2015 year in review

Eyewitness Identification

Commonwealth v. Gomes, 470 Mass. 352 (2015)

Juries must be instructed on "generally accepted" scientific principles regarding eyewitness identification

- Common sense is not enough to allow jury to evaluate ID; research is not widely known and some results are counterintuitive (e.g. disconnect between confidence of witness and accuracy of identification)
- Standard for including a principle in jury instruction is higher than for admissibility of expert testimony; must be "near consensus" in the scientific community
- Expert testimony may still be admissible in judge's discretion
- Counsel can request different/more specific instructions in particular cases based on expert testimony or other evidentiary support for the principles' general acceptance

Model instruction finalized November 16, 2015; available on SJC's website

- Instruction not required if there is no eyewitness ID testimony that "significantly incriminates the defendant." *Commonwealth v. Johnson*, 470 Mass. 389 (2015).

Commonwealth v. Bastaldo, 472 Mass. 16 (2015)

Judges ***must*** instruct on cross-racial ID unless ***both parties agree*** that the instruction is not relevant to the case

- "In short, when we speak of cross-racial identification in the context of eyewitness identification, we mean that based on facial appearance, the person who made the identification is likely to have perceived the person identified to be of a different race."

Judges ***may*** instruct on cross-***ethnic*** ID on request

- "Where the persons involved in the identification self-identify as being of the same race but different ethnicity, and look as categorically different as people of different races, a cross-ethnic instruction will generally be appropriate."

Commonwealth v. Bastaldo, 472 Mass. 16 (2015)

Commonwealth v. Alcide, 472 Mass. 150 (2015)

Murder conviction reversed due to ineffective assistance of counsel

- Trial counsel failed to investigate the case or familiarize himself with the discovery file
- Did not present substantial third-party culprit evidence
- Did not object to two in-court identifications of the defendant as the shooter

Eyewitness identifications might have been excluded

- Both eyewitnesses failed to ID defendant soon after shooting
- After seeing defendant's photo in newspaper article about the shooting, both witnesses testified at trial (without objection) that he was the shooter
- Failure to object to in-court IDs ineffective: the IDs were arguably tainted by news coverage & photographic showup in DA's office

See also and stay tuned…

Commonwealth v. Johnson, 473 Mass. 594 (Feb. 12, 2016)

- Reaffirms common law exclusion of unreliable identifications
  - Notes danger of unfair prejudice due to juries' inability to evaluate identifications made under suggestive circumstances that artificially inflate witness confidence
  - If first ID excluded as unreliable, subsequent ID *may not* be admitted
- Leaves open possibility that an ID may be excluded as unreliable based only on estimator variables (i.e. poor lighting, long distance, short time to observe)

Commonwealth v. Coutu, 88 Mass. App. Ct. 686 (2015)

- Witness may not identify the defendant in court based on his "energy" using ESP

Watch for

- Commonwealth vs. Marcus Thomas, SJC-12055
  - Whether police failure to follow best practices in an ID procedure requires suppression of the resulting identification

Standards of Review

Commonwealth v. Jones-Pannell, 472 Mass. 429 (2015)

Time for the Appeals Court to stop finding its own facts in suppression appeals

- May only supplement motion judge's findings with evidence that is ***uncontroverted and undisputed*** where the judge ***explicitly or implicitly credited*** that witness's testimony
  - May *not* supplement findings with testimony that "detracts from the judge's ultimate findings"
- The fact that testimony is "uncontroverted" because only one witness testified at the hearing does not mean that it's okay to supplement the judge's findings with that testimony
  - "The mere absence of contradiction is not enough to permit supplementation"

Appeals Court seems to have taken this to heart

- Commonwealth v. Colon, 88 Mass. App. Ct. 579 (2015); *id.* at 582 (Berry, J., concurring): reversing denial of motion to suppress in spite of "uncontroverted" testimony that might have justified the stop but about which the judge made no findings

Legal standards in new trial motions

"…if it appears that justice may not have been done" (Brescia, 471 Mass. 381)

- New trial properly granted where defendant had a stroke between first and second day of his testimony, "reducing" his "ability to testify" on cross-examination
- Fairness may require new trial even without error at first trial or newly discovered evidence
  - This standard does not necessarily equate to "substantial risk of a miscarriage of justice"
  - Murder cases applying G.L. c.278, §33E, may be instructive
- "In sum, extraordinary fact patterns can frustrate even meticulous efforts to do justice."

Ineffective assistance of counsel (Hampton, 88 Mass.App.Ct. 162)

- Under ***first prong*** of *Saferian* analysis, decisions by trial counsel must be assessed based on what counsel knew at the time; judge may not "supply a rationale for counsel's decision based on information acquired after the fact"
- Under ***second prong***, judge may not weigh credibility of witness in deciding whether defendant was prejudiced by counsel's failure to discover that witness
  - If an ordinary fallible lawyer would have called the witness, the question is whether the jury's verdict might have changed *if they believed him*

Closing Arguments

Snatching Defeat from the Jaws of Victory

Convictions reversed at least in part because of prosecutorial misconduct in closing argument

Commonwealth v. Niemic, 472 Mass. 665 (2015) (SRMJ combined with instructional error)

- Argument that defendant has motive to lie because he's on trial
- Improper missing witness argument that we "only" heard from defendant about victim's reputation as a "tough guy" (esp. where any potential witness would not be allowed to testify re: victim's reputation)
- Improper appeal to jury's sympathy for murder victim, including equating defendant's right to fair trial with victim's "constitutional right to live"

Commonwealth v. Alphonse, 87 Mass. App. Ct. 336 (2015) (substantial risk)

- Argument that defendant was the only witness with a motive to lie, and (unlike the other witnesses) was not sequestered & had an opportunity to tailor his testimony to match the other evidence

Commonwealth v. Botelho, 87 Mass. App. Ct. 846 (2015) (substantial risk)

- Improper comment on defendant's silence ("the only testimony you heard from that night was Officer Strong's") compounded prejudice from judge's failure to instruct on defendant not testifying

See also…

Commonwealth v. Tavares, 471 Mass. 430 (2015)(reversed on other grounds)

- Improper appeal to sympathy where prosecutor said victim was "an uncle, a husband, and a friend to many people and he's none of those things anymore," and he "did not deserve to wind up dead under a sheet on the floor … with a bullet in his chest"
- Prosecutor improperly suggested that jury could infer malice solely from defendant's act of pointing a gun at someone ("That's malice, pointing it at someone"); malice may be inferred from *shooting* a gun at someone, but not from merely *pointing* it

Commonwealth v. Scesny, 472 Mass. 185 (2015)(no prejudice; overwhelming evidence)

- Improper for prosecutor to tell jury he represents "the citizens of the Commonwealth"
- Improper to say third-party culprit defense "lacked materiality and relevance" and should not even be called "evidence" – this argument "both misstated the law" and "verged on suggesting that the entire third-party culprit defense was improper and should not have been presented"
- N.B. "what may be permissible if stated once may become less so through constant repetition"

Commonwealth v. Jones, 471 Mass. 138 (2015)(no SRMJ)

- Improper to suggest that defendant would have committed more indecent assaults if victim had not moved away

Commonwealth v. Dyette, 87 Mass. App. Ct. 548 (2015)(reversed on other grounds)

- Improper vouching to say "because we don't know [who possessed one gun], we don't charge [the defendant with that crime]. What we do know is that he is the only person who could have dropped [another gun]."

Mass. Guide to Evidence §1113 (2015 Edition)

Marijuana

Commonwealth v. Ilya I., 470 Mass. 625 (2015)

SJC emphasizes need for extra caution in assessing probable cause of intent to distribute where only a non-criminal amount of marijuana is involved, *especially* in juvenile cases (citing *Humberto H.*)

- Defendant had 13 small baggies of marijuana concealed in his groin area, had no smoking paraphernalia, and "in consort with three other people took complex evasive maneuvers" when they realized the police were around

Dissent by Spina, joined by Cordy & Botsford:

- In probable cause determination, the whole may be greater than the sum of its parts
- Marijuana decriminalization shouldn't affect probable cause determination on question of intent to distribute

Commonwealth v. Rodriguez, 472 Mass. 767 (2015)

By itself, odor of burnt marijuana provides only ***reasonable suspicion*** of a ***civil infraction***

Police may not stop a vehicle based on reasonable suspicion of a ***non-traffic-related*** civil violation

Spina dissents again

Commonwealth v. Canning, 471 Mass. 341 (2015)

Warrant may not issue for suspected marijuana grow unless police show probable cause not only that the suspect is cultivating marijuana, but also that he is not registered or licensed to do so

More generally, principles from firearm & other license cases will probably be applicable to medical marijuana issues

Attempt

If at first you don't succeed...

Is "noncompletion" an *element* of attempt?

Commonwealth v. Aldrich, 88 Mass. App. Ct. 113 (2015)

- Noncompletion of the substantive offense is *not* a "distinct element" for double jeopardy purposes
- Therefore attempted larceny is a lesser included offense of larceny

Commonwealth v. Coutu, 88 Mass. App .Ct. 686 (2015)(AFAR pending)

- Noncompletion of the substantive offense *is* an element of attempt under G.L. c.274, §6; "the completed substantive offense nullifies the existence of an attempt"
- Therefore evidence that defendant actually set a box on fire could not sustain a conviction of *attempt* to burn personal property

Commonwealth v. LaBrie, 473 Mass. 754 (March 9, 2016)

- Nonachievement of the substantive offense is *not* an element of attempted murder under G.L. c.265, §16
- Defendant could properly be convicted of attempted murder where Commonwealth could not prove whether or not her son's death was a result of her failure to give him chemotherapy drugs
- SJC reserves judgment on *Coutu*'s holding under c.274, §6

Police Interrogation

Commonwealth v. Monroe, 472 Mass. 461 (2015)

Convictions of aggravated kidnapping, sexual assault, armed robbery, ABDW reversed due to admission of defendant's involuntary statements to police

- Defendant's will was overborne by police's repeated threats that if he didn't confess, his daughter would be removed from her mother's custody
  - The "breaking point occurred … when the defendant reacted to Detective O'Rourke's statement, 'At least have that baby grow up with someone they know' by stating, 'Please don't take my daughter'; hanging his head; and crying. His inculpatory statements followed."
- Court also notes defendant's "emotionally disturbed state" during the interview; his age (18) and educational background (working on GED); hostile tone of the interview
- Police also minimized alleged crimes, falsely told defendant that they had found his DNA on one of the victims

Commonwealth v. Pacheco, 87 Mass.App.Ct. 286 (2015)

When interrogating a juvenile, police must "scrupulously honor" a request to speak with an interested adult the same way as an adult's request to speak with an attorney

- Must be a *meaningful opportunity* to consult *privately*; police may not impose "ground rules" that impinge on their ability to communicate

Justice Cohen, concurring, advocates extension of the rule for juveniles under age 14 to *all juveniles*: an *actual* consultation with an adult should be required before a *Miranda* waiver can be knowing or voluntary, not merely an *opportunity* to request consultation

N.B. Commonwealth v. Smith, 471 Mass. 161 (2015), which extends the "interested adult" rule to 17-year-olds

See also and stay tuned…

Commonwealth v. Libby, 472 Mass. 37 (2015):

- Waiver of right to counsel ineffective where cop had previously told defendant a lawyer could be appointed for him "at arraignment," then when defendant asks during interrogation "how long" it would "take a lawyer to get here," cop says he has "a right to call an attorney" but "they don't just come running out and sit in an interview"

Commonwealth v. Smith, SJC-11723 (March 11, 2016)

- Defendant's statement "I'm done talking. I don't wanna talk no more," was a clear invocation of the right to remain silent
- Additional statement picked up by camera after police left the room also should have been suppressed as fruit of poisonous tree

Watch for:

- Commonwealth v. Alleyne, SJC-11614
  - Should unrecorded custodial statements be per se excluded?
  - Argument held March 11, 2016

Lightning Round!

Commonwealth v. Simpkins, 470 Mass. 458: defendant entitled to 211/3 review of sufficiency of evidence (for double jeopardy purposes) after a mistrial

Commonwealth v. McGhee, 470 Mass. 638: sleeping juror is structural error

Commonwealth v. DiCicco, 470 Mass. 720: impermissible to deny motion for funds "in hindsight" based on decision that expert opinion is inadmissible

Commonwealth v. Garrett, 473 Mass. 257: BB gun is not a "firearm"

Commonwealth v. Armstrong, 88 Mass. App. Ct. 756: assault on homeowner in attempt to escape sufficient for armed home invasion conviction on "remains in dwelling place knowing that someone is present" element

Corporal Punishment

SJC recognizes right of parents to use reasonable physical discipline

Commonwealth v. Dorvil, 472 Mass. 1 (2015)

Parent/guardian cannot be subjected to criminal liability for use of force against minor child, provided that force used is: 1) reasonable; 2) reasonably related to promoting the minor's welfare (including disciplining minor's misbehavior); 3) neither causes, nor creates a substantial risk of causing physical harm, gross degradation, or severe mental distress.

- Commonwealth failed to show that father who spanked his almost-three year old's clothed bottom was not exercising his right to use reasonable physical discipline; conviction reversed.
- Physical harm must be more than fleeting pain or minor, transient marks
- Rejects suggestion in Rubeck, 64 Mass. App. Ct. 396 (2005), that parent's anger renders otherwise reasonable use of force impermissible
- Rejects bright-line cutoff age below which any corporal punishment is impermissible – age is instead a factor in assessing reasonableness.

Commonwealth v. Packer, 88 Mass. App. Ct. 585 (2015)

Split panel of Appeals Court holds that stepmother defendant in loco parentis was entitled to instruction on reasonable parental discipline.

- Father and stepmother both tried on assault and battery charges on teenage daughter; judge sua sponte decided to give the instruction only as to father, who was then acquitted.
- Dorvil applies to one acting in loco parentis; on facts of this case, jury could have found defendant was acting in loco parentis.
  - Not all stepparents will be entitled to instruction; depends on facts of relationship.
- Defendant's conduct in striking stepdaughter's ear, causing it to bleed, and pulling her hair was "not so out of bounds" as to exclude the parental discipline defense.
- Court also troubled by fundamental unfairness of explicitly instructing jury to treat defendants differently; tended to invite jury to focus on defendant as more culpable party.

Dissent, by Judge Berry, frames reasonableness question in light of the particular misbehavior (here, lying about eating cheese) and asks whether this misbehavior warranted corporal punishment.

Prior Bad Acts – Acquitted Conduct

Commonwealth v. Dorazio, 472 Mass 535 (2015)

Article 12 double jeopardy/collateral estoppel principles prohibit admission of evidence of prior bad acts for which defendant was acquitted.

- At trial of defendant for rape of two young girls, Commonwealth introduced evidence of similar conduct for which defendant had been acquitted. SJC finds this created substantial risk of a miscarriage of justice.
  - This argument has been rejected on federal constitutional grounds, so case provides nice example of art. 12 providing greater protection that Fifth Amendment's double jeopardy clause (despite absence of explicit language on double jeopardy in art. 12).
- FN 13 notes that holding applies only to acquittals, not to cases where no charges were filed, or charges are pending, or charges were dismissed.

The Emergency Aid Exception

- **Commonwealth v. Kaeppeler, 473 Mass. 396 (2015).** Where hospital doctors believed that two patients might have ingested a dangerous "date rape" drug at defendant's home, the emergency aid exception justified a warrantless entry into defendant's home. He then agreed to go to the hospital. Motion to suppress should have been allowed because officers' conduct in seizing tequila bottle after entry was not reasonable: there was no well-being/public safety reason to remain in defendant's apartment once he went to the hospital, and the seizure of the tequila bottles bore no relationship to the emergency (they were not sent to the lab for four months).
- **Commonwealth v. Gordon,** 87 Mass App Ct 322 (2015). Given "very strong public policy in this Commonwealth against domestic violence," emergency aid exception permitted police to enter apartment of man whose girlfriend had recently appeared in bar downstairs looking disheveled and asking for police.
  - Appeals Court reached this conclusion even though no one had seen her return to apartment, and indeed, only drug evidence – no people – were in the apartment when police entered. N.B.: court considered an "implied finding" (that the woman turned in the direction of the apartment when she left the bar) not included in the judge's findings, because it was uncontroverted and (they said) judge implicitly credited the witness. Jones-Pannell likely would not permit this, but case – and FAR – decided before Jones-Pannell.

Unavailable Witnesses

Commonwealth v. Housewright, 470 Mass. 665 (2015)

Where Commonwealth seeks to introduce prior recorded testimony on basis that witness is unavailable due to illness/infirmity, it must show an "unacceptable risk that the witness's health would be significantly jeopardized if the witness were required to testify in court on the scheduled date."

- Must present reliable, up-to-date information on which judge can make an independent finding – conclusory assertions about witness's condition are not sufficient.
  - Doctor's note that testifying "might be detrimental" to health of witness does not suffice.
- If such a risk exists, judge should consider whether a continuance would alleviate the risk, and if so, whether it is in the interests of justice in light of burden on the court, parties, witnesses.
- Judge may also consider whether risk would still exist at out-of-court deposition, which may be preferable to admission of prior recorded testimony
- CW has good faith obligation to promptly inform court and defendant of unavailability .
- Commonwealth v. Dorsica, 88 Mass. App. Ct. 776 (2015) - applying Housewright, holds it was error to find medical examiner was unavailable because she'd gone into labor four days before trial started (no other information was presented), but harmless beyond a reasonable doubt.

Commonwealth v. Housewright, 470 Mass. 665 (2015)

SJC rejected argument that prior recorded testimony should not have been admitted b/c "dangerousness" hearing did not afford defendant reasonable opportunity or similar motivation to cross-examine witness:

- Not entitled to same discovery you would have at trial
- Motive not sufficiently different where counsel didn't focus solely on defendant's dangerousness.
  - Will be interesting to see what they do in a case where dangerousness IS the whole focus of the cross-examination.

See also…

Commonwealth v. Drayton, 473 Mass. 23 (2015)

- After being diagnosed with terminal cancer, new witness comes forward with statement that discredits Commonwealth's key witness from murder trial
  - Not a "dying declaration" – doesn't relate to cause or circumstances of death
  - No other hearsay exception would cover it (MA has no residual clause)
- SJC recognizes narrow constitutionally-based hearsay exception for statements "critical to defense" that have "persuasive guarantees of trustworthiness"
  - Remands for hearing on whether this statement is sufficiently trustworthy

Drug Lab Cases

Farak and Dookhan

Farak Cases in the SJC

Commonwealth v. Ware,
471 Mass. 85 (2015)

- Appeal from denial of motion to conduct post-conviction discovery and for funds
- Commonwealth had a duty to conduct a thorough investigation to determine the nature and extent of [Farak's] misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted
- Commonwealth didn't conduct a thorough investigation and we suggest the AGO do so

Commonwealth v. Cotto,
471 Mass. 97 (2015)

- Farak engaged in egregious misconduct attributable to the Commonwealth
- No conclusive presumption
- Commonwealth has an obligation to conduct an investigation, in a timely fashion; burden of ascertaining whether Farak's misconduct has created a problem of systemic proportions is not one that should be shouldered by defendants
- Fashions remedy if no investigation is forthcoming: retesting

Dookhan updates

Bridgeman v. DA for the Suffolk District, 471 Mass 465 (2015)

- Exposure cap – cannot be charged with more serious offenses than those of which originally convicted or get a higher sentence than that originally imposed
- If a defendant testifies at a Rule 30 hearing, that testimony is only admissible at re-trial for impeachment purposes
- No global remedy; still working on identification and notification

Commonwealth v. Torres, 470 Mass. 1020 (2015)

- Can still try to prove misconduct in cases without the presumption

Commonwealth v. Resende, SJC-11981 (oral argument scheduled for April)

- Does conclusive presumption apply where AD did some work but her name is not on the certificate of analysis?

Commonwealth v. Francis, SJC-11988 (argued in March 2016)

- Whether a defendant is entitled to a new trial on drug distribution and trafficking charges where certificates of drug analysis signed by Annie Dookhan were admitted in evidence at his jury trial, but where the defendant also admitted to police that he sold up to one-half a kilogram of cocaine every week.

NGRI

Commonwealth v. Chappell, 473 Mass. 191 (2015)

- Revised *Mutina* instruction regarding the consequences of an NGRI verdict: defendant may remain committed for the rest of his life

Commonwealth v. Kolenovic, 471 Mass. 664 (2015)

- No IAC for failing to explore NGRI based on PTSD
- Strong post-trial evidence of mental illness not relevant to whether strategic choice was reasonable when made; counsel had preliminary psych evaluation and that was enough
- Question is whether defense counsel had a duty to unearth that evidence based on what he knew or should have known

Commonwealth v. Lang, 473 Mass. 1 (2015)

- Hines/Duffly say failure to get at least a preliminary psych evaluation on issue of criminal responsibility was ineffective but, assuming viable NGRI defense, not manifestly unreasonable to go with self-defense
- Lenk/Gants/Cordy say can't assess a strategic decision not made; failure to investigate a NGRI defense is a strategic decision that is unreasonable; but no prejudice

Commonwealth v. Bruneau, 472 Mass. 510 (2015)

- If found NGRI, may appeal the conviction

Sentencing Issues

Commonwealth v. Ridge, 470 Mass. 1024 (2015) – judge has the discretion to grant pre-trial credit at time of sentencing, even if that pre-trial credit was also awarded on another charge (double dipping allowed)

Commonwealth v. Luckern, 87 Mass. App. Ct. 269 (2015) – a suspended sentence of three years or more counts as a sentence of three years or more under the habitual offender statute

Commonwealth v. Sallop, 472 Mass. 568 (2015)

- A defendant may not be resentenced on a charge where he has already served the entirety of that sentence
- If the defendant has time left on a committed sentence, and the court changes that sentence to probation, any sentence imposed upon a violation of probation may not exceed the remainder of the original sentence

Really Awful Cases

Those that are an embarrassment to our jurisprudence

Commonwealth v. Santiago, 470 Mass. 574 (2015)

- It is reasonable to suspect that Hispanic males riding bicycles are drug dealers

Commonwealth v. Johnson, 88 Mass. App. Ct. 705 (2015) (AFAR pending)

- It is also reasonable to stop any black male walking anywhere near an area of a shooting if the shooter has been described as black or Spanish
- And also he's wearing a hoodie (even if that doesn't match the shooter's clothing)
- Reasonable because this was a public safety emergency

Commonwealth v. Perez, 471 Mass. 624 (2015)

- No-knock warrant not justified
- But so what, as long as the police complied with the warrant

Commonwealth v. Crowley-Chester, 86 Mass. App. Ct. 804 (2015) (AFAR pending)

- Impoundment need not be necessary, only reasonable, and it is reasonable to impound if the people in the car are sketchy

Friendly Footnotes

Commonwealth v. DeJesus, 87 Mass. App. Ct. 198 (2015)

- Note 4 – Defendant objected to admission of evidence and gave reasons at sidebar; sidebar not transcribed; nevertheless, "[w]e assume for purposes of this appeal that the arguments raised here were preserved below."

Commonwealth v. Depeiro, 87 Mass. App. Ct. 105 (2015)

- Note 8 – For purposes of *Aguilar-Spinelli* test, to determine whether an anonymous tip is reliable, ordinary citizens are not necessarily more reliable than confidential informants

Commonwealth v. Evans, 87 Mass. App. Ct. 687 (2015)

- Note 11 – Not reaching issue of whether looking into someone's mouth "is so particularly intrusive that it necessarily constitutes a constitutional 'search,'" and that doing so transforms a voluntary encounter into a seizure; then citing cases that support such a finding
- But see unfriendly note 8 – Cannot consider race in reasonable person analysis

For the Future

Topics the SJC Has Left for Another Day

Commonwealth v. Santiago, 470 Mass. 574 (2015)

- Distinctly egregious conduct violating a third party's constitutional rights may someday allow a defendant to challenge that violation through target standing, but not today

Commonwealth v. Ramos, 470 Mass. 740 (2015)

- Not addressing the issue of whether there is an "accomplice sweep" exception to the warrant requirement

Commonwealth v. Tejeda, 473 Mass. 269 (2015)

- Still waiting to decide whether Massachusetts should join those jurisdictions which have either abolished or redefined felony murder

What Will We Be Talking About in 2017

Commonwealth v. Warren, 87 Mass. App. Ct. 476 (2015)

(FAR granted and argued in February 2016)

- Green Opinion: Reasonable to stop two black males wearing dark clothing, one wearing a hoodie, because two black males in dark clothing, one wearing a hoodie, had committed a crime nine or ten blocks away 30 minutes prior; also when approached, the males took flight
- Agnes Dissent: Descriptions too generic and those that weren't generic weren't matched; one mile away, 30 minutes later in a densely populated neighborhood, even though they jogged away when the police "asked" them to wait, does not support reasonable suspicion
- Rubin Dissent: "Hey, wait a minute," is a command to stop; seized prior to flight that majority relies upon for reasonable suspicion

Commonwealth v. Camblin, 471 Mass. 639 (2015)

- Requires a hearing on and substantive consideration of the defendant's challenges to the reliability of the breath tests
- In *Camblin*, had hearing; awaiting a ruling
- In the Concord consolidated cases, the judge has denied the defense some discovery so they took a 211 § 3; hearing in late May/early June
- In the BMC consolidated cases, they have requested the same discovery and are going to have a hearing on whether they get it
- Commonwealth has requested that the RAJ consolidate the Concord cases and BMC cases; defense counsel for both cases have objected to consolidation; no word yet

OUI – Drugs

- Commonwealth v. Gerhardt, SJC-11967 (argued in February 2016)
- OUI-Heroin case in Worcester District scheduled for *Daubert/Lanigan* hearing at the end of April

Impoundment

- Commonwealth v. Oliveira, SJC-11972 (argued in January 2016)
  - Can the police impound a car legally parked in a public parking lot?
- Commonwealth v. Campbell, SJC-11980 (argued in February 2016)
  - Can the police tow a car legally parked on the side of the road?
- Commonwealth v. Abdallah, SJC-12001 (argued in February 2016)
  - Can the police "impound" a backpack and bring it to the police station to be searched when a third party was available to take it instead?
- Commonwealth v. Mello, 15-P-566 (unpublished opinion)
  - Judge Frison (of the Superior Court) ruled that owner of car, who was with the car, should have been given the opportunity to have the car towed privately
  - Appeals Court says whether the police have to consider practical alternatives to impoundment is an open question