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DECISIONS OF NOTE: JANUARY 2004 – MARCH 2005

In the year that has passed since the last MCLE *Juvenile Delinquency & Child Welfare Law Conference*, the United States Supreme Court, the Supreme Judicial Court of Massachusetts and the Massachusetts Appeals Court have released a number of decisions that impact juvenile court practice. In addition, on March 1, 2004, the Supreme Judicial Court authorized significant amendments to the Rules of Criminal Procedure, most notably in the area of pre-trial discovery. The following section offers a brief summary of five of the most significant cases decided this past year, followed by a topical list of criminal cases from 2004 worth a further look. The section concludes with a comprehensive chart and Chronology and Crib Sheet prepared by Chris Dearborn of CPCS Salem, detailing the changes to the Rules of Criminal Procedure.

**CRAWFORD v. WASHINGTON
124 S.Ct. 1354 (2004)**

In Crawford, the petitioner, Michael Crawford, was charged with assault and attempted murder for stabbing a man whom had allegedly attempted to rape his wife, Sylvia Crawford. Crawford was arrested the night of the stabbing and he and his wife made tape recorded statements post Miranda to police. In his statement, Crawford confessed that he and his wife had gone to the victim's apartment where a fight had ensued, the victim had been stabbed, and Crawford had sustained a cut to his hand. Crawford further stated that he believed that the victim had reached for some type of weapon and that Crawford had grabbed for this weapon and sustained the cut to his hand. Sylvia Crawford told a similar story; however, her description of the fight differed in that she did not recall seeing anything in the victim's hands. At trial, Sylvia Crawford invoked her marital privilege and did not testify. The State, relying on an exception to the marital privilege in Washington law for statements otherwise admissible under a hearsay exception, introduced her tape recorded statements as statements against penal interest. Crawford was convicted of assault.

On appeal, Crawford argued that the admission of his wife's statement violated his confrontation rights under the Sixth Amendment to the United States Constitution. The Washington State Appeals Court reversed his conviction, finding that Sylvia Crawford's statements failed to demonstrate particularized guarantees of trustworthiness. In reaching this decision, the Appeals Court relied on Ohio v. Roberts, 448 U.S. 56 (1980), which allowed the admission of an unavailable witness's statement if the statement bears "adequate indicia of reliability" by either falling within a firmly rooted hearsay objection

or bearing particularized guarantees of trustworthiness. Crawford's conviction was then reinstated by the Washington Supreme Court which concluded that Mrs. Crawford's statement did not fall under a firmly rooted hearsay objection, but did bear guarantees of trustworthiness in its similarities to Crawford's confession.

The United States Supreme Court granted certiorari and reversed the decision of the Washington Supreme Court. Justice Scalia, writing for the majority, conducted an in-depth analysis of both the text of the Confrontation Clause and its historical underpinnings, and concluded that the Clause was written to redress two main evils: 1) the use of ex parte examinations as evidence, specifically those of witnesses who bore testimony against the accused; and 2) the admission of such testimonial statements (or hearsay) of a witness who did not appear at a trial where there had been no prior opportunity for cross-examination. It was in an effort to eradicate such use of testimonial hearsay, according to Justice Scalia, that the Framers mandated that "the accused shall enjoy the right...to be confronted with the witnesses against him."

Justice Scalia then applied this interpretation of the Confrontation Clause to the framework that the Court had established in Ohio v. Roberts. Justice Scalia concluded that the Roberts framework was not consistent with the Framers' intent for the Confrontation Clause, rather, that the Confrontation Clause required that reliability of testimonial hearsay be determined "by testing in the crucible of cross-examination," and not be left up to the subjective analysis of a judge. The Court then held that where testimonial hearsay is at issue, like that of Crawford's wife's statements to the police that were used to refute his claim of self-defense at trial, the Sixth Amendment mandates that such testimonial hearsay may only be admitted where the witness is unavailable and there has been a prior opportunity for cross-examination. The Court declined to offer a more comprehensive definition of "testimonial," but did indicate that it applied at a minimum to police interrogations, prior testimony at a preliminary hearing, before a grand jury, at or at a former trial.

At first blush, it appeared that the Crawford decision would have a sweeping impact on all manner of proceedings and discussions abounded about its application to everything from probation surrenders to the admission of drug certificates of analysis at trial. To date, attorneys across the Commonwealth have made Crawford arguments predominantly in the context of the use of so-called excited utterances at trials and to challenge the use of judicial determinations of reliability at probation surrenders with mixed results. Currently there are two cases pending before the Massachusetts Supreme Judicial Court regarding Crawford's application to the admissibility of so-called "excited utterances" at trials where the declarant is either unavailable or unwilling to testify.

CPCS Chief Appellate Counsel, Brownlow Speer, who argued one of the cases before the Supreme Judicial Court this past February, is hopeful that Crawford, if applied correctly, will eventually sound the "death knell" for Massachusetts prosecutions based exclusively on excited utterances. According to Attorney Speer, the leading Massachusetts case on the use of excited utterances, Commonwealth v. Whelton, 428 Mass. 24 (1998), rests

largely on the United States Supreme Court's decision in White v. Illinois, 502 U.S. 346 (1992), which the Court in Crawford suggests in a footnote may be overruled. At a minimum, the Crawford Court clearly expressed its belief that the statement that was admitted as an "excited utterance" in White would not pass Constitutional muster as an "excited utterance" under the holding of Crawford. For this reason, Attorney Speer suggests that attorneys should not only argue that the Sixth Amendment bars the use of hearsay which has not been subjected to cross-examination as substantive evidence, but also add that if hearsay that has not been subjected to cross-examination can ever be admissible, that it's a Federal question as to whether or not a specific hearsay declaration qualifies as an excited utterance.

ROPER v. SIMMONS
125 S.Ct. 1183 (2005)

In Simmons, 17 year old Christopher Simmons was charged with burglary, stealing, and the kidnapping and first degree murder of Shirley Crook. Intruders had entered Mrs. Crook's home while her husband was away on business, duct taped her eyes, mouth and hands, gagged her and taken her to a railroad trestle that spanned the Meramec River. Once at the railroad trestle, her assailants covered her face with duct tape and bound her hand and feet with electrical wire and threw her off the trestle. Simmons, who was still a junior in high school, was apprehended within days of the crime, after police learned that he had been bragging about his role in the killing. Simmons made a full confession after less than two hours of interrogation and agreed to perform a videotaped reenactment at the crime scene. At his trial, some nine months later, the State introduced his confession and the videotaped reenactment along with testimony from at least one co-conspirator that he had discussed the crime in advance and bragged about it later. Simmons was convicted and the State sought the death penalty.

During the penalty phase, the State offered evidence that the murder was committed for the purpose of receiving money, that Simmons killed Mrs. Crook in an attempt to prevent his arrest for the other crimes he committed the night of the murder, and that the murder involved "depravity of the mind and was outrageously and wantonly vile, horrible and inhuman." In mitigation, Simmons' attorneys called a witness to testify that Simmons had no prior involvement with the juvenile justice system and then several of his family members, a neighbor and a friend to discuss their relationships with Simmons and plead for mercy on his behalf. Both the State and Simmons' attorneys referenced his age in their closing arguments and the judge instructed the jury that they could consider age as a mitigating factor. Simmons' attorneys reminded jurors of the reasons why juveniles of Simmons' age are not allowed to drink, vote, serve on juries. In rebuttal the State told the jury that Simmons' age was not a mitigating factor; rather, the fact that he was only seventeen at the time of the offense should scare them more. The jury found that the State had proven the three aggravating factors that it had submitted for their consideration and recommended the death penalty. The judge accepted the jury's recommendation and sentenced Simmons to death.

Successor counsel sought a new trial, arguing that Simmons' trial counsel had been ineffective because they failed to present testimony from clinical psychologists and other witnesses regarding Simmons' immaturity, impulsivity and his susceptibility to influence and manipulation by others, as well as related information about his background and family life. The trial court denied this Motion and the consolidated appeal of Simmons conviction, sentence, and the denial of post conviction relief were all affirmed by the Missouri Supreme Court. Simmons' petition for a writ of habeas corpus was also denied by the federal courts. Simmons again sought post conviction relief after the United States Supreme Court decided Atkins v. Virginia, 122 S.Ct. 2242 (2002), which held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. Simmons asserted that a similar national consensus had developed against the execution of juvenile offenders as had against the execution of the mentally retarded requiring the abolishment of the juvenile death penalty. The Missouri Supreme Court agreed and set aside Simmons' death sentence.

The United States Supreme Court granted certiorari and affirmed the decision of the Missouri Supreme Court. Justice Kennedy, writing for the Court, detailed the Court's practice of interpreting the Eighth Amendment's proscription against "cruel and unusual punishment" through the lens of history, tradition and precedent. Justice Kennedy further explained this practice as necessitating a review of the nation's evolving standards of decency to determine whether or not a national consensus had been reached as to the acceptability of a particular punishment, as well as a determination by the Court whether in its independent judgment, the punishment passes Constitutional muster. Justice Kennedy then turned to the Court's last decision to address the execution of juveniles, Stanford v. Kentucky, 109 S.Ct. 2969 (1989) and reviewed it in light of Atkins'.

According to Justice Kennedy, in Stanford, a plurality of justices concluded that there was no national consensus that the use of execution as a punishment for juvenile offenders over fifteen but under eighteen offended contemporary standards of decency such that it constituted cruel and unusual punishment. On the same day, the Court also concluded in Penry v. Lynaugh, 109 S.Ct. 2934 (1989), that the Eighth Amendment did not prohibit the execution of the mentally retarded. In reaching both of these conclusions, Justice Kennedy noted that the Court looked to the number of states that had outlawed the execution of these classes of offenders and concluded that there were not enough states implicated to provide evidence of a national consensus. In both Stanford and Penry, however, the Court refused to impose its own judgment to assess the proportionality of the imposition of the death penalty against the implicated classes.

When the Court returned to the issue of the execution of the mentally retarded in Atkins, Justice Kennedy noted that it conducted a new analysis of the issue in light of contemporary standards of decency. In Atkins, the Court found that in the three years since they had decided Penry, the tide had shifted such that only a minority of states permitted the execution of the mentally retarded, and only then in rare circumstances. However, the Court also looked to Eighth Amendment decisions predating Stanford and

Penry and determined that it was also necessary for the Court to impose its independent judgment on the question of the acceptability of the death penalty. The Court then acknowledged that the impairments of mentally retarded offenders make it “less defensible to impose the death penalty as retribution” and less likely that there will be any deterrent effect. On this basis the Court held that standards of decency had evolved to the point that the execution of the mentally retarded constituted cruel and unusual punishment.

Drawing from this precedent, Justice Kennedy first traced the evolution of national attitudes on the juvenile death penalty post Stanford. Justice Kennedy found that five states that had allowed the juvenile death penalty at the time of Stanford had since abolished it, with the result that the majority of states prohibit the execution of juveniles. Additionally, Justice Kennedy noted that in those states that still allowed the juvenile death penalty, it was infrequently used. Justice Kennedy then concluded that there was objective evidence to support a finding of a national consensus against the juvenile death penalty.

After reaching this conclusion, Justice Kennedy detailed the Court’s contemplation of the nature of the death penalty as a punishment and the legal precedent restricting its use for a narrow category of the worst crimes and offenders. Justice Kennedy noted that the Court considered this history in the context of scientific and sociological data regarding juveniles, finding that juveniles cannot with any reliability be classified among the worst offenders. The Court recognized three general differences between juveniles and adults, namely juveniles possess: 1) a lack of maturity and underdeveloped sense of responsibility; 2) are more vulnerable and susceptible to negative influences and outside (peer) pressure; and 3) an underdeveloped character without fixed personality traits. The Court then found that these differences mandate recognition that the irresponsible conduct of juveniles is not as morally reprehensible as adults and that even where a juvenile commits a heinous crime, it is unsupportable to conclude that this is evidence of “irretrievable depraved character.” The Court also opined that the vulnerability and comparative lack of control that juvenile’s have over their lives gives them “a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” The Court concluded that once the “diminished capacity” of juveniles is recognized, it becomes evident that the social purposes of retribution and deterrence that the death penalty serves are not met by executing juveniles. The Court then held that on the basis of the national consensus against the juvenile death penalty and its own assessment of the diminished capacity of juvenile offenders, the Eighth and Fourteenth Amendments bar the imposition of the death penalty on any offender under eighteen years of age.

It is not known at this time what the legacy of Simmons will be for Massachusetts juvenile jurisprudence, however, it is hoped that the Court’s recognition of the unique vulnerabilities of juveniles may serve as a reminder to our courts. Specifically, it is hoped that the Court’s recognition of the susceptibility of juveniles to negative influences and peer pressure may spark discussion about the appropriateness of joint venture

prosecutions and perhaps an overall assessment of the capacity of juvenile offenders to form criminal intent. In a similar vein, it is hoped that the Court's acknowledgements regarding the transitory nature of juvenile character traits and the implications of this for rehabilitative potential, may recharge the debate about the appropriateness of the prosecution of juveniles as youthful offenders and the imposition of adult sentences. Finally, it is hoped that such a strongly worded reminder will reaffirm the Commonwealth's commitment to support the juvenile courts around the state and lead to the expansion of services that promote youth development.

COMMONWEALTH v. DIGIAMBATTISTA
442 Mass. 423 (2004)

Valerio DiGiambattista was charged with of burning down a house that belonged to his former landlord, Angelo Paolini. DiGiambattista, his girlfriend (later fiancée) and her children had lived in the house for an unspecified number of years before choosing to move out in March of 1998. DiGiambattista had opted to withhold his rental payments, however, during the last year of his tenancy in response to Paolini's failure to make promised necessary repairs to the premises. Prior to vacating the house, DiGiambattista changed the locks and he and his mother kept the only copies of the key to the front door. Approximately three days after DiGiambattista moved out, the house burnt down. Fire inspectors determined that the blaze was the result of two separate fires, one that had been set using an accelerant near or in a closet, and one that had been set in the kitchen sink.

DiGiambattista was initially questioned by police the night following the fire, and was released. One month after the fire, DiGiambattista was brought in for further questioning. He was Mirandized and executed a written waiver of his rights. During this second interrogation, officers told DiGiambattista that he was their main suspect, and that they had a witness placing him at the scene of the fire. Throughout this, DiGiambattista denied that he was at the scene of the fire and when asked, agreed to take a lie detector test.

After DiGiambattista agreed to a polygraph, which of course the police never intended to administer, a new officer entered the room. This officer carried a thick folder and two videotapes. The folder was filled with blank paper and miscellaneous unrelated news clippings. The videotapes were labeled with the address of the property and the name of the construction company next door. The officer then contrived to "confront" DiGiambattista with the "evidence" against him. The officer then played the role of "good cop" and tried to downplay the incident and empathize with DiGiambattista as a strategy to elicit a confession. DiGiambattista still maintained that he was not at the scene. Finally, DiGiambattista was left alone with the officer who had brought in the tapes who proceeded to confront him with "the evidence" against him again and offer him face-saving explanations for his actions. DiGiambattista then confessed to setting the fire, and gave a detailed explanation of how he set the fire and drew diagrams for the officer. This confession was not recorded in any way. Further investigation showed that DiGiambattista's confession was inconsistent with the evidence found at the scene of the

fire, making it highly improbable that DiGiambattista was actually the one who had set the fire.

At the trial court level, DiGiambattista moved for a required finding of not guilty, which was denied by the trial judge. On appeal, DiGiambattista asked that the corroboration rule, set out in Commonwealth v. Forde, 392 Mass. 453 (1984), be expanded to require that his confession be corroborated with evidence that he was the actual perpetrator of the crime. The court held that this expansion was unnecessary, and that even if the rule was expanded, there was corroboration in this case.

More importantly, however, DiGiambattista challenged the voluntariness of his confession. He filed a motion to suppress at the trial court level arguing that trickery was used to obtain his confession. The motion judge had found that there had been no explicit promises of leniency in their “trickery” to obtain the confession. On appeal, the Supreme Judicial Court found that the combination of an implied promise of leniency, minimization, fake tapes, and further trickery all led to the conclusion that the Commonwealth did not and could not meet its burden to prove that the confession was voluntary.

In reaching this conclusion, the Court reviewed its past decisions regarding the use of trickery by the police. The Court noted that it had issued a staunch disapproval of the use of deliberately false statements to secure a confession twenty five years ago in Commonwealth v. Jackson, 377 Mass. 666 (1979), but had also consistently held that the use of such statements does not compel suppression. Rather, the Court stated that use of false statements is to be considered part of the totality of circumstances in a determination of the voluntariness of a statement, but alone, without further indicia of involuntariness, will not ordinarily prompt suppression. The Court then turned to current research regarding false confessions and related this body of research to the false statements and other coercive elements in the interrogation of DiGiambattista that constituted implied promises of leniency and may have prompted his confession. The Court was clear, however, that they were not seeking to establish whether or not DiGiambattista’s confession was false, but instead simply whether or not it was voluntary.

After concluding that the Commonwealth had not met its burden of proof on the issue of voluntariness, the Court chose to use the case as an opportunity to address the issue of requiring electronic recordings, an issue that had been briefed by the parties and various amici. The Court posited that the case provided a useful illustration of the need for there to be better preservation of the details of an interrogation for adequately assessment of the voluntariness of any statements that result. The Court then suggested that a recording of DiGiambattista’s interrogation would have greatly aided their analysis.

After a review of prior cases where the Court had addressed the issue of recording interrogations, the Court decided not to require that all confessions be electronically recorded. It did, however, hold that if there is not an audiotape of a confession or

statement made during a custodial interrogation, a defendant may request a jury instruction that the Court has stated a preference that confessions be recorded. Further, the jury may be instructed to weigh the evidence of such a confession with great caution and care due to the absence of a recording. Finally, if the voluntary nature of the confession is at issue, the jury can be further instructed that the absence of a recording permits them to conclude that the Commonwealth cannot prove voluntariness beyond a reasonable doubt. There was no such instruction in the case at hand. The Court, therefore, reversed the conviction and remanded the case to Superior Court.

COMMONWEALTH v. ADJUTANT
SJC-09299 (Mass. 2005)

Rhonda Adjutant, an employee of an escort service, was found guilty of the voluntary manslaughter of a client, Stephen Whiting. Adjutant had been driven to Whiting's apartment after Whiting had agreed to a body massage and one hour of an escort's company for \$175. Once inside Whiting's apartment, Whiting asserted that he was expecting intercourse as part of the service. Adjutant refused and called the dispatcher of the escort service. The dispatcher told Adjutant to leave, and that the drivers would be back shortly to pick her up. When Whiting realized that Adjutant was going to leave, he armed himself with a crowbar. Adjutant was armed with a knife, although it is unclear whether she got the knife before or after Whiting got the crowbar. Whiting swung the crowbar and hit Adjutant in the leg, at which point she nicked Whiting in the face with the knife. A struggle ensued, and by the end, Adjutant had fatally stabbed Whiting in the neck.

At trial, Adjutant maintained that she was acting in self-defense when she inflicted the fatal wound. In furtherance of her defense, Adjutant's counsel sought to cross-examine Whiting's neighbors about Whiting's reputation and violent behavior. The judge sustained the prosecutor's objections due to the fact that Adjutant could not have been aware of Whiting's reputation at the time of the incident. Adjutant was convicted of voluntary manslaughter, which was affirmed by the Appeals Court. The Supreme Judicial Court then granted further appellate review to consider whether the trial judge erred in not allowing the evidence concerning Whiting's violent behavior. The Court concluded that the trial judge had erred in barring the introduction of such evidence.

In reaching this conclusion, the Court conducted a comprehensive survey of the laws of other jurisdictions as well as the Federal Rules of Evidence and determined that the overwhelming trend was toward the admission of some form of evidence of a victim's violent character to support a defendant's claim that the victim was the initial aggressor. The Court further noted that all other jurisdictions that admit character evidence also admit reputation evidence and that some also allow evidence of specific violent acts. The Court then dismissed concerns raised by the Commonwealth that juries would be distracted by information about the victim's unrelated acts of violence and refused to limit the type of evidence that could be considered to character evidence. According to the Court, such evidence has been found to have probative value and its admission is

considered consonant with the principle of the use of latitude in the admission of exculpatory evidence in criminal trials.

The Court then held, as a matter of common-law principle, that it is within the discretion of a trial judge to admit evidence of a victim's prior violent acts and violent reputation evidence in self-defense cases where the identity of the initial aggressor is in dispute. A defendant seeking to introduce evidence of specific acts of violence to support a claim that the victim was the first aggressor must provide the court and the Commonwealth notice of this intent and of the specific evidence to be offered. Notice must be provided in a timely manner, such that the prosecution can then investigate and prepare a rebuttal. The Commonwealth must then provide notice to the court and defendant of whatever rebuttal evidence is to be introduced at trial. Judges then have the discretion to admit specific incidents of violence that the victim is reasonably alleged to have initiated, but must consider whether the probative value of the evidence outweighs any prejudicial effects. The Court concluded that if the judge in the case at hand had considered this new common-law rule of evidence, she may have allowed some of the evidence concerning Whiting's character to come in. For that reason, the case was reversed and remanded for a new trial.

COMMONWEALTH v. WILSON
441 Mass. 390 (2004)

Roosevelt Wilson was charged with possession of marijuana with the intent to distribute within 1000 feet of a school zone. Wilson was arrested when a State Trooper Walls responded to a call from a pizza shop that a person was being beaten or stabbed in the middle of a group of ten people. When Trooper Walls approached the group of men, he made eye contact with Wilson, at which point Wilson turned and walked away, placing his hand to his waist area. Trooper Walls then took Wilson by the back of his shirt and felt the area where Wilson's hand had just been. After Trooper Walls felt what he recognized to be dime bags of marijuana in Wilson's waist, he removed the bags and placed Wilson in handcuffs. During pat frisk Trooper Walls recovered a pager, a cell phone, and \$476 in cash.

Wilson filed a pretrial motion to suppress the marijuana, claiming that Walls lacked reasonable suspicion to stop and frisk him, and that the frisk itself exceeded what is constitutionally permissible. The trial judge denied the motion, and Wilson was convicted of possession of marijuana with intent to distribute and of committing an offense within 1,000 feet of a school. Wilson appealed, and the SJC transferred the case on its own initiative from the Appeals Court.

In Wilson, the Supreme Judicial Court addressed the "plain feel" doctrine as a matter of first impression and concluded that the doctrine comports with the requirements of Article 14 of the Massachusetts Declaration of Rights. According to the Court, the "plain feel" doctrine permits an officer to seize items where, due to the officer's training and

experience, it is immediately apparent that the concealed item is contraband. The “plain feel” must occur in the context of a lawful pat-frisk of the person, and the officer is not permitted to make a “general exploratory search.” The contraband nature of the item must be immediately apparent on touch.

In reaching this conclusion, the Court noted that the “plain feel” doctrine was neither an extension of current law nor a violation of Article 14 of the Massachusetts State Constitution. The Court analogized the “plain feel” doctrine to the “plain view” doctrine, and reiterated that both relied on the lawfulness of the initial seizure. The Court opined that the only difference was in the use of different senses to perceive the nature of the object at issue and was no more susceptible to abuse than the “plain view” doctrine.

Applying the “plain feel” doctrine to the case at hand, the SJC found that Walls did not exceed the scope of the search because he could plainly feel the marijuana when he touched Wilson’s waist. They found that Walls was capable of determining that the object was marijuana due to his experience and training and affirmed the trial court’s denial of the Motion to Suppress.

OTHER CRIMINAL CASES OF NOTE

SEARCH AND SEIZURE

Warrantless Searches

Automobiles

1. Commonwealth v. Murphy, 63 Mass.App.Ct. 11 (2005) (Motion to Suppress firearm found in vehicle properly allowed because police improperly transformed inventory search of person into search of vehicle when officer sought to match key to rental vehicle where there was no overtly criminal information on keys. Motion to Suppress drugs found on codefendant also properly allowed where police had no reasonable suspicion of criminal activity or danger from co-defendant who had approached simply to give police a necklace that he had found).
2. Commonwealth v. Henley, 63 Mass.App.Ct. 1 (2005) (Motion to Suppress drugs found during inventory search properly denied where car legally impounded because there was no authorized driver to remove rental car from breakdown lane of highway).
3. Commonwealth v. Carkhuff, 441 Mass. 122 (2004) (Suspicionless stop and administrative search of defendant at roadblock unconstitutional where troopers failed to provide any prior notice or warning to motorists of the roadblock to minimize the intrusiveness of the stop and search procedure).

4. Commonwealth v. Silva, 61 Mass.App.Ct. 28 (2004) (Motion to Suppress drugs should have been allowed where Commonwealth failed to establish that there were written guidelines for towing impounded vehicles that permitted entry into defendant's car to search for registration and ownership information).
5. Commonwealth v. Feyenord, 62 Mass.App.Ct. 200 (2004) (Appeals Court concluded that dog sniff of the air outside trunk of car stopped for traffic offense did not constitute a search and officer's decision to issue exit order to separate defendant from passenger for questioning was justified after nervous defendant failed to produce valid license or registration in his name. Court also stated that defendant's detention while the dog was summonsed did not constitute a seizure implicating the 4th Amendment or Article 14)
NOTE: Further Appellate Review granted regarding Motion to Suppress
6. Commonwealth v. Goncalves, 62 Mass.App.Ct. 153 (2004) (Motion to Suppress should have been denied where officer's action of leaning into car to turn off engine after defendant arrested for driving with suspended license was physically necessary to effect lawful impoundment and rendered officer's plain view observation of firearm while doing so lawful).
7. Commonwealth v. Muckle, 61 Mass.App.Ct. 678 (2004) (Search of crumpled bag found in car during inventory search was unlawful in the absence of standard written police procedures regarding the opening of closed but unlocked containers during inventory searches of impounded vehicles).

Persons

8. Commonwealth v. Prophete, 443 Mass. 548 (2005) (Court found that search of defendant which involved his removal of his shirt, shoes, socks and pants in special van used by police to conduct strip searches was a permissible search incident to his lawful arrest and not a strip search since he was not required to remove his underwear).
9. Commonwealth v. Scott, 440 Mass. 642 (2004) (The Court finally accepted the judge's finding, after multiple remands, that the trooper could not have seen the distinguishing physical characteristics of the defendant from 15-20 feet away and did not have a reasonable suspicion to stop defendant).
10. Commonwealth v. Perry, 62 Mass.App.Ct. 500 (2004) (Defendant who ran at sight of police was not seized by officer who pursued him because officer did not make any show of authority or say anything to defendant and there was no evidence that defendant knew officer was running behind him).

“Plain Feel”

11. Commonwealth v. Osborne, 62 Mass.App.Ct. 445 (2004) (Officer's seizure of hard object between the cheeks of the defendant's buttocks after officer had located

folding knife in defendant's front pocket was justified under "plain feel" doctrine where contraband nature of item was immediately apparent on touch and in context of knife found).

NOTE: Further Appellate Review granted on issue of jury waiver executed by defendant.

12. Commonwealth v. Cullen, 62 Mass.App.Ct. 390 (2004) (Officer's seizure of coins from defendant's pocket was justified by "plain feel" doctrine where police had reasonable foundation to believe weapon may be found and the coins "appeared" to be a fruit of the burglary the officer was investigating).

Warrant Based Searches

1. Commonwealth v. Forish, 61 Mass.App.Ct. 554 (2004) (Search of defendant's residence pursuant to warrant was unlawful where officers noted the location rather than the specify items to be seized in the applicable space on the warrant and affidavit failed to specify items to be seized).
2. Commonwealth v. Peterson, 61 Mass.App.Ct. 632 (2004) (Appeals Court held that affidavit which was based on hearsay was still reliable because the hearsay used was reliable and supported by additional information).
3. Commonwealth v. Catanzaro, 441 Mass. 46 (2004) (Portion of warrant allowing the search of persons present inside apartment at time of search includes persons outside premises where person outside can be shown to be an occupant of apartment).
4. Commonwealth v. Silva, 440 Mass. 772 (2004) (Police seeking to enter home to serve arrest warrant must possess a reasonable belief that location to be searched is the arrestee's residence and that the arrestee is in residence at the time of the search).

Miranda Issues

1. Commonwealth v. Hilton, 443 Mass. 597 (2005) (Court credited trial court's finding that defendant who agreed to accompany police to station for questioning was not capable of waiving Miranda, but determined that she was not in custody for purposes of Miranda until officers began to ask her specific detailed questions regarding her role in the crime. The Court declined to suppress any statements made prior to their finding of "custody." The Court also affirmed the suppression of certain statements defendant made to a court officer, finding that her Sixth Amendment rights had attached prior to her conversation with the court officer and that the court officer could be construed a law enforcement agent).
2. Commonwealth v. Cruz, 442 Mass. 299 (2004) (Statements made by defendant who was wrongfully arrested when police unlawfully entered his home without a warrant in the absence of exigent circumstances were still admissible because defendant conceded that he received and understood his Miranda warnings and there was no

connection between the evidence unlawfully seized at his home and his later statements at the police station).

3. Commonwealth v. Novo, 442 Mass. 262 (2004) (Portion of defendant's statement to police made after police began to misrepresent his trial rights must be suppressed because such coercive tactics tainted his confession and rendered his statements involuntary; however, defendant's earlier statements post Miranda and pre coercion were still admissible).

ELEMENTS OF CRIMES

Criminal Harassment

1. Commonwealth v. Clemens, 61 Mass.App.Ct. 915 (2004) (Crime of criminal harassment requires evidence of no less than three separate incidents of wilful and malicious conduct intended to alarm a specific person which did cause alarm and would cause a reasonable person to suffer substantial emotional distress. Criminal harassment conviction overturned where court determined that only the last of four encounters between defendant and victim constituted harassment).

Destruction of Property

1. Commonwealth v. McDowell, 62 Mass.App.Ct. 15 (2004) (Crime of defacing personal property requires that there be willful and malicious conduct OR wanton conduct. Conviction for defacing property appropriate where defendant intended to drive car without concern for consequences, which included the destruction of a fence and other property).
2. Commonwealth v. Kirker, 441 Mass. 226 (2004) (Defendant convicted of slashing automobile tires, was entitled to a finding of guilty on lesser included offense of malicious destruction of property under \$250 because correct measure of valuation for damaged property was cost of replacement of the tires and not the value of the automobile).
3. Commonwealth v. Deberry, 441 Mass. 211 (2004) (Court concluded that Defendant who punched hole in wall was responsible for cost to repair hole and held that where damage caused to a portion of a property can be repaired or replaced, the value of the property is to be measured by the pecuniary loss rather than the fair market value of so much of the property as has been destroyed).

Disorderly Conduct

1. Commonwealth v. Lopiano, 60 Mass.App.Ct. 723 (2004) (Commonwealth failed to establish that defendant who was yelling and flailing his arms in a motel parking lot engaged in tumultuous behavior where there was no claim that his loud protestations constituted a threat of violence or that his flailing arms were anything more than a demonstration of his agitation, or that he was extremely noisy).

Identity Fraud

1. Commonwealth v. Giavazzi, 60 Mass.App.Ct. 374 (2004) (Where defendant altered identification of another and attempted to cash checks in that person's name, but additional evidence showed that the owner of the checks had asked the defendant to cash checks, court found that Commonwealth had failed to prove that defendant impersonated another without his express authorization).

Incest

1. Commonwealth v. Rahim, 441 Mass. 273 (2004) (Consanguinity is essential element of incest; statute only criminalizes relationships between persons related by blood or adoption).

Indecent Assault and Battery

1. Commonwealth v. Rosa, 62 Mass.App.Ct. 622 (2004) (Adult defendant who inserted his thumb into 11 year old victim's mouth past her teeth while making sexually suggestive statements clearly intended to engage in "pseudo fellatio" and as such engaged in conduct that is fundamentally offensive to contemporary moral values sufficient to sustain his conviction for indecent assault and battery).

Mayhem

1. Commonwealth v. Tavares, 61 Mass.App.Ct. 385 (2004) (Injury to victim's fingernails suggesting that a needle had been stuck under them would have been so painful and required such repetition and restraint as to qualify as serious under the second prong of the mayhem statute. Similarly, evidence of serious injuries to victim's eyes though not permanently disabling were also rightly submitted to jury under first prong of mayhem statute).

Open and Gross

1. Commonwealth v. Kessler, 442 Mass. 770 (2004) (Defendant's conviction for open and gross lewdness and lascivious behavior set aside where victims who saw defendant expose and manipulate his penis were neither shocked or nor alarmed, but rather, excited and giggly).

Possession of an Infernal Machine

1. Commonwealth v. Carter, 442 Mass. 822 (2004) (Unassembled elements that could be combined to create an infernal machine that are not in and of themselves capable of inflicting unusual damage do not constitute infernal machines for the purposes of the statute).

School Zone

1. Commonwealth v. Bell, 442 Mass. 118 (2004) (Court determined that defendant not entitled to admit Department of Education regulations regarding alternative education programs where defendant sought to challenge Commonwealth's designation of an alternative education program as a secondary school for the purposes of the school

zone statute and instructed the trial court to use a dictionary definition of the term “secondary school” rather than DOE regulations because that fits better with the broad purpose of the school zone statute.

Threats

1. Commonwealth v. Maiden, 61 Mass.App.Ct. 433 (2004) (Defendant who uttered threat against boyfriend’s former wife while she and the former wife were leaving a courtroom within earshot of a police detective was appropriately convicted of threats though the former wife did not hear the threat until the detective told her about it because the defendant should have reasonably expected that the detective would hear her and communicate her threat to the former wife).

EVDENTIARY ISSUES

Identification

1. Commonwealth v. Zimmerman, 441 Mass. 146 (2004) (Superior Court denied defendant’s motion for funds for expert on cross racial identification, finding that an average person would not go to the expense of hiring an expert given the questionable admissibility of such evidence. SJC reversed holding that judge should have considered the desirability and necessity of the testimony to the defendant’s case and not only the potential for admissibility. The opinion contains great language from Justice Cordy about the dangers of cross-racial identification, including a review of recent research).

(Someone else is guilty)

1. Commonwealth v. Dew, 443 Mass. 620 (2005) (Defendant not entitled to introduce evidence that a different murder occurred at same address two days before murder at issue to suggest that someone else was responsible for the murder at issue because evidence showed that defendant had unlimited access to entire address and could have committed that murder as well as the one at issue).
2. Commonwealth v. Conkey, 443 Mass 60 (2004) (Defendant entitled to introduce evidence that 3rd party had pattern of sexually aggressive behavior because details were so closely connected in point of time and method of operation as to cast doubt on the identification of the defendant as the perpetrator of the crime)

Bad Acts

1. Commonwealth v. Delong, 60 Mass.App.Ct. 528 (2004) (Evidence of two prior robberies admissible as bad acts against defendant where all three robberies occurred within 3 days of each other, within a few miles of each other and of the defendant’s home, and were committed by someone in similar clothes who accosted a victim in a similar manner and in the same location in each store).

2. Commonwealth v. Swafford, 441 Mass. 329 (2004) (Judge properly admitted evidence of gang affiliation where the evidence was relevant to show both motive and to support a joint venture theory of prosecution).
3. Commonwealth v. John, 442 Mass. 329 (2004) (Judge properly admitted evidence of gang affiliation where evidence was relevant to establish the background for the murder and was not being offered for the purpose of demonstrating that the defendant had a propensity for criminality).
4. Commonwealth v. Mendes, 441 Mass. 459 (2004) (Judge properly admitted evidence of defendant's prior (cocaine and prostitutes) and subsequent (lots of cocaine and big spending) bad acts because they were relevant to his motive to kill his wife).

Character Evidence

1. Commonwealth v. Martin, 442 Mass. 1002 (2004) (Judge improperly admitted evidence of defendant's alias where alias was not relevant to any of the crimes charged and was simply used by Commonwealth for the impermissible purpose of impeaching the defendant's character and credibility where the defendant had not put his character at issue).
2. Commonwealth v. Walker, 442 Mass. 185 (2004) (The Court declined to adopt Proposed Mass. R. Evid. 405 (a) which would permit witnesses to testify not only about a person's reputation in the community, but also to offer their own opinion of his character).

Rape Shield

1. Commonwealth v. Harris, 2005 WL 667821 (Mass.) (Court re-affirmed trial court's discretion despite rape shield statute to allow defendant to impeach sexual assault complainant with prior common nightwalker conviction if impeachment value of conviction outweighed prejudice to Commonwealth and complainant).

Bishop

1. Commonwealth v. Pelosi, 441 Mass. 257 (2004) (Where judge failed to make a Bishop Stage One determination of privilege, defendant's submission could not be said to fail to meet the relevancy standard of Stage 2 and was adequate to meet the "different and less demanding standard of relevance applicable to obtain access to unprivileged records as compared to records for which privilege has been asserted").
2. Commonwealth v. Lampron, 441 Mass. 265 (2004) (Court found that Bishop is not implicated until a privilege is asserted and that motions for production of potentially privileged records fall under Rule 17(a)(2), which covers all requests for records held by 3rd parties. Court further found that the affidavit for a motion for production under Rule 17(a)(2) may contain hearsay as long as the sources are identified, the hearsay is

reliable, and the affidavit establishes with specificity the relevance of the requested documents.

3. Commonwealth v. Maxwell, 441 Mass. 773 (2004) (Defendant sought to obtain complainant's privileged AIDs treatment records which Commonwealth claimed were barred from disclosure due to the fact that the AIDs treatment records are protected by an "absolute privilege." The Court held that Bishop-Fuller protocol applies to AIDs treatment records and that even "absolute privileges" may be trumped by a defendant's right to a fair trial).

Impeachment

1. Commonwealth v. Hailey, 62 Mass.App.Ct. 250 (2004) (Commonwealth's impeachment of own witness with prior grand jury testimony did not implicate Benoit because Commonwealth did not call witness for the sole purpose of impeachment; rather, witness had current memory of events surrounding the incident and his testimony contained probative evidence).

Verbal Completeness

1. Commonwealth v. Bruce, 61 Mass.App.Ct. 474 (2004) (Where a witness was confronted in cross-examination with the fact that he had testified to something on direct that he had omitted to mention to the police and the Commonwealth sought to introduce grand jury testimony that was consistent with the witnesses trial testimony to rehabilitate him, the judge erred in allowing in admitting the grand jury statements under the doctrine of verbal completeness because the statement at issue was entirely separable from the witnesses grand jury testimony).

Missing Witness

1. Commonwealth v. Ortiz, 61 Mass.App.Ct. 468 (2004) (Where there was no evidence to suggest that defendant willfully attempted to withhold or conceal significant evidence by refusing to call an available witness, rather the record reflected that the witness' testimony would have been cumulative and that the defendant had made efforts to secure the presence of the witness and had no superior knowledge as to the witness' identity or whereabouts, the foundation was not met for the judge's missing witness instruction).

Consciousness of Guilt

1. Commonwealth v. Delaney, 442 Mass. 604 (2004) (Defendant's refusal to accompany the police when they presented him with a warrant at his place of employment and his act of walking away from the police was properly admitted as evidence of "consciousness of guilt" and did not implicate Article 12 or the 5th Amendment because the defendant had no choice but to comply with a lawful warrant).

ASSORTED TRIAL ISSUES

Competency

1. Commonwealth v. Torres, 441 Mass. 499 (2004) (While bail statute has been interpreted to require that a defendant be given a reasonable opportunity to be heard on the matter of bail and to be represented by counsel at such a hearing, and that bail is a critical stage in the proceedings, the Court concluded that there is no statutory bar against conducting a bail hearing for a defendant who has been found incompetent to stand trial and that the conducting such a hearing does not per se violate that defendant's due process rights, but may if the defendant's infirmity precludes any meaningful communication with counsel).

Severance / Joinder

1. Commonwealth v. Perez, 62 Mass.App.Ct. 912 (2004) (Appeals Court held that the trial judge did not abuse his discretion when he joined three robberies for trial where all three crimes happened in the same area in the span of 30 minutes and the defendant failed to demonstrate prejudice).
2. Commonwealth v. Pillai, 61 Mass.App.Ct. 603 (2004) (Trial judge erred in joining indecent assault and battery on a child charges where the charges involved separate acts against different children that occurred four or five months apart from each other despite similarities in the victims, the offenses and the circumstances of the offenses because the acts could not be said to be part of a single course of action, scheme or plan).
NOTE: Further Appellate Review granted.
3. Commonwealth v. Gaynor, 443 Mass. 245 (2005) (Trial judge did not err in joining four separate murder indictments where the joinder served the interests of judicial economy and the evidence supported a common plan to prey on cocaine addicted women for sexual gratification and a similar temporal and schematic nexus. The Court also noted that the defendant failed to demonstrate any prejudice from the joinder).

Jury Selection

1. Commonwealth v. Lopes, 440 Mass. 731 (2004) (The Court found that though it would have been preferable to ask, it was not reversible error for the trial judge in a homicide case to refuse to ask the venire whether or not they or anyone in their family had been the victim of a violent crime).

Jury Instructions

1. Commonwealth v. Graham, 62 Mass.App.Ct 642 (2004) (Defendant facing, among other charges, three counts of assault and battery on police officers and resisting arrest, was entitled to instruction on self defense where evidence called into question whether the officers involved used excessive or unnecessary force to subdue him such that he would have been allowed to use reasonable force to defend himself).

ASSISTANCE OF COUNSEL

1. Commonwealth v. Godwin, 60 Mass.App.Ct. 605 (2004) (Defendant bears burden of demonstrating to court that s/he is indigent and unable to retain counsel).
2. Commonwealth v. Yates, 62 Mass.App.Ct. 494 (2004) (Defendant who pled to 2nd degree murder permitted to withdraw plea where Court found that defendant's plea was not intelligently made because counsel failed to explain or discuss with him the concept of "adequate or reasonable provocation.")
3. Commonwealth v. Teti, 60 Mass.App.Ct. 279 (2004) (The Appeals Court declined to find that a conflict of interest existed where defense counsel's co-counsel had briefly represented a key witness in defendant's trial, long before co-counsel had learned of the status of this witness as an informant against the defendant, where there was no evidence that co-counsel had gained any privileged information through this representation that was used to the detriment of the defendant or shared any information that could have harmed the defendant, where co-counsel's involvement in the trial was "virtually nonexistent," and the defendant had indicated that he was satisfied with his representation by his lead counsel. The Appeals Court also did not find that it was ineffective for lead counsel to fail to advise the defendant of the potential conflict where informing him would not have "accomplished anything material for the defense.")

PROBATION SURRENDERS AND RELATED ISSUES

1. Commonwealth v. Negron, 441 Mass. 685 (2004) (Court held that when an Assistant District Attorney assists in a probation surrender, the Commonwealth becomes a party to the proceedings and can take a direct appeal from an order finding that a defendant has not violated the terms and conditions of his probation).
2. Commonwealth v. Kendrick, 63 Mass.App.Ct. 142 (2005) (The Appeals Court concluded that the defendant violated a condition of his probation that mandated he not have any contact with children under the age of 16 by attending a car show that was held in the parking lot of a candy store which he should have realized would place him in close proximity to children, and by then displaying an antique car and dog in a manner that he'd used in the past to attract children, and ultimately by failing to leave the car show when he became aware that children were present).
3. Commonwealth v. Wilcox, 63 Mass.App.Ct. 131 (2005) (The Appeals Court concluded that defendant violated a condition of his probation that he have no unsupervised contact with anyone under the age of 16 by following a girl in his car who was walking home from school to her home, then staring at that girl and two others through the window of a grocery store, and then following them back to one girls home where he proceeded to circle the block repeatedly).

MISCELLANEOUS

1. Commonwealth v. Wemers, 61 Mass.App.Ct. 182 (2004) (Where a trial judge dismisses an indictment without prejudice, the Commonwealth has the right to appeal that dismissal).
2. Commonwealth v. Clegg, 61 Mass.App.Ct. 197 (2004) (Appeals Court concluded that it was an abuse of discretion for a judge hearing motion to suppress to deny the Commonwealth's Motion to Continue and require it to proceed without the presence of its sole witness where the judge failed to inquire into the reason for the witness' absence and there was no evidence that the witness' failure to appear was not based on good cause or that the defendant (who had previously defaulted) was prejudiced. The Appeals Court perceived the judge's action of allowing the Motion after the Commonwealth failed to present its witness as tantamount to dismissing the case and felt that there were other more appropriate less severe sanctions available to the judge including the issuance of a warrant for the witness).
3. Commonwealth v. Adkinson, 442 Mass. 410 (2004) (Where a child witness or victim is in the custody of the Department of Social Services, the Department has the authority to refuse to allow that child to be interviewed by the defendant, his attorney or any experts. Such refusal cannot be construed as interference with a defendant's rights by prosecution because, according to the Court, there is no agency relationship between the District Attorney's Office and the Department. The Court noted that just because the Department refers cases to the District Attorney's Office, such a referral does not create an interest in the prosecution or give the prosecutor any control over the Department. The Court concluded that the relationship is best described as a cooperative effort intended to support the best interest of a child and not the prosecution of criminal cases).

THE NEW RULES OF CRIMINAL PROCEDURE¹

April 2004

By Chris Dearborn, CPCS Salem

Rule	Old rule	New Rule	Bottom line
Rule 3(a) Complaint and Indictment	3(a) "Defendant...requests a probable cause hearing, that request shall constitute a waiver of...indictment"	3(a) if "the defendant has waived the right to an indictment...the Commonwealth may proceed by way of complaint."	3(a) The omission of the probable cause language clearly suggests that insisting on a probable cause hearing does not by itself constitute a waiver of indictment. (This appears to have been the practice anyway, but now there should be no ambiguity.)
Rule 3(c) Waiver of indictment	3(c) "a defendant shall not waive the right to indictment and elect to proceed by probable cause hearing..."	3(c) Contemplates a written waiver to indictment with no mention of it being tied into the request for a probable cause hearing	" "
Rule 3(f) Probable cause hearing	No old rule	3(f) for either bind over felonies or felonies for which the District Court declines jurisdiction, the defendant has the right to a probable cause hearing, unless an indictment has returned.	This is identical to the previous legal principle. The location of the language is just different.
Rule 3(g) the complaint process	No old rule	3(g) "The complainant shall convey to the court the facts constituting the basis for the complaint..."either reduced to writing or recorded." under oath requirement	The requirement is essentially what was previously required under the District Court/ Municipal Rules of Criminal Procedure and the Trial Court Rules.
Rule 3.1 Determination for Probable Cause	No old rule	(a) 24 hour rule (b) Police may present the information orally or in writing (e) the judicial officer shall make a determination in writing. (f) "The order and	" " Currently, many District Courts will not allow you to copy police reports from a file where

¹ The new rules go into effect on **September 7th, 2004** and apply only to complaints and indictments initiated after that date.

		findings...with all the written information submitted by the police” shall be submitted. “These documents... shall be public record. ”	you are not filing an appearance. The language creates a strong argument that any police report in a court file is a public record. ²
Rule 5 The Grand Jury	The old rule mandated a venire of 45 persons.	The new rule requires “the appropriate number of jurors” be summoned.	Under both rules not more than 23 grand jurors are selected.
Rule 7 Initial Appearance and Arraignment	The rule, like all of the new rules, eliminates separate provisions for District Court and Superior Court		This is logical and easier to read.
Rule 7(b) Appearance of Counsel	The old rule only applied to District Court.	(b)(2)“The court may permit an appearance...for such a time as the court may order...”	This codifies what was already the practice in most courts.
Rule 7(c) Arraignment	The old rule was 7(d)	The language of the two rules is identical.	
Rule 7(d) Provision of Criminal Record; Preservation of Evidence	No old rule	“The Court shall ensure that at or before arraignment” (1) the defendant’s criminal record is provided and (2) the parties are provided the opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E)	The record was routinely provided and was required under both the District and Superior Court Rules. This provision just legislates the opportunity to do something that is good practice in the right case and not a practice that judges typically oppose.
Rule 7(e) Order Scheduling Pretrial Proceedings	No old rule	“At a district court arraignment on a complaint which is outside the jurisdiction of the District Court’s final jurisdiction or on which jurisdiction is declined,	The old rules implied the right to an interim pretrial date, and the District Court Rules of Criminal Procedure explicitly required one date between the

² The same argument can be made under the District Court and Municipal Rules; however, it may be a slightly stronger argument now.

		the Court shall schedule the case for Probable Cause Hearing . “In all other District Court and Superior Court cases the” the parties shall (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.	arraignment and probable cause date. ³ This provision clearly mandates two separate and distinct dates for both District and Superior Court. See rule 11 below for more.
Rule 11 Pretrial Conference and Pretrial Hearing	The old rule had separate provisions that applied to the District Court and the Superior Court	11(a) except on a complaint regarding which the court will not exercise final jurisdiction the parties are required to attend a pretrial conference. The defendant shall be available for attendance at the pretrial conference	The new rules clearly mandate two separate dates and allow for the attendance of the defendant at both dates. In Superior Court, where in practice the two events are often consolidated, there may be little practical effect, unless the Courts take the intent of the drafters to consolidate the pretrial hearing and discovery motions into one date seriously. In the District Court, the practice is to have two separate dates, however, the provision requiring the defendant’s attendance at both events is new. Practice tip: As a time and cost saving measure, there is a movement in the court system to eliminate as many trips to court for defendants as possible. The defense bar needs to fight for the appearance of the defendants at the pretrial conference.
Rule 11(a)(1)(C)	The old rule contemplated discussion at the pre trial conference” of the nature of the defense”	The new rule omits this language.	Somebody must have realized this was overbroad and absurd. The new rules still trigger very specific obligations on behalf of defense counsel regarding certain defenses.
Rule11(b) The Pretrial Hearing	There was no equivalent old rule.	The new rule requires the pretrial conference report to be filed and “the court shall hear all discovery motions pending at	This apparently is an attempt to consolidate events especially in light of the broadened

³ See District/Municipal Court Rules of Criminal Procedure rule 4(f). The new rules are silent about resolving any inconsistencies that may exist between separate sets of rules. The most logical assumption is that the new rules trump this provision. Hopefully, the reporter’s notes will address this issue.
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		the time of the pretrial hearing.” See Rule 13(d)(1)	mandatory discovery in new rule 14. In practice, with the requirement of a separate pretrial conference date where the defendant is entitled to be present, the number of court events should be the same.
Rule 11(c) Compliance Hearing	No old rule	This new section contemplates a separate compliance date only if there are residual discovery issues from the pretrial hearing/discovery hearing. The rule also allows for the selection of a trial date or a trial assignment date once compliance is completed.	The rules are not crystal clear on this, but presumably you can wait, if you choose to, and schedule any other pretrial motions post compliance.
Rule 12 Pleas and Dispositions	The vast majority of this rule is the same.	Masculine pronouns are replaced with gender neutral pronouns.	
Rule 12(c)(2)(A) Contingent Pleas	The same principle was in a different sub section of the old rule 12.	Allows the defendant to withdraw his plea when the recommendation is agreed and the judges chooses to exceed that recommendation	
Rule 12(c)(2)(B) Defendant Capped Pleas	“ “	Allows the defendant in District Court only to tender a defense capped plea and withdraw the plea if it rejected by the court.	
Rule 12(c)(3) Notice of Consequences of Plea	Same number. With the approval of the Court, the old rule permitted counsel, rather than the judge, to inform the defendant of his various rights.	Omits this language. Broadens the laundry list of what the judge is required to inform the defendant of before his plea can be accepted to include: <ul style="list-style-type: none"> (1) community parole supervision for (2) sexually dangerous persons statute (3) sex Offender registry provisions (4) alien warnings 	Oddly enough, the alien warnings were previously only required by statute and not listed under rule 12. Successful motions for a new trial based on inadequate colloquies may be a dying breed.

Rule 12(c)(5)(A) Factual Basis For Plea	The old rule is identical and the same number	“The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea.” ⁴	
Rule 12(d) Withdrawal of Plea	Old rule only	Deleted from new rules	The old rule arguably prevented the prosecution from making the same offer again if a plea was withdrawn. Someone must have decided this was a silly restriction on plea negotiations.
Rule 13(a) Pre Trial Motions	The old rule had District Court only provisions because of de novo system	Other than the one deletion, the rule remains the same	
Rule 13(b) and (c)	The old rule is the same as	the new rule	
Rule 13(d) Filing Motions	Old rule had separate provisions for District and Superior Courts	The new rule consolidates	
Rule 13(d)(1) Discovery Motions	Did not apply specifically to discovery motions.	“Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown.”	This change is consistent with the central theme of the rule changes: to expedite the process by creating less court dates and attempting to reduce discovery disputes.
Rule 13(d)(2) Non Discovery Pre Trial Motions	The old rules, which did not seem to be followed in practice, contained different, and in some cases much tighter deadlines. For example, in Superior Court the old rule required disputed pre trial motions to be filed within seven days of the filing of the pre trial conference report.	Any other pre trial motions “shall be filed Before the assignment of a trial date or within 21 days thereafter, unless good cause shown.”	The new rules on deadlines do not seem to be that onerous. However, only time will tell to what extent, if any, they are enforced.

⁴ This language arguably supports the option of an *Alford* plea. See *North Carolina v. Alford*, 400 U.S. 25 (1970)
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<p>Rule 13(e) Hearing on Motions</p>	<p>The old rules did not have an analogous separate section.</p>	<ol style="list-style-type: none"> (1) All pending motions are supposed to be resolved prior to the selection of a trial date. (2) Any non discovery pre trial motions can be litigated at any subsequent court date. 	<p>This provision does not appear like it will have any effect on current practice.</p> <p>Read in conjunction with the rest of rule 13, this seems to contemplate or at least allow for two separate dates; one for filing and one for the hearing.</p>
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<p>Rule 14 (a)(1)(A) Mandatory Discovery</p>	<p>Old rule allowed mandatory discovery “upon motion....”</p> <p>Under the old rule, the mandatory discovery was limited to (A) defendant’s written or recorded statements, (B) statements of a person who testified in front of a grand jury; and (C) facts of an “exculpatory” nature.</p> <p>Under the old rule, the discretionary discovery available on motion included:</p> <p>names and addresses of all Commonwealth witnesses and production by Probation Dept. of record of such witnesses;</p> <p>Old rule did not separately treat police.</p> <p>No analogous provision in old rule.</p>	<p>The new rule refers to it as “automatic”.</p> <p>No motion is required for the automatic/mandatory discovery</p> <p>The rule also specifically qualifies, consistent with the case law, what possession, custody or control means.⁵</p> <p>The time line for compliance is “at or before the pretrial conference”</p> <p>The new rule expands the old mandatory list by adding to it: (i) co-defendant’s written or recorded statements and the substance of any oral statements of either defendant or co-defendant; and (ii) The grand jury minutes that underlie the indictment.</p> <p>The new rule adds to the list of mandatory discovery automatically available the following items, some borrowed from the old discretionary list, and some completely new:</p> <p>(iv) names, addresses and DOB of prospective witnesses (other than law enforcement witnesses) to be provided both to defendant and to the Probation Dept (see 14(a)(1)(D), requiring Probation Dept to provide record of defendant and of all witnesses so identified);</p> <p>(v) names and business addresses of police witnesses;</p> <p>(vi) intended expert opinion evidence other than for criminal responsibility (covered by 14 (b)), including identity of expert, current c.v., “publications” and reports;</p> <p>(vii) police reports, photographs tangible objects, exhibits, scientific tests and experiments and statements of witnesses the Commonwealth intends to call at trial;</p>	<p>It remains to be seen how “automatic” this discovery will be in practice.</p> <p>In theory, new rule 14 should stream line the discovery process and limit discovery motion practice.</p> <p>The list is much more extensive than what was previously required and may, if the judges treat it seriously, create some leverage in the plea process.</p> <p>MGL Ch. 218 sec. 26A mandates this discovery in BMC and District Ct., but not subject to automatic production.</p> <p>MGL ch. 218 sec. 26A continues to mandate the old rule’s more general and broader discovery in the BMC and District Ct., but, again, not subject to automatic production</p>
<p>MCLE JUVI Conference 2005.rtf</p>			

Rule 14(a)(1)(B) Reciprocal Discovery	<p>The old analogous provision, 14(a)(3)(A) & (B), allowed the court to condition the receipt of discovery on reciprocity by the defense.</p> <p>The old rule also allowed the Commonwealth to move for reciprocal discovery even if the defendant had not moved for discovery discretionary or otherwise.</p>	<p>Under the new rule, the defendant “shall disclose” to the Commonwealth reciprocal discovery of a similar nature but only after the defense has received its discovery.</p> <p>The only limitation imposed in the new rule is consistent with the applicable case law: “which the defendant intends to use at trial”</p>	<p>The new rule broadens the discovery obligations of the defense; however, the limitations imposed are consistent with the existing law. The rule specifically refers to 14(a)(1)(A) and lists vi, vii and ix.</p> <p>The rule does not require a motion from the commonwealth and is mandatory once discovery has been furnished.</p> <p>At least the rule finally uses the word reciprocal correctly.</p>
Rule 14(a)(1)(C) Stay of Discovery; Sanctions	Old rule relating to sanctions was in a different section, and, since the discovery was only on motion (allowing for the opponent to assert any objection) there was no provision for a stay to allow an objecting party to seek a protective order.	In substance the rule as it relates to sanctions is the same. The Court has tremendous discretion and latitude in imposing sanctions, if at all. The new rule now provides for a procedure, including a stay of automatic discovery , to allow an objecting party to seek a protective order. 14(a)(6)	Because so much more discovery is mandatory and because it has to be provided earlier in the game, this issue may rear its ugly head more often and earlier in the process.
Rule 14(a)(1)(D) Record of Convictions	The old rule required a court order and/or a motion	Requires, without a motion , the probation department to provide records of the defendant and any witnesses. ⁶	Automatic now

⁵ See generally *Commonwealth v. Martin*, 427 Mass. 816 (1998); *Kyles v. Whitley*, 514 U.S. 419 (1995).

⁶ The rule is silent on whether this provision applies to NCIC requests.

<p>Rule 14(a)(1)(E)</p> <p>Notice and Preservation of Evidence</p>	<p>No analogous provision in the old rule.</p>	<p>The rule requires, “upon receipt of information that any item...exists, except that is not within the possession...of the prosecution..., the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item’s location and the identity of any persons possessing it.</p> <p>The rule also contemplates the option of filing a motion to preserve such items.</p>	<p>The rule requires the defense to raise the issue first. Perhaps a specific motion to preserve that echoes the language of the rule could, arguably should, be filed.</p>
<p>Rule 14 (a)(2)</p> <p>Motions for Discovery</p>	<p>No old rule</p>	<p>Allows for the filing of discovery motions by the defendant and the Commonwealth-only after it has filed its certificate of compliance--and refers back to rule 13(d)(1)</p>	<p>The rule’s explicit requirements for the defendant are the same. However, it does preclude the Commonwealth from filing any discovery motions until after they have provided all automatic/mandatory discovery to the defendant.</p>
<p>Rule14 (a)(3)</p> <p>Certificate of Compliance</p>	<p>No old rule</p>	<p>Requires both parties to file a written “certificate of compliance” with the court.</p>	<p>The rule excludes expert reports.</p> <p>Under the related rules, the Commonwealth’s obligations are triggered at an earlier date than the defendant.</p>
<p>Rule 14 (a)(4)</p> <p>Continuing Duty</p>	<p>The old rule was 14(a)(3)(B)(4)</p>	<p>Essentially the same rule.</p>	

Rule 14(a)(5-7) (5) Work Product (6) Protective Orders (7)Amendment of Discovery Orders	The old rule was 14(a)(3)(B)(5-7)	The two rules are identical except that (a)(6) relating to Protective Orders adds a sentence making it explicit that just because the objecting party must now move for a protective order, instead of simply opposing the other party's discovery motion, the burden of proof with regard to, e.g., privilege, is not altered.	
Rule 14(a)(8) Waiver of Discovery	No analogous provision in the old rule.	The new rule expressly permits a party to waive her right to otherwise automatic and mandatory discovery or to its production within the mandated time. Requires written, specific waiver , signed by the party.	This provision is necessitated by the automatic and mandatory nature of most discovery under the new rule, allowing a party to opt out of her right to automatic discovery.
Rule 14(b)(1)(A) Special procedures; Alibi	Same as the old rule		
Rule 14(b)(1)(B) Disclosure of Information re: Alibi	Same number as old rule	Under the new rule the time line is changed to seven days from the notice.	The new rule applies uniformly to both District and Superior Court.
Rule14 (b)(1)(C-F)	The rules are exactly the same.		
Rule 14 (b)(2) Lack of Criminal Responsibility	The entire rule is the same as the old rule		
Rule 14(c) Sanctions for Non compliance	“ “		
Rule 14(d)	The old rule was the same	The new rule expands 14 (d)(1) ,	

<p>Definition of a Statement</p>	<p>number. Part 1 of the old rule required that to be a “statement,” a writing must be “signed or otherwise adopted or approved” by the writer, and it made no mention of notes or prior drafts that underlay the production of such a writing.</p> <p>Part 2 of the old rule did not include “written” recording of an oral statement, although the rule did, and continues to, include “stenographic” recordings.</p>	<p>which covers written statements by a percipient witness, by deleting the requirement of formal adoption or approval by the writer, but it explicitly excludes from these statements “notes” or drafts that have been incorporated into a subsequent draft or final report.</p> <p>The new rule expands 14(d)(2), which covers recordings of oral statements, by including “written” recordings.</p>	<p>Arguably, this only makes clear what the case law seems to require. <i>See Com. v. Bing Sial Liang, 434 Mass. 131, 140 (2001)</i>(VWA’s notes of complainant interview protected as work product except for “witness statements” contained therein).</p>
<p>Rule 14(e) Time Limits</p>	<p>The old rule has been deleted</p>	<p>The applicable time limits are sprinkled through out the new rules.</p>	<p>The time limits apply uniformly in both District and Superior Court.</p>
<p>Rule 34 Report</p>	<p>The old rule applied to Superior Court and the District Court jury session only.</p>	<p>The new rule eliminates this limitation.</p>	<p>Judges may report a question of law that arises in any session of either court.</p>

**CHRONOLOGY OF COURT EVENTS UNDER THE NEW RULES OF
CRIMINAL PROCEDURE** Chris Dearborn

I. **Arraignment** (Rule 7) set both PTC & PTH (Rule 7(e) separate events)

II. **Pretrial conference** (Rule 11(a))

- D has option of being present ; in court event
- CW automatic discovery due
- File PTCR 11(a)(2)(A)

III. **Pretrial hearing** (Rule 11(b))

- D present
- Plea/plea negs.
- Discovery motions to be heard 11(b)(ii) (Unless no automatic discovery yet)
- File PTCR
- Other motions may be heard

IV. **Compliance Hearing** (Rule 11(c))

- Separate event if discovery incomplete
- Certificate of compliance signed by ADA (*fluid date*)
- Set trial date or Trial Assignment date
- Reciprocal Discovery due? (Rule 14(a)(2) Agreed date only after CW compliance complete) (*fluid date*)

V. **Filing** of other **pretrial motions** (can be done earlier) in court?

VI. **Other Pretrial Motions Hearing** (can be done earlier) Rule 13(d) & 13(e)

- w/in 7 days of filing set hearing date
 - If filed at or b/4 PTH then hearing scheduled for next court date (13(e)(2))
- OR**
- B/4 assignment date or within 21 days there after Rule 13(d)(2)

VII. **Trial Assignment date**

VIII. **TRIAL**

