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MPTC

Municipal Police Training Committee

In-Service Training

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MANUAL

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

This manual incorporates cases decided between May 2023 and April 2024. Relevant legal updates are posted throughout the year and available for review on the MPTC website: mass.gov/MPTC.

This document is intended to serve as a training tool for police officers to review relevant legislation and case law that has been issued from the United States Supreme Court, the Supreme Judicial Court, and the Appeals Court of Massachusetts over the course of the past year. This manual is not intended to serve as a criminal law or criminal procedure book. For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor.

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CONSTITUTIONAL LAW

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

STATE MUST PROVE CRIMINAL INTENT IN TRUE THREATS CASES

Counterman v. Colorado, 600 U.S. 66 (2023).

FACTS
From 2014 – 2016, a singer/musician received hundreds of Facebook messages from the Counterman, a man she had never met. Some messages indicated a close relationship with the singer. For example, "good morning sweetheart" and "I am going to the store would you like anything?" Others indicated the Counterman had the singer under surveillance: "was that you in the White Jeep?" or references to "a couple of physical sightings." In some of the messages Counterman expressed anger toward the singer: "fuck off permanently," "staying in cyber life is going to kill you," and "you're not being good for human relations. Die."

The singer did not respond to any of the messages and on several occasions blocked him; however, whenever she did block him, Counterman would create a new account and contact her again.

The singer was scared. She believed Counterman was threatening her life and was afraid he was following her and would hurt her. She had trouble sleeping and suffered extreme anxiety. She also changed her behaviors: she no longer walked alone, she declined social invitations and she cancelled some of her performances.

The singer ultimately reported the posts to the authorities and Counterman was charged under a Colorado statute that made it unlawful to "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." p. 70.

Counterman moved to dismiss the complaint arguing that the messages were not true threats and were therefore protected by the First Amendment. Under the Colorado statute the State did not need to prove any intent by Counterman. The issue presented to the Supreme Court was whether the First Amendment requires States to show that a person is aware of the threatening nature of their statements before they can be charged criminally for making those statements.

DISCUSSION

The First Amendment protects free speech, but there are limits to its protection. Whenever a statute infringes on an individual's right, the court must determine if the restriction is lawful. To make this determination, the court will engage in a two-part analysis:

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

In prior cases the court has recognized some narrowly defined categories of speech that are not protected by the First Amendment.

> "This court has often described those historically unprotected categories of speech as being of such slight moral value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in their proscription." pp. 73-74.

Some of the categories of speech that are not protected by the First Amendment include:

> Incitement – "statements directed at producing imminent lawless action and likely to do so." p. 73 (quotations and citations omitted.) See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
>
> Defamation – "false statements of fact harming another's reputation." p. 73. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
>
> Obscenity – "valueless material appealing to the prurient interest and describing sexual conduct in a patently offensive way." p. 73 (quotations and citations omitted.) See *Miller v. California*, 413 U.S. 15 (1973).

True threats is another category of speech not historically protected by the First Amendment.

When analyzing whether the Colorado statute at issue here was narrowly tailored, the court looked at each of the other categories of unprotected speech to determine

whether the prior cases determined that a subjective intent of the speaker was required.

For defamation, the court found that a public figure cannot recover from a speaker unless that speaker had knowledge that the statement was false or acted with reckless disregard as to whether the statement was true or not.

> "That rule is based on fear of 'self- censorship' – the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers form making even truthful statements." p. 76.

Incitement cases require the State to prove the speaker acted with purpose or knowledge.

> The First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were intended (not just likely) to produce imminent disorder. That rule helps prevent a law from deterring 'mere advocacy' of illegal acts – a kind of speech falling within the First Amendment's core. p. 76 (quotations and citations omitted.)
>
> We recognize that incitement to disorder is commonly a hair's breadth away from political "advocacy" and particularly from strong protests against the government and prevailing social order. p. 81.
>
> A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core. p. 81.

In the case of obscene material, the material is either obscene or it isn't. Laws related to the distribution of obscene material cannot punish the behavior unless the individual was aware of the "character and nature" of the materials they distributed.

The cases that established these categories of speech that are not protected by the First Amendment all require the State to prove that the speaker had some criminal intent. This intent requirement is necessary to prevent any chilling effect on the right to free speech guaranteed by the First Amendment.

The court found that, for those same reasons, some intent of the speaker must be proven in the context of true threats cases. The Court determined that a reckless standard is the minimum that is required.

> The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. p. 69.

Counterman was prosecuted under an objective standard where the State was only required to show that a reasonable person would have understood his Facebook messages were threats. This violated the First Amendment.

The judgment was vacated.

THREATS IN MASSACHUSETTS: MGL c 275 §§ 2-4

The statutes in Massachusetts that criminalize threats satisfy the reckless standard required in Counterman.

In order to prove threats in Massachusetts, the Commonwealth must prove four things beyond a reasonable doubt[1]:

First: That the defendant expressed an intent to injure a person, or property of another, now or in the future;

Second: That the defendant intended that his (her) threat be conveyed to a particular person;

Third: That the injury that was threatened, if carried out, would constitute a crime; and

Fourth: 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 LAWFUL POLICE ORDER NOT PROTECTED BY FIRST AMENDMENT

Commonwealth v. Manolo M., 103 Mass.App.Ct. 614 (2023).

FACTS

Approximately 100 students were outside Brockton High School after an early dismissal one day entirely blocking the street. Officers tried to disburse the crowd by issuing orders over a microphone and using cruiser lights and sirens to clear the road. Officers were struggling with one of the students when a juvenile, Manolo M., tried to run past an officer toward that struggle. Manolo M. was pushed back by the officer. Manolo M. then rocked back and forth in front of the officer with his fist up saying, "let's go mother f'er, let's go." Manolo M. tried to punch the officer in the head, but the officer was able to block the punch. The officer then kicked Manolo M., who, undeterred, approached the officer again. As the officer tried to place Manolo M. under arrest, a physical struggle ensued during which they both fell to the ground. Another officer came to

[1] Model Jury Instructions for Use in the District Court 6.700.

assist and grabbed Manolo M.'s arm so that the original officer could successfully apply the handcuffs.

As officers arrested Manolo M. and the other individual, the crowd ran closer and surrounded the officers and refused to leave the area. Frederick was one of the juveniles on scene. He ignored several verbal warnings to leave. Instead, he remained and encouraged others in the crowd to stay. Frederick appeared to get more agitated, walking slowly in the middle of the street yelling "Fuck you pigs I aint moving shit!" An officer tried to arrest Frederick for disorderly conduct. Frederick refused to put his arms behind his back and pulled his arms away from the officer. He continued to fight with the officer until two other officers joined in the effort and he was ultimately tased.

Manolo M., Frederick and another juvenile, Angela, were all charged and adjudicated delinquent on resisting arrest charges.[2] Manolo M. was also adjudicated delinquent on an offense of assault and battery on a police officer (ABPO). Each of the juveniles appealed arguing that the evidence was insufficient as to the resisting arrest charge. Manolo M. also appealed the ABPO adjudication.

DISCUSSION

Assault and Battery on a Police Officer

Manolo M. argued that there was insufficient evidence to prove he touched the officer. The court found that there was evidence presented that Manolo M. had tried to punch the officer in the head and that, when the officer blocked the punch, the juvenile came into contact with the officer. These facts are enough for a fact finder to conclude that an assault and battery had occurred.

NOTE: The jury instructions on that charge were erroneous so his adjudication as delinquent on that offense was vacated.

Resisting Arrest

To prove resisting arrest, MGL c 268 § 32B, the Commonwealth must prove three elements:

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.

[2] The juveniles involved were also charged with disorderly conduct. Those charges were dismissed because it was their first offense minor misdemeanor. For further information on this issue, please refer to *Commonwealth v. Manolo M.* 486 Mass. 678 (2021) which was covered in Legal Updates In-Service Training Year 2021-2022.

To prove knowledge, the Commonwealth must prove the defendant knew that the officer was attempting to make an arrest and that the officer was a police officer.

Manolo M. argued that there was insufficient evidence to prove the first element. The court found there was evidence that after Manolo M. was prevented from running past an officer to get to an ongoing struggle, he then tried to punch the officer in the head. After that, a physical struggle began as the officer tried to arrest him. The officer told Manolo M. to put his hands behind his back and that he was under arrest, but Manolo M. did not comply. Instead, he continued to physically struggle with the officer until another officer came to assist and they were able to place Manolo M. in handcuffs. The court found that these facts were sufficient to prove that Manolo M. was actively resisting the officer's attempts to place him under arrest.

Frederick and Angela appealed their adjudications of delinquent for resisting arrest based upon the third element.

Model jury instruction for use in the district court 7.460 says the following:

> 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.

Both juveniles argued that officers did not have a good faith basis to arrest them. For purposes of this case, the officers were acting under color of law if they had probable cause to arrest Frederick and Angela for disorderly conduct. To prove disorderly conduct under MGL c 272 § 53, the Commonwealth must prove three elements:

1. That the defendant involved themselves in at least one of the following actions:
    a. fighting or threatening;
    b. violent or tumultuous behavior; or
    c. created a hazardous or physically offensive condition by an act that served no legitimate purpose of the defendant
2. The defendant's actions were reasonably likely to affect the public
3. That the defendant either:
    a. intended to cause public inconvenience, annoyance or alarm; or
    b. recklessly created a risk of public inconvenience, annoyance or alarm.

Frederick argued that his conduct and words were protected speech under the First Amendment which protects his right to criticize the police and to watch police engaged in their official duties in public places. The court agreed that police do not "have unfettered discretion to arrest someone for speech that annoys or offends." *Commonwealth v. Adams*, 482 Mass. 514, 528 (2019).

> However, 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. (quotations omitted) p. 622 quoting *Lozman v. Riviera Beach*, 138 S.Ct. 1945, 1953 (2018).

While the court agreed that some of Fredrick's conduct may have been protected speech, the First Amendment does not entitle him to ignore "police commands reasonably calculated at ensuring public safety amid potentially dangerous circumstances." p. 623 quoting *Commonwealth v. Marcavage*, 76 Mass.App.Ct. 34, 40 (2009).

The court found that the facts and circumstances in this case were sufficient to establish a good faith basis for officers to believe there was probable cause to arrest Frederick for the charge of disorderly conduct.

Angela argued that the First Amendment allows her to record police interactions and to ask why police are harassing people on the street. The court found that the evidence here showed she did more than that. The evidence presented was that Angela was swearing and telling officers they were violating people's rights and that she was "in all the officers' faces with her phone," including holding her phone five inches from an officer's face while he was initially dealing with Frederick. The officer told Angela to get the phone out of his face and he slapped the phone out of her hand three times. She also had her phone inches away from another officer who was struggling to place an individual in custody with the help of another officer. She was in that officer's face, screaming and swearing, saying he was violating rights. She refused to stop and to walk away.

> Viewed in the light most favorable to the Commonwealth, a rational jury could conclude that Angela failed to comply with police orders to stand back from the officers while they were performing their duties, including when [an officer] was engaged in a struggle. This conduct was sufficient to give officers a good faith basis to believe probable cause supported Angela's arrest." pp. 632-624.
>
> 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. p. 624.

Angela further argued that her conduct did not amount to resisting arrest. Angela argued that simply failing to offer her arms to officers as quickly as they would have

liked is insufficient to prove resisting arrest. The court found that the evidence showed she actively and physically refused to submit to the officers. An officer testified she pulled her arms away from officers and that the officer ultimately grabbed her backpack and her hair and put her on the ground. At that point, Angela pulled her arms underneath her body to prevent officers from handcuffing her. After giving her multiple orders to put her hands out and a verbal warning, she was sprayed with OC spray. These facts are enough to support the charge of resisting arrest.

The adjudications for resisting arrest were affirmed.

CRIMINAL HARASSMENT

WHETHER STATEMENTS ARE PROTECTED SPEECH IS A QUESTION OF FACT

Commonwealth v. Salvatore, 103 Mass.App.Ct. 605 (2023).

FACTS

The victim filed an application for criminal complaint in the district court clerk's office against his girlfriend's ex-boyfriend for criminal harassment. In the written application, the victim alleged that the defendant had harassed him on multiple occasions. He described one incident in which the defendant stood in front of the victim's car and took pictures of the car and the license plate. He alleged that the defendant targeted him through the victim's employer's social media account, calling him among other things, a child abuser. The victim said the defendant's actions were potentially damaging to his reputation and that they were a "continuous and deliberate attempt to damage (the victim's) relationship with his girlfriend" and that the escalating pattern of behavior had caused him "substantial emotional distress." p. 606.

The clerk scheduled the matter for a show cause hearing. The victim testified at the clerk's hearing and provided significant additional details about the defendant's behavior. The victim testified that the defendant made social media posts calling the victim names, saying he was pathetic and weak. In one post the defendant said, "I keep begging the universe not to push me." The victim further testified that the defendant posted numerous times about being in the town that the victim and his girlfriend just moved to. According to the victim, the defendant "was never here before, and now he's here, again, nearly every single day." The victim testified that these posts appeared 170 times in just over 60 days and that he and his girlfriend "feel like they're confined to their home." None of the posts threatened physical harm, but the victim testified that he suffered from "significant amounts of emotional distress" and "anxiety, fear and embarrassment." p. 607.

After the hearing, the clerk found probable cause to issue a complaint charging the defendant with criminal harassment in violation of MGL c 265 § 43A. On the paperwork

the clerk checked the box indicating the testimony was recorded and noted that the recording was available through the court's recording system.

The defendant filed a motion to dismiss pursuant to *Commonwealth v. DiBennedetto*, 436 Mass. 310 (2002). The defendant argued that the four corners of the complaint application did not set forth probable cause for all of the elements of criminal harassment. The court agreed and dismissed the complaint. Neither party nor the judge relied on or addressed the recorded testimony. This appeal followed.

DISCUSSION

At a motion to dismiss pursuant to *DiBennedetto,* the court must determine whether the information presented to the clerk at the time the complaint issued was sufficient to establish probable cause to believe the defendant committed the crime alleged. In ruling on the motion, it is often said that the court is limited to considering only the "four corners" of the application for complaint; however, that terminology can be misleading. The court should consider any information that was presented to the clerk. In this case, it was clear that the clerk heard testimony as part of their probable cause determination because the clerk noted on the paperwork that testimony was taken and recorded. Because the testimony at the show cause hearing was part of the evidence presented to the clerk, it should have been considered by the judge at the motion hearing.

To prove criminal harassment in this case, the Commonwealth must prove five things beyond a reasonable doubt[3]:

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.

The victim's testimony at the clerk's hearing established probable cause to believe that the defendant's conduct was willful and malicious because it was evident that the purpose of the defendant's actions was to distress the victim. The court also found that a reasonable person would be seriously alarmed and would suffer substantial emotional distress if they were targeted by such behavior.

[3] Model Jury Instructions for Use in the District Court Instruction 6.640.

The criminal harassment statute is directed at patterns of conduct; however, it also includes speech that is not constitutionally protected. The determination of probable cause is complicated here because of the interplay between criminal harassment and the rights guaranteed to the defendant by the First Amendment.

Standing in front of the victim's car while taking pictures of the car and its license plate was conduct and not speech. The rest of the conduct at issue would constitute speech.

When considering whether speech is harassment or constitutionally protected, the context in which the statements were made matter.

> 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. p. 612.

Any false allegation that the victim was a child abuser would also not be considered protected speech. The court found that there were at least three incidents of harassment here.

When it cannot be determined as a matter of law that the speech was protected, the fact finder will decide whether the speech was harassment or protected. It is not appropriate to make that determination at the motion stage.

> As the Supreme Judicial Court has made clear, even "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." p. 612 quoting *Commonwealth v. Bigelow*, 475 Mass 554, 570 -571 (2016).

The court found that there was probable cause on the record before the clerk-magistrate to establish the charge of criminal harassment. The order allowing the motion to dismiss was reversed.

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 ESTABLISHED BETWEEN DRUG DEALING AND DEFENDANT'S NEW HOME

Commonwealth v. Lewis, 103 Mass.App.Ct. 61 (2023).

FACTS

A 17-year veteran of the Brockton police was conducting a drug investigation in April 2019. The detective was contacted by a confidential informant (CI) who said that the defendant was selling crack cocaine out of a specific apartment. The police confirmed that the tenant of the apartment shared the same last name as the defendant and that the tenant always had people staying with him.

No information was provided about the CI's prior reliability. The CI participated in two controlled buys at the apartment. In both instances the CI contacted the defendant via a phone number the CI said belonged to the defendant. After the controlled buys, the detective sought and obtained a search warrant for the apartment. When the police went to execute the warrant, the detective learned from an unidentified source that the defendant had "moved out." The CI then confirmed that the defendant had moved downtown but could not provide any more specific information as to where.

The detective received information from another unidentified source that the defendant was now staying in room 205 at a hotel in Brockton. The CI contacted the defendant, using the same telephone number used before, and arranged a third controlled buy. Officers watched the defendant leave the hotel on foot and travel to the agreed upon location. Officers only lost sight of the defendant for "seconds" while they had him under surveillance. The CI completed the third controlled buy and officers watched the defendant return to the hotel. All the substances purchased by the CI were confirmed to be cocaine via field testing.

On May 1, 2019, the officer spoke to the front desk clerk of the hotel who confirmed that the defendant checked in on April 26 and was staying in room 205. On May 2, 2019, the officers sought and obtained a search warrant for the hotel room. Police recovered crack cocaine and $694 in cash from the hotel room.

The defendant was charged with possession of a class B substance. He filed a motion to suppress arguing that the search warrant affidavit did not establish a nexus between the alleged drug dealing activity and the place to be searched. The motion was denied. This appeal followed.

DISCUSSION

A search warrant must be supported by an affidavit which contains "facts sufficient to demonstrate that there is probable cause to believe that drugs, or related evidence, will be found at the location to be searched." p. 63 quoting *Commonwealth v. Pina*, 453 Mass. 438, 440 (2009). The affidavit does not need to show that the evidence sought will more likely than not 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. p. 63 quoting *Commonwealth v. Hayes*, 102 Mass.App.Ct. 455, 462 (2023).

The court found that three controlled buys in a two-week period "well established" that the defendant was conducting an illegal drug distribution operation and had a supply of drugs to sell. The affidavit showed that the defendant was initially selling crack cocaine out of the apartment. The affidavit also established that, after moving to the hotel, he was contacted by the CI, travelled directly from the hotel to the agreed upon meet location, sold the drugs, and then returned directly to the hotel. Based upon these facts and chronology of events, the court found it was reasonable for police to believe that evidence of the illegal drug operation would be found in the hotel room.

The court reiterated that a single observation of an individual leaving a home and participating in a controlled buy is not sufficient to establish a nexus between the home and the drug dealing. The court found that the facts in this case were distinguishable from that scenario.

> Most significantly, it is a reasonable inference that once the defendant moved from the apartment to the hotel, his room there became his base of operation. Before applying for the search warrant, the Commonwealth corroborated that inference by the third controlled buy, as the affidavit explained. p. 64.

The court was also clear that establishing a nexus between the drug dealing operation at the original apartment would not establish a nexus between the drug dealing and his new residence at the hotel. Prior cases established a residence-by-residence approach which requires a search warrant affidavit to establish a sufficient nexus for each location to be searched.

> 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. p. 65.

The affidavit established probable cause to believe that evidence of the illegal drug operation would be found in room 205 of the hotel. The motion to suppress was properly denied.

"ANY PERSON PRESENT" INCLUDED DEFENDANT WHO WAS IN THE DRIVEWAY

Commonwealth v. Cintron, 103 Mass.App.Ct. 799 (2024).

FACTS

Police began investigating Christopher Gasper after receiving a tip that he was selling heroin and fentanyl out of his single-family home in West Yarmouth. As part of that investigation, officers set up surveillance of the house and observed some people meet with Gasper outside the home and others go into the home for several minutes while leaving their cars running outside.

After conducting three controlled buys, officers obtained a search warrant. The warrant authorized the search of the home, Gasper, and "any person present who may be found to have fentanyl, cocaine, and related items in his or her possession or under his or her control or to whom such property may have been delivered." p. 800.

Police arrived at the home at 5:30 PM on November 24, 2020. A surveillance officer saw the defendant pull a black Cadillac into the driveway at approximately 6:15 PM. The defendant and his passenger got out of the car and went into the house. They came out of the house 5 – 10 minutes later. The defendant then stood in the driveway.

As the defendant stood in the driveway, Gasper came out of the house and got into a truck. The police stopped the truck shortly thereafter and arrested Gasper. Multiple unmarked police cars then pulled up to the house with blue lights activated. Several officers yelled, "Police. Search warrant." The defendant was tackled in the street by an officer after he tried to run away.

The defendant was handcuffed and was asked "if he had anything on him that was going to hurt…or poke" the officer. The defendant said he had a knife and a bag of marijuana. Officers searched the defendant and recovered the knife and a bag containing over 4.5 grams of a substance later found to be fentanyl.

The defendant was arrested and charged. He filed a motion to suppress the evidence which was denied. The defendant was convicted of possession of fentanyl. The

defendant appealed arguing that he was not "a person present" for purposes of the search warrant.

DISCUSSION

> 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. p. 802 (quotations and citations omitted.)

The defendant did not challenge the validity of the search warrant or the fact that the warrant authorized the search of any person present. The only issue here is whether the defendant, who was in the driveway and not in the house at the time of the search, was a person present during the execution of the search warrant.

The defendant argued that the execution of the warrant began at the time police announced their presence. He argued that, because he had exited the building by that time, he was not a person present during the execution of the search warrant. The court was not persuaded.

The court found that the execution of the search warrant started before the defendant left the house. The execution of the search warrant started when the police arrived at the home and established surveillance of it at 5:30 PM.

> 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. p. 803.

In this case, the defendant was seen by officers enter the home and stay in the vicinity and in view of the officers until they announced the search warrant. Based upon the circumstances here, officers could search the defendant under the "any person present" provision of the warrant.

In footnote 7, the court specified the limitations of this case. "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."

The motion to suppress was properly denied.

AFFIDAVIT ESTABLISHED PC TO BELIEVE ITEMS WOULD BE AT DEFENDANT'S HOME

Commonwealth v. Robinson, 493 Mass. 775 (2024).

FACTS

On February 21, 2001, Hair Textures, a barbershop in Brighton, was closing its doors because the owner was moving to North Carolina. Many visitors had come to the barbershop that day, but at 4:20 PM only four remained: the owner, the defendant who was a family friend of the owner, James Rainey, and Maurice McIntosh.

The owner started lecturing the defendant, telling him to "straighten up" so that he can take better care of his children. The defendant was upset by the lecture and showed everyone a black revolver he was carrying. After seeing the gun, the owner looked at his phone. When the defendant asked who he was calling, the owner said he was not calling anyone. The owner then continued to lecture the defendant. The entire conversation lasted about five minutes and ended when the defendant pulled out the gun and shot the owner in the chest. When the owner fell, the defendant shot him three more times; once in the back of the head and twice in the back.

After the shooting, McIntosh fled out the door and called 911 from a nearby pizza shop. Police arrived within minutes. During a protective sweep officers found Rainey in the basement who had hid there after the shooting.

Officers brought Rainey, McIntosh, and another witness who had seen the shooting as she was parking her car outside the shop, back to the station and took their statements. All three provided a description of the shooter. McIntosh's description included that the shooter wore a black and white Polo brand shirt, a black leather jacket, and a silver chain with a cross. Rainey reported the shooter was wearing blue jeans and a black leather jacket. The third witness said the shooter was wearing a brown leather jacket and dark pants.

Based upon the descriptions witnesses gave to officers, 106 pictures were compiled. Rainey and McIntosh, after viewing the photos separately, both identified the defendant. Police then used that photograph in an array with nine other filler photos. Rainey and McIntosh, again, both identified the defendant. The other witness was able to narrow the pictures down to two pictures, one of which was the defendant.

On the night of the murder, police arrested the defendant at a convenience store down the street from his apartment. At the time of his arrest, he was wearing dark pants and a black leather jacket. That same night, officers executed a search warrant for the defendant's apartment. The search warrant authorized officers to seize black slacks, a black and white Polo brand shirt, a black revolver and ammunition, and documents establishing residency. Upon execution of the warrant, officers seized a black and white Polo shirt and a silver chain with a cross.

The defendant filed a motion to suppress the evidence seized from his apartment. He argued that the search warrant was not supported by probable cause. That motion was denied. The defendant was later convicted of murder in the first degree. He raises numerous issues on appeal, including the denial of the motion to suppress.

DISCUSSION

> 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. p. 780 (quotations and citations omitted.)

The defendant argued that the warrant failed to establish a nexus between the items the officers were looking for and his apartment.

The affidavit in this case explained that officers responded to the barbershop in response to a shooting. The affidavit included information that McIntosh witnessed both the argument and the shooting and that he had identified the defendant as the shooter. The affidavit also included information from another named witness who was present for an argument that occurred between the shop owner and the defendant earlier in the day.

The affidavit said that witnesses described the clothing of the defendant as being "black pants, a black and white long-sleeved Polo brand shirt, and a dark leather jacket." The affidavit also noted that when the defendant was arrested on the night of the shooting, he was near his home and wearing a black leather jacket, but not the other clothes described. Based upon these facts, the court found that it was reasonable to conclude that the items sought would be found at the defendant's home, especially because the items the police were looking for were "durable, of continuing utility to the defendant, and it was reasonable to expect that they would be kept at home, particularly as they were not inherently incriminating to possess." p. 781 quoting *Commonwealth v. James*, 424 Mass. 770, 778 (1997).

The defendant argued that there was not probable cause to search for the black revolver and ammunition because "a discharged gun is inherently incriminating, and it is unreasonable to believe that an assailant would store such evidence at his home." p. 781. The court recognized that previous court decisions have suggested that a defendant who had killed someone with a gun would not keep the weapon, which could easily be identified as the murder weapon by ballistic evidence, in their home. The court did not reach the issue in this case for two reasons. First, when part of a search warrant is not supported by probable cause, the remedy is to sever that part of the warrant from the rest. That means that, even if the affidavit did not establish a nexus between the gun and the apartment, the rest of the warrant would still be valid. Second, officers did not find a gun or ammunition in the apartment, nor was a gun introduced at the defendant's trial. The defendant here suffered no prejudice by the revolver and ammunition being included in the search warrant.

The defendant also argued that there was no probable cause for the search warrant because the affidavit failed to name the person providing the clothing description. The last paragraph of the search warrant affidavit containing the clothing description simply said the description was given by witnesses. The court found that the defendant's argument would require a "hypercritical analysis" of the affidavit as opposed to the "common sense and realistic manner" favored by the court. p. 782.

Whether a witness is named is a factor the court can use when determining probable cause. However, not naming a witness is not necessarily fatal. In this case, the affidavit named two witnesses, both of whom saw the defendant on the day of the shooting and talked to police. It was reasonable for the judge who issued the warrant to assume that one or both of the named witnesses were the ones that provided the clothing description to the officers.

The motion to suppress was properly denied. None of the other issues raised by the defense warranted reversal of the conviction.

REASONABLE TO INFER CELL PHONE HAD BEEN IN USE FOR A MONTH

Commonwealth v. Janvier, 104 Mass.App.Ct. 93 (2024).

FACTS

On November 10, 2020, the victim was getting out of his car in Waltham. As he did so, a Black man approached him. Without saying a word, the Black man swung what the victim believed to be a long knife at him cutting his upper lip. The passenger in the victim's car saw the attack and recognized the perpetrator as the defendant, with whom she had gone to high school.

On November 11, 2020, a Black man approached three men who were sitting in a car in a parking garage. When one of the occupants got out of the car, the Black man grabbed

him, slammed his head into the car, and punched him in the face. The victim got a tire iron from the car to defend himself. The assailant then struck the victim with the blunt side of a machete that he had pulled from his sweatpants. The assailant fled on foot.

Between November 16, 2020 and November 27, 2020, a series of similar attacks occurred in Waltham, mostly within three geographic areas in the city. The victims were all male, the attacks usually occurred from behind without any warning and often involved a weapon of some sort. The perpetrator said little or nothing to the victims and left without taking anything from them.

Based upon the information from the passenger in the first incident, officers called the defendant on November 22 using a 781-area code. The defendant agreed to come to the station; however, he ultimately declined to speak to officers after he was read his Miranda rights. An administrative subpoena for the cell phone provider identified the defendant as the subscriber for that telephone number.

On December 7, the victim from the second attack called the police because he believed he saw his attacker wearing the same outfit sitting in a parked car in the same parking garage he was attacked in. Officers arrived on scene and found the defendant in a car that was registered to him. On December 10, the victim from the second attack identified the defendant from a photo array.

Officers obtained an arrest warrant for the defendant and arrested him on December 11, 2020 in the same car he was in days earlier. It appeared as if the defendant had been living in the car. During booking, the defendant stated he was homeless and provided a phone number with an 857-area code.

Police were issued a search warrant for the defendant's car where they found a large knife/machete, clothing that matched the description the victims gave from the attacks, a loaded gun and a cell phone. An officer sent a text to the 857 number which then appeared on the cell phone found in the defendant's car.[4]

As part of the investigation, officers executed two search warrants for the cell phones. These were the warrants at issue in this case. The first warrant, issued on December 16, 2020, sought cell site location information (CSLI), subscriber information and global position system (GPS) data associated with both the 781 and the 857 numbers from 6PM on November 10 (90 minutes before the first attack) and 3AM on November 28 (5 hours after the last attack). The cell phone provider (T-Mobile) produced the requested information, except for the GPS data.

The second warrant, issued on January 15, 2021, sought information from the phone recovered from the defendant's car, including a list of incoming and outgoing calls, and

[4] The defendant did not argue that this was a search. FN 8.

list of contacts. Both affidavits included information about the investigation. The second affidavit also included information obtained from the first warrant that placed the phone in the vicinity of five of the attacks and that the 857 number was no longer in service.

> The second affidavit also stated that the phone number assigned to the defendant's iPhone had changed from the 857 number to the 781 number. Apparently to explain the change, [the affiant] stated that "customers of TMobile who subscribe on a 'minutes-based' contract will have their number changed if their contract lapses." p. 97.

The defendant filed a motion to suppress the evidence obtained from the two cell phone search warrants. He argued that the affidavits failed to establish a nexus between either the actual cell phone or the numbers and him between November 10 and November 28. More specifically, he argued that the affidavit did not establish that he was using either of the phone numbers during the relevant time frame or that he owned, possessed, or used the phone found in his car during that time frame.

The judge allowed the motion with respect to information obtained from November 10 to November 21 and denied the motion with respect to information obtained on or after November 22. The judge's reasoning was that the affidavit did not establish probable cause to believe that the defendant owned, possessed, or used a cell phone prior to the date that the officer called him, which was November 22. Both parties appealed.

DISCUSSION

Historical location information for phones can be found in two ways: as GPS data on the device itself or by CSLI kept by the service provider. For purposes of this discussion, the court treated GPS and CSLI the same.

A search warrant affidavit looking for location information must establish probable cause to believe that the person committed a crime, that the person possessed a cell phone at the relevant time, and that their location would be helpful in solving or proving the crime committed.

> The affidavit in support of the warrant "must demonstrate probable cause to believe
>
> > 1. That a particularly described offense has been, is being, or is about to be committed, and
> >
> > 2. That the CSLI being sought will produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit

> such offense." p. 98 quoting *Commonwealth v. Perry*, 489 Mass. 436, 454 (2022).

The affidavits submitted in this case established probable cause to believe that the defendant was the perpetrator of the string of attacks in Waltham. The only issue before the court was whether the affidavits established probable cause to believe that the location information associated with the 781 and 857 phone numbers or on the phone itself would produce evidence of the crime.

It may generally be inferred that the location data from a phone will yield the owner's location at any given time. An affidavit that establishes that an individual committed a crime and that the individual was known to own or use a particular cell phone provides probable cause to believe that the location data associated with the phone will provide evidence of the individual's participation in the criminal activity.

Prior to this case, there had not been much guidance on what is needed to establish that a particular phone or number was owned or used by an individual. In *Commonwealth v. Hobbs*, 482 Mass. 538 (2019) investigators linked the defendant to a particular phone number two and one-half months after a murder. In *Hobbs,* the defendant's brother gave the defendant's phone number to the police and the defendant's ex-girlfriend confirmed that number was the defendants. The court in that case found that establishing that the defendant had used that particular phone number within months of the crime established probable cause to obtain the CSLI.

In *Commonwealth v. Lavin*, 101 Mass.App.Ct. 278 (2022), the defendant's mother provided officers with the defendant's phone number slightly more than a month after the crime.

If a phone number can be linked to an individual, the issue becomes one of staleness: does the information link the individual to that phone during the relevant time? When considering staleness, the courts have categorized items either as "perishable, readily disposable, or transferrable" or "durable, of enduring use to its holder, and not inherently incriminating." Information about perishable items will become stale more quickly than information about durable items.

> 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. p. 101.

The first search warrant sought location data from the cell phone provider for both phone numbers between November 10 to 28. Officers contacted the defendant on November 22 using the 781 number. Until he arrived at the station, the defendant had no reason to believe he was suspected of any crimes.

> 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. p. 106.

The court did not find that the defendant's apparent financial difficulties (being homeless, living out of his car) changed the result. The court found that it may be reasonable to infer that someone in such a dire financial situation could not afford to maintain a cell phone, it is also reasonable to infer that individuals prioritize paying a cell phone bill "as a means of maintaining contact, communication, business ties, and even for entertainment." P. 107.

Police learned of the 857 number at the time the defendant was booked. They also linked the number to the phone that was seized from the defendant's car. The defendant argued that it was not reasonable to believe that this number had been active for a full month prior to his arrest on December 11. The court found it was reasonable to infer that the 857 had not been activated the day he was arrested and that the defendant had been using it for at least some time before his arrest on December 11.

> 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. p. 103.

The court recognized that this result led to the conclusion that the defendant, despite apparent poverty, was using two phone numbers or phones at the same time. However, probable cause deals with probabilities, not certainties. A search warrant affidavit can establish probable cause to believe that evidence may be found in more than one location. In addition, the affidavit does not need to exclude other possibilities. In this case, the affidavit established probable cause to believe that the defendant was using both of those numbers during or just after the crime spree. That is enough.

> 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. p. 104.

The motion to suppress with respect to the first warrant should have been denied.

The second warrant sought location data from the phone itself. Based upon the durability of cell phones, the court found that it was reasonably likely that the

defendant possessed the phone that was seized from his car for at least a month before the arrest.

> 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. p.105.

The order allowing any part of the motion to suppress was reversed. The motion to suppress, in its entirety, was denied.

As part of the investigation, officers used Zetx and learned that the 857 number was listed under the defendant's name. In footnote 1 of the dissent, the court offered a word of caution to officers about Zetx:

> 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

DRIVEWAY WAS NOT WITHIN CURTILAGE OF THE HOME

Commonwealth v. Wittey, 492 Mass. 161 (2023).

FACTS[5]

The victim failed to pick up his friend for breakfast on February 9, 2016. When the friend could not reach the victim by phone, she went to the victim's home. The friend found the victim's body inside the home. When officers arrived, both the victim's car and the friend's car were in the driveway. Officers observed what they believed to be tire impressions left in the newly fallen snow under the friend's car. The car had blocked the sun's rays and preserved the tire tread impressions from melting away. Officers photographed the impressions.

The investigation led officers to the defendant. A trooper went to the defendant's home to speak to him.

> The defendant's residence is set back from a long driveway. A visitor approaching the front door of the home would have to walk up the driveway to

[5] There were several issues raised in this case that are not relevant to the police investigation. This case summary focuses on the issue of establishing curtilage and omits facts and legal analysis unrelated to that topic.

> get there, traveling along a walkway toward the front steps leading up to the main entrance of the home. From the street, there was an unobstructed view of the Sienna; there was no gate around the driveway, no fence around the property, and no 'no trespassing' signs posted around the property. p. 172.

The trooper observed a Toyota Yaris and a Toyota Sienna in the driveway and got within five to ten feet of the cars when he walked up the driveway to the front door.

Police spoke to the defendant in his home and he agreed to go to the police station. The defendant stated he found an email that his recently deceased girlfriend of 20 years had sent to the victim which disclosed an affair between the girlfriend and the victim.

Another trooper responded to the defendant's home that same day to speak to a person of interest who lived with the defendant and to see the Sienna. The trooper pulled into the driveway and saw both the Yaris and the Sienna. Both cars were parked toward the end of the driveway closest to the house with the Yaris parked further down from the Sienna, closer to the garage.

The trooper looked at the tread pattern of the Sienna's tires and noticed unique rain channels on the tread pattern which appeared similar to the tread marks left at the victim's driveway. It was dark when the trooper made these observations and he could not recall whether he used his flashlight to make these observations, but it is reasonable to assume that the tires must have been illuminated. The trooper also looked inside the Sienna and saw an open case of Beck's, a sleeping bag, and another bag. These observations were included in search warrant affidavits for the defendant's home and the Toyota Sienna.

Search warrants issued for the defendant's home and the Toyota Sienna. State Police Sgt. Tarbokas participated in the search warrant executions. He noted the Yaris tires were much smaller than the impression left under the friend's car. Sgt. Tarbokas took impressions of the Sienna's tires and opined that the tread marks found under the friend's car "could have been made by a tire on the Sienna or any other tire with a similar design and size." p. 167. Various places within the car tested positive for blood.

Various ballistic evidence, evidence retrieved from the GPS found in the Sienna, and evidence found in the defendant's home linked him to the death of the victim.

The defendant was indicted on murder charges and firearms offenses. The defendant filed a motion to suppress in which he argued that the observations of the tire tread and inside the Sienna were unlawful warrantless searches because the Sienna was parked within the curtilage of his home. The motion judge denied the motion, finding that the driveway was not part of the home's curtilage. After his conviction, the defendant appealed arguing that the motion to suppress was denied in error.

DISCUSSION

Areas within the curtilage of the home are given the same Constitutional protections as the home itself.

> 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." p. 174-175 (quotations and citations omitted).

There is no bright line rule with respect to what will be considered curtilage. Each case must be determined based upon its own facts and circumstances. *United States v. Dunn*, 480 U.S. 294 (1987) sets out four factors the court can consider when determining curtilage:

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, and
4. the steps taken by the resident to protect the area from observation by people passing by.

A driveway is a semiprivate area. A possessor's reasonable expectation of privacy in a driveway will generally depend on the nature of activities that occur on the driveway and whether it is visible from the street.

The courts have decided numerous cases involving driveways and whether they are within the curtilage of a home.

In *Commonwealth v. Simmons*, 392 Mass. 45 (1984), the car was visible from the roadway, not enclosed in anyway, there were no "no trespassing" signs and the "driveway was the normal means of access to the home where visitors would traverse on the way to the front door." p. 175. The court found there was no reasonable expectation of privacy in a "vehicle located between one to two feet from the driveway, directly across a path leading to the front door."

In *Commonwealth v. Butterfield*, 44 Mass.App.Ct. 926 (1998), the vehicle was visible from the street and the driveway was not enclosed. The court found it was not within the curtilage of the home.

In *Commonwealth v. Fernandez*, 458 Mass. 137 (2010), the driveway was wide enough for one car and long enough for two cars. It was right next to the three-family home where the defendant lived on the first floor. Visitors would have no need to traverse the driveway to enter the home. The only cars that used the driveway were those of the defendant, indicating his exclusive use. A fence separated the driveway from the building next door. The vehicle itself was visible from the street; however, to look

inside, the observer would have to leave the path that led to the front door. This driveway was found to be within the home's curtilage.

In *Collins v. Virginia*, 138 S.Ct. 1663 (2018) the defendant's motorcycle was in the driveway sitting a few yards past the front edge of the home. It was enclosed on three sides; one by the house and the other two by a brick wall that was as tall as a vehicle. A side door to the home provided direct access to this area of the driveway. Visitors would gain entrance to the home by the front porch which they would access by heading up a set of stairs which were located before the enclosed area. The motorcycle in question was also covered by a tarp. The court found the defendant's motorcycle was parked within the curtilage of the home.

In this case, the court applied the Dunn factors. Photographs showed the home which was set back from a long driveway and the Sienna was parked in an area close to the home. Both the home and driveway are flanked by trees, as the home was in a wooded area. Despite the area, the Sienna was visible from the street. Visitors had to traverse the driveway to access the front door. There was no gate or fence around the driveway. There was a two-car garage attached to the home. The Sienna was on the driveway within five to ten feet of the walkway.

There was no evidence that the defendant used the driveway for anything other than parking. The defendant took no steps to conceal the Sienna or any other portion of the driveway from view.

The fact that the trooper may have used a flashlight to make his observations does not transform his actions into a search. It also did not matter that the trooper went to the home for the purpose of viewing the Sienna.

The driveway was not within the curtilage of the home. Because the trooper's actions did not intrude upon an area to which the defendant had a reasonable expectation of privacy, no search occurred in the Constitutional sense.

The motion to suppress was properly denied.

REASONABLE SUSPICION TO STOP

STOP JUSTIFIED BY EXPERIENCED OFFICER'S BELIEF THAT DRUG DEAL OCCURRED

Commonwealth v. Castillo-Martinez, 104 Mass.App.Ct. 22 (2024).

FACTS

On May 3, 2021, a plain clothes Danvers police detective was conducting surveillance at the Liberty Tree Mall parking lot. The detective had 23 years of experience as a police

officer, including eight years working on a Drug Enforcement Agency task force. He had extensive training related to narcotics investigations and had participated in hundreds of investigations into drug activity.

The detective had witnessed hundreds of drug transactions in the parking lot that was under surveillance. The detective also had seen numerous legitimate exchanges, such as Craigslist or Ebay purchases, in that lot. The legitimate exchanges generally involved people getting out of their cars, greeting one another, and then exchanging items. On less than five occasions the detective stopped people who had been involved in an exchange of items only to learn that the transaction was legitimate.

On this day, the detective saw a black Mercedes pull into the lot and park. With the use of binoculars, the detective watched the driver for 10 minutes as he sat in the car. He was seen looking around, looking at his lap, and moving his arms.

Based upon the car's registration and driver's license information of the owner, the detective was able to identify the driver as Theodore Combs out of Gloucester. The detective contacted a Gloucester detective who informed him that Combs was known to sell THC products in Gloucester.

After 10 minutes, the Danvers detective saw a Subaru pull in and park a couple of spaces away from the Mercedes. The driver, later identified as the defendant, got out of the car and entered the passenger seat of the Mercedes. The defendant had nothing visible in his hands at that time. The detective watched the men in the car with their heads down lean in toward each other and move their arms. After a few minutes, the defendant, with a plastic bag in his hand, left Combs' car and got back into the Subaru.

Based upon his observations, the detective believed he witnessed a drug transaction. He called for a marked unit to stop the Mercedes while he activated the lights on his unmarked car and pulled up beside the defendant's car.

The detective approached the defendant who remained in the Subaru and told him what he had observed. The defendant admitted that he "did something wrong" because he was trying to make some extra money. The defendant gave the plastic bag to the detective. There were five boxes in the bag each of which contained 10 vials of liquid THC.

The defendant was charged and moved to suppress both his statements and the THC. The defendant argued that the police did not have reasonable suspicion to stop him. The motion was allowed and the Commonwealth appealed.

DISCUSSION

The defendant was stopped when the detective activated the cruiser lights to stop the Subaru. To justify a stop, an officer must have reasonable, articulable suspicion that the

person has committed, is committing, or is about to commit a crime. That suspicion must be based on specific and articulable facts and any reasonable inferences that can be drawn from those facts. A hunch will not be enough.

When reasonable suspicion is based upon what officers believed to be a drug transaction, it is not required that the officer actually see an exchange or that they see drugs or money. What is necessary is that the officer's observations occur "in a factual context that points to criminal activity." pp. 24-25 quoting *Commonwealth v. Kearse*, 97 Mass.App.Ct. 297, 302 (2020).

The court in *Commonwealth v. Santaliz*, 413 Mass. 238 (1992) provided a non-exhaustive list of factors that, when considered together, support a finding that officers had probable cause to believe a street-level drug transaction had occurred. The *Santaliz* factors are:

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.

All the *Santaliz* factors were present in this case. A person known by police to sell THC was seen parked in a parking lot that the detective personally knew to be the location of hundreds of illegal drug deals. The person stayed in the car for 10 minutes while he moved his arms and looked around as if he was waiting or expecting someone. After 10 minutes, another car arrived. The driver of that car got into the first car where he and the known drug dealer leaned toward each other with their heads down and moved their arms. After a few minutes, the defendant returned to his own car carrying a bag that he was not previously carrying. The court found that these actions could be reasonably characterized as furtive and designed to hide the nature of the transaction.

The detective was an experienced drug investigator. In addition, he had information that the driver of the Mercedes was a drug dealer. The motion judge discounted this fact because no specific information was provided about any stops, arrests, convictions to support the information. The Appeals Court noted that the information was not from an anonymous source whose veracity must be established. The information was relayed to the detective from another police detective.

> We are unaware of any precedent requiring such knowledge before an officer may use particularized information about a specific individual obtained from another police officer as a factor in developing a reasonable suspicion. p. 26.

> 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. p. 26.

Based upon the evidence presented at the motion hearing, the court found that the detective had "ample specific and articulable facts" to establish a reasonable suspicion that the defendant had participated in an illegal drug transaction prior to being stopped.

The order allowing the motion to suppress was reversed.

PATFRISK

FACT THAT A CAR WAS INVOLVED IN SHOOTING YESTERDAY DOES NOT JUSTIFY A FRISK OF ITS OCCUPANTS TODAY

Commonwealth v. Powell, 102 Mass.App.Ct. 755 (2023).

FACTS

At 2:22 PM on July 22, 2019, officers responded to a report of a shooting in the Vine Street area of Roxbury. Officers found two spent shell casings from a nine-millimeter gun on scene. A witness provided a license plate number for a white sedan that was reportedly involved in the shooting.

Officers obtained video surveillance in the area. The video showed a white car turn onto Vine Street and then both victims were seen running down the street. Officers put out a be on the lookout (BOLO) flyer which included information about the investigation and still shots from the video of the car and license plate. The flyer said:

> 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. <u>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.</u> (emphasis in original)

The flyer then had the following language in red ink:

> <u>A suspect is not wanted at this time. If this MV is located, please stop and hold and contact B2 Detectives</u>. (emphasis in original)

Just after midnight on July 24, thirty-four hours after the shooting, an officer was driving home and recognized the car from the flyer pull up next to him. The driver was a female whom the detective did not know. There was also a passenger in the car, but the officer could not tell whether they were male or female.

The officer called in the information and followed the car to a Chinese food restaurant. When the car stopped, the defendant went into the restaurant, picked up some food, and returned to the car. By this point, backup officers had arrived. Officers approached the car and ordered the two occupants out of the car. There was no evidence of any furtive movements or any attempt to evade the police by either occupant. A patfrisk of the defendant was conducted and a semiautomatic firearm was found.

The defendant was charged with various firearm offenses. After his motion to suppress the evidence was denied, the defendant entered a conditional plea, preserving his right to appeal. The defendant appealed arguing that the exit order and patfrisk were unconstitutional.

DISCUSSION

> 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. Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020).

Based upon the facts of this case, the exit order was not justifiable under either of the first two grounds. Whether the third ground would justify the exit order on the basis of probable cause was a closer question for the court.

The car was described with particularity and was involved in a shooting the previous day. The court found that an argument could be made that there was probable cause to believe that evidence of the crime, such as fingerprints, might still be in the car thirty-four hours later; however, the court does not reach the issue of the exit order because the patfrisk was unconstitutional.

To conduct a patfrisk, officers must have reasonable suspicion to believe that a suspect is armed and dangerous. In this case the crime under investigation was a shooting that had occurred thirty-four hours prior but there was no evidence linking the defendant to the shooting. The defendant was compliant with officer directives and made no suspicious movements that would create reasonable suspicion that he was armed.

> 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. p. 761.

At the time of the exit order and patfrisk, there were no named suspects, no description of the suspects, and the officers who stopped the car did not know who the driver of the car was at the time of the stop. In addition, no explanation was given as to what the "ties to Heath St." comment in the flyer meant. There was also no connection between the registered owner of the car and any criminal activity.

The motion to suppress should have been allowed.

RACIAL PROFILING

MOTOR VEHICLE STOP WAS NOT MOTIVATED BY RACE

Commonwealth v. Stroman, 103 Mass.App.Ct. 122 (August 17, 2023).

FACTS

A New Bedford officer was on patrol at 2 AM on November 25, 2019 when the bars were closing. When he observed a blue Audi with the rear license plate that was not illuminated, he initiated a motor vehicle stop. The officer entered the license plate number into the mobile data terminal (MDT) and called in the stop to dispatch. The MDT produced a photograph of the owner, a Black man, and indicated that the registered owner had an outstanding warrant.

After receiving the information from the MDT, the officer approached the vehicle on foot. There were two occupants in the car, including the defendant who was the driver and the registered owner. The officer confirmed the warrant was active through dispatch and learned that it was for a carjacking charge. By this time, backup officers had arrived on scene.

The officer asked the defendant out of the car and placed him under arrest. During a patfrisk, a handgun was found in his waistband.

The defendant was indicted on multiple firearm offenses. The defendant filed a motion to suppress alleging selective enforcement in violation of the equal protection clause. In support of his motion, the defendant submitted several exhibits including:

1. All of the officer's citations from November 2018 until November 2020, which showed that of the 66 citations issued, 26% were issued to Black motorists.

2. The 2019 US Census which showed that the population of New Bedford at that time was 7% Black or African American.

3. New Bedford Police directive adopted in 2006 implementing a "zero-tolerance strategy" for addressing gun violence. The directive encouraged officers to use tactics such as threshold inquiries, field interviews and motor vehicle stops rigorously, especially between 10 PM and 5 AM. The directive also stated that no stop or seizure should be conducted without proper legal justification and that these activities were "not intended to violate any individual's civil or constitutional rights." p. 124.

Based upon this information, it was determined that the officer had issued 10 citations for license plate violations. Four of those, including the one issued in this case, were issued to Black drivers.

The judge found that the defendant had made a threshold showing of discriminatory enforcement and ordered an evidentiary hearing to take place. The officer was the only witness at the hearing. The judge found the officer's testimony "credible in all respects." p. 125. The judge found that the officer did not see the race, gender, or any other characteristics of the occupants, other than to determine that there were two people in the car, prior to the stop.

> "The judge found when questioned about his motives for initiating the stop, [the officer] credibly denied that the occupants' race was a factor in any way. He testified he had no idea of the race, gender or ethnic background of the driver or occupant when he decided to initiate the stop." p. 125.

During direct examination, the officer was asked about his nationality and how he felt about being accused of issuing some citations motivated by race. The officer testified that he was Hispanic and that he was offended about being accused of racial profiling.

> "The judge found, as a person of Hispanic ethnicity, born and raised in New Bedford, [the officer] found the suggestion that race was a factor in the stop offensive and contrary to his upbringing and training." p. 125.

Based upon the credible testimony of the officer, the judge found that the Commonwealth had successfully rebutted the defendant's evidence of discrimination.

> "Based on the totality of the circumstances, the evidence presented by the Commonwealth sufficiently demonstrates the stop was not motivated by racial bias." p. 126.

The motion was denied. The defendant appealed.

DISCUSSION

Selective enforcement allegations are "notoriously hard to prove." p. 126 quoting *Note, Criminal Law – Discriminatory Enforcement – Racial Profiling – Statutory Rape*, 93 Mass.L.Rev. 342, 342 (2011).

If a defendant raises a selective enforcement claim based on race, the Commonwealth must do more than just show that there was 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. *Commonwealth v. Long*, 485 mass 711, 726 (2020).

When evaluating a claim of selective enforcement, the court will consider the totality of the circumstances. The court in *Long* provided the following list of factors the court should consider:

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.

This is not an exhaustive list.

In this case, the defendant claimed it was error for the court to deny the motion because the Commonwealth did not rebut his statistical evidence. The court disagreed. The Commonwealth is not required to rebut each piece of evidence introduced by the defendant. The court must consider the totality of the circumstances when reaching its decision.

The motion judge found that the statistical evidence introduced by the defendant raised a reasonable inference of discrimination to warrant an evidentiary hearing and to shift the burden to the Commonwealth; however, the statistical data was not conclusive. The data provided information about traffic citations written by the officer but did not include information about other encounters the officer had with civilians while on patrol.

The motion judge also found that the comparison to the census information was unreliable because it reflected the demographics of the residents of the area but not necessarily the demographics of the drivers of the road in the area of this stop.

With respect to the department's zero-tolerance directive, the court noted that the directive was issued 12 years before the officer joined the department. The judge also credited the officer's testimony when he stated that he was "generally aware" of the directive but that it played no role in his decision to stop the defendant's car that night.

The directive encouraged motor vehicle stops for any infraction regardless of the driver's race. The court noted that, if an officer targeted neighborhoods where most of the residents were minorities for intensive traffic enforcement efforts, a discriminatory intent might be inferred. There was no evidence of that here.

The court found that the officer's offense at being accused of racial discrimination had little, if any relevance, but that the testimony was "not appreciably different from denying that race played any role in his decision to stop the defendant." p. 130.

The court found the relevance of the officer's testimony about his Hispanic heritage to be more complicated. A witness' race, ethnicity, or nationality has no bearing on their credibility. The idea that someone of Hispanic origin is less likely to discriminate against a Black driver is speculative.

> Moreover, it would be improper to infer that simply because [the officer] is Hispanic, he would be incapable of discriminating against others of Hispanic origin, let along against members of other groups. p. 131.

The court noted that race and ethnicity are relevant in interactions between the police and the public. However, when the issue is whether someone acted in a particular way because of such personal characteristics, judges and litigants must be careful to act on competent evidence and not on stereotypes.

Because the rules of evidence are relaxed at a motion to suppress and judges are encouraged to err on the side of hearing evidence and then granting it the proper weight, if any, it deserves, there was no error in the judge admitting the testimony of the officer's Hispanic origin or his offense at being accused of racial discrimination at the motion.

The court also stated that the question before the court was not whether a reasonable officer would have stopped the defendant at 2AM for a license plate violation if race was not a factor. The issue for the court to consider is whether this particular officer "actually chose to stop the defendant's car because of the defendant's race." p. 129. Under *Commonwealth v. Long*, it is the "true" or "subjective" motivation of the officer at the time of the stop that is relevant.

In this case, the judge found that the officer's true motivation was enforcement of the motor vehicle infraction and not race because the officer was not aware of the defendant's race at the time the stop was initiated.

In this case, there was not just a mere denial of racial discrimination. The officer testified credibly that he was not aware of the race of the occupants of the car before he pulled it over. This was enough to meet the Commonwealth's burden.

The court offered a word of caution.

> 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. p. 132.

The motion was properly denied.

LONG **RACIAL PROFILING STANDARD APPLIES TO PEDESTRIAN STOPS**

Commonwealth v. Robinson-Van Rader, 492 Mass. 1 (2023).

FACTS

At 7:30 PM on April 23, 2018, Boston police received reports of gunshots and ShotSpotter alerts at a basketball court near headquarters. Two 911 calls came in within a minute of the first report. The first caller reported about eight shots being fired. The second caller was a few blocks away and reported hearing about six shots and seeing two Black males wearing black hoodies riding off on bikes. She provided a direction of travel for the bike riders who headed onto Tremont Street. This caller reported still being able to see the two males and that an officer was coming. Sirens could be heard in the background of the call.

Dispatch broadcast information about the males. No information about their race was broadcast. An officer was working a detail one-half mile away and was monitoring the radio. He heard the reports of shots being fired and that there were two male suspects wearing black sweatshirts riding away on bicycles. This officer saw two Black males wearing black shirts or sweatshirts on bicycles. He reported to dispatch seeing two Black males coming down Tremont Street. He described one as wearing a black vest and the other as wearing a black jacket. The men were pedaling slowly which the officer assumed was because they were tired.

When the information was first broadcast, three members of the Boston Police youth violence strike force were in an unmarked SUV 1 ½ - 2 miles from the scene. They were not in uniform but had tactical vests with "Boston Police" written on the front and back. These officers drove quickly to the area of the shooting. They stopped at the location of the detail officer and spoke to him. The officers drove along Columbus Ave. which parallels a bike path and searched for the bicyclists. These officers had no information about the age, height, weight, build, hair style or facial features of the males they were looking for.

The youth violence strike force officers saw two young Black males wearing hoodies walking on Columbus Ave. near Southwest Corridor Park. There were only a few people outside in the area that night and these two males were the only ones wearing hoodies. The officers drove by the men, both of whom continuously looked over their shoulders toward Boston Police headquarters. The officers turned the SUV around and positioned themselves behind the men. They pulled up beside the men and stopped. Two of the officers got out of the SUV and approached the suspects. The young men did not change their pace when they were approached. One officer told them to "holdup a second" which they did. The officers did not see any indication of a hidden firearm on either of the men.

When an officer asked the defendant's companion if he had anything on him, he turned sideways, "kind of like a jerk reaction - like as a reflex." P. 6. This motion shielded his right hip from the officer. During a patfrisk, a firearm was found in his waistband.

While the companion was being patfrisked, an officer was watching the defendant who was sweating and kept looking over his shoulder toward police headquarters. He also kept his hand in the pocket of his sweatshirt, but he did not shield either side of his body away from the officers. When the firearm was found on the companion, the officer watching the defendant grabbed him, put him on the ground, and secured him in handcuffs. A firearm was located in his pants pocket during a patfrisk. Both the defendant and his companion were arrested between 7:35 and 7:36 PM, seven minutes after the initial report of shots being fired. The stop occurred 8/10 of a mile from police headquarters.

The defendant was indicted for unlawful possession of a firearm (MGL c 269 § 10(a)); carrying a loaded firearm (MGL c 269 § 10(n)); unlawful possession of ammunition (MGL c 269 § 10(h)); and discharging a firearm within 500 feet of a building (MGL c 269 § 12E). The defendant filed a motion to suppress arguing that police lacked reasonable suspicion to stop him and that the stop violated his right to equal protection of the law.

The defense offered statistical evidence in support of their argument that the stop of the defendant violated his right to equal protection. The expert witness, a professor of

mathematics did a statistical analysis of the traffic stops of the officers who conducted the patfrisks of the two men here. The expert found the following:

1. 51% of the residents in the officer's patrol area were Black;
2. 90% of individuals who were the subject of discretionary stops by the officers were Black.
3. During the 20- month period reviewed by the professor, Black individuals were 5 times more likely to be stopped than other individuals.

Based upon her statistical analysis, the expert "concluded that the stops were consistent with racial profiling." p. 8. After a three-day hearing, the motion to suppress was denied. The defendant appealed.

DISCUSSION

Reasonable Suspicion

An individual is stopped when, "an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." *Commonwealth v. Matta*, 483 Mass. 357, 362 (2019). The court will consider the "naivete, immaturity, and vulnerability of a child" when determining whether the conduct of police was coercive. *Commonwealth v. Evelyn*, 485 Mass. 691, 699 (2020).

The defendant and his companion were young men. The court found that the young men were seized when officers wearing tactical gear pulled up next to them and told them to "hold up a second."

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.

The description given out in this case was generic; however, a generic or vague description can justify a stop if other factors known to the police make it reasonable to believe the individual stopped was involved in the crime being investigated. The court will look at the totality of the circumstances when making this determination.

In this case, the officers were looking for two Black males wearing black hoodies and riding bicycles in a particular direction. The defendant and his companion were walking and not on bicycles and they were both observed looking over their shoulders toward Boston police headquarters, even though no one appeared to be following them. There was also no indication that the defendant or his companion were aware that the unmarked car that had passed them was a police vehicle.

> Thus, the officers' approach cannot be considered the source of the defendant's nervousness. p. 12.

While nervous behavior alone will not be enough to constitute reasonable suspicion, it is certainly a factor that can be considered by the court.

> At the same time, 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. p. 11 (quotations and citations omitted).

The defendant's geographic and temporal location to the crime was an appropriate factor for the court to consider. They were walking in the reported direction of flight from the scene. They were approximately one mile away from the scene and were stopped within seven minutes of the initial report.

> The location of the stop was not a "random occurrence." Multiple reports by witnesses and police officers followed the path of the suspects as they traveled from near the scene of Annunciation Road to Columbus Avenue near the Southwest Corridor Park. pp. 13-14.

The nature of the crime under investigation is also a factor the court can consider. Police here were investigating a shooting in a "dense residential and commercial area, near a university and a train station." p. 14.

> The seriousness of the offense, and the danger presented to the community, are factors that properly may be considered in assessing whether police had reasonable suspicion at the time of a stop. p. 14.

Based upon the factors present here, the officers had reasonable suspicion to stop the defendant. Although the description of the suspects was generic, the additional factors present sufficiently narrowed the search.

<u>Equal Protection</u>

Equal protection claims can be divided into two categories: selective prosecution and selective enforcement. Selective prosecution is when the decision to charge someone with a crime is based upon impermissible criteria such as race, national origin, or gender. Selective prosecution results in a greater number of convictions of individuals who share that characteristic when compared to individuals who do not share that characteristic.

Selective enforcement is when law enforcement utilizes practices that unjustifiably target an individual for investigation based upon their membership in a protected class,

such as race. The defendant's equal protection claim here involved selective enforcement.

In *Commonwealth v. Long*, 485 Mass. 711 (2020), the court ruled that when a defendant argues that a motor vehicle stop was racially motivated, the defendant is not required to produce statistical evidence to support the allegation of racial bias.

> The requirement that a defendant establish a reasonable inference that a traffic stop was motivated by racial bias means simply that the defendant must produce evidence upon which a reasonable person could rely to infer that the officer discriminated on the basis of the defendant's race or membership in another protected class. *Long* at 723-234.

The defendant can meet their burden by producing any evidence from which a reasonable person could infer that the officer discriminated against them because of the individual's membership in a protected class. The defendant must point to specific facts to support the inference based upon their own personal knowledge, their own investigation, or some other relevant source. If the defendant raises the inference of discrimination, the Commonwealth then bears the burden to rebut the inference by establishing a race-neutral reason that justifies the stop.

In this case, the defendant argued that the holding in *Long* applies to any stop initiated by the police that is racially motivated and not just motor vehicle stops. The Commonwealth argued that *Long* only applies to motor vehicle stops.

> 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. p. 18.

When considering a selective enforcement allegation, the court must look at the totality of the circumstances. These circumstances may include patterns of enforcement of the involved officers, events that preceded the investigation which led officers to target the defendant, the seriousness of the crime under investigation, and whether the defendant's membership in a protected class was part of the description of the suspect.

In this case, the defendant provided statistical evidence which satisfied his burden. The court found that the Commonwealth rebutted the inference of selective enforcement because it demonstrated that the police had a race-neutral reason to stop the defendant and his companion.

The second 911 caller heard the shots and reported seeing two Black males riding bicycles from the scene. Within minutes the officer working a detail saw two Black males on bicycles heading toward Heath Street. In a short period of time, the other

officers had the individuals stopped as they were walking in a direction "consistent in time and direction with two individuals fleeing from a shooting on bicycles." p. 22.

The defendant argued that the equal protection claim was separate and distinct from the reasonable suspicion analysis and that under *Long* the Commonwealth "cannot ignore or sidestep a defendant's statistical case." p. 22. The court agreed that the equal protection guaranteed by the Federal and State constitutions is separate and distinct from an individual's right to be free from unreasonable searches and seizures. However, this does not mean that an officer is precluded from explaining why an officer stopped an individual.

> There may be substantial overlap between an inquiry into the reasonableness of a stop and the officer's motivation for stopping a suspect. 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. pp. 23-24 (quotations and citations omitted.)

The court found that the motion judge's determination that the police stopped the defendant in this case to investigate the recent shooting and not because of his race was supported by the evidence.

The motion to suppress was properly denied.

DISCOVERY CAN BE ORDERED TO SUPPORT AN ALLEGATION OF RACIAL PROFILING

Commonwealth v. Cuffee, 492 Mass. 25 (2023).

FACTS

At 1:34 PM on November 8, 2018, two Springfield police detectives responded to multiple ShotSpotter alerts in the area of Grand Street. One block from the alerts, they saw the defendant running away from the scene toward them. The defendant was a Black man wearing a black sweatshirt and dark pants and had his hair in dreadlocks.

The detectives observed him running with an "unnatural gait." His right hand was pinned to his body while his left hand swung freely as he ran. It appeared that he had a heavy object tucked in his waistband. Based upon these observations, in the context of their training and experience, the detectives believed he had a gun in his waistband without a holster. Based upon their training and experience the detectives also believed that someone who carries a gun without a holster was more likely than not to not be properly licensed to possess a firearm.

The detectives were working in a plain clothes capacity in a car that, while technically unmarked, looked like a police cruiser, just without a light bar and without police markings on it. When the detectives' vehicle approached the defendant, the defendant slowed to a walk, put on his hood, and went into a convenience store.

The detectives followed the defendant inside the store. Detectives identified themselves and demanded to see the defendant's hands. A violent struggle ensued followed by a foot pursuit outside the store. A firearm was recovered inside the store in the vicinity of where the physical struggle occurred.

The defendant filed a discovery motion seeking all police reports and field interrogation and observation reports of the two detectives involved in his arrest for one year before and one year after his arrest. The defendant argued that he was entitled to this discovery because it was "relevant and material to the question whether the police investigation was motivated improperly by race, in violation of his constitutional right to equal protection of the laws." p. 26.

In support of the request for discovery, defense counsel filed an affidavit that stated that the defendant was a Black man stopped by two Caucasian detectives investigating a report of gunshots in the area. The affidavit also said that the stop was based upon the alleged observations of the detectives of the defendant running on a sidewalk with an unnatural gait while appearing to be "supporting a weighted object on his right side with his right hand." p. 29.

The motion judge denied the request for discovery because the motion failed to meet the relevance standard required by Rule 14. After trial, the defendant was convicted of unlawful possession of a firearm and acquitted on four other charges. In his appeal, the defendant argued, among other things, that the motion for discovery was improperly denied.

DISCUSSION

All discovery in criminal cases is governed by Massachusetts Rules of Criminal Procedure Rule 14. Rule 14 requires certain mandatory discovery be provided in all cases (witness statements, exculpatory evidence, etc.) Rule 14 also allows for discretionary discovery to be ordered upon request of the defendant. Such requests are made by filing a motion with the court.

According to the Rules of Criminal Procedure, a motion must be accompanied by an affidavit, signed by someone with personal knowledge of the facts, that contains all the facts relied upon in support of the motion. When deciding a motion, the judge must determine whether the defense has made a "threshold showing of relevance." *Commonwealth v. Bernardo B.*, 453 Mass. 158, 169 (2009).

A defendant can request discovery under Rule 14 to support an allegation of discriminatory acts by the police.

> "A defendant has a right to reasonable discovery of evidence concerning the totality of the circumstances" of alleged discriminatory law enforcement. p. 30 quoting *Commonwealth v. Long*, 485 Mass. 711, 725 (2020).

The discovery request must still comply with the requirements of Rule 14. For the defendant to be entitled to the reports he requested in this case, he must establish that the materials he is requesting are relevant to a claim of selective enforcement. The defendant is not required to establish a *prima facie* case of discrimination before they can request discovery, but they must meet the basic relevance threshold required by Rule 14.

The court pointed to the *Robinson-Van Rader* case as an example of a sufficient showing of selective enforcement that would warrant an order of discretionary discovery. In that case, the affidavit submitted by the attorney in support of the discovery request cited a study of the Boston police department and a report of the Associated Press. The study found that "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." p. 31 quoting *Robinson-Van Rader*. The Associated Press report said that "at least 71% of all street level civilian-police encounters involved minorities while minorities make up about 25% of the Boston population." p. 31 quoting *Robinson-Van Rader*.

The attorney in the *Robinson-Van-Rader* case also stated that, in his 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." p. 31.

The court found the judge did not abuse her discretion in denying the defendant's discovery request in this case. The motion and affidavit basically said Caucasian officers stopped a Black man while investigating a recent shooting.

> The judge was within her discretion to deny the motion seeking discovery based only on the defendant's membership in a protected class. To make a threshold showing of relevance, more is required. p. 31.

The defendant's discovery motion was properly denied.

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.

For police officers, the most relevant part of the Fifth Amendment is the right to not be compelled in any criminal case to be a witness against oneself.

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.

<u>Miranda</u>

Miranda rights only apply to suspects who are in custody <u>and</u> subject to interrogation.

> <u>Custody</u>
>
> Custody for Miranda purposes is not just people who are under arrest. "The crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody. *Commonwealth v. Damiano*, 422 Mass. 10, 13 (1996).
>
> When determining custody, the court will consider several factors set forth in *Commonwealth v Groome*, 435 Mass. 201 (2001).
>
> 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.

These factors are not exhaustive. The court will look to the facts and circumstances in each case to determine whether the suspect was in custody based on the totality of the circumstances.

Interrogation

Interrogation is any words or actions of the police which the officer knows or should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis,* 446 U.S. 291 (1980).

For suspects who are in custody and subject to interrogation, they must be given their Miranda rights and they must make a knowing, intelligent and voluntary waiver of those rights before they speak. Statements given without a proper waiver of Miranda rights will likely be suppressed.

Miranda warnings

There are four required Miranda warnings. The omission of any of these warnings means that the warnings were defective and any statements made will be suppressed. The Miranda warnings are:

(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.

The best practice is also to advise the suspect: If you do decide to answer questions, you still have the right to stop answering at any time.

Voluntariness

Statements must be made freely and voluntarily before they can be used against someone. A voluntary statement is 'the product of a rational intellect and a free will and not induced by physical or psychological coercion. *Commonwealth v. Hammond*, 477 Mass. 499, 502 (2017). The court looks to the totality of the circumstances when determining whether a statement is voluntary.

CUSTODY

SUSPECT IN CUSTODY ON SIDE OF ROAD AFTER HE WAS CHASED, TACKLED AND PLACED IN CUFFS

Commonwealth v. Earl, 102 Mass.App.Ct. 664 (2023).

FACTS

In January 2014, Faniesha Hunter came home to her apartment to find her boyfriend Samuel Constant, there with the defendant. Hunter did not know the defendant and he made her uneasy. Hunter motioned for Constant to follow her into one of the bedrooms. The defendant followed the couple to the bedroom, pulled out a knife, and lunged at Hunter. Constant intervened and a struggle ensued. The struggle continued out the open front door where a maintenance supervisors saw the two men running. Constant fell down while the defendant ran off. The maintenance supervisor called 911 and tried to perform CPR on Constant.

Two uniformed security guards for Longwood Public Safety, a private security company, were special Boston police officers and were working in the area. One of the officers saw the defendant running in the middle of Crown Point Drive through heavy traffic. The defendant was knocking on windshields and attempting to stop the passing cars. The officer was working in a marked vehicle at the time. He activated his lights and parked in the middle of the street. He approached the defendant whom he saw was bleeding heavily from his ear.

Upon seeing the officer, the defendant took off his sweatshirt, threw it onto the ground, took two "aggressive" steps toward the officer, and then fled into a wooded area. The officer ran after him and tackled him from behind. The officer then put the defendant in handcuffs and patfrisked him. When the defendant said he had been shot down the street, the officer asked why he ran. The defendant said, "I just killed somebody, and if you walk straight ahead you will find something." The officer then asked "why?" and the defendant said, "because he was running his mouth." pp. 669-670.

The other security officer had arrived on scene as the first officer was yelling for the defendant to stop. After helping the original officer sit the handcuffed defendant up against a tree, the officer contacted Boston police and requested help and medical assistance for the defendant. The maintenance supervisor arrived yelling for the officers' attention. The second officer followed the maintenance supervisor and found Constant who had been stabbed in the face, head, shoulder, and chest and had no pulse. Constant was dead by the time medical personnel arrived on scene.

The defendant was treated for lacerations to his head and neck at the hospital. Hunter was brought to the hospital for an identification procedure. The detective advised Hunter that a person at the hospital might or might not be the person involved in

stabbing Constant. She was told it was important to determine if the person was or was not involved.

Before arriving at the hospital, officers standing near the defendant were asked to step away from him. The detective was going to walk Hunter around the entire perimeter of the emergency unit to see if she recognized anyone; however, as soon as Hunter entered the area, she saw the defendant across the room and said, "That's him, that's him. He's the one." p. 679. At the time of the identification, the defendant had just received treatment for injuries to his head and his face was lit up by a surgical light.

The defendant was arrested and gave a statement back at the station where he said he was the victim of the attack.

The defendant was indicted on charges of first-degree murder and assault by means of a dangerous weapon. The defendant filed a motion to suppress his statements and the identification made by Hunter at the hospital. Both motions were denied.

In addition to the defendant's statements, and the result of the showup identification procedure, the Commonwealth introduced a letter into evidence that was written by the defendant while he was being held in jail. The letter apologized to the victim's mother. The jury found the defendant guilty of murder in the second degree and assault by means of a dangerous weapon. The defendant appealed on several grounds.

DISCUSSION

Roadside Statements

The defendant argued that the statements he made to the security officers at roadside should have been suppressed because the officers violated his Miranda rights. The court found that the security officers were state actors for Miranda purposes.

Miranda warnings are only necessary when a defendant is in custody and subject to interrogation.

> The crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody. p. 670 quoting *Commonwealth v. Damiano*, 422 Mass. 10, 13 (1996).

The court applied the factors set out in *Commonwealth v. Groome*, 435 Mass. 201 (2001) to the facts of this case:

1. The place of the interrogation. The questioning here was in a public area; however, he was placed against a tree in handcuffs by two uniformed officers after having been chased and tackled by one of them.

> 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. p. 673.

2. Conveying that the defendant was a suspect. The court emphasized that the focus should be the impact of the officer's words and actions on the defendant, not on the point of view of the officers. It does not matter if the officers did not consider the defendant a suspect. If the officer's actions convey to the individual that they are a suspect, then that is what matters.

   In this case, the defendant was forcibly detained and when he told the officers he was shot, he was asked why he ran. The officer may have intended the question to be neutral; however, it may have implied to the defendant that he would have no reason to run if he had done nothing wrong. 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.

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." p. 674.

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.

The appeals court noted that the *Groome* factors were developed because the issue of whether someone is in custody is often a complicated question requiring close scrutiny.

> 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.' p. 672 quoting *Commonwealth v. Bryant*, 390 Mass. 729 (1984).

The court found that this was a case that did not require the nuanced analysis of *Groome*.

> 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. p. 672.

The court also found that it was clear that the questioning of the defendant at roadside was interrogation. Because the defendant was subject to custodial interrogation and was not advised of his Miranda warnings, his statements at roadside should have been suppressed.

Recorded statement

The Commonwealth bears the burden of showing that any Miranda waiver is voluntary, knowing, and intelligent. The defendant argued that his recorded statement after his arrest should have been suppressed because the Commonwealth failed to show that his Miranda waiver was voluntary.

Prior to giving his statement, the defendant was provided with a written Miranda waiver form and was read the form by the detective. He initialed each right as it was read to him and then he signed the form. "The tone of the interview was cordial and conversational throughout." p. 680. After being read his Miranda rights the defendant made statements about not understanding what was going on and why he was there. He maintained he was the victim of the attack. Toward the end of the interview he said, "I had nothing to do with anything, I don't understand why I'm in the police station, where's the guy who could have attacked me?" The detective said that it could be the guy who is dead, to which the defendant said, "Somebody did a good job then." p. 681. When the defendant said he was done answering questions, the interview promptly ended.

The defendant argued that his answers during the interview were incoherent and his statements that he did not know what was going on showed that his statements were involuntary. The court disagreed.

The defendant here had graduated high school and completed one year of college. His responses were coherent and, the court found, calculated. His statement about not knowing why he was in the police station was not an indication that he was disoriented as to place, time, or situation. These statements were commentary on the defendant's belief as to the strength of the evidence against him.

Identification procedure

One-on-one showup identification procedures are inherently suggestive and are disfavored by the court; however, they will only be suppressed if they are unnecessarily suggestive. Such identification procedures are appropriate where there is good reason to secure a prompt identification of a suspect.

In this case, the police had good reason to conduct a one-on-one showup because police were investigating a violent crime and needed to confirm whether the defendant should be arrested or released.

The defendant claims that the procedure was unduly suggestive because Hunter knew she had hit the assailant in the head with a metal object during the struggle and, at the time of the identification, his head was lit up by a surgical light. The court found that the lighting was a result of a medical procedure, not a police procedure. It did not render the procedure unnecessarily suggestive.

The appeals court agreed with the motion judge that:

> 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. p. 679.

Authentication of apology letter

The judge acts as a gatekeeper of the evidence to ensure that only relevant information is presented to the jury. This gatekeeper responsibility requires the judge to make a preliminary determination that proffered evidence is what the proponent claims it is.

The defendant argued that the Commonwealth failed to properly authenticate the letter sent to the victim's mother. The letter is only relevant if the defendant wrote it. The burden is on the Commonwealth to establish confirming circumstances that establish the defendant as the author.

The court found that the letter was sent from Nashua Street Jail where the defendant was being held, his name was listed in the return address area of the envelope, and the letter itself contained information and details of the crime that would only be known to someone familiar with the murder, including that the assault began in Hunter's bedroom, Hunter had hit him in the head with a kitchen utensil and that "he used a kabar pocket knife." p. 683.

There was evidence that a KA-BAR brand pocketknife was found near the scene. A fragment from the knife was found in one of the fatal stab wounds and DNA found on the knife's blade was consistent with the DNA profile of the victim, while DNA found on the handle was consistent with the DNA profile of the defendant.

These were sufficient confirming circumstances to establish the defendant as the author of the letter.

Because the roadside statements of the defendant were the strongest evidence of motive in this case, the admission of the statements was prejudicial. The court ordered that the convictions be reversed.

QUESTIONING AT ROADSIDE DID NOT REQUIRE MIRANDA

Commonwealth v. Tantillo, 103 Mass.App.Ct. 20 (2023).

FACTS

On August 9, 2019, East Bridgewater Police received two phone calls about an accident at Cumberland Farms. The first said someone crashed into a pole outside Cumberland

Farms and that the driver appeared to be impaired. The second provided the make, model and license plate number of the car that had hit a pole and said the driver was a blond woman who had stumbled out of the car. Based upon this information, an officer pulled over the defendant's car some distance from the store.

The defendant, who was driving the car, was asked whether she was in an accident at Cumberland Farms. She said, "maybe." When asked by another officer, she said "yes." She appeared nervous and disoriented. She was talking slowly and her voice shook.

The defendant was asked out of the car. She was unsteady on her feet and held onto the car for support. When asked when she left her house she said "2:30." It was only 2:05. When asked, she admitted she had taken medication that day.

She was unable to follow the officer's instructions while they administered roadside assessments and she failed to keep her balance. "The defendant appeared very unsteady, shaky, and had a blank look on her face." p. 22.

Paramedics arrived and transported her to the hospital. During an inventory of her car, officers found prescription pill bottles in the defendant's name for Clonazepam and Tramadol. The officer testified that he thought Gabapentin was the other one. None of the bottles or pictures of the bottles were introduced into evidence.

An officer went to Cumberland Farms and found damage to a pole; however, they could not determine how fresh the damage was.

The defendant was charged with operating under the influence (OUI) of drugs, negligent operation, and leaving the scene of property damage. A motion for required finding was allowed on the leaving the scene charge. The defendant was acquitted of the OUI drugs charge and convicted of the negligent operation charge. On appeal, the defendant argues, among other things, that her motion to suppress her statements at roadside should have been allowed and that there was insufficient evidence to support the conviction.

DISCUSSION

<u>Statements</u>

The defendant contends that she was in custody at roadside and her statements should be suppressed because she was not advised of her Miranda warnings prior to being questioned.

> An interrogation is custodial if, based upon an objective evaluation of the circumstances, a reasonable person in the defendant's shoes would have perceived the environment to be coercive. p. 23 (quotations and citations omitted.)

The court applied the factors set out in *Commonwealth v. Groome*, 435 Mass. 201 (2001) to the facts of this case:

1. The place of the interrogation.

The questioning here took place on the street after the officer stopped her car for a short period of time. This did not create a coercive environment.

2. Whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect.

> Brief preliminary questions asked in an effort to confirm or dispel suspicion of criminal activity typically do not require Miranda warnings. p. 24.

Minor motor vehicle collisions are not crimes. When officers stopped the defendant, they were aware that her car had hit a pole but did not know whether there was any damage to the pole. When officers spoke to her, they didn't know whether a crime had been committed. The first officers asked if she had an accident at Cumberland Farms, to which she said, "maybe." Another officer arrived and asked if she had hit something at the Cumberland Farms at which point the defendant said "yes."

> These were brief, preliminary questions asked in an effort to confirm or dispel suspicion of criminal activity for which Miranda warnings are not required. p. 24.

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.

The court found that the questioning of the defendant at roadside was investigatory and not accusatory. The questioning was not aggressive nor had officers conveyed to her that they believed she had committed a crime.

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.

The court also found that police had not "through words or conduct, objectively communicated that the officer would use his or her police power to coerce the defendant to stay." p. 25 quoting *Commonwealth v. Matta*, 483 Mass 357, 362 (2019).

For all these reasons, the court concluded that the defendant was not in custody when she was questioned at roadside.

Sufficiency of the evidence

The defendant argued that the Commonwealth had failed to prove each of the elements of negligent operation beyond a reasonable doubt. To prove negligent operation, the Commonwealth must prove three elements:

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.

The defendant contends that the Commonwealth failed to prove the case because the lives or safety of the public had not been endangered by her striking the pole in an empty parking lot. MGL c 90 § 90 (2)(a) requires proof that the lives or safety of the public may be endangered, not that the lives or safety of the public were actually endangered.

The defendant admitted that she was in an accident by striking a pole at Cumberland Farms, she was disoriented and spoke slowly to officers, she was unsteady on her feet and had consumed medication that day.

> 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. pp. 26 – 27.

In footnote 4, the court states: 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 in considering the negligent operation charge.

The judgment was affirmed.

QUESTIONING AT ROADSIDE WAS NOT CUSTODIAL

Commonwealth v. Fisher, 492 Mass. 823 (2023).

FACTS[6]

Officers conducted an extensive investigation into a string of violence targeting prostitutes working out of hotels in Burlington, Woburn, and Saugus during the overnight hours between July 1, 2015 and July 2, 2015. One prostitute was shot and killed, another was robbed at gunpoint by two men, and the other refused to open the hotel door because the male knocking "just didn't look right." p. 828.

The investigation led officers to the co-defendant and a car that was missing some of its hubcaps and had a different colored right front quarter panel. On July 3, officers located a car that matched the description. The car was registered to the co-defendant who was believed to be the one that held a gun to the head of one of the victims.

At 6 PM, officers located the car as it was at the drive-through window at a fast-food restaurant in Winchester. A Woburn police cruiser parked in front of the car blocking its exit from the drive-through. The officer approached the occupants on foot. Another officer approached the car and had his gun in the "low ready" position; however, there was no evidence that any of the occupants saw the weapon out of the holster. The original officer calmly told the occupants that he needed their identification and that the car may have been involved in a crime. All the occupants were cooperative.

The investigating officers arrived within minutes. Numerous other officers arrived on scene – as many as 13 officers at different times. A large portion of the officers left soon after arrival or were standing near the perimeter of the parking lot. The original responding officers left within minutes of the arrival of the investigating officers.

There were three Black men in the car. The co-defendant was the driver and the defendant was the front seat passenger. Officers told the driver they were interested in a car that was similar to his. They also told him he was not under arrest and that he was free to go. The driver acknowledged he was free to go but agreed to step out to talk to the officers. He was asked about his whereabouts on July 1 and 2. He was never advised of his Miranda rights. The interview ended when officers asked if they could search the car and he responded by saying "I think I need a lawyer." p. 837. He was told that the car was being seized, but that he was free to leave.

Another officer approached the car and spoke to the passengers. He told them that the car they were in matched the description of a car involved in a serious crime involving

[6] This was a lengthy court decision that involved numerous complicated issues. This factual summary and discussion focus on the motion to suppress statements.

weapons and that the occupants might have nothing to do with the crime, but the officers needed to investigate the car.

The passengers were asked out of the car and pat frisked. The defendant looked similar to one of the suspects seen on video surveillance retrieved from the hotel. Officers told the defendant that he was not under arrest and when officers said he could leave he said "OK". The defendant engaged in a three-to-four-minute conversation with police about his whereabouts on the night of the crimes and other topics. This conversation was held on the grass to the right of the paved entrance to the restaurant. The defendant was never read his Miranda rights.

At the end of the conversation, officers seized his cell phone and he was told he was free to go. The car was also seized. All three occupants of the car went into the restaurant.

The defendant was ultimately charged with various crimes. He filed a motion to suppress his statements made during the stop outside the restaurant. That motion was denied. The defendant was found guilty of first-degree murder, attempted armed robbery of one victim, and unarmed robbery of another victim.

The defendant raised numerous issues on appeal. This discussion focuses on the denial of the motion to suppress his statements.

DISCUSSION

Being in custody for 5th Amendment purposes is closely linked but not identical to being seized in the 4th Amendment sense. Both require consideration of the totality of the circumstances and a determination of whether the person was compelled to engage with the officers. When determining whether someone is in custody at the time of questioning, the court will focus on two inquiries:

1. What were the circumstances surrounding the interrogation; and
2. Under those circumstances, would a reasonable person have felt they were free to terminate the interrogation and leave?

The court applied the factors set out in *Commonwealth v. Groome*, 435 Mass. 201 (2001) to the facts of this case:

1. <u>The place of the interrogation</u>

The interrogation here took place at 6 PM in the public parking lot of a restaurant. The car that the defendant was in was blocked from leaving the area and there were as many as 13 officers on scene at various times. Many of the officers left quickly after arrival or did not interact with the occupants of the car, none of the occupants were handcuffed, and the questioning of the defendant was brief. The court found that it was

a close call as to whether this was a police-dominated area and for the purposes of its analysis, the court assumed it was.

2. Whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect

Investigators did not convey to the defendant that he was a suspect. In fact, he was told that the car was of interest and that he might have nothing to do with it. There was some question as to whether the defendant was free to leave before the pat frisk; however, the question is whether he was free to end the interview at the time the incriminating statements were made. After the frisk, he was told he was not under arrest and he was free to go, which he acknowledged.

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

The nature of the interrogation favors a finding that the defendant was not in custody. It was not aggressive, persistent, or harsh. The other occupant of the car testified that the officers were polite and courteous. There was no indication that the officers raised their voices or threatened the defendant.

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 was terminated with an arrest.

After the defendant and co-defendant were questioned, they walked around the area without any interruption of the police and ultimately walked into the restaurant.

> We conclude, based on the totality of the circumstances, that the defendant was not in custody at the time he was questioned by the officers because a reasonable person in his position would have felt that he was free to leave during the questioning. p. 842.

The motion was properly denied.

DEFENDANT NOT IN CUSTODY FOR MIRANDA PURPOSES WHILE POLICE SPOKE TO HIM IN COMMUNITY CARETAKING ROLE

Commonwealth v. Armstrong, 492 Mass. 341 (2023).

FACTS

After the death of his mother in 2016, the defendant reconciled with his 83-year-old father from whom he had been estranged for the prior 20 years. On January 11, 2017, nine months after his mother's death, officers found the father's body with a garbage

bag over his head secured around his neck tightly with a belt. There were no signs of forced entry. The medical examiner opined that the victim was alive when the bag was placed over his head. The cause of death was blunt force trauma to the head and torso and asphyxia by ligature strangulation.

During the investigation, the police learned that the defendant was without a car two days before the victim's body was discovered. The victim owned a truck which he generally did not allow others to drive and had, on at least one prior occasion, refused to let the defendant use it. The victim's truck had no damage to it the day before his body was found. When his body was found, the truck was missing and the sideview mirror was found inside the home. The defendant's identification and cell phone were also found in the victim's home.

Two days after the victim's body was found, officers in Mount Laurel, New Jersey were dispatched to a motel on a report of a "trespassing-suspicious persons complaint." A motel employee told them that a man who was not a guest at the hotel had been going in and out of the building for most of the night. They were concerned because of his appearance and demeanor and asked officers to check on him to make sure he was OK.

Officers knocked on the door to the bathroom that was in the lobby. The defendant exited the bathroom, walked out of the motel into an adjacent parking lot. The officers followed him.

The defendant was evasive when asked his name. At one point he told officers he was robbed of his wallet and cell phone and was stranded because he ran out of gas. At another point, he said he had lost his wallet. The defendant told officers he was on his way to an unpaid job at the Department of the Interior. Officers described him as "just kind of strange" and "aggressive at times." They reported that he seemed irrational and "didn't make much sense." Officers thought he "might be lost, disoriented, or a missing person." p. 348.

Because he was becoming agitated and irrational, officers directed the defendant to sit down near a truck that was missing a sideview mirror. The officers ran a query of the registration which came back to the victim. They also learned that "Glenn Armstrong" was wanted for questioning in a murder investigation. When the defendant responded to that name, he was placed under arrest. The entire interaction with the officers lasted 20 minutes.

The officers tried to read the defendant his Miranda warnings. He repeatedly interrupted them. He asked them whether the victim had reported the truck stolen and admitted to ripping the sideview mirror off the truck. He said he woke his father up who was "grouchy" and that he took the truck to get it fixed at his brother-in-law's garage.

The defendant was indicted. He filed a motion to suppress which was denied. The defendant raised numerous issues on appeal. This summary focuses on whether the statements the defendant made to the New Jersey officers should have been suppressed. The defendant argued that he was subjected to custodial interrogation and had not been given his Miranda rights.

DISCUSSION

Community caretaking functions are legitimate police responsibilities that are "totally divorced from the detection, investigation, or acquisition of evidence related to the violation of a criminal statute." p. 349 quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

> 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. p. 349 (quotations and citations omitted.)

The New Jersey officers in this case had an objectively reasonable belief that the safety of the defendant or the public were in jeopardy. The actions they took were reasonably related to their community caretaking function and did not transform the encounter into a criminal investigation.

> 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. p. 50.

It was reasonable in these circumstances for the officers to temporarily detain the defendant and to try to identify him to confirm that he was not missing or wanted.

> 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. p. 350.

The motion to suppress was properly denied.

DEFENDANT NOT IN CUSTODY WHEN QUESTIONED IN COMMON AREA OF DORM

Commonwealth v. Chilcoff, 103 Mass.App.Ct. 48 (2023).

FACTS

The victim and the defendant were undergraduate students at UMass Amherst in 2017. At 9:15 PM on December 8, 2017, the victim was at a "pregame" party where she consumed four to six "nips" of vodka in 30 minutes. She also "shot gunned" a beer and drank more beer while playing a drinking game. As she left the party to go to a fraternity house, she was described as "stumbling drunk" and "wobbling." p. 50. The victim had no memory of leaving the party.

Believing the victim was in no condition to be walking alone, some of her friends escorted her back to her dormitory when she left the party. On the way back to the dorm, she was unsteady on her feet, could not walk in a straight line, slurred her speech and did not make sense when she spoke. Her friends left after they watched her pass security at the front door of the dormitory.

Once inside, the victim went to the wrong floor and entered the defendant's room, which was directly above her own. The defendant was there with his roommate and another person watching a movie. None of the occupants of the room knew the victim. They told her she was in the wrong room. The victim stroked the friend's face and left the room. The friend said, "Wow that girl is drunk." p. 51.

The victim returned a short time later. She took off her shirt and got in the defendant's bed. She told the three occupants that she lived in the Sylvan residential area which is located across campus. She said she did not know where she was and was looking for a friend. When asked if she knew what room she was in, she gave her room number. She was unsteady, wobbling and her speech was slurred.

The victim fell asleep in the defendant's bed. The defendant's roommate feared that she would vomit on the bed because she was so intoxicated. A short time later the roommate saw the victim take the defendant's hands and rubbed them on her chest and vaginal area. The defendant asked what she wanted to do. The victim said, "I want you" and "I want to stay here." The roommate said, "Just because she's saying it doesn't mean it's okay." p. 51. The roommate asked the defendant if he should get the resident assistant. The defendant said no and motioned for the roommate to leave, which he did. The defendant then had sexual intercourse with the victim.

When the victim woke up the next morning the defendant had left on a prearranged trip to New York. The victim did not know where she was and had no memory of what happened after leaving the party. When she was looking for her clothes, she and the roommate found a used condom. Later testing of the condom confirmed the presence of DNA from both the defendant and the victim.

The victim returned to her room. Her vaginal area and chest area were sore. She believed someone had sex with her while she was in the room upstairs.

The police interviewed the defendant as part of their investigation. The interview was audio-recorded and took place in the common room of the dormitory just outside the defendant's room. It was a large, open room and people walked in and out of the room during the interview. The defendant told officers that the victim came into his room and seemed to think it was hers. He said the victim made sexual advances to him and they had consensual sex.

The defendant was charged with rape. The defendant filed a motion to suppress his statements which was denied. After he was convicted, the defendant appealed arguing that his statement should have been suppressed and there was insufficient evidence to prove rape.

DISCUSSION

Statements

The defendant's position was that he was in custody when he was interviewed by the police and he was never advised of his Miranda rights. The court considered the factors set out in *Commonwealth v. Groome*, 435 Mass. 201 (2001):

1. the place of the interrogation;
2. whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect;
3. the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and
4. whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest."

In this case, all the factors favor a finding that the defendant was not in custody. During the interview, officers did not suggest that he was suspected of a crime. The officers were gathering information and "just starting to sort out each party's story about the night of the alleged incident." p. 53. The questioning was not aggressive or accusatory and the defendant was told he could leave at any time.

Because the defendant was not in custody, officers were not required to advise him of his Miranda warnings.

The defendant next claimed that his statements were not voluntary.

> 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. p. 53 (quotations and citations omitted.)

When considering voluntariness, the court will consider the totality of the circumstances including: the age of the suspect, education level, emotional stability, experience with the criminal justice system and any promise of leniency or inducement.

The defendant here was a young adult attending college, not impaired by drugs or alcohol at the time of the interview and was calm during the interview. The court noted that the officers may have misled the defendant because they told him they did not intend to talk to his friends, which they later did.

Based upon all the facts and circumstances here, the court found that there was no evidence that the defendant's statement was not "the product of a rational intellect and a free will." p. 54 quoting *Commonwealth v. Selby*, 420 Mass. 656, 662 (1995).

Sufficiency of the evidence

The Commonwealth theory was that the victim lacked the ability to consent to sex because she was incapacitated by alcohol. While the law does not require the Commonwealth to prove the victim as unconscious, the level of intoxication must be extreme. The question is whether the level of intoxication was such that it rendered the victim incapable of consenting to sex.

When pursing this theory, the Commonwealth must also prove that the defendant knew or reasonably should have known that the victim's condition rendered her incapable of consenting to sex.

> We are satisfied that this evidence was sufficient to support the finding that the victim was too intoxicated to consent to sexual activity and that the defendant knew or reasonably should have known that she was incapable of consent. p. 55.

The judgment was affirmed.

WAIVER OF MIRANDA RIGHTS

STATEMENTS WERE VOLUNTARY DESPITE IMPROPER TACTICS USED DURING INTERVIEW

Commonwealth v. Escobar, 493 Mass. 694 (2024).

FACTS

On January 16, 2015, the defendant went to the home of Jonny Pineda and Oscar Interiano located in Everett. The men drank together at the home and then went to a local restaurant where they were met by the victim. After the restaurant closed at 1 AM, Pineda drove them all back to his house. On the way home, they stopped briefly at the defendant's home where the defendant retrieved a gun that he owned.

The defendant, Interiano and the victim started arguing when they got back to the house. Pineda told the men to take it outside, which they did. The argument got physical when the defendant and the victim started pushing and then punching each other. The victim also pushed and punched Interiano when he tried to intervene and stop the fight. Interiano was ultimately able to separate the other two. The victim left and the defendant told Interiano to go inside and open the back door.

The defendant followed the victim down the street to a dead-end road approximately 200 feet away. The defendant then shot the victim at close range (1-2 feet) through the right eye. After the victim fell, the defendant shot him twice through the back of his head.

After shooting the victim, the defendant ran between houses and hopped a fence back to Interiano and Pineda's house where Interiano let him in the back door. When asked what happened, the "defendant replied that the man he had a problem with would not be able to talk." p. 697.

The defendant showed Interiano a gun and asked if he could hide it in the house. Interiano agreed and they wrapped the gun in a shirt and hid it in a rolled-up rug in the basement. After hearing police sirens outside, the defendant said he would sleep on the couch. By the time Interiano woke up at 6:30 AM, the defendant was gone.

Police arrived at the defendant's home around 9:30 PM on January 17, 2015. Officers entered the defendant's bedroom with guns drawn. After waking up the defendant, they holstered their weapons. A Spanish speaking officer told the defendant that the officers wanted to talk to him and asked if he would accompany them to the police station. He was told he was not required to do so, but he agreed to go with the officers.

After waiting at the station for over three hours, the defendant was brought to the interrogation room just before 1 AM. He was read his Miranda rights from a form written in Spanish. When asked, he said he understood his rights. The officer then had

the defendant read the form himself. After a few minutes, the defendant said he read the form. The officer and the defendant signed the form.

The defendant was then interviewed by an Everett police detective and a State police trooper while the Spanish speaking officer translated the conversation. In the beginning, officers did not tell the defendant why he was being interviewed.

> After about twenty minutes, however, the officers told the defendant they knew what had happened, that he had to tell them the truth, and that he would only have one chance to tell what happened. p. 698.

The defendant said he argued and fought with the victim but denied anything more serious happened. The officers told him they knew he was lying and that they could not help him unless he told the truth. Officers informed the defendant that they had security camera footage and that they would find "microscopic" evidence from his apartment, both of which would show he was lying.

The defendant maintained his story that nothing more than a fistfight had occurred while officers told him that the fight occurred at the same place where the victim was killed and that people had told officers that the defendant carried a gun.

The firearm was found in the apartment around 3 AM while the defendant was being interviewed. The officers told the defendant that they had found the gun. "The defendant changed his posture, slumped forward in his chair, and put his head down." p. 699. After a few minutes of additional questioning the defendant admitted that he was drunk and that when he was fighting with the victim he "went crazy, took the gun out, and fired several times at the victim at close range." p. 699. He did not know how many shots he fired or where he hit the victim, but saw the victim fall to the ground. He said he hid the gun when he got back to the house. The defendant was arrested at the end of the interview.

The defendant filed a motion to suppress his statements. He argued that the Miranda rights were deficient and that he did not waive his rights knowingly. He also argued that his statements were not voluntary as they were the result of police coercion and that officers violated his right to make a telephone call. His motion to suppress was denied.

At trial the defendant said he lied when he spoke to police to protect his friends. He denied shooting the victim. He said he brought the gun over because Pineda and Interiano had expressed interest in buying it. He said he hid the gun as soon as they arrived at the house.

The defendant was convicted of murder in the first degree and firearm offenses. The defendant raised several issues on appeal. This summary focuses on the denial of his motion to suppress.

DISCUSSION

Miranda warnings

A waiver of Miranda rights must be knowingly, intelligently, and voluntarily given. The Commonwealth must show that the warnings were given and that the defendant understood them. The waiver must be proven beyond a reasonable doubt.

In this case, the defendant was read the warnings in his native language and said he understood them. He then read the warnings himself and signed the form indicating he understood those rights. The motion judge further found that:

> 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. p. 701.

The court found that the Miranda rights were properly provided to the defendant and that his waiver of them was knowing, intelligent, and voluntary.

Voluntariness

> 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. pp. 701-702.

There are several tactics that, when used by police during an interrogation, may render a statement involuntary. These tactics, which include making assurances that a confession will aid the defense or result in a lesser sentence or making false statements during an interrogation, are disfavored by the court. "Such tactics cast doubt on the voluntariness of any subsequent confession or admission." p. 702 quoting *Commonwealth v. Tremblay,* 460 Mass. 199, 208 (2011). Officers also cannot tell a defendant that if they do not speak to officers that a judge or jury will never hear the defendant's side.

The motion judge found that the officers act improperly when they interrogated the defendant in this case by

> making assurances that a confession would assist the defendant and by telling him that they would find incriminating 'microscopic evidence' in his home and that the interview was the only chance for him to tell his side of the story. p. 702.

Despite these improper tactics, the court noted that the defendant continued to deny his involvement in the victim's death. The defendant only confessed after he was told that the officers had found the gun. "Therefore, the motion judge concluded that the defendant's will was not overborne by the improper interrogation techniques." p. 703.

The SJC agreed with the motion judge. A statement will only be suppressed if there is a causal link between officer misconduct and the defendant's confession such that the defendant's will was overborne. In this case, the defendant resisted all tactics used by officers to elicit a confession. Throughout the interview he appeared to be calm, focused, and responsive to officers. The judge did not find him to be physically uncomfortable or in any apparent distress. That only changed after the police found the gun.

> Once the defendant was confronted with the fact that police had recovered the firearm, however, he changed his posture and slumped forward in his chair and put his head down before confessing to shooting the victim. This strengthens the conclusion that it was not improper tactics by police but tangible evidence of his guilt that convinced the defendant to confess to the murder. Accordingly, although the officers may have acted improperly in questioning the defendant, these improper tactics did not coerce the defendant into confessing, and thus his confession to the police was voluntary. p. 703.

<u>Telephone call</u>
MGL c 276 § 33A states:

> 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.

If an arrestee's rights are intentionally violated, any statement they give to the police must be suppressed. The rights under the statute are triggered by a formal arrest.

A formal arrest occurs when there is:

> An actual or constructive seizure or detention of the person;
> Performed with the intention to effect an arrest; and
> It is so understood by the person detained. p. 704 (quotations and citations omitted.)

The defendant was clearly in custody for Miranda purposes. He was sleeping in his bedroom when he was woken up by several officers with firearms drawn. "A reasonable person in his circumstances would not have felt free to decline the officers' request that he come to the police station." p. 704. The court also found that no person would have stayed at the police station for three hours like the defendant did before his interview unless they did not feel free to leave.

Despite being in custody for Miranda purposes, the court found the defendant was not arrested until he was booked after the interview. At the motion to suppress hearing, the officers testified that they did not believe they had probable cause to arrest the defendant until he confessed. At the time of the interview, the police were still actively investigating the murder as evidenced by the fact that the gun was recovered at 3AM while the defendant was being questioned.

Prompt arraignment

The defendant next argued that his statements must be suppressed because they were made outside the *Rosario* safe harbor period.

A defendant has the right to be arraigned as soon as reasonably possible after arrest. In *Commonwealth v. Rosario*, 422 Mass. 48 (1996), the court established a bright-line rule regarding statements made by individuals under arrest. Statements made within six hours of arrest, if otherwise admissible, will not be suppressed because of an unreasonable delay in arraignment. Statements made outside this six-hour window shall be suppressed.

Much like the right to make a phone call, the clock for *Rosario* purposes starts upon the arrest of the defendant. Even if the court found that the defendant was arrested at the time of his confession, around 4AM, the interview was over by 6AM, well within the safe harbor.

The statements were properly admitted at trial.

VOLUNTARINESS

STATEMENTS MADE TO VIRGINIA OFFICERS WERE VOLUNTARY

Commonwealth v. Hart, 493 Mass. 130 (2023).

FACTS

On October 5, 2016, the defendant and his girlfriend broke into the home of 95-year-old Thomas Hardy and his wheelchair bound 77-year-old wife. Their plan was to break into the home and intimidate the occupants into giving them money and a car. The assailants were then going to use the car to leave the Commonwealth to avoid prosecution on pending charges.

The defendants entered the garage of the home through an unlocked door. They took a socket wrench with them into the home and knives from the kitchen counter. The defendant attacked the husband in the living room, stabbed him multiple times in the chest and neck and then placed a pillow over his face until he stopped breathing. The defendant then joined his girlfriend who was attacking the wife. The defendant stabbed the wife several times, stood on her stomach, and then put a pillow over her face in an attempt to suffocate her. The defendants stole credit cards, $200 in cash, and the car.

The victims were found the next day when a visiting nurse arrived at the home for a scheduled appointment. The husband was dead, but the wife was still alive. She died weeks later from complications resulting from the attack.

The police were able to identify the assailants from video footage from a store where they tried to use the victim's credit cards hours after the attack. Law enforcement tracked the couple as they fled down the east coast. They were arrested in Virginia on October 8, 2016.

Upon his arrest, the defendant told Virginia officers he wanted to speak to them. The interrogation lasted approximately one hour. The defendant confessed to attacking both victims and provided a sketch of the victims' home. He confessed again the next day when he was interviewed by Massachusetts State troopers for two hours and ten minutes.

The defendant's motion to suppress his statements was denied. After trial, he was found guilty of first-degree murder of both the victims. He appealed on several grounds, including arguing that his statement to the Virginia officers was not voluntary.

DISCUSSION

"A statement is presumed voluntary until a defendant produces any evidence showing otherwise." p. 135. Such evidence can be raised by motion, affidavit, or a proffer. Once evidence is presented, the burden shifts to the Commonwealth to prove the statement was made voluntarily beyond a reasonable doubt.

> A voluntary statement is 'the product of a rational intellect and a free will and not induced by physical or psychological coercion. P. 135 quoting *Commonwealth v. Hammond*, 477 Mass. 499, 502 (2017).

The court will look at the totality of the circumstances to determine whether the will of the defendant was overborne to the extent that the statement was not free and voluntary. The court will consider the circumstances under which the statement was made as well as relevant individual characteristics and conduct of the defendant.

Relevant factors include, but are not limited to:

> 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), and the details of the interrogation, including the recitation of Miranda warnings. p. 136 quoting *Commonwealth v. Hammond*, 477 Mass. 499, 502 n.3 (2017).

The interrogation with the Viriginia officers in this case only lasted about an hour and the tone was conversational with no voices raised. The officers never harassed the defendant and he did not appear agitated or intimidated.

The defendant had a postsecondary education, was coherent and physically healthy and had "significant experience with the criminal justice system." The defendant said he knew the Miranda warnings, "very well" and recited them to the officers before officers read them to him and obtained the waiver. The defendant was the one who initiated the conversation and "displayed an obvious desire to speak and confess to them." In addition, he told the Massachusetts officers that he had "volunteered to talk" to the Virginia officers. p. 136.

> The totality of the circumstances here demonstrates that the will of the defendant was not overborne when he confessed to the Virginia officers. p. 136.

The defendant argued that the Virginia officers used four specific tactics which rendered his statement involuntary.

Now or never tactics

The court does not favor "now or never" tactics that lead a defendant to believe that talking to police is the only time they will be able to tell their story. When such tactics are used, it "casts substantial doubt on the voluntariness of a subsequent confession and on the integrity of the interrogation process leading up to it." p. 137 quoting *Commonwealth v. Miller*, 486 Mass. 78, 93 (2020). The court noted that it is extremely difficult to overcome a voluntariness argument when "now or never" tactics are used.

"Now or never" tactics were not used here. The Virginia officers did not suggest to the defendant that this would be his only opportunity to tell his story or have any impact on his right to counsel, his right to testify, or his right to represent himself.

Minimization

When officers minimize or understate the seriousness of the crime, it could imply a promise of leniency. While minimization does not, by itself, require a finding that the confession was involuntary, when it is done, the court will consider what was said and

whether it caused the defendant to be misled about the severity of the situation they faced.

In this case, the officers used minimization language twice when they characterized the crimes as "a mistake" and then as a "lapse in judgment." The court found that the defendant's response to these comments was proof that he was not misled by the comments. When officers made these statements, the defendant immediately disagreed, at one point saying, "well this is bigger than a little mistake." Officers also later described the situation as a "pretty severe, heinous incident," a description which the defendant agreed with.

> Any minimization tactic employed here did not coerce the defendant to confess because "the defendant's actions reveal that he was able to decide what to tell the officers and could further identify the officers' tactics for what they were." p. 138 quoting *Commonwealth v. Durand*, 457 Mass. 574, 596-598 (2010).

The court further noted that, even if the defendant had been misled, it would not change the analysis in this case where there was "significant and considerable evidence that the defendant sought to speak to law enforcement and then voluntarily did so consistent with his desire." p. 138.

Appeal to religion

While the court frowns upon exploiting a defendant's religious anxieties, the statements will not be suppressed if the religious commentary were limited and were not made with the intent to exploit a psychological vulnerability of the defendant. The court found the reference to religion here was "extremely limited, if present at all." p. 138. During the interrogation, the officers made reference to the co-defendant's soul, but there was no evidence to suggest that the officers were trying to exploit the defendant's religious sensibilities.

Promise of leniency

The defendant finally argued that the statement was not voluntary because the officers promised leniency for his co-defendant/girlfriend if he confessed.

> Officers may not make a threat concerning a person's loved one, such as threatening arrest and charging a loved one without any basis to do so or expressly bargain with the defendant over the release of other individuals. (quotations and citations omitted) p. 139.

The Virginia officers did not make any promises to the defendant in this case. After both defendants had been arrested, the defendant asked to speak to the officers and he professed the innocence of his girlfriend, stating multiple times that she was not responsible for what happened. The defendant asked the officers if they thought they could contact the police department and "arrange something." The Virginia officer told

the defendant, "If you're honest with me and you're telling me everything that's going on." p. 139.

> In this context, the Virginia officer's response was a truthful explanation of what he believed would be the benefit of the defendant's confession: if the defendant was being honest when he stated that [his girlfriend] was not involved in the killings, then lenience for [the girlfriend] would likely result. Explaining the truthful, natural result of a suspect's statement is permissible. p. 140.
>
> 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. p. 140.

The statements made to the Virigina officers were voluntarily made. The motion to suppress was properly denied.

MIRANDA RIGHTS AND THE BOOKING PROCESS

Routine booking questions are not investigatory in nature and are not usually considered interrogation for Miranda purposes. However, even if a question is typically asked during the booking, it is interrogation for Miranda purposes if the response will likely elicit an incriminating response. The key inquiry is whether the questions being asked at booking are designed to or have the potential to elicit an incriminating response.

The following three cases (*Kacavich, Carey,* and *Woods*) are not new. They are summarized briefly here as a reminder of the current state of the law regarding Mirada rights and the booking process.

Commonwealth v. Kacavich, 28 Mass.App.Ct. 941 (1990).

FACTS

Officers executed a search warrant at the defendant's apartment. After finding drugs and other evidence of a drug distribution business, the defendant was arrested and searched. Officers seized $840 from his person.

Booking occurred approximately one hour later. As part of the routine booking process, the defendant was asked where he lived and what he did for work. He provided the same address where the search warrant was executed as his address and stated he was unemployed.

The defendant objected to these statements being introduced at his trial. The judge allowed the statements to be introduced and the defendant was convicted. On appeal the defendant argued that the statements were made without a valid Miranda waiver.

DISCUSSION

> Interrogation under Miranda does not involve questioning normally attendant to arrest and custody. p. 941 (quotations and citations omitted).

Because the questions were routine identification questions asked as part of the routine booking process and not for an investigatory purpose, they did not constitute interrogation for Miranda purposes.[7]

Commonwealth v. Carey, 26 Mass.App.Ct. 339 (1988).

FACTS

The defendant was arrested for operating under the influence of intoxicating liquor. The defendant was provided his Miranda rights at booking. During booking, the defendant was asked the usual questions: his name, address, occupation, etc. Then the booking officer, who was also the arresting officer, engaged in the following exchange with the defendant:

Officer: Where were you drinking and for how long?

Defendant: I just went down the Do-Drop and I had a couple of beers.

Officer: How long were you there for, do you know?

Defendant: An hour maybe…Like, I figured, well, shit, I'm close to home, you know, just right down the road."

The defendant objected to these statements being admitted at trial.

DISCUSSION

The defendant's statements about where, what and for how long he had been drinking would have been suppressed if he had not been given Miranda warnings. However, the court found that the defendant "clearly understood his Miranda rights." For that reason, there was no violation of Miranda rights.

The court also found that the statements were voluntary because the officer did not "press for information about what, how much, and why the defendant was drinking." p. 342.

The statements were properly admitted.

[7] The defendant was read his Miranda warnings immediately upon arrest. Because the court determined that Miranda warnings were not necessary, the court did not address whether those warnings were sufficient for questions asked an hour later at the booking desk.

Commonwealth v. Woods, 419 Mass 366 (1995).

FACTS
The defendant was charged with distribution of cocaine after police observed what they believed to be, based upon their training and experience, a drug deal. When he was arrested, the defendant had $207 on him. At booking, the defendant was asked routine booking question, including his occupation. The defendant said he was an unemployed hairdresser. Miranda warnings were not given to the defendant before booking.

DISCUSSION
In this case, the SJC recognized that there is a general exception to the Miranda requirement for routine booking questions; however, that does not mean that all questions asked at booking automatically fall within that exception.

> Unless they first give the arrestee Miranda warnings or obtain a waiver of those rights, the police may not ask questions, even during booking, that are designed to elicit incriminating admissions. p. 373.

This court specifically found that this would apply to questions about employment status.

> We believe that, where an arrestee's employment status may prove incriminatory, the police must give Miranda warnings before asking questions about employment. p. 372.

QUESTION ABOUT ALCOHOL CONSUMPTION AT BOOKING FOR OUI VIOLATED MIRANDA

Commonwealth v. Roberson, 103 Mass.App.Ct. 772 (2024).

FACTS
At 1 AM on July 7, 2020, A West Bridgewater police officer was dispatched to the area where Routes 24 and 106 intersect. Upon arrival the officer found the defendant sitting in the driver's seat of a Cadillac in a gas station parking lot. The engine was running and the headlights were on, but the car was in park.

The officer approached the defendant and told him that he had received reports that a car was parked in the middle of the highway and that the officer wanted to check on the well-being of the driver. The defendant asked the officer why he was being pulled over. The officer said, "I'm not pulling you over, I'm just here to check your well-being." p. 773. The defendant accused the officer of racial profiling and claimed he was only stopped because he was a Black man driving a Cadillac.

During the interaction, the officer detected a moderate odor of an alcoholic beverage coming from the defendant. The officer also noted the defendant's eyes to be bloodshot and his speech to be "thick-tongued, slurred, loud, argumentative." p. 774. The defendant refused to answer the officer's questions and made a phone call. The officer asked the defendant to get out of the car, but he refused. The defendant refused the officer's second request to get out of the car, but when the officer opened the door of the car, the defendant agreed to step out.

Once outside the vehicle, the defendant continued to be uncooperative and argumentative. He refused to answer questions, used profanities, and continued to accuse the officer of racial profiling. The defendant was handcuffed and put in the back of the cruiser. Inside the cruiser he spit and kicked at the plexiglass barrier. A few minutes after he was put in the cruiser, the defendant's wife arrived on scene. The officer formed the opinion that the defendant was drunk and placed him under arrest.

The defendant was taken back to the station where he refused to answer booking questions. He was brought to a holding cell where he made multiple demands to speak to a lawyer. He was brought back to the booking area after 15 minutes and was advised of his Miranda rights. When asked if he understood those rights, the defendant responded with a "thumbs up" hand signal. The defendant was asked routine biographical questions and if he had consumed alcohol. The defendant responded again with a "thumbs up." The defendant's behavior and words at the station were recorded.

After a bench trial, during which the booking video was played, the defendant was found guilty of operating a motor vehicle under the influence (OUI) of alcohol. The defendant appealed on several grounds, including arguing that statements he made at booking should have been suppressed and the Commonwealth failed to meet its burden of proof.

DISCUSSION

<u>Invocation of right to counsel</u>

On appeal the defendant argued that the "thumbs up" he gave at the booking desk when asked if he had consumed alcohol was a nonverbal admission made after he had invoked his right to counsel.

> 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. p. 775 (quotations and citations omitted.)

When a defendant reinitiates communication, the Commonwealth bears the burden of proving beyond a reasonable doubt that it was the defendant and not the officers who

initiated the discussion that ultimately led to the defendant rescinding the invocation of the right to counsel.

Routine booking questions usually are not considered interrogation for Miranda purposes because they are not intended to elicit an incriminating response.

> Even after the invocation of counsel, the police may ask routine booking questions, but not about the crime that is under investigation. p. 775 (quotations and citations omitted.)

However, even if a question is typically asked during a routine booking process, it is interrogation for Miranda purposes if the response will likely elicit an incriminating response. The key inquiry is whether the questions being asked at booking are designed to or have the potential to elicit an incriminating response.

> 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." p. 776 quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (308).

In this case, the defendant had repeatedly demanded to speak to a lawyer. He was then booked and asked the incriminating question. It was the police that initiated the discussion and not the defendant. Therefore, the statements should have been suppressed.

Sufficiency of the evidence

The defendant claimed that the Commonwealth failed to establish that the defendant was under the influence at the time of operation. When the judge found the defendant guilty, the judge made certain findings on the record, including:

> 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. pp. 774-775.

The defendant argued that the judge's comments indicate that the judge found the defendant was drunk at the police station but was not convinced of his intoxication at the time of operation.

> It is plain, however, that the judge's brief remarks were "not intended as a comprehensive statement of all the facts he found or of all his legal rulings." p. 777 quoting *Commonwealth v. Carter*, 481 Mass. 352, 361 (2019).

The court found that the Commonwealth had offered "ample evidence" that the defendant's ability to operate a motor vehicle was impaired at the time of the operation. The officer testified as to his observations of the defendant's appearance, the moderate odor of an alcoholic beverage coming from the defendant and the officer's opinion that the defendant was drunk. Based upon the officer's testimony and the booking video, the court found there was sufficient evidence to conclude that the defendant was under the influence of alcohol at the time of operation.

The judgment was affirmed.

WIRETAP

RECORDED INTERVIEW DID NOT VIOLATE WIRETAP STATUTE

Commonwealth v. Morris, 492 Mass. 498 (2023).

FACTS

Between 1:30-2:00 AM on August 9, 2014, the defendant and the victim were outside a bar in Brockton where they argued for several minutes. The victim was angry during the argument while the defendant appeared calm. After the argument, the victim and the defendant separated. The victim sat in the rear passenger seat of a car with some friends.

After separating from the victim, the defendant obtained a firearm from a friend and walked over to the car the victim was in. As he approached the rear passenger side of the car, it began to slowly drive out of the parking lot. The defendant fired multiple gunshots into the window of the vehicle. The victim was struck in the chest and ultimately died as a result of those injuries.

The mother of one of his children identified the defendant via surveillance footage taken outside the bar. The defendant was arrested at 12:30 PM and interviewed by police at 1:11 PM. He was provided with his Miranda rights and advised that he had the right to a prompt arraignment. He signed written waivers of those rights. The interrogation, which lasted just over an hour, was audio and video recorded via a camera on the wall that resembled a thermostat or motion detector. The defendant was not advised that the interrogation was being recorded. During the interrogation the defendant admitted firing two shots into the car window. Both officers were seen on the recording taking notes at different times during the interview.

The defendant was indicted on firearm charges and murder. A motion to suppress his statements was denied and he was convicted. On appeal, he argued his statements should have been suppressed because they were secretly recorded in violation of the wiretap statute.

DISCUSSION

MGL c 272 § 99, the Massachusetts wiretap statute, makes it a crime to secretly record an oral communication. The statute provides that a defendant in a criminal prosecution whose oral communications have been intercepted in violation of the statute may move to suppress the recordings.

In *Commonwealth v. Rainey*, 491 Mass. 632 (2023), the court found that the body camera footage of a voluntary statement of a domestic violence victim to police officers who were taking notes for purposes of writing a report was not a violation of the wiretap statute. As in *Rainey,* the speaker here, the defendant, was aware that officers were memorializing their statements via handwritten notes.

The court found that the recording was not secretly eavesdropping on a private conversation, which was a concern of the wiretap statute. Instead, this was a voluntary statement to the police which the defendant knew was being memorialized in writing. The recording was merely an alternative means of memorializing the statement.

The court in *Rainey* found that a strict reading of the statute could interpret the actions of the police as being in violation of the wiretap statute, but that such an interpretation of the statute would be absurd.

> Similarly, here 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. p. 506.

The defendant next argued that his statement should be suppressed because he was denied the right to a telephone call. MGL c 276 § 33A provides individuals in police custody to be permitted to use the telephone to communicate with their family or friends, to arrange for bail, or to contact an attorney. The statute also provides:

> 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.

The statute itself does not provide for a remedy for a violation; however, the courts have applied the exclusionary rule in cases where the defendant can show the violation was intentional.

In this case, the defendant waived his Miranda rights and his prompt arraignment rights. He was also advised that he would be given the opportunity to make a phone call when he went to booking; however, he was not told when he would be booked. After his interrogation, which took over an hour, he was asked if he wanted to call his parents. He was then brought to the booking area and was advised of his right to make a telephone call.

The court found that the police had violated the defendant's rights guaranteed by MGL c 276 §33A; however, the court found that the defendant did not meet his burden of proving that the violation was intentional. Because the exclusionary rule would serve no deterrent effect by granting a motion to suppress in this situation, suppression was not warranted.

The motion to suppress statements was properly denied.

RECORDING UNDERCOVER DRUG DEALS VIOLATED WIRETAP STATUTE

Commonwealth v. Du, 103 Mass.App.Ct. 469 (2023).[8]

FACTS

An undercover Boston police officer used a cell phone application to record three purchases of drugs from the defendant. Before each of the purchases, the officer began an audio-visual call with surveillance officers nearby using an application called Callyo. This application allowed the surveillance officers to watch and listen to what was happening with the undercover officer. These calls were also stored on the cloud.

The deals took place in public places of the defendant's choosing. On each occasion the officer bought $100 worth of narcotics from the defendant. The defendant's image and voice were recorded and transmitted during the buys without his knowledge or consent. At the time of the deals, the defendant did not know that the purchaser was an officer, that the officer was recording the interaction, that the recording was being transmitted to others, or that the recording was being transmitted to the cloud and stored there. The officer also downloaded copies of the recordings from the cloud to a disc.

The defendant was charged with multiple counts of drug distribution as a subsequent offender. The recordings were turned over to the defense during discovery. The

[8] The Supreme Judicial Court has granted further appellate review of this case on February 15, 2024. Officers should be on the lookout for a legal update regarding the Supreme Judicial Court's decision on this case.

defendant moved to suppress the recordings, arguing that they violated the Massachusetts wiretap statute. He did not raise any Constitutional grounds for suppressing the recordings.

The judge found the defendant had an expectation of privacy in the conversations he had with the undercover officer. The judge also found that the Commonwealth had not established reasonable suspicion that the defendant was selling the drugs as part of organized crime. Based upon these findings, the judge suppressed the audio recording but noted that the undercover officer could testify about his recollection of the transactions at trial. Both the Commonwealth and the defendant appealed.

DISCUSSION

MGL c 272 § 99 is commonly referred to as the wiretap statute; however, it would be more appropriately referred to as the Massachusetts communications interception statute. The defendant's only argument was that the recordings must be suppressed under the provisions of MGL c 272 § 99(P) which states:

> 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.

The statute was originally drafted to address the growing concern about organized crime and the need for law enforcement to be able to employ innovative investigative tools to combat it. The legislature was concerned with the potential danger posed by the "uncontrolled development and unrestricted use of modern electronic surveillance devices" and the use of such devices by law enforcement to eavesdrop surreptitiously on conversations. p. 473 – 474.

The statute defines "interception" as:

> 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 <u>it shall not constitute an interception</u> 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. (emphasis added.)

In this case, there was clearly an interception. The video and audio of the defendant's conversations with the undercover officer during the drug deals were transmitted in real time to surveillance officers and were recorded and stored on the cloud. During each of the drug deals, four interceptions took place.

1. The audio-visual recording of the conversation.
2. The surveillance officers listening in on those conversations in real time.
3. The storing of the recordings on the cloud.
4. Downloading the recordings from the cloud onto a disc.

All the interceptions were secret in that the defendant was being recorded without his knowledge and consent. This is different from situations seen in prior cases such a *Commonwealth v Rainey*, 491 Mass. 632 (2023) (victim statement to police with body worn camera) and *Commonwealth v. Yusuf*, 488 Mass 379 (2021) (statements made to police wearing body worn camera after call for assistance) where the recording was done openly via a body worn camera when the individual knew they were speaking to an officer.

This case was also different from cases where the recording was made for a non-investigatory purpose. See *Commonwealth v. Rivera*, 445 Mass. 119 (2005) (in-store surveillance camera); *Commonwealth v. Gordon*, 422 Mass. 816 (1996) (booking video).

To fall outside the definition of "interception," the Commonwealth had to prove that the interception here was done during an investigation of a designated offense. The definition of "designated offense" requires that the offense be connected to organized crime. Drug dealing that is connected to organized crime would fall within the definition.

> "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." p. 476 quoting *Commonwealth v. Burgos*, 470 Mass. 133, 140 (2014).

The Commonwealth failed to establish a nexus to organized crime. There was no evidence that the defendant was acting with anyone else and the nature of the transactions, including the small amounts of drugs sold, did not give rise to a permissible inference that the sale was part of organized crime.

The Commonwealth argued that the officers could expose themselves to criminal and civil liability if they are found to have violated the wiretap statute. The court recognized that the statute does include criminal and civil culpability for violation of the statute; however, officers can protect themselves in such situations by obtaining a warrant.

> 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).[9] 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. p. 481 (quotations and citations omitted.)

The court found that the interceptions in this case violated the wiretap statute. Subsection P of the statute allows a criminal defendant to move to suppress the contents of a communication that was intercepted in violation of the statute. For that reason, the contents of the interception were suppressed.

Subsection P requires the suppression of the recording; however, it does not prohibit live testimony about what was recorded. While the recordings are suppressed, the undercover officer can still testify about what was said and what he observed.

The court left open the issue of whether video-only recordings should be treated differently under the statute.

> This case does not involve a video-only recording of a communication or a video recording of communication that was audio recorded separately. Nor do we consider or decide whether the contents of such video recordings may fall within the statute. FN 18.

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[9] MGL c 272 § 99D(1) lists circumstances that will be considered a permitted interception. Subsection (e) says: for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

The court also recommended in a footnote that officers who wish to use a "novel surveillance tool such as Callyo" to seek a search warrant before they do so.

> 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. FN 20.

CRIMINAL LAW

INTERPERSONAL VIOLENCE

PROTECTIVE ORDERS

COLLEGE ROOMMATE WAS NOT ELIGIBLE FOR 209A PROTECTION

S.J. v. T.S., 103 Mass.App.Ct. 166 (2023).

FACTS
The plaintiff and the defendant were roommates during their freshman year at college from January – March 2022. They were assigned their dorm room from the university and had no prior relationship.

On March 10, 2022, the roommates were in their dorm room when the defendant hit the plaintiff on the side of the head. The plaintiff left for a period of time. Upon his return, the defendant picked the plaintiff up by his shirt, pushed him, put him on the ground, and then dragged him. When the plaintiff told him to stop, the defendant hit him on the sides of his chest. The defendant stopped when the plaintiff said he would leave, but the attack resumed when the plaintiff asked if he could get his laptop before he left.

On March 11, 2022, the plaintiff obtained a temporary abuse prevention order against the defendant. On March 25, 2022, the parties were in court for the extension hearing. The defendant moved to dismiss the order arguing that they were not "household members" for purposes of MGL c 209A. The court extended the order. The defendant appealed.

DISCUSSION

MGL c 209A § 1 defines "family or household members" as people who:

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

The only question in this case was whether the parties were "residing together in the same household" for purposes of MGL c 209A. The court noted that the purpose of MGL c 209A is to "prevent violence in the family setting." p. 168 citing *Silva v. Carmel*, 468 Mass. 18, 24 (2014).

In *Silva*, the parties were intellectually disabled individuals living in a State-licensed residential facility. The court found that the parties were not "household members" under MGL c 209A. The court reasoned that the phrase "residing together in the same household" must be interpreted in context with the other categories listed under "family or household members." The court found that, while the living situation of the parties in *Silva* had some "home-like" features, the parties lacked the "family-like connection" that would exist in the other categories of family or household members.

The defendant argued that the court should find that he and the plaintiff were not family or household members because their living situation was similar to that in *Silva*. The court found that the judge must determine whether the parties shared a "family-like" connection that would be protected by MGL c 209A on a case-by-case basis. Several factors should be considered, including:

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

No one factor will be dispositive.

In this case, the court found that the parties lived together for approximately two months and had been assigned to the dorm room by the university. There was no evidence that they socialized together, ate meals together, or had a "socially interdependent relationship." P. 169 quoting *Silva* at 22.

Based upon the facts of this case, the court found that the parties were not residing together in the same household for purposes of the 209A statute. Therefore, they did

not meet the definition of "family or household member" and the plaintiff was not eligible for a protective order under MGL c 209A.

The abuse prevention order was vacated.

PLAINTIFF ELIGIBLE FOR HPO EVEN AFTER ORIGINAL ORDER BASED ON SAME CONDUCT LAPSES

Wilhelmina W. v. Uri U., 102 Mass.App.Ct. 634 (2023).

FACTS

In 2016, the defendant was arraigned on three counts of indecent assault and battery on a child under 14. At least one of those charges involved the daughter of the plaintiff. The plaintiff sought a harassment prevention order (HPO) against the defendant on behalf of her child. An ex parte order issued and notice was given to the defendant. The order was extended after hearing and extended again to March 2018. On the hearing date in 2018, neither party appeared and the order expired as a matter of law.

In 2019, the defendant was convicted of the charges and was sentenced to a period of incarceration and probation. His conditions of probation required that he stay away and have no contact with the child.

In 2021, the plaintiff learned that the defendant was going to be released on parole. She obtained a harassment prevention order based upon the same conduct as the original order. The plaintiff did not report any other misconduct and did not allege that the defendant violated any terms of his probation. The defendant opposed the order. He argued that the plaintiff should be precluded from obtaining a second order when she let the first order, based on the same conduct, lapse. He also argued that the order was not necessary because it was duplicative of his probationary and parole terms. The judge granted the order. The defendant appealed.

DISCUSSION

A person who suffers from harassment can request an order of protection from their harasser under MGL c 258E. The statute defines "harassment" as:

(i) 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

(ii) an act that:

(A) by force, threat or duress causes another to involuntarily engage in sexual relations; or
(B) constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of chapter 265 or section 3 of chapter 272.

The enumerated statutes include various sex assault crimes including indecent assault and battery, as well as stalking and criminal harassment.

When a plaintiff seeks an HPO, they bear the burden of proving, by a preponderance of the evidence, that they suffered from harassment. At an extension hearing, the court should extend an HPO if "the order is necessary to protect her from the impact of that past sex offense." p. 638 quoting *Yasmin Y. v. Queshon Q.*, 101 Mass.App.Ct. 252, 252 (2022).[10] In *Yasmin Y.* the court found that it was not appropriate to allow the defendant to contest and re-litigate the basis for the original order after he had that opportunity at the initial hearing.

The defendant asked the court to create a rule that would require a plaintiff to show good cause when they seek a subsequent order in situations where:

1. The plaintiff obtains an HPO based on one of the enumerated offenses of the harassment statute;
2. The plaintiff allows the HPO to expire; and
3. The plaintiff seeks a new HPO based solely on the same enumerated offense that was the basis for the original order.

The court found no reason to establish a rule or require a different showing in these circumstances. Nothing in the statute precludes a plaintiff from seeking an order after an initial order expires. Nor does the statute require a heightened burden of proof in such situations.

> 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. p. 639.

The court stated it "leaves for another day" whether the standard would be different if the first order was vacated as opposed to just expired. FN 3.

In a footnote the court addressed the argument of the defendant that the order was unnecessary because the conditions were the same as the terms of his probation and

[10] *Yasmin Y* was covered in the legal update in-service training last year.

parole. The court stated that conditions of release, probation or parole are not a substitute for a protective order.

If a plaintiff obtains an HPO after notice, lets that order lapse, then seeks another HPO based on the same conduct, the judge may preclude the defendant from relitigating the original act(s) of harassment. If the judge does so, the only burden on the plaintiff is to prove, by a preponderance of the evidence, that they are in need of protection from the impact of the harassment.

The order extending the HPO was affirmed.

DEFENDANT CAN BE TRIED FOR ATTEMPTED SEXUAL ASSAULT BASED ON PHONE CALLS

Commonwealth v. Martinez, 104 Mass.App.Ct. 13 (2024).

FACTS

The defendant was incarcerated at a Massachusetts correctional facility in 2019. During his stay, he routinely called his mother and, during these calls, also spoke to his daughter who was 13 – 14 years old at the times relevant to this case. The calls were recorded. The conversations with his daughter, when she was not within earshot of his mother, were graphic and sexual in nature.

During one call that occurred when the child was 13 years old, the defendant talked about the child's serious mental illness and she told him she was lonely and did not believe anyone would love her. He told her he would love her forever. She admitted being "very vulnerable" with him and loved him so much. The defendant offered her hope of paternal affection and support once he was released, saying he would take her to see movies and buy her clothes. During this conversation he also talked about wanting to have sex with her and instructed her on how to masturbate. He encouraged her to masturbate while she was on the phone with him. She refused because she was in the car at the time but said that she would do so later when she was in her bedroom.

When the child was 14 years old, there was another call in which he again described how he wanted to have sex with her. He then told her to masturbate, giving her explicit instructions on how to do so. When she said she was not following his instructions, the defendant told her to "go ahead, you might as well." p. 15

During the calls the defendant also repeatedly told the child he would stop talking to her if she told anyone about what they talked about and that she had to keep their secret as if her life depended on it. He told her they would be "finished" if she did not keep the secret.

There were also efforts by the defendant to isolate the child from her grandmother. For example, the child expressed concern that, once she and the defendant had sex, her doctor would know and would tell her grandmother. The defendant's response was:

> I'm going to get you…anything you want…Listen you're not going to worry about your grandmother anymore. Pretty soon you're going to be swearing at her like 'Fuck you, you bitch…" and eventually she's gonna be so mad, she's gonna push you out. She's not even gonna want you there no more. Then I'm gonna scoop you up… p. 18.

The defendant was indicted on multiple charges including: attempted indecent assault and battery on a child under 14; attempted indecent assault and battery on a person 14 or older; and attempted rape of a child under the age of 16. The defendant filed a motion to dismiss these charges, which was allowed by the court. This appeal followed.

DISCUSSION

To indict a defendant, the grand jury must find sufficient evidence to establish the identity of the accused and probable cause to arrest them for the crime. Because this was an appeal on a motion to dismiss, the issue before the court was whether the grand jury had heard enough evidence to establish probable cause.

The defendant was indicted under the Massachusetts attempt statute, MGL c 274 § 6. To prove an attempt, the Commonwealth must prove two elements:

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.

To prove attempt, the gap between the defendant's actions and what else would need to be done to complete the crime must be relatively short.

<u>Attempted Indecent Assault and Battery on a Child and Attempted Rape of a Child</u>

With respect to these charges, there were two issues the court had to decide:

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; and

2. Were the defendant's actions sufficiently overt?

Neither rape nor indecent assault and battery require the defendant to do the touching. While physical proximity to the victim is a factor to be considered, such proximity is not required to prove an overt act.

> 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. p. 17.

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.

> Such "grooming"' has as its ultimate goal the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity." p. 18 (quotations and citations omitted.)

Based upon the evidence presented, the grand jury could have found probable cause to believe that the sexual and manipulative content of the telephone calls, the promises of the defendant to involve himself in her life upon his release and his threats to re-abandon her "carried powerful emotional weight in inducing her to touch herself." p. 18.

> We thus conclude that the defendant came sufficiently close to realizing the target offenses to give rise to probable cause that the defendant took an overt act toward completion of the crimes. pp. 18 – 19.

<u>Attempted indecent assault and battery on a person 14 or older.</u>
Unlike the other charges, to prove this crime, the Commonwealth must prove a lack of consent. When determining the issue of consent, the fact finder must consider the totality of the circumstances, including any age difference between the parties and any disparity between the experience and sophistication of the parties.

To prove lack of consent, the Commonwealth must show more than just inducement or persuasion. To consent to something, the person must have the capacity to consent. The ability to consent can be affected by several different things: intoxication of alcohol or drugs, lack of sleep, unconsciousness, intellectual disability, head injuries.

> We see no principled reason why the same analysis would not apply to a person's emotional or psychological capacity, at least where a defendant was aware or reasonably should have been aware of that person's circumstances. p. 20.

Whether emotional or psychological factors render a victim unable to consent is ultimately an issue for the factfinder at trial, where the Commonwealth has the burden of proving lack of consent beyond a reasonable doubt. In this case, the court only had to determine whether there was probable cause to believe the child was incapacitated to the extent that they could not consent.

The evidence presented to the grand jury in this case was enough to show that the child would have consented to the defendant's suggestion that she touch herself; however, there was also evidence that she lacked the ability to consent. Relevant factors to consider in this case include: the age disparity, the parent/child relationship, the child's mental illness, the child's fear of abandonment and emotional vulnerability, the defendant's promises to the child about his involvement with her upon his release, the sexual nature of the calls, the defendant's threats of what would happen if the victim told anyone about the content of their conversations, and his "efforts to sexually groom, manipulate, and isolate the child." pp. 20 – 21.

> 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.

The order allowing the motion to dismiss was reversed. The indictments were reinstated.

SUFFICIENCY OF THE EVIDENCE

FOSTER PARENTS CAN BE CHARGED FOR FAILING TO GET MEDICAL TREAMENT FOR CHILD IN THEIR CARE

Commonwealth v. Barlow-Tucker, 493 Mass. 197 (2024).

FACTS

On the morning of February 18, 2020, the foster mother of a 10-month-old boy found the child unresponsive in his crib. The child was never revived. The foster mother and father were both indicted on charges of involuntary manslaughter and reckless endangerment of a child in their care.

Various members of the foster family, including the baby, had suffered from a cold around January 25, 2020. The baby's symptoms included a fever, cough, noisy breathing, lethargy, and congestion. His fever, which fluctuated depending on how much he ate, lasted two weeks. At some point the foster family called the doctor for their 2-year-old daughter about her cold. The daughter had a preexisting medical condition, but her cold symptoms were not as severe as the baby's symptoms.

While the other family members recuperated, the baby was taking longer to recover. The foster mother said that she called the Department of Children and Families (DCF) the first week of February about the baby needing to see a doctor, but that could not be corroborated.

On February 14, a speech pathologist was at the home for another child. She saw that the baby was not well and was struggling with a persistent cough. She asked if the baby had been seen by a doctor. The foster mom said she would call the doctor if the baby got worse.

The family had a surveillance camera in the baby's room. On February 17, 2020, the baby was put to bed at 6:23 PM by the son of the foster parents. "From the video recording (video), [the baby] can be heard coughing prominently, wheezing, and gasping for air." p. 200. The foster father went into the room between 6:30 and 7:17 that evening to put another child to bed. He never checked on the baby. The baby coughed, wheezed, and gasped for air while the foster dad was in the room. The baby never moved after 7:34 PM.

The foster mother was interviewed and gave a statement inconsistent with the video footage. She said she was the one who put the baby to bed and that she saw the baby moving and coughing on the video at 3:00 or 3:30 AM.

The autopsy revealed that the baby died from complications of strep throat, bronchopneumonia, and fluid in his right lung. The baby had a massive infection in his right lung and bacteria entered his bloodstream. The doctor testified that the condition was treatable with antibiotics and by draining the fluid from the lung. The baby's pediatrician testified that, if a child presented in his office with x-rays like that of the baby, he would have transferred them to the emergency room. The pediatrician also watched the video of the baby's last night. He opined that the

> persistent, nonstop coughing was caused by the fluid in [the baby's] chest pushing the breathing tube to one side, narrowing the airway and forcing [the baby] to cough to breathe, which was also known as 'air hunger'. [The doctor] further opined that [the baby] would have been exhibiting symptoms of 'air hunger' for at least five to seven days. If [the doctor] had seen a patient with 'air hunger' breathing combined with [the baby's] X-rays, [the doctor] would have called 911. p. 203.

The foster parents were indicted on numerous charges, including involuntary manslaughter by way of wanton or reckless conduct (MGL c 265 § 13) and reckless endangerment of a child (MGL 265 §13L.) The defendants filed motions to dismiss the indictments alleging, among other things, that the Commonwealth failed to present sufficient evidence to the grand jury. The motion was allowed. The Commonwealth appealed.

DISCUSSION

The issue in this case was whether the grand jury heard enough evidence to support the charges. A "grand jury must hear sufficient evidence to establish the identity of the

accused…and probable cause to arrest him [or her] for the charged offense." p. 204 quoting *Commonwealth v. McCarthy* 385 Mass 160, 163 (1982).

> It requires only "sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed." p. 204 quoting Commonwealth v. Levesque, 436 Mass. 443, 447 (2002).

Involuntary manslaughter

Involuntary manslaughter is a common law offense, not defined by statute. It is

> 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. p. 204 quoting *Commonwealth v. Catalina*, 407 Mass. 779, 783 (1990).

"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." pp. 204-205. The Commonwealth must prove that the defendant either realized the risk of harm or that a reasonable person in the defendant's shoes would have realized the risk.

When deciding a motion to dismiss, the Court must consider the evidence in the light most favorable to the Commonwealth. In this case, the grand jury was presented with evidence that the 10-month-old child had a persistent cough, raspy breath, and a fever that, at times, was 102 degrees and was lethargic and congested for at least two weeks.

There was evidence that the defendants provided some care for the baby with respect to the illness. They provided the baby with alternating doses of ibuprofen and Tylenol and tried to hydrate him by inserting drops of water in his mouth with a syringe. The foster parents also administered albuterol with a nebulizer they had received from the doctor after a visit in December.

The grand jury could have found that the foster family knew the baby needed medical attention as they had joked at one point that they should take one of the other kids to the doctor and bring the baby to be examined as an extra child. Based upon the fact that the defendants had called the doctor about their 2-year-old daughter who was experiencing much less severe symptoms than the baby and the speech pathologist's comments on February 14, the court found that the grand jury could infer that the foster parents "had the ability to recognize when to seek medical care but decided to forego such care in [the baby's] case." p. 204. There was also evidence presented that the foster parents were aware that they could seek emergency medical care for the child as needed based upon foster parent training they had attended.

The court also found that the video evidence showed that the defendants were wanton or reckless in failing to get medical attention for the baby.

In the video, [the baby's] pronounced breathing is notable. p. 206.

The foster father walked by the crib without checking on the baby. The grand jury could have concluded that a reasonable person in the foster father's position "would have understood the high degree of risk and responded to [the baby's] gasping breath by seeking immediate medical care." p. 206. Based upon the pediatrician's testimony, the grand jury could also infer that the baby had exhibited these symptoms for a period of time before the video footage.

Based upon the evidence presented, the grand jury could have found that the baby was gravely ill in the weeks before his death and that the foster parents' failure to get him medical attention put the baby "at risk that substantial harm would result." p. 205.

Reckless endangerment of a child

Reckless endangerment of a child is a statutory crime which requires the Commonwealth to prove that a child under the age of 18 suffered

> a substantial risk of serious bodily injury and that the defendant wantonly or recklessly either:
>
> > 1. Engaged in conduct that created the substantial risk or
> > 2. Failed to take reasonable steps to alleviate the risk where a duty to act exists. p. 207 (citations omitted).

Unlike involuntary manslaughter, the Commonwealth must prove the defendant was actually aware of the risk in order to establish reckless endangerment of a child. The court found that the facts presented to the grand jury were sufficient to show that the foster parents were aware that their conduct created a substantial risk of harm.

The order allowing the motion to dismiss is reversed. The case was remanded to Superior Court for further proceedings.

FELONY-MURDER WITH ARMED ROBBERY AS A PREDICATE OFFENSE

Commonwealth v. Robinson, 493 Mass. 303 (2024).

FACTS

On March 27, 2000, the defendant was with Tanzerius Anderson, Anderson's girlfriend Joleena Tate, and others at Edward Gauthier's home. Tate asked Anderson if he wanted to rob someone she knew that carried a lot of cash on him. Anderson agreed and asked the defendant if he was "down for the robbery." p. 305. The defendant said he was. The three hatched a plan where Tate would meet with the victim and lead him to an

apartment building. When they arrived, Anderson and the defendant would ambush him.

Tate went to dinner with the victim and then brought him to the apartment building. When Anderson and the defendant approached them, Tate told the victim "'we're being robbed' and walked away." p. 306. Anderson and the defendant brought the victim back into the building where they told him to keep his hands up and not to turn around and look at them. The victim pled with the assailants and reached for a doorknob. Anderson told him to stop reaching. The victim continued with his pleas. Anderson then shot him in the back of the head. A resident found the victim's body hours later lying in a pool of blood.

Anderson and the defendant ran out and got into a car Tate was waiting in. As the car drove off, the defendant began counting cash inside a wallet as he sat in the back seat. When Tate asked what happened, Anderson said "he's murked" which Tate believed meant he was dead. p. 306. Anderson also commented that "I got my body for the summer." p. 306. Anderson passed the gun over to the defendant. The firearm was never recovered.

The defendant was convicted of murder in the first degree on a joint venture theory of felony-murder with armed robbery as the predicate offense and other offenses. The defendant raises several issues on appeal. This discussion focuses on the sufficiency of the evidence.

DISCUSSION

To prove joint venture felony-murder with armed robbery as the predicate offense, the Commonwealth must prove the "defendant participated in committing the armed robbery as a joint venturer with the intent to commit that offense and that the victim was killed in furtherance of that armed robbery." p. 307.

To prove an armed robbery, the Commonwealth must prove four elements:

1. the defendant was armed with a dangerous weapon;
2. the defendant either applied actual force or violence to the victim, or by words or gestures put the victim in fear;
3. the defendant took the money or property of the victim; and
4. the defendant did so with the intent to steal it.

To succeed on a theory of joint venture, the Commonwealth must prove that the defendant knew his codefendant was armed and that the defendant assisted the codefendant in committing the robbery while sharing the intent to steal the victim's property.

The court found that the Commonwealth presented sufficient evidence for the jury to infer that the defendant knew Anderson was armed when they committed the robbery. When planning the robbery, the group decided it would take place in the hallway of an apartment building. The court found it was reasonable for the jury to infer that the defendant knew that Anderson was armed.

> 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. p. 308 (quotations and citations omitted.)

The court also noted that the defendant and Anderson spent 1 -2 hours together before the robbery while Tate was having dinner with the victim. The court found it would be reasonable to infer that the defendant and Anderson discussed their plan during this time and that Anderson told the defendant about the gun.

It was also significant that the defendant did not withdraw from the robbery after he learned about the gun. He was seen in the backseat of the car immediately after the robbery counting money from a wallet which a jury could infer had belonged to the victim.

> 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. pp. 308-309 quoting *Commonwealth v. Phap Buth*, 480 Mass. 113, 117 (2018).

> 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. p. 309.

The evidence was sufficient to convict the defendant of felony murder.

EVIDENCE FROM OUT OF STATE MURDER RELEVANT TO IDENTITY OF PERPETRATOR

Commonwealth v. Honsch, 493 Mass. 436 (2024).

FACTS

In September 1995, the defendant lived in New York with his wife and daughter. In late September he told his wife's other daughter that he had received several job offers in different countries. He also told her that his wife and teenage daughter had already moved to Australia. When visiting with his son-in-law, the defendant told him about his plan to move to Australia. When asked whether his wife and teenage daughter knew about the move, the defendant did not respond.

On September 28, 1995, New Britain, CT police officers found a female body behind a strip mall. The body was in two overlapping garbage bags wrapped in sleeping bags. The female, identified in 2014 as the teenage daughter of the defendant, died as a result of a gunshot wound to the head from a medium to large caliber bullet.

On October 6, 1995, a camper in Tolland State Forest in Massachusetts discovered the body of a female near the campground's dump station. The body was identified in 2014 as the wife of the defendant. On scene officers discovered a guardrail that had fresh damage from a projectile strike, a discharged .45 caliber cartridge casing, a towel with three holes in it, and an empty package of cigarettes. The cigarettes were traced back to upstate New York. The defendant, a smoker, lived in New York at the time. The autopsy revealed that the victim died between September 22, 1995 and October 2, 1995 with a cause of death being a gunshot wound to the head likely caused by a medium to large caliber bullet.

Records showed the defendant never applied for an Australian visa and that he never actually went to Australia. In November 1995, he had moved to Africa. For several years he lived in different countries before returning to the US in 1999. In 2000, he remarried and took his new wife's surname. One of his deceased wife's daughters located the defendant in November 2013. The defendant said that her mother had left him for another man in Australia and she remained there with her daughter.

In 2014, the family filed a missing persons report with New York State police. Officers linked the bodies found in 1995 to the report and were ultimately able to identify the bodies as belonging to the defendant's wife and daughter. Officers spoke to the defendant who said he had not seen either of the women since 1995 when he moved to Africa. He admitted to police that the two sleeping bags found at his daughter's crime scene belonged to him.

The defendant's DNA was found on his wife's body. The defendant was excluded as a contributor to evidence found at his daughter's crime scene, but his palm prints were found on the garbage bags covering his daughter's body.

The defendant was indicted for the murder of his wife. He was convicted of first-degree murder on a theory of deliberate premeditation. The defendant made several arguments on appeal, including that there was insufficient evidence as to his guilt.

DISCUSSION

Sufficiency of evidence: identity

The court found there was sufficient evidence to establish the defendant as the perpetrator of the crime based on four categories of evidence. First, he had the opportunity to commit the crime. His sperm was found in her body from which a jury could reasonably infer that he was with her around the time of the murder.

Next, there was evidence tying him to the scene of the crime. He had previously camped at the state forest where the body was found, he was a smoker who lived in New York and the cigarette package on scene was traced back to upstate New York.

The evidence of his daughter's murder also linked him to the murder of his wife. Based upon the evidence of his daughter's death, it was reasonable to infer that the defendant murdered his daughter. Based upon the similar circumstances of the deaths of both his wife and his daughter, it was reasonable to infer that the same person committed both murders.

The final category of evidence was the consciousness of guilt. The defendant lied to his wife's relatives about moving to Australia, and about his wife and daughter moving to Australia. A jury could infer that the defendant made these statements to conceal the fact that the victims were missing. The defendant's flight to Africa was also consciousness of guilt as was the fact that he changed his name shortly after returning to the United States.

Based upon the evidence presented to the jury, it was reasonable for it to conclude that the defendant was the perpetrator of the crime.

Sufficiency of evidence: deliberate premeditation

To prove deliberate premeditation, the Commonwealth must establish that the defendant planned to kill the victim after deliberation and reflection. There is no specific time requirement for premeditation, a few seconds may suffice. Deliberate premeditation can be inferred based upon the nature of the injuries, the duration of the attack, the use of weapons, and the number of blows.

The towel that was found on scene was evidence of premeditation. The towel had three holes in it, which was evidence that the victim was shot through the towel. The Commonwealth argued that the defendant used the towel to muffle the sound of the

gunshot. The defendant said that the Commonwealth's argument was too speculative. The court found that it did not matter how the towel was used.

> Regardless of how the towel was used, the important point is that the defendant chose to use the towel for some role in the killing, thereby demonstrating at least a moment of planning and reflection. p. 443.

The autopsy also revealed that the victim was shot 2-3 times, one of which was to the head. It is reasonable for a jury to infer deliberate premeditation when a victim is shot multiple times.

Admission of prior bad act evidence

The defendant argued that it was an error for the Commonwealth to introduce evidence of his daughter's murder. Prior bad act evidence is not permissible except in limited circumstances. Uncharged conduct must pass a two-pronged inquiry before it can be admitted.

> First, the evidence must be relevant to something other than the defendant's propensity to commit the charged offenses.
>
> Second, if the evidence is relevant, its prejudicial effect must not outweigh its probative value. p. 443 quoting *Commonwealth v. Peno*, 485 Mass 378, 386 (2020).

The evidence of the daughter's murder was relevant to establish the defendant as the perpetrator. Bad acts used to establish identify are usually "modus operandi" evidence which are acts that are "so unusual and distinctive as to be like a signature." p. 444 (citations omitted.)

> 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. p. 444.

The circumstances of the murders here were not so unique that they would qualify as modus operandi. However, bad act evidence 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." p. 444 quoting *Commonwealth v. Veiovis*, 477 Mass 472 491 (2018) (Lowy, J., dissenting.)

> The circumstances must strongly suggest that the two crimes are related and were perpetrated by the same individual. p. 445.

The court found this case was similar to that of *Commonwealth v. Gray*, 465 Mass. 330 (2013). In that case, the defendant had physically attacked one uncle, killed another, and killed his stepfather. In all three incidents the victims were attacked in their home with a gun while they were likely kneeling. While the court found these circumstances to be similar, they were not so unique as to constitute a "signature". However, other circumstances of the case made the evidence probative of the defendant's identity: the attacks all occurred within a 30-day period and all the victims were older male family members of the defendant whom the defendant believed molested him when he was a child.

> The possibility that these three attacks were not perpetrated by the same individual – considering that there was a similar method used, the attacks occurred within a short period of time, and the victims were all relatives of the defendant – was quite remote. p. 446.

In the present case, the two victims were family members of the defendant and were attacked within the same week. Both victims were shot in the head with a medium to large caliber bullet. Both bodies were left in hidden areas without identification and were in states that were not where the defendant lived. In addition, both bodies were found in camping-related circumstances. The wife in a campground and the daughter's body was found in garbage bags that were stuffed in sleeping bags.

While the evidence of his daughters killing was prejudicial to the defendant, it was highly probative and went to the heart of the Commonwealth's case. Based on the similarities between the crime scenes and the other circumstances present, it was not an abuse of discretion for the court to admit the evidence of the daughter's killing.

The judgement was affirmed.

EXPERT TESTIMONY WAS NOT NEEDED TO PROVE SERIOUS BODILY INJURY

Commonwealth v. Corey, 493 Mass. 674 (2024).

FACTS

On July 27, 2009, the victim's landlord entered her apartment "in response to concerns about the victim's pets." The landlord was met with a "very foul" smell. When he pulled on a blanket in the victim's bedroom, a leg fell out. The autopsy showed the victim suffered blunt force trauma to the head, there was an electrical cord wrapped around her neck twice, and a nine-inch incision to her abdomen and the victim's reproductive organs were missing. The victim was pregnant at the time of her death, due to give birth at any time.

For a brief time, the defendant and her on-again/off-again boyfriend had lived in the same building as the victim. The defendant and her boyfriend had begun dating again in February 2009 and she was pregnant that Spring. The defendant told her boyfriend, family, and friends that she was due June 20th until June 20th came and went. Then, the defendant said the baby was due July 2. She later claimed that she had a cesarean section scheduled for July 24.

On the afternoon of July 23, 2009, the defendant told her boyfriend she was going to a friend's house. She later called and said she was going to give the victim a ride to the store. Her boyfriend found this strange because the victim and the defendant were not friends. The defendant called her boyfriend again around 10 PM saying she was having stomach pains. In phone calls that followed throughout the night and early morning hours, she reported her water had broken, she was at the hospital, and that she had given birth to a little girl. She also complained about the hospital and said she was going to leave against medical advice.

The defendant came home between 7 AM and 8 AM the next morning with a baby girl. The baby had dried blood in the creased skin of her arms and neck. The umbilical cord was tied off with a string as opposed to the plastic clip hospitals typically use.

The investigation revealed that the baby girl was the victim's child. The defendant was charged in connection with the victim's death. The Commonwealth's theory at trial was that the defendant had lost her own child by July 23, 2009 and was concerned that her boyfriend would leave her and she would lose the financial assistance benefits she had been receiving while she was pregnant. The Commonwealth argued that the defendant was distraught, killed the victim, and took the baby as a solution to her problems.

The defendant was convicted of murder in the first degree on several theories: deliberate premeditation, extreme atrocity or cruelty, and felony-murder with aggravated kidnapping as the predicate felony. The defendant filed a motion for new trial. The trial judge allowed the motion as to the felony-murder conviction because the court found that the Commonwealth failed to prove that the defendant inflicted serious bodily injury on the child. The defendant and the Commonwealth appealed different aspects of the conviction. This discussion focuses on the Commonwealth's appeal with respect to the felony-murder conviction.

DISCUSSION

> To convict the defendant on the theory of felony-murder, the Commonwealth was required to prove beyond a reasonable doubt that the defendant committed the homicide while engaged in the commission of an aggravated kidnapping… Aggravated kidnapping, in turn, required that the Commonwealth prove that the defendant kidnapped the baby "while armed with a dangerous weapon and

> inflicted serious bodily injury thereby upon the baby." p. 687 quoting MGL c 265 § 26.

The statute defines serious bodily injury as: bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb, or organ or substantial risk of death.

The trial judge allowed the motion for new trial because there was no evidence of injury to the baby. While the Commonwealth did introduce expert testimony about the effects the mother's injuries would have on the baby as well as the effects of removing the baby from the mother, the judge found that this was not enough to satisfy the Commonwealth's burden.

The court in *Commonwealth v. Scott*, 464 Mass. 355 (2013) found that the Commonwealth did not meet its burden of proof regarding the severity of an injury by introducing medical records that included technical jargon that was beyond the jury's common knowledge or experience. In that case, the Commonwealth was required to introduce expert testimony to explain the medical records.

The court in this case found that *Scott* was distinguishable from the facts here. When viewed in the light most favorable to the Commonwealth, the evidence presented was that the mother of the baby was killed and the baby removed from her body by someone with no medical training in a non-sterile environment. An expert in obstetrics testified that the death of the mother would cease the flow of blood and oxygen to the fetus and that the longer the fetus was without blood and oxygen, the more harm and danger there would be for the fetus.

> We conclude that the loss of blood and oxygen, caused by the killing of the mother, presents a bodily injury to the fetus. p. 688.

Based upon the expert testimony of the obstetrician, the jury reasonably could infer that the injuries to the mother inflicted bodily injury to the child. Unlike *Scott*, such an inference based upon the facts and circumstances here would be well within the common sense and experience of the jury and did not require additional testimony.

It was also reasonable for the jury to conclude that the injury created a substantial risk of death to the baby. The obstetrician explained that a fetus gets blood and oxygen needed to survive from the mother and that there is only a narrow window of time in which to remove the baby from the mother's body once the supply of blood and oxygen stop.

> Additionally, the forcible removal of the baby from the mother was not performed according to recognized medical procedures, such as a cesarean section. Nor was it performed by a trained professional in a sterile environment.

Rather, it was performed by the victim's murderer at a crime scene. The jury did not need additional expert testimony to conclude that such actions would create significant risks to the baby, including a risk of death. The jury could use their common sense to draw such a conclusion. p. 689.

The order allowing the defendant's motion for new trial was reversed. The conviction was reinstated.

MOTOR VEHICLE LAW

UPDATE FROM DOT: VULNERABLE USER LAW

Several traffic safety laws were covered in last year's in-service training. As required by those laws, the Department of Transportation (DOT) updated the RMV CR65 crash books and the crash reports. Your departments should have had training with respect to the changes to the crash reports. A copy of the Vulnerable Road User Types Reference Guide produced by DOT is attached to this manual in the Appendix.

As part of a Traffic Records Improvement grant, the Department of Public Health assessed the data quality in the alcohol and drug fields in crash reports. They issued a report in February 2024 which found that all the alcohol and drug fields for drivers had high percentages of missing or invalid values. A letter summarizing the missing or invalid values is attached to this manual in the Appendix.

Officers must make every effort to fill in all fields on the crash reports accurately and completely. This information is used by your department and other state agencies for a multitude of reasons, including determining funding for your department and community.

NEGLIGENT OPERATION

ACCIDENT ALONE NOT ENOUGH TO PROVE NEGLIGENCE

Commonwealth v. Howe, 103 Mass.App.Ct. 354 (2023).

FACTS

The defendant was driving on a public way in Tewksbury around 12:30 PM on Saturday, August 29, 2020. It was raining heavily at the time and the car crashed. An officer arrived on scene and found the defendant's car with extensive front-end damage sitting partially in the street and partially in the front yard of a residence. There was damage

to the driver's side front tire and the driver's side windshield. No other vehicles were involved.

The defendant was stuck in the driver's seat and required mechanical assistance to be extricated. The defendant told the officer he was unfamiliar with the area and that he had hit a telephone pole. The officer observed damage to a telephone pole, two mailboxes and a small (5 inch tall) retaining wall that was situated between one of the mailboxes and the telephone pole. The damaged items were all within 10 feet of one another.

At trial, the officer testified to his training in motor vehicle accidents and that he had responded to between 50 – 100 accidents. Based upon his observations, in light of his training and experience, the officer opined that the defendant had been traveling south on North Street, a public way in Tewksbury, and crossed the double yellow line into the opposite lane of travel until he struck a mailbox, the retaining wall and then the telephone pole. The officer further opined that the vehicle, because of the impact from hitting the telephone pole, went in the opposite direction and struck the other mailbox. The officer also testified that there are no sidewalks in that area but that he had seen residents walking, jogging, and running along the street.

At trial, the evidence consisted of the testimony of the officer and photographs of the damage. The defendant was found guilty. The defendant appealed, arguing that the Commonwealth did not meet its burden of proof.

DISCUSSION

To prove negligent operation, the Commonwealth must prove three elements. The Model Jury Instructions for Use in the District Courts define the elements as:

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.

The statute does not require proof that the operation did, in fact, endanger the safety of the public. It is enough if the defendant's conduct might have endangered the public.

The fact that an accident occurred is not proof that negligence occurred.

> Accidents happen, and sometimes they are the result simply of bad luck, not error. p. 358.

In this case, the Commonwealth did not just prove an accident occurred. The extensive damage was evidence that the crash occurred with considerable force. In addition, the defendant's statement that he was unfamiliar with the area suggested that he was aware that he should have been driving with particular care.

> This admission, together with the crossing of the double yellow line and the extensive damage, permitted an inference that the defendant was not driving with the care he ought to have been exercising under the circumstances of the rainy conditions and the defendant's unfamiliarity with the area. p. 360.

The judgement was affirmed.

OPERATING UNDER THE INFLUENCE

DAMAGE TO CAR AND WILLINGNESS TO TAKE FSTS CORROBORATED ADMISSION

Commonwealth v. Waite, 102 Mass.App.Ct. 578 (2023).

FACTS

Two State troopers were dispatched to a single car crash along Route 140 in Taunton at 1 AM on July 10, 2020. Upon arrival, the troopers found two individuals on scene, one of whom was the defendant who was changing a flat passenger side tire. There was damage to the front bumper of the car.

The defendant said that he was driving the car and hit the curb when he swerved to avoid striking an animal. He could not describe the animal. The defendant was asked where he was coming from. The defendant said he had been at Nantasket Beach with the other person on scene for most of the day and admitted to drinking earlier. He said he was on his way to work and had to be there by midnight. The defendant said he thought it was 11:30 PM; however, it was 1:20 AM. During the conversation one of the troopers noted that the "defendant smelled like alcohol, his speech was slurred, his eyes were glassy and bloodshot." p. 579.

The defendant agreed to take two field sobriety tests, the walk-and-turn and the one-leg stand. The defendant did not complete the walk-and-turn to the satisfaction of the trooper because he started before he was instructed to do so, missed heel to toe on some steps, did not do the turn correctly, and walked back 11 steps instead of the nine he was instructed to do. The defendant successfully completed the one-leg stand.

The trooper formed the opinion that the defendant was intoxicated and placed him under arrest. A jury found the defendant guilty of operating a motor vehicle under the influence of liquor. The defendant appealed and raised multiple issues, including an

argument that there was insufficient corroboration of the defendant's admission that he was the driver.

DISCUSSION
The Commonwealth is required to provide some evidence that a crime was committed beyond a defendant's confession.

> "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." p. 580 quoting *Commonwealth v. Forde*, 392 Mass. 453, 458 (1984).

The court found that the Commonwealth's evidence corroborated the defendant's statement that he was the driver. The damage the troopers observed on scene was consistent with the defendant's statement that he had hit a curb. In addition, the defendant agreed to perform the field sobriety tests without protest and nobody else claimed to have been driving the car, even though there was someone else on scene when officers arrived.

The court found the admission in this case was adequately corroborated. The judgement was affirmed.

CONSENT NOT NEEDED TO INTRODUCE BAC RESULTS IN AGGRAVATED OUI OFFENSES

Commonwealth v. Zucchino, 493 Mass. 747 (2024).

FACTS
On January 12, 2020, officers responded to a two-car crash. Upon arrival, first responders observed two occupants in one of the cars and the defendant, who had a bloody nose, sitting outside the other car. The airbags of the second car had been deployed. A firefighter noticed that the defendant smelled of an alcoholic beverage. The defendant spoke to officers and initially said he was heading home from a bar and that a friend was driving. The defendant later admitted to emergency responders that he was the driver. The occupants of the other car and the defendant were all brought to the hospital for treatment of their injuries. The driver of the other car died.

During his treatment at the hospital, the defendant's blood was drawn. The next day, officers sought and obtained a search warrant for the defendant's blood. The blood was tested by a chemist who determined that the defendant's blood alcohol content (BAC) was .32 on the night of the crash.

The defendant was indicted on charges of operating under the influence of alcohol causing serious bodily injury (OUI-SBI) in violation of MGL c 90 § 24L and manslaughter

by means of operating while under the influence of alcohol in violation of MGL c 265 § 13 ½.

The defendant filed a motion to suppress the BAC evidence arguing that the results were inadmissible because the defendant did not consent to having his blood tested. The court denied the motion, but reported the following question:

> 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)?

DISCUSSION
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.

> Thus, a defendant's BAC is admissible in a prosecution for OUI under § 24 (1)(a) only if the test had been performed with the defendant's permission. p. 749.

The defendant argued that, because a simple OUI is a lesser included offense of OUI-SBI and manslaughter-OUI, the language of § 24(1)(e) applies to those offenses as well. The court was not persuaded.

> This reading ignores the plain language of § 24(1)(e), which clearly limits its application to prosecutions for violations of § 24(1)(a). p. 750.

The court found that it was well within the purview of the Legislature to treat simple OUIs differently than aggravated OUI offenses. Based upon the clear language of the statute, it was the intent of the Legislature to do just that.

> As the consent provision of § 24(1)(e) does not reference violations under any other section or chapter, including MGL c 265 § 13 ½ or MGL c 90 § 24L, the denial of the defendant's motion to suppress is affirmed. p. 751.

UNCLEAR IF CONSENT NEEDED TO ADMIT BLOOD TESTS IN OUI-DRUGS CASES

Commonwealth v Cappellucci, 493 Mass. 1035 (2024).

FACTS

The defendant was involved in a head-on collision with another car. The other driver reported that the defendant had veered onto her side of the road and caused the collision. Officers observed the defendant's eyes to be bloodshot and glassy and they smelled an odor of an alcoholic beverage on him. The defendant was arrested on scene and both he and the other driver were brought to the hospital for treatment.

The defendant refused to have his BAC tested at the hospital. Officers obtained and executed a search warrant for the defendant's blood samples that had been taken during the normal course of treatment at the hospital. The blood was tested at the State Police crime lab. The defendant's BAC was determined to be .09 and was also positive for fentanyl and THC.

The defendant was charged, among other things, with two counts of OUI-SBI. One under a theory of being under the influence of alcohol and one for being under the influence of drugs. The defendant moved to suppress the blood test results because the defendant did not consent to the analysis of the blood. The judge allowed the motion and the Commonwealth appealed.

DISCUSSION

The defendant was not charged with a simple OUI. For all the same reasons articulated in *Zucchino*[11], the consent requirement of § 24(1)(e) does not apply.

The court noted in footnote 3 that the defendant also argued that consent was a requirement to test for substances other than alcohol. Because the court determined that the consent requirement of § 24(1)(e) did not apply to the charges the defendant faced, they did not reach this issue.

The motion to suppress was reversed.

[11] Both cases were decided on the same day.

JUVENILE LAW

SUMMONS v. ARREST AND UPDATES FROM OFFICE OF THE CHILD ADVOCATE

The law recognizes that children are not miniature adults. They lack the emotional, physical, and mental maturity that adults have. For this reason, laws have been enacted to protect children in several ways. Some laws protect children by assuring they have appropriate supervision and protection (e.g., Child Requiring Assistance and Care and Protection laws.) Some laws provide enhanced penalties for crimes that are perpetrated against children (e.g., indecent assault and battery on a child under 14.) Some laws have established additional safeguards to protect children's Constitutional rights (e.g., the interested adult rule.)

> It is the mission of the Juvenile Court to protect children from abuse and neglect and promote opportunities for children to reside in safe, stable, permanent family environments whenever possible, to strengthen families when their children are in need of services, to rehabilitate juveniles, to protect the public from delinquent and criminal activity while holding offenders accountable and addressing the harm suffered by the community and the victim, and to decide all cases fairly and impartially with dedication, integrity and professionalism.[12]

Even when children commit crimes, the juvenile court strives to treat the offenders as children in need of support and guidance, not criminals. Officers should keep this in mind as they are often the first point of exposure for a juvenile when they enter the justice system.

Statutes concerning violations of criminal statutes by juveniles "shall be liberally construed so that the care, custody, and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement, and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings."[13]

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.

[12] Commonwealth of Massachusetts (2022). Juvenile Court. *Mass.gov.*
[13] MGL c 119 § 53.

According to the Juvenile Justice Policy and Data (JJPD) Board 2023 Annual Report, there was an increase in the use of the juvenile justice system in Massachusetts in Fiscal Year 2023 compared to the previous fiscal year.

Fiscal Year 2023 was the first year since 2018 (when the Criminal Justice Reform Act was passed) where applications for complaint initiated by arrest represented more than half of all applications. The data shows that between FY 2022 and FY 2023, the use of summons decreased by 1% while the use of arrests increased by 36%.

Based upon their findings, the JJPD Board made several recommendations for police departments, including:

1. Police departments should uniformly report their decision to seek summonses.
2. Police departments should use their internal data to see if the disparities highlighted in the report are replicated at their 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.
4. 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)
5. 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:
    a. where (e.g., what neighborhood),
    b. when (e.g., during the day, in school, overnight),
    c. how (e.g., traffic stops, on foot patrol, in schools)
    d. and in what manner (e.g., use of stop & frisk techniques)

In the Appendix to this manual, officers will find more detailed information about the data, findings, and recommendations contained in the JJPD board report.

COURT CANNOT ORDER JUVENILES CHARGED WITH MURDER TO BE HELD AT DYS

Commonwealth v. Padilla, 493 Mass. 1023 (2024).

In this case, the 16-year-old juvenile was charged with murder in the second degree and other related charges. The Superior Court judge wanted clarification as to whether the judge had the authority to order the defendant held at the Department of Youth Services (DYS) in such a situation.

The last paragraph of MGL c 119 § 68 states:

> A person who at the time of the offense had attained the age of fourteen but had not attained the age of 18, and who is charged with murder in the first or second degree and is held by the superior court for trial or continuance, or for indictment and trial, if unable to furnish bail, shall be committed by the court to the custody of the sheriff of the county in which the court is situated; provided, however, that the appearance of the person at such examination or trial shall be the responsibility of the court for which he is being held in safekeeping.

The judge asked the SJC to answer certain questions with respect to MGL c 119 § 68:

1. Does MGL c 119 § 68 allow a Superior Court judge to commit a person under age 18 charged with committing murder in the first or second degree to the care of the Department of Youth Service (DYS) as a pre-trial detainee pending disposition on the murder charges?

2. If the answer to question 1 is "no", can a Superior Court judge set bail on a charge related to, but other than murder in the first or second degree, whether severed or joined, such that a person under age 18 is not held on bail on the murder charge and the last paragraph of MGL c 119 § 68 does not apply, thus committing a person under age 18 to DYS's care as a pre-trial detainee pending disposition of the murder charges?

The SJC addressed both of these questions in *Nicholas-Taylor v. Commonwealth*, 490 Mass. 552 (2022). The *Nicholas-Taylor* decision was covered in last year's legal update in-service class. The court took this opportunity to clarify its ruling in *Nicholas-Taylor*

The court recognized that there is a common practice whereby DYS will accept juveniles charged with murder until their 18th birthday. This practice is done not by court order, but rather at the request of the sheriff's department. Sheriff's facilities often cannot accommodate holding a juvenile out of "sight and sound contact" with adults as is required by certain Federal grant programs. For this reason, sheriff's departments routinely request DYS to hold these juveniles on a "courtesy" basis. DYS then holds the child in a "hardware secure" program within a DYS facility, but the sheriff is still ultimately responsible for the child. The sheriff will transport the juvenile for court appearances and will make arrangements for necessary medical, dental, and mental health treatment for the juvenile.

The questions presented do not address such courtesy holds. Instead, the questions focus on whether the judge has the authority to commit a juvenile charged with murder to the custody of DYS. As determined in *Nicholas-Taylor*, they cannot. In that case the court found that judges have no authority to sidestep the clear language of the law by ordering the juvenile held on related, non-murder charges by DYS instead of the murder charge.

CRIMINAL PROCEDURE

GUILTY FILED FOR SHOPLIFTING COUNTS AS SUBSEQUENT OFFENSE

Commonwealth v. McNeill, 492 Mass. 336 (2023).

FACTS

The defendant was charged with shoplifting, third offense, in violation of MGL c 266 §30A. One of the predicate offenses was resolved with a guilty-filed disposition. The defendant moved to dismiss so much of the complaint that alleged a third offense, arguing that a guilty-filed disposition cannot be used as a predicate offense.

DISCUSSION

MGL c 266 § 30A has a graduated sentence structure. A first or second offense is punishable by a fine while a third offense is punishable by imprisonment. The term "offense" is not defined in the statute, but sentencing statutes treat the word "offense" the same as "conviction" or "adjudication."

> 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. p. 338 quoting *Commonwealth v. Resende*, 474 Mass. 455, 467-468 (2016).

A guilty-filed disposition is entered after a factual finding of guilt, such as a plea. A guilty-filed disposition allows the judge to suspend any sentence with the consent of both the defendant and the Commonwealth. A judge retains the ability to remove the case from the file and sentence the defendant at any time.

> While no sentence is imposed with the entry of a guilty-filed disposition, there is a definitive adjudication of guilt, and therefore, in keeping with the statutory purpose of increased penalties for those who are repeatedly adjudged guilty of criminal wrongdoing, it is clear that a guilty filed disposition constituted an offense under § 30A. p. 340.

The guilty-filed disposition constitutes a prior offense under MGL c 266 § 30A.

MULTIPLE CHARGES OF ADW DID NOT VIOLATE DOUBLE JEOPARDY

Commonwealth v. Wooden, 103 Mass.App.Ct. 667 (2024).

FACTS

At 6PM on April 14, 2016, two Salem police officers were on patrol when they saw the defendant driving an SUV. Both officers were familiar with the defendant and were aware of an outstanding warrant for his arrest. The officers activated the blue lights and pulled the SUV over. The officers watched the defendant climb into the back seat of the car.

When officers approached the car, the defendant got out of the passenger side and stood on the sidewalk. The defendant backed up as one of the officers approached him and ignored the officers' instructions. The defendant fled and was chased by the officers. One officer was able to catch up to the defendant and a struggle ensued. The defendant continued to resist even after he was told he was under arrest. The officer was able to push the defendant up against a pickup truck in a driveway at 7 Fairfield Street but was unable to gain control of him when the defendant got out of the sweatshirt he was wearing. At this point, the officer was almost wedged between the truck and the garage.

As the struggle continued, the defendant pulled a gun out of his pants. The officer did not see the gun but did see the defendant move his left hand over his right hand and heard the defendant "push the rack back on the slide of a gun." p. 679. The defendant lowered his center of gravity, causing the officer to lose his grip on the defendant. At this point the officer saw that the defendant was pointing a black gun at his leg. The officer tried to move his leg behind the defendant's leg. The officer lost his balance and fell to his knees between the truck and the garage. The defendant stood less than one foot away and pointed the gun directly at the officer. The officer sat back and put his hands up. The defendant stepped back to 3 -4 feet away, still pointing the gun at the officer who was pleading for the defendant not to shoot. The defendant pulled the trigger, but missed.

The defendant then demanded the officer's weapon. The defendant pulled on the officer's service weapon twice, both times with enough force to physically move the officer. The defendant was not able to gain possession of the service weapon because it was locked in the holster. The defendant then fled on foot. A black handgun was recovered at 1 Fairfield Street.

The defendant was convicted of multiple charges, including two counts of assault with a dangerous weapon (ADW) to wit firearm, assault and battery on a police officer and carrying a firearm without a license. On appeal the defendant argued, among other things, that the ADW convictions violated double jeopardy because they were part of a single, brief, continuous and uninterrupted assault.

DISCUSSION

Double jeopardy prohibits the Commonwealth from imposing multiple punishments for the same offense. The issue in this case was whether the defendant committed multiple assaults or if his actions constituted one, continuous assault.

The continuous offense doctrine "recognizes that certain criminal statutes are intended to punish just once for a continuing course of conduct, rather than for each and every discrete act comprising that course of conduct." p. 680 quoting *Commonwealth v. Dykens*, 473 Mass. 635, 640 (2016).

> 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. p. 681.

If separate and distinct acts are committed against the same victim during the same attack, separate offenses can be prosecuted.

In this case, the theory of prosecution was that there were two assaults with a dangerous weapon – once when the defendant pointed the gun at the officer's leg and the second for pointing the gun at the chest/torso of the officer.

When the men were struggling, the defendant pulled out the gun, pushed the rack back on the slide, and pointed the gun at the officer's leg. These facts meet the elements of an assault by means of a dangerous weapon.

The second ADW occurred after the officer lost his balance and was on his knees. The officer saw the defendant pointing the gun directly at him. While this ADW took place close in time to the first, it was a separate and distinct act and not a continuous, uninterrupted assault.

At the time of the second ADW, the circumstance had changed. The men were no longer in a struggle and the defendant stood in a position of power over the officer.

> Once [the officer] was on the ground and in an inferior physical position to the defendant, the defendant had the time to contemplate his next steps. p. 682.

The court found that once the defendant was in a superior physical position over the officer, there was a demonstrable break in the chain of events and the actions that followed were an independent course of conduct.

The defendant here faced a "fork in the road", a point during the commission of a crime where he had the opportunity to reflect and make a choice. After the struggle ended, the officer was on the ground and the defendant stood over him. The defendant could

have chosen to run away. Instead, he chose to continue his criminal conduct. He aimed the gun at the officer and shot that gun.

The court drew an analogy between these facts and the facts of *Commonwealth v. Horne*, 466 Mass. 440 (2013). In that case the court concluded that an individual committed one violation for MGL c 269 sec 10(a) when they possess a firearm outside their home for an uninterrupted period, but that a second violation occurs when they come back to the home and then leave again with the firearm. In such instances, the defendant faced a "fork in the road" decision – they could stay in the home or leave with the firearm. By choosing to leave again with the firearm, they are committing a second crime.

Based upon the facts and circumstances here, the convictions were not duplicative and did not violate double jeopardy.

> 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." p. 684 quoting *Commonwealth v. Dykens*, 473 Mass. 635, 644 (2016).

The judgments on the ADW charges were affirmed.

COMMONWEALTH CAN RETRY FIREARMS CASES TO PROVE LACK OF LICENSE

Commonwealth v. Guardado 493 Mass. 1 (2023) (Guardado II).[14]

FACTS
The defendant was charged with various violations of the Massachusetts firearms laws. At trial, the judge's instructions to the jury did not include a requirement that the Commonwealth prove that the defendant did not have a firearms license. The defendant was convicted of multiple firearm offenses.

After his trial, the United States Supreme Court (USSC) issued its decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022). Based upon the *Bruen* decision, the court overturned the defendant's convictions for unlawful possession of a firearm, a loaded firearm, and ammunition.

> "We concluded, in light of *Bruen*, that absence of licensure is an essential element of the crimes of unlawful possession of a firearm and unlawful possession of ammunition."

[14] A petition for certiorari was docketed in the US Supreme Court on February 16, 2024.

Because the Commonwealth had failed to establish that the defendant did not have a valid firearms license at trial, the court vacated the convictions and ordered that judgments of not guilty be entered on those charges. The original appeal, *Commonwealth v. Guardado*, 491 Mass. 666 (2023) was covered in last year's legal update in-service class.

The Commonwealth brought this appeal arguing that it should be allowed to retry the defendant on those charges. The Defendant argued that a retrial would violate the principles of double jeopardy.

DISCUSSION

Double jeopardy protects an individual from being prosecuted for the same offense twice, which would essentially give the Commonwealth a second chance to meet its burden of proof. Double jeopardy does not apply; however, when a defendant's conviction is reversed because of an error in the proceedings. For instance, when a conviction is reversed because of an error in the jury instructions, the remedy is a new trial, not acquittal.

The Commonwealth conceded that it did not present any proof that the defendant lacked a firearms license. The Commonwealth argued that it did not present such evidence because, at the time of the trial, the SJC "clearly had established that absence of licensure was not an essential element of any of the crimes with which the defendant was charged." p. 6. That changed after the defendant's trial when the USSC issued its decision in *Bruen*. After Bruen, the SJC overturned its previous holding and concluded that the absence of a license is an element of these offenses that the Commonwealth must prove beyond a reasonable doubt.

This sequence of events did not provide the Commonwealth with a fair opportunity to offer whatever evidence it could at trial to meet its burden of proof. The court found that, under these circumstances, a new trial was warranted to give the Commonwealth "one complete opportunity to convict" the defendant. p. 7 (citations omitted).

The case was remanded for a new trial.

EXCULPATORY EVIDENCE

PENDING CRIMINAL INVESTIGATIONS AGAINST OFFICERS AND ADVERSE CREDIBILITY FINDINGS ARE EXCULPATORY AND MUST BE DISCLOSED

Graham v. District Attorney for the Hampden District, 493 Mass. 348 (2024).

FACTS

In 2018 the US Attorney's Office and the Department of Justice's (DOJ) Civil Rights Division were investigating the Springfield police department's narcotics bureau. The investigation focused on three incidents: a sergeant that was federally indicted for threatening juveniles; six off-duty officers who were involved in a brawl outside a bar; and an officer who was indicted for stealing approximately $400,000 from the evidence room.

As part of the investigation, the Springfield police department made its record management system available to the DOJ. The DOJ reviewed over 114,000 pages of documents from the Springfield police department including: policies, training materials related to the use of force, and internal affairs protocols.

The DOJ issued a report of its findings in 2020. There were approximately 23 incidents of misconduct described in the report; however, specific details of most of the incidents were not provided. The DOJ concluded that the narcotics bureau engaged in a "pattern or practice of excessive force" and that it was not uncommon for bureau officers to write "false or incomplete" reports. p. 352. Based upon the report, the DOJ sued the city which ultimately resulted in the parties entering into a consent decree.

The District Attorney's office (DA) received a copy of the DOJ report. Believing some of the information reviewed by the DOJ was exculpatory, the DA's office made efforts to obtain the documents reviewed by the DOJ. Despite several requests, the DOJ refused to identify which documents it relied on in reaching its conclusions and refused to provide copies to the DA's office.

The Springfield police department attempted to provide the DA's office with the documents it provided to the DOJ; however, the department could not accurately identify every document that was shared with the DOJ. The city was able to identify 16 incidents referred to in the DOJ report and provided the DA's office with material related to those cases. Those documents amounted to 700-800 pages.

Upon receipt of this information from the Springfield police, the DA's office was able to link identified officers to approximately 8,000 criminal cases. The DA's office sent redacted copies of the materials to attorneys of record for those cases. No disclosures were made to pro se defendants.

There were also two specific incidents of misconduct that were readily identifiable in the DOJ report. The first involved Officer Bigda interrogating three juveniles for the theft of an unmarked police car.[15]

> A video recording (video) of the interrogation shows that no parent or guardian was present during Bigda's questioning. In the video, Bigda uses profane and racist language, and threatens the juvenile with physical violence and a lengthy incarceration. Further, Bigda can be heard threatening to plant evidence on the juveniles and assuring them that he would "get away with it." p. 354.

This video was obtained by the DA's office and disclosed in all cases in which Officer Bigda was involved.

In a report from a Wilbraham police officer about the arrest, it states that an unidentified plain clothes officer from Springfield had kicked one of the juveniles. This information was disclosed to the juveniles involved in this case. Because the DA's office could not confirm which officer had actually kicked the juvenile, they did not disclose the information beyond that.

The second incident was a brawl that occurred outside a bar in 2015 that involved multiple off-duty officers. The DA's office investigated the matter and concluded that it lacked probable cause to bring criminal charges because they could not identify the specific perpetrator of any of the criminal acts.[16] The DA's office drafted a report about its findings which was publicly available. Because it could not identify who specifically committed a criminal act, the DA's office did not provide the report as part of discovery in any criminal case.

Unrelated to the DOJ investigation, the DA's office policy with respect to adverse credibility findings was also at issue in the case. When a judge found that an officer was untruthful, the DA's office would conduct an independent evaluation of the facts and circumstances involved. Whether the DA's office would disclose the judge's finding in other cases depended on the results of the independent evaluation. In one instance, a judge found an officer's testimony to be "fanciful" and a "made up tale." After its own evaluation of the case, the DA's office found that the officer "misunderstood, but did not misrepresent" relevant facts to the court and the DA's office did not disclose the motion judge's findings in other cases the officer was involved in. p. 359.

[15] Mr. Bigda was Federally indicted for civil rights violations in connection with his interaction with the juvenile that night. He was acquitted of the charges. The Massachusetts POST commission had declined to recertify Mr. Bigda as a police officer.

[16] The DA's office referred the matter to the US Attorney's office. Fourteen officers were later indicted.

This was a civil case brought by six plaintiffs (defendants, defense attorneys, and defense organizations) seeking relief for what they believed was the DA's office failure to meet its obligations with respect to exculpatory evidence. The plaintiffs raise three specific concerns:

1. The DA's policy with respect to disclosing judicial findings of adverse credibility made against officers on a discretionary basis.
2. The policy of withholding instances of officer misconduct where multiple officers are involved and the wrongdoer cannot be clearly identified.
3. Failure to investigate the DOJ's findings.

DISCUSSION

The Commonwealth has a duty to disclose exculpatory evidence. It also had a duty not to turn a blind eye to potentially exculpatory evidence. These duties can be categorized as the duty to disclose and the duty to investigate. While they are interrelated, they are separate and distinct duties.

Duty to disclose exculpatory information

> 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. p. 261 (emphasis in original, quotations and citations omitted.)

While the court can set forth discovery obligations that parties must adhere to, the SJC found that it did not have the power or authority to require the Attorney General or the various District Attorney's office to establish policies with respect to meeting those obligations. The court took the opportunity to strongly suggest that prosecution offices establish such policies.

> 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. p. 363.

The court found that the District Attorney's practice of disclosing judicial findings of adverse credibility against a police officer on a discretionary basis violates the duty to disclose exculpatory evidence. Judicial findings of adverse credibility must be disclosed in all of the officer's cases.

> Adverse credibility findings made about police witnesses are exculpatory, as they may undercut the prosecution's case and therefore tend to diminish the defendant's culpability. p. 364.

The court also found that the practice of not disclosing officer misconduct when the acts cannot be attributed to a specific officer violated the duty to disclose.

> When a subset of a known number of officers has committed misconduct, and it is unclear which officer or officers are the offenders, the district attorney's office cannot shirk its disclosure obligations, but rather must disclose the incident in any cases involving any of the officers who could be the possible offenders. p. 365.

The extent of a particular officer's involvement in criminal behavior does not need to be clearly proven to trigger the duty to disclose.

> Pending criminal investigations involving and known to members of the prosecution team require disclosure. p. 365.

<u>Duty to investigate police misconduct</u>

The prosecutor has a duty to learn of and disclose exculpatory information held by any member of the prosecution team. The efforts made by the prosecutor 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. p. 369 (quotations and citations omitted.)

The DA's duty to investigate was unquestionably triggered by the DOJ's report that found a pattern or practice of misconduct within the police department. The DA made numerous attempts to obtain the documents reviewed by the DOJ, including suing the DOJ for access to the documents. The DA's office also asked the Springfield police department for access to the documents that were provided to the DOJ. The court found that the steps the DA's office took to inquire about the misconduct were reasonable.

However, The DOJ had reviewed over 114,000 pages and the DA's office only obtained 700-800 pages. While the police department could not say for sure what documents had been turned over to the DOJ, the DOJ had provided categories of documents that

were reviewed. The onus was on the DA's office to gather all documents from the department that fall within those categories.

The court noted that some of the documents that the DOJ reviewed were internal affairs records. The court found that the Commonwealth' duty to investigate did not extend to internal affairs records because those records are subject to discovery procedures as set out in *Commonwealth v. Wanis*, 426 Mass. 639 (1998) and *Commonwealth v. Rodriguez*, 426 Mass. 647 (1998).

> *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. p. 374.

By failing to obtain all documents within the categories identified in the DOJ report, the DA's office violated its duty to investigate.

The SJC ordered the DA's office to obtain access to all categories of documents known to have been reviewed by the DOJ and to disclose them to the plaintiffs and individuals in cases affected by the misconduct. Once the disclosure is made, claims of misconduct made by individual defendants can be reviewed on a case-by-case basis.

PENDING CIVIL CASES AGAINST OFFICERS ARE NOT EXCULPATORY

Commonwealth v. McFarlane, 493 Mass. 385 (2024).

FACTS
On July 7, 2017, the defendant was arrested for various firearm offenses. In March 2018, one of the two officers involved in the defendant's arrest was named in a civil lawsuit. The lawsuit alleged numerous constitutional, statutory claims, including false imprisonment and false arrest. This lawsuit was unrelated to the defendant's case. On February 11, 2020, the defendant was found guilty after a jury trial. On February 21, 2020, a civil jury found the officer liable for false arrest and false imprisonment. The defendant learned of the civil lawsuit sometime after the jury's verdict.

The defendant filed a motion for new trial arguing that the existence of the pending civil lawsuit against the officer was exculpatory information that the Commonwealth should have disclosed to him. That motion was denied. The defendant appealed. (The Appeals Court decision was covered in the Legal Updates In-Service training last year.)

DISCUSSION
"Exculpatory evidence" is not a narrow term. It encompasses all evidence that tends to negate the guilt of the accused.

> 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. p. 391.

The court found that there is a difference between a pending civil suit and a finding of civil liability.

> Until a finding of liability has been made, a pending civil lawsuit constitutes an unsubstantiated allegation of police misconduct that does not tend to negate the guilt of a defendant. p. 386.

For this reason, pending civil lawsuits are not exculpatory; however, civil findings of liability are exculpatory and fall within the prosecutor's duty of inquiry.

> 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. P. 393.

The court limited the duty of inquiry to findings of civil liability related to the performance of the prosecution team member's official duties.

Because the civil suit against the officer was pending at the time of the defendant's trial, the prosecutor had no duty to inquire about it or to disclose the existence of the lawsuit as exculpatory evidence.

The defendant's motion for new trial was properly denied.

APPENDIX

Examples of Vulnerable Road Users



January 2024

Vulnerable Road Users

Massachusetts law defines ‘vulnerable road users’ as:

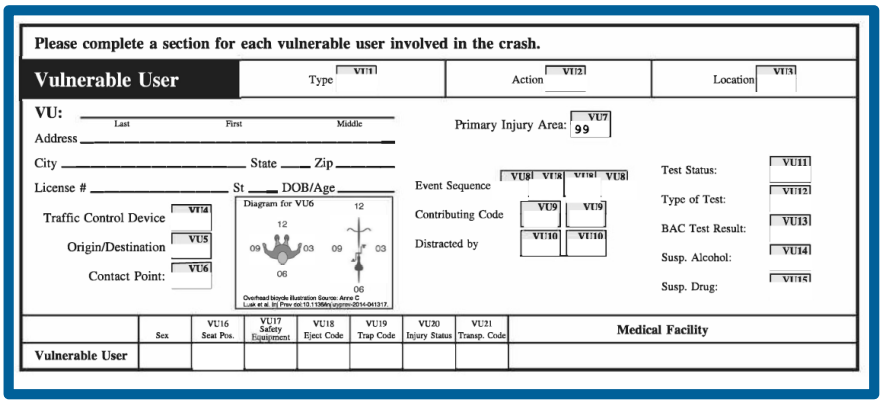
- Pedestrians
- Roadside workers
- Bicyclists
- People riding horses or horse drawn carriages
- People using:
  - Wheelchairs
  - Personal mobility devices
  - Motorized bicycles
  - Motorized scooters
  - Non-motorized scooters
  - Skateboards
  - Roller skates





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 VU11 | Action VU12 | Location VU13

VU: Last First Middle

Address

City State Zip

License # St DOB/Age

Traffic Control Device VU14

Origin/Destination VU5

Contact Point: VU6

Diagram for VU6

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 Eject 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
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 (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
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

2 – Bicyclist (Examples)





Popular brands include:

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

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)





Popular brands include:

- Baker
- Girl
- Element
- Zero

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
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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
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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)





Popular brands include:

- Impala
- Moxi
- Roller Derby

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)

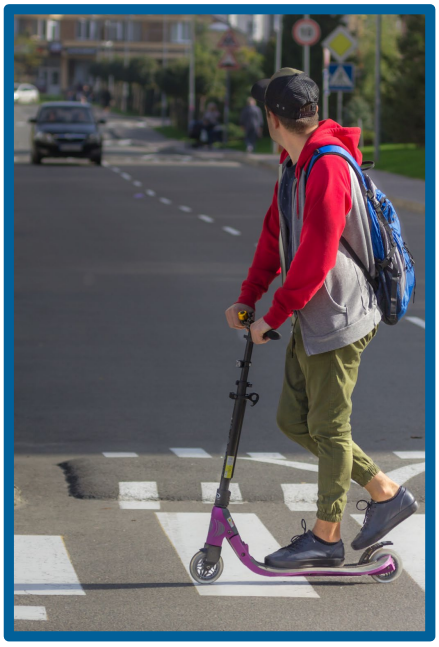
A footboard mounted on two wheels with a long steering handle propelled manually by resting one foot on the footboard and pushing the other against the ground.

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
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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

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
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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
9	Motorized Bicyclist
10	Hand Cyclist
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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

9 - Motorized Bicyclist (Examples)





Popular brands of motorized bicycles include:

- Tomos
- TaoTao
- Yamaha
- Zhen

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
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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)





Popular manufacturers include:
- Invacare
- AmTryke

11 – Tricyclist (Definition)

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
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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

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
10	Hand Cyclist
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14	Horse 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

12 - Motorized Scooter Rider (Examples)





Popular brands include:
- Niu
- Roadrunner

13 - Electric Personal Assistive Mobility Device User (Definition)

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
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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

13 – Electric Personal Assistive Mobility Device User (Examples)





Popular manufacturers include:

- Segway
- BEST Power Wheelchair

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
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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

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
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20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

15 – Horse-Drawn Carriage Driver (Examples)





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
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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

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
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19	Roadway Worker - Outside of vehicle
20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

17 – Other Micromobility Device User (Examples)







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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20	Emergency Responder - Outside of vehicle
97	Other
99	Unknown

18 - Utility Worker – Outside of Vehicle (Examples)





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
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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

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
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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
2 Bicyclist
3 Skateboarder
4 Train/Trolley Passenger
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97 Other
99 Unknown

97 – Other (Examples)







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

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4	Train/Trolley Passenger
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The Commonwealth of Massachusetts
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To: Municipal Police Training Committee

From: Department of Public Health – Injury Prevention & Control Program/Injury Surveillance Program

Date: February 1, 2024

The Injury Surveillance Program at the Massachusetts Department of Public Health recently assessed the data quality in the alcohol and drug fields in crash reports as part of a 405c Traffic Records Improvement grant. The presentation with key findings and recommendations is attached. The assessment found that all the alcohol and drug fields for drivers had high percentages of missing or invalid values, ranging from 37% to 93%.

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%

Based on the findings in the attached assessment, we recommend this information be shared with all Law Enforcement Personnel and be included in New Recruit and In Service training curriculums to highlight the importance of documenting complete violation codes and respective OUI fields in the RMV Police Crash Report. We also recommended to all MA Chiefs of Police with the assistance of the RMV Crash Law Enforcement Liaison, they share this assessment with their Officer's and Administration. In addition, we also suggested they engage their Record Management System (RMS) vendors to improve the data quality in the alcohol and drug fields by requiring entry into these fields and update the violation code field to match the Merit Rating Board's list of current violation codes rather than being an open text field.

Thank you for considering these recommendations. Improving the quality of the alcohol and drug fields, including complete documentation of violation codes in the crash report, would improve traffic safety partners' ability to assess the role of impaired driving in crash-related injuries and develop and implement impaired driving interventions.

1. Potential OUI violation codes considered "missing" were Ch. 90, Sec. 23 or 24 codes without a subsection code.

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

1

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.

2

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

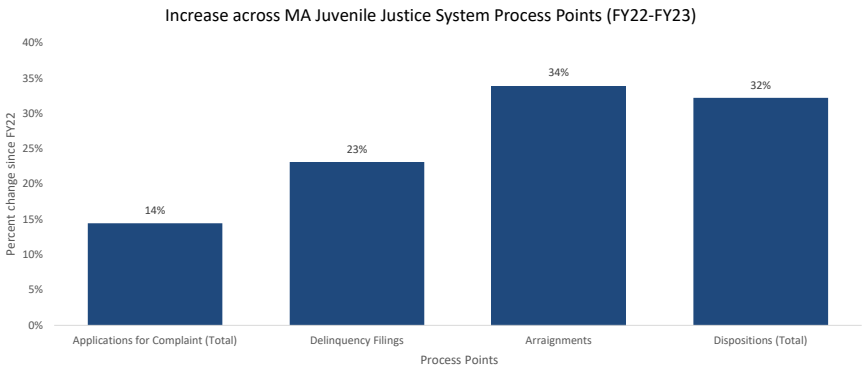
Studying the implementation of any statutory changes to the juvenile justice system

Making recommendations for any statutory changes to improve juvenile justice system

3

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.

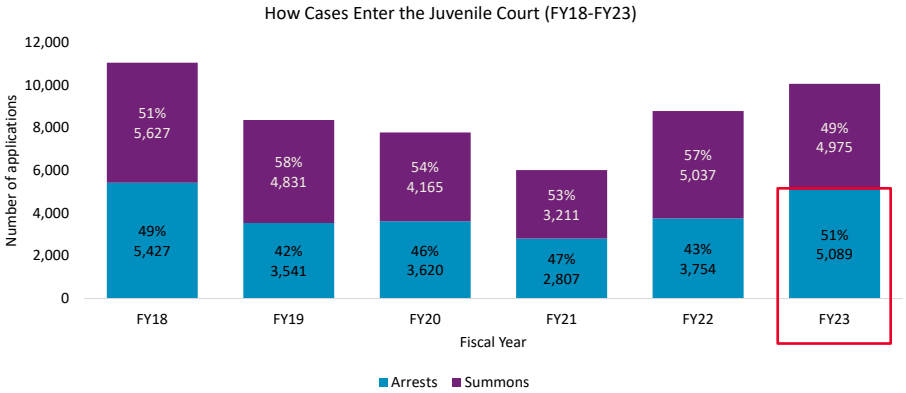


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4

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

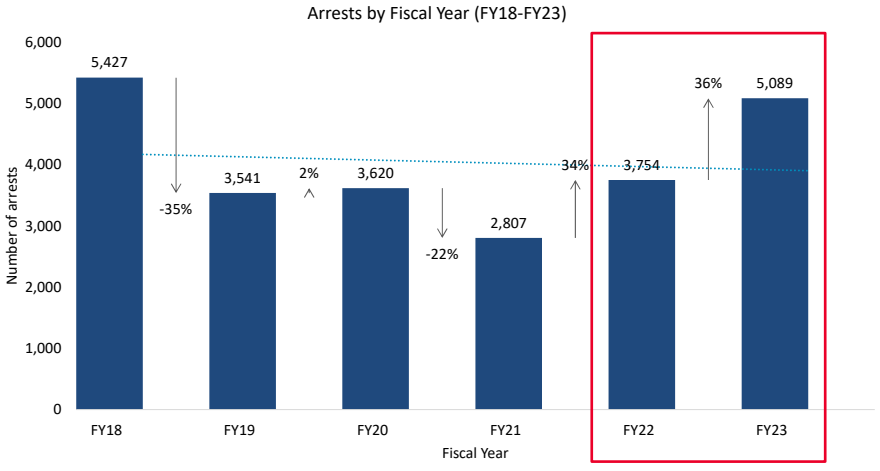
FY23 was the first year since the passing of the CJRA where applications for complaint initiated by arrest represented more than half (51%) of all applications.



5

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

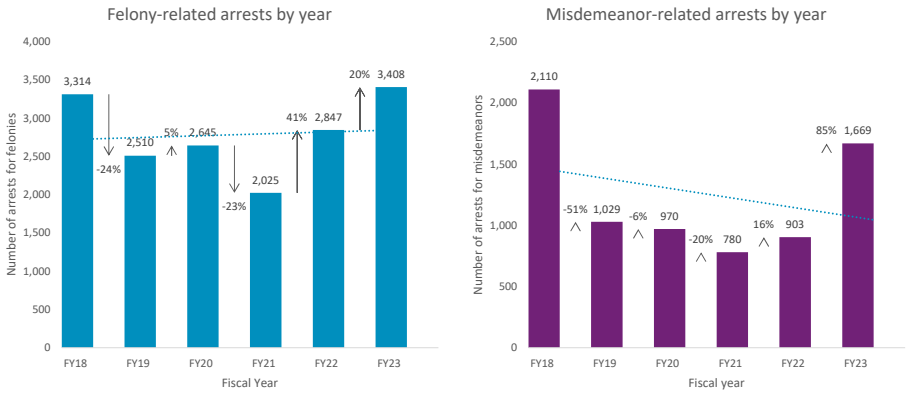
During that same time, the use of summons *decreased* by 1%. Arrest counts are back to pre-CJRA numbers.



6

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

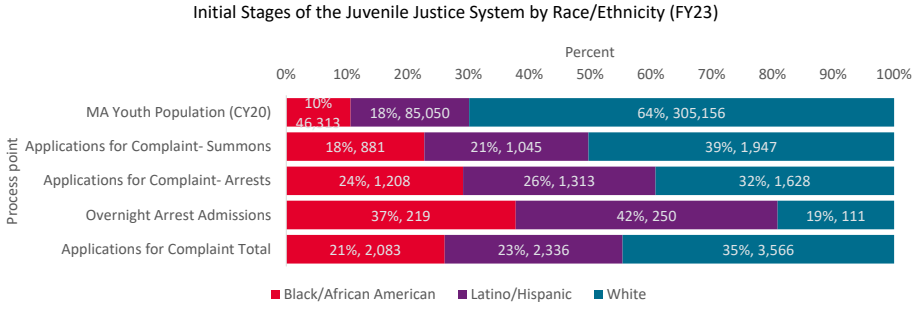
Compared to FY22, arrests for misdemeanors increased by 85% while arrests for felonies increased 20%.



7

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.



8

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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9

The Board's analysis found that each of the four hypotheses can account for <u>some, but not all</u>, 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**

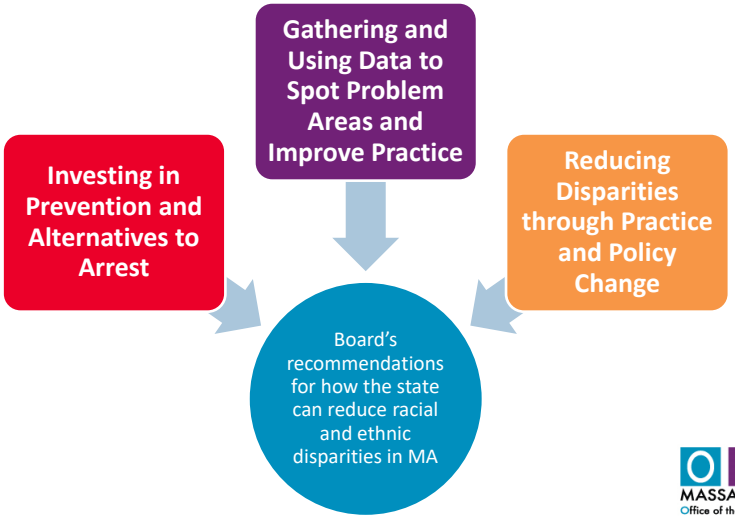
- While Suffolk, Hampden and Essex counties account for a large proportion of the states' applications for complaint and have higher rates of youth of color generally, there are other factors contributing to racial and ethnic disparities seen across the state for both applications for complaint generally, 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.

10

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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11

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.

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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)

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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

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