

CPCS Amicus Briefs
Decisions Issued 1/1/18 – 12/31/18

Commonwealth v. Kennedy, 478 Mass. 804 (2018)

The defendant was convicted of indecent assault and battery on a person over fourteen, assault and battery, and indecent exposure. The charges stemmed from an encounter between the defendant and the victim, who met on a dating website and exchanged flirtatious messages. After they met in person for the first time, the victim agreed to let the defendant come to her home to talk. Once inside, he immediately exposed himself to her, walked toward her, and forced her to touch his penis. During the trial, the defendant sought a jury instruction on mistake of fact – that he honestly and reasonably believed that the victim had consented to the contact based on their flirtatious messages and her agreement to have him come to her home. The SJC solicited an amicus brief on the following question: “Where a defendant has been charged with a sex offense for which force is not an element of proof, whether the defendant is entitled to an instruction as to honest and reasonable mistake of fact, where the claim of mistake of fact as to consent is at least arguably supported by the evidence.” CPCS filed a brief, authored by staff attorney **David Rangaviz**, arguing that such a defense should be available. The SJC concluded that the facts of the case did not give rise to an honest and reasonable mistake of fact defense, even if one existed, because the victim “did provide clear, objective indicia of nonconsent.” The Court specifically noted that “the problem” with the claim of mistake in this case was “not the defendant’s legal argument,” but rather that the facts showed that the defendant had ignored the “victim’s clear and unambiguous pleas to stop.” Thus, the SJC expressly “h[e]ld open the possibility that a mistake of fact instruction may be an appropriate and fair defense to charges of indecent assault and battery on a person over fourteen.”

Commonwealth v. Gomez, 480 Mass. 240 (2018)

In this case, the SJC confronted a reported question concerning the availability of conditional guilty pleas – guilty pleas expressly conditioned on the right to appeal from the denial of a pretrial motion. Such pleas had never before been allowed in Massachusetts. CPCS authored an amicus brief, written by staff attorney **David Rangaviz**, arguing that defendants have a right to enter a conditional guilty plea, with or without the consent of the Commonwealth. The SJC accepted the amicus brief’s arguments concerning the availability of conditional guilty pleas, but concluded that such pleas should only be permitted with the consent of the Commonwealth. A revision to Rule 12 of the Massachusetts Rules of Criminal Procedure was referred to the SJC’s standing advisory committee. The committee’s proposed revision, which also requires prosecutorial consent to a conditional guilty plea, has been released and is now open for public comment.

Noe No. 5340 v. Sex Offender Registry Board, 480 Mass. 195 (2018)

Doe No. 76819 v. Sex Offender Registry Board, 480 Mass. 212 (2018)

Noe No. 5340 appealed the denial of his request for downward reclassification of his sex offender status before the Sex Offender Registry Board (SORB). The Superior Court vacated SORB’s reclassification of Noe as a level 3 offender and granted him declaratory relief, holding that SORB’s failure to provide counsel to indigent registrants seeking reclassification violated Massachusetts statutory law, and that SORB’s regulations placing the burden of proof on the registrant seeking reclassification violated his constitutional protections. The Commonwealth appealed. Doe No. 76819 and others seeking reclassification or termination of their duty to register sought relief before the single justice, pursuant to G.L. c. 211, §3, challenging the allocation of the burden of proof in these proceedings and SORB’s failure to conduct registrant-initiated reclassification and termination hearings in a timely way. SORB moved to dismiss the plaintiffs’ petition. The Single Justice reserved and reported to the full court so much of the

case as involved SORB's motion to dismiss, as well as a question asking the quantum of proof required at a hearing initiated by a registrant seeking termination or a downward reclassification.

A consolidated amicus brief was written by Appeals Unit staff attorney **Nancy Dolberg**. Decisions recognizing crucial rights of SORB registrants issued simultaneously on August 1, 2018. In Noe No. 5340, the Court held that the plain language of the statute provides indigent registrants the right to appointed counsel in registrant initiated reclassification hearings. It also concluded that after the registrant met their burden of production, the burden of proof is on SORB to prove, by clear and convincing evidence, that the classification is current and correct. In Doe No. 76819, the Court reiterated its holdings as to burden of proof, denied SORB's motion to dismiss, and remanded the case to the single justice.

The single justice also established an SJC working committee, chaired by Special Master Margaret Hinkle (J. ret.), which meets monthly to monitor the progress of SORB in addressing the backlog of petitions seeking reclassification and/or termination.

Commonwealth v. Buckley, 478 Mass. 861 (2018)

This case involved a challenge to the SJC's decision in *Commonwealth v. Santana*, 420 Mass. 205 (1995), permitting police officers to make pretextual traffic stops, for the purpose of investigating a crime for which they do not have reasonable suspicion or probable cause, so long as they observe some traffic violation. CPCS filed an amicus brief, joined by MACDL, urging the court to overrule *Santana* and hold that pretextual stops violate article 14. The brief, authored by staff attorney **Rebecca Kiley**, focused on the very strong evidence of pervasive racial disparities in traffic stops, which in turn lead to disparities in prosecutions, convictions, and incarceration. Ultimately, the SJC rejected amici's arguments and re-affirmed the *Santana* rule. Justice Budd, in a concurring opinion, agreed that it was "unworkable" to strike down *Santana*, but wrote to "highlight how pretextual stops disproportionately affect people of color, and to explore what can be done to mitigate the harm caused by this pretext."

Commonwealth v. Orbin O., 478 Mass. 759 (2018)

The 14-year-old juvenile, who had an IEP, shouldered past a paraprofessional at his school. School administrators brought a private complaint charging the juvenile with assault and battery. The juvenile's pre-arraignment motion to dismiss was allowed and the Commonwealth appealed. Prior to joining the CPCS staff, **Afton M. Templin** authored the party brief, arguing that the judge properly dismissed the complaint because it was not supported by probable cause and, even if it was, the juvenile court judge had the discretion to dismiss a delinquency complaint in the best interests of the child and the interests of justice. YAD's amicus brief, authored by **Ryan Schiff** and **Joe Schneiderman**, posited that the history, nature and purpose of Juvenile Court supported such discretion. The SJC reversed, holding that the complaint was supported by probable cause and dismissal of the complaint violated art. 30. However, the SJC did create a small carve-out for private complaints, holding that the Commonwealth must affirmatively move for arraignment on private complaints "to ensure that prosecutorial judgment has been exercised in deciding whether to proceed." *Id.* at 765. If the Commonwealth does not so move, separation of powers does not apply and a juvenile court judge "deciding a motion to dismiss a civilian complaint issued pursuant to § 35A may consider whether the clerk-magistrate abused his or her discretion in issuing the complaint, and, in doing so, may consider whether dismissal of the complaint is in the best interests of the child and in the interests of justice." *Id.* 766.

Commonwealth v. Newton N., 478 Mass. 747 (2018) (paired for argument with Orbin O.)

The 10 year old juvenile was found outside, in a parking lot, in the middle of the night, making deranged statements, waving guns in the air and pointing them at himself, and trying to open car doors. When

police arrived, they determined he needed a mental evaluation. In the ambulance, the juvenile punched himself in the genitals until he was restrained. Police learned from his mother he was autistic and his medication was not well managed. The police charged him with multiple offenses including breaking and entering, larceny and disorderly conduct. The juvenile's pre-arraignment motion to dismiss was allowed and the Commonwealth appealed. Before becoming a CPCS staff member, **Laura Chrismer Edmonds** authored the party brief, arguing the judge properly dismissed the complaint because it was not supported by probable cause as to intent, due to the child's age and diagnosis and, even if it was, the juvenile court judge had the discretion to dismiss a delinquency complaint in the best interests of the child and the interests of justice. YAD's amicus brief, authored by **Ryan Schiff and Joe Schneiderman**, posited that the history, nature and purpose of Juvenile Court supported such discretion. The SJC reversed, holding that a judge in considering a pre-arraignment motion to dismiss cannot consider criminal responsibility or mental impairment/diminished capacity, including adolescent brain development, as those issues are not relevant to the probable cause calculus. The SJC held that unless there was legislative authorization, dismissal of a delinquency complaint supported by probable cause violated art. 30.

J.H. v. Commonwealth, 479 Mass. 285 (2018)

In 2007, the 16 year old juvenile and 13 year old complainant repeatedly engaged in sexual intercourse. At the time, the complainant did not want to cooperate with the District Attorney. In 2009, the investigation was reopened, the complainant participated in a sexual assault interview, but did not want to pursue the case because she believed the juvenile "wanted to be with her" and she did not want him "to be in any trouble." In 2014, the then-20-year-old complainant went to the police and said she wanted to go forward with the case. By the time he was charged with 3 counts of rape of a child with force, the juvenile was 23 years old. A transfer hearing pursuant to G. L. c. 119, § 72A, was held in 2016. After the evidence closed, the Commonwealth conceded it had insufficient evidence of force and sought a finding of probable cause and transfer on the lesser included offense of statutory rape. The judge agreed and transferred the juvenile to adult court for trial on three charges of statutory rape. The juvenile filed a G. L. c. 211, § 3 petition which was reserved and reported. The juvenile, represented at trial and on appeal by privately retained counsel **Thomas Dougherty, III**, argued that § 72A does not authorize transfer of an uncharged lesser included offense and, even if it did, the transfer in this case did not provide him with due process. The amicus brief, authored by staff attorney **Afton M. Templin**, supported those arguments by tracing the history of the statutory language and the due process violation that occurred in this case, where, had the juvenile known he was defending against transfer on the lesser included offense, he would have presented a different defense at the hearing. The SJC held that "§ 72A[] permits a Juvenile Court judge, who has dismissed offenses charged for lack of probable cause, to cause a criminal complaint to be issued for lesser included offenses, where the lesser included offenses are supported by probable cause and the interests of the public require that the defendant be tried for the lesser included offenses." *Id.* at 290. The SJC also held, however, that even if this juvenile was on notice as a matter of law that statutory rape was a lesser included offense of rape of child with force, and even if "lesser included offenses are 'part and parcel' of the transfer process," the hearing did not provide him a meaningful opportunity to be heard on both parts of the § 72A inquiry. "[W]here a judge finds no probable cause of the crime charged, but does find probable cause of a lesser included offense, the judge must give the defendant a meaningful opportunity to address why discharge rather than transfer of the lesser included offense is consistent with the protection of the public." *Id.* at 293.

Juvenile v. Commonwealth, 480 Mass. 1012 (2018)

In this case, the juvenile appealed the setting of \$50,000 cash bail. He was in DCF custody but on the run from his placement, and was charged as an accessory to murder. The juvenile, represented by

Melissa A. Celli, argued on appeal from the Single Justice's denial of his bail review petition that the bail order violated his due process rights under *Brangan*, equal protection, and art. 30. An amicus brief authored by staff attorney **Afton M. Templin** argued that cash bail did not serve its purpose in juvenile court, particularly for multisystem youth, because youth were not motivated to return to court by someone else posting bail and DCF did not post cash bail for youth in its custody. Accordingly, an order of cash bail on a multi-system youth was a de facto detention order and the youth was entitled to the requisite level of procedural protections. The SJC disagreed, concluded "in the particular circumstances here, and in particular on the [sparse] record before us," there was no due process violation. The court reaffirmed that juvenile court judges were not required to set bail a juvenile could afford but judges must make the required findings demonstrating they have considered alternative, non-financial conditions and must state their reasons for setting a cash bail that amounts to a detention order. The SJC also found no equal protection violation as between youth in DCF custody and youth in parental custody unable to afford bail, and declined to reach the separation of powers issue.

Commonwealth v. Wilbur W., 479 Mass. 397 (2018)

The 12 year old juvenile was found delinquent of two counts of statutory rape with an 8 year old victim. The two youth were friends, and the juvenile, represented on appeal by **Joseph Maggiacomo, III**, argued that G. L. c. 265, § 23, the Commonwealth's statutory rape law, violates federal and state due process, and equal protection by imposing strict liability on juveniles engaging in sexual experimentation with other youth. YAD's amicus brief, authored by **Merritt Schnipper and Bob Hennessy**, argued that, as applied to youth under 16, the statute was unconstitutionally vague and encouraged arbitrary and discriminatory enforcement. The SJC held that the statute survived rational basis review because the legislature could rationally establish the age of 16 as the age of consent to protect all children, and there was no arbitrary or selective enforcement in this case. However, in a concurrence, Justice Gants noted the prevalence of consensual underage sexual activity in the Commonwealth and noted that prosecutors had the ability to charge 1 in 5 9th and 10th graders for statutory rape. He supported judges enforcing, for the first time, language in § 23 requiring proof of "abuse" as well as intercourse to prove statutory rape.

Commonwealth v. Lutskov, 480 Mass. 575 (2018)

In 1999, the 16 year old juvenile was adjudicated as a youthful offender for armed home invasion and other offenses. He was sentenced to the armed home invasion statutory mandatory minimum sentence of 20 years. Represented by **Merritt Schnipper**, in 2016, after *Diatchenko I*, the juvenile filed a Rule 30 motion arguing the mandatory minimum sentence violated art. 26. A judge denied the motion and the SJC granted the juvenile's application for direct appellate review. On appeal, the juvenile argued that his sentence was presumptively disproportionate because it imposed a longer period of incarceration prior to parole eligibility than that applicable to youth convicted of murder, without the required *Miller* hearing. YAD's amicus brief, authored by **Barbara Kaban**, argued that juveniles' diminished culpability and greater prospects for reform rendered a mandatory 20 year minimum unconstitutionally disproportionate and impermissibly cruel. The SJC agreed that the sentence violated the "proportionality requirement inherent in art. 26" and remanded for resentencing. The SJC concluded that a trial judge could impose a committed sentence with a parole ineligibility period longer than 15 years only after a *Miller* hearing and consideration of the *Perez* factors (attributes of offender/home and family environment/circumstances of the offense). The court also held that a judge could not impose a sentence below the statutory minimum, but, absent extraordinary circumstances, the youth would be parole eligible after 15 years.

Commonwealth v Perez II, 480 Mass. 562 (2018)

In 2000, the 17 year old juvenile committed two armed robberies and attempted a third, encouraged by his “monster” of an uncle. He was convicted of and sentenced for multiple non-homicide offenses, resulting in an aggregate sentence of 32.5 years, with a parole ineligibility period of 27.5 years. In 2016, following *Diatchenko I*, the juvenile, represented by **Elizabeth Caddick**, filed a Rule 30 motion arguing his aggregate sentence was unconstitutional. A judge denied the motion, the defendant appealed, and *Perez I*, 477 Mass. 677 (2017), resulted. In *Perez I*, the SJC held “where a juvenile is sentenced for a nonmurder offense or offenses and the aggregate time to be served prior to parole eligibility exceeds that applicable to a juvenile convicted of murder, the sentence cannot be reconciled with art. 26 unless, after a [Miller hearing], the judge makes a finding that the [extraordinary] circumstances warrant treating the juvenile more harshly for parole purposes than a juvenile convicted of murder.” *Id.* at 679. The case was remanded for a *Miller* hearing. At that hearing on remand, the judge found extraordinary circumstances warranting a longer parole ineligibility period based on the circumstances of the offense, and left the sentence intact. The juvenile appealed and the SJC granted his application for direct appellate review. Still represented by Attorney Caddick, the juvenile argued the judge erred in finding extraordinary circumstances and his unchanged sentence violated art. 26. YAD’s amicus brief, authored by **Michelle Menken and Elizabeth Billowitz**, argued that fair punishment of youth is a substantive, not just procedural rule, such that the Commonwealth must provide beyond a reasonable doubt that a juvenile is incorrigible, and juveniles should be entitled de novo review of a sentencing judge’s application of the *Miller* factors. The SJC concluded that the judge did err in his application of the *Miller* factors, because he determined the third factor (circumstances of the offense) outweighed the other two factors. The SJC clarified that all three factors must be weighted equally, but declined to reach the standard of proof issue, raised for the first time on appeal. The SJC also clarified the standard of review on appeal: abuse of discretion or error of law. It remanded the matter for resentencing, but not another *Miller* hearing, as the appellate record was entirely documentary and the court reviewed it and concluded the evidence was insufficient to support a finding of extraordinary circumstances.

Commonwealth v. Gardner, 480 Mass. 551 (2018)

In 2016, the Plymouth District Attorney’s office failed to file a sexually dangerous person (SDP) petition before Mr. Gardner’s release from a Massachusetts prison where he was serving a sentence for sexual assaults, even though it was notified pursuant to G.L. c.123A, §12. When Mr. Gardner was subsequently incarcerated in Rhode Island for a probation violation, the District Attorney’s office convinced Rhode Island to transfer Mr. Gardner to Massachusetts, four week before his sentence terminated, for the purpose of filing an SDP petition. An SDP petition was filed the day after his transfer. This case presented the question of whether filing a petition to hold someone as an SDP when that person is not serving a sentence for a Massachusetts offense, but rather is serving an out of state sentence while being housed in a Massachusetts correctional facility, violates G.L. c.123A, §§12, 14. CPCS filed an amicus brief, authored by private counsel **David Hirsch**. The SJC unanimously agreed that the legislature intended the SDP statute to apply only to those who are in Massachusetts custody serving a Massachusetts sentence, and that this nexus to Massachusetts is required to establish jurisdiction. The SJC therefore affirmed that Superior Court order dismissing the SDP petition.

R.B., petitioner, 479 Mass. 712 (2018)

In this case, the SJC solicited amicus briefing to address the appropriate standard of review for unpreserved claims in appeals from civil commitment trials under the sexually dangerous person statute, G. L. c. 123A. The question arose because of a decision issued by the SJC shortly after the present version of c. 123A was enacted, in which the Court declined to address a number of claims that had been “waived” by failure to raise them at an SDP trial. Some panels of the Appeals Court

subsequently took the view that SDP appeals were subject to the appellate standards of review applied to civil cases, where issues not raised below generally are not addressed by the appellate court regardless of their legal merit. However, other Appeals Court decisions, and several subsequent SJC cases, addressed “waived” claims in SDP appeals using the standard typically applied in criminal appeals, wherein a legal error raised for the first time on appeal results in reversal if it creates a “substantial risk of a miscarriage of justice.” In *R.B.*, the petitioner-appellant raised an issue that had not been addressed at trial and argued that it had created a substantial risk of a miscarriage of justice. The Commonwealth argued that the issue was waived and should not be considered. The SJC took the case *sua sponte* to resolve the “split in authority” as to the applicable standard of review. CPCS staff attorney **Patrick Levin** filed an amicus brief urging the SJC to adopt the “substantial risk” standard in SDP appeals. In light of “the fundamental liberty interest at stake in sexual dangerousness proceedings,” the Court agreed with CPCS that it is “appropriate to review arguments that are raised for the first time on appeal,” and that appellate courts reviewing SDP proceedings should “apply the same standard governing criminal cases: review for a substantial risk of a miscarriage of justice.”