

## DECISIONS OF NOTE: APRIL 2005-APRIL 2006

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### CRAWFORD V. WASHINGTON AND THE RIGHT TO CONFRONTATION

- Commonwealth v. Gonsalves, 445 Mass. 1 (2005)

This was the first Massachusetts case to interpret the confrontation clause in light of Crawford. The defendant was charged with assault and battery by means of a dangerous weapon stemming from an argument with his girlfriend. In response to questions from a police officer, the complainant stated that her boyfriend had lifted her off the floor, choked her and hit her head against the floor. She identified and described the defendant. Before the police arrived, the complainant also told her mother what happened. Prior to trial, the Commonwealth moved *in limine* to introduce both of the complainant's statements as excited utterances; the complainant was available to testify at trial and the motion was allowed. Subsequently, the complainant invoked her Fifth Amendment privilege. As a result, the trial court found her statements to be inadmissible under Crawford and the Commonwealth appealed this ruling pursuant to G.L. c. 211 §3.

The Court distinguished testimonial and non-testimonial statements, and held that “statements made in response to questioning by law enforcement agents are *per se testimonial*, except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care” *Id.* at 3 (emphasis added). Testimonial statements are inadmissible unless the declarant testifies at trial, or is unavailable and was previously subject to cross-examination. In discussing how statements are obtained, the Court further held that “interrogation must be understood expansively to mean all law enforcement questioning related to the investigation or prosecution of a crime.” *Id.* at 8.

Statements that are not *per se* testimonial can be “testimonial in fact” and the inquiry a court must make is “whether a reasonable person in the declarant’s position would anticipate the statements being used against the accused in investigating and prosecuting a crime.” *Id.* at 13. Additionally, the court stated that out-of-court statements not made to police, and spontaneous statements, made without prompting would be considered non-testimonial.

The Court remanded the case to the district court to allow the parties to reopen the evidence as to the admissibility of the statements to the police and to the complainant’s mother.

- Commonwealth v. Rodriguez, 445 Mass. 1003 (2005) (Following the Gonsalves decision, the Court held that children's statements to the officers regarding an assault were testimonial *per se* because the statements were made in response to police interrogation at a secure scene. The admission into evidence of these statements, as relayed by the officers, therefore violated the confrontation clause.)
- Commonwealth v. Foley, 445 Mass. 1101 (2005) (The Court, citing Gonsalves, held that the complainant’s initial responses to the officer’s questions (“Where is he?” and whether

she needed medical care) did not involve police interrogation because, among other things, the purpose behind the questioning involved a community caretaking function and not the prosecution of a crime. However, the Court found that the statements made in response to questioning after the scene was secure and the victim declined medical attention were made in response to investigatory interrogation and therefore testimonial per se. As a result, admission of the statements violated the Sixth Amendment.)

- Commonwealth v. Williams, 65 Mass. App. Ct. 9 (2005) (The police responded to a 911 call about a fight between a man and a woman. When they responded to the scene, the police spoke to complainant and asked her what happened. The complainant told the police how the fight started and the defendant blocked the door, grabbed her neck and stabbed her in the hand. Court held that the admission of the statements violated the defendant's rights under the confrontation clause. The statements were responses to police interrogations and were therefore, testimonial per se.)
- Commonwealth v. Tang, (Appeals Court, April 11, 2006) (Five-year-old boy's statements to police were not testimonial because the questions were posed on an emergency basis while police were securing a volatile scene; trial judge was not required to conduct a voir dire examination of the child to determine his testimonial competency.)

**But, Crawford does not apply to...**

#### **Probation Surrenders:**

- Commonwealth v. Nunez, 446 Mass. 54 (2006) (Crawford does not apply to probation revocation proceedings. In Nunez, the police officer's testimony consisted of statements from a witness regarding an attempted robbery. Even though the judge did not explicitly state that he found the hearsay reliable, the Court found that because the statements were detailed, based on personal knowledge and direct observations, made soon after the incident, and corroborated by the officer's observations, the hearsay was reliable and admissible.)
- Commonwealth v. Wilcox, 446 Mass. 61 (2006) (The right of confrontation as explicated in Crawford does not apply to probation revocation proceedings and that the standard articulated in Durling controls. The Court reasoned that a probation surrender hearing is not a "criminal prosecution," and evidence that would not be admissible at trial would be admissible in a surrender hearing. Hence the Sixth Amendment right of confrontation does not apply in the same way. The Court also found that Article 12 of the Massachusetts Declaration of Rights does not afford more protections here. Only reliable hearsay is admissible at the surrender hearing.)

#### **Drug Certificate and Certified Prior Record:**

- Commonwealth v. Verde, 444 Mass. 279 (2005) (Court held that the admission of drug certificates at trial, without a witness to authenticate the document, does not violate the

defendant's Sixth Amendment right. The Court reasoned that "certificates of chemical analysis are neither discretionary, nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance." Additionally, the Court noted the certificate is only prima facie evidence which the defendant can rebut. Since drug certificates are similar to business records, the Court found that the confrontation clause is not implicated.)

- Commonwealth v. Crapps, 64 Mass. App. Ct. 915 (2005) (followed Verde and implied same standard for allowing the admission of a certified prior conviction in a second offense drug distribution case.)

### **Hospital Records:**

- Commonwealth v. Lampron, 65 Mass. App. Ct. 340 (2005) (Hospital records with results of drug tests and evidence of intoxication, including writing in the margins of the records, were not testimonial in nature when, as here, a reasonable person would not have anticipated their use in the investigation and prosecution of a crime.)

## **CONSENT TO SEARCH**

Georgia v. Reynolds, (SCOTUS Docket No. 04-1067, March 22, 2006):

In a 6-3 decision with six separate opinions, the Supreme Court held that a warrantless entry and search of a house is unconstitutional when there are two occupants at the door and one expressly objects to police entry while the other consents.

Respondent Scott Reynolds lived with his wife, Janet Reynolds, and their son until shortly before the incident in question. In July 2001, Janet Reynolds called the police to report that there had been a fight between her and her husband, and her husband had taken their child away. When the police arrived, she told them that her husband was using cocaine. The police asked if they could search the residence. With both Scott and Janet Reynolds at the door, Scott "unequivocally refused," while Janet consented and led the police upstairs to her husband's bedroom, where the police officers found a straw containing what they suspected was cocaine. When the officer went to get an evidence bag from his car, Janet withdrew her consent. The police subsequently obtained a search warrant and found further evidence of drug use, with which Scott Reynolds was indicted for possession of cocaine. The trial court in Georgia denied Scott Reynolds's motion to suppress the evidence, the Georgia Supreme Court reversed, and the Supreme Court affirmed.

The holding in Reynolds draws a "fine line" and applies only to "a potential defendant with self-interest in objecting" who is "in fact at the door and objects." If the objector is nearby, but not at the door, then the police may enter. Justice Souter, writing for the majority, distinguished Reynolds from the Court's holdings in Illinois v. Rodriguez, 497 U. S. 177 (1990), and United States v. Matlock, 415 U. S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.") Souter explained that taken together, the decisions are "a

function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.”

Chief Justice Roberts' dissent would interpret Matlock and Rodriguez to mean that police may enter and search the premises when *any* occupant gives consent. Roberts accuses the majority of crafting a random rule with potentially severe consequences for victims of domestic violence. The majority's response is to distinguish between entering a residence for the purpose of obtaining evidence, and entering a residence when there are legitimate reasons to suspect spousal abuse.

## RECIPROCAL DISCOVERY

Commonwealth v. Durham, 446 Mass. 212 (2006):

In a 4-3 decision, the Court held that Rule 14(a) allows discovery by the Commonwealth of statements not only from witnesses the defense intends to call, but also from Commonwealth witnesses if the defense intends to use those statements in cross-examination.

Defendant was charged with first degree murder. At issue was the validity of a pretrial order from a Superior Court judge directing the defendant to “produce and provide the Commonwealth with 'statements' of civilian witnesses that are in the possession, custody or control of the defendant or his attorney, and that constitute statements of witnesses the Commonwealth intends to call at trial.” The Commonwealth had specifically requested discovery of statements the defense intended to use for impeachment purposes after learning from an affidavit accompanying a request for additional funds for investigation that the defense's investigator had done extensive work and interviewed many people.

The Court held that the order was valid under the old version of Rule 14 in place in 2000. The kind of order in question does not become part of automatic reciprocal discovery, but a judge can approve such an order at the request of the Commonwealth. The majority reasoned that Rule 14(a)(3)(a) cannot be read in isolation, and instead includes “statements of persons” under Rule 14 (a)(2), whether or not they are witnesses whom the defense intends to call in its case-in-chief. The majority stressed that witnesses do not “belong” to either side, and disagreed with the defendant's argument that such an order violates the work product provision in Rule 14(a)(5).

The Court also rejected the defendant's constitutional arguments, holding that the order did not violate the Fifth or Sixth Amendments or Article 12 of the Massachusetts Declaration of Rights. The majority held that the type of order in question does not violate a defendant's right to cross-examination, reasoning that any lost advantage in surprising a witness with a contradictory statement can be resolved by questioning that witness about pretrial preparation. It also rejected the argument that such discovery violates a defendant's right against self-incrimination, as it only applies to things the defense intends to use at trial. The majority opinion stated, “The role of cross-examination, and the existence of an imbalance [in resources between the prosecution and defense], should not override the right of the people, and the victims of crimes, to have the evidence evaluated by a fully informed trier of fact.”

The dissenting opinion strenuously disagreed with the majority regarding both its interpretation of Rules 14(a)(2) and 14(a)(3)(A) and its policy considerations. The dissent stressed that a defendant's right to confrontation is impeded by the majority's new rule, as the effectiveness of cross-examination often depends on being able to surprise a witness with impeachment evidence. The dissent also focused on the uneven investigatory playing field that defendants face going into pretrial preparation.

Both the majority and dissent note that the majority's holding in this case is contrary to the analogous Federal Rule of Criminal Procedure (16(b)(2)), as well as the rules and holdings of the vast majority of other states. The majority grounds its distinction from national practice in the doctrine of "liberal discovery" in Massachusetts.

### **SENTENCING ENHANCEMENT**

Commonwealth v. Foreman, 63 Mass. App. Ct. 801 (2005)

The defendant's prior delinquency adjudication for armed robbery qualified for adult sentencing enhancement as an armed career criminal G.L. c. 269 §10G(a). In Foreman the defendant was indicted, as an adult, for possession of a firearm, G.L. c. 269 §10(a)] and armed career criminal [c. 269 §10G(a)]. He argued that his prior delinquency adjudication for armed robbery does not qualify as a "conviction" under G.L. c. 119 §53 which states "[p]roceedings against children . . . shall not be deemed criminal . . ."

The Court rejected the defendant's argument and followed its holding in Commonwealth v. Furr, 58 Mass. App. Ct. 155 (2003), which held that c. 269 §10G incorporates the definition of "violent crime" as defined in c. 140 §121, ("any crime punishable by imprisonment for a term exceeding one year, or any act of *juvenile delinquency* involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.") Since delinquent acts are included in this definition of "violent crime," the Court found that the legislature intended such adjudications to qualify as a prior "conviction" under the armed career criminal statute.

### **BAIL REVOCATION**

Commonwealth v. Pagan, 445 Mass. 315 (2005):

In Pagan, the Court held that a judge cannot vacate a bail revocation order when none of the charges against a defendant have been dismissed or has resulted in acquittal, and where no manifest injustice exists. The court interpreted G.L. c. 276, §58, third paragraph., to mean that a bail revocation order entered because the defendant has been charged with a new offense cannot

be vacated unless any of the cases against the defendant are dismissed or the required sixty days has passed.

The defendant's bail had been set at \$1,000 for a series of related crimes. Less than two weeks before the trial date of December 8, the defendant was arrested on new charges. At his arraignment on the new charges, the judge accepted the Commonwealth's motion to revoke the defendant's bail on the previous charges, and indicated on the motion that it was "allowed to 12-8-03." When on December 8<sup>th</sup> the trial did not proceed as scheduled, a different judge vacated the order revoking defendant's bail. The Commonwealth appealed. The Court held that the judge in district court did not have discretion to vacate the bail revocation order.

Under the Court's interpretation of G.L. c. 276, §58, once a bail revocation order enters, it remains valid for 60 days or until some of the charges in question are dismissed unless a "manifest injustice" exists. The Court directed that when entering an order, a judge should enter a mittimus holding the defendant without bail until sixty days later and "specify[ing] that the defendant be returned for his next appearance to the court with jurisdiction over the charges to which the bail revocation order relates... for a new bail hearing on those charges. At that time, the defendant will be afforded the opportunity to seek new bail or waive his right to his new bail hearing on that day and remain held without bail." Pagan, 445 Mass. at 323.

## HEARSAY

- Commonwealth v. Le (and a companion case), 444 Mass. 431 (2005):

The Court overruled its prior decision in Commonwealth v. Daye, 393 Mass. 55 (1984), and adopted the modern federal interpretation of F.R.E 801(d)(1)(C) (also proposed Mass. R. Evid. 801(d)(1)(c)), the hearsay exception for a prior statement of a witness identifying a person. The Court held that a trial court can admit pretrial identification evidence for substantive purposes even if the witness testifies that he or she did not make such an identification or cannot remember it.

Le and another defendant were convicted of assault and battery, and appealed their convictions on the ground that the trial court had violated the holding in Daye by allowing a police detective to testify to out-of-court identifications that the complainant had made of the defendants in two arrays of photographs when the complainant also made an in-court identification of both men at trial. The Court agreed that the trial court had violated the rule in Daye, but modified the rule to allow substantive use of identification evidence as long as the defense is able to cross-examine the witness, whether or not the evidence is being used for impeachment purposes. The Court applied the new rule retroactively and affirmed the convictions.

The Court's holding follows the interpretations of most federal circuits in interpreting Fed.R.Evid. 801(d)(1)(C) after United States v. Owens, 484 U.S. 554 (1988). In Owens, the Supreme Court held that Fed.R.Evid. 801(d)(1)(C) does not violate the confrontation clause as long as the witness "is placed on the stand, under oath, and responds willingly to

questions" and when the judge does not inappropriately limit the scope of the questioning. Id. at 561. The Court concluded that a similar rule should apply in Massachusetts, reasoning that "prior identification evidence is of substantive value, even in the absence of any in-court identification, because it has occurred under nonsuggestive circumstances and closer in time to the offense." Le, 444 Mass. at 441.

- Commonwealth v. Edwards, 444 Mass. 526, (2005):

Court adopted the "forfeiture by wrongdoing" exception to the hearsay rule, which permits the substantive admission of a witness's out-of-court statements if the defendant is found to have "procured the unavailability of that witness." The parties are entitled to a pretrial evidentiary hearing in which hearsay is admissible. The Commonwealth must prove by a preponderance of evidence that: 1) the witness is unavailable; 2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and 3) the defendant acted with the intent to procure the witness's unavailability. The defendant's involvement in procuring the witness's unavailability need not be a criminal act and may include the defendant's collusion with a witness to ensure that the witness will not be heard at trial.

The Court found that the causal link necessary between a defendant's actions and a witness's unavailability may be established where: 1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure; 2) a defendant physically prevents a witness from testifying; or 3) a defendant actively facilitates the carrying out of the witness's independent intent not to testify. The doctrine is broad, but footnote 23 states that informing a witness of the right to remain silent under the Fifth Amendment does not, standing alone, constitute "forfeiture."

## **PRE-TRIAL PROBATION**

Commonwealth v. Sebastian S., 444 Mass. 306 (2005)

Court found that "pretrial probation" is not a legal post-admission disposition. Juvenile admitted to facts sufficient for a finding of delinquency, after which a judge placed him on "pretrial probation" for six months and indicated an intention to dismiss the complaint if the juvenile completed the period without incident. The docket identified "pretrial probation" as the disposition. The Commonwealth objected and filed a motion to correct the docket to reflect that the dispositions were in fact "continuances without a finding." The Court held that "pretrial probation" is not a legally cognizable disposition after an "admission to sufficient facts" distinct from a CWOFF conditioned on probation, as authorized under G.L. c. 278, §18.

The Court held that if probation is imposed as a disposition under G. L. c. 278, § 18, it is not "pretrial" probation and discussed its holding in Commonwealth v. Cheney, 440 Mass. 568 (2003), where, in dicta, it stated that "G.L. c. 278 §18 only permitted the use of *pre-trial probation* and dismissal as a disposition after the tender of a guilty plea or an admission to sufficient facts..." The Court said the use of the word "pretrial" in Cheney was "technically inaccurate." Pretrial probation is not an option after a plea or admission.

## EX PARTE RULE 17 MOTIONS

Commonwealth v. Mitchell, 444 Mass. 786 (2005)

Court held that, in rare instances, an ex parte motion may be an appropriate procedure by which to obtain a court order compelling the pretrial production of books, papers, documents, or other objects pursuant to Mass. R. Crim P. 17(a)(2), in the custody of a third party. The defendant must demonstrate: (i) a reasonable likelihood that the prosecution would be furnished with information incriminating to the defendant which it otherwise would not be entitled to receive; or (ii) a reasonable likelihood that notice to a third party could result in the destruction or alteration of the requested documents. An ex parte motion for the pretrial production of documents cannot be made on the basis that notice to the Commonwealth will reveal trial strategy or work product or might disclose client confidences.

After the determination has been made on whether an ex parte procedure is warranted, the judge must assess then assess the proposed summons under the standards established in Lampron, whether it has been clearly shown that 1) the information is evidentiary and relevant; 2) the information is not otherwise obtainable in advance through the exercise of due diligence; 3) the party seeking production cannot prepare for trial without advance inspection; and 4) the application is made in good faith and is not a fishing expedition. The facts in the supporting affidavit must not be conclusory, but specific and detailed.

## MIRANDA

- Commonwealth v. Martin, 444 Mass. 213 (2005)

In response to a complaint that the defendant had threatened his neighbor with a gun, police surrounded the defendant's apartment and convinced him to surrender. The officers handcuffed him in the building's hallway and conducted a protective sweep of his apartment. The defendant was then positively identified by the complainant. While the defendant remained handcuffed and without advising him of his Miranda rights, a detective at the scene asked the defendant to reveal the location of the firearm. After some discussion, the defendant stated that the firearm was in his bedroom closet. The detective entered the apartment and located the gun. An officer then read the defendant his Miranda rights and formally placed him under arrest.

The defendant first moved to suppress the gun based on the warrantless search of his apartment and later amended his motion to include an argument that the gun should be suppressed as the fruit of unlawful questioning under the Fifth Amendment and Article 12 of the Mass. Declaration of Rights. Citing to the Supreme Court's recent decision in U.S. v. Patane, 124 S.Ct. 2620 (2004), the Commonwealth argued that the exclusion of physical evidence obtained in violation of Miranda principles, but which was voluntarily provided by the defendant, is not required by the Fifth Amendment. The trial court agreed with the Commonwealth that the introduction of the firearm would not violate the Fifth Amendment

since the defendant's statement as to the location of the gun was voluntary. However, the trial court went on to hold that the greater protections provided under Article 12 required suppression.

The Court agreed. Noting that Massachusetts appellate courts had "consistently excluded the fruits (both testimonial and physical) of custodial interrogations undertaken without administering [*Miranda*] warnings from use at trial," the Court concluded that the Supreme Court's construction of the *Miranda* rule was "no longer adequate to safeguard the parallel but broader protections afforded Massachusetts citizens by art. 12." Adopting what it deemed a "bright-line" common-law rule, the Court held that the admissibility of physical evidence obtained in violation of *Miranda* is "presumptively excludable from evidence at trial as 'fruit' of the improper failure to provide such warnings." To hold otherwise, the Court noted, would "countenance precisely the kind of police interrogation we have intended to deter."

- Commonwealth v. Mark M., 65 Mass. App. Ct. 703 (2006)

Court upheld the suppression of 13-year-old juvenile's incriminating statements during police interrogation made both before and after his grandmother had left the interrogation room; before, the juvenile and grandmother were not given sufficient time to consult before waiving his *Miranda* rights, and when the interrogating officer left the room for three minutes to consult his supervisor before escorting the grandmother out, there was not a sufficient break in the proceedings to break the stream of interrogation. The few minutes did not constitute a sufficient opportunity to consult because this occurred after the juvenile had waived his rights and after the interrogation had begun. Therefore, the waiver was not knowing, voluntary or intelligent.

### **DANGEROUSNESS HEARING**

Commonwealth v. Lester L., 445 Mass. 250 (2005) The Court held that the Commonwealth may make the probable cause to arrest showing required by G.L. c. 276 §58A(4) by means of a complaint or by a police report. The Court also found that the defendant does not have the right to an evidentiary hearing, but rather, his interests are protected by a hearing at which counsel can argue and make representations to a judge who has discretion to expand the scope of the hearing. The Court held that the judge has no discretion to release a defendant on bail pending the hearing if the judge finds that there was probable cause to arrest and good cause to continue the hearing.

## **OTHER CRIMINAL CASES OF NOTE**

### **SEARCH AND SEIZURE**

Investigatory stops:

- Commonwealth v. Feyenord, 445 Mass. 72 (2005) (Exterior sniff of a properly stopped motor vehicle, by a dog trained in drug detection, is not a search; extended detention after motor vehicle was stopped for a traffic violation for the purpose of summoning a canine unit was reasonable and proportional when the unfolding circumstance suggested involvement in criminal activity beyond the violation for which suspect was initially detained.)
- Commonwealth v. Walker, 443 Mass. 867 (2005) (Ineffective assistance case denying motion for new trial when counsel had not advised the defendant to appeal denial of motion to suppress evidence obtained by stopping defendant on a bicycle only because he was the same race as the perpetrator, but stating in dicta that under current law, motion would have been reversed on appeal.)
- Commonwealth v. Santos, 65 Mass. App. Ct. 122 (2005) (No reasonable suspicion for a stop when the only basis is that a driver lacked a license and registration in a high crime area, and sat upright after being pulled over.)
- Commonwealth v. Clark, 65 Mass. App. Ct. 39 (2006) (Upholding suppression of evidence based on stop of automobile based on hunch gained from observing what appeared to be a drug transaction in a high-crime area without any more specific information to lead to reasonable suspicion)
- Commonwealth v. Costa, 65 Mass. App. Ct. 640 (2006) (Reversing order allowing motion to suppress when police officers conducted investigatory stop in response to anonymous cell phone call from a caller in the same public location as the defendant saying that she observed a teenager with a gun in his pants and described his clothing.)
- Commonwealth v. Ancrum, 65 Mass. App. Ct. 647 (2006) (A radio report describing two black males with do-rags is not sufficient on its own to justify a stop, but state troopers had reasonable suspicion to conduct an investigatory stop when they were also drawing inferences from the location of the car, the condition and coloring of the car, and the short time period that had elapsed since the incident.)

Warrentless searches:

- Commonwealth v. McAfee, 63 Mass. App. Ct. 467 (2005) (Warrentless entry to impound the interior of a house found unconstitutional under the Fourth Amendment and Article 14 when the police created their own “exigent circumstances” (exception to rule from

DeJesus, 790 N.E.2d 231 (2003)) by knocking on the door of the house, and there was no specific evidence beforehand that D knew there was a pending investigation.)

- Commonwealth v. Baptiste, 65 Mass. App. Ct. 511 (2006) (Evidence found during inventory search of car conducted immediately after arrest was admissible even though police were suspicious of white powdery substance in the armrest of the car and would not have had probable cause to search the armrest in an investigative search.)

Consent to Search:

- Commonwealth v. Rogers, 444 Mass. 234 (2005) (Upheld suppression motion because Commonwealth failed to meet its burden of demonstrating that occupant who voluntarily consented to the entrance of three police officers had apparent authority to let them in when the officers had knocked on the door early in the morning, asked for the defendant, and a woman had pointed towards the kitchen.)

Scope of Warrants:

- Commonwealth v. Dew, 443 Mass. 620 (2005) (Warrant to search all floors of a multi-unit dwelling is not overbroad when defendant had access to and use of all units in the house given his relations to the tenants).
- Commonwealth v. Charros, 443 Mass. 752 (2005) (Warrant to search defendants' residence did not give police officers authority to seize the defendants one mile from their home, or to return and detain them in their home while the search took place.)

### **ILLEGAL EAVESDROPPING**

- Commonwealth v. Damiano, 444 Mass. 444 (2005) (interpreting 18 U.S.C.S. 2510 et seq. (illegal wiretapping statute) to mean that when a private citizen illegally intercepts a telephone conversation and contacts the police, the exclusionary rule is triggered – in this case, it applied to evidence seized subsequent to arrest, but not to statements made after the defendant waived his Miranda rights.)

### **MIRANDA/INTERROGATION ISSUES**

- Commonwealth v. Almonte, 444 Mass. 511 (2005) (When defendant walked into a police task force base voluntarily, he was not in custody when he made initial statements to police even though he was in a police station; once in custody, defendant did not invoke his right to remain silent by saying “I’ve said all I have to say” and then agree to further questioning.)
- Commonwealth v. LeClair, 445 Mass. 734 (2006) (Holding that further questioning of a defendant after he invoked his right to counsel was constitutional under Oregon v.

Bradshaw (462 U.S. 1039 (1983)) when the defendant “evinced a desire for more conversation about the killing.”)

- Commonwealth v. O’Brian, 445 Mass. 720 (2006) (Upholding the voluntariness of a confession to murder given after a detective stated that if the defendant confessed, the detective would let the prosecutors know so that the defendant “may see the light of day down the road.”)

## DISCOVERY

- Commonwealth v. Daniels, 445 Mass. 392 (2005) (Reversing order denying defendant’s request for post-trial discovery of exculpatory evidence after a conviction of first degree murder and other crimes, stating: “Once the Commonwealth has notice that the defendant seeks specific favorable information in its possession, it must examine the material and furnish that information to the defense if it is favorable. Where the Commonwealth knows that a judge has not reviewed the specifically requested material, its obligation continues.” When the evidence against the defendant was based almost entirely on the testimony of one eyewitness who first associated the defendant with the crime based on hearing that a friend of the defendant’s was suspected of being the main assailant, the Commonwealth should have turned over a statement implicating someone else as the main assailant after the defense specifically requested information regarding that individual’s case.)
- Commonwealth v. Reed, 444 Mass. 803 (2005) (Court ordered new trial for defendant convicted of raping his daughter because (i) judge should have allowed motion for production of medical records of a pelvic exam of the alleged victim conducted two months before the incident; and (ii) at trial, the defendant’s prompt denial of the rape when questioned by his father should have been admitted under the curative admissibility exception to hearsay.)
- Commonwealth v. Lam, 444 Mass. 224 (2005) (Defendant was accused of assault and battery of a child at her school; a summons under 17(a)(2) for school attendance records for the dates the child claimed the assaults occurred was unquestionably relevant and allowable, but a request for attendance records at a middle school three years later could not be justified under Lampron.)
- In Re Jansen, 444 Mass. 112 (2005) (Production under 17(a)(2) can include a DNA swab of a third private party when there is reasonable cause and the production is critical to the preparation of the defense.)

## **PRE-TRIAL PROCEEDINGS**

Condition: no contact:

- Commonwealth v. Kendrick, 446 Mass. 72 (2006) (Holding that the defendant's probation condition to have "no contact" with minors under 16 years old gave him sufficient notice that he was prohibited from displaying his car at a car show attended by minors).

Competency hearing:

- Seng v. Commonwealth, 445 Mass. 536 (2005) (In preparation for a competency hearing, a court can compel a defendant to submit to an examination by the Commonwealth's expert without defendant's counsel present when the trial judge has placed sufficient limits on the disclosure of information relating to the alleged charges.)

Accord and satisfaction:

- Commonwealth v. Guzman, 2006 Mass. LEXIS 106 (2006): (Upholding the dismissal of an assault and battery complaint after the defendant and his accuser executed an accord and satisfaction pursuant to G.L. 276, §55; Commonwealth had challenged the constitutionality of the statute.)

## **ELEMENTS OF CRIMES/DEFENSES**

Resisting Arrest:

- Commonwealth v. Maylott, 65 Mass. App. Ct. 466 (2006) (Upholding a jury's determination that a defendant's stiffening his arms when officers told him he was under arrest could constitute either prong of the resisting arrest statute, G. L. c. 268, §32B(a)).

Receiving a Stolen Motor Vehicle:

- Commonwealth v. Darnell D., 445 Mass. 670 (2005) (Insufficient evidence to support adjudication of delinquency for receiving a stolen motor vehicle: juvenile turned around for two seconds to look at the police car following them. It was unclear that he was the driver and evidence insufficient to show that the juvenile ever had "dominion and control" over the automobile and directed the car which way to go after turning back around.)

Intimidating a Witness:

- Commonwealth v. Cathy C., 64 Mass. App. Ct. 471 (2005) (Affirming adjudication of delinquency for juvenile accused of intimidating a witness when the juvenile made statements to the witness after the verdict had been reached, as the proceedings do not end until a judgment is entered.)

#### Home Invasion:

- Commonwealth v. Marshall, 65 Mass. App. Ct. 710 (2006) (First element of home invasion, “knowingly entering the dwelling place of another,” is one of occupancy rather than ownership and not satisfied where defendant had lived there for years, but had spent most of the last three months sleeping elsewhere.)

#### Defense of Killing/Injuring in a Dwelling:

- Commonwealth v. McKinnon, 446 Mass. 263 (2006) (A front porch does not constitute a “dwelling” under the defense of killing or injuring of person unlawfully in a dwelling.)

#### Resisting Arrest:

- Commonwealth v. Pagan, 63 Mass. App. Ct. 780 (2005) (Conviction for resisting arrest overturned when Commonwealth failed to establish that the plain clothes police officer was effectuating an arrest when he made physical contact with the defendant.)

#### Assault and Battery Causing Serious Bodily Injury:

- Commonwealth v. Jean-Pierre, 65 Mass. App. Ct. 162 (2005) (Assault and bodily causing “serious bodily injury,” G.L. 265, §13A, need not include an injury leading to permanent loss or impairment of a bodily function; upholding conviction based on a blow that left the victim’s jaw broken for more than six weeks.)

## **EVIDENTIARY ISSUES**

#### “First Complaint” (formerly Fresh Complaint) Doctrine:

- Commonwealth v. King, (2005) (Revises “Fresh Complaint” doctrine to create “First Complaint” rule: in sexual assault cases, the person to receive the complainant’s first complaint of being sexually assaulted can testify as to the fact of, circumstances surrounding, and details of the complaint. The complainant can also testify to the details of the first complaint and why the complaint was made at that particular time. First complaint testimony can only be admitted to assist the jury in assessing the credibility of the complainant’s description of the first complaint, and testimony from other witnesses concerning complaints is inadmissible.)

#### Character Evidence:

- Commonwealth v. Bonds, 445 Mass. 821 (2006) (Affirming holding that mother's testimony that alleged victim was overly trusting was not character evidence given that it was a specific manifestation of her diminished mental capacity.)
- Commonwealth v. Podkowa, 445 Mass. 692 (2006) (It was improper for the defense to attempt to impeach a mother's testimony by implying ways in which she was a bad mother when the theory of the defense was that the mother, not the father, killed the child. Evidence of poor parenting alone is not a basis for an inference of motive to injure or murder a child.)

#### Statements by Joint Venturers:

- Commonwealth v. Wright, 444 Mass. 576 (2005) (Statements made in furtherance of a joint venture and before the end of the enterprise are admissible as an exception to hearsay; when the defendant and two others engaged in a joint venture to "get some Bloods" and someone was shot, their conversations after the fact counted as part of the enterprise even if they were not conspiring to conceal things about the murder for which defendant was eventually charged.)

#### Implied Consent to field sobriety test:

- Commonwealth v. Ranieri, 65 Mass. App. Ct. 366 (2006) (Reversing convictions for OUI and operating to endanger based on admission of evidence that defendant initially refused to take the alphabet field sobriety test, even though he failed the test when he did take it. This was a harmless violation of the defendant's right against self-incrimination because the jury could have inferred from the defendant's initial refusal that he didn't think he would pass the test.)

#### Violation of Protective Order:

- Commonwealth v. Griffen, 444 Mass. 1004 (2005) (Even though protective order not properly served by police when read over the phone, evidence of the existence of the ex parte order and the attempts to serve it can be probative of the defendant's knowledge of the existence of the order.)

#### Eyewitness identification:

- Commonwealth v. Cruz, 445 Mass. 589 (2005) (Admission of five photographs of defendant in different styles of hair and dress not overly prejudicial as probative of the fact that the alleged victim knew the defendant well enough to recognize his voice during a robbery.)
- Commonwealth v. Rosario, 444 Mass. 550 (2005) (Physically presenting someone before the jury when that person has invoked his Fifth Amendment privilege not to testify does not automatically violate that privilege; in this case, the judge prevented the defense from

presenting a third party perpetrator defense by not allowing a witness to identify that third party as the supplier in the alleged incident.)

- Commonwealth v. Martin, 63 Mass. App. Ct. 587 (2005) (Identification procedure violated defendant's due process rights when the 15-year-old complainant identified defendant after her father spotted a man whom he thought might be his daughter's attacker, and her father and the police arrived at the complainant's house with the defendant, whom she identified.) (SJC granted further review.)

Suppression hearings:

- Robinson v. Commonwealth, 445 Mass. 280 (2005) (Defendant's failure to appear at a suppression hearing does not constitute an automatic waiver of a suppression motion; a trial judge may conduct the hearing in the defendant's absence. If the judge determined that the defendant's absence was excusable, then the defendant would not have been found to have waived the right to be present at the hearing.)

## **TRIAL ISSUES**

Joinder:

- Commonwealth v. Pillai, 445 Mass. 175 (2005) (Joinder of two complaints of sexual assault against two different children and at least four months apart was properly within trial judge's discretion given that the offenses showed a common pattern of operation.)

Jury Selection:

- Commonwealth v. Leahy, 445 Mass. 481 (2005) (Upholding voir dire in which jurors who had been exposed to publicity surrounding the events in question were admitted to the jury; Court held that jurors' assertions of impartiality should be accepted by the judge unless extraordinary reasons give a reason to question them.)

Waiver of jury trial:

- Commonwealth v. Osborne, 445 Mass. 776 (2006) (Upholds the bright line rule that a waiver of a jury trial must be in writing.)

Extraneous Influence on the Jury:

- Commonwealth v. Kincaid, 444 Mass. 381 (2005) (Holding that in meeting the first step of the Fidler, 377 Mass. 192 (1977), test for extraneous influence on the jury, the defendant's burden is to prove exposure to extraneous matter by a preponderance of the evidence.)

Stipulated Evidence:

- Commonwealth v. Castillo, 2006 Mass. App. LEXIS 395 (Reversed conviction due to judge's failure to inquire of the defendant if he had agreed to a trial based on stipulated evidence and if he was aware of the various constitutional rights he was waiving.)

#### Closing Arguments:

- Commonwealth v. Beaudry, 445 Mass. 577 (2005) (In closing arguments in a sexual misconduct case, prosecutor exceeded the scope of proper argument by saying that the only way the 14-year-old complainant could have known about the acts she described was by having experienced them with defendant. The Court held that this argument, which had not been subject to rebuttal or made the subject of a curative instruction, was so prejudicial as to require a grant of a new trial.)

#### Jury Instructions:

- Commonwealth v. Urkiel, 63 Mass. App. Ct. 445 (2005) (Court reversed defendant's conviction of resisting arrest, finding that the judge at the bench trial should have considered a self-defense instruction because the evidence allowed the finding that the elements of self-defense claim existed.)
- Commonwealth v. Correia, 65 Mass. App. Ct. 597 (2006) (There was no implicit deal to warrant a special jury instruction concerning the reliability of the Commonwealth's key witness, who was present at the shooting and whom the defendant claimed actually shot the victim. When the witness spoke to detectives, he asked if he would be charged with a crime, and an ADA came in and said "we're only interested in the shooter.")

### ASSISTANCE OF COUNSEL

- Commonwealth v. Downey, 65 Mass. App. Ct. 547 (2006) (Attorneys wearing of concealed microphones during a trial for the purposes of making a documentary gave rise to a conflict of interest which undermined the attorney-client relationship, disclosed client confidences, and yielded constitutionally inadequate representation when clients had not consented to the microphones.)
- Commonwealth v. Berrios, 64 Mass. App. Ct. 541 (2005) (Counsel undermined the ability of the defendant to make a knowing and intelligent plea by failing to investigate and uncover new statements of a key witness in the case, and may have negated the voluntariness of the plea by placing excessive pressure on the defendant to plead.)
- Commonwealth v. Phinney, 446 Mass. 155 (2006) (Affirming a finding of ineffective assistance of counsel when defendant's trial counsel's inattention to police reports denied defendant the opportunity to present two grounds of defense (third-party culprit and failure of police to adequately investigate.))

## **PROBATION SURRENDERS**

- Commonwealth v. Aquino, 445 Mass. 446 (2005) (Judge cannot revoke probation and impose sanctions for behavior occurring after the date on which a defendant's probation was scheduled to terminate when the defendant was on notice that revocation proceedings had begun, but the hearing had been continued so he could hire counsel.)

## **SENTENCING**

- Commonwealth v. Talbot, 444 Mass. 586 (2005) (If requested by the defendant or her attorney, probation officers must give the defendant's attorney notice and a reasonable opportunity to attend a presentence interview of the defendant.)
- Commonwealth v. Hampton, 64 Mass. App. Ct. 27 (2005) (Holding that the rule on meeting youthful offender statute requirement set forth in Quincy Q., 434 Mass. 589, does not apply retroactively.)

## **RESTITUTION**

- Commonwealth v. Casanova, 65 Mass. App. Ct. 750 (2006) (Vacated judge's order for defendant to pay restitution of \$8,000+ for victim's lost college tuition from mononucleosis that he claimed was a direct cause of the three punches to the face for which defendant was convicted of assault and battery and other charges; Court held that the Commonwealth had failed to establish a clear causal connection without expert testimony or more reliable evidence.)