

MASSACHUSETTS

Topic Outline

I. OFFENSES DEFINED

A. Child Pornography

1. Creating Child Pornography
 - a. “Nudity” Defined
 - b. “Lascivious Intent” Defined
2. Knowing Purchase or Possession of Visual Material of Child Depicted in Sexual Conduct
 - a. “Sexual Intercourse” Defined
 - b. “Unnatural Sexual Intercourse” Defined
3. Dissemination
 - a. “Visual Material” Defined
 - b. “Disseminate” Defined
 - c. “Picture” Defined
 - d. Photography
 - i. “Photograph” Defined
 - ii. Digital Photography
4. Knowing Possession With Intent to Distribute
5. Virtual/Simulated Child Pornography

B. Child Sexual Exploitation

1. Unnatural and Lascivious Acts on a Child Under the Age of 16
2. Lewd, Wanton, and Lascivious Persons in Speech or Behavior
 - a. Elements
 - b. “Public Place” Defined

C. Familial Kidnapping

D. Online Enticement/Solicitation to Travel With Intent to Engage in Sex With a Minor

E. Transporting Minor for the Purposes of Prostitution

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause
 - a. Probable Cause Sufficient to Issue Search Warrant
 - b. Nexus Between the Defendant, the Premises to Be Searched, and the Items to Be Seized
 - c. The Particularity Requirement
 - d. Motion to Suppress
 - e. The Defendant's Burden
 - i. False Statements
 - ii. Evidence Illegally Obtained
2. Scope of Search
3. Staleness
 - a. In General
 - b. Dissemination of Child Pornography

B. Anticipatory Warrants

C. Methods of Searching

D. Types of Searches

1. Employer Searches
2. Private Searches
3. Civilian Searches
4. University-Campus Searches
5. Consent Searches: Limitations

E. Computer Technician/Repairperson Discoveries

F. Photo-Development Discoveries

G. Criminal Forfeiture

H. Disciplinary Hearings for Federal and State Officers

I. Probation and Parolee Rights

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

B. Internet Nexus

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State
2. Federal
3. Concurrent

D. Interstate Possession of Child Pornography

IV. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

B. Defense Requests for Copies of Child Pornography

C. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues
2. Circumstantial Evidence
3. Technical Aspects of Electronic Evidence Regarding Admissibility

D. Text-Only Evidence

1. Introduction into Evidence
2. Relevance

E. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act
2. Cable Act
3. Patriot Act
 - a. National Trap and Trace Authority
 - b. State-Court-Judge Jurisdictional Limits

F. Evidence Obtained Through Wiretapping

1. Consent
2. Suppression of Unlawfully Intercepted Communication
3. Extension-Telephone Exception

G. Prior Bad Acts and “Other Crimes” Evidence

1. Inadmissible
2. Admissible
 - a. Uncharged Similar Acts
 - i. Committed Against Another Person
 - ii. Remoteness

- b. Uncharged Sexual Misconduct
- c. Common Plan or Course of Conduct
- d. Evidence of a Sexual Assault on a Person Other than the Victim

H. Witnesses and Testimony

- 1. Expert Testimony
 - a. Admissibility
 - b. Testimony on Child Pornography
 - c. Testimony on Sexually Abused Children
 - i. In General
 - ii. Treating Therapist as Expert Witness
 - d. Testimony on Witness's Credibility
 - i. Opinion Testimony
 - ii. Patterns of Disclosure
- 2. Child Witnesses
 - a. Competency
 - b. Videotaped Testimony
 - i. When Used
 - ii. Burden
 - iii. Requirements
 - iv. Alternatives
- 3. Psychological and Emotional Trauma
- 4. "Fresh Complaint" Witnesses
 - a. "Fresh Complaint" Defined
 - b. Time Frame
- 5. Reputation and Character Evidence
 - a. Admissible
 - b. Inadmissible

I. Privileges: Social Workers

- 1. Privilege
- 2. Exception

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Victim

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

VI. MULTIPLE COUNTS

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

B. Issues of Double Jeopardy

1. Cases Involving Ongoing Abuse
2. Prosecution After Acquittal

VII. DEFENSES

A. Age

B. Consent

C. Diminished Capacity

1. Addiction to the Internet
2. Insanity

D. First Amendment

E. Impossibility

1. Factual
2. Legal

F. Manufacturing Jurisdiction

G. Outrageous Conduct

H. Researcher

I. Sexual Orientation

VIII. SENTENCING ISSUES

A. Enhancement

1. Age
2. Distribution/Intent to Traffic
3. Number of Images
4. Pattern of Activity for Sexual Exploitation
5. Sadistic, Masochistic, or Violent Material
6. Use of Computers

B. Sexually Dangerous Persons

1. "Mental Abnormality" Defined
2. "Personality Order" Defined

3. “Likely to Engage in Sexual Offenses” Defined
4. Involuntary Commitment
 - a. “Likelihood of Serious Harm” Defined
 - b. State’s Burden

C. Probation

1. Purposes
2. Conditions
3. Enforceability of Conditions

IX. SUPERVISED RELEASE

MASSACHUSETTS

Case List by Court

I. United States Supreme Court

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

II. Supreme Judicial Court of Massachusetts

- *Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997)
- *Commonwealth v. Beals*, 541 N.E.2d 1011 (Mass. 1989)
- *Commonwealth v. Bean*, 761 N.E.2d 501 (Mass. 2002)
- *Commonwealth v. Beauchemin*, 571 N.E.2d 395 (Mass. 1991)
- *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)
- *Commonwealth v. Gauthier*, 679 N.E.2d 211 (Mass. 1997)
- *Commonwealth v. Hinds*, 2002 Mass. LEXIS 379 (Mass. 2002)
- *Commonwealth v. Jones*, 535 N.E.2d 221 (Mass. 1989)
- *Commonwealth v. LaCaprucia*, 708 N.E.2d 952 (Mass. 1999)
- *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001)
- *Commonwealth v. LeFave*, 556 N.E.2d 83 (Mass. 1990)
- *Commonwealth v. Oakes*, 551 N.E.2d 910 (Mass. 1990)
- *Commonwealth v. Provost*, 636 N.E.2d 1312 (Mass. 1994)
- *Commonwealth v. Roy*, 647 N.E.2d 1179 (Mass. 1995)
- *Commonwealth v. Smith*, 728 N.E.2d 272 (Mass. 2000)
- *Commonwealth v. Tufts*, 542 N.E.2d 586 (Mass. 1989)

III. Appeals Court of Massachusetts

- *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. Avery*, 437 N.E.2d 242 (Mass. App. Ct. 1982)
- *Commonwealth v. Barboza*, 763 N.E.2d 547 (Mass. App. Ct. 2002)
- *Commonwealth v. Benoit*, 531 N.E.2d 262 (Mass. App. Ct. 1988)
- *Commonwealth v. Colon*, 729 N.E.2d 315 (Mass. App. Ct. 2000)
- *Commonwealth v. Foskette*, 568 N.E.2d 1167 (Mass. App. Ct. 1991)
- *Commonwealth v. Hanlon*, 694 N.E.2d 358 (Mass. App. Ct. 1998)
- *Commonwealth v. O'Brien*, 626 N.E.2d 892 (Mass. App. Ct. 1994)

IV. Superior Court of Massachusetts

A. Bristol

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

B. Essex

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

C. Middlesex

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

D. Plymouth

- *Commonwealth v. Kelley*, 2001 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)

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

- *Commonwealth v. Gousie*, 2001 Mass. Super. LEXIS 374 (Mass. Super. Ct. 2001)
- *Commonwealth v. Hinds*, 2002 Mass. LEXIS 379 (Mass. 2002)
- *Commonwealth v. Kelley*, 2001 Mass. Super. LEXIS 104 (Mass. Super. Ct. 2001)
- *Commonwealth v. Rubino*, 2000 Mass. Super. LEXIS 693 (Mass. Super. Ct. 2000)

a. “Sexual Intercourse” Defined

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

b. “Unnatural Sexual Intercourse” Defined

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

3. Dissemination

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

a. “Visual Material” 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)

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)

c. “Picture” Defined

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

d. Photography

i. “Photograph” Defined

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

ii. Digital Photography

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

4. Knowing Possession With Intent to Distribute

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

5. Virtual/Simulated Child Pornography

No state cases reported.

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. Familial Kidnapping

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

D. Online Enticement/Solicitation to Travel With Intent to Engage in Sex With a Minor

No state cases reported.

E. Transporting Minor for the Purposes of Prostitution

No state cases reported.

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause

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

a. Probable Cause Sufficient to Issue Search Warrant

- *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. 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)

d. Motion to Suppress

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

e. The Defendant's Burden

i. False Statements

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

ii. Evidence Illegally Obtained

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

2. Scope of Search

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

3. Staleness

a. In General

- *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)

C. Methods of Searching

No state cases reported.

D. Types of Searches

1. Employer Searches

No state cases reported.

2. Private Searches

No state cases reported.

3. Civilian Searches

No state cases reported.

4. University-Campus Searches

No state cases reported.

5. Consent Searches: Limitations

- *Commonwealth v. Hinds*, 2002 Mass. LEXIS 379 (Mass. 2002)

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)

2. Suppression of Unlawfully Intercepted Communication

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

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

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)

ii. Treating Therapist as Expert Witness

- *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)

a. Competency

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

b. Videotaped Testimony

i. When Used

- *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. 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)

B. Consent

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

C. Diminished Capacity

1. Addiction to the Internet

No state cases reported.

2. Insanity

No state cases reported.

D. First Amendment

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

E. Impossibility

1. Factual

No state cases reported.

2. Legal

No state cases reported.

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)

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. 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. 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. 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. 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, 2002 Mass. LEXIS 379 (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. 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. 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. 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. 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. 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. 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. 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.

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.

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).
- 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).

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. 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*, 2002 Mass. LEXIS 379, 19 (Mass. 2002).

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).

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).
- 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).

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).
- 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).

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).

E. Virtual/Simulated Child Pornography

No state cases reported.

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).

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 to Travel With the Intent to Engage in Sex With a Minor

No state cases reported.

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

- 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. 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 nexus between the items to be seized and the place to be searched need not be based on direct observations.
– *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. 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).

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 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

No state cases reported.

C. Civilian Searches

No state cases reported.

D. University-Campus Searches

No state cases reported.

E. Consent Searches: Limitations

- 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*, 2002 Mass. LEXIS 379, 9 (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*, 2002 Mass. LEXIS 379, 9 (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).

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).

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.

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).

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).

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 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).

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).

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).

III. Diminished Capacity

A. Addiction to the Internet

No state cases reported.

B. Insanity

No state cases reported.

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

No state cases reported.

B. Legal

No state cases reported.

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.

MASSACHUSETTS

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).

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).

MASSACHUSETTS

Supervised Release

No state cases reported.