in any case of the Supreme Judicial Court or this court and the affidavit does not explain its reliability. It might behoove future affiants to provide that information. For purposes of this appeal, I accept that Zetx is reliable.

CURTILAGE

Commonwealth v. Wittey

- Friend finds victim's body in home; tire tracks under friend's car
- Troopers go to defendant's house; long driveway; no gate
- Two cars in driveway; Sienna's tread marks matched; Becks, sleeping bag and another bag inside car
- SW for home and Sienna; affidavit included observations about the car

Were observations made of car in the driveway an unwarranted search?

WHAT IS CURTILAGE?



If an area is so intimately tied to the home itself than an individual reasonably may expect that the area in question will be treated as the home itself, it will be considered part of the curtilage.

CURTILAGE

Factors to consider:

1. the proximity of the area to the home
2. whether the area is included within an enclosure surrounding the home
3. the nature of the uses to which the area is put
4. steps taken by the resident to protect the area from observation by people passing by.

DRIVEWAYS







DRIVEWAYS

Commonwealth v. Simmons	Car visible, no “no trespassing” signs; driveway was normal way to access the home; car parked 1-2 ft from driveway across path leading to door
Commonwealth v Butterfield	Car visible from street; driveway not enclosed
Commonwealth v. Fernandez	Driveway wide enough for one car; long enough for two cars; driveway next to three-family home where defendant lived; no need to traverse driveway to get to front door; only cars to use the driveway were the defendants; fence separated driveway from building next door; car visible to street; could not look inside the car from street or path to front door.
Collins v. Virginia	Motorcycle in driveway; few yards beyond front edge of home; enclosed on three sides; access to enclosed area by side door; steps to front door before the enclosure; covered by a tarp

APPLICATION OF THE DUNN FACTORS HERE

1. the proximity of the area to the home – set back; long driveway; parked close to home

2. whether the area is included within an enclosure surrounding the home – home and driveway flanked by trees; no gate/fence

3. the nature of the uses to which the area is put – parking; visitors had to use driveway to access home

4. steps taken by the resident to protect the area from observation by people passing by – visible from street; no gate/fence

REASONABLE SUSPICION

Commonwealth v. Castillo-Martinez

- Surveillance at Liberty Tree Mall; experience officer; known drug area
- Mercedes pulled up; parked 10 minutes; drug dealer
- Subaru parks; defendant gets in Mercedes; exits with plastic bag
- Officer approached defendant; gives up plastic bag with 50 vials of THC

Was there reasonable suspicion to stop the defendant?

REASONABLE SUSPICION

To stop an individual an officer must have reasonable, articulable suspicion that the person has committed, is committing, or is about to commit a crime.

SANTALIZ FACTORS

1. The observation of an unusual transaction;
2. Furtive actions by the individuals involved;
3. Event occurred in a location where police know drug transactions are common; and
4. An experienced officer observed the event and believed it was consistent with a street-level drug transaction

REASONABLE SUSPICION

Information from Gloucester officer:

We think it a commonsense proposition that an experienced police officer is not merely repeating local gossip or base rumor when passing specific information about a person's reputation for criminal behavior to another officer. The Danvers detective thus reasonably could have relied on the information from the Gloucester detective as a factor, albeit not as weighty as his own observations and experience, supporting his reasonable suspicion that the defendant and Combs had engaged in a drug transaction.

EXIT ORDER AND PATFRISK

Commonwealth v. Powell

- 2:22PM July 22, 2019: Shooting in Roxbury; white sedan leaving area
- BOLO flyer goes out
- 12:00AM July 24: officer sees car; 2 occupants; parked at restaurant; defendant went into restaurant
- Defendant exits; officers approach; exit order and patfrisk; semiautomatic firearm found

Was the exit order lawful?

Was the patfrisk lawful?

BOLO

Detectives are seeking information on the above pictured MV [motor vehicle], a white 2017 Ford Fusion registered to Kayla Evans. The occupants were possibly involved in a shooting that occurred earlier today, 7/22/19, at approximately 2:22 PM. in the area of Mt. Pleasant Ave/Vine St. If encountered, please FIO the occupants and tow the MV to B2. Officers are advised to use caution, as this MV may have ties to Heath St.

A suspect is not wanted at this time. If this MV is located, please stop and hold and contact B2 Detectives.

EXIT ORDER

An exit order is justified during a traffic stop where:

(1) police are warranted in the belief that the safety of the officers or others is threatened;

(2) police have reasonable suspicion of criminal activity; or

(3) police are conducting a search of the vehicle on other grounds.

EXIT ORDER

Was the exit order lawful in this case?

(1) police are warranted in the belief that the safety of the officers or others is threatened **No**

(2) police have reasonable suspicion of criminal activity **No**

(3) police are conducting a search of the vehicle on other grounds **??**

EXIT ORDER

Was exit order lawful in this case?

(3) police are conducting a search of the vehicle on other grounds

- Car described with particularity
- Car involved in shooting 34 hrs prior
- Probable cause to believe evidence would be in the car?

PATFRISK

To conduct a patfrisk, officers must have reasonable suspicion to believe that a suspect is armed and dangerous.

- Shooting 34 hrs prior
- Car involved in shooting
- Defendant not linked to shooting
- No suspicious movements; compliant

PATFRISK

The fact that the car was used in a shooting did not provide reasonable suspicion that an armed shooter or shooters were still in the car thirty-four hours later.



RACIAL PROFILING

Commonwealth v. Stroman

- 2AM Nov. 25, 2019; license plate not illuminated; stop
- MDT; photo of owner; Black male; outstanding warrant
- Approach; Defendant owner/drive; arrest; patfrisk; gun
- Motion to suppress: violation of equal protection
  - Officer's citations Nov. 2018 – Nov. 2020
  - Census data
  - New Bedford Police directive adopted 2006

RACIAL PROFILING

Commonwealth v. Stroman

- 2AM Nov. 25, 2019; license plate not illuminated; stop
- MDT; photo of owner; Black male; outstanding warrant
- Approach; Defendant owner/drive; arrest; patfrisk; gun
- Motion to suppress: violation of equal protection
  - Officer's citations Nov. 2018 – Nov. 2020
  - Census data
  - New Bedford Police directive adopted 2006
  - Officer did not see race, gender of occupants before the stop

RACIAL PROFILING

Judge's findings:

- Defendant made threshold showing of discriminatory enforcement
- Officer's testimony was "credible in all respects"
  - Race was not a factor
  - Did not know race/gender of occupants prior to stop
  - Offended by being accused of racial profiling

"Based on the totality of the circumstances, the evidence presented by the Commonwealth sufficiently demonstrates the stop was not motivated by racial bias."

SELECTIVE ENFORCEMENT

- “Notoriously hard to prove.”

- Commonwealth must do more than show a valid reason for the stop.

Rather, it would have to grapple with all of the reasonable inferences and all of the evidence that a defendant presented, and would have to prove that the stop was not racially motivated.

LONG FACTORS

1. patterns of enforcement by the particular police officer
2. the regular duties of the officer involved in the stop
3. the sequence of events prior to the stop
4. the manner of the stop
5. the safety interests in enforcing the motor vehicle violation
6. the specific police department's policies and procedures regarding traffic stops

SELECTIVE ENFORCEMENT

Totality of the circumstances

- Statistical data not conclusive
- Census date unreliable
- Zero-tolerance directive played no role
- Officer's offense at accusation of little relevance
- Relevance of officer's Hispanic heritage is more complicated

SELECTIVE ENFORCEMENT

- Race/ethnicity/nationality of witness has no bearing on credibility
- Race and ethnicity are relevant to interactions between police and the public
- Court must be careful to rely on competent evidence and not stereotypes
- Subjective motivation
  - Question is not whether a reasonable officer would have stopped the defendant
  - Question is whether this officer actually chose to stop the defendant's car because of the defendant's race.

SELECTIVE ENFORCEMENT

Nothing in this opinion should be taken to suggest that police officers can defeat claims of selective prosecution in traffic stops simply by testifying that they did not know the race of the driver before they made the stop. Ultimately, the judge holding the evidentiary hearing must, as the judge did here, carefully assess the officer or officers' credibility and determine – under the totality of the circumstances, and in light of the factors that created the reasonable inference of discrimination requiring an evidentiary hearing in the first place, whether the stop was truly made without knowledge or consideration of race.

Motion to suppress properly denied.

RACIAL PROFILING: PEDESTRIAN STOPS

Commonwealth v. Robinson-Van Rader

- 7:30 PM: Reports of gunshots near HQ; two Black males in hoodies left on bikes
- Dispatch: two males in black sweatshirts on bikes
- Detail officer ½ mile away sees two Black males wearing black shirts on bikes; pedaling slowly as if tired
- Youth violence strike force officers go to area; speak to detail officer; no information about age, height, weight, build, hairstyles, facial features
- Strike force officers saw two Black males wearing hoodies; only a few people outside; only these two were wearing hoodies
- Strike force officers drove by the males
- Males continuously looking over their shoulders toward HQ

RACIAL PROFILING: PEDESTRIAN STOPS

- Officers pulled beside males; unmarked car; “Boston Police” tactical vests; two officers approach the males; “hold up a second”
- Companion asked if he had anything on him; turned sideways; patfrisk; firearm
- Defendant sweating; looking toward HQ; hand in pocket of sweatshirt
- When gun found, officer grabbed defendant; secured; patfrisk; gun
- Males arrested seven minutes after reports came in 8/10 of a mile from HQ
- Motion to suppress; statistical evidence introduced

Was stop in violation of equal protection?

REASONABLE SUSPICION

A stop of an individual is justified if the police have reasonable suspicion, based upon specific and articulable facts, that the person has committed, is committing or is about to commit a crime.

When was defendant stopped?

REASONABLE SUSPICION

A stop of an individual is justified if the police have reasonable suspicion, based upon specific and articulable facts, that the person has committed, is committing or is about to commit a crime.

When was defendant stopped?

When officers in tactical gear told him to "hold up a second."

REASONABLE SUSPICION

- Generic description
- Two Black males wearing hoodies riding bikes in a particular direction
- Males stopped were not on bikes
- Nervous: looking over their shoulders when not being followed, unaware of police presence
- Only ones in area wearing hoodies
- Time and location make sense with crime location
- Nature of crime: shooting in densely populated area

NERVOUS

Caution must be exercised in considering nervous or evasive behavior in the calculus of reasonable suspicion. In some instances, the fact that members of certain groups – such as Black males in Boston – have been disproportionately and repeatedly targeted for police encounters suggest a reason for flight or evasive conduct unrelated to any possible consciousness of guilt.

REASONABLE SUSPICION

- Stop was justified
- Generic description plus additional factors properly narrowed the search

Was stop in violation of equal protection?

EQUAL PROTECTION

Selective Prosecution

The decision to charge someone with a crime is based upon impermissible criteria such as race, national origin, or gender.

Selective Enforcement

When law enforcement utilizes practices that unjustifiably target an individual for investigation based upon their membership in a protected class, such as race.

COMMONWEALTH V. LONG

- Motor vehicle stop
- Defendant burden: reasonable inference that traffic stop motivated by race
  - Not required to provide statistical evidence
- Commonwealth burden: rebut inference by establishing a race-neutral reason for the stop

Does Long apply to all stops?

COMMONWEALTH V. LONG

Does Long apply to all stops?

YES

We conclude that the equal protection standard established in Long for traffic stops applies equally to pedestrian stops and threshold inquiries, as well as other selective enforcement claims challenging police investigatory practices.

SELECTIVE ENFORCEMENT

Totality of circumstances

- patterns of enforcement
- events that preceded the stop
- Seriousness of the crime
- Whether membership in protected class was part of description of the suspect

Was stop in this case violation of equal protection?

SELECTIVE ENFORCEMENT

Defendant's burden

- Met by statistical evidence

Commonwealth's burden

- 911 caller: two Black males riding bikes from scene
- two Black males seen within minutes by detail officer
- time and location made sense

SELECTIVE ENFORCEMENT

To be sure, the constitutional basis for the stop is not sufficient, standing alone, to rebut an inference of selective enforcement. The burden shifts to the Commonwealth to grapple with all of the reasonable inferences and all of the evidence that a defendant presented and would have to prove that the stop was not racially motivated.

Commonwealth met its burden of rebutting the statistical evidence.

The motion to suppress was properly denied.

RACIAL PROFILING: DISCOVERY

Commonwealth v. Cuffee

- 1:34 PM ShotSpotter alerts; defendant seen one block from shooting running away; unnatural gait; right hand pinned to body
- Defendant is a Black male
- Police in unmarked but easily identifiable police cruiser; defendant slowed to a walk; put hood on; went into convenience store
- Officers approached in store; struggle; foot pursuit; gun found in store
- Defendant requested discovery relevant to whether investigation motivated by race

Was defendant entitled to discovery to prove selective enforcement?

RULE 14

Mandatory discovery

- All statements of defendant
- Written or recorded statements of witnesses
- Exculpatory evidence

Discretionary discovery

- Request made by motion
- Must be accompanied by an affidavit of someone with personal knowledge
- Motion and affidavit must establish relevance

SELECTIVE ENFORCEMENT

A defendant has a right to reasonable discovery of evidence concerning the totality of the circumstances of alleged discriminatory law enforcement.

Must comply with Rule 14

DISCOVERY REQUESTS

Commonwealth v. Robinson-Van Rader	Commonwealth v. Cuffee
Affidavit cited a study by AP: Black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations and interrogations.	Affidavit stated defendant was a Black man who was stopped by two Caucasian detectives investigating gunshots in the area
Attorney affidavit included statement that, in the attorney's experience, Boston's Youth violence strike force officers "consistently stop, search and arrest Black and Brown people at higher rates than the department-wide statistics.	Affidavit said stop based on alleged observation of defendant running with an unnatural gait while appearing to be "supporting a weighted object on his right side of his right hand."
Affidavit made sufficient showing of selective enforcement to warrant an order of discovery	Affidavit insufficient. Basically said Caucasian officers stopped a Black man while investigating a shooting.

FIFTH AMENDMENT



FIFTH AMENDMENT

- Overview
- Custody
- Waiver
- Voluntariness
- Miranda Warnings and the Booking Process
- Wiretap







FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

MIRANDA OVERVIEW

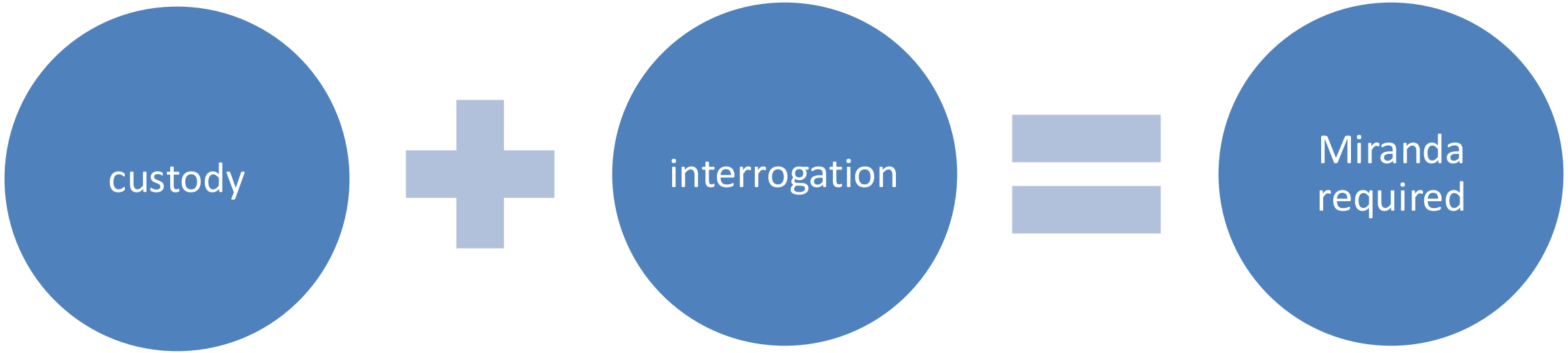
There are two (2) separate inquiries the court makes when deciding whether the statement of a defendant can be introduced into evidence:

1. Was there a violation of the defendant's Miranda rights?

2. Was the statement voluntary?

Only statements that comply with Miranda and are voluntary will be admissible

Miranda Overview



CUSTODY

Groome factors:

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 of 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

INTERROGATION

Any words or actions of the police which the officer knows or should know are reasonably likely to elicit an incriminating response.

MIRANDA WARNINGS

(1) You have the right to remain silent.
(2) Anything you say can and will be used against you in a court of law.
(3) You have the right to an attorney.
(4) If you cannot afford an attorney, one will be appointed for you.

Bonus: If you do decide to answer questions, you still have the right to stop answering at any time.

VOLUNTARINESS

A statement that is the product of a rational intellect and a free will and not induced by physical or psychological coercion.

CUSTODY: ROADSIDE

Commonwealth v. Earl

- Defendant in Hunter's apartment with Constant; pulled out a knife, struggle ensued; struggle continued out front door; Constant fell; defendant ran
- Security officers saw defendant running through traffic; officers approach defendant; defendant took off shirt; took "aggressive" steps toward officer; defendant ran
- Officer tackled defendant; handcuffed
- Defendant said he was shot down the street; asked why he ran
  - D: I just killed somebody, and if you walk straight ahead you will find something.
  - Officer: Why?
  - D: Because he was running his mouth

CUSTODY: ROADSIDE

Commonwealth v. Earl

- Defendant brought to hospital
- Hunter brought to hospital for showup
  - Hunter told a person at the hospital may or may not be the person involved
  - Defendant being treated; illuminated by surgical light
  - Hunter identified defendant
- Defendant arrested; gave recorded statement after waiving Miranda
- Defendant indicted; wrote letter of apology to Constant's mom
- Defendant raises several issue on appeal

ISSUES ON APPEAL

- Were roadside statements made in violation of Miranda?
- Was waiver of Miranda for recorded statement valid?
- Was identification procedure unnecessarily suggestive?
- Was apology letter properly authenticated?

WERE ROADSIDE STATEMENTS MADE IN VIOLATION OF MIRANDA?

1. Place of interrogation:

   From the defendant's point of view, the officers' actions objectively created a coercive and police-dominated environment, even if it was not in a police station.

2. Conveying that the defendant was a suspect:

   A reasonable person in the defendant's position would likely have believed that the officer who chased and tackled him suspected him of criminal activity.

WERE ROADSIDE STATEMENTS MADE IN VIOLATION OF MIRANDA?

3. Nature of the interrogation:

   Asking the defendant why he ran after the defendant just reported he had been shot was “clearly intended to gather inculpatory evidence.”

4. Defendant’s freedom to end the encounter.

   A reasonable person in the defendant’s position would not believe they could leave or otherwise end the interview.

WERE ROADSIDE STATEMENTS MADE IN VIOLATION OF MIRANDA?

A nuanced analysis of the Groome factors is unnecessary, however, for ‘obvious cases in which a suspect has been formally arrested or otherwise deprived of his physical freedom by police agents.

Simply put, in this case it is obvious that a reasonable person in the defendant’s position would not have believed that he was free to leave.

WERE ROADSIDE STATEMENTS MADE IN VIOLATION OF MIRANDA?

YES

WAS WAIVER OF MIRANDA FOR RECORDED STATEMENT VALID?

- Provided with written Miranda waiver
- Initialed each right as it was read to him
- Signed the form
- Conversation was cordial
- “I don’t understand why I’m at the police station”
- Graduated from high school; one year of college
- When defendant said he was done answering questions, interview ended

Was waiver valid?

WAS WAIVER OF MIRANDA FOR RECORDED STATEMENT VALID?

YES

WAS ID PROCEDURE UNNECESSARILY SUGGESTIVE?

Was there good reason to conduct a showup?

Did fact that defendant's head was lit up by surgical light make procedure unnecessarily suggestive?

WAS ID PROCEDURE UNNECESSARILY SUGGESTIVE?

Was there good reason to conduct a showup?

Yes

Did fact that defendant's head was lit up by surgical light make procedure unnecessarily suggestive?

No

WAS ID PROCEDURE UNNECESSARILY SUGGESTIVE?

The police did an exemplary job of trying to make sure the identification procedure was done fairly and orderly, that it was conducted promptly after the incident, and that the lighting did not make the procedure unduly suggestive.

WAS APOLOGY LETTER PROPERLY AUTHENTICATED?

- Judge is gatekeeper
- Evidence must be relevant
- This letter only relevant if defendant wrote it
  - Sent from Nashua St. jail
  - Defendant's name in return address area
  - Contained information only known to someone familiar with crime

Were these facts sufficient confirming circumstances?

WAS APOLOGY LETTER PROPERLY AUTHENTICATED?

YES

CUSTODY: ROADSIDE

Commonwealth v. Tantillo

- Car crashed into a pole at Cumberland Farms; appeared impaired
- Defendant pulled over some distance away
- Asked if she was in an accident; “maybe,” “yes”; asked out of car; unsteady
- Asked when she left her house; “2:30”; admitted taking medication that day
- Unable to follow directions; brought to hospital; inventory = pills
- Damage to pole; unclear how fresh
- Trial: required finding on leaving the scene; NG on OUI; G on negligent operation

Were Miranda warnings required on scene?

CUSTODY: ROADSIDE

1. Place of interrogation
   - not coercive

2. Conveying that the defendant was a suspect
   - minor motor vehicle collisions are not crimes

3. Nature of the interrogation
   - investigatory, not accusatory

4. Defendant's freedom to end the encounter
   - Officer had not through words or conduct objectively communicated that the officer would coerce the defendant to stay

SUFFICIENCY OF THE EVIDENCE

Negligent operation:

1. The defendant operated a motor vehicle

2. The defendant did so on a public way

3. The defendant did so negligently so that the lives or safety of the public might be endangered.

SUFFICIENCY OF THE EVIDENCE

The evidence was sufficient to prove that the defendant's ability to control the vehicle was significantly impaired, and as a result, the lives and safety of the public might have been endangered.

Footnote: The fact that the judge ultimately did not convict the defendant of operating under the influence of drugs does not preclude consideration of such evidence when deciding the negligent operation charge.

CUSTODY: ROADSIDE

Commonwealth v. Fisher

- July 1 – July 2: String of violent attacks on prostitutes
- Co-defendant owned car that matched a vehicle of interest
- July 3: car at drive-through window at fast-food restaurant; blocked in
- Officers approach on foot; gun at “low ready”; asked for ID; told car may have been involved in a crime; several officers respond
- Three Black men in car; co-defendant driver; defendant front seat
- Co-defendant spoke to officers
- Passengers told car was of interest; asked out; defendant looked like one of suspects; 3-4 minute conversation

Were Miranda warnings required on scene?

CUSTODY: ROADSIDE

1. Place of interrogation
    - Parking lot
    - Blocked in
    - 13 officers on scene
    - No handcuffs
    - Told not under arrest

Was this a police-dominated area?

CUSTODY: ROADSIDE

1. Place of interrogation
    - Parking lot
    - Blocked in
    - 13 officers on scene
    - No handcuffs
    - Told not under arrest

Was this a police-dominated area?

Close call. Assume it was

CUSTODY: ROADSIDE

2. Conveying that the defendant was a suspect
   - Told not a suspect
   - Told police interested in the car

3. Nature of the interrogation
   - Not aggressive
   - Officers polite and courteous

4. Defendant's freedom to end the encounter
   - Defendant and others walked away

Were Miranda warnings required on scene?

CUSTODY: ROADSIDE

Were Miranda warnings required on scene?

NO

CUSTODY: COMMUNITY CARETAKING

Commonwealth v. Armstrong

- Jan. 11, 2017: Father's body at his home with garbage bag secured over his head; truck gone; undamaged as of Jan. 10; sideview mirror found in the home
- Jan. 13 officers in NJ called to a motel; trespassing-suspicious person
- Defendant in bathroom in lobby; went to parking lot
- Evasive about identity; said he was robbed of wallet and cell phone, was stranded without gas; on way to unpaid job at Dept. of Interior
- Defendant told to sit beside truck with missing sideview mirror; query of plate; learned Glenn Armstrong wanted for questioning in murder investigation
- Defendant responded to his name; placed under arrest
- Interrupted officers when they tried to read Miranda; made statements

Should the statements be suppressed?

CUSTODY: COMMUNITY CARETAKING

Under the community caretaking function, an officer may, when the need arises, stop individuals and inquire about their well-being, even if there are no grounds to suspect that criminal activity is afoot.

CUSTODY: COMMUNITY CARETAKING

The officers' noncoercive inquires centered on the well-being of the defendant, who appeared to be stranded, away from his home, without a cell phone, a wallet, or gasoline for the truck, and ill-dressed for the winter day. Moreover, the defendant refused to identify himself and also exhibited behaviors indicating that he was disoriented or potentially experiencing a mental health crisis.

Because the officer's conduct did not ripen into a custodial investigation of criminal activity, the officers were not required to give Miranda warnings to the defendant.

CUSTODY: COMMON AREA OF DORM

Commonwealth v. Chilcoff

- Victim partying at UMass Amherst; friends walked her back to dorm
- Victim went to wrong floor; went to room directly above hers
- Defendant there with roommate and another; watching a movie; told victim she was in the wrong room; victim left; “Wow that girl is drunk”
- Victim returned; fell asleep on defendant’s bed; defendant and victim had sex
- Police interviewed defendant in common room; people walking in and out
- Defendant convicted of rape

Was defendant in custody for Miranda purposes?

Was there sufficient evidence of rape?

CUSTODY: COMMON ROOM OF DORM

1. Place of interrogation

2. Conveying that the defendant was a suspect

3. Nature of the interrogation

4. Defendant's freedom to end the encounter

Was defendant in custody for Miranda purposes?

CUSTODY: COMMON ROOM OF DORM

Was defendant in custody for Miranda purposes?

NO

Were the statements voluntary?

VOLUNTARINESS

The test for voluntariness is whether, in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act.

Factors

- Age of suspect
- Education level
- Emotional stability
- Experience with criminal justice system
- Any promises of leniency/inducements

VOLUNTARINESS

Factors

- Age of suspect – young adult
- Education level – in college
- Emotional stability - calm
- Experience with criminal justice system - none
- Any promises of leniency/inducements – none
- Officers may have misled defendant

Were the statements voluntary?

VOLUNTARINESS

Were the statements voluntary?

YES

SUFFICIENCY OF EVIDENCE: RAPE

Theory: victim lacked the capacity to consent

- Victim does not need to be unconscious
- Level of intoxication must be extreme
- Must show defendant knew or reasonably should have known victim was incapable of consenting to sex

Was there sufficient evidence of rape?

SUFFICIENCY OF EVIDENCE: RAPE

Was there sufficient evidence of rape?

YES

WAIVER OF MIRANDA RIGHTS

Commonwealth v. Escobar

- Defendant drinking with Pineda, Interiano, and victim; went back to Pineda/Interiano's home; stopped at defendant's home; defendant retrieved a gun
- Defendant, Interiano, and victim arguing; told to take it outside; fight got physical; victim left; defendant told Interiano to open the back door
- Defendant followed victim down dead-end street; shot victim through the eye and twice through the back of the head
- Defendant ran back to house; Interiano helped hide the gun; defendant slept on couch
- 9:30 PM officers enter defendant's bedroom with guns drawn; Spanish speaking officer told defendant officers wanted to speak to him at the station; told he did not have to go

WAIVER OF MIRANDA RIGHTS

- Defendant waited at station for three hours; brought to interrogation room just before 1AM; read Miranda rights in Spanish; defendant read the form; signed form
- Interviewed by two officers with a Spanish speaking officer translating
- Officers told defendant they knew he was lying; would find microscopic evidence; had security camera footage
- Defendant told when firearm was found; posture changed; changed his story

Was waiver of Miranda rights valid?

Were statements voluntary?

Was defendant's right to a telephone call violated?

Was defendant denied his right to a prompt arraignment?

WAS WAIVER OF MIRANDA RIGHTS VALID?

Miranda waiver must be knowing, intelligent, and voluntary

- Read to him in native language
- Provided in writing in native language

The defendant was sober, alert, focused, and responsive to questions. He felt comfortable asking for clarification when he did not understand a particular question. After receiving the warnings, the defendant demonstrated with words and with behavior that he heard, read, and understood them…and that he agreed to speak with officers.

WERE STATEMENTS VOLUNTARY?

Where there is evidence of misconduct by police during an interrogation, a defendant's statement will be considered involuntary if the misconduct by police resulted in the defendant's will being overborne.

<u>Improper tactics used in this case:</u>

- Making assurances that a confession would assist the defendant
- Telling him that they would find incriminating 'microscopic evidence' in his home
- Telling him that the interview was the only chance for him to tell his side of the story.

Did these tactics result in the defendant's will being overborne?

WERE STATEMENTS VOLUNTARY?

Did these tactics result in the defendant's will being overborne?

NO

WAS DEFENDANT'S RIGHT TO A TELEPHONE CALL VIOLATED?

MGL c 276 § 33A:

The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed forthwith upon his arrival at such station or place of detention, of his right to so use the telephone, and such use shall be permitted within one hour thereafter.

Trigger: formal arrest

Intentional violation = statements must be suppressed

WAS DEFENDANT DENIED RIGHT TO A PROMPT ARRAIGNMENT?

- Defendant has the right to be arraigned as soon as reasonably possible after arrest
- Rosario rule: statements made more than 6 hours after arrest shall be suppressed
- Clock starts at time of arrest



VOLUNTARINESS

Commonwealth v. Hart

- Defendant and GF break into home of elderly couple; attacked occupants; stole credit cards, cash, and car
- Victims found by visiting nurse; husband died; wife died weeks later
- Defendants identified by surveillance footage at store; arrested in Virginia
- Defendant wanted to speak to Virginia officers; 1 hr; confessed

Was the defendant's statement to Virginia officers voluntary?

VOLUNTARINESS

A voluntary statement is ‘the product of a rational intellect and a free will and not induced by physical or psychological coercion.

Question for the court:

Was the will of the defendant overborne to the extent that the statement was not voluntary?

VOLUNTARINESS

Relevant factors

- promises or other inducements
- conduct of the defendant
- the defendant's age, education, intelligence and emotional stability
- experience with and in the criminal justice system
- physical and mental condition
- the initiator of the discussion of a deal or leniency (whether the defendant or the police)
- the details of the interrogation, including the recitation of Miranda warnings

VOLUNTARINESS

Did Virginia officers engage in tactics that rendered the statement involuntary?

- Now or never
- Minimization
- Appeal to religion
- Promise of leniency

VOLUNTARINESS

Did Virginia officers engage in tactics that rendered the statement involuntary?

- Now or never - not used
- Minimization – used, defendant was not misled
- Appeal to religion – extremely limited, if at all
- Promise of leniency – not used

VOLUNTARINESS

Indeed, the defendant's motivation for speaking with law enforcement, at its core, can be reduced to one driving force: his desire to protect his girlfriend. This desire, absent any illegitimate police tactics, does not render a confession involuntary

MIRANDA WARNINGS AND THE BOOKING PROCESS

Miranda warnings not usually considered interrogation

Commonwealth v. Kacavich (1990)

Commonwealth v. Carey (1988)

Commonwealth v. Woods (1995)

MIRANDA WARNINGS AND THE BOOKING PROCESS

Commonwealth v. Roberson

- Well-being of car parked at gas station; indicia of intoxication; arrested
- Refused booking; multiple demands for a lawyer; brought back to booking; Miranda warnings read; thumbs up
- Answered biographical questions; asked about consuming alcohol; thumbs up

Did question about alcohol consumption violate Miranda?

Was there sufficient evidence to prove OUI?

DID QUESTION ABOUT ALCOHOL CONSUMPTION VIOLATE MIRANDA?

The right to counsel must be scrupulously honored. Once a defendant invokes the right to counsel, all questioning must cease. Questioning may not resume until an attorney is obtained for the suspect and is present, or the suspect initiates further communication, exchanges, or conversations with the police.

Even after the invocation of counsel, the police may ask routine booking questions, but not about the crime that is under investigation.

DID QUESTION ABOUT ALCOHOL CONSUMPTION VIOLATE MIRANDA?

Here, the question about drinking, after the defendant had been arrested for operating a motor vehicle while under the influence of alcohol, had direct investigatory relevance, regardless of whether the question is typically asked as part of the routine booking process. Therefore, it was a question that the officer should have known was “reasonably likely to elicit an incriminating response.”

WAS THERE SUFFICIENT EVIDENCE TO PROVE OUI?

And I must say that the video was overwhelming. The video shows - the officer tells me that he smelled of alcohol, that the man's speech was slurred, and that he had – that his eyes were glassy. But the video is overwhelming, he looks very drunk in the video… Right at the end of the video before they put him in his cell, he pirouetted backwards and bopped into the wall when he wasn't handcuffed to the bar…. And I believe that his ability to operate was impaired by alcohol from what I saw in the video and the officer's observations.

WIRETAP

Commonwealth v. Morris

- 1:30 – 2:00 AM: Argument outside bar in Brockton; defendant shot at car; victim died
- 12:30 PM: defendant arrested
- 1:11 PM: interviewed; Miranda rights given; advised of right to prompt arraignment; interview recorded by camera that looked like a thermostat; officers taking notes

Was recording of interview in violation of the wiretap statute?

Was the defendant denied his right to a telephone call?

WIRETAP STATUTE MGL c 272 § 99

- Makes it a crime to secretly record an oral communication
- Defendant in a criminal prosecution can move to suppress the recording under the statute
- Defendant was aware that statement was being memorialized

Nothing in the statute, as a whole, including its codified preamble, supports the conclusion that the Legislature intended to criminalize the police officers' recording of the defendant's voluntary statement, which the defendant understood was being preserved for future use in connection with the investigation of the crime about which the defendant was speaking voluntarily

WAS THE DEFENDANT DENIED HIS RIGHT TO A TELEPHONE CALL?

MGL c 276 § 33A:

The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed forthwith upon his arrival at such station or place of detention, of his right to so use the telephone, and such use shall be permitted within one hour thereafter.

Trigger: formal arrest

Intentional violation = statements must be suppressed

WAS THE DEFENDANT DENIED HIS RIGHT TO A TELEPHONE CALL?

Chronology:

- 12:30 PM Defendant arrested
- 1:11 PM waived Miranda, was told he could make a call when he went to booking
- 2:11 PM interview ended, asked if he wanted to call his parents

Was MGL c 276 § 33A violated?

WAS THE DEFENDANT DENIED HIS RIGHT TO A TELEPHONE CALL?

Was MGL c 276 § 33A violated?

YES

Should statements be suppressed?

WAS THE DEFENDANT DENIED HIS RIGHT TO A TELEPHONE CALL?

Should statements be suppressed?

NO

No evidence violation was intentional

UC WORK AND THE WIRETAP STATUTE

Commonwealth v. Du

- 3 drug buys by UC; surveillance officers listened in via Callyo; recorded and saved
- Defendant unaware that deals were being recorded or transmitted

Did recordings violate the wiretap statute?

Should the recordings be suppressed?

MGL c 272 § 99(P)

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.
2. That the communication was not intercepted in accordance with the terms of this section.
3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.
4. That the interception was not made in conformity with the warrant.
5. That the evidence sought to be introduced was illegally obtained.
6. That the warrant does not conform to the provisions of this section.

“INTERCEPTION”

To secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer… to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

Designated offense: connected to organized crime

CONNECTION TO ORGANIZED CRIME

To show a nexus to organized crime, there must be some evidence of an ongoing illegal business operation. The Commonwealth also must demonstrate a high degree of discipline and organization among the suspected members of the criminal enterprise. However, facts suggesting coordination of efforts among cohorts standing alone is insufficient…For a conspiracy to commit an offense enumerated in MGL c 272 § 99B(7), to rise to the level of organized crime, there must, at the very least, be an organized plan from which one reasonably may infer the existence of an ongoing criminal operation. Finally, the Commonwealth must show that the designated offense was committed to promote the supply of illegal goods and services or the furtherance of an ongoing criminal business operation.

UC WORK AND THE WIRETAP STATUTE

Commonwealth v. Du

Did recordings violate the wiretap statute?

Should the recordings be suppressed?

UC WORK AND THE WIRETAP STATUTE

Commonwealth v. Du

Did recordings violate the wiretap statute?

YES

Should the recordings be suppressed?

YES

But, officers can still testify

NOTE: SJC granted further appellate review for this case on Feb. 15, 2024

OFFICER LIABILITY UNDER WIRETAP STATUTE

In addition, the statute protects investigative and law enforcement officers from criminal and civil liability if they violate the statute for the purposes of ensuring officer safety while operating undercover. MGL c 272 § 99D(e). In such circumstances, although the officers will be insulated from liability, the contents of the unlawful interceptions are nonetheless excluded from evidence. In sum, the statute reflects the Legislature's careful balancing of competing concerns.

Best practice: get a warrant

WHAT'S NEXT FOR WIRETAPS?





Will video-only recordings be treated differently than those with sound?

Will video recordings that have audio recorded separately be treated differently?

WHAT'S NEXT FOR WIRETAPS?



CAUTION



When police wish to use a novel surveillance tool such as Callyo, we encourage them to seek a search warrant beforehand. Because our statutes and Declaration of Rights may be more protective of individual privacy rights than similar laws in some other states, the police should not simply rely on the fact that the tool has been used in other jurisdictions.

CRIMINAL LAW

- Interpersonal Violence
- Sufficiency of Evidence
- Motor Vehicle Law
- Juvenile Law

INTERPERSONAL VIOLENCE: 209A ORDERS

S.J. v. T.S.

- College roommates Jan - March; assigned by university
- Altercation March 10
- S.J. obtained a restraining order

Are S.J. and T.S. “household members” for purposes of 209A?

“FAMILY OR HOUSEHOLD MEMBER”

People who:

- are or were married to one another
- are or were residing together in the same household
- are or were related by blood or marriage
- have a child in common regardless of whether they have ever married or lived together
- are or have been in a substantive dating or engagement relationship.

RESIDING TOGETHER IN THE SAME HOUSEHOLD

Purpose of 209A is to prevent violence in the family setting

Factors to consider:

- whether the living arrangement was voluntary
- the nature of the physical living space, including how much of it is shared
- the length of the parties' relationship
- the nature of the relationship and interactions, including whether they engaged in communal living activities

INTERPERSONAL VIOLENCE: HPO ORDERS

Wilhelmina W. v. Uri U.

- 2016: Defendant charged with indecent A&B on a child under 14; Victim's mom obtained an HPO
- HPO extended twice; 2018: neither party appeared at extension hearing
- 2019: Defendant convicted; incarcerated and probation
- 2021: Defendant eligible for parole; plaintiff requests HPO

Can the court issue the HPO?

HARASSMENT

MGL c 258E defines “harassment” as:

- 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or
- an act that:
  - (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or
  - (B) constitutes a violation of [various sex assault crimes, stalking and criminal harassment].

HARASSMENT PREVENTION ORDERS

- Burden on plaintiff
  - preponderance of the evidence
  - prove they suffered harassment
  - To extend: they are in need of protection from the impact of the harassment

- Same burden of proof required even if original order expired and plaintiff reapplies

- The plaintiff need not relitigate the fact of the harassment when seeking a subsequent order based on exactly the same harassment on which the prior order was based.

ATTEMPTED SEXUAL ASSAULT

Commonwealth v. Martinez

- Defendant serving time; spoke to daughter (13-14 yrs old) on the phone
- Calls were recorded; conversations graphic and sexual
- Discussed daughter's serious mental illness; loneliness; said he would stop talking to her if she told anyone
- Defendant indicted: attempted indecent A&B on a child; attempted indecent A&B on a person over 14; attempted rape of a child

Was there sufficient evidence presented to the grand jury to indict the defendant on the charges?

ELEMENTS OF ATTEMPT

1. The defendant had the specific intent to commit the crime at issue

and

2. The defendant committed an overt act toward completing the crime.

ATTEMPTED INDECENT A&B ON A CHILD AND ATTEMPTED RAPE OF A CHILD

Issues:

1. If the victim had touched herself based on the defendant's actions, would that be enough to convict the defendant of indecent assault and battery or rape?

2. Were the defendant's actions sufficiently overt?

ATTEMPTED INDECENT A&B ON A CHILD AND ATTEMPTED RAPE OF A CHILD

Evidence was presented to the grand jury on which it could have found probable cause to believe that the defendant exploited his daughter's loneliness, mental illness, and desperation for affection to induce her actions.

The crimes in this case would have been completed if the child touched herself. The calls themselves, with the sexualized and manipulative content, were the overt acts taken by the defendant to complete the sexual assaults.

ATTEMPTED INDECENT A&B ON A PERSON OVER 14

- Requires proof of lack of consent
- Person must have the capacity to consent
- Factors:
    - Intoxication
    - Lack of sleep
    - intellectual disability
    - Head injuries
    - Emotional or psychological capacity

Did the daughter in this case have the capacity to consent?

ATTEMPTED INDECENT A&B ON A PERSON OVER 14

Did the daughter in this case have the capacity to consent?

NO

Together, these were sufficient to support probable cause that the child lacked the capacity to consent to the sexual touching that is the basis for the indictment of attempted indecent assault and battery on a person aged fourteen or older and that the defendant was aware of her lack of capacity.

SUFFICIENCY OF EVIDENCE

Commonwealth v. Barlow-Tucker

- January: Defendants fostering 10 mo. old baby
- Jan. 25: various members of family had a cold; baby had a fever, cough, lethargy, congestion; foster family called doctor about 2 yr. old daughter
- Feb 14: speech pathologist in home
- Feb. 17: baby put to bed; video camera in the room
- Feb. 18: baby found unresponsive in crib; autopsy: strep throat, bronchopneumonia, and fluid in his right lung
- Foster parents indicted on numerous charges including: involuntary manslaughter/wanton or reckless conduct; reckless endangerment of a child

Was there probable cause to issue the indictments?

INVOLUNTARY MANSLAUGHTER

An unlawful homicide, unintentionally caused…by an act which constitutes such a disregard of probable harmful consequences to another as to constitute wanton or reckless conduct.

“Wanton or reckless conduct usually consists of an intentional act but may be satisfied by an intentional omission where there is a duty to act.”

INVOLUNTARY MANSLAUGHTER

- Defendants provided some care for the baby's cold

- Knew baby needed medical attention
  - Joked about having doctor see an "extra kid"
  - 2 year old was taken to the doctor
  - Speech pathologist
  - Foster parent knew from training they could seek emergency medical care
  - Video

INVOLUNTARY MANSLAUGHTER

Grand jury could have found that the baby was gravely ill for weeks before his death and the foster parents' failure to get him medical attention put the baby at risk that substantial harm would result.

RECKLESS ENDANGERMENT OF A CHILD

Child under 18 suffered a substantial risk of serious bodily injury and that the defendant wantonly or recklessly either:

- Engaged in conduct that created the substantial risk or
- Failed to take reasonable steps to alleviate the risk where a duty to act exists.

Must prove defendant was actually aware of the risk.

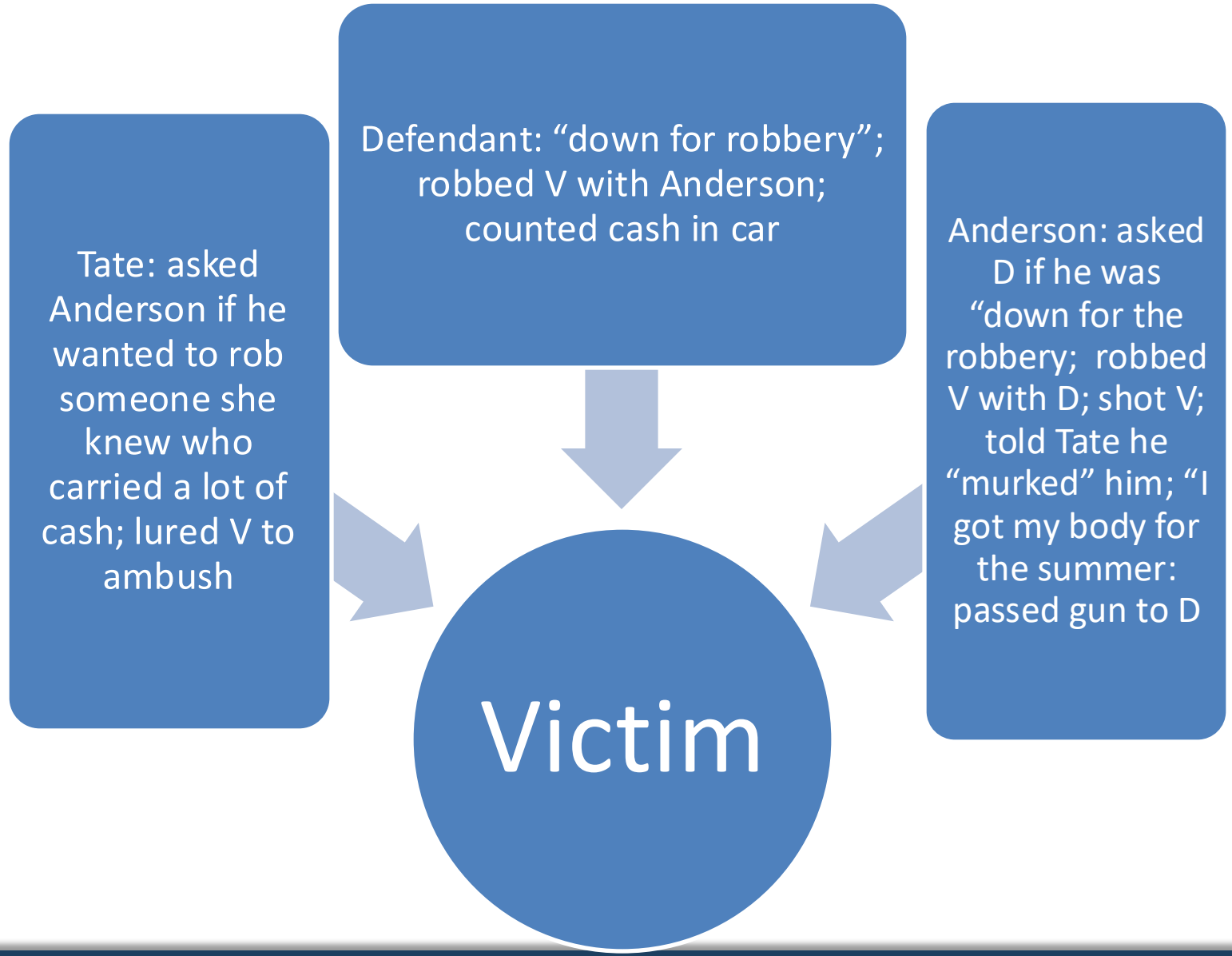
FELONY-MURDER WITH ARMED ROBBERY AS A PREDICATE OFFENSE

Commonwealth v. Robinson

Defendant charged with felony-murder on a joint venture theory

Elements:

- Defendant knew the codefendant was armed
- Defendant assisted the codefendant in committing the armed robbery
- Defendant shared the intent to steal the victim's property


Tate: asked Anderson if he wanted to rob someone she knew who carried a lot of cash; lured V to ambush
Defendant: “down for robbery”; robbed V with Anderson; counted cash in car
Anderson: asked D if he was “down for the robbery; robbed V with D; shot V; told Tate he “murked” him; “I got my body for the summer: passed gun to D
Victim

FELONY-MURDER WITH ARMED ROBBERY AS A PREDICATE OFFENSE

Did defendant know codefendant was armed?

- Planned the robbery
- Robbery was to take place in the hallway of an apartment building
- No masks
- Defendant was with Anderson for 1-2 hours before robbery

FELONY-MURDER WITH ARMED ROBBERY AS A PREDICATE OFFENSE

Did defendant know codefendant was armed?

YES

A weapon was likely to be of particular use to persuade the victim to surrender his property quickly and without resistance to avoid being seen by potential witnesses. In addition, neither Anderson nor the defendant had a mask, and they therefore would need a weapon to discourage the victim from looking at them.

FELONY-MURDER WITH ARMED ROBBERY AS A PREDICATE OFFENSE

Did defendant share the intent to commit the robbery?

FELONY-MURDER WITH ARMED ROBBERY AS A PREDICATE OFFENSE

Did defendant share the intent to commit the robbery?

YES

Where a defendant continues to act in furtherance of the joint venture even after learning of a coventurer's weapon, we have allowed an inference that the coventurer had the requisite intent for the joint venture.

FELONY-MURDER WITH ARMED ROBBERY AS A PREDICATE OFFENSE

The totality of the evidence, viewed in the light most favorable to the Commonwealth, was sufficient to support the jury's finding that the defendant intended to participate with Anderson in an armed robbery of the victim. Where the circumstances of the robbery gave rise to a reasonable inference that a weapon would be needed, and where the evidence suggested that the defendant did not withdraw from the venture after Anderson drew the gun, the jury were permitted to infer that the defendant possessed the requisite knowledge and intent to be convicted of the predicate offense of armed robbery.

FIRST DEGREE MURDER: DELIBERATE PREMEDITATION

Commonwealth v. Honsch

- Sept. 1995: defendant living with wife and daughter in NY; told family moving to Australia; never went to Australia
- Sept. 28: CT officers find female body in garbage bags wrapped in sleeping bags; gunshot wound to the head; ID'd as daughter in 2014
- Oct. 6: Tolland State Forest body discovered; guardrail damage; towel with 3 holes in it; empty pack of cigarettes; gunshot wound to the head; ID'd as wife in 2014
- Nov: Defendant moved to Africa; returned to US in 1999; took new wife's surname
- 2013: Deceased wife's daughter found defendant; was told wife left in Australia
- 2014: Missing persons reports filed; defendant said last saw them in 1995 in Africa; admitted sleeping bags were his; DNA found on wife's body; handprint found on garbage bags covering daughter's body

FIRST DEGREE MURDER: DELIBERATE PREMEDITATION

Was there sufficient evidence that defendant was the perpetrator?

Was there sufficient evidence to prove deliberate premeditation?

Should evidence from CT crime scene have been admitted?

SUFFICIENCY OF THE EVIDENCE: IDENTITY

Court focused on four categories of evidence:

- Opportunity
- Evidence tying defendant to crime scene
- Evidence both murders linked
- Consciousness of guilt

SUFFICIENCY OF THE EVIDENCE: DELIBERATE PREMEDITATION

Deliberate premeditation can be inferred:

- Nature of injuries
- Duration of attack
- Use of weapons
- Number of blows

Evidence here:

- Towel
- Number of shots

EVIDENCE FROM CONNECTICUT

To introduce uncharged conduct: must pass 2-pronged inquiry:

- The evidence must be relevant to something other than the defendant's propensity to commit the charged offenses.

- If the evidence is relevant, its prejudicial effect must not outweigh its probative value.

What is relevance in this case?

RELEVANCE OF EVIDENCE FROM CONNECTICUT

Identity: modus operandi

Such evidence is relevant to prove identity because where the prior or subsequent crime and the charged crime have the same unique signatures, it is highly likely that both crimes were perpetrated by the same individual.

Was evidence from CT specific enough to be considered modus operandi?

RELEVANCE OF EVIDENCE FROM CONNECTICUT

Was evidence from CT specific enough to be considered modus operandi?

NO

But may still be admissible for identity purposes “when the evidence is ultimately relevant because the evidence makes it more likely than it would be without the evidence that the defendant is the individual responsible for the crime.”

Commonwealth v. Gray	Commonwealth v. Honsch
D physically attacked one uncle; killed another uncle; killed his stepfather	Victims were defendant's wife and daughter
Victims attacked in their homes	Victims attacked within same week
Victims attacked with a gun	Victims shot with medium to large caliber bullet
Victims likely kneeling	Bodies left in hidden areas without ID
Attacks occurred with 30-day period	Bodies left in states defendant did not live in
Victims older male family members of defendant whom he believed molested him	Bodies found in "camping-related circumstances

RELEVANCE OF EVIDENCE FROM CONNECTICUT

Was evidence from CT relevant to establish identity of the perpetrator?

YES

Evidence was prejudicial, but was highly probative. Not an abuse of discretion to introduce the evidence at trial.

PROOF OF SERIOUS BODILY INJURY

Commonwealth v. Corey

- July 29, 2009: Landlord found victim's body in apartment, electrical cord around her neck; reproductive organs gone
- Defendant and BF lived in same building as victim; defendant pregnant, due June 20 then July 2 then July 24
- July 23: Defendant says going to give victim a ride; reports water broke; came home with baby next morning
- Baby was victim's baby
- Defendant convicted of murder in the first degree on multiple theories, including felony-murder with the predicate offense being aggravated kidnapping

Did Commonwealth meets its burden of proving aggravated kidnapping?

PROOF OF SERIOUS BODILY INJURY

Aggravated Kidnapping requires proof that:

- that defendant kidnapped the baby
- while armed with a dangerous weapon and
- inflicted serious bodily injury upon the baby

Serious bodily injury: bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb, or organ or substantial risk of death

Did Commonwealth meets its burden of proving aggravated kidnapping?

PROOF OF SERIOUS BODILY INJURY

Did Commonwealth meets its burden of proving aggravated kidnapping?

YES

We conclude that the loss of blood and oxygen, caused by the killing of the mother, presents a bodily injury to the fetus.

MOTOR VEHICLE LAW



- Update from DOT
- Negligent operation
- Operating under the influence

UPDATE FROM DOT



- RMV CR65 crash books and crash reports updated
- DOTs Vulnerable Road User Types Reference guide is in Appendix to Legal Update manual

Examples of Vulnerable Road Users

January 2024



Vulnerable Road Users

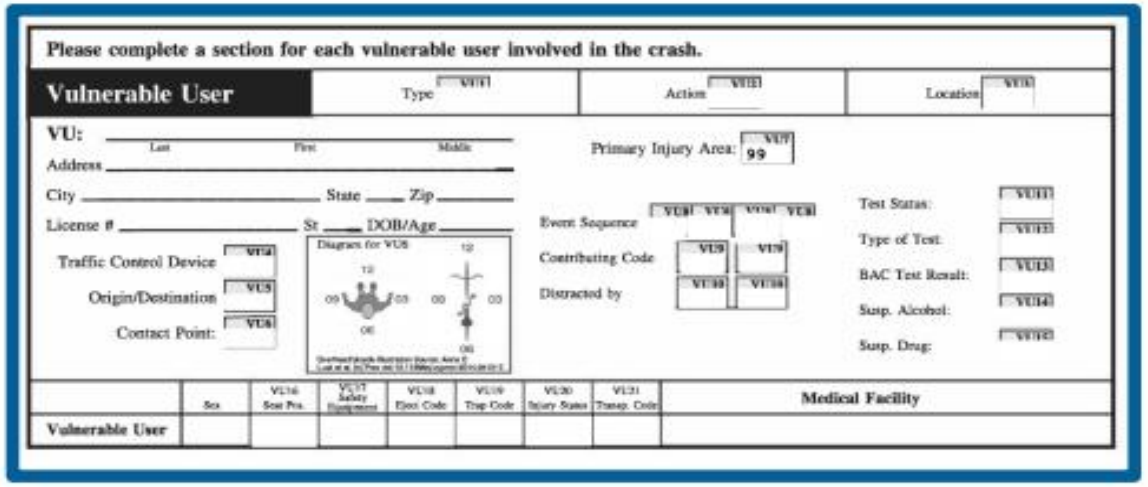
Massachusetts law defines 'vulnerable road users' as:

- Pedestrians
- Roadside workers
- Bicyclists
- People riding horses or horse drawn carriages
- People using:
  - Wheelchairs
  - Personal mobility devices
  - Motorized bicycles
  - Motorized scooters
  - Non-motorized scooters
  - Skateboards
  - Roller skates



Police Crash Report

The Police Crash Report has been revised to include vulnerable road users. Included in the presentation are definitions and examples of the vulnerable road user types that may be used when completing the police crash report.



Please complete a section for each vulnerable user involved in the crash.

Vulnerable User | Type VU1 | Action VU2 | Location VU3

VU: Last First Middle

Address

City State Zip

License # St DOB/Age

Traffic Control Device VU4

Origin/Destination VU5

Contact Point: VU6

Diagram for VU8

Primary Injury Area: VU7 99

Event Sequence VU8 VU8 VU8 VU8

Contributing Code VU9 VU9

Distracted by VU10 VU10

Test Status: VU11

Type of Test: VU12

BAC Test Result: VU13

Susp. Alcohol: VU14

Susp. Drug: VU15

	Sex	VU16 Seat Pos.	VU17 Safety Equipment	VU18 Ejct. Code	VU19 Trap Code	VU20 Injury Status	VU21 Transp. Code	Medical Facility
Vulnerable User								

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

1 – Pedestrian (Definition)

Any person who is not an occupant. Inclusions:

- Person on foot
- Person standing, walking, running, jogging, hiking, sitting, or lying within the trafficway or on private property, etc.
- A person assisted with a cane or walker
- Person pushing a baby carriage/stroller or carrying a baby.
- Baby being carried.
- A person ejected from a transport vehicle who has come to rest in the trafficway during a prior unstabilized situation and struck in a second or subsequent unstabilized situation.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
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14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

1 – Pedestrian (Examples)





2 – Bicyclist (Definition)

Any occupant of a two-wheeled road vehicle propelled by pedaling and **may include an electric motor** of 750 watts or less. It includes bicycles solely propelled by human power and those that can be propelled by human power and/or an electric motor. This includes all people (operator and passengers) on bicycles and a person being pulled by a bicycle (e.g., in a wagon or bike trailer).

Per M.G.L. c. 90,§ 1 , an e-bicycle can have one of two classes:
"'Class 1 electric bicycle", an electric bicycle or tricycle equipped with a motor that provides assistance only when the rider is pedaling and that ceases to provide assistance when the bicycle reaches the speed of 20 miles per hour.

"Class 2 electric bicycle", an electric bicycle or tricycle equipped with a motor that may be used exclusively to propel the bicycle and that is not capable of providing assistance when the bicycle reaches the speed of 20 miles per hour.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
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14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

2 – Bicyclist (Examples)

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Popular brands include:

- Trek
- Specialized
- Cannondale
- Santa Cruz
- Scott
- Schwinn

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3 – Skateboarder (Definition)

A person riding on a board mounted on wheels whether manual or e-powered.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

3 – Skateboarder (Examples)

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Popular brands include:

- Baker
- Girl
- Element
- Zero

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4 - Train/Trolley Passenger (Definition)

A passenger of a land vehicle that is designed primarily for, or in use for, moving people or property from one place to another on rails and not in use on a trafficway other than a railway.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

4 - Train/Trolley Passenger (Examples)





5 - Roller Skater (Definition)

A person riding on roller skates that have a wheel on each “corner” of the skate.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

5 - Roller Skater (Examples)

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Popular brands include:

- Impala
- Moxi
- Roller Derby

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6 - In-line Skater (Definition)

A person riding on in-line skates consisting of a single line of wheels along the bottom.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

6 - In-line Skater (Examples)





Popular brands include:

- K2
- Bauer
- CCM
- Impala

7 - Non-motorized Scooter Rider (Definition)

A footboard mounted on two wheels with a long steering handle propelled manually by resting one foot on the footboard and pushing the other against the ground.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

7 - Non-motorized Scooter Rider (Examples)





Popular brands include:

- Razor
- Mongoose
- Cityglide

8 - Non-motorized Wheelchair User (Definition)

A person riding on a manually propelled wheelchair. (For **motorized wheelchair** see ***Electronic Personal Assistive Mobility Device***.)

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

8 - Non-motorized Wheelchair User (Examples)





Popular manufacturers include:

- Invacare
- TiLite
- Permobil

9 - Motorized Bicyclist (Definition)

According to MGL c. 90, s. 1: *"Motorized bicycle", a pedal bicycle which has a helper motor, or a non-pedal bicycle which has a* ***motor****, with a cylinder capacity not exceeding fifty cubic centimeters, an automatic transmission, and which is capable of a maximum speed of no more than thirty miles per hour; provided, that the* ***definition of "motorized bicycle" shall not include an electric bicycle.***

- A "**motorized bicycle**" is typically referred to as a **moped** and is a Registered Vehicle that should be captured in the Vehicle Section of the crash report. If the motorized bicycle is NOT registered, it should be reported in the Vulnerable User section of the crash report.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
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15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

9 – Motorized Bicyclist (Examples)

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Popular brands of motorized bicycles include:

- Tomos
- TaoTao
- Yamaha
- Zhen

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10 - Hand Cyclist (Definition)

A person riding a type of human-powered land vehicle powered by the arms rather than the legs, as on a bicycle. Most handcycles are tricycle in form, with two coasting rear wheels and one steerable powered front wheel. Despite usually having three wheels, they are also known as ***hand bikes.***

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
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16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

10 - Hand Cyclist (Examples)

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Popular manufacturers include:

- Invacare
- AmTryke

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11 – Tricyclist (Definition)

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Any occupant of a three-wheels road vehicle propelled by pedaling **and may include an electric motor** of 750 watts or less. It includes tricycles solely propelled by human power and those that can be propelled by human power and/or a motor. This includes all people (operator and passengers) on tricycle and a person being pulled by a tricycle (e.g., in a wagon or bike trailer).

Per M.G.L. c. 90,§ 1 , an e-bicycle can have one of two classes:
"'Class 1 electric bicycle", an electric bicycle or tricycle equipped with a motor that provides assistance only when the rider is pedaling and that ceases to provide assistance when the bicycle reaches the speed of 20 miles per hour.

"Class 2 electric bicycle", an electric bicycle or tricycle equipped with a motor that may be used exclusively to propel the bicycle and that is not capable of providing assistance when the bicycle reaches the speed of 20 miles per hour.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

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11 – Tricyclist (Examples)





Popular brands include:

- Schwinn
- Radio Flyer
- Liberty Trike

12 - Motorized Scooter Rider (Definition)

A person riding a motorized scooter consisting of any two wheeled tandem or three wheeled device that has handlebars, designed to be stood or sat upon by the operator, powered by an electric or gas-powered motor that is capable of propelling the device with or without human propulsion. The definition of "motorized scooter" shall NOT include a motorcycle or motorized bicycle, a moped or a three wheeled motorized wheelchair.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
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11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

12 - Motorized Scooter Rider (Examples)

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Popular brands include:

- Niu
- Roadrunner



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13 - Electric Personal Assistive Mobility Device User (Definition)

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An individual who is riding on a self-balancing, two non-tandem wheeled device or 4-tandem wheeled device designed to transport only one person, with an electric propulsion system whose maximum speed on a paved level surface is 12.5 miles per hour or less.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
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17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

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13 - Electric Personal Assistive Mobility Device User (Examples)

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Popular manufacturers include:

- Segway
- BEST Power Wheelchair

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14 – Horse Rider (Definition)

An individual riding on a horse for use of transportation.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
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11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

14 – Horse Rider (Examples)





15 – Horse-Drawn Carriage Driver (Definition)

A person driving any wheeled device similar to, but not limited to, wagons, carriages, carts, or similar devices in, upon, or by which any living person may be transported; designed to be drawn by one or more horse(s), hold passengers, and be driven for hire.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
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17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

15 – Horse-Drawn Carriage Driver (Examples)

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16 – Farm Equipment Operator (Definition)

Any person operating a farm tractor or irrigation equipment having a per unit purchase price of at least one thousand dollars ($1,000.00). Farm Equipment also includes, regardless of purchase price, attachments and bailing wire, binders' twine and surface wrap used primarily and directly in any farm operation; aircraft designed or adapted to undertake agricultural applications; dairy equipment.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
11	Tricyclist
12	Motorized Scooter Rider
13	Electric Personal Assistive Mobility Device User
14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

16 - Farm Equipment Operator (Examples)





Popular brands include:

- MTZ
- John Deere
- New Holland

17 – Other Micromobility Device User (Definition)

Any person operating a small, low-speed, electric-powered transportation device, lightweight, wheeled electric-powered conveyances.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
8	Non-Motorized Wheelchair User
9	Motorized Bicyclist
10	Hand Cyclist
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12	Motorized Scooter Rider
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16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

17 – Other Micromobility Device User (Examples)

massDOT
Massachusetts Department of Transportation
Registry of Motor Vehicles







MUNICIPAL POLICE TRAINING COMMITTEE
COMMONWEALTH OF MASSACHUSETTS

18 – Utility Worker – Outside of Vehicle (Definition)

A person outside of a vehicle whose job it is to perform general maintenance, repair, and construction work assignments in support of public works projects; and to operate light and moderately heavy maintenance and construction equipment.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
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18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

18 - Utility Worker – Outside of Vehicle (Examples)

massDOT
Massachusetts Department of Transportation
Registry of Motor Vehicles





MUNICIPAL POLICE TRAINING COMMITTEE
COMMONWEALTH OF MASSACHUSETTS

19 - Roadway Worker – Outside of Vehicle (Definition)

Any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
7	Non-Motorized Scooter Rider
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14	Horse Rider
15	Horse-drawn Carriage Driver
16	Farm Equipment operator
17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

19 - Roadway Worker – Outside of Vehicle (Examples)





20 – Emergency Responder – Outside of Vehicle (Definition)

A person whose job it is a paramedic, police officer, or firefighter who is among those responsible for going immediately to the scene of an accident or emergency to provide assistance.

VU1 - Vulnerable User Type

1	Pedestrian
2	Bicyclist
3	Skateboarder
4	Train/Trolley Passenger
5	Roller Skater
6	In-Line Skater
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17	Other Micromobility Device User
18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

20 - Emergency Responder – Outside of Vehicle (Examples)





97 – Other (Definition)

A person who does not meet the definition of the other vulnerable user categories such as an individual working at a toll booth or a person who is inside of a store.

VU1 - Vulnerable User Type

1	Pedestrian
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97 – Other (Examples)

massDOT Massachusetts Department of Transportation Registry of Motor Vehicles



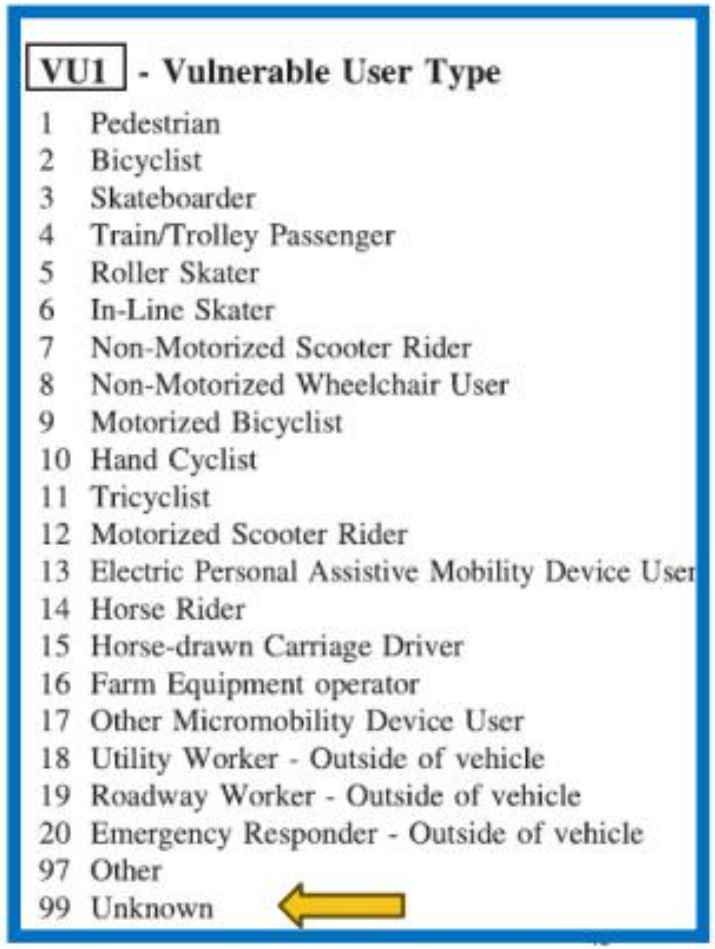




MUNICIPAL POLICE TRAINING COMMITTEE COMMONWEALTH OF MASSACHUSETTS

99 – Unknown

Used when it cannot be determined which attribute describes the non-motorist at the time they became involved in the crash. This would occur in situations where the details to make the determination are missing in the case materials or are reported as unknown. An example would be if it is unknown if the person was on foot or on a skateboard at the time they were struck.



VU1 - Vulnerable User Type

1	Pedestrian
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3	Skateboarder
4	Train/Trolley Passenger
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18	Utility Worker - Outside of vehicle
19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

ALCOHOL AND DRUG FIELDS IN CRASH REPORTS

Number and percentage of missing or invalid values in alcohol and drug fields of drivers, 2018 – 2019 Crash Data, N = 324,106

Crash Field	Missing or Invalid Values	
	Number	Percentage
Suspected Alcohol Use	119,059	36.7%
Suspected Drug Use	120,877	37.3%
Test Status	124,048	38.3%
BAC Test Result	198,648	61.3%
Potential OUI Violation Codes[1]	7,331	75.9%
Type of Test	302,126	93.2%

NEGLIGENT OPERATION

Commonwealth v Howe

- 12:30 PM Saturday; raining heavily; extensive front-end damage; damage to driver's side front tire and windshield
- Defendant extracted from car; unfamiliar with area; said hit a telephone pole
- Damage nearby: telephone pole, 2 mailboxes, small retaining wall
- Officer testified and opined about how crash happened; saw residents walking, jogging, and running along street

Did Commonwealth prove negligent operation?

NEGLIGENT OPERATION

Elements:

1. The defendant operated a motor vehicle

2. The defendant did so on a public way (or in a place where the public has a right of access or in a place where members of the public have access as invitees or licensees) and

3. The defendant did so in a negligent manner so that the lives or safety of the public might have been endangered.

Accident ≠ Negligence

NEGLIGENT OPERATION

Did Commonwealth prove negligent operation?

NEGLIGENT OPERATION

Did Commonwealth prove negligent operation?

YES

OPERATING UNDER THE INFLUENCE

Commonwealth v. Waite

- Single car crash 1 AM; 2 people on scene; defendant changing flat tire; damage to front bumper
- Defendant said he hit a curb; coming from Nantasket Beach; headed to work; admitted drinking earlier; indicia of alcohol
- Defendant agreed to take 2 SFSTs; successful one-leg stand

Was there sufficient corroboration that the defendant was the driver?

OPERATING UNDER THE INFLUENCE

Cannot convict defendant on confession alone

The corroboration rule requires only that there be some evidence, besides the confession, that the criminal act was committed by someone, that is, that the crime was real and not imaginary.

Was there sufficient corroboration that the defendant was the driver?

OPERATING UNDER THE INFLUENCE

Was there sufficient corroboration that the defendant was the driver?

YES

OPERATING UNDER THE influence

Commonwealth v. Zucchino

- 2 car crash; defendant smelled of an alcoholic beverage; all brought to hospital; driver of other car died
- Defendant's blood drawn for treatment; officers obtained a search warrant for the blood; BAC .32
- Defendant indicted on OUI alcohol causing serious bodily injury (MGL c 90 § 24L) and manslaughter by means of OUI alcohol (MGL c 265 § 13 ½)
- The defendant filed a motion to suppress the BAC evidence. Court reported question to the SJC:

Is the Commonwealth required to seek a defendant's consent in order to admit his blood testing results in the prosecution of MGL c 90 § 24L (OUI-SBI offense)?

ADMISSIBILITY OF BAC RESULTS

MGL c 90 § 24(1)(e) states, in relevant part:

In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense… shall be admissible…provided, however, that…such test or analysis…was made with the consent of the defendant…

Paragraph (a) refers to simple operating under the influence of alcohol or drugs offenses.

Is the Commonwealth required to seek a defendant's consent in order to admit his blood testing results in the prosecution of MGL c 90 § 24L (OUI-SBI offense)?

ADMISSIBILITY OF BAC RESULTS

Is the Commonwealth required to seek a defendant's consent in order to admit his blood testing results in the prosecution of MGL c 90 § 24L (OUI-SBI offense)?

NO

This reading ignores the plain language of § 24(1)(e), which clearly limits its application to prosecutions for violations of § 24(1)(a).

ADMISSIBILITY OF BAC RESULTS

Commonwealth v. Cappellucci

- Head-on collision; indicia of alcohol; defendant arrested; both drivers brought to hospital
- Defendant refused to have his BAC tested at hospital; blood taken for medical treatment; officers got search warrant for the blood; BAC .09; blood also positive for fentanyl and THC
- Defendant charged with OUI-SBI X 2: alcohol and drugs

Can the Commonwealth introduce the BAC results?

ADMISSIBILITY OF BAC RESULTS

Can the Commonwealth introduce the BAC results?

YES*

* Court did not reach the issue of whether consent required to test blood for substances other than alcohol

JUVENILE LAW

Children not miniature adults

Laws protect children

- Child Requiring Assistance
- Care and Protection
- Enhanced penalties for crimes committed against children
- Safeguards in place to protect children's Constitutional rights

Juveniles who commit crimes are not treated like criminals

JUVENILE LAW

Police **CANNOT** arrest, summons, or charge a juvenile under 12 years old for violating any town by-law, municipal ordinance, or criminal law in Massachusetts.

Police **CAN** arrest or charge a juvenile between 12 and 18 years old who commits a misdemeanor or a felony.

A summons is the preferred method for bringing all delinquent juveniles to court unless there is reason to believe the child will not appear upon a summons.

Data reporting on MA police use of custodial arrests compared to summons

Data & analysis from the state

Juvenile Justice Policy and Data (JJPAD) Board 2023 Annual Report

Presented by: Massachusetts Office of the Child Advocate

MASSACHUSETTS

Office of the Child Advocate

The Office of the Child Advocate (OCA) is an independent executive branch agency with oversight and ombudsperson responsibilities. The OCA's mission is to ensure that children receive appropriate, timely and quality state services, with a particular focus on ensuring that the Commonwealth's most vulnerable and at-risk children have the opportunity to thrive. Through collaboration with public and private stakeholders, the OCA identifies gaps in state services and recommends improvements in policy, practice, regulation, and/or law. The OCA also serves as a resource for families who are receiving, or are eligible to receive, services from the Commonwealth.

The Juvenile Justice Policy and Data Board (JJPAD)

Permanent commission created by the Legislature (2018).

Membership consists of representative of child-serving agencies from the Executive and Judicial Branches, members of the state House and Senate, advocacy organizations and parent representatives

Charged with evaluating juvenile justice system policies and procedures and making recommendations to improve outcomes

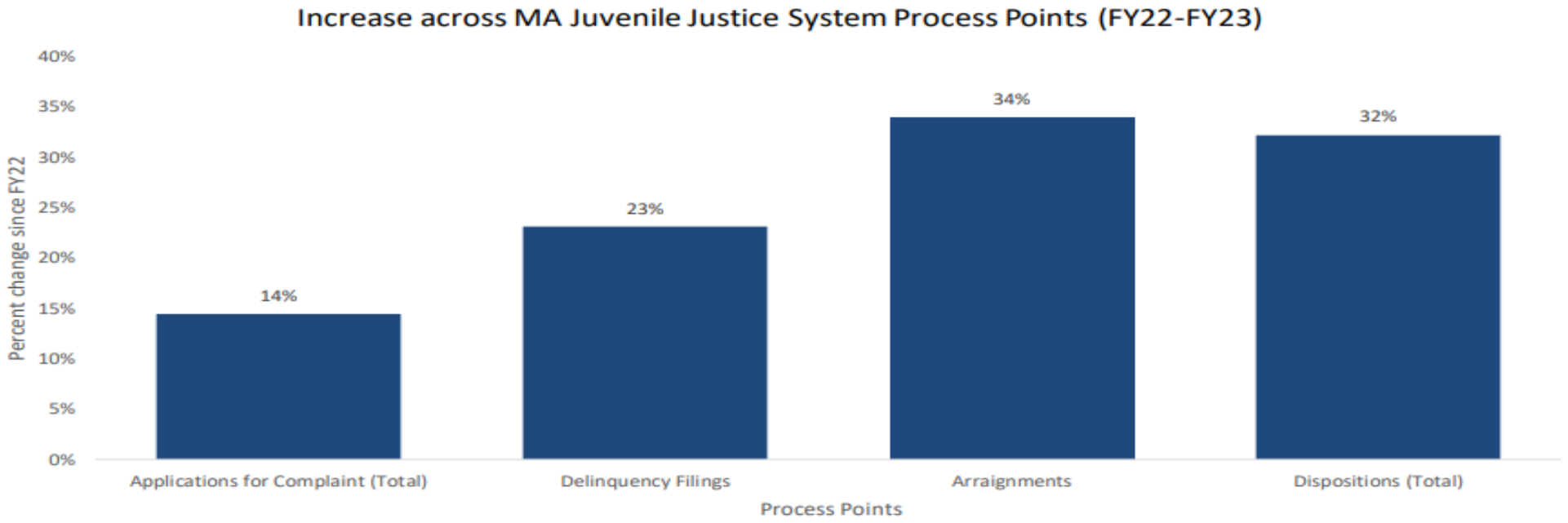
Collecting and reporting available aggregate juvenile justice system data

Studying the implementation of any statutory changes to the juvenile justice system

Making recommendations for any statutory changes to improve juvenile justice system

There was an increase in use of the juvenile justice system in Massachusetts in FY23 compared to FY22

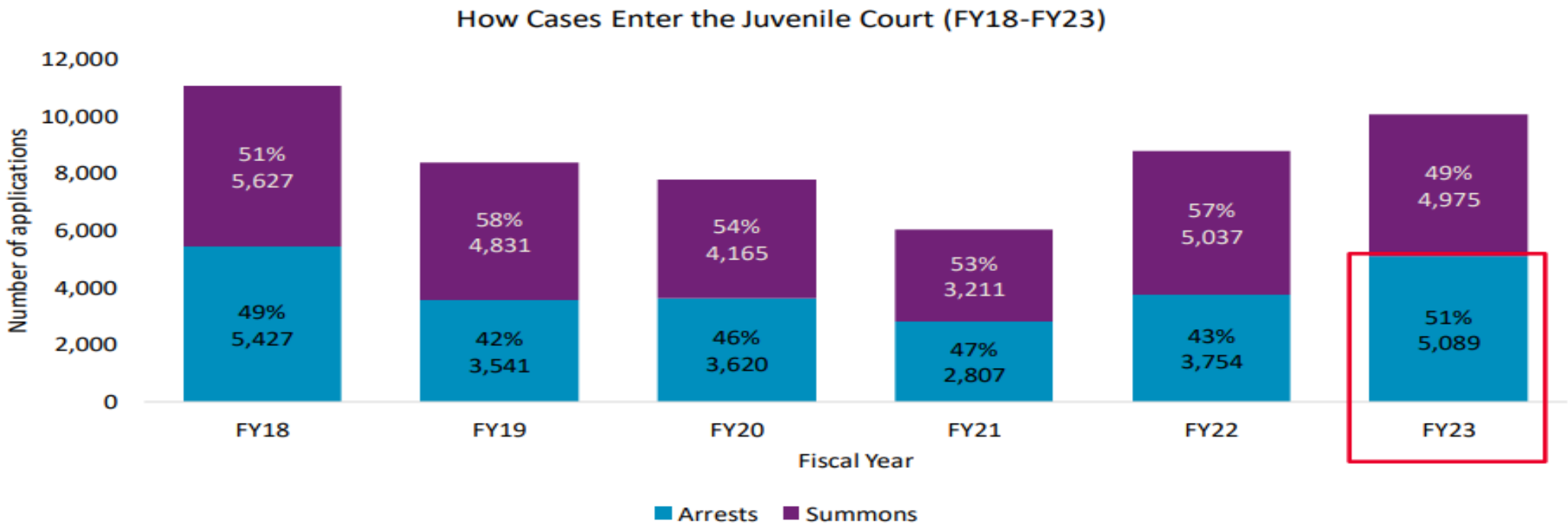
This increase begins at the initial stages of the system with an increase in applications for complaints and continues through all major court process points.



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Office of the Child Advocate

The increase in applications for complaint is driven by an increase in arrests

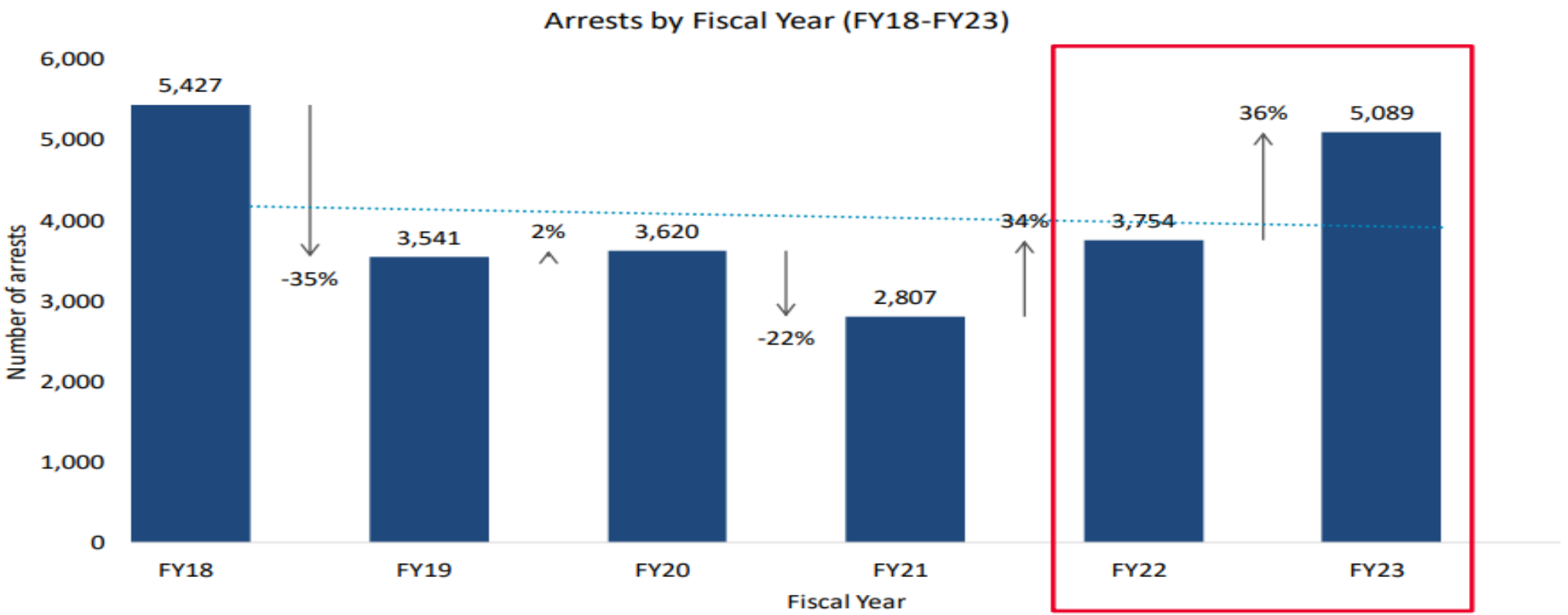
FY23 was the first year since the passing of the CJRA where applications for complaint initiated by arrest represented more than half (51%) of all applications.



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The use of arrests increased by 36% between FY22 and FY23

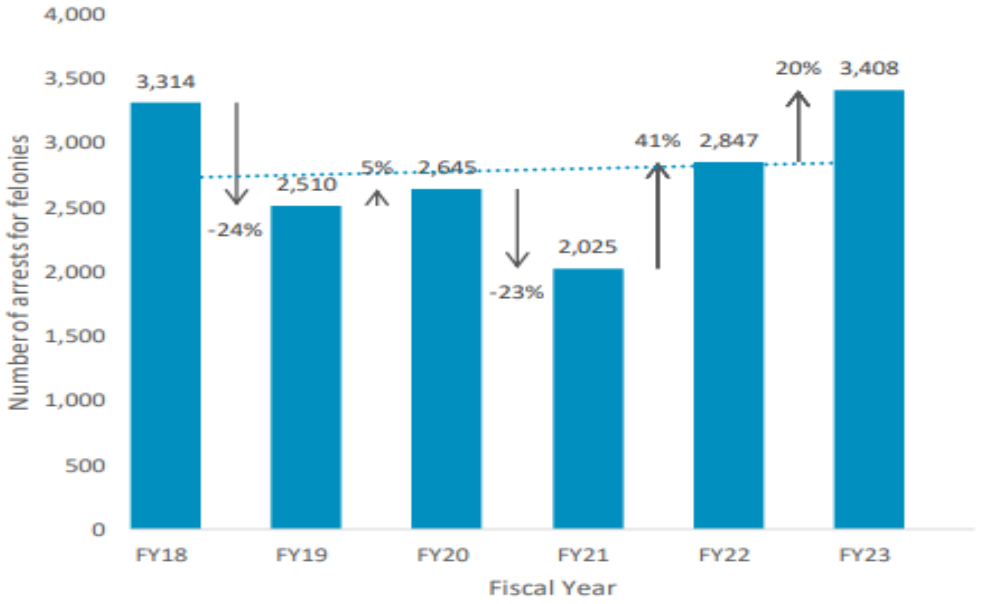
During that same time, the use of summons *decreased* by 1%. Arrest counts are back to pre-CJRA numbers.



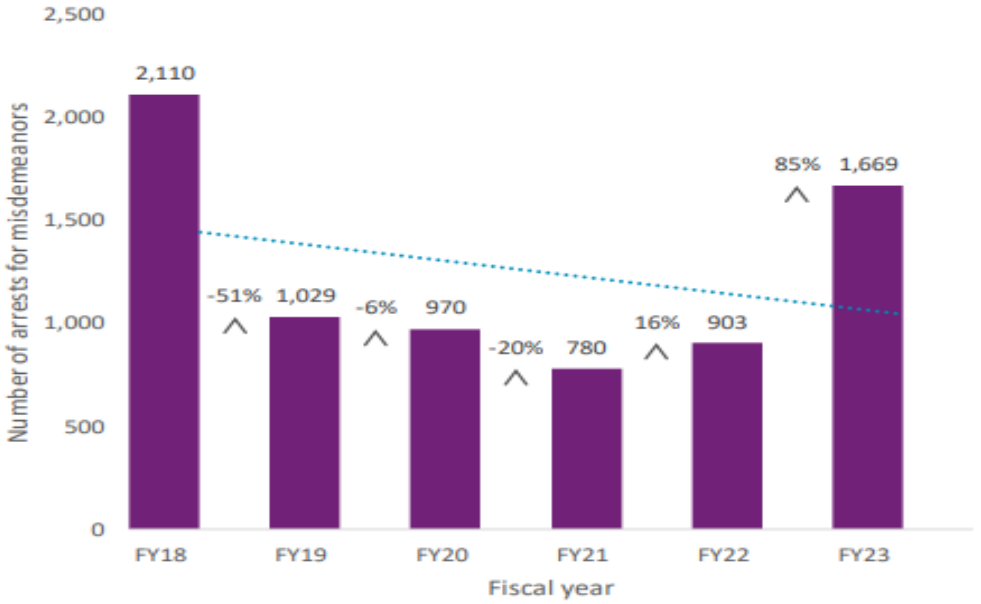
The increase in arrests is driven by cases involving youth alleged of misdemeanor/lower-level offenses

Compared to FY22, arrests for misdemeanors increased by 85% while arrests for felonies increased 20%.

Felony-related arrests by year



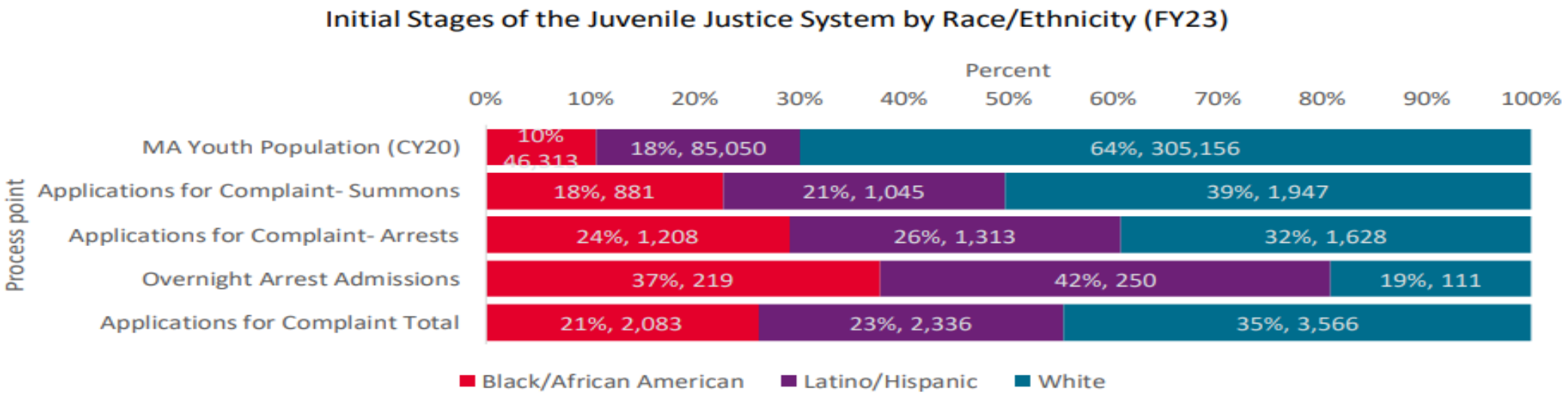
Misdemeanor-related arrests by year



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Office of the Child Advocate

Black and Latino youth were more likely to be arrested than to be issued a summons compared to white youth

- Black/African American youth were 3.85 times more likely to have charges filed against them via an application for complaint, but **4.89 times more likely to have been arrested** and brought to court. They were **2.98 more times likely to be summonsed** into court than white youth.
- Latino/Hispanic youth were 2.35 times more likely to have charges filed against them via an application for complaint, but **2.89 times more likely to have been arrested** and brought to court. They were **1.93 times more likely to be summonsed** into court than white youth.



In FY22 the Board looked at *why* these racial and ethnic disparities (RED) exist by testing four hypotheses:

Hypothesis #1: RED can be explained by offense severity

"Youth of color are brought to court for more serious crimes than white youth"

Hypothesis #2 RED can be explained by offense type

"Youth of color are brought to court for offense types that are more likely to result in arrest because they threaten public safety, such as weapons and person offenses"

Hypothesis #3: RED can be explained by different regional practices

"Some police departments are more likely to use arrests compared to summons (or diversion) than others, and those same jurisdictions have a higher percentage of youth of color than other counties"

Hypothesis #4: RED can be explained by police department policies and practices

"Police officers are more likely to use arrests compared to summons or diversion for Black and Latino youth than white youth"

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The Board's analysis found that each of the four hypotheses can account for some, but not all, of the differences seen in the data.

Hypothesis #1: RED can be explained by offense severity

- Black and Latino youth are accused of felony offenses more often than white youth can, in part, explain higher rates of disparities – but it does not explain disparities completely, especially when considering that Black and Latino youth experience custodial arrests more frequently than summons for the same offense levels as white youth, and specifically for misdemeanor offenses which are lower-level offenses.

Hypothesis #2 RED can be explained by offense type

- The fact that Black and Latino youth are accused of person and weapons offenses more often than white youth can, in part, explain higher rates of disparities at the front door of the system, but it does not explain disparities completely, particularly considering Black and Latino youth experience higher rates of custodial arrests than white youth for almost every offense type (e.g., public order and property).

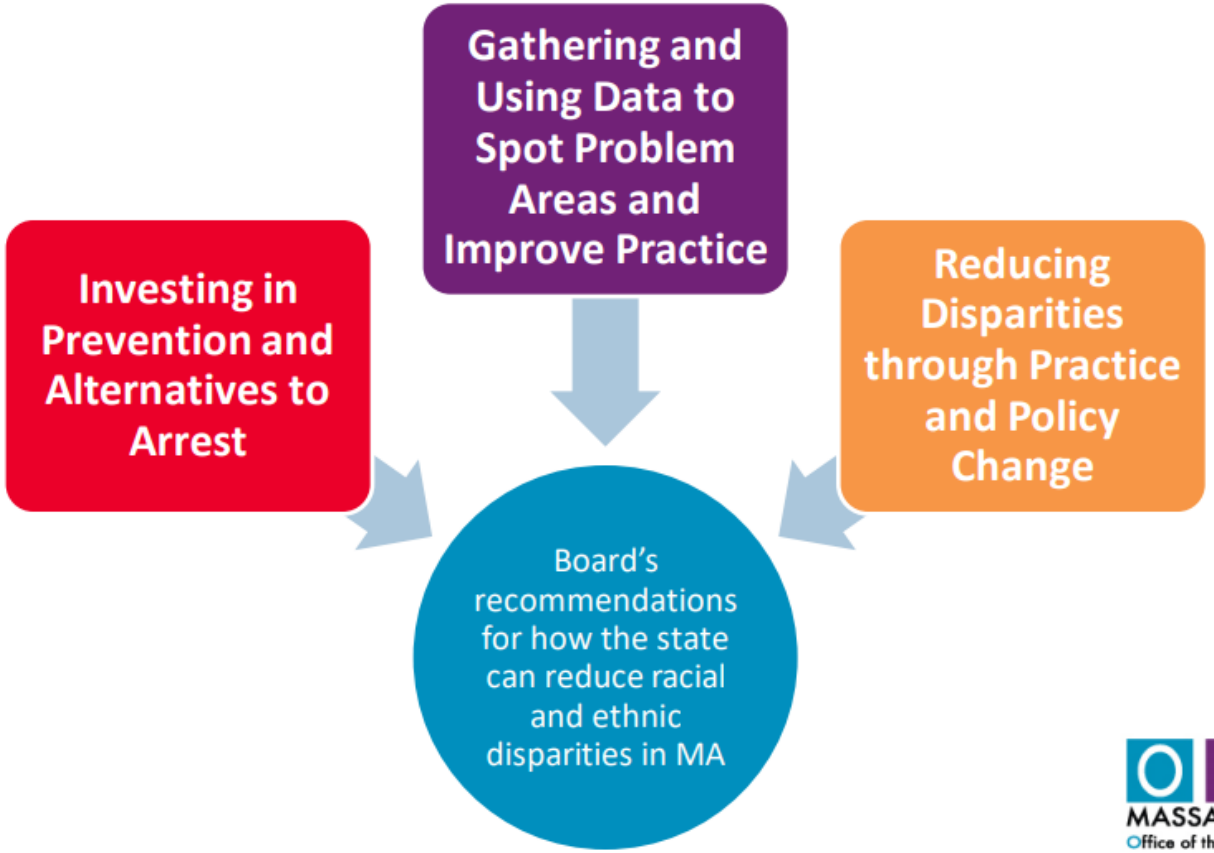
Hypothesis #3: RED can be explained by different regional practices

- While Suffolk, Hampden and Essex counties account for a large proportion of the states' applications for complaint and have higher rates of youth of color generally, there are other factors contributing to racial and ethnic disparities seen across the state for both applications for complaint generally, and the use of custodial arrests in particular for youth of color. There are high levels of disparities seen in certain counties despite a smaller proportion of the state's overall applications for complaint in those places, and there is a higher percentage of youth of color entering the front door of the justice system as a result of an arrest instead of a summons in *every* court county.

Hypothesis #4: RED can be explained by police department policies and practices

- The JJPAD Board does not have access to data that would allow us to examine variations in arrest practices by police department or police officer.
- Nationally: a meta-analysis of 23 research studies that focused on the relationship between race and the likelihood of an arrest between 1977 and 2004 found that law enforcement were more likely to arrest a person if they were Black, even when controlling for factors like the seriousness of the alleged offense and the suspect's prior record.

Based on the data, the Board made several recommendations to address RED at the "front door" of the state's juvenile justice system



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Board recommendations for police departments: Gathering and using data to spot problem areas and improve practice

1. Not all MA PDs are currently reporting summons-use to the FBI NIBRS data system. Police departments should uniformly report their decision to seek summonses, which would allow the state to continue to monitor and analyze this data in the context of racial and ethnic disparities.

2. Departments should use their internal data to see if the disparities highlighted in this presentation are replicated at the department and/or individual officer level to guide further practice recommendations.

3. Police departments should require officers to document *why* they decided to arrest a youth instead of seeking a summons and publish their findings.

Board recommendations for police departments: Reducing disparities through practice and policy change

1. Police departments should provide more guidance and limitations on when to use a custodial arrest, when to seek a summons, and when to offer diversion (e.g., Everett)

2. Police departments should re-examine what department policies and practices may be contributing to racial and ethnic disparities in arrests, including policies and practices regarding how decisions on:
   - where (e.g., what neighborhood),
   - when (e.g., during the day, in school, overnight),
   - how (e.g., traffic stops, on foot patrol, in schools)
   - and in what manner (e.g., use of stop & frisk techniques)

OCA MASSACHUSETTS Office of the Child Advocate

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Office of the Child Advocate

Learn More about the JJPAD

Click here to read the JJPAD 2023 Annual Report

Click here to read the JJPAD Report on racial and ethnic disparities at the "front door."

Read all the JJPAD Reports & explore more system data on the JJPAD Board website:
https://www.mass.gov/juvenile-justice-policy-and-data-board

OCA Website

https://www.mass.gov/orgs/office-of-the-child-advocate

JUVENILE LAW

Commonwealth v. Padilla

- 16-year-old charged with murder in the second degree
- 2 questions reported to SJC about MGL c 119 § 68
    - Does judge have authority to order juvenile charged with murder to the care of DYS pre-trial?
    - If no, does judge have authority to hold juvenile on bail on other charges instead of murder charges?

JUVENILE LAW

Does judge have authority to order juvenile charged with murder to the care of DYS pre-trial?

NO

If no, does judge have authority to hold juvenile on bail on other non-murder related charges instead of murder charges?

NO

CRIMINAL PROCEDURE

- Shoplifting
- Double jeopardy
- Exculpatory evidence







SHOPLIFTING

Commonwealth v. McNeill

- Defendant charged with shoplifting, 3rd offense
- Prior offense = Guilty filed

Is a guilty-filed disposition a prior offense for purposes of the shoplifting statute?

SHOPLIFTING

MGL c 266 § 30A has a graduated sentence structure.

The generally recognized purpose of… graduated sentencing law such as §30A is to punish offenses more severely when the defendant has exhibited an unwillingness to reform his miscreant ways and to conform his life according to the law.

“offense” means same as “conviction” or “adjudication”

Is a guilty-filed disposition a prior offense for purposes of the shoplifting statute?

SHOPLIFTING

Is a guilty-filed disposition a prior offense for purposes of the shoplifting statute?

YES

DOUBLE JEOPARDY

Commonwealth v. Wooden

- Outstanding warrant for defendant; defendant driving down street; pulled over; defendant climbed into back seat
- Defendant ignored officer instructions; fled on foot
- Struggle; defendant wiggled out of sweatshirt; officer wedged between truck and garage
- Defendant pulled a gun; pushed rack back; pointed gun at officer's leg; officer lost balance; defendant pointed gun at officer; pulled trigger
- Defendant demanded officer's weapon; tried to grab officer's gun; defendant fled; gun found in neighboring yard
- Defendant convicted of multiple charges, including 2 ADWs

Were ADW convictions duplicative?

DOUBLE JEOPARDY

Generally, when the intent of the Legislature in enacting criminal statutes is aimed at protecting the safety of individuals, the number of victims determines the unit of prosecution... However, the prosecution of distinct assaults on the same person during a single episode is not barred by this principle.

Were ADW convictions duplicative?

CONTINUOUS EVENT OR DISTINCT CRIMES?

Commonwealth v. Horne	Commonwealth v. Wooden
Possessed a gun outside home without a license	During struggle with officer, pointed gun at officer's leg
Defendant came home	Officer lost balance; on his knees
Defendant left home with the firearm	Defendant took a step back, stood over the officer, pointed gun at officer, pulled trigger
"fork in the road decision"	"fork in the road decision"

DOUBLE JEOPARDY

Were ADW convictions duplicative?

NO

Here, the assaults occurred close in time, with the same weapon, but we do not read M.G.L. c. 15B(b) to "reward the defendant's persistence."

DOUBLE JEOPARDY

Commonwealth v. Guardado (Guardado II)

- Guardado I established lack of licensure is an essential element of crime
- Double jeopardy protects individuals from being prosecuted twice for the same crime
- At time of original trial, SJC had determined that lack of licensure was an affirmative defense and NOT an element of the crime
- Commonwealth did not have a fair opportunity to prove its case

Ruling: Commonwealth can retry the defendant

EXCULPATORY EVIDENCE

Graham v. District Attorney for the Hampden District

- 2018 DOJ investigating Springfield PD
  - Sgt. federally indicted for threatening juvenile suspects
  - Six off-duty officers involved in bar brawl
  - Officer stealing $400,000 from evidence room
- Springfield PD made record management system available to DOJ; 114,000 pages
- 2020 - DOJ report issued; 23 incidents of misconduct; consent decree
- DA requested docs from DOJ; DOJ refused to cooperate; Springfield PD could not identify which documents had been turned over; Springfield PD provided 700-800 pages related to 16 identifiable incidents in DOJ report

EXCULPATORY EVIDENCE

- DA sent out discovery notices on identified officers to attorneys in 8,000 cases
- Officer Bigda: video turned over in all his cases; information that an officer kicked one of the juveniles turned over to the juveniles involved
- Bar brawl: DA drafted report and made it publicly available; no disclosure in criminal cases
- Adverse credibility findings: DA would conduct independent evaluation; disclosure determined by result of evaluation
- Civil suit filed
  - Policy regarding adverse credibility findings
  - Policy regarding police misconduct when specific officers unknown
  - Failure to investigate DOJ's findings

EXCULPATORY EVIDENCE

Prosecutor has duty to disclose exculpatory evidence

- Duty to disclose
- Duty to investigate

DUTY TO DISCLOSE

When a prosecutor or any member of the prosecution team learns that a police officer either lied to conceal the unlawful use of excessive force or lied about a defendant's conduct and the applicable charges, the prosecutor must disclose the untruthful conduct in any criminal case in which that officer prepared a report or may serve as a witness.

Accordingly, to comply with its obligations under Giglio v. United States, 405 U.S. 150 (1972) to disclose information known to the prosecution team, it behooves the prosecutor's office to institute formal disclosure procedures to ensure the communication of all material information to defense counsel.

DUTY TO DISCLOSE

- Judicial findings of adverse credibility must be disclosed in all of the officer's cases.

- Practice of not disclosing officer misconduct when the acts cannot be attributed to a specific officer violated the duty to disclose.

- Pending criminal investigations involving and known to members of the prosecution team require disclosure.

DUTY TO INVESTIGATE

- Prosecutor has a duty to learn of exculpatory information held by any member of the prosecution team.
- Efforts must be reasonable

Reasonableness demands, at the very least, that prosecutors ask other members of the prosecution team whether exculpatory information exists, particularly any information specifically requested by defense counsel or required to be disclosed under rule 14…When a prosecutor is aware of potential misconduct involving a member of the prosecution team, the duty of reasonable inquiry also demands that he or she conduct a thorough investigation to determine the nature and extent of the misconduct.

DUTY TO INVESTIGATE

- Requested documents from DOJ numerous times
- Sued DOJ for access to documents
- Requested access to documents from Springfield PD

Were these efforts reasonable?

DUTY TO INVESTIGATE

Were these efforts reasonable?

YES…

but only got 700-800 of 114,000 documents

DOJ provided categories of documents it reviewed.

DA was required to gather all documents that fall within those categories

DUTY TO INVESTIGATE

Duty to Investigate does NOT extend to Internal Affairs records

Wanis and Rodriguez, together, place an explicit limitation on a prosecutor's duty of inquiry by deeming records from police department internal affairs divisions to be outside a prosecution team's possession, custody, or control and, therefore, outside the scope of prosecutor's disclosure obligations under rule 14.

EXCULPATORY EVIDENCE

Commonwealth v. McFarlane

- July 2017: defendant arrested
- March 2018: officer involved in defendant's arrest named in an unrelated civil suit; false imprisonment and false arrest
- February 11, 2020: defendant found guilty after trial
- February 21, 2020: officer found liable in civil suit

Was pending civil suit exculpatory evidence that needed to be turned over to the defense?

EXCULPATORY EVIDENCE

While our conception of exculpatory evidence is rightfully broad, it is not boundless. The civil lawsuit at issue here exceeds those bounds. By virtue of being both: 1. civil, rather than criminal; and 2. pending, rather than fully adjudicated, pending civil lawsuits are not exculpatory and are not subject to automatic disclosure requirements

EXCULPATORY EVIDENCE

A bright-line rule is necessary to guide disclosure and inquiry requirements related to civil lawsuits. Therefore, we conclude that findings of civil liability made against prosecution team members in the performance of their official duties are subject to automatic disclosure and fall within the duty of inquiry.

QUESTIONS?



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