

The Massachusetts Law Enforcement and Prosecutors Manual on Child Exploitation Crimes

Statutory and Case Law



**NATIONAL LAW CENTER
FOR CHILDREN AND FAMILIES**



National Law Center for Children and Families' Preface to the 2008 Second Edition

It is our honor at the National Law Center for Children and Families to provide this second edition of the Massachusetts State Manual. This manual is an update and refinement of the legal manual produced by the National Center for Missing and Exploited Children (NCMEC) in 2004.

The National Law Center is a non-profit law center formed in 1991 and based in Alexandria, Virginia. It has since served as an agent of change and education in the area of child sexual exploitation. The NLC is proud to continue that service today in seminars and through its website, www.nationallawcenter.org. In addition to these projects, the National Law Center has entered into a partnership with the NCMEC to update these existing 25 manuals. Over the next few years we will update these existing manuals and create new manuals for prosecutors and law enforcement professionals to use in the defense of children and families.

Additionally, the manual would not have been completed were it not for the support of NCMEC's Legal Staff and L.J. Decker, NLC Law Clerk (3L Georgetown University Law Center), Christien Oliver, NLC Law Clerk (JD George Washington School of Law 2008), Tara Steinnerd, NLC Law Clerk (3L Catholic University School of Law), Michael Bare (Valparaiso University School of Law), Amanda Rekow (University of Idaho College of Law), Leigh Darrell (University of Baltimore School of Law), Aeri Yum (University of Hawaii Richardson School of Law), Aimee Conway (Suffolk University Law School), Jennifer Allen (University of Hawaii Richardson School of Law), Judith Harris (University of Hawaii Richardson School of Law), Lianne Aoki (University of Hawaii Richardson School of Law), Jeffrey Van Der Veer (University of Colorado School of Law), and Kelly Higa (University of Hawaii Richardson School of Law).

The Editors,

**National Law Center for Children and Families
June 2008**

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- *Commonwealth v. Anthony*, 883 N.E.2d 918 (Mass. 2008)
- *Commonwealth v. Disler*, 884 N.E.2d 500 (Mass. 2008)
- *Commonwealth v. Filopoulos*, 884 N.E.2d 514 (Mass. 2008)
- *Commonwealth v. Kenney*, 874 N.E.2d 1089 (Mass. 2007)
- *Commonwealth v. Staines*, 806 N.E.2d 910 (Mass. 2004)
- *In the Matter of a Grand Jury Investigation*, 819 N.E.2d 171 (Mass. 2004)
- *Commonwealth v. Quinn*, 789 N.E.2d 138 (Mass. 2003)
- *Commonwealth v. Bean*, 761 N.E.2d 501 (Mass. 2002)
- *Commonwealth v. Hinds*, 768 N.E.2d 1067 (Mass. 2002)
- *Perry v. Commonwealth*, 780 N.E.2d 53 (Mass. 2002)
- *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001)
- *Commonwealth v. Smith*, 728 N.E.2d 272 (Mass. 2000)
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- *Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997)
- *Commonwealth v. Gauthier*, 679 N.E.2d 211 (Mass. 1997)
- *Commonwealth Roy*, 647 N.E.2d 272 (Mass. 1995)
- *Commonwealth v. Provost*, 636 N.E.2d 1312 (Mass. 1994)
- *Commonwealth v. Beauchemin*, 571 N.E.2d 395 (Mass. 1991)
- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)
- *Commonwealth v. Oakes*, 551 N.E.2d 910 (Mass. 1990)
- *Commonwealth v. Beals*, 541 N.E.2d 1011 (Mass. 1989)
- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)
- *Commonwealth v. Jones*, 535 N.E.2d 221 (Mass. 1989)
- *Commonwealth v. Tufts*, 542 N.E.2d 586 (Mass. 1989)

III. Appeals Court of Massachusetts

- *Commonwealth v. Dingle*, 2008 Mass. App. LEXIS 1169 (Mass. App. Ct 2008)
- *Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138 (Mass. App. Ct. 2008)
- *Commonwealth v. Starkus*, 867 N.E.2d 811 (Mass. App. Ct. 2007)
- *Commonwealth v. Wallace*, 877 N.E.2d 260 (Mass. App. Ct. 2007)
- *Commonwealth v. Militello*, 848 N.E.2d 406 (Mass. App. Ct. 2006)
- *Commonwealth v. Vann Bell*, 853 N.E.2d 563 (Mass. App. Ct. 2006)

- *Commonwealth v. Wright*, 799 N.E.2d 1263 (Mass. App. Ct. 2003)
- *Commonwealth v. Barboza*, 763 N.E.2d 547 (Mass. App. Ct. 2002)
- *Commonwealth v. Howze*, 788 N.E.2d 586 (Mass. App. Ct. 2002)
- *Commonwealth v. Colon*, 729 N.E.2d 315 (Mass. App. Ct. 2000)
- *Commonwealth v. O'Keefe*, 723 N.E.2d 1000 (Mass. App. Ct. 2000)
- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)
- *Beldotti v. Commonwealth*, 669 N.E.2d 222 (Mass. App. Ct. 1996)
- *Commonwealth v. Allen*, 665 N.E.2d 105 (Mass. App. Ct. 1996)
- *Commonwealth v. Traynor*, 666 N.E.2d 148 (Mass. App. Ct. 1996)
- *Commonwealth v. O'Brien*, 262 N.E.2d 892 (Mass. App. Ct. 1994)
- *Commonwealth v. Foskette*, 568 N.E.2d 1167 (Mass. App. Ct. 1991)
- *Commonwealth v. Benoit*, 531 N.E.2d 262 (Mass. App. Ct. 1988)
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- *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)

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- *Commonwealth v. Maccini*, 2007 Mass. Super. LEXIS 235 (Mass. Super. Ct. 2007)

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- *Commonwealth v. Sullivan*, 2008 Mass. Super. LEXIS 211 (Mass. Super. Ct. 2008)
- *Commonwealth v. Kelley*, 2002 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

MASSACHUSETTS

Topic Outline With Cases

I. OFFENSES DEFINED

A. Child Pornography

1. Creating Child Pornography

- *Commonwealth v. Bean*, 761 N.E.2d 501 (Mass. 2002)
- *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9 (Mass. Super. Ct. 2002)
- *Commonwealth v. Oakes*, 551 N.E.2d 910 (Mass. 1990)
- *Commonwealth v. Provost*, 636 N.E.2d 1312 (Mass. 1994)

a. “Nudity” Defined

- *Commonwealth v. Provost*, 636 N.E.2d 1312 (Mass. 1994)

b. “Lascivious Intent” Defined

- *Commonwealth v. Bean*, 761 N.E.2d 501 (Mass. 2002)
- *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9 (Mass. Super. Ct. 2002)
- *Commonwealth v. Provost*, 636 N.E.2d 1312 (Mass. 1994)
- *Commonwealth v. Sullivan*, 2008 Mass. Super. LEXIS 211 (Mass. Super. Ct. 2008)

2. Knowing Purchase or Possession of Visual Material of Child Depicted in Sexual Conduct

- *Commonwealth v. Anthony*, 883 N.E.2d 918 (Mass. 2008)
- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
- *Commonwealth v. Hinds*, 768 N.E.2d 1067 (Mass. 2002)
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)
- *Commonwealth v. Kenney*, 874 N.E.2d 1089 (Mass. 2007)
- *Commonwealth v. O’Keefe*, 723 N.E.2d 1000 (Mass. App. Ct. 2000)
- *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)

- *Commonwealth v. Sullivan*, 2008 Mass. Super. LEXIS 211 (Mass. Super. Ct. 2008)

a. “Sexual Intercourse” Defined

- *Commonwealth v. Smith*, 728 N.E.2d 272 (Mass. 2000)

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- *Commonwealth v. Smith*, 728 N.E.2d 272 (Mass. 2000)

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- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)
- *Commonwealth v. O’Keefe*, 723 N.E.2d 1000 (Mass. App. Ct. 2000)
- *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)

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- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)
- *Perry v. Commonwealth*, 780 N.E.2d 53 (Mass. 2002)

b. “Disseminate” Defined

- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)

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- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
- *Perry v. Commonwealth*, 780 N.E.2d 53 (Mass. 2002)

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- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
- *Perry v. Commonwealth*, 780 N.E.2d 53 (Mass. 2002)

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- *Commonwealth v. Militello*, 848 N.E.2d 406 (Mass. App. Ct. 2006)
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- *Commonwealth v. O’Keefe*, 723 N.E.2d 1000 (Mass. App. Ct. 2000)

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- *Commonwealth v. Militello*, 848 N.E.2d 406 (Mass. App. Ct. 2006)

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- *Commonwealth v. Militello*, 848 N.E.2d 406 (Mass. App. Ct. 2006)

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- *Commonwealth v. Dingle*, 2008 Mass. App. LEXIS 1169 (Mass. App. Ct. 2008)
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)

5. Virtual/Simulated Child Pornography

- *Commonwealth v. Kenney*, 874 N.E.2d 1089 (Mass. 2007)

B. Child Sexual Exploitation

1. Unnatural and Lascivious Acts on a Child Under the Age of 16

- *Commonwealth v. Benoit*, 531 N.E.2d 262 (Mass. App. Ct. 1988)

2. Lewd, Wanton, and Lascivious Persons in Speech or Behavior

a. Elements

- *Commonwealth v. Beauchemin*, 571 N.E.2d 395 (Mass. 1991)
- *Commonwealth v. Roy*, 647 N.E.2d 1179 (Mass. 1995)

b. “Public Place” Defined

- *Commonwealth v. Beauchemin*, 571 N.E.2d 395 (Mass. 1991)

c. “Lewd” Defined

- *Commonwealth v. Sullivan*, 2008 Mass. Super. LEXIS 211 (Mass. Super. Ct. 2008)
- *Commonwealth v. Quinn*, 789 N.E.2d 138 (Mass. 2003)

C. Familial Kidnapping

- *Commonwealth v. Beals*, 541 N.E.2d 1011 (Mass. 1989)

D. Online Enticement/Solicitation of a Child

- *Commonwealth v. Disler*, 884 N.E.2d 500 (Mass. 2008)
- *Commonwealth v. Filopoulos*, 884 N.E.2d 514 (Mass. 2008)
- *Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138 (Mass. App. Ct. 2008)

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E. Transporting Minor for the Purposes of Prostitution

No state cases reported.

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

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- *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9 (Mass. Super. Ct. 2002)
- *Commonwealth v. Anthony*, 883 N.E.2d 918 (Mass. 2008)

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- *Commonwealth v. Anthony*, 883 N.E.2d 918 (Mass. 2008)
- *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9 (Mass. Super. Ct. 2002)
- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

b. Nexus Between the Defendant, the Premises to Be Searched, and the Items to Be Seized

- *Commonwealth v. Anthony*, 883 N.E.2d 918 (Mass. 2008)
- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

c. The Particularity Requirement

- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

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- *Commonwealth v. Anthony*, 883 N.E.2d 918 (Mass. 2008)
- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

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i. False Statements

- *Franks v. Delaware*, 438 U.S. 154 (1978)

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- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

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- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

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- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

b. Dissemination of Child Pornography

- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)

B. Anticipatory Warrants

- *Commonwealth v. Gauthier*, 679 N.E.2d 211 (Mass. 1997)
- *Commonwealth v. Staines*, 806 N.E.2d 910 (Mass. 2004)

C. Methods of Searching

No state cases reported.

D. Types of Searches

1. Employer Searches

No state cases reported.

2. Private Searches

- *Commonwealth v. Raboin*, 2008 Mass. Super. LEXIS 202 (Mass. Super. Ct. 2008)

3. Civilian Searches

No state cases reported.

4. University-Campus Searches

No state cases reported.

5. Consent Searches

- *Commonwealth v. Hinds*, 768 N.E.2d 1067 (Mass. 2002)
- *Commonwealth v. Wallace*, 877 N.E.2d 260 (Mass. App. Ct. 2007)

E. Computer Technician/Repairperson Discoveries

No state cases reported.

F. Photo-Development Discoveries

No state cases reported.

G. Criminal Forfeiture

- *Beldotti v. Commonwealth*, 669 N.E.2d 222 (Mass. App. Ct. 1996)

H. Disciplinary Hearings for Federal and State Officers

No state cases reported.

I. Probation and Parolee Rights

No state cases reported.

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No state cases reported.

B. Internet Nexus

No state cases reported.

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State

No state cases reported.

2. Federal

No state cases reported.

3. Concurrent

No state cases reported.

D. Interstate Possession of Child Pornography

No state cases reported.

IV. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

No state cases reported.

B. Defense Requests for Copies of Child Pornography

No state cases reported.

C. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues

No state cases reported.

2. Circumstantial Evidence

No state cases reported.

3. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

D. Text-Only Evidence

1. Introduction into Evidence

No state cases reported.

2. Relevance

No state cases reported.

E. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act

No state cases reported.

2. Cable Act

No state cases reported.

3. Patriot Act

a. National Trap and Trace Authority

No state cases reported.

b. State-Court-Judge Jurisdictional Limits

No state cases reported.

F. Evidence Obtained Through Wiretapping

1. Consent

- *Commonwealth v. Barboza*, 763 N.E.2d 547 (Mass. App. Ct. 2002)
- *Commonwealth v. Maccini*, 2007 Mass. Super. LEXIS 235 (Mass. Super. Ct. 2007)

2. Suppression of Unlawfully Intercepted Communication

- *Commonwealth v. Barboza*, 763 N.E.2d 547 (Mass. App. Ct. 2002)
- *Commonwealth v. Maccini*, 2007 Mass. Super. LEXIS 235 (Mass. Super. Ct. 2007)

3. Extension-Telephone Exception

- *Commonwealth v. Barboza*, 763 N.E.2d 547 (Mass. App. Ct. 2002)

G. Prior Bad Acts and “Other Crimes” Evidence

1. Inadmissible

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)

2. Admissible

- *Commonwealth v. Dingle*, 2008 Mass. App. LEXIS 1169 (Mass. App. Ct. 2008)

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)
- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)
- *Commonwealth v. Starkus*, 867 N.E.2d 811 (Mass. App. Ct. 2007)

a. Uncharged Similar Acts

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)

i. Committed Against Another Person

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)

ii. Remoteness

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)

b. Uncharged Sexual Misconduct

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)

c. Common Plan or Course of Conduct

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)

d. Evidence of a Sexual Assault on a Person Other than the Victim

- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)

H. Witnesses and Testimony

1. Expert Testimony

a. Admissibility

- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)
- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)

b. Testimony on Child Pornography

- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)

c. Testimony on Sexually Abused Children

i. In General

- *Commonwealth v. Allen*, 665 N.E.2d 105 (Mass. App. Ct. 1996)
- *Commonwealth v. Colon*, 729 N.E.2d 315 (Mass. App. Ct. 2000)
- *Commonwealth v. O'Brien*, 626 N.E.2d 892 (Mass. App. Ct. 1994)

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- *Commonwealth v. Allen*, 665 N.E.2d 105 (Mass. App. Ct. 1996)

d. Testimony on Witness's Credibility

i. Opinion Testimony

- *Commonwealth v. Colon*, 729 N.E.2d 315 (Mass. App. Ct. 2000)

ii. Patterns of Disclosure

- *Commonwealth v. Colon*, 729 N.E.2d 315 (Mass. App. Ct. 2000)

2. Child Witnesses

- *Commonwealth v. Avery*, 437 N.E.2d 242 (Mass. App. Ct. 1982)
- *In the Matter of a Grand Jury Investigation*, 819 N.E.2d 171 (Mass. 2004)

a. Competency

- *Commonwealth v. Avery*, 437 N.E.2d 242 (Mass. App. Ct. 1982)
- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)

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- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)

ii. Burden

- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)

iii. Requirements

- *Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997)
- *Commonwealth v. Tufts*, 542 N.E.2d 586 (Mass. 1989)

iv. Alternatives

- *Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997)

3. Psychological and Emotional Trauma

- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)

4. “Fresh Complaint” Witnesses

- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)

a. “Fresh Complaint” Defined

- *Commonwealth v. Foskette*, 568 N.E.2d 1167 (Mass. App. Ct. 1991)

b. Time Frame

- *Commonwealth v. Allen*, 665 N.E.2d 105 (Mass. App. Ct. 1996)
- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)
- *Commonwealth v. Foskette*, 568 N.E.2d 1167 (Mass. App. Ct. 1991)

5. Reputation and Character Evidence

a. Admissible

- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)

b. Inadmissible

- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)

I. Privileges: Social Workers

1. Privilege

- *Commonwealth v. Jones*, 535 N.E.2d 221 (Mass. 1989)

2. Exception

- *Commonwealth v. Jones*, 535 N.E.2d 221 (Mass. 1989)

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Victim

- *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)

B. The Defendant's Knowledge of the Age of the Child

- *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)

VI. MULTIPLE COUNTS

A. What Constitutes an "Item" of Child Pornography?

No state cases reported.

B. Issues of Double Jeopardy

- *Commonwealth v. Howez*, 788 N.E.2d 586 (Mass. App. Ct. 2007)
- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)

1. Cases Involving Ongoing Abuse

- *Commonwealth v. LaCaprucia*, 708 N.E.2d 952 (Mass. 1999)

2. Prosecution After Acquittal

- *Commonwealth v. LaCaprucia*, 708 N.E.2d 952 (Mass. 1999)

VII. DEFENSES

A. Age

- *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)
- *Commonwealth v. Wright*, 799 N.E.2d 1263 (Mass. App. Ct. 2003)

B. Consent

- *Commonwealth v. Benoit*, 531 N.E.2d 262 (Mass. App. Ct. 1988)
- *Commonwealth v. Traynor*, 666 N.E.2d 148 (Mass. App. Ct. 1996)

C. Diminished Capacity

1. Addiction to the Internet

No state cases reported.

2. Insanity

No state cases reported.

3. Mental Abnormalities and Personality Disorders

- *Commonwealth v. Barrett*, 2001 Mass. Super. LEXIS 351 (Mass. Super. Ct. 2005)

4. Lack of Criminal Responsibility

a. Lack of Substantial Ability to Appreciate the Criminality or Wrongfulness of One's Conduct

- *Commonwealth v. Barrett*, 2001 Mass. Super. LEXIS 351 (Mass. Super. Ct. 2005)

b. Lack of Ability to Conform One's Conduct to the Requirements of Law

- *Commonwealth v. Barrett*, 2001 Mass. Super. LEXIS 351 (Mass. Super. Ct. 2005)

D. First Amendment

- *Commonwealth v. Bean*, 761 N.E.2d 501 (Mass. 2002)

E. Impossibility

1. Factual

- *Commonwealth v. Vann Bell*, 853 N.E.2d 563 (Mass. App. Ct. 2006)

2. Legal

- *Commonwealth v. Vann Bell*, 853 N.E.2d 563 (Mass. App. Ct. 2006)

F. Manufacturing Jurisdiction

No state cases reported.

G. Outrageous Conduct

No state cases reported.

H. Researcher

- *Commonwealth v. Oakes*, 551 N.E.2d 910 (Mass. 1990)

I. Sexual Orientation

No state cases reported.

VIII. SENTENCING ISSUES

A. Enhancement

1. Age

No state cases reported.

2. Distribution/Intent to Traffic

No state cases reported.

3. Number of Images

No state cases reported.

4. Pattern of Activity for Sexual Exploitation

No state cases reported.

5. Sadistic, Masochistic, or Violent Material

No state cases reported.

6. Use of Computers

No state cases reported.

B. Sexually Dangerous Persons

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)
- *Commonwealth v. Starkus*, 867 N.E.2d 811 (Mass. App. Ct. 2007)

1. “Mental Abnormality” Defined

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

2. “Personality Order” Defined

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

3. “Likely to Engage in Sexual Offenses” Defined

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

4. Involuntary Commitment

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

a. “Likelihood of Serious Harm” Defined

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

b. State’s Burden

- *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

C. Probation

1. Purposes

- *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001)

2. Conditions

- *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001)

3. Enforceability of Conditions

- *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001)

IX. SUPERVISED RELEASE

No state cases reported.

MASSACHUSETTS

Case Highlights

Beldotti v. Commonwealth, 669 N.E.2d 222 (Mass. App. Ct. 1996)

Property may not be forfeited simply because it is offensive or repugnant; however, if the items a defendant seeks to have returned can be seen as being directly related to the crimes committed, as having influenced the defendant's behavior, or as being relevant to an understanding of the psychological or physical circumstances under which the crime was committed, returning said property would be so offensive to basic concepts of decency treasured in a civilized society that it would undermine the confidence that the public has a right to expect in the criminal-justice system.

Commonwealth v. Allen, 665 N.E.2d 105 (Mass. App. Ct. 1996)

An expert may testify about general syndromes associated with sexual abuse. While it is the better practice to avoid using the treating therapist as an expert on syndromes associated with sexual abuse, as it gives rise to the risk that such an expert's testimony can be construed as impliedly supporting the truthfulness of the complainant, courts have not gone so far as to hold that it would never be permissible for a treating therapist to give expert testimony.

Commonwealth v. Amirault, 677 N.E.2d 652 (Mass. 1997)

The right of confrontation requires a judge to refrain from designing seating configurations that comfortably shield a witness from a face-to-face meeting. If testimony is to be videotaped, the judge must assure that the setting of the videotaping approximates as closely as possible the conditions that would obtain in a traditional courtroom confrontation. The jury should be made aware of the setting at the videotaping.

Commonwealth v. Anthony, 883 N.E.2d 918 (Mass. 2008)

The court held that warrants to search the contents of a storage locker rented by the defendant and electronic data on items from the storage locker, on two laptop computers from a computer repair shop, and on one desktop hard drive from the Boston Public Library were properly issued because there was probable cause to believe that the defendant had violated M.G.L. chapter 272 § 29C and was hiding evidence in the locker. Specifically, the court held that the state had established a nexus between the criminal articles or activity described in the affidavits and the places to be searched. The court concluded that this nexus does not have to be based on direct observation, but rather can be based on the "type of crime, the nature of the items sought, the extent of the accused opportunity for concealment, and normal inferences as to where a criminal would be likely to hide items of the sort sought."

Commonwealth v. Avery, 437 N.E.2d 242 (Mass. App. Ct. 1982)

A child is not disqualified as a witness merely by reason of his or her youth. There is no precise age that determines the competency of a child to testify. This depends on the capacity and intelligence of the child; his or her understanding of the difference between

truth and falsehood; the child's appreciation of the duty to tell the truth; and, in a general way, the child's belief that failure to perform the obligation will result in punishment.

Commonwealth v. Barboza, 763 N.E.2d 547 (Mass. App. Ct. 2002)

A recording by parents of their own minor son talking on the telephone in their own home, motivated by concerns that an adult was sexually exploiting him, does not violate wiretap statutes.

Commonwealth v. Barrett, 2001 Mass. Super. LEXIS 351 (Mass. Super. Ct. 2001)

Defendant pled guilty to molesting two three-year-old girls. On appeal he argued that his guilty plea was not intelligently made because at the time that the plea was entered he did not know that he could later be civilly committed as a sexually dangerous person. He also argued ineffective assistance of counsel and requested a new trial based on new evidence. The court held that it was not necessary to inform defendant of the possibility that the legislature would re-enact the sexually dangerous persons statute following his plea, that he did not suffer from ineffective assistance of counsel, and that the alleged new evidence was not sufficient to require a new trial.

Commonwealth v. Beals, 541 N.E.2d 1011 (Mass. 1989)

Neither parent, in the absence of a custody order altering his or her natural custody rights to a child, commits the crime of kidnapping by taking exclusive possession of the child. A court order is required to divest a parent of lawful authority to control his or her child, even where the parent's assertion of control over a child had the effect of excluding the child's other parent.

Commonwealth v. Bean, 761 N.E.2d 501 (Mass. 2002)

When photographs are neither obscene nor pornographic, the artistic nature of the photographs is relevant evidence of an intention other than "sexual gratification."

Commonwealth v. Beauchemin, 571 N.E.2d 395 (Mass. 1991)

Because there was no evidence in the record warranting a finding that the complainant and the defendant were actually observed, the motion for a required finding of not guilty of lewd, wanton, and lascivious behavior should have been allowed.

Commonwealth v. Benoit, 531 N.E.2d 262 (Mass. App. Ct. 1988)

Lack of consent must be shown for a conviction under Massachusetts General Laws chapter 265, § 13B, nonharmful indecent assault and battery on a child under 14.

Commonwealth v. Colon, 729 N.E.2d 315 (Mass. App. Ct. 2000)

Testimony pertaining to patterns of disclosure – that victims of child sexual abuse often fail to disclose their abuse until long after the fact, omit certain details, change their stories over time, and give inconsistent statements, or that certain children are apt to lie about sexual abuse – goes directly to the truthfulness of the child complainant's testimony and therefore usurps the jury's function.

Commonwealth v. Dingle, 2008 Mass. App. LEXIS 1169 (Mass. App. Ct. 2008)

The court held that the indictment against a defendant charging him with in the alternative with violations of paragraph a and b of M.G.L. chapter 272 § 29B was not duplicative. The court concluded that paragraphs a and b of M.G.L. chapter 272 § 29B constitute a single crime and merely describe two means of committing the same offense and thus the Commonwealth can argue in the alternative for a violation of both paragraphs.

Commonwealth v. Disler, 884 N.E.2d 500 (Mass. 2008)

Interprets Massachusetts General Laws chapter 265, § 26C, the child enticement statute. Under the statute, the state must prove that the defendant sent or spoke enticing words or engaged in enticing gestures for the purpose of committing one of the criminal acts enumerated in the statute. The state must also prove that the defendant had the intent to engage in the enumerated criminal act with a child under 16 years of age or someone the defendant believed to be under 16 years of age. The court held that the statute was not unconstitutionally overbroad.

Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989)

A child can give videotaped testimony if the court finds by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in front of the defendant, or as a result of both.

Commonwealth v. Dow, 2002 Mass. Super. LEXIS 9 (Mass. Super. Ct. 2002)

The defendant was charged with “posing a child in a state of nudity,” after having filmed his stepdaughter getting out of the shower. In reading the plain meaning of the statute, the child may be “exhibited in a state of nudity”; therefore, the defendant need not take active steps to pose the child. Furthermore the statute does not state that the child need be aware that they are being represented or reproduced on visual material while in a state of nudity.

Commonwealth v. Filopoulos, 884 N.E.2d 514 (Mass. 2008)

Intent to commit one of the enumerated criminal acts against a minor under the age of 16 is an element of the crime of enticement. The state must prove not only that the defendant intended to commit one of the enumerated criminal acts, but that the defendant intended to commit that act against a person under the age of 16.

Commonwealth v. Foskette, 568 N.E.2d 1167 (Mass. App. Ct. 1991)

A person violated sexually may be expected to complain to others; evidence of such complaint – if the complaint was “fresh,” and thus probably not a product of imagination or contrivance – may be admitted, not in proof of the criminal occurrence, but in corroboration of other evidence of it.

Commonwealth v. Gauthier, 679 N.E.2d 211 (Mass. 1997)

An anticipatory warrant is valid even though it does not state on its face the conditions precedent to its execution when clear, explicit, and narrowly drawn conditions for the execution of the warrant are contained in the affidavit that applies for the warrant application and those conditions are actually satisfied before the warrant is executed.

Commonwealth v. Gousie, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
Computer images are capable of possession.

Commonwealth v. Hanlon, 694 N.E.2d 358 (Mass. App. Ct. 1998)

The trial judge's admission of testimony of four young men who claimed to have been assaulted sexually by the defendant over a period of approximately nine years following the charged sexual assaults on the present complainant was not an abuse of discretion. The evidence was admissible to show a common plan or pattern of conduct that may explain the defendant's intent or modus operandi.

Commonwealth v. Hinds, 768 N.E.2d 1067 (Mass. 2002)

Having discovered illegal files on the defendant's computer, pursuant to a consent search, it was reasonable for a detective, already inside the defendant's residence, to seize the computer prior to obtaining a warrant because, by nature, computer data are not readily separable from the hard drive and the detective was faced with the prospect of their destruction. The risk that computer data could be easily deleted and thus lost justified seizing the defendant's hard drive until such time as the detective could obtain a warrant.

Commonwealth v. Howez, 788 N.E.2d 586 (Mass. App. Ct. 2002)

The defendant was convicted of rape of a child and indecent assault and battery on a child. On appeal the defendant argued that his conviction of both offenses was duplicative and violated principles of double jeopardy because the offenses involved proof of the same elements and the offenses arose from the same acts. The appellate court held that indecent assault and battery of a child is a lesser included offense of rape of a child because there are no elements not in common the two. Further the court held that because the trial failed to instruct the jurors that they could only find defendant guilty of both offenses if they determined that the evidence established two separable sets of acts, each supporting one of the charges, the defendant's Constitutional guarantees against double jeopardy were violated.

Commonwealth v. Jones, 535 N.E.2d 221 (Mass. 1989)

A criminal defendant is allowed to obtain investigation and evaluation reports from the Department of Social Services that ultimately led to his or her indictment and criminal prosecution.

Commonwealth v. Kelley, 2001 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)

Under the child-pornography-dissemination statute, it is not the communicative format or medium that matters; what matters is whether the visual material represents a child in sexual conduct or in a state of nudity and whether such material is disseminated with knowledge and lascivious intent.

Commonwealth v. Kenney, 874 N.E.2d 1089 (Mass. 2007)

In a case involving the possession of 323 computer images depicting children in states of nudity or depicting children engaged in sexual conduct, the court held that in order to establish a violation of M.G.L. chapter 276 § 29C the Commonwealth had the burden of

proving that no reasonable person would not believe that the children depicted in the images were under eighteen years. The court also held that the statute was not vague or overbroad, and did not punish an excessive range of constitutionally protected speech. Thus, the statute did not violate the defendant's constitutional rights. The court concluded that the term "depiction by computer" as used within the statute only applied to images made with real children.

Commonwealth v. LaCaprucia, 708 N.E.2d 952 (Mass. 1999)

Where the Commonwealth brings a number of indictments against a defendant alleging child sexual abuse occurring at unspecified times or places, there is always the risk that jurors may vote to find the defendant guilty on a particular indictment, but with different incidents or conduct in mind. A reviewing court may uphold a conviction in such a case only where the record is clear that the jurors understood their duty unanimously to agree to a particular set of facts.

Commonwealth v. LaPlante, 2008 Mass. App. LEXIS 1138 (Mass. App. Ct. 2008)

A violation of the enticement statute can be established absent any reference to sexual conduct as long as the defendant enticed a minor under the age of 16 to enter, exit or remain within any vehicle, dwelling, building or other outdoor space and had the requisite intent to commit one of the enumerated criminal acts against a minor under 16 years of age. For instance, in this case, the defendant attempted to entice the minor victim into his vehicle for the purpose of kidnapping her.

Commonwealth v. LaPointe, 759 N.E.2d 294 (Mass. 2001)

A probation condition is enforceable, even if it infringes on a defendant's ability to exercise constitutionally protected rights, so long as the condition is reasonably related to the goals of sentencing and probation. The residence prohibitions imposed on the defendant reasonably related to his offense and to the goals of sentencing and probation. The residency prohibitions removed the defendant from situations in which he presented a danger and were designed to eliminate the risk that he would commit further sexual abuse on his own minor children. At the same time, by removing the defendant from the environment giving rise to his sexual abuse, the residency requirements assisted his rehabilitation and deterred him from repeating his criminal conduct; therefore, the residency requirement was valid.

Commonwealth v. LeFave, 556 N.E.2d 83 (Mass. 1990)

Testimony by each of the child victims that they were photographed by the defendants while the defendants sexually abused them was sufficient to suggest the defendants had a motive for their conduct; therefore, the testimony was admissible.

Commonwealth v. Maccini, 2007 Mass. Super. LEXIS 235 (Mass. Super. Ct. 2007)

Defendant's motion to suppress evidence was denied because defendant's e-mail and instant message communications were not unlawfully intercepted within the meaning of Massachusetts General Laws chapter 272, § 99 where a police officer's receipt and recording of defendant's communications was with defendant's knowledge and implicit consent.

Commonwealth v. Militello, 848 N.E.2d 406 (Mass. App. Ct. 2006)

To establish a violation of Massachusetts General Laws chapter 272, § 28 the Commonwealth must establish that the material disseminated to minors was obscene as defined by Massachusetts General Laws chapter 272, § 31.

Commonwealth v. Oakes, 551 N.E.2d 910 (Mass. 1990)

It is a defense to prosecution under Massachusetts General Laws chapter 272, § 29A that a visual representation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed, or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum, or library.

Commonwealth v. O'Brien, 626 N.E.2d 892 (Mass. App. Ct. 1994)

In offering an expert who would testify about the general behavioral characteristics of sexually abused children, the Commonwealth must take care not to lead the expert to trespass on the jury's province to assess the credibility of witnesses, in particular the child as witness.

Commonwealth v. O'Keefe, 723 N.E.2d 1000 (Mass. App. Ct. 2000)

Defines "matter" for the purposes of the obscenity statutes (Massachusetts General Laws chapter 272, §§ 28-30D) as "any printed material, visual representation, live performance or sound recording." The handwritten notes at issue in this case did not fall within the definition of printed material under the statute.

Commonwealth v. Provost, 636 N.E.2d 1312 (Mass. 1994)

The taking of photographs of a partially nude child with lascivious intent is conduct that Massachusetts General Laws chapter 272, §29A is designed to prevent.

Commonwealth v. Quinn, 789 N.E.2d 138 (Mass. 2003)

The court found that exposure of genitalia is not a required element of open and gross lewdness or lewd, wanton, or lascivious behavior. A defendant may be convicted based on intentional exposure his/her genitalia, buttocks, or breasts.

Commonwealth v. Raboin, 2008 Mass. Super. LEXIS 202 (Mass. Super. Ct. 2008)

Defendant's motion to suppress DVD and mini-cassette evidence was denied. When police watched the DVDs defendant's expectation of privacy had already been ended, and the fact that the police took more time and were more thorough than private parties who viewed them did not result in a Fourth Amendment violation.

Commonwealth v. Reese, 2001 Mass. Super. LEXIS 112 (Mass. Super. Ct. 2001)

To be found a sexually dangerous person, the Commonwealth must meet its burden of showing that the defendant (1) has been convicted of a sexual offense; (2) suffers from a mental abnormality or personality disorder; and (3) that this mental abnormality or personality disorder makes him or her likely to engage in sexual offenses if not confined to a secure facility.

Commonwealth v. Roy, 647 N.E.2d 1179 (Mass. 1995)

The defendant was charged with being a lewd, wanton, and lascivious person in speech or behavior; however, because the evidence left to speculation whether his remark was a prelude to a sexual contact that was to occur in a private place, or in a place that could be found to be public, the defendant was acquitted.

Commonwealth v. Rubino, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)

In cases involving knowingly possessing depictions by computer of children engaged in sexual activity, a conviction requires proof that the defendant knows or reasonably should know the child to be under the age of 18.

Commonwealth v. Smith, 728 N.E.2d 272 (Mass. 2000)

Sexual intercourse is limited to penile-vaginal penetration, with or without ejaculation; therefore, incest indictments involving oral sex were properly dismissed against the defendant.

Commonwealth v. Staines, 806 N.E.2d 910 (Mass. 2004)

Evidence was properly seized and the motion to suppress was properly denied. The facts in the warrant affidavit supported a determination that there was probable cause to believe that defendant possessed cocaine in his car during drug sales.

Commonwealth v. Starkus, 867 N.E.2d 811 (Mass. App. Ct. 2007)

The court held that evidence of the defendants prior offense contained within a police report was properly admitted under G.L. chapter 123A, § 14(c) to prove that he was a sexually dangerous persons. The court further held that the trial judge did not err in his decision and the affirmed the commitment order and the finding that the defendant was sexually dangerous person.

Commonwealth v. Sullivan, 2008 Mass. Super. LEXIS 211 (Mass. Super. Ct. 2008)

The court held Massachusetts General Laws chapter 272, § 29C(iii) is not unconstitutionally overbroad or vague. The court concluded that under the statute a photograph of a minor child in a nude state constituted a lewd exhibition under the statute. The court defined lewd as “sexually unchaste or licentious; suggestive of moral looseness; inviting sensual desire or imagination; indecent, obscene, or salacious.”

Commonwealth v. Traynor, 666 N.E.2d 148 (Mass. App. Ct. 1996)

Lack of consent of the victim is not an element that must be established in order to prove a violation based on indecent assault and battery on a child under fourteen years.

Commonwealth v. Tufts, 542 N.E.2d 586 (Mass. 1989)

Videotaped testimony should be required to convey to the jury the totality of the circumstances involved in the giving of the testimony. Videotapes must show all persons present in the room as the jury would perceive them in open court. It is preferable that jurors be able to observe the reactions of the defendants to the child witness's testimony during the videotaping, but the fact that the defendants in this case were not visible on the videotape is not a fatal flaw to an otherwise satisfactory videotape.

Commonwealth v. Vann Bell, 853 N.E.2d 563 (Mass. App. Ct. 2006)

In case involving a police sting operation, the defendant was charged with attempted rape of a child or solicitation for a fee for transacting with an undercover police officer to engage in sex with a five year old child. The child who served as the subject of the transaction did not actually exist and the defendant alleged that the non-existence of the child made it impossible for him to be charged with attempt to rape or solicitation for a fee. The court held that the actual existence of the child victim was not a required element of the offense. Further, the court held that the lack of existence of the child victim was a factual impossibility which is not a defense to attempt charges.

Commonwealth v. Wallace, 877 N.E.2d 260 (Mass. App. Ct. 2007)

Defendant claimed that evidence was illegally seized from his vehicle and presented to the jury even though its potential for prejudice outweighed its probative value. The court found that defendant consented to the search of his vehicle and that the seized evidence was admissible to show his sexual intent, predatory motive, and intentional rather than accidental touching of the victim. The court held that the defendant voluntarily consented to the search and because there was no evidence of coercion his consent was valid. The court also held that the potential for prejudice associated with admitting the evidence did not far outweigh the probative value of the evidence because it was relevant to and probative of the defendant's voyeuristic tendencies and served as substantive evidence. Consequently, the evidence was properly admitted.

Commonwealth v. Wright, 799 N.E.2d 1263 (Mass. App. Ct. 2003)

Where the age of the victim is an element of an offense the Commonwealth must prove that the defendant knew the age of the victim or should have known the age of the victim.

Franks v. Delaware, 438 U.S. 154 (1978)

Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a search-warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment of the U.S. Constitution requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

In the Matter of a Grand Jury Investigation, 819 N.E.2d 171 (Mass. 2004)

Supreme Judicial Court affirmed an order denying motions to quash duces tecum summonses. The SJC ordered the minor children to testify in a grand jury investigation against their father because the children did not reside in the same household as their father and thus no testimonial privilege existed under Massachusetts General Laws chapter 233, § 20, Fourth.

Perry v. Commonwealth, 780 N.E.2d 53 (Mass. 2002)

The term “visual material” as used in Massachusetts General Laws chapter 272, §29B and §31 includes computers images.

MASSACHUSETTS

Offenses Defined

I. Child Pornography

A. Creating Child Pornography

- An individual violates Massachusetts General Law chapter 272, § 29A when he or she, knowing that a person is a child under 18 years of age, or possessing such facts that he or she should have reason to know that such person is a child under 18 years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of conduct for the purpose of visual representation or reproduction in any book, magazine, pamphlet, motion-picture film, photograph, or picture.
 - *Commonwealth v. Bean*, 761 N.E.2d 501, 503 (Mass. 2002).
 - *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9, 6 n.2 (Mass. Super. Ct. 2002).
 - *Commonwealth v. Oakes*, 551 N.E.2d 910, 910 n.1 (Mass. 1990).
 - *Commonwealth v. Provost*, 636 N.E.2d 1312, 1313 n.1 (Mass. 1994).
- It is sufficient that the pose of the child be in a state of nudity as broadly defined by the statute, as long as the posing is done with lascivious intent.
 - *Commonwealth v. Bean*, 761 N.E.2d 501, 505 (Mass. 2002).
- The depiction of mere nudity is not enough to support a conviction.
 - *Commonwealth v. Bean*, 761 N.E.2d 501, 508 n.17 (Mass. 2002).
- The taking of photographs of a partially nude child with lascivious intent is conduct that Massachusetts General Laws chapter 272, § 29A is designed to prevent.
 - *Commonwealth v. Provost*, 636 N.E.2d 1312, 1315 (Mass. 1994).
- The child may be exhibited in a state of nudity; therefore, the defendant need not take active steps to pose the child.
 - *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9, 10 (Mass. Super. Ct. 2002).
- The statute does not state that the child need be aware that he or she is being represented or reproduced on visual material while in a state of nudity.
 - *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9, 10 (Mass. Super. Ct. 2002).

1. “Nudity” Defined

- “Nudity” means uncovered or less than opaquely covered human genitals or pubic areas or the covered male genitals in a discernibly turgid state. *Mass. Gen. Laws ch. 272, § 31*.
– *Commonwealth v. Provost*, 636 N.E.2d 1312, 1314 (Mass. 1994).
- The statute does not require that the areas be completely uncovered. It is enough that a portion of the nude genital area is visible.
– *Commonwealth v. Provost*, 636 N.E.2d 1312, 1314 (Mass. 1994).

2. “Lascivious Intent” Defined

- “Lascivious intent” is defined as a state of mind in which the sexual gratification or arousal of any person is an objective.
 - *Commonwealth v. Bean*, 761 N.E.2d 501, 504 (Mass. 2002).
 - *Commonwealth v. Sullivan*, 2008 Mass. Super. LEXIS 211, 7 (Mass. Super. Ct. 2008).
- Proof of lascivious intent may include, but shall not be limited to, the following:
 - (1) whether the circumstances include sexual behavior, sexual relations, infamous conduct of a lustful or obscene nature, deviation from accepted customs and manners, or sexually oriented displays;
 - (2) whether the focal point of a visual depiction is the child’s genitalia, pubic area, or breast area of a female child;
 - (3) whether the setting or pose of a visual depiction is generally associated with sexual activity;
 - (4) whether the child is depicted in an unnatural pose or inappropriate attire, considering the child’s age;
 - (5) whether the depiction denotes sexual suggestiveness or a willingness to engage in sexual activity;
 - (6) whether the depiction is of a child engaging in or being engaged in sexual conduct, including, but not limited to, sexual intercourse, unnatural sexual intercourse, bestiality, masturbation, sado-masochistic behavior, or lewd exhibition of the genitals.

Mass. Gen. Laws ch. 272, § 31.
– *Commonwealth v. Bean*, 761 N.E.2d 501, 506 (Mass. 2002).
– *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9, 8 n.3 (Mass. Super. Ct. 2002).
– *Commonwealth v. Provost*, 636 N.E.2d 1312, 1314 n.3 (Mass. 1994).
Commonwealth v. Sullivan, 2008 Mass. Super. LEXIS 211, 7 (Mass. Super. Ct. 2008).

B. Knowing Purchase or Possession of Visual Material of Child Depicted in Sexual Conduct

- An individual violates Massachusetts General Laws chapter 272, § 29C when he or she knowingly possesses depictions by computer of children whom the person knows or reasonably should know to be under the age of 18 and such children are: actually or by simulation engaged in any act of sexual intercourse with any person; or actually or by simulation engaged in any act of masturbation; or depicted or portrayed in any pose, posture, or setting involving a lewd exhibition of the unclothed genitals, pubic hair, buttocks with knowledge of the nature or content thereof. *Mass. Gen. Laws ch. 272, § 29C.*
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 13 (Mass. Super. Ct. 2001).
 - *Commonwealth v. Hinds*, 2002 Mass. LEXIS 379, 17 n.5 (Mass. 2002).
 - *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 9-10 (Mass. Super. Ct. 2001).
 - *Commonwealth v. Kenney*, 874 N.E.2d 1089 (Mass. 2007).
 - *Commonwealth v. O’Keefe*, 723 N.E.2d 1000 (Mass. App. Ct. 2000).
 - *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693, 12 (Mass. Super. Ct. 2000).
- Computer images are indeed capable of possession.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 4 (Mass. Super. Ct. 2001).
- “Knowing purchase or possession of visual material of child depicted in sexual conduct” includes “depiction by computer” as an item of child pornography, the possession of which is unlawful.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 4 (Mass. Super. Ct. 2001).
- “Depiction by computer” includes graphic computer images stored in the form of data.
 - *Commonwealth v. Hinds*, 768 N.E.2d 1067 (Mass. 2002).
- If there is a disparity regarding the age of the individual depicted the state has the burden of proving that “no a reasonable person would not have known that the child subject was under the age of eighteen”
 - *Commonwealth v. Kenney*, 874 N.E.2d 1089, 1093 (Mass. 2007).
- The images themselves can be used to determine the ages of the persons depicted
 - *Commonwealth v. Kenney*, 874 N.E.2d 1089, 1093 (Mass. 2007).

1. “Sexual Intercourse” Defined

- By “sexual intercourse” the Legislature intended the traditional common-law notion of rape, the penetration of the female sex organ by the male sex organ, with or without emission.
 - *Commonwealth v. Smith*, 728 N.E.2d 272, 275-76 (Mass. 2000).

2. “Unnatural Sexual Intercourse” Defined

- “Unnatural sexual intercourse” refers to oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person’s body or other object into the genital or anal opening of another person’s body.
– *Commonwealth v. Smith*, 728 N.E.2d 272, 275 (Mass. 2000).

C. Dissemination

- Massachusetts General Laws chapter 272, § 29B (a) makes it a criminal offense for any person to disseminate, with knowledge and lascivious intent, any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity involving the use of a child under 18.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 5 n.1 (Mass. Super. Ct. 2001).
– *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 4-5 (Mass. Super. Ct. 2001).
- Massachusetts General Laws chapter 272, § 29B(b) makes it a criminal offense for a person to disseminate, with knowledge and lascivious intent, any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child under 18.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 6 n.2 (Mass. Super. Ct. 2001).
– *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 5 (Mass. Super. Ct. 2001).
- Massachusetts General Laws chapter 272, § 28 states that whoever disseminates to a minor any matter harmful to minors, as defined in section thirty-one, knowing it to be harmful to minors, or has in his possession any such matter with the intent to disseminate the same to minors, shall be punished.
– *Commonwealth v. O’Keefe*, 723 N.E.2d 1000 (Mass. App. Ct. 2000).
– *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000).

1. “Visual Material” Defined

- “Visual material” is defined as any motion-picture film, picture, photograph, videotape, book, magazine, or pamphlet that contains pictures, photographs, or similar visual representations or reproductions. *Mass. Gen. Laws ch. 272, § 31*.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 6 n.3 (Mass. Super. Ct. 2001).
– *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 6 (Mass. Super. Ct. 2001).
– *Perry v. Commonwealth*, 780 N.E.2d 53, 54 (Mass. 2002).
- “Visual Material” is “any visual image created by use of a camera or similar device regardless of how or where the image is stored.”
– *Perry v. Commonwealth*, 780 N.E.2d 53, 54 (Mass. 2002).

- Undeveloped photographs, pictures, motion-picture films, videotapes, and similar visual representations or reproductions may be visual materials notwithstanding that processing, development, or similar acts may be required to make the contents thereof apparent. *Mass. Gen. Laws ch. 272, § 31.*
– *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 6 (Mass. Super. Ct. 2001).
- It is not the communicative format or medium that matters; what matters is whether the visual material represents a child in sexual conduct or in a state of nudity and whether such material is disseminated with knowledge and lascivious intent.
– *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 7-8 (Mass. Super. Ct. 2001).
- The definition of “visual material” includes computer images
– *Perry v. Commonwealth*, 780 N.E.2d 53, 54 (Mass. 2002).

2. “Disseminate” Defined

- “Disseminate” includes producing, printing, manufacturing, distributing, exhibiting, or displaying.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 9 (Mass. Super. Ct. 2001).
– *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 9 (Mass. Super. Ct. 2001).
- The statutory concern is not with the manner of processing the “display” or the means of distributing; the statutory concern is with the content of the material.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 9-10 (Mass. Super. Ct. 2001).
– *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 9 (Mass. Super. Ct. 2001).
- The statutes criminalize dissemination whether accomplished by way of hand, mail, facsimile, or through the use of E-mail.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 9 (Mass. Super. Ct. 2001).

3. “Picture” Defined

- A “picture” is a design or representation made by various means as painting, drawing, or photography.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 7 (Mass. Super. Ct. 2001).

- The construction of the term “picture” must be allowed reasonably to reflect technological advances.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 15 (Mass. Super. Ct. 2001).

4. **Photography**

a. **“Photograph” Defined**

- A “photograph” is a picture of a likeness obtained by photography.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 7 (Mass. Super. Ct. 2001).
 - *Perry v. Commonwealth*, 780 N.E.2d 53, 54 (Mass. 2002).
- The construction of the term “photograph” must be allowed reasonably to reflect technological advances.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 15 (Mass. Super. Ct. 2001).

b. **Digital Photography**

- Because digital photography is a process of photography, the likeness or representation that results therefrom must be considered a picture or photograph.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 7 (Mass. Super. Ct. 2001).
 - *Perry v. Commonwealth*, 780 N.E.2d 53, 54 (Mass. 2002).

5. **“Matter” Defined**

- Massachusetts General Laws chapter 272, § 31 defines “matter” for the purposes of chapter 265, §§ 28-30D as “any printed material, visual representation, live performance or sound recording, including by not limited to books, magazines, motion picture films, pamphlets, figures, statues, plays, dances.”
 - *Commonwealth v. Militello*, 848 N.E.2d 406, 412 n.3 (Mass. App. Ct. 2006).
 - *Commonwealth v. O’Keefe*, 723 N.E.2d 1000, 1001 (Mass. App. Ct. 2000).

6. **“Printed Material” Defined**

- “Printed material” includes machine-produced documents, not handwritten documents
 - *Commonwealth v. O’Keefe*, 723 N.E.2d 1000, 1001 (Mass. App. Ct. 2000).

7. **“Harmful to Minors” Defined**

- “Matter is harmful to minors if it is obscene’ or if taken as a whole, it (1) describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of

minors; (2) is patently contrary to prevailing standards of adults in the country where the offense was committed as to suitable material for such minors; and (3) lacks serious literary, artistic, political or scientific value for minors.” Massachusetts General Laws chapter 272, § 31.

-*Commonwealth v. Militello*, 848 N.E.2d 406, 410 (Mass. App. Ct. 2006)

8. “Obscene” Defined

- “Matter is obscene if taken as a whole it (1) appeals to the prurient interest of the average person applying the contemporary standards of the country where the offense was committed; (2) depicts or describes sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political or scientific value.” Massachusetts General Laws chapter 272, § 31.

-*Commonwealth v. Militello*, 848 N.E.2d 406, 410 n.2 (Mass. App. Ct. 2006).

D. Knowing Possession With Intent to Distribute

- Massachusetts General Laws chapter 272, § 29B (a) makes it a criminal offense for any person to knowingly possess with the intent to distribute any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity involving the use of a child under 18.
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 5 n.2 (Mass. Super. Ct. 2001).
- Massachusetts General Laws chapter 272, § 29B(b) makes it a criminal offense for a person to knowingly possess with the intent to distribute any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child under 18.
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104, 5 n.2 (Mass. Super. Ct. 2001).
- Paragraphs (a) and (b) of Massachusetts General Laws chapter 272, § 29B constitute a single crime and thus when indicting a defendant the state may argue in the alternative for a violation of the statute under paragraph a or b without being duplicative.
- *Commonwealth v. Dingle*, 2008 Mass. App. LEXIS 1169, 9 (Mass. App. Ct. 2008).

E. Virtual/Simulated Child Pornography

1. Virtual Child Pornography Defined

- “Sexually explicit images that appear to depict children but which, in fact, are created using adults (who look like children) or through the use of computer imaging technology”
- *Commonwealth v. Kenney*, 874 N.E.2d 1089, 1093 (Mass. 2007).

II. Child Sexual Exploitation

A. Unnatural and Lascivious Acts on a Child Under the Age of 16

- Massachusetts General Laws chapter 272, § 35A (commission of an unnatural and lascivious act on a child under the age of 16) should not be construed to make nonconsent an element and that proof of public exposure of the unnatural and lascivious act is not necessary for conviction under the statute.
– *Commonwealth v. Benoit*, 531 N.E.2d 262, 265 (Mass. App. Ct. 1988).

B. Lewd, Wanton, and Lascivious Persons in Speech or Behavior

1. Elements

- Massachusetts General Laws chapter 272, § 53 provides penalties for lewd, wanton, and lascivious persons in speech or behavior.
– *Commonwealth v. Beauchemin*, 571 N.E.2d 395, 397 (Mass. 1991).
– *Commonwealth v. Roy*, 647 N.E.2d 1179, 1181 (Mass. 1995).
- Massachusetts General Laws chapter 272, § 53 prohibits only the commission of conduct in a public place, or the public solicitation of conduct to be performed in a public place, when the conduct committed or solicited involves the touching of the genitals, buttocks, or female breasts, for purposes of sexual arousal, gratification, or offense, by a person who knows or should know of the presence of a person who may be offended by the conduct.
– *Commonwealth v. Beauchemin*, 571 N.E.2d 395, 397 (Mass. 1991).
– *Commonwealth v. Roy*, 647 N.E.2d 1179, 1181 (Mass. 1995).

2. “Public Place” Defined

- The essential query is whether the defendant intended public exposure or recklessly disregarded a substantial risk of exposure to one or more persons.
– *Commonwealth v. Beauchemin*, 571 N.E.2d 395, 397 (Mass. 1991).
- The Commonwealth must prove that the likelihood of being observed by casual passersby must have been reasonably foreseeable to the defendant, or stated otherwise, that the defendant acted upon an unreasonable expectation that his or her conduct would remain secret.
– *Commonwealth v. Beauchemin*, 571 N.E.2d 395, 397 (Mass. 1991).

3. “Lewd” Defined

- “Sexually unchaste, or licentious; suggestive of moral looseness; inviting sensual desire or imagination; indecent, obscene, or salacious”
-*Commonwealth v. Quinn*, 789 N.E.2d 138, 145 n.13 (Mass. 2003).
-*Commonwealth v. Sullivan*, 2008 Mass. Super. LEXIS 211, 10 (Mass. Super. Ct. 2008).
- A “lewd exhibition” and “lascivious exhibition” are essentially the same thing
-*Commonwealth v. Sullivan*, 2008 Mass. Super. LEXIS 211, 17 (Mass. Super. Ct. 2008).

III. Familial Kidnapping

- Massachusetts General Laws chapter 265, § 26A prohibits whoever, being a relative of a child less than 18 years old, without lawful authority, from holding or intending to hold such a child permanently or for a protracted period, or from taking or enticing the child away from his or her lawful custodian.
-*Commonwealth v. Beals*, 541 N.E.2d 1011, 1012 (Mass. 1989).
- Massachusetts General Laws chapter 265, § 26A does not criminalize the act of a parent’s taking his or her children out of the Commonwealth permanently or for a prolonged period in cases in which no court proceeding or custody order exists.
-*Commonwealth v. Beals*, 541 N.E.2d 1011, 1012 (Mass. 1989).
- Neither parent, in the absence of a custody order altering his or her natural custody rights to a child commits the crime of kidnapping by taking exclusive possession of the child.
-*Commonwealth v. Beals*, 541 N.E.2d 1011, 1013 (Mass. 1989).
- A court order is required to divest a parent of lawful authority to control his or her child, even where the parent’s assertion of control over a child had the effect of excluding the child’s other parent.
-*Commonwealth v. Beals*, 541 N.E.2d 1011, 1013 (Mass. 1989).

IV. Online Enticement/Solicitation of Children

- Massachusetts General Laws chapter 265, § 26C added in 2008 states that any person who entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that he or another person will violate section 13B, 13F, 13H, 22, 22A, 23, or 24 of chapter 265, section 4A, 16, 28, 29, 29A, 29B, 29C, 35A, 53, or 53A of chapter 272, or any offense that has an element that use or attempted use of force, shall be punished.
-*Commonwealth v. Disler*, 884 N.E.2d 500, 506 (Mass. 2008)
-*Commonwealth v. Filopoulos*, 884 N.E.2d 514, 517 (Mass. 2008)

-*Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138, 5 (Mass. App. Ct. 2008)

A. “Entice” Defined

- “To lure, induce, persuade, tempt, incite, solicit, coax or invite.”
Massachusetts General Laws chapter 265, § 26C.
-*Commonwealth v. Disler*, 884 N.E.2d 500, 506(Mass. 2008).
-*Commonwealth v. Filopoulos*, 884 N.E.2d 514, 517 (Mass. 2008).
-*Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138, 5 (Mass. App. Ct. 2008).

B. Elements of Enticement

1. Enticing words or gestures
- *Commonwealth v. Disler*, 884 N.E.2d 500, 506-507 (Mass. 2008).
 2. Intent to violate one or more of the criminal statutes enumerated in the statute against someone under 16 years of age
-*Commonwealth v. Disler*, 884 N.E.2d 500, 507 (Mass. 2008).
-*Commonwealth v. Filopoulos*, 884 N.E.2d 514, 517 (Mass. 2008).
-*Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138, 6-7 (Mass. App. Ct. 2008).
- No overt act is required to establish a violation of the enticement statute. Sending or speaking enticing words or engaging in enticing gestures in addition to the requisite intent is sufficient to establish a violation.
-*Commonwealth v. Disler*, 884 N.E.2d 500, 506 (Mass. 2008).
-*Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138, 6 (Mass. App. Ct. 2008).
 - Enticing words may be communicated orally or in writing, in person or electronically
- *Commonwealth v. Disler*, 884 N.E.2d 500, 507 (Mass. 2008).
 - The statute does not prohibit the sending of sexually explicit messages to minors, it prohibits sending such messages to lure, induce, persuade, tempt, incite, solicit, coax, or invite a minor, or someone the sender believes to be a minor, to take certain action so long as the sender has the requisite intent to use the messages to commit one of the enumerated criminal acts.
-*Commonwealth v. Disler*, 884 N.E.2d 500, 508 (Mass. 2008).
 - The enticement statute can be violated absent any reference to sexual matters
-*Commonwealth v. Disler*, 884 N.E.2d 500, 508 n. 13 (Mass. 2008).
-*Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138 (Mass. App. Ct. 2008).
 - To establish a violation of the enticement statute the state must prove that the defendant had the intended to commit one of the enumerated criminal acts *against a child under 16 years old*
-*Commonwealth v. Disler*, 884 N.E.2d 500, 507 (Mass. 2008).
-*Commonwealth v. Filopoulos*, 884 N.E.2d 514, 517 (Mass. 2008).
-*Commonwealth v. LaPlante*, 2008 Mass. App. LEXIS 1138, 6-7 (Mass. App. Ct. 2008).

V. Transporting Minor for the Purposes of Prostitution

No state cases reported.

MASSACHUSETTS

Search and Seizure of Electronic Evidence

I. Search Warrants

A. Probable Cause

- Probable cause is based on reasonable trustworthy information sufficient to warrant a prudent person in believing that the defendant had committed an offense.
– *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9, 4 (Mass. Super. Ct. 2002).

1. Probable Cause Sufficient to Issue Search Warrant

- “To establish probable cause to search, the facts contained in an affidavit, and reasonable inferences that may be drawn from them, must be sufficient for the magistrate to conclude ‘that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.’”
– *Commonwealth v. Anthony*, 883 N.E.2d 918, 925 (Mass. 2008)(quoting *Commonwealth v. Walker*, 780 N.E.2d 26 (Mass. 2002) quoting *Commonwealth v. Donahue*, 723 N.E.2d 25 (Mass. 2000)).
- “The probable cause necessary to support the issuance of a search warrant does not require definitive proof of criminal activity. Rather, ‘the basic question for the magistrate, when evaluating an affidavit supporting an application for the issuance of a search warrant, is whether there is a substantial basis on which to conclude that the article or activity described are *probably* present or occurring at the place to be searched.’”
– *Commonwealth v. Anthony*, 883 N.E.2d 918, 925 (Mass. 2008) (quoting *Commonwealth v. Spano*, 605 N.E.2d 1241 (Mass. 1993)).
- In order to establish the absence of probable cause, the defendant must demonstrate that the affidavit failed to contain enough information for the issuing magistrate to determine that the items sought are related to the criminal activity under investigation and that they may reasonably be expected to be located in the place to be searched.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 18 (Mass. Super. Ct. 2001).

- Probable cause requires more than mere suspicion of criminal involvement, but less than that required to demonstrate, *prima facie*, the commission of a crime or to warrant a conviction.
 - *Commonwealth v. Dow*, 2002 Mass. Super. LEXIS 9, 4 (Mass. Super. Ct. 2002).
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 18 (Mass. Super. Ct. 2001).
- In reviewing the warrant application to determine whether probable cause to issue the warrant existed, the court should read the affidavits as a whole, in an ordinary, common-sense manner, and should not subject the writings to hypertechnical analysis.
 - *Commonwealth v. Anthony*, 883 N.E.2d 918, 925 (Mass. 2008).
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 19 (Mass. Super. Ct. 2001).

2. Nexus Between the Defendant, the Premises to Be Searched, and the Items to Be Seized

- “The requisite nexus between the criminal article or activity described in the affidavit and the place to be searched need not be based on direct observation.”
 - *Commonwealth v. Anthony*, 883 N.E.2d 918, 926 (Mass. 2008).
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 24 (Mass. Super. Ct. 2001).
- The nexus may be found in the type of crime, the nature of the missing items, the extent of the suspect’s opportunity for concealment, and normal inferences as to where a criminal would be likely to hide evidence of the crime.
 - *Commonwealth v. Anthony*, 883 N.E.2d 918, 926 (Mass. 2008).
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 24 (Mass. Super. Ct. 2001).
- The evidence required to justify issuance of a warrant need not be beyond a reasonable doubt, but it must provide a substantial basis for concluding that evidence connected to the crime is probably located on the specified premises.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 24-25 (Mass. Super. Ct. 2001).

3. The Particularity Requirement

- The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved.
 - *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 26-27 (Mass. Super. Ct. 2001).

4. Motion to Suppress

- Only the facts revealed within the four corners of the affidavit, and any reasonable inferences to be drawn from those facts, may be considered by the reviewing court in its disposition of a motion to suppress.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 19 (Mass. Super. Ct. 2001).
- “When reviewing a decision on a motion to suppress, an appellate court accepts the motion judge’s findings of fact absent clear error.”
– *Commonwealth v. Anthony*, 883 N.E.2d 918, 925 (Mass. 2008).

5. The Defendant’s Burden

a. False Statements

- If a defendant establishes by a preponderance of the evidence that a false statement made knowingly, intentionally, or with reckless disregard for the truth was included in a probable-cause affidavit, and if it was material to establish probable cause, the false information must be excised from the affidavit.
– *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978).

b. Evidence Illegally Obtained

- When challenging a search conducted pursuant to a search warrant, the defendant has the burden of showing that the evidence was illegally obtained.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 18 (Mass. Super. Ct. 2001).

B. Scope of Search

- Where the commingling of legitimate and illegitimate items makes an on-site examination impracticable, a temporary seizure of the whole is permitted.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 28 (Mass. Super. Ct. 2001).
- The nature of computer and data storage permits, as a matter of reasonable necessity, an on-site seizure followed by an off-site examination, with, of course, the corollary that non-incriminating material be returned promptly.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 28 (Mass. Super. Ct. 2001).

C. Staleness

1. In General

- The facts supporting probable cause must be closely related to the time of the issue of the warrant so as to justify a finding of probable cause at that time.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 20 (Mass. Super. Ct. 2001).
- The nature of the alleged criminal activity is significant in determining the timeliness *vel non* of the issuance of the warrant.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 20 (Mass. Super. Ct. 2001).
- If an affidavit evidences activities describing protracted and continuous conduct, the passage of time between the activities and the issuance becomes less significant.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 21 (Mass. Super. Ct. 2001).
- An important factor in demonstrating continuity is the number and quality of observations that suggest a continuing criminal activity.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 21 (Mass. Super. Ct. 2001).

2. Dissemination of Child Pornography

- The fact that an affidavit's allegations concern dissemination of child pornography *via* computer may permit a magistrate to issue a search warrant on information the timeliness of which might illegitimize a warrant for the seizure of other items.
– *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374, 22 (Mass. Super. Ct. 2001).

II. Anticipatory Warrants

- “An anticipatory warrant is one based on an affidavit that establishes probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.”
– *Commonwealth v. Staines*, 806 N.E.2d 910, 913 n. 2 (Mass. 2004).
- An anticipatory warrant takes place at some future time, not at the time of issuance
– *Commonwealth v. Staines*, 806 N.E.2d 910, 915 (Mass. 2004).
- “Standard for determining whether an anticipatory warrant may issue is probable cause”
– *Commonwealth v. Staines*, 806 N.E.2d 910, 914 n.3 (Mass. 2004) (citing *Commonwealth v. Soares*, 424 N.E.2d 221 (Mass. 1981)).

- For an anticipatory warrant to be valid the triggering event must be adequately specified within the supporting affidavit and there must be a substantial probability that the item sought will be present when the warrant is triggered.
-*Commonwealth v. Staines*, 806 N.E.2d 910, 914 (Mass. 2004).
- As with affidavits in support of an ordinary search warrant an affidavit in support of an anticipatory warrant is “to be read in an ordinary, commonsense manner and is not to be subjected to hypothetical analysis.”
-*Commonwealth v. Staines*, 806 N.E.2d 910, 915 (Mass. 2004) (quoting *Commonwealth v. Cefalo*, 409 N.E.2d 719 (Mass. 1980)).
- An anticipatory warrant is valid even though it does not state on its face the conditions precedent to its execution, when (1) clear, explicit, narrowly drawn conditions for the execution of the warrant are contained in the affidavit that applies for the warrant application; and (2) those conditions are actually satisfied before the warrant is executed.
- *Commonwealth v. Gauthier*, 679 N.E.2d 211, 216 (Mass. 1997).

III. Methods of Searching

No state cases reported.

IV. Types of Searches

A. Employer Searches

No state cases reported.

B. Private Searches

1. Private Search Doctrine

- “The exclusionary rule barring searches in violation of the Fourth Amendment requires government action. Fourth Amendment restrictions are ‘wholly inapplicable ‘to search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.’”
-*Commonwealth v. Raboin*, 2008 Mass. Super. LEXIS 202, 14 (Mass. Super. Ct. 2008).
- Evidence obtained through a private search, even if the evidence was obtained illegally, is admissible.
- *Commonwealth v. Raboin*, 2008 Mass. Super. LEXIS 202, 14 (Mass. Super. Ct. 2008).

C. Civilian Searches

No state cases reported.

D. University-Campus Searches

No state cases reported.

E. Consent Searches

- When there is a question as to whether a person's consent for a search is valid the Commonwealth has the burden of proving that the defendant consented to the search, that the consent was freely and voluntarily given, and that the consent was not a product of expressed or implied coercion.
-*Commonwealth v. Wallace*, 877 N.E.2d 260, 265 (Mass. App. Ct. 2007).
- To determine whether consent is valid the court considered the totality of the circumstances at the time the consent was given.
-*Commonwealth v. Wallace*, 877 N.E.2d 260, 265 (Mass. App. Ct. 2007).
- "Consent will be held to be valid 'if it can rationally be determined that it did not come about y virtue of a prior illegality, but rather was given for a reason independent of the earlier unlawful act or event.'"
- *Commonwealth v. Wallace*, 877 N.E.2d 260, 265 (Mass. App. Ct. 2007) (quoting *Commonwealth v. Kipp*, 785 N.E.2d 403 (Mass. App. Ct. 2003)).
- What, if any, limitations on the consent are implied by the language or conduct of the consenting party is a question in the first instance for the judgment of law-enforcement officers to whom the consent is given.
- *Commonwealth v. Hinds*, 768 N.E.2d 1067 (Mass. 2002).
- The ultimate question is whether, in light of all the circumstances, a man of reasonable caution would be warranted in the belief that some limitation was intended by the consent-giver.
- *Commonwealth v. Hinds*, 768 N.E.2d 1067 (Mass. 2002).

V. Computer Technician/Repairperson Discoveries

No state cases reported.

VI. Photo-Development Discoveries

No state cases reported.

VII. Criminal Forfeiture

- Property may not be forfeited simply because it is offensive or repugnant; however, if the items a defendant seeks to have returned can be seen as being directly related to the crimes committed, as having influenced the defendant's behavior, or as being relevant to an understanding of the psychological or physical circumstances under which the crime was committed, returning said property would be so offensive to

basic concepts of decency treasured in a civilized society that it would undermine the confidence that the public has a right to expect in the criminal-justice system.
– *Beldotti v. Commonwealth*, 669 N.E.2d 222, 224 (Mass. App. Ct. 1996).

VIII. Disciplinary Hearings for Federal and State Officers

No state cases reported.

IX. Probation and Parolee Rights

No state cases reported.

MASSACHUSETTS

Jurisdiction and Nexus

I. Jurisdictional Nexus

No state cases reported.

II. Internet Nexus

No state cases reported.

III. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

A. State

No state cases reported.

B. Federal

No state cases reported.

C. Concurrent

No state cases reported.

IV. Interstate Possession of Child Pornography

No state cases reported.

MASSACHUSETTS

Discovery and Evidence

I. Timely Review of Evidence

No state cases reported.

II. Defense Requests for Copies of Child Pornography

No state cases reported.

III. Introduction of E-mails into Evidence

A. Hearsay/Authentication Issues

No state cases reported.

B. Circumstantial Evidence

No state cases reported.

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

IV. Text-Only Evidence

A. Introduction into Evidence

No state cases reported.

B. Relevance

No state cases reported.

V. Evidence Obtained from Internet Service Providers

A. Electronic Communications Privacy Act

No state cases reported.

B. Cable Act

No state cases reported.

C. Patriot Act

1. National Trap and Trace Authority

No state cases reported.

2. State-Court-Judge Jurisdictional Limits

No state cases reported.

VI. Evidence Obtained Through Wiretapping

A. Consent

- The Massachusetts wiretap statute requires both parties to consent to the recording of telephone calls for the recording to be legal. *Mass. Gen. Laws ch. 272, § 99*.
– *Commonwealth v. Barboza*, 763 N.E.2d 547, 551 (Mass. App. Ct. 2002).
- Federal law permits recording with the consent of one party to the communication. Recording done outside of Massachusetts is subject to the laws of the state in which the recording occurred or federal law.
– *Commonwealth v. Maccini*, 2007 Mass. Super. LEXIS 235, 5 (Mass. Super. Ct. 2007).
- When a person uses electronic mail, instant messaging, and other computer-related methods of communication (s)he “‘as a matter of law, consents to the recording of his or her communications,’ because recoding on a computer is inherent in such communications.”
– *Commonwealth v. Maccini*, 2007 Mass. Super. LEXIS 235, 6-7 (Mass. Super. Ct. 2007).

B. Suppression of Unlawfully Intercepted Communication

- The statute does not mandate that all unlawfully intercepted communications should be suppressed. Rather it has been held that although any person who is a defendant in a criminal trial may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom if that communication was lawfully intercepted, the Legislature has left it to the court to decide whether unlawfully intercepted communications must be suppressed.
– *Commonwealth v. Barboza*, 763 N.E.2d 547, 551 (Mass. App. Ct. 2002).

- The statute prohibits willful interception of any wire communication without a warrant. Massachusetts General Laws chapter 272, § 99C1.
-*Commonwealth v. Maccini*, 2007 Mass. Super. LEXIS 235, 4 (Mass. Super. Ct. 2007).
- **“Interception” Defined**
 - ““To secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through any intercepting device or any person other than the person give prior authority by all parties to such communication.””
-*Commonwealth v. Maccini*, 2007 Mass. Super. LEXIS 235, 4 (Mass. Super. Ct. 2007) (quoting *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987)).

C. Extension-Telephone Exception

- The extension-telephone exception exempts from the statute equipment used by a telephone service subscriber in the ordinary course of business.
-*Commonwealth v. Barboza*, 763 N.E.2d 547, 554 (Mass. App. Ct. 2002).
- This exception has been read to permit family members within their own homes to eavesdrop on, and even record, each other.
-*Commonwealth v. Barboza*, 763 N.E.2d 547, 554 (Mass. App. Ct. 2002).
- A recording by parents of their own minor son talking on the telephone in their own home, motivated by concerns that he was being sexually exploited by an adult, does not violate the Massachusetts wiretap statute.
-*Commonwealth v. Barboza*, 763 N.E.2d 547, 554 (Mass. App. Ct. 2002).

VII. Prior Bad Acts and “Other Crimes” Evidence

A. Inadmissible

- Evidence of uncharged criminal acts against third parties as well as against a complaining victim is not admissible to show a defendant’s propensity to commit the charged crime.
-*Commonwealth v. Hanlon*, 694 N.E.2d 358, 365 (Mass. App. Ct. 1998).
- Evidence of uncharged acts that are too remote in time is not admissible if the charged and uncharged acts are not sufficiently similar.
-*Commonwealth v. Hanlon*, 694 N.E.2d 358, 366 (Mass. App. Ct. 1998).

B. Admissible

- Evidence of other crimes that are connected with the facts of the case at hand may be admitted to establish knowledge, intent, motive, method, material to proof of the crime charged.
-*Commonwealth v. LeFave*, 556 N.E.2d 83, 89 (Mass. 1990).

- Evidence of uncharged bad acts may be admitted to show common plan, pattern of conduct, intent, or motive.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 365 (Mass. App. Ct. 1998).
- “‘In response to an entrapment defense, the Commonwealth may introduce a defendant’s prior criminal acts to show predisposition.’...However, ‘those prior criminal acts must be similar to the crimes for which the defendant is on trial.’”
–*Commonwealth v. Dingle*, 2008 Mass. App. Ct. LEXIS 1169, 19-20 (Mass. App. Ct. 2008) (quoting *Commonwealth v. DeCastro*, 509 N.E.2d 25 (Mass. App. Ct. 1987)).
- Massachusetts General Laws chapter 123A, § 14(c) states “Juvenile and adult court probation record, psychiatric and psychological records and report of the person named in the petition, including reports of any qualified examiner, as defined in section I, and filed under this chapter, police reports relating to such persons prior sexual offenses, incident reports arising out of such person’s incarceration or custody, oral or written statements prepared for and to be offered at the trial by the victims of the person who is the subject of the petition and any other evidence tending to show that such person is or is not a sexually dangerous person shall be admissible at trial if such written information has been provided to opposing counsel reasonably in advance of trial.”
–*Commonwealth v. Starkus*, 867 N.E.2d 811, 817 (Mass. App. Ct. 2007).
- In a trial to determine whether someone is a sexually dangerous person any of the records discussed in the statute, including records discussing prior convictions and prior bad acts, are admissible to prove that the person is or is not a sexually dangerous person as long as the prior conviction or prior bad act is sexual in nature.
– *Commonwealth v. Starkus*, 867 N.E.2d 811, 817 (Mass. App. Ct. 2007).

1. Uncharged Similar Acts

- Evidence of uncharged acts similar to the offense charged is admissible to show a common plan or pattern of conduct which may explain the defendant’s intent or modus operandi, to corroborate the victim’s testimony, or to counter the defendant’s denial.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 365 (Mass. App. Ct. 1998).

a. Committed Against Another Person

- When the uncharged offenses are committed against a person other than the complaining victim, there must be both a schematic similarity and a temporal connection for the evidence to be admissible.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 366 (Mass. App. Ct. 1998).

b. Remoteness

- There is no bright-line test for measuring remoteness.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 366 (Mass. App. Ct. 1998).
- When the uncharged misconduct is one instance in a continuing course of related events, or the conduct is unusual and particularly similar to the charged acts, the allowable time period is greater.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 366 (Mass. App. Ct. 1998).

2. Uncharged Sexual Misconduct

- Evidence of uncharged sexual misconduct, when not too remote in time, is competent to prove an inclination to commit the acts charged in the indictment and is relevant to show the probable existence of the same passion or emotion at the time in issue.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 365 (Mass. App. Ct. 1998).

3. Common Plan or Course of Conduct

- Evidence offered for the purpose of showing a common plan or course of conduct can be admitted where each incident is part of an ongoing plan, where it supports the inference that the defendant had a plan or pattern of conduct to commit the charged offense, or where it corroborates the victim's testimony.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 365-66 (Mass. App. Ct. 1998).

4. Evidence of a Sexual Assault on a Person Other than the Victim

- Evidence of a sexual assault on a person other than the victim is only admissible if it is connected in time, place, or other relevant circumstances to the particular sex offense for which the defendant is being tried.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 366 (Mass. App. Ct. 1998).
- The conduct toward the other victims must form a temporal and schematic nexus which renders the evidence admissible to show a common course of conduct regarding the victims.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 366 (Mass. App. Ct. 1998).
- Evidence of uncharged acts need not have been against persons closely related to the complaining witness, where the evidence is sufficiently related in time and location, or where the assaults are closely related in form.
– *Commonwealth v. Hanlon*, 694 N.E.2d 358, 366 (Mass. App. Ct. 1998).

VIII. Witnesses and Testimony

A. Expert Testimony

1. Admissibility

- A trial judge has broad discretion with respect to the admission of expert testimony.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 597 (Mass. 1989).
- Testimony on matters within the witness’s field of expertise is admissible whenever it will aid the jury in reaching a decision, even if the expert’s opinion touches on the ultimate issues that a jury must decide.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 597 (Mass. 1989).
- A proper subject of expert testimony has been that, if other criteria are met, such testimony is admissible if, in the judge’s discretion, the subject is not within the common knowledge or common experience of the jury.
– *Commonwealth v. LeFave*, 556 N.E.2d 83, 88 n.9 (Mass. 1990).
- The question is whether, in the wide discretion of the trial judge, the subject is one on which the opinion of an expert will be of assistance to the jury.
– *Commonwealth v. LeFave*, 556 N.E.2d 83, 88 n.9 (Mass. 1990).

2. Testimony on Child Pornography

- It is within the judge’s discretion to conclude that the types of poses typically depicted in child pornography constitute information beyond the common knowledge or experience of the jurors and that expert testimony will aid the jurors.
– *Commonwealth v. LeFave*, 556 N.E.2d 83, 88 n.9 (Mass. 1990).

3. Testimony on Sexually Abused Children

a. In General

- An expert may testify about general syndromes associated with sexual abuse.
– *Commonwealth v. Allen*, 665 N.E.2d 105, 110 (Mass. App. Ct. 1996).
- In offering an expert who would testify about the general behavioral characteristics of sexually abused children, the Commonwealth must take care not to lead the expert to

trespass unduly on the jury's province to assess the credibility of witnesses, in particular the child as a witness.

– *Commonwealth v. O'Brien*, 626 N.E.2d 892, 895 (Mass. App. Ct. 1994).

- Expert testimony on the typical symptoms or signs and general behavioral characteristics of sexually abused children is admissible and does not, of itself, constitute an opinion on the credibility of the complaining witness.
– *Commonwealth v. Colon*, 729 N.E.2d 315, 317 (Mass. App. Ct. 2000).

b. Treating Therapist as Expert Witness

- It is the better practice to avoid using the treating therapist as an expert on syndromes associated with sexual abuse, as it gives rise to the risk that such an expert's testimony can be construed as impliedly supporting the truthfulness of the complainant; however, courts have not gone so far as to hold that it would never be permissible for a treating therapist to give expert testimony.
– *Commonwealth v. Allen*, 665 N.E.2d 105, 111 (Mass. App. Ct. 1996).

4. Testimony on Witness's Credibility

a. Opinion Testimony

- An expert may not offer an opinion on a witness's credibility.
– *Commonwealth v. Colon*, 729 N.E.2d 315, 317 (Mass. App. Ct. 2000).

b. Patterns of Disclosure

- Testimony pertaining to patterns of disclosure – that victims of child sexual abuse often fail to disclose their abuse until long after the fact, omit certain details, change their stories over time, and give inconsistent statements or that certain children are apt to lie about sexual abuse – goes directly to the truthfulness of the child complainant's testimony and therefore usurps the jury's function.
– *Commonwealth v. Colon*, 729 N.E.2d 315, 318 (Mass. App. Ct. 2000).

B. Child Witnesses

- A child is not disqualified as a witness merely by reason of his or her youth.
– *Commonwealth v. Avery*, 437 N.E.2d 242, 244 n.2 (Mass. App. Ct. 1982).

- Unemancipated minor children who reside with an accused parent may invoke a testimonial privilege against testifying under Massachusetts General Laws chapter 233, § 20, Fourth, if the other requirements of the statute are met.
-*In the Matter of a Grand Jury Investigation*, 819 N.E.2d 171, 173 n.2 (Mass. 2004).

1. Competency

- There is no precise age which determines the competency of a child to testify.
– *Commonwealth v. Avery*, 437 N.E.2d 242, 244 n.2 (Mass. App. Ct. 1982).
- In order to determine competency of a child-witness, the ultimate test must depend upon the existence of an understanding sufficient to comprehend the difference between truth and falsehood; the wickedness of the latter and the obligation and duty to tell the truth; and, in a general way, belief that failure to perform the obligation will result in punishment.
– *Commonwealth v. Avery*, 437 N.E.2d 242, 244 n.2 (Mass. App. Ct. 1982).
– *Commonwealth v. LeFave*, 556 N.E.2d 83, 92 (Mass. 1990).
- In determining competency, the judge is afforded wide discretion to tailor the competency inquiry to the particular circumstances and intellect of the witnesses.
– *Commonwealth v. LeFave*, 556 N.E.2d 83, 92 (Mass. 1990).
- A trial judge retains discretion to determine whether the jury should receive a special instruction with respect to the credibility of a young witness, and, if so, the nature of that instruction.
– *Commonwealth v. Avery*, 437 N.E.2d 242, 245 (Mass. App. Ct. 1982).

2. Videotaped Testimony

a. When Used

- Massachusetts General Laws chapter 278, § 16D provides that a child can give videotaped testimony if the court finds by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in front of the defendant, or as a result of both.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 594 (Mass. 1989).

b. Burden

- The Commonwealth must show, by more than a mere preponderance of the evidence, a compelling need for use of videotaped testimony. Such a compelling need could be shown where, by proof beyond a reasonable doubt, the recording of

the testimony of a child witness outside the courtroom, but in the presence of the defendant, is shown to be necessary so as to avoid severe and long-lasting emotional trauma to the child.

– *Commonwealth v. Dockham*, 542 N.E.2d 591, 594 (Mass. 1989).

c. Requirements

- In constitutional terms, a videotape should be required to convey to the jury the totality of the circumstances involved in the giving of the testimony.
– *Commonwealth v. Tufts*, 542 N.E.2d 586, 590 (Mass. 1989).
- Videotapes should show all persons present in the room as the jury would perceive them in open court. Ideally all persons present in the room during the taping should be visible in the videotape.
– *Commonwealth v. Tufts*, 542 N.E.2d 586, 591 (Mass. 1989).
- It is more preferable that jurors be able to observe the reactions of defendants to the child witness’s testimony during the videotaping, but defendants who are not visible on the tape will not necessarily constitute a fatal flaw to an otherwise satisfactory videotape.
– *Commonwealth v. Tufts*, 542 N.E.2d 586, 591 (Mass. 1989).
- The witness must give his or her testimony to the accused’s face.
– *Commonwealth v. Amirault*, 677 N.E.2d 652, 662 (Mass. 1997).
- The right of confrontation requires a judge to refrain from designing seating configurations which comfortably shield a witness from a face-to-face meeting.
– *Commonwealth v. Amirault*, 677 N.E.2d 652, 663 (Mass. 1997).
- The judge must assure that the setting of the videotaping approximates as closely as possible the conditions that would obtain in a traditional courtroom confrontation.
– *Commonwealth v. Amirault*, 677 N.E.2d 652, 665 (Mass. 1997).
- The jury should be made aware of the setting at the videotaping, perhaps by a presentation, repeated from time to time, in which the whole setting and the positions of the participants are shown on the screen.
– *Commonwealth v. Amirault*, 677 N.E.2d 652, 665 (Mass. 1997).

d. Alternatives

- Special arrangements encompassing more intimate, less intimidating settings for the child’s testimony may be devised: the number of persons present may be limited, the judge may sit at the same level as the other participants and not wear robes, special furniture may be used such as child-size chairs and tables, the child’s parent or a favorite toy may be placed near the witness.
– *Commonwealth v. Amirault*, 677 N.E.2d 652, 664 (Mass. 1997).

C. Psychological and Emotional Trauma

- Massachusetts General Laws chapter 278, § 16D imposes no requirement that a judge’s finding of psychological or emotional trauma be based on expert testimony.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 595 (Mass. 1989).

D. “Fresh Complaint” Witnesses

- In sexual-assault cases, evidence of a fresh complaint is admitted for the more general purpose of confirming the victim’s testimony.
– *Commonwealth v. LeFave*, 556 N.E.2d 83, 92 (Mass. 1990).

1. “Fresh Complaint” Defined

- A person violated sexually may be expected to complain to others; evidence of such complaint – if the complaint was “fresh,” and thus probably not a product of imagination or contrivance – may be admitted, not in proof of the criminal occurrence, but in corroboration of other evidence of it.
– *Commonwealth v. Foskette*, 568 N.E.2d 1167, 1170-71 (Mass. App. Ct. 1991).

2. Time Frame

- Freshness is not, or is not entirely, a matter of counting the hours between the event and first declaration.
– *Commonwealth v. Foskette*, 568 N.E.2d 1167, 1171 (Mass. App. Ct. 1991).
- There is no absolute rule as to the time frame within which a sexual-assault victim must make a first complaint for that complaint to be admissible in evidence as a fresh complaint.
– *Commonwealth v. Allen*, 665 N.E.2d 105, 112 (Mass. App. Ct. 1996).
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 595 (Mass. 1989).

- The time frame is especially flexible in the context of fresh complaints by young, sexually abused children.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 595 (Mass. 1989).
- The determination as to whether statements are sufficiently prompt to constitute fresh complaints rests within the sound discretion of the trial judge.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 596 (Mass. 1989).
- The test is whether the victim’s actions were reasonable in the particular circumstances of the case. Among other relevant factors are the child’s age, the length of time the child has been away from an abusive setting, whether the perpetrator used threats or coercion, and whether the perpetrator is a relative or close friend of the child.
– *Commonwealth v. Allen*, 665 N.E.2d 105, 112 (Mass. Ct. App. 1996).
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 596 (Mass. 1989).

E. Reputation and Character Evidence

1. Admissible

- A witness can testify as to another witness’s general reputation for truthfulness and veracity among those who know him or her.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 599 (Mass. 1989).
- Competent evidence of reputation must reflect a uniform and concurrent sentiment in the public mind.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 599 (Mass. 1989).
- A witness’s character can be shown only by evidence of his or her general reputation as disclosed by the common speech of his or her neighbors and members of the community.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 599 (Mass. 1989).

2. Inadmissible

- Personal opinions and isolated acts are not evidence of general reputation.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 599 (Mass. 1989).
- Evidence of specific or particular acts of lying or similar misconduct is not admissible; nor is the opinion of a witness as to the character of the witness being impeached.
– *Commonwealth v. Dockham*, 542 N.E.2d 591, 599 (Mass. 1989).

IX. Privileges: Social Workers

A. Privilege

- Massachusetts General Laws chapter 112, § 135 prohibits a social worker, except in seven specified circumstances, from disclosing information acquired from persons consulting the social worker in a professional capacity.
– *Commonwealth v. Jones*, 535 N.E.2d 221, 222 (Mass. 1989).

B. Exception

- Massachusetts General Laws chapter 112, § 135(f) creates an exception for information that the social worker has acquired while conducting an investigation pursuant to chapter 19, § 51B. Massachusetts General Laws chapter 119, § 51B requires that the department notify the district attorney of, and transmit a written report of, the investigation and evaluation of any child-abuse or neglect case resulting in the death, sexual assault, brain damage, sexual exploitation, or serious bodily injury of a child.
– *Commonwealth v. Jones*, 535 N.E.2d 221, 222 (Mass. 1989).

MASSACHUSETTS

Age of Child Victim

I. Proving the Age of the Child Victim

- The determination whether the child in any visual material prohibited hereunder is under 18 years of age may be made by the personal testimony of such child; by the testimony of a person who produced, processed, published, printed, or manufactured such visual material that the child was known to him or her to be under 18 years of age; by testimony of a person who observed the visual material; by expert-medical testimony as to the age of the child based upon the child's physical appearance; by inspection of the visual material; or by any other method authorized by any general or special law or by any applicable rule of evidence.

– *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693, 23-24 (Mass. Super. Ct. 2000).

II. The Defendant's Knowledge of the Age of the Child

- A conviction for knowing possession of material containing depictions of a child under the age of 18 engaged in sexual activity requires proof that the defendant knows or reasonably should know the child to be under the age of 18 years of age.

– *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693, 23-24 (Mass. Super. Ct. 2000).

MASSACHUSETTS

Multiple Counts

I. What Constitutes an “Item” of Child Pornography?

No state cases reported.

II. Issues of Double Jeopardy

- To determine whether a defendant may be convicted of two statutory offenses arising from a single incident, the long-prevailing test in Massachusetts is whether each crime requires proof of an additional fact that the other does not.
– *Commonwealth v. LeFave*, 556 N.E.2d 83, 93 (Mass. 1990).
- “In Massachusetts, a single act may provide the basis for multiple convictions and penalties so long as none of the offenses involved is a lesser included crime of the other.”
– *Commonwealth v. Howez*, 788 N.E.2d 586, 588 (Mass. App. Ct. 2002).
- Neither offense is a lesser included offense if each of the two crimes has an element the other does not.
– *Commonwealth v. Howez*, 788 N.E.2d 586, 588 (Mass. App. Ct. 2002).
- If neither offense is a lesser included offense of the other multiple punishments are permitted even where the two offenses arise out of the very same act or closely related acts”
– *Commonwealth v. Howez*, 788 N.E.2d 586, 591 n.7 (Mass. App. Ct. 2002).
- If one offense is a lesser included offense of another the principles of double jeopardy prohibit the imposition of penalties based on violations of both the greater and lesser offenses.
– *Commonwealth v. Howez*, 788 N.E.2d 586, 588 (Mass. App. Ct. 2002).

A. Cases Involving Ongoing Abuse

- In cases alleging continuous, ongoing sexual abuse of a young child, particularly by an abuser who lives with the child, information regarding specific dates and places of the criminal conduct is often impossible to ascertain, and selecting the number of incidents on which to charge a defendant is necessarily difficult.
– *Commonwealth v. LaCaprucia*, 708 N.E.2d 952, 956 (Mass. 1999).
- The Commonwealth is not foreclosed from obtaining convictions of defendants who have abused children over a period of time; however, when

the Commonwealth brings a number of indictments against a defendant alleging child sexual abuse occurring at unspecified times or places, there is always the risk that jurors may vote to find the defendant guilty on a particular indictment, but with different incidents or conduct in mind. A reviewing court may uphold a conviction in such a case only where the record is clear that the jurors understood their duty unanimously to agree to a particular set of facts.
– *Commonwealth v. LaCaprucia*, 708 N.E.2d 952, 956 (Mass. 1999).

B. Prosecution After Acquittal

- The constitutional prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal.
– *Commonwealth v. LaCaprucia*, 708 N.E.2d 952, 955 (Mass. 1999).

MASSACHUSETTS

Defenses

I. Age

- A conviction for knowing possession of material containing depictions of a child under the age of 18 engaged in sexual activity requires proof that the defendant knows or reasonably should know the child to be under the age of 18 years of age.
–*Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693, 23-24 (Mass. Super. Ct. 2000).
–*Commonwealth v. Wright*, 700 N.E.2d 1263, 1265 (Mass. App. Ct. 2003).

II. Consent

- Lack of consent must be shown for a conviction under Massachusetts General Laws chapter 265, § 13B, nonharmful indecent assault and battery on a child under 14.
–*Commonwealth v. Benoit*, 531 N.E.2d 262, 263 (Mass. App. Ct. 1988)
- Lack of consent by the victim is not an element of indecent assault and battery on a child under fourteen years (Massachusetts General Laws chapter 265, § 13B).
–*Commonwealth v. Traynor*, 666 N.E.2d 148, 149 (Mass. App. Ct. 1996).

III. Diminished Capacity

A. Addiction to the Internet

No state cases reported.

B. Insanity

No state cases reported.

C. Mental Abnormalities and Personality Disorders

- If there is evidence that an individual has a mental abnormality or personality disorder which makes it impossible for him or her to control his sexual impulses the abnormality or disorder *may potentially* serve as a defense.
–*Commonwealth v. Barrett*, 2001 Mass. Super. LEXIS 351, 10 (Mass. Super. Ct. 2001).
- For the abnormality or disorder to be a defense there must be evidence that the individual lacked the power to control his or her sexual impulses at the time that the offense occurred, not at the time that the psychological evaluation was performed, at the time of trial, or at the time a plea was entered.
– *Commonwealth v. Barrett*, 2001 Mass. Super. LEXIS 351, 10 (Mass. Super. Ct. 2001).

D. Lack of Criminal Responsibility

1. Lack of the Substantial Capacity to Appreciate the Criminality or Wrongfulness of One's Conduct

-*Commonwealth v. Barrett*, 2001 Mass. Super. LEXIS 351 (Mass. Super. Ct. 2001).

2. Inability to Conform One's Conduct to the Requirements of Law

-*Commonwealth v. Barrett*, 2001 Mass. Super. LEXIS 351 (Mass. Super. Ct. 2001)

IV. First Amendment

- The artistic nature of a composition may be relevant evidence of an intention other than "sexual gratification."
- *Commonwealth v. Bean*, 761 N.E.2d 501, 508 n.16 (Mass. 2002).

V. Impossibility

A. Factual

- "Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a physical circumstance unknown to the defendant prevents him from accomplishing that intended objective." Factual impossibility is not a defense to a charge of an attempted crime.
-*Commonwealth v. Disler*, 884 N.E.2d 500, 507 (Mass. 2008).
-*Commonwealth v. Vann Bell*, 853 N.E.2d 563, 567 (Mass. App. Ct. 2006) (quoting *Commonwealth v. McDonald*, 1850 Mass. LEXIS 12 (Mass. 1850)).

B. Legal

- "Legal impossibility occurs when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime." Legal impossibility can be a defense to a charge of an attempted offense, however it will only serve as a defense if the defendant's objective to do something was not a crime.
- *Commonwealth v. Vann Bell*, 853 N.E.2d 563, 567 (Mass. App. Ct. 2006).

VI. Manufacturing Jurisdiction

No state cases reported.

VII. Outrageous Conduct

No state cases reported.

VIII. Researcher

- It shall be a defense in any prosecution pursuant to Massachusetts General Laws chapter 272 § 29A (creation of child pornography) that such visual representation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed, or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum, or library.
– *Commonwealth v. Oakes*, 551 N.E.2d 910, 911 n.2 (Mass. 1990).

IX. Sexual Orientation

No state cases reported.

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Sentencing Issues

I. Enhancement

A. Age

No state cases reported.

B. Distribution/Intent to Traffic

No state cases reported.

C. Number of Images

No state cases reported.

D. Pattern of Activity for Sexual Exploitation

No state cases reported.

E. Sadistic, Masochistic, or Violent Material

No state cases reported.

F. Use of Computers

No state cases reported.

II. Sexually Dangerous Persons

- To be found sexually dangerous, the Commonwealth must meet its burden of showing that defendant (1) has been convicted of a sexual offense, as defined in Massachusetts General Laws chapter 123A, §1; (2) suffers from a mental abnormality or personality disorder; and (3) that this mental abnormality or personality disorder makes him or her likely to engage in sexual offenses if not confined to a secure facility.
– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 10-11 (Mass. Super. Ct. 2001).
- The issue in determining whether a person is sexually dangerous is not whether there is a risk of sexual recidivism, but whether that risk is so high that the sexual offender is deemed under the law to be likely to engage in sexual offenses if not confined to a secure facility.
– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 32 (Mass. Super. Ct. 2001).

- The consequence of being found a sexually dangerous person is that a person is deprived of his or her liberty for an indeterminate period of one day to life based, not on what the person has done in the past, but on what the person is feared he or she shall do in the future.
– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 36 (Mass. Super. Ct. 2001).
- In a trial to determine whether someone is a sexually dangerous person any of the records discussed in M.G.L. chapter 123A, § 14(c), including records discussing prior convictions and prior bad acts, are admissible to prove that the person is or is not a sexually dangerous person as long as the prior conviction or prior bad act is sexual in nature. Massachusetts General Laws chapter 123A, § 14(c).
– *Commonwealth v. Starkus*, 867 N.E.2d 811, 817 (Mass. App. Ct. 2007).

A. “Mental Abnormality” Defined

- For one to suffer from a mental abnormality, one must have a condition that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.
Mass. Gen. Laws ch. 123A, § 1.
– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 37 (Mass. Super. Ct. 2001).

B. “Personality Order” Defined

- For one to have a personality disorder, one must have a condition that results in a general lack of power to control sexual impulses.
– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 37-38 (Mass. Super. Ct. 2001).

C. “Likely to Engage in Sexual Offenses” Defined

- “Likely to engage in sexual offenses” means that there is a substantial likelihood, at least more likely than not, that the defendant will commit a new sexual offense within the immediate future, understood generally to be within the next five years but with a longer time horizon if the anticipated future harm is extremely serious.
– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 43 (Mass. Super. Ct. 2001).

D. Involuntary Commitment

- In order to justify an involuntary commitment, Massachusetts General Laws chapter 123, § 8 requires a finding that such person is mentally ill and the discharge of such a person from a facility would create a likelihood of serious harm.
– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 39 (Mass. Super. Ct. 2001).

1. “Likelihood of Serious Harm” Defined

- “Likelihood of serious harm” is defined as:
 - (1) a substantial risk of physical harm to the person him- or herself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm;
 - (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or
 - (3) a very substantial risk of physical impairment or injury to the person him- or herself as manifested by evidence that such person’s judgment is so affected that he or she is unable to protect him- or herself in the community and that reasonable provision for his or her protection is not available in the community.

Mass. Gen. Laws ch. 123, § 1.

– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 39-40 (Mass. Super. Ct. 2001).

- A “serious likelihood of harm” requires both a substantial risk and specific evidence manifesting that risk, which dramatically limits the circumstances where a likelihood of serious harm can be found.

– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 40 (Mass. Super. Ct. 2001).

2. State’s Burden

- The State must support an involuntary commitment with a showing of imminent danger of harm so as to ensure that the person’s potential for doing harm, to him- or herself and others, is great enough to justify such a massive curtailment of liberty.

– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 40-41 (Mass. Super. Ct. 2001).
- The deprivation of liberty inherent in an involuntary commitment must be justified by a substantial risk of physical harm manifested by specific evidence and the risk of harm must be imminent, unless the anticipated harm is so serious as to approach death.

– *Commonwealth v. Reese*, 2001 Mass. Super. LEXIS 112, 41 (Mass. Super. Ct. 2001).

III. Probation

A. Purposes

- The principal goals of probation are rehabilitation of the defendant and protection of the public.

– *Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass. 2001).

- Other goals of probation include punishment, deterrence, and retribution.
– *Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass. 2001).

B. Conditions

- Judges are permitted great latitude in imposing conditions of probation.
– *Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass. 2001).
- A judge, in furnishing an appropriate individualized sentence, may consider many factors which would not be relevant at trial including hearsay information about the defendant's character, behavior, and background.
– *Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass. 2001).

C. Enforceability of Conditions

- A probation condition is enforceable, even if it infringes on a defendant's ability to exercise constitutionally protected rights, so long as the condition is "reasonably related" to the goals of sentencing and probation.
– *Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass. 2001).
- In cases where a condition touches on constitutional rights, the goals of probation are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime.
– *Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass. 2001).
- The propriety of any given probation condition depends heavily on the facts of the case before the court.
– *Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass. 2001).

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Supervised Release

No state cases reported.