MASSACHUSETTS STATE COURT
2016 YEAR IN REVIEW

ATTEMPT

Commonwealth v. Robert McWilliams, 473 Mass. 606 (Feb. 12, 2016) (Spina, J.)

- **When does preparation for a crime = attempt to commit crime?**
  - There are two types of attempt – final act completed & preparation.
  - Factors: Degree of proximity to consummation, gravity of crime, uncertainty of result, seriousness of harm.
- **Sufficient Evidence of Attempt**: Defendant sits outside of the bank he'd robbed 3 weeks earlier, wearing a wig and carrying a bag with a fake beard and a pellet gun.
  - Defendant robs bank in Kendall Square on July 7th. On July 26th, an employee of the bank recognizes him during a smoking break and they call the cops.
  - Court: He was sitting close to the bank; he had the then-present ability to walk in and rob it; same clothes; disguise; holding "similar bag" as last time.
  - "Reasonable jury could conclude that it was virtually certain that he would have robbed the bank a second time" if he hadn't been stopped.
- **ALSO:** Court closes door left open in *CW v. Fortunato*, 466 Mass. 500 (2013). Holds that "volunteered, unsolicited statements" made more than six hours after arrest do not require suppression.

Commonwealth v. Kenneth Dykens, 473 Mass. 635 (Feb. 17, 2016) (Cordy, J.)

- **4-3 opinion** (Duffly, J., dissenting, with Lenk and Hines JJ.)
- **Majority**: Rejects argument that all overt acts directed toward committing a single crime constitute a single attempt.
    - On February 10th, the defendant attempted an unarmed burglary in Malden. He went to a residence and …
        - (a) placed a ladder against the house toward a window;
        - (b) tore a screen off a first-floor window; and
        - (c) smashed a sliding glass door in the rear of the house.
    - He is charged with *three counts* of attempted unarmed burglary and pled guilty to all three. Later moved to vacate on double jeopardy grounds.
- **Majority**: Each act undertaken = sufficient "overt act" to be punished as attempt.
    - Defendant "had the opportunity to abandon his endeavors" each time he failed. "The Legislature surely did not intend to reward such persistence by encompassing multiple, discrete attempts within a single unit of prosecution."
    - Court distinguishes between continuous actions (e.g., "repeatedly battering a single door" = one attempt) and the discrete acts undertaken here (3 acts at 3 separate access points).
- **Duffly Dissent:** Does NOT disagree with the majority's key holding. Instead, says that tearing a screen off a window and leaning a ladder are insufficient overt acts to constitute "attempts." (Were they paying attention last week?)
- **ALSO:** A rock is not a burglar's tool. Tool = man-made item.

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

- **WORTH A READ.**
- Facts: Mother charged (and convicted) of attempted murder for withholding cancer medication from her son. With treatment, long-term survival rate ~ 85-90%. Son died.
- **HOLDING**: "Nonachievement" is NOT an element of attempted murder, though it is "clearly relevant."
    - "[T]he acts stand on their own, and whether a particular act qualifies as an overt act that, combined with proof of the requisite intent, constitutes a criminal attempt does not depend on whether the substantive crime has or has not been accomplished."
    - ATTEMPT = Specific intent to commit substantive crime + overt act toward its completion.
    - Court seeking to avoid anomaly: If required to prove failure as an element of attempt, then if there was reasonable doubt whether the attempt succeeded, a jury would have to acquit on both the substantive crime and the attempt.
- Court vacated the attempted murder and A&B convictions on other grounds, affirmed reckless endangerment conviction.
- **ALSO**:
    - An increased risk of death DOES NOT constitute substantial bodily injury.
    - Counsel ineffective for failure to consult with independent oncologist. Patently unreasonable strategic decision given ongologist's testimony during MNT hearing that parents don't adhere to treatment plans for a number of reasons.
        - FN31: This was trial counsel's *first criminal case in the Superior Court.*

Commonwealth v. David Coutu, 90 Mass. App. Ct. 227 (Sept. 15, 2016) (Meade, J.)

- *Coutu I*, 88 Mass. App. Ct. 686 (2015) – Court reversed D's conviction for attempt to burn personal property based on insufficient evidence. FAR was granted and remanded in light of *LaBrie*. Appeals Court happy to reinstate conviction.
- In broad strokes, the issue was whether evidence support attempt conviction even though jury could have concluded that D achieved the substantive crime of arson. "The box was actually ablaze before the victim extinguished it."
- **HOLDING:** The rule of *LaBrie* applies to the attempted arson statute (MGL c. 255 s. 5A), even though the statute is different than the general attempt statute.

EYEWITNESS IDENTIFICATION

Commonwealth v. Kyle Johnson, 473 Mass. 594 (Feb. 12, 2016) (Gants, C.J.)

- After B&E gone bad, the victim's cousin showed him a picture of the guy he suspected, and the victim ID'd him.
- **POLICE PROCEDURE:** Where out-of-court ID is conducted by police, Article XII requires suppression when the ID is "so unnecessarily suggestive and conducive to irreparable misidentification." Per se exclusion is meant to deter police misconduct.
- **THIRD PARTY PROCEDURE:** Where out of court ID is *not* conducted by police, "common law principles of fairness" require suppression if the ID is unreliable due to highly-suggestive procedure.
    - Principle is basically exercise of 403 – out-of-court is rendered more prejudicial than probative.
- Motions to suppress are procedurally similar in both contexts – must be timely filed by D + D bears burden of proof by preponderance.
- Rules are substantively different:
    - Article XII is a per se rule of exclusion; common law principle is based upon weighing of probative value and prejudice.
    - Appellate review is different. Article XII review is clearly erroneous for facts but de novo on the law. Common law review is for abuse of discretion.
- **ALSO:** Independent source doctrine does not apply. In-court ID cannot be admitted when out-of-court ID is found unreliable.
    - *See CW v. Dasheem Dew* (SJC-12225) (April argument) – QP: Whether a witness's in-court identification of a defendant is inadmissible where it was preceded by an unequivocal pretrial identification by the witness that allegedly was the product of a suggestive procedure.

Commonwealth v. Santiago Navarro, 474 Mass. 247 (May 5, 2016) (Hines, J.)

- Armed robbery of high-stakes poker game. Co-D testified against D at trial. Only 2 of 6 victims picked D out of photo array.
- **HOLDING:** Defendant is not entitled to a *sua sponte Rodriguez* instruction. BUT it was ineffective for counsel not to request it. BUT there was insufficient prejudice because of the strength of the evidence.
    - *Rodriguez*, 378 Mass. 296 (1979): Outlines model instruction on the risk of misidentification and the factors jury should consider in assessing ID accuracy.
    - Model Instruction, 473 Mass. 1051 (Nov. 16, 2015), available on SJC website.
- Oddly, the Court also says in a FN: "Because the issue in this appeal involves the law at the time of the trial, we caution against any implication that a judge should not give an eyewitness identification instruction unless the defendant requests it." The new 2015 instructions say, "This instruction *should be given* in any case in which the jury heard eyewitness evidence." So the Court seems to be suggesting that the instruction might now be required even *sua sponte* in all ID cases after the new model instructions came out – but I'd still ask for it.

Commonwealth v. Frankie Herndon, 475 Mass. 324 (Aug. 26, 2016) (Botsford, J.)

- Court affirms 1st degree murder conviction.
- **HELD**: No error in refusing to provide better instructions on eyewitness ID when defendant was tried before release of new model instructions. *Gomes* was prospective only.
    - The defendant requested an instruction that included principles subsequently added to the model instruction, but it didn't matter.
        - Human memory is not like a video recording.
        - Witness's level of confidence is not indicative of his reliability.
        - Accuracy of an ID may be impacted by stress, presence of a weapon, and drug/alcohol.
        - Info provided by outside sources may affect reliability.
- **HELD:** "[A]s a matter of criminal procedure, the Commonwealth shall be required to question a putative identification witness concerning an alleged prior identification before it seeks to introduce substantive evidence of that identification through a third party."
    - **Not a constitutionally-required rule.**
    - Court doubles down on *Cong Duc Le*, 444 Mass. 431 (2005): ID statements are admissible substantively so long as the declarant is subject to cross-examination (regardless of whether he admits, denies, or does not remember statement). This does not violate confrontation right.
    - Here, CW introduced witness's pretrial ID of defendant through police officers when witness stated he did not recall conversation. But that error did not require reversal.

Commonwealth v. Eric Snyder, 475 Mass. 445 (Sept. 8, 2016) (Lenk, J.)

- Court affirms 1st degree murder conviction. D convicted in March 2003 of September 1994 killing his girlfriend's ex, who had threatened and harassed them both over time (*see* FN5).
- D's theory was mistaken ID.
- **HELD:** Not error for judge to disallow expert testimony on eyewitness identifications.
    - Court essentially says that even when ID is at issue, expert testimony isn't necessary in all cases. So you can't just use a boilerplate motion. There must be something specific about your case that requires an expert.
    - For example, this expert would have testified that confidence and reliability are not necessarily correlated. But the witness "ultimately volunteered during his testimony that he was not wholly confident in the accuracy of his identification." So the jury didn't need to hear the expert's testimony.
    - This jury well knew the limits of eyewitness ID: "At one point, a witness incorrectly identified the foreperson of the jury as having been present in Quincy on the day of the shooting."
- One wonders what the Court will do with a request for an expert when the issues the expert would address are covered by the new model instruction.
- **ALSO:** Case remanded for consideration of motion to revise sentence to (potentially) make it concurrent with federal sentence (felon-in-possession conviction for which D received 22 years).

ARMED CAREER CRIMINAL ACT

- General Laws c. 269, § 10G – Armed Career Criminal Act.
- Imposes an enhanced sentence on anyone convicted of certain firearm offenses who has previously been convicted of a "violent crime" or a "serious drug offense."
    - 1 prior = 3-15 years
    - 2 priors = 10-15 years
    - 3 priors = 15-20 years.
    - MM cannot be suspended or reduced, and D is not eligible for probation nor parole until the MM is served.
- A "violent crime" is:
    - [A]ny crime punishable by imprisonment for a term exceeding one year ... that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) **otherwise involves conduct that presents a serious risk of physical injury to another**.
    - So there are 3 ways that a prior offense can be a violent crime: (1) force clause, (2) the enumerated crimes clause, or (3) **the residual clause**.

Commonwealth v. Gerald Sylvia, 89 Mass. App. Ct. 279 (April 6, 2016) (Wolohojian, J.)

- After stealing 20 pounds of marijuana at gunpoint, D was indicted for five crimes, including a separate ACC indictment.
- **HELD:** ACC statute does not define a separate, stand-alone crime. It is a sentencing enhancement for repeat offenders who (a) commit certain firearm crimes, and (b) have prior violent crimes, serious drug offenses, or some of each. MGL c. 269, s. 10G.
    - Defendant should have received a single sentence on the underlying firearm offense enhanced by the ACC statute.
    - Remand for amendment of firearm indictment (to include ACC enhancement), dismissal of ACC indictment, and resentencing on the firearm indictment.
- **ALSO**: When one (non-sentencing) judge says on the record during PTC that they will sentence a defendant to 6-9 years, but the different plea & sentencing judge gives the defendant 10 years, that's ok.
    - "[T]hat statement was informational in nature and did not amount to a binding agreement."

Commonwealth v. Daunte Beal, 474 Mass. 341 (May 24, 2016) (Duffly, J.)

- Defendant convicted of various crimes arising out of a shooting in Dorchester, and the firearm offense included an ACC enhancement.
- **HELD**: Residual clause's definition of a "violent crime" is unconstitutionally vague.
    - Adheres to SCOTUS holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (Scalia, J.) – categorical approach/ordinary case analysis leads to too much uncertainty and vagueness.
    - CW agreed.
    - Definition of violent crime is in MGL c. 140 s. 121 → Any time you see this definition incorporated into anything (ACCA or not) you should be making this argument.
        - MGL c. 140 s. 122D: prohibition on purchase of self-defense spray.
        - MGL c. 140 s. 129B: prohibition on FID card.
        - MGL c. 140 s. 131, 131F: prohibition on license to carry.
        - MGL c. 265 s. 58: possession of deceptive weapon device during "violent crime."
        - MGL c. 276 s. 58A: Dangerousness hearing for those "convicted of a violent crime as defined …"
        - MGL c. 268 s. 1: Perjury statute.
    - **There is also another residual clause in the definition of "violent crime" in MGL c. 127 s. 133E → should also be subject to same vagueness challenge!**
    - D's predicates here – A&B and A&B on a public employee – did not satisfy the force clause of the ACCA, so it could not be a basis for enhancement. **A&B is not categorically a crime of violence under the ACCA.**
        - Overruling *CW v. Colon*, 81 Mass. App. Ct. 8 (2011) (Mills, J.).
- In April 2016, SCOTUS held that *Johnson* was retroactive to final sentences of federal prisoners. *See Welch v. United States*, 136 S. Ct. 1257 (2016). So we should be making the same argument about *Beal*.
- **ALSO**:
    - Do not need expert testimony or testimony from victim to establish "serious bodily injury." Jury can use their common sense based upon evidence admitted if it does not require explanation from expert for them to understand.
    - D convicted of ABDW SBI and ADW. Judge did not instruct jury that these offenses had to be based upon separate acts. ADW conviction vacated due to "serious doubt" that they weren't duplicative.
        - Instruction that each charge must be considered separately <u>does not cure the error</u>.

Commonwealth v. Admilson Resende, 474 Mass. 455 (June 9, 2016) (Botsford, J.)

- **HELD**: Previous convictions for predicate offenses should be treated as a *single* predicate conviction when they were all charged as part of a single prosecution.
    - D had five priors for distribution, but all the counts were included in a single set of charges. Court held that those five priors would count only as one ACC predicate.
    - This is different than federal rule.
        - State ACCA: requires that prior convictions "aris[e] from separate **incidences**."
            - The Court all but says that if the word "incidents" was used instead, the defendant would have probably lost.
        - Federal ACCA: requires that prior convictions must have been "committed on occasions different from one another."
        - The SJC held that the conscious deviation from the federal language required a different interpretation.
    - The point of the ACCA is to increase punishment when people persevere with criminality "despite the theoretically beneficial effects of penal discipline." So you punish more severely as the defendant has more opportunities for reform, but fails to do so.
        - So could this rule be extended to context in which crimes are charged separately, but there's no intervening discipline?
    - Rule of lenity.
- This matters because the enhancement is so draconian. Defendant now subject to 3 year MM rather than 15 year MM. Instead of 15 years, on resentencing, the defendant got five to five and a day, and was home a month after the rescript from the SJC.
- **Cordy J., joined by Spina, J., Dissent**: State ACCA unambiguously means separate criminal incidents.
    - Situation in which Cordy does a parade of horribles about the majority's logic, and you want to use those horribles to help you to try to extend *Resende*.

PORNOGRAPHY

Commonwealth v. Glenn Christie, 89 Mass. App. Ct. 665 (July 5, 2016) (Rubin, J.)

- Vacates conviction for statutory rape and indecent A&B because the trial court (Lowy, J.) admitted testimony concerning same-sex pornography in D's possession to demonstrate D's sexual interest in the alleged victim (a 12 year-old boy).
    - Judge Lowy recognized the prejudice, because he didn't allow the pornography to be played for the jury. He instead let an officer describe what was on the tapes.
    - Judge gave a limiting instruction: Testimony was only admitted to show D's sexual interest and state of mind as it relates to the victim and the manner and means by which D accomplished the alleged sexual assault.
- **HELD**: Homosexuality is irrelevant to whether D has sexual interest in children ("ingrained stereotypes and mistaken views"). Adult pornography probative only of same-sex interest is thus inadmissible to show sexual interest in children.
    - Pornography is only admissible where it is "specifically probative of that interest" in children.
    - Admission of testimony about pornography depicting generic acts of same-sex sex is thus irrelevant to whether D had a sexual interest in a young boy.
    - Court: Imagine if the evidence was about adult heterosexual pornography and the victim were a girl. No court would ever have admitted it!
- Tapes may have been admissible to show "grooming" of the victim, but it was undisputed that these particular videos were never played for the victim.
- One video showed the use of a sex toy similar to that allegedly used on the victim. But the CW did not put on evidence to show that use of a sex toy is "sufficiently distinctive" that a video showing it could be admitted to show the defendant's interest in this practice.
- Dissemination conviction stands for showing the victim pornography.

Commonwealth v. Ryan Coates, 89 Mass. App. Ct. 728 (July 15, 2016) (Cypher, J.)

- Affirms indecent A&B under 14 & disseminating matter harmful to minor (5yo girl). Defendant was mother's boyfriend.
- **HELD:** Pornography properly admissible and relevant. Showed the "defendant's interest in committing the crimes charged." And the Court notes that "[t]his is so even if the material did not actually depict children."
    - Materials and the internet searches that returned them showed his interest in sex between a stepfather and his stepdaughter.
    - Many titles showed an interest in anal intercourse. – Court does not engage in the analysis it did in *Christie*, as to whether anal sex is a sufficiently distinctive sexual act to take on additional probative value.
    - Prejudicial impact was limited because only the titles were read to the jury, not the images.
    - **The judge had no duty, *sua sponte*, to engage in prejudice balancing or to give a limiting instruction. Must be requested!**
- **ALSO**:
    - Victim never ID'd defendant in court. Evidence still sufficient to establish D as perpetrator where CW established that "Ryan" was the assailant and D later testified himself and acknowledged living with the victim and her mother.
    - Correct that D was not allowed to introduce expert testimony to say that he did not fit the profile of a pedophile. "Such evidence is fundamentally irrelevant." Court distinguishes b/t permissible character evidence and impermissible profile evidence: "character evidence pertains to trains that are personal to the defendant; profile evidence consists of characteristics exhibited by other people who have been convicted of a similar crime."
    - Expert testimony is also not scientifically valid because "[t]here is no psychological test that validly detects persons who have or will sexually abuse children." [Nevermind that expert testimony is admissible in SDP hearings for precisely that purpose. Cypher: Profiles can be used to show what someone *will do* in the future, not what they *have done* in the past.]

Different Admissibility Standards

- *Christie* FN2 has a whole discussion of the change in how courts balance prejudice and probative value.
    - In *CW v. Crayton*, 470 Mass. 228, 249 n.27 (2014), the SJC said that "' other bad acts' evidence is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk." So *Crayton* imposes a "more exactly standard on its admissibility."
- *Christie* probably takes this entirely out of context, because that FN is about prior bad act evidence, which *Christie* doesn't mention. It acts like this is a wholesale change to 403.
- *Coates* uses the general 403 standard and asks only whether the "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."
- Cite *Christie* and its more restrictive standard. If the CW picks up on the fact that this appears to be an expansion of *Crayton*, say that all pornography is inherently character evidence and it is only admitted under Rule 404 when something specific ties it to the crime. So this area has all of the trappings of the propensity, character, and 404(b) analysis, so the same prejudice analysis should apply.

RANDOM SUPPRESSION CASES

Commonwealth v. Jerry Meneide, 89 Mass. App. Ct. 448 (June 1, 2016) (Wolohojian, J.)

- CW appeal from suppression order. Legal traffic stop; as D stops, cop sees him lift his butt up in the seat and seem to put something under it. Marijuana odor. Exit order for safety reasons. Cops search the car, pull down the backseat armrest and find a firearm inside.
- **HELD**: Gun, and statements made after its discovery, were properly suppressed.
    - **Exit order**: Valid. Must be justified by safety concerns. Court says that "the defendant's unusual action of lifting himself off the seat by six inches in a manner consistent with concealing something was sufficient to justify the exit order and patfrisk." Such acts of concealment will justify an exit order.
        - That single motion of concealment justifies an exit order, patfrisk, and "a limited search of the immediate area where the defendant had been seated."
    - **Search of Backseat**: Excessive. D made no movement toward the backseat; D was calm and cooperative; D's nervousness alone was not enough to justify expanded search.
        - Scope of a protective search is limited to the area from which the suspect might gain possession of a weapon & rationally connected to the circumstances that gave rise to the safety concern.
        - ***Even though the back armrest was within his wingspan*, the Court held that there was no evidence that he "did or would" reach for it.**
    - *See also CW v. Douglas*, 472 Mass. 439 (2015) – RS can be dispelled when nothing is found, so cops cannot extend "protective" search.

Commonwealth v. Eddy Teixeira-Furtado, 474 Mass. 1009 (June 20, 2016) (Rescript)

- Motion to suppress allowed, CW appealed, AC reversed in 1:28, SJC granted FAR.
- **HELD:** Officer's unsupported statement that vehicle was traveling "at a speed greater than reasonable" was insufficient to establish legality of traffic stop.
    - Belief that someone is speeding must be supported by articulable facts, not just a conclusory statement that the person was speeding.
- Opinion provides a menu of options for officers to avoid the rule, by listing all of the things the officer *didn't* say.
    - The Commonwealth was not required to identify the vehicle's precise speed, but the testifying officer provided nothing on the subject of speed beyond his conclusion that it was greater than reasonable. He did not, for example, estimate the vehicle's speed; compare its speed to the vehicle in which he was riding or to other vehicles; provide any measurement from a radar gun or other device; or testify that the vehicle was traveling faster than the posted speed limit for that particular road and location. Nor was there evidence presented regarding the traffic on the road, the use being made of the road at the time by pedestrians or others, or other relevant safety considerations.

Commonwealth v. Jimmy Warren, 475 Mass. 530 (Sept. 20, 2016) (Hines, J.)

- D stopped after B&E, one mile from scene, 25 minutes after call to police, runs away when police try to stop him → **NO REASONABLE SUSPICION!**
    - **Description of Suspects**: Victim's vague description – 3 black males, 2 in "dark clothing" and the third in a "red hoodie" – was not sufficiently detailed for the police "reasonably and rationally" to target D.
    - **Proximity**: One mile away, 25 minutes later. Court says that location and timing of stop were "random occurrence" that were "not probative of individualized suspicion" because the direction of flight was unknown. Court also constructs a map, and says that based upon timing, perpetrator could have been anywhere in a 12 square mile area. Also, person traveling directly from the scene would have been further than one mile away.
    - **FLIGHT**: Flight by black men in Boston adds nothing to reasonable suspicion analysis because Boston police disproportionately stop African-Americans (citing BPD study).
        - Black men in Boston, "when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."
        - And overall, flight deserves "little, if any, weight" because people are free to avoid consensual police encounters.
        - *Contrast Illinois v. Wardlow*, 528 U.S. 119 (2000) – Flight + "high crime area" = reasonable suspicion.
- **Invites creative advocacy** – Court cited BPD study to change the rules regarding flight.

IMPOUNDMENT / INVENTORY SEARCHES

Commonwealth v. Jemaul Oliveira, 474 Mass. 10 (March 28, 2016) (Gants, C.J.)

- D held by LPOs for shoplifting, police go out to parked car and retrieve bag of merchandise, officers told D that car would be inventoried and towed, D proposes that girlfriend (car's owner) retrieve the car. Police find gun during inventory search.
- **General Standard**: Inventory searches are lawful when (a) seizure of car is reasonable, and (b) search is conducted following standard written police procedures.
- **HELD:** When D offers police "lawful & practical alternative" to impoundment, it is unreasonable to impound & inventory car, and fruit of search must be suppressed.
    - Even if seizure is for legitimate reason, it must be "reasonably necessary."
    - Important Factor = whether car parked in legal space of D's choosing or whether D was pulled over by police and parked in place he wouldn't have otherwise chosen. In latter case, cops could be held responsible for any risks created by car's location.
    - Police have no obligation to locate or call the car's owner or to wait with vehicle until licensed driver can be located.
    - Court rejects CW's proposed per se rule that police only have to consider alternatives to impoundment when owner is on the scene. Says that "authorized drivers" can also propose alternatives.

Commonwealth v. Jared Abdallah, 475 Mass. 47 (July 28, 2016) (Duffly, J.)

- D arrested on larceny warrant at hotel (while wearing backpack), police arranged for hotel to secure all of his belongings EXCEPT backpack. Cops searched the bag at the station pursuant to their inventory policy, find drugs.
- **HELD:** It was unreasonable to seize backpack and take it to the station. Similar to *Oliveira* – police had lawful and practical alternative to the seizure.
    - Unique facts. Officers let hotel safeguard the rest of D's property, but "single[d] out" the backpack.
- CW made no argument that any other exceptions to warrant requirement applies (e.g., search incident).

Commonwealth v. Jahliel Nicoleau, 90 Mass. App. Ct. 518 (Oct. 14, 2016) (Agnes, J.)

- Combines the last two – a backpack *in* a car.
- **HELD**: Unreasonable for inventory search of car to extend to interior of backpack found in the backseat.
    - Reasonable to impound and inventory car b/c it was unregistered and uninsured.
    - Unreasonable to seize backpack with the car because there was a "practical & available" alternative to its seizure – giving to D's grandmother who was present at the scene.
    - Officers had removed other property from car ("music player") and given it to grandmother.
    - **"Item that is not itself suspected to be dangerous" + "responsible third party available to take possession of it" = no basis to seize item.**
    - "An inventory search is valid only when it is necessary."
    - D "should be asked his preference as to the disposition of his property. If there is a practical and available alternative that D expressly or impliedly approves, the police MUST choose it."
- Inventory searches have *nothing* to do with suspicion of criminal activity. It is largely about protecting police from claims of theft, so there is no need for that protection where police aren't taking possession of the property in question.
- Two temporally-distinct reasonableness inquiries in impoundment cases:
    - (1) whether car was reasonably impounded. (*Oliveira*)
    - (2) whether certain property must be inventories prior to the vehicle being towed. (*Nicoleau*)

Commonwealth v. Garcia-German, 90 Mass. App. Ct. 753 (Dec. 20, 2016) (Green, J.)

- Search of car in correctional facility parking lot. Court concluded that search was invalid administrative/special needs search.
- **HELD**: Invalid administrative search where (a) no written policy regulated the conduct of the search, (b) not all vehicles were subject to the search, and (c) apparent investigatory motive for the search.
    - Sign at entrance said – "**Warning: all vehicles beyond this point are subject to search."** Court held this was *not enough* to reduce a visitor's expectation of privacy and justify the search. "Prior notice does not imply consent."
- **ALSO**: No P/C for search.
    - Prescription pill bottle with two different colors of pills does not justify search. Contraband nature of pill bottle not immediately apparent – officer couldn't tell it was oxy, couldn't tell if it was validly prescribed.
    - Presence of 2 cell phones in car does not justify search when car was just occupied by 2 people.

TIPSTERS

Commonwealth v. Depiero, 473 Mass. 450 (Jan. 4, 2016) (Cordy, J.)

- Anonymous 911 caller says that D is driving drunk. Cops go to D's house and wait for him to come home, don't see any unreasonable or illegal operation.
- **HELD**: SJC rejects SCOTUS holding in *Navarette v. California*, 134 S. Ct. 1683 (2014), which basically held that all anonymous 911 calls are generally reliable and therefore police need not verify or personally observe criminality. *Navarette* is not the law in Massachusetts. "We decline to credit any indicia of reliability to the unidentified caller's information merely because the information was transmitted in the form of a 911 telephone call."
    - *Aguilar-Spinelli* Test: CW must establish the source's basis of knowledge AND veracity (credibility of known source or reliability of info).
        - [SCOTUS doesn't follow A-S test since *Illinois v. Gates*, 462 U.S. 213 (1983) – "totality of circumstances".] SJC still follows A-S.
        - SJC: A-S test is "less rigorous" in RS cases vs. PC cases.
    - Basis of knowledge satisfied by firsthand observation of caller.
    - Veracity =
        - Rejects *Navarette*.
        - Rejects AC's (Vuono, J.) "excited utterance" theory. Says that excited utterance theory is inapposite where the only information about the occurrence of the crime comes from the 911 caller. Plus, this 911 caller didn't sound excited.
    - BUT still allows the search b/c the officer sufficiently corroborated the call's details:
        - Car appeared where it was said to be heading.
        - Police learned owner of car was on probation for OUI.

Commonwealth v. Hector Gonzalez, 90 Mass. App. Ct. 100 (Aug. 29, 2016) (Katzmann, J.)

- D arrested based upon anonymous tip from CI who had provided reliable info leading to only TWO prior arrests and both of those past prosecutions were ongoing (at the time of the tip). **BUT** at the time of the MTS, one of those prosecutions had been dismissed after a motion to suppress was allowed. That MTS was allowed because the CI was found *not reliable*. So … D argued that the CI was not reliable here either.
- **HELD**: That previous finding does not control here. CI is reliable now.
    - One finding of CI reliability does not control for all future cases. No collateral estoppel.
    - Motion judge here *can* consider the evidence (a gun) that was seized from the prior defendant, in order to bolster the CI's reliability, even though the evidence was suppressed in the other prosecution.
        - "[A]t least not in a case such as this where the evidence obtained from the prior tip had **not yet been suppressed at the time the officers relied on it** as part of the CI's reliability track record."
        - D was not the "victim" of the illegality in the prior case, so there is no "incremental deterrent effect" that would be served by exclusion.
        - So … motion judge can consider the fact that police recovered a gun on the other defendant as the CI had predicted.
- A-S Test:
    - **Basis of Knowledge**: Details concerning D's location, clothing, means of transport, and ethnicity gives rise to reasonable inference of CI's basis of knowledge.
    - **Veracity**: Sufficient evidence of reliability from the fact of 2 prior arrests for narcotics and firearms + independent corroboration by cops + CI was not anonymous.
- FN10: But even if we excised everything about that one prior case, there was still sufficient evidence of veracity. So is it all dicta?

INTERROGATION

Commonwealth v. Kyle Alleyne, 474 Mass. 771 (July 15, 2016) (Hines, J.)

- First degree murder EAC affirmed – D stabbed wife two weeks after she gave birth to baby that wasn't his.
- **Juror Attentiveness:** ADA told judge that juror was struggling to stay away, judge said he'd keep an eye on it. D now argues that judge abused his discretion in not conducting voir dire of juror.
    - Court: Where there isn't evidence that juror was actually sleeping, okay to just monitor situation; plus, counsel agreed to it.
- **Autopsy Photos:** D argues prejudicial admission of 19 autopsy photos.
    - Court: Photos of the victim's 13 stab wounds were probative of EAC and deliberation; state of decay of body relevant to time of death; trash bags in photos relevant to concealment/consciousness of guilt.
    - Court describes ways judges can mitigate prejudice – voir dire question, limiting # of photos, low-res photos, instructions to jury.
- **Unrecorded Interview**: Interview of D was not recorded because, according to officers, he "emphatically" indicated that he didn't want recording. Judge gives *DiGiambattista* instruction and tells jury that D has "right" to refuse recording. D claims error in latter instruction.
    - Court: Close enough. "Gist" of instruction was ok, but "better practice" not to instruct juries that D's have a "right" to refuse recording.
    - Best Practices: Police should record suspects saying they don't want to be recorded. Also, police should just advise suspects they're being recorded rather than ask permission.
    - Rejects D's argument for per se exclusion of all unrecorded statements.
- **EAC Instructions:** D argues that instructions should require CW to prove that D intended V to suffer greatly or was indifferent to such suffering.
    - Court: No. Intent element in EAC is just the malice needed for all murder convictions. Model instructions ok.
    - Plus, D's "actions, including inflicting thirteen separate stab wounds, satisfies the very instruction he is requesting."
    - Model focuses on manner/means of inflicting death, not D's intent.

Commonwealth v. Glenis Adonsoto, 475 Mass. 497 (Sept. 16, 2016) (Hines, J.)

- OUI conviction. D agreed through phone interpreter to do breathalyzer, but then didn't produce any results b/c she didn't follow instructions properly. D's statements to the officer that night were admitted through the officer (not the interpreter), even though he didn't understand Spanish.
- **HELD:** Conviction affirmed.
    - **Failed Breathalyzer**: Evidence admissible; right against self-incrimination not implicated where she consented to breathalyzer but then didn't get a result. This was not a "refusal." Initial consent is "all that was required for admissibility." Any explanation for her failure to complete was for the jury.
    - **Hearsay**: D's statements are admissible as statement of party-opponent. Translator's statement to officer is admissible as statement of D's agent.
        - Government appointed interpreter "not always" to be considered D's agent. D's actions showed that translator was properly relaying instructions. [Even though she failed to perform the test right??]
        - Interpreter was obtained through third-party interpreter service, so "no motive to distort the translation."
    - **Confrontation Clause:** For purposes of CC, is an interpreter a "declarant" that defendant has a right to confront??
        - Court: "[W]e decline to wade into this thicket of unsettled constitutional principles." D didn't object, so we'll just say there's no substantial risk and move on.
    - **Electronic Recording of Interpreter Services**: <u>"Going forward, and where practicable, we expect that all interviews and interrogations using interpreter services will be recorded."</u>

MISCELLANEOUS CASES

Commonwealth v. Carroll Heath, 89 Mass. App. Ct. 328 (April 26, 2016) (Kafker, C.J.)

- **MISSING EVIDENCE.**
- D convicted of ABPO in booking room of police station. Police did not preserve the video of the incident. D requested missing evidence instruction, but trial judge didn't give it.
- **HELD**: Conviction reversed.
    - **Initial Burden:** D's affidavit contending that he was the victim of the assault is ALONE enough to satisfy his initial burden to establish "reasonable possibility" that video was exculpatory.
    - **Balancing Test**:
        - **Culpability of CW**: Judge erred in presuming that CW only has duty to preserve exculpatory evidence once motion to preserve is made. Instead, where police possess video of alleged crime, CW has duty to preserve without demand. [This is true regardless of CW's actual knowledge, since actions of cops are imputed to the CW.] CW was negligent here.
        - **Materiality of Evidence**: Goes to cop's credibility, so very material.
        - **Potential Prejudice to D**: Would have been best evidence to impeach the cop. Cross-exam about the loss of the evidence was not enough, particularly because no "missing evidence" instruction was given.
- On retrial, judge must instruct jury that they can make negative inference about CW's case because video was destroyed.

Commonwealth v. Cauris Gonzalez, 475 Mass. 396 (Sept. 6, 2016) (Lenk, J.)

- **Evidence insufficient for first-degree murder! 43 footnotes!**
- Incredibly fact-intensive opinion. Basically, D was charged with deliberate premeditation on the theory that she had aided 4 principals by driving them to the scene of the shooting while knowing of and sharing their lethal intent.
- **HELD**: Motive + Consciousness of Guilt + D's possessions (car & phone) involved in killing ≠ proof BRD of participation in joint venture.
    - Participation: Jury could have inferred that it was D's mother's caravan that dropped off the killers, but not that she was the driver. No evidence that D maintained exclusive use of her mother's minivan.
        - CSLI would have allowed jury to infer that her cell phone was involved, but her BF (one of the killers) used her phone that day.
    - Knowingly w/Requisite Mens Rea: Even if she participated, and even if she knew there was going to be "some sort" of attack, there is no evidence at all that she wanted a deadly attack.
- **Cordy, J., concurring**: Agrees that evidence of participation is too weak, but says that (had evidence of participation been sufficient) the evidence of mens rea is sufficient.

Commonwealth v. Richard Lawson, 475 Mass. 806 (Oct. 28, 2016) (Gants, C.J.)

- Insanity defense in resisting arrest and officer assault case; D called expert witness, CW rested on the circumstances of the incident to prove sanity.
- **HELD:** SJC changes the law – "Presumption of sanity" is NOT a presumption at all; it is an inference that D is probably criminally responsible b/c most people are. So CW cannot rely SOLELY on that "presumption" to prove criminal responsibility.
    - Inference is not strong enough for CW to rely on it alone. While most people *in the general population* are sane, most defendants *who proffer an NCR defense* probably aren't.
    - FN8 –> "[J]udges should not instruct juries regarding this inference" because of its "meager weight" and the "risk of juror confusion." [This was a bench trial.]
    - Motion for required finding on NCR grounds may be brought ONLY at the close of all the evidence, because it is generally D's evidence that will raise the issue.
- **BUT** CW need not put on expert. It can rely on D's conduct before/during/after offense, as they did here. Thus, conviction affirmed.

Commonwealth v. William Sylvester, 476 Mass. 1 (Nov. 9, 2016) (Hines, J.)

- *Padilla* argument for sex offenders.
- **HELD**: Counsel was not ineffective for failing to explain consequences of SORB registration when D pled to indecent A&B *in 2002*.
    - That may be IAC now. Court leaves question for another day.
- *Padilla* factors for when "collateral" consequence must be told to defendant:
    - "practically inevitable" – this is satisfied. Duty to register as sex offender is a certainty after conviction for predicate offense.
    - "severe consequence" – penalties for sex offenders and onerous registration requirements largely came *after* 2002.
        - 2003 – Internet dissemination of registry for level 3 (expanded in 2013 to include level 2).
        - 2003 & 2006 – Offenders required to provide more information.
        - 2006 – CPSL added (later struck down).
        - 2010 – Homeless sex offenders required to update every 30 days and wear GPS.
        - 2010 – MMs increased severely for failing to register.
        - 2010 – Level 2 and 3 cannot seal records.
    - "recognition of critical need for warning" – Judge is required to warn D and D must acknowledge receipt of warning in writing, but statute also says that failure to warn doesn't require vacatur. So this ain't critical.
        - R. Crim. P. 12 was revised in 2004 to include notification of registry obligation. So warning "became more critical" thereafter.
        - District Court forms now contain acknowledgement of warning. But it didn't back in 2002.

Commonwealth v. Joshua Roe, 90 Mass. App. Ct. 801 (Dec. 28, 2016) (Cypher, J.)

- Rare bad acts win in Boy Scout sex case.
- **HELD**: Error when V's dad testified that D had told him that "he had not touched V the way he touched another boy."
    - Judge had granted D's MIL, but V's father testified to the bad acts anyway. D objected, the objection was sustained, but counsel wasn't allowed to sidebar.
    - Curative instruction not given until the following day, after deliberations began.
- **ALSO**: V's father testified that D said he "didn't really know" if he had a sexual interest in young boys. Court held that it was prejudicial error to admit this w/o limiting instruction to proper 404(b) purpose (motive/state of mind/intent).