Commonwealth of Massachusetts
Office of the Attorney General

SCOTT HARSHBARGER
ATTORNEY GENERAL

in cooperation with

The Massachusetts District Attorneys' Association

The Prosecution of Juveniles Under the New Transfer Law: Homicide and Other Serious Offenses

SEPTEMBER, 1992

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The Prosecution of Juveniles Under the New Transfer Law: Homicide and Other Serious Offenses

SEPTEMBER, 1992

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Office of the Attorney General
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September 18, 1992

To The Participants At The Juvenile Transfer Training:

In late December, 1991, the state legislature enacted Chapter 488 which significantly amended the process by which juvenile offenders are bound over for trial to the adult court. The most important of these changes to the juvenile transfer statute affect homicide cases.

The legal implications of these amendments are numerous and far-reaching. Today's program presents an opportunity to review several of the provisions of the new law which may be problematic for prosecutors. By examining the law closely, it is hoped that we, as prosecutors, will gain a better understanding of its complex provisions.

I am proud to be a co-sponsor with the Massachusetts District Attorneys Association of this seminar. I look forward to further collaborative training efforts on issues of concern to prosecutors in the future.

In closing, I want to thank you for your attendance at this program. I am confident that you will find the presentations and the materials helpful to you in the prosecution of serious and violent juvenile offenders under the new law.

Sincerely,

Scott Harshbarger

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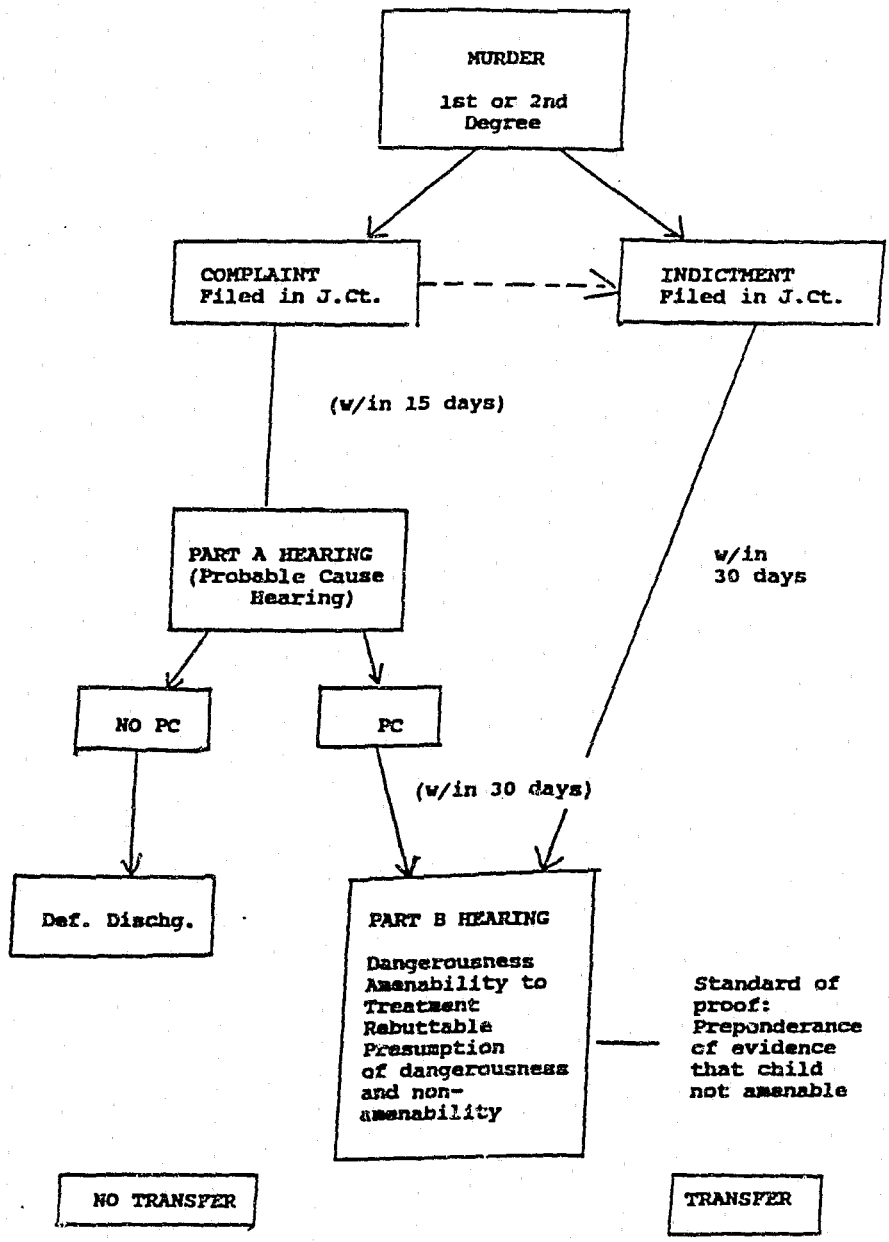

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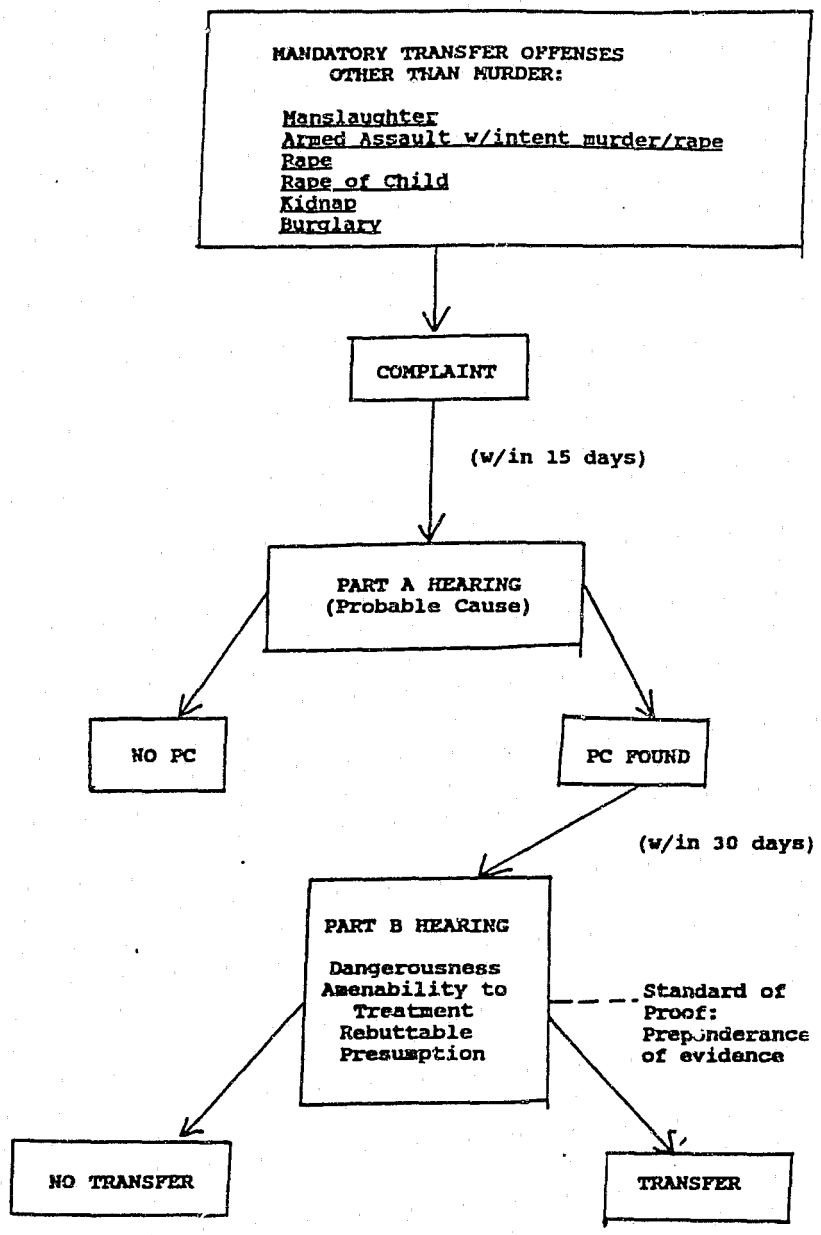
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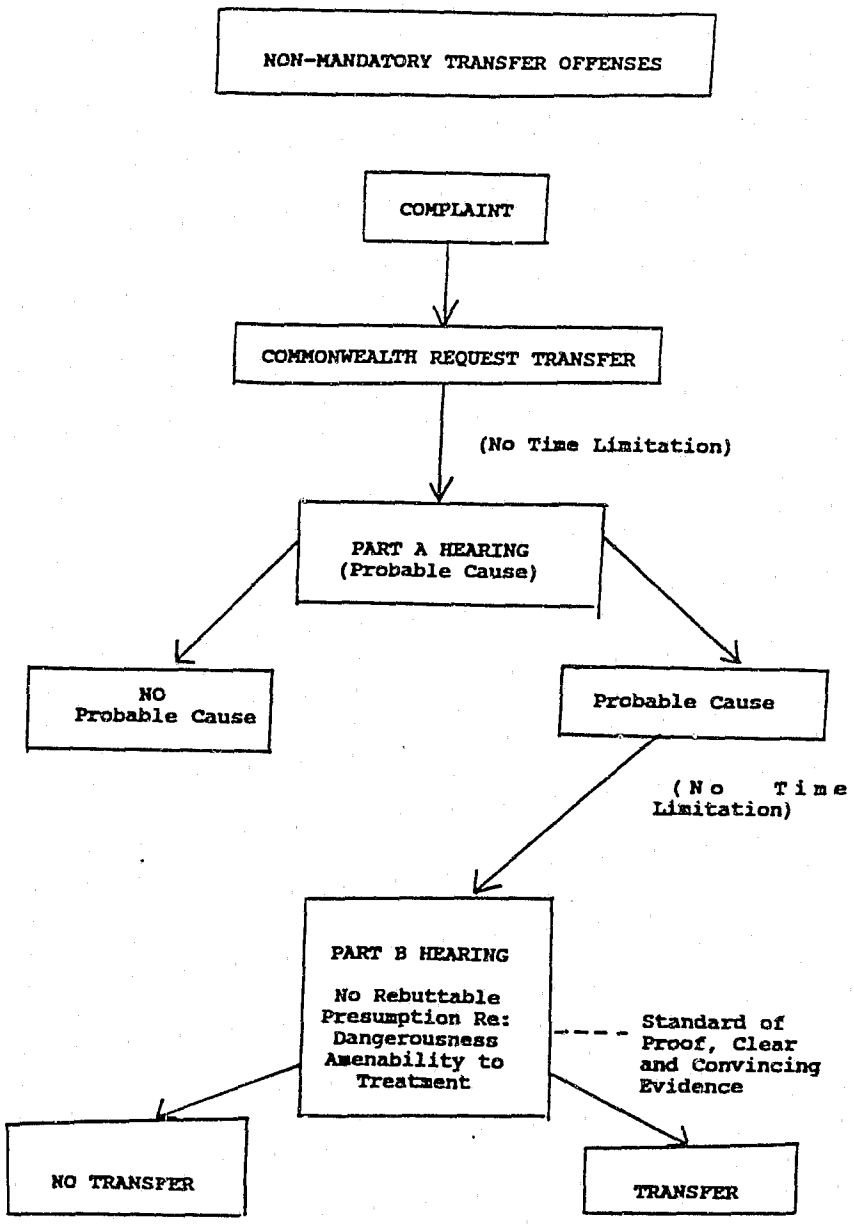
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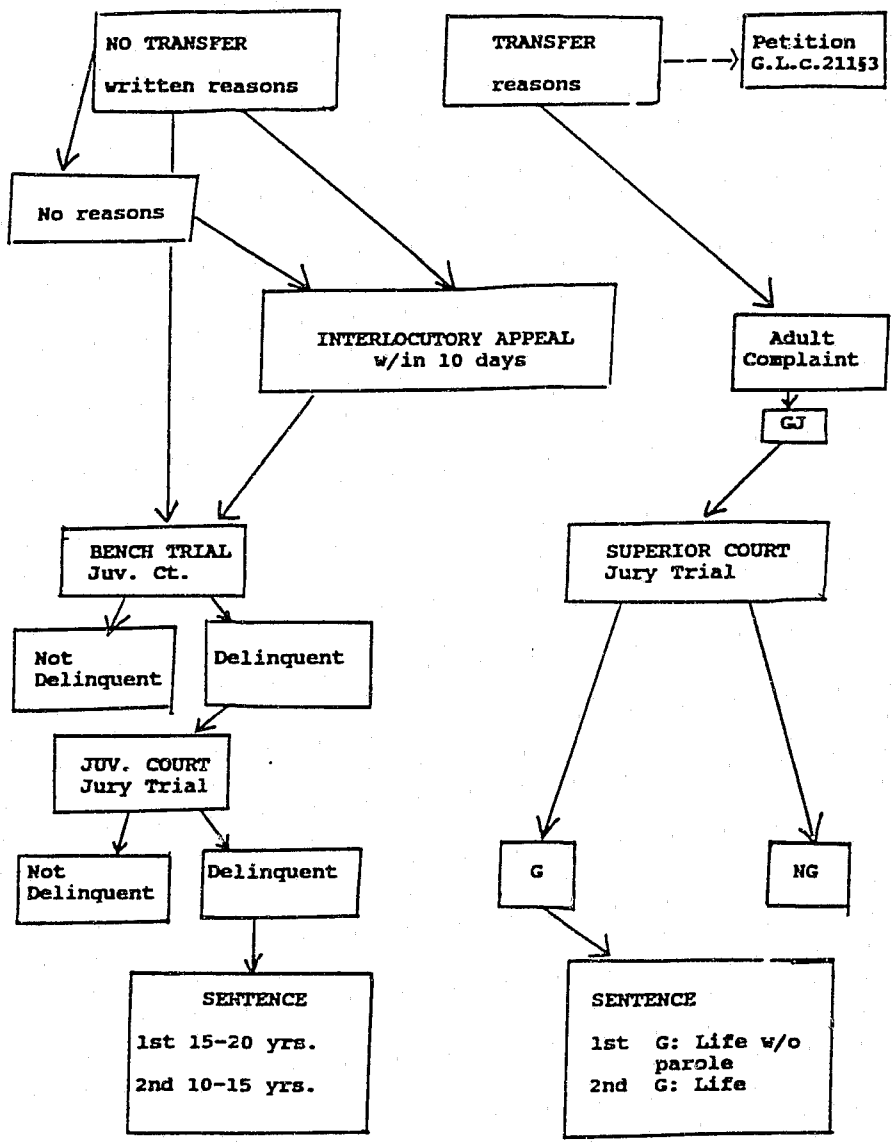

THE JUVENILE TRANSFER CASE: AN OVERVIEW OF THE LAW

JANE E. TEWKSBURY, ESQ.
OFFICE OF THE ATTORNEY GENERAL

THE JUVENILE TRANSFER CASE: AN OVERVIEW OF THE LAW[1/]

JANE E. TEWKSBURY, ESQ.
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BOSTON, MASSACHUSETTS

I. OVERVIEW

Massachusetts case law supports the view that non-criminal treatment of juveniles is preferred. A Juvenile v. Commonwealth, 370 Mass. 272 (1976), A Juvenile v. Commonwealth, 380 Mass. 552 (1980), Commonwealth v. A Juvenile, 383 Mass. 877, 878 (1981)

A. No criminal proceedings shall be begun against a juvenile unless proceedings against him as a delinquent child have been begun and dismissed. Comonwealth v. White, 365 Mass. 301 (1974); M.G.L. c. 119, §74.(See Handout 1)

B. In 1990, in Massachusetts, there were a total of 118 "Part B" hearings, the result of which 11 juveniles have been bound over to adult court. (See Handout 2)

II. §61 TRANSFER

A. Threshold Criteria

1. A child must be 14 years of age or older and charged with a state prison felony and

   a. Previous committment to DYS or
   b. Charged with an offense involving an infliction or threat of infliction of serious bodily harm.(See Handout 3, A Juvenile v. Commonwealth, No. 86-36 (Sup. Jud. Ct. May 5, 1986) (Single Justice opinion holding that statutory rape is not an offense involving the infliction or threat of serious bodily harm). Compare with Commonwealth v. A Juvenile (No. 1), 10 Mass. App. Ct. 385, aff'd 383 Mass. 877 (1981)(Negligent operation of a motor vehicle is an offense involving the infliction or threat of serious bodily harm).

2. In every case in which the offense alleged

1/ The author wishes to acknowledge the contributions to this outline by Carolyn Keshian, Suffolk Law School.

is murder in the first or second degree; manslaughter; armed assault with intent to rob or murder; rape; forcible rape of a child; kidnapping; or armed burglary.(See Handouts 4A, 4B, 4C, M.G.L. c. 119, § 61 (Pre-1990), (1990), (1991))

(See Handouts 5A, 5B, 5C, Bulletins of the District Court, for purposes of legislative history on the transfer statute. See also Handout 5D, The Statutory Evolution of the Transfer Issue.)

B. District Court Rules

1. Rule 208 requires that a transfer hearing be held:

   a. Whenever requested by the Commonwealth or ordered by the Court and,

   b. Pursuant to court order in cases involving the infliction or threat of infliction of serious bodily harm when the penalty for the offense is life imprisonment. (See Handouts 6 and 7, District Court Special Rules 208)

   NOTE: Rule 208, as appearing in the 1992 edition of the Rules of Court, was promulgated in 1976, and therefore has been superceded by statutory amendments to M.G.L. c. 119, § 61.

2. Rule 205 requires a seven day notice of a transfer hearing. (See Handout 8, Special Rules of the District Court 204, 205, 206, 207)

C. Procedure

1. Arraignment - The Court may order a transfer hearing at any time. The Commonwealth must file a written request for a transfer hearing within seven (7) days of the arraignment, EXCEPT when the offense charged is one of the 8 designated offenses in which a hearing is automatic. (See Handout 9, Commonwealth's Motion for Transfer Hearing). All charges related to the same incident should be included in the same transfer hearing whether appearing in the same or in different complaints.

2. A Motion to Amend Complaint is needed since

the nature of the offense, the fact that it is a state prison felony, the fact of a prior commitment to the Department of Youth Services, and the fact that the offense charged involves the infliction or threat of infliction of serious bodily harm will not be alleged in the complaint as required by M.G.L. c. 119, § 61. (See Handout 10, Commonwealth's Motion to Amend Complaint)

3. The clerk then sends a Notice of Transfer hearing to the defense counsel, juvenile and juvenile's parents or guardians at least seven (7) days prior to the date scheduled for the hearing. (See Handout 11, Form DCM-11)

D. Time Standards

Pursuant to the 1991 revisions of M.G.L. c. 119, §61, if the charge is murder in the first or second degree, manslaughter, rape, kidnapping, armed assault with intent to rob or murder, forcible rape of a child and armed burglary, the Part A or probable cause hearing must be held within fifteen days of the juvenile's first appearance before the court after the issuance of the complaint and the Part B or amenability hearing must be held within thirty days of the probable cause hearing.

NOTE: These statutory changes supercede Standing Order of the District Court 2-88 and Standing Order of the Juvenile Court 1-88 for these offenses only. (See Handouts 12A & 12B).

E. Open Court Proceedings

Chapter 267 of the Acts of 1990 amended M.G.L. c. 119, § 65 to allow for proceedings to be open to the general public when the charge is murder in the first or second degree. See Newsgroup v. Commonwealth, 409 Mass. 627 (1991) (Statute allowing for open court proceedings in cases of murder in the first or second degree does not violate due process or equal protection principles.)

NOTE: The court in Newsgroup acknowledged the fact that certain material in the Part B hearing should remain confidential, although the presumption is that the courtroom will remain open. Newsgroup v. Commonwealth, 409 Mass. 627, 633-634 (1991)

III. §72A TRANSFER

A. Threshold Criteria

1. Crime committed between the ages of 14 and 17 Commonwealth v. A Juvenile, 407 Mass. 550 (1990), Commonwealth v. Bousquet, 407 Mass. 854 (1990) and

2. Defendant not apprehended until after age 18. (For a discussion of the definition of the term "apprehended", see Commonwealth v. A Juvenile, 16 Mass. App. Ct 251, 256, n.9 (1983), Commonwealth v. A Juvenile, 406 Mass. 31 (1989))

NOTE: The 1991 Amendments revised M.G.L. c. 119, §72 to provide that any child from 7 - 17 charged with murder in the first or second degree, manslaughter, rape, forcible rape of a child, or kidnapping (armed burglary and armed assault with intent to rob or murder are not included) and who is not apprehended until after age 18 is subject to a mandatory transfer hearing under M.G.L. c. 119, §61. This is a significant change since Section 72A sets forth the general procedure for cases where the juvenile is apprehended after age 18 and Section 72 originally contained jurisdictional provisions only. It is critical to note this amendment of Section 72 removes the 6 offenses from Section 72A and results in the Commonwealth having to prove both dangerousness and nonamenability to rehabilitation pursuant to Section 61. Section 72A only requires a finding of dangerousness without requiring proof of nonamenability. (See Handout 13, M.G.L. c. 119, §§ 72, 72A)

B. Procedure - Such cases shall be heard in accordance with §§53-63 (except for 6 designated offenses, see above). (See Handout 14, Motion For Transfer Hearing pursuant to Section 72A)

C. Outcome - Dismissal of the complaint and transfer of the defendant for trial as an adult or dismissal of complaint and discharge of defendant.

IV. PART A HEARING

A. Stipulations and Submissions

1. Probable cause stipulation. (See Handout 15)

2. Stipulations as to amenability or non-amenability to treatment. (See Handouts 16 and 17)

3. Stipulation to certain elements of the offense charged or to particular counts of the complaint.

4. Stipulation that victim/witness testimony taken at the Part A hearing or at the Grand Jury be received at the Part B hearing on the issue of the nature, circumstances and seriousness of the offense.

B. Probable Cause Hearing

NOTE: The 1991 Amendments to c. 119, §61 provide that the Commonwealth may proceed against the juvenile by filing an indictment in juvenile court/session and if the Commonwealth has proceeded by indictment than no probable cause hearing shall be held. Notwithstanding this provision, there is no statutory provision setting forth the procedure by which an indictment is returned against a juvenile. See Commonwealth v. A Juvenile, 413 Mass 148, 149 n.2 (1992).

1. Co-defendants cases should be joined for purposes of probable cause only. But cf. Handout 7, Reporter's Note to Rule 208.

2. Electronic recording of the proceedings by either party (see Supp. Rules Crim. Pro. 9 and 114) or by a steno-grapher upon motion of the juvenile. See M.G.L. c. 221, §91B; Connaughton v. District Court of Chelsea, 371 Mass. 301 (1976).

3. Court announces purposes of hearing. See A Juvenile v. Commonwealth, 370 Mass. 272, 279, n.9 (1976)

4. Standard of proof. See A Juvenile v. Commonwealth, 375 Mass. 104, 106-107 (1978)

5. Outcome of Part A hearing.

   a. If probable cause is found, the case should be scheduled for a "show cause" hearing, if permitted by the court, and then for the Part B hearing.

   b. If no probable cause is found, the

complaint is dismissed and in the case of a §72A transfer, the adult is discharged.

V. SHOW CAUSE HEARING

A. Motions

1. File motions at the conclusion of the Part A hearing (See Handouts 18, 19, 20, 21, 22, 23, 24, 25 and 26) and present arguments for/against motions at the same time.

2. Schedule a status hearing before the Part B hearing and issue subpoenas/court orders for the production of discovery materials on the status date.

B. Status Hearing

1. Issues of confidentiality and privilege may require an in camera review of the records by the court. (See Handout 27)

2. Agree on compliance dates for the production of the probation report and the exchange of expert reports. (See Handout 28, Probation Report)

VI. PART B HEARING

A. Legal Standard

1. §61 - Judge must enter written findings based upon clear and convincing evidence that

   a. the child presents a significant danger to the public and

   b. the child is not amenable to rehabilitation within the juvenile justice system.

   NOTE: In 1990, this section was amended to provide that in cases where the juvenile was charged with murder in the first or second degree, a rebuttable presumption exists in favor of these findings. In 1991, the crimes of manslaughter, armed assault with intent to rob or murder, rape, forcible rape of a child, kidnapping and armed burglary were added. In Part B

hearings involving these offenses and where the rebuttable presumption is overcome, the Commonwealth's burden of proof is a preponderance of the evidence. See Commonwealth v. Dunn and Harris, Nos. 91-25140/91-25141 (Super. Ct. June 18, 1992) (Constitutional challenges to 1990 version of the juvenile transfer law reported to the Court of Appeals after Superior Court Judge's determination that these provisions of the transfer law do not violate due process or equal protection principles.)

2. §72A - Only the first finding as to whether or not the child presents a significant danger to the public is required. Commonwealth v. A Juvenile, 16 Mass. App. Ct. 251, 257 (1983).

NOTE: As noted above, a child charged with murder in the first or second degree, manslaughter, rape, forcible rape of a child, or kidnapping, who is apprehended after age 18 is proceeded against under §61 and both findings - dangerousness and nonamenability - must be found.

B. Factors to be considered

1. §61 - In making his Part B findings, the judge must consider at least the statutory factors See A Juvenile v. Commonwealth, 370 Mass. 272, 282 (1976)). No one single factor will be controlling. Ward v. Commonwealth, 407 Mass. 434, 437 (1990). These factors are:

   a. the nature, circumstances and seriousness of the alleged offense (Id, at 439);

      NOTE: In considering the factors a judge may attach substantial significance to the seriousness of the offense. See Ward v. Commonwealth, 407 Mass. 434, 439 (1990), quoting Two Juveniles v. Commonwealth, 381 Mass. 736, 743 (1980)

   b. the child's court and delinquency record;

   c. the child's age and maturity;

d. the child's family, school and social history;

e. the success or lack of success of any past treatment efforts of the child;

f. the nature of services available through the juvenile justice system;

g. the adequate protection of the public;

h. the likelihood of rehabilitation of the child. See Commonwealth v. Matthews, 406 Mass. 387 (1990) quoting A Juvenile v. Commonwealth, 370 Mass. 272, 283 (1976) (The Commonwealth is not required to produce expert psychiatric testimony to prove juvenile is not amenable to rehabilitation. Accord Commonwealth v. Cole, 380 Mass. 30, 35-38 (1980); Commonwealth v. Costello, 392 Mass. 393, 397 (1984))

NOTE: The statute only requires that the judge focus on the minor's potential for successful treatment before the age of majority within the existing juvenile facilities. See Commonwealth v. Matthews, 406 Mass. 380, 387 (1990), quoting Commonwealth v. A Juvenile, 370 Mass. 272, 283 (1976)

2. §72A - Only the first four factors are relevant. The fifth factor is relevant to the extent that the 'likelihood of rehabilitation' has a broader application than 'amenability to treatment as a juvenile' and includes whatever rehabilitation as a juvenile may have occurred prior to the time of the hearing. See Commonwealth v. A Juvenile, 16 Mass. App. Ct., 251, 257-258, (1983)

C. Admissibility of evidence

1. The standard for the admission of all evidence (including hearsay) is fundamental fairness. See McKeiver v. Pennsylvania, 403

U.S. 528, 543 (1971), Breed v. Jones, 421 U.S. 519, 537-538 (1975).

2. The normal rules of privilege apply for the admission of privileged information.

D. Proposed Findings of Fact and Memorandum of Law (See Handouts 29 and 30)

E. Outcome of Part B Hearing

1. If no transfer is ordered, the court must state its reasons in writing, and the case will be continued for trial in the juvenile court/session (§61). Unless the juvenile waives this provision, the trial must be heard by a different judge (§61). In the case of a §72A transfer, the complaint is dismissed and the adult is discharged.

NOTE: If determination at the Part B stage results in a decision to retain the juvenile in the juvenile justice system, and the offense charged is murder in the first or second degree, the juvenile should be indicted in order to obtain the mandatory sentence to the Department of Corrections as provided in M.G.L. c. 119, § 72.

2. If no transfer is ordered, a second complaint may issue and a second transfer hearing may be held if new or additional evidence not previously available to the Commonwealth becomes available. See A Juvenile v. Commonwealth, 375 Mass. 104 (1975).

3. Following a decision not to transfer a juvenile proceeded against under c. 119, §61, the Commonwealth has ten days within which to exercise its right to appeal. Further proceedings in the juvenile court/session are stayed pending the entry of an order by the Appellate Court.

NOTE: There is no right of appeal from a no transfer decision in a §72A case.

4. An order of transfer does not affect unrelated juvenile complaints against the same juvenile.

5. If a transfer is ordered, written findings

must be filed by the court, the juvenile complaint is dismissed and the juvenile/adult is arraigned on a district court complaint.

NOTE: This may be problematic in the full time juvenile courts.

VII. BINDOVER

A. Procedure - The clerk in the juvenile session/court transmits the judge's written findings, Order for Transfer; and the docket sheet reflecting the dismissal of the juvenile complaint and the arraignment, bail, etc. of the juvenile/adult on criminal complaint, to the adult District Court Session.

NOTE: Again, this may be problematic in the full time juvenile courts.

B. District Court - When the juvenile or the adult has been charged with offenses over which the District Court has jurisdiction, it is within the discretion of the district court judge in the criminal session to retain jurisdiction for trial in the District Court (See Handout 31, Motion for Retention of Jurisdiction in the District Court) or to bind the case over to the Superior Court for trial. See District Attorney for the Northern District v. Lowell Division of the District Court, 402 Mass. 511 (1988).

C. Superior Court

1. It is within the discretion of the prosecutor in all transfer cases, following arraignment of the juvenile/adult on criminal complaints, to present the matter to the Grand Jury for indictment. No probable cause hearing should be held in the criminal session as either one has already been held as the Part A hearing of the transfer proceeding, or the juvenile has been previously indicted.

   NOTE: The indictment provided for in M.G.L. c. 119 §61, and M.G.L. c. 263, §4 as amended in 1991, does not appear to take the place of an indictment in the adult court following a transfer hearing.

2. Only the Superior Court can adjudicate a juvenile delinquent and impose a juvenile disposition on a juvenile (c. 119, §58) following his transfer to the adult court. In addition, the juvenile must not have

reached the age of 18 prior to the delinquency finding or plea. (See Handout 32, M.G.L. c. 119, §83.)

CAVEAT: A juvenile who is adjudicated delinquent and committed to DYS from the Superior Court will be discharged from DYS upon reaching his/her 18th birthday except in the case of murder in the first or second degree, in which case, the commitment period is until age 21. (See Handouts 33 and 34, M.G.L. c. 120, § 16, M.G.L. c. 119, § 58)

The Department of Youth Services may order the extention of a juveniles's committment if the Department is of the opinion that release would be physically dangerous to the public. This order must be reviewed upon its merits by the committing court. (See Handout 35, M.G.L. c. 120, § 17)

NOTE: Since c. 119, §83 gives the Superior Court the power only to make such disposition as may be made under §58, the Superior Court judge cannot commit a juvenile adjudicated delinquent for manslaughter to DYS until age 21 despite authority for the juvenile judge to do so in §72.

D. Multiple Offenses

If there are multiple offenses arising out of the same incident, once the court determines that a transfer is appropriate in one or more of the offenses, it is the better practice (although not expressly authorized by the statute) to transfer all of the related offenses to the adult court. (See Handout 5B).

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PROSECUTORIAL PITFALLS

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PROSECUTORIAL PITFALLS

I. PART A OF TRANSFER HEARING

A. Proceeding By Indictment

1. Jurisdiction of Juvenile Court

(a) Challenge: Does the Juvenile Court have jurisdiction to accept a grand jury indictment?

(b) Response: Section 61 states that the Commonwealth may proceed by indictment when a juvenile is charged with murder. The Juvenile Court was created by statute and derives its power from the legislature. School Committee of Worcester v. Worcester Juv. Ct., 410 Mass 831, 834 (1991). Thus, by the plain wording of the statute the legislature expanded the Juvenile Court's jurisdiction to include the grand jury.

Furthermore, in amending G.L. c. 119, the legislature expanded the jurisdiction of the Juvenile Courts to include the power to impose mandatory prison sentences for juveniles adjudicated delinquent by reason of murder.

Thus, the grand jury was brought within the jurisdiction of the Juvenile Court because an individual may not be subjected to "infamous penalty" without first having his case brought before a grand jury. Brown v. Commission of Corrections, 394 Mass. 89, 92 (1985); Jones v. Robbins, 74 Gray 329 (1857). See also Commonwealth v. A Juvenile, (Bristol, No. 9200019).

2. Procedure For Filing An Indictment

In amending Section 61, the legislature did not provide a means for docketing in a Juvenile Court an indictment returned to the Superior Court pursuant to G.L. c. 277.

The Commonwealth should request that the Superior Court Clerk, or the Superior Court Justice, who accepts the grand jury returns, remit the indictment to the Juvenile Court.

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The juvenile may then be arraigned on the indictment and the juvenile complaint may be dismissed. Legislation is pending before the state legislature which indicates that it is the legislature's intent that the juvenile be arraigned on the indictment.

NOTE: While Section 61 is clear that an indictment may be filed in the Juvenile Court, it is unclear which document, the indictment or complaint, should be used as the charging document. Thus, the Commonwealth must argue that the legislature's intent can be determined by the legislative history of Section 61 and 72 as well as the amendment to Section 61 pending before the legislature.

3. Wording Of The Indictment

(a) Age of Juvenile: The Indictment should state that the juvenile is between the age of seven and fourteen in order to insure jurisdiction in the first instance within the Juvenile Court. This may be accomplished by adding the Juvenile's date of birth to the Indictment.

(b) Charge of Murder: In Commonwealth v. A Juvenile, (Bristol County 9200019), Judge Harper ruled that the fact that the indictment did not charge "delinquency by reason of murder", did not preclude an adjudication of delinquency in the Juvenile Court.

If the indictment charges murder and the Juvenile Court retains jurisdiction, the Commonwealth may amend the indictment to charge delinquency by reason of murder or at the conclusion of the adjudicatory hearing, a finding of delinquency may be entered on the Indictment and so docketed.

If the case is transferred to the Superior Court, the Commonwealth may arraign the juvenile on the indictment since an indictment is the charging document of the Superior Court. Rule 3, Mass. R. Crim. P.

Also, it would appear that once a juvenile is arraigned in Superior Court on the

indictment charging murder, there would be no need to duplicate the grand jury proceedings.

(c) Charge of Delinquency: If the indictment reads that there has been a finding of delinquency by reason of murder by a grand jury, and the case is transferred to Superior Court, the Commonwealth may attempt to amend the indictment to allege a charge of murder and arraign the juvenile on the indictment.

This type of amendment may, however, be viewed as substantive, and thus a new grand jury proceeding may be required.

NOTE: Since there is no set procedure for the use of the Indictment, either process may raise jurisdictional issues.

4. Multiple Charges

Since an indictment may only be used in the case of murder, a complaint will be necessary when charging related offenses.

This raises the issue of the need for a probable cause hearing on the related charges, which will defeat the purpose of filing an indictment in lieu of a probable cause hearing in order to facilitate the completion of transfer proceedings.

Since the indictment will include a finding of probable cause on all lesser offenses, the Commonwealth may consider whether additional complaints on less serious offenses should be requested.

5. Factual Considerations

When proceeding by indictment, the Juvenile Court will be unaware of the specific facts of the case. The Commonwealth should request that the Court accept the grand jury minutes as representing the factual basis supporting the grand jury's determination of probable cause.

NOTE: When presenting the case to the grand jury the Commonwealth should be cognizant of the fact that testimony presented will not only form the basis of probable cause, but will also be used to demonstrate the nature and seriousness of the offense for the purposes of Part B of the transfer hearing.

6. McCarthy Motion

(a) Challenge: If an indictment is filed in Juvenile Court in lieu of a probable cause hearing, does the juvenile have a right to file a McCarthy Motion?

(b) Response: While this matter has not been addressed by the Appellate Courts, it would appear that the juvenile would have the same right as an adult to challenge an indictment.

B. Proceeding By Complaint

If the Commonwealth proceeds by complaint and the Juvenile Court retains jurisdiction over a case where a juvenile is charged with delinquency by reason of murder, an indictment should be obtained prior to the commencement of the adjudicatory hearing in order for the Juvenile Court to have the authority to impose the mandatory penalties contained in G.L.c. 119 § 72.

C. Constitutional Challenges

1. Due Process

(a) Challenge: The amendment to Section 61 which allows the Commonwealth to proceed by indictment deprives a juvenile of due process of law because the standard for a grand jury indictment (probable cause to arrest) compared to the standard required at a probable cause hearing (directed verdict standard) lowers the Commonwealth's burden of proof.

(b) Response: A grand jury indictment and a probable cause hearing are alternative means of establishing probable cause. Thus, there is no violation of due process. Lataille v. District Court of Hampden, 366 Mass. 525 (1974). Commonwealth v. Dunn (Suffolk No. 91-25140-41).

Furthermore, any collateral benefits which arise from the nature of a probable cause hearing (i.e. cross examination of witness, discovery) are not independent rights which may be asserted apart from their role in a probable cause hearing. Id.

II. PART B OF TRANSFER HEARING

A. Request For Ruling Of Law

1. Challenge: Juvenile may request ruling of law prior to the Part B hearing alleging that Section 61 is unconstitutional on its face.

2. Response: In order to find a statute unconstitutional on its face a juvenile must demonstrate that "there are no conceivable grounds which support the legislation's validity." Leibovich v. Antonellis, 410 Mass. 568 (1991). The Commonwealth should argue that based on the plain language of the statute, it is constitutional and that the juvenile cannot sustain his burden of proof.

   Also, the Commonwealth may argue that request for rulings should be reserved until the conclusion of the Part B hearing when a factual record has been made.

B. Due Process

1. Burden Of Proof

   (a) Challenge: The change in the burden of proof from clear and convincing evidence to preponderance of the evidence constitutes a violation of due process because a juvenile's liberty interest is implicated during the transfer hearing, and thus a higher standard of proof is required.

   (b) Response: A transfer hearing is jurisdictional in nature and does not affect a juvenile's liberty interest. The only decision made at the hearing is whether the Juvenile Court will retain jurisdiction over

the case or whether the court will transfer the case to the District Court or Superior Court. It is not an adjudication on the merits and does not deprive a juvenile of his liberty interest. Commonwealth v. Dunn, (Suffolk, No. 91-25140-41). Cf. Care and Protection of Roberts, 408 Mass. 52, 58 (1990); Spence v. Gomley, 307 Mass. 258 (1982). Thus, a higher standard of proof at the Part B hearing is not mandated by the principles of due process.

2. Rebuttable Presumption

(a) Challenge: The rebuttable presumption contained in the 1990 and 1991 Amendments to Section 61 violates due process because it impermissibly shifts the burden of proof to the juvenile and relieves the Commonwealth of its burden to prove dangerousness and non-amenability to treatment.

(b) Response: Section 61 creates a mandatory rebuttable presumption which shifts the burden of production to the juvenile with the ultimate burden of proof remaining on the Commonwealth. Commonwealth v. Dunn, (Suffolk, No. 91-25140-41). Cf. Pryor v. Holiday Inn, 401 Mass. 506, 508-509 (1988), Commonwealth v. Mutina, 366 Mass. 810 (1975).

While mandatory presumptions are unconstitutional for the purposes of a criminal trial, a transfer hearing is jurisdictional in nature and thus such a presumption is not unconstitutional.

The question remains as to the quantum of evidence required to rebut the presumption.

In Commonwealth v. Dunn, (Suffolk, No. 91-25140-41), Judge Moriarty held that the juvenile must present "some credible evidence" to rebut the presumption.

The Commonwealth may argue, however, that the quantum of evidence required to rebut the presumption is a preponderance of evidence because the presumption is based on a legitimate public policy, and does not place an unreasonable burden upon the juvenile.

There is no constitutional right to be treated as a juvenile. A transfer proceeding not only concerns the rehabilitation of juveniles, but also the protection of the public from violent juveniles who commit serious offenses such as murder.

Furthermore, a juvenile has greater access to facts about his personal background which may be presented to the court to demonstrate that he is not a danger to the community and is amenable to rehabilitation.

The Commonwealth may argue that the statute operates as follows: At the commencement of the Part B hearing, the Commonwealth would have established the base fact, the commission of a murder, at the Part A hearing. The burden of production would then shift to the juvenile to rebut the presumption that he is a danger to the community and is not amenable to rehabilitation within the juvenile system. Once the juvenile has produced evidence to rebut the presumption by a preponderance of the evidence, the Commonwealth would then have to sustain its burden of proof by demonstrating by a preponderance of the evidence that the juvenile is a danger to the community and not amenable to rehabilitation within the juvenile system.

C. Evidentiary Issues:

1. Psychiatric Testimony

(a) Challenge: May a juvenile refuse to submit to a psychiatric evaluation conducted by a psychologist retained by the Commonwealth?

(b) Response: While this issue has not been specifically addressed by the Appellate Courts, Judge Moriarty in Commonwealth v. Dunn has held that a juvenile may refuse to be examined by a psychologist retained by the Commonwealth. Furthermore, Judge Moriarty ruled that a juvenile who refuses to submit to such an evaluation may offer testimony from his own expert regarding amenability to treatment and dangerousness.

There are numerous ways in which the Commonwealth can demonstrate dangerousness and non-amenability to treatment, i.e. failure in previous treatment program, delinquency record.

Furthermore, the Commonwealth has no affirmative obligation to produce psychiatric evidence and does not have the initial burden of going forward in cases containing the rebuttable presumption.

2. Evidence Negating Dangerousness

(a) Challenge: If the Commonwealth proceeds by indictment and thus no probable cause hearing is held, a juvenile may attempt to call Commonwealth witnesses to testify regarding the nature and circumstances of the offense during the Part B hearing in order to negate the presumption of dangerousness.

(b) Response: The Commonwealth should file a Motion in Limini to limit the testimony of witnesses to facts which related to dangerousness and the defendant's amenability to rehabilitation.

The legislature has allowed the Commonwealth to proceed by indictment in order to facilitate the transfer process. The Commonwealth should argue that the legislature's intent would be frustrated if the juvenile was allowed to incorporate a probable cause hearing into the Part B hearing by calling Commonwealth's witness.

III. EQUAL PROTECTION

A. Challenge: A juvenile charged with murder is deprived of equal protection under the law due to (1) the Commonwealth's right to proceed by indictment, (2) the change in the burden of proof and (3) the rebuttable presumption.

B. Response: Juveniles who commit murder or one of the other enumerated offenses in Section 61 are not a suspect class. News Group Boston Inc. v. Commonwealth, 409 Mass. 627 (1991). Thus, the issue

is whether the changes in the statute are rational means to serve a legitimate state interest. The legislature's decision to treat the transfer of juveniles who commit murder and other serious offenses in the manner prescribed in Section 61 is rationally related to the legislature's interest in protecting the public from juveniles who commit violent crimes and to ensure the prompt and proper disposition of such cases.

Furthermore, juveniles who commit murder and other serious offenses have historically been treated differently from juveniles who have committed less serious offenses. (See prior versions of G.L.c. 119).

IV. Sentencing Provision

A. Challenge: What effect does the sentencing provision of G.L.c. 119 § 72 have on a determination of amenability to treatment?

B. Response: Under the new statutory scheme it would appear that in the case of murder amenability to treatment is no longer a primary concern. Regardless of whether a juvenile is tried in Superior Court or Juvenile Court he will be subjected to a mandatory term of incarceration. Thus, it appears that the focus has changed from rehabilitation to punishment when dealing with a juvenile charged with murder.

C. Challenge: Does the Juvenile Court have jurisdiction to impose a sentence to the Department of Correction?

D. Response: The legislature has great latitude to prescribe penalties. Commonwealth v. Morrow, 363 Mass. 601, 610-611 (1973).

There is no constitutional right to be treated as a juvenile. It is only by the grace of the legislature that a juvenile is treated differently from an adult. Thus, it was within the power of the legislature to expand the jurisdiction of the Juvenile Court to impose mandatory sentences to the Department of Correction.

SECTION-BY-SECTION ANALYSIS
C. 488 OF THE ACTS OF 1991 (S. 1689)
AN ACT RELATIVE TO CRIMINAL SENTENCES OF JUVENILES CHARGED WITH MURDER

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SECTION-BY-SECTION ANALYSIS

C. 488 OF THE ACTS OF 1991 (S.1689)

AN ACT RELATIVE TO CRIMINAL SENTENCES OF JUVENILES CHARGED WITH MURDER

(DRAFT -- 1/30/92)

by

Jane Tewksbury, Chief, Family and Community Crimes Bureau
Carolyn Keshian, Legal Intern

1. SECTION 1: Amends G.L. c. 119, § 60 regarding the admissibility of court delinquency records in subsequent proceedings. The significant revisions alter the section in two ways:

   a. This section amends the current statute to allow the use of prior adjudications of delinquency for impeachment purposes in subsequent delinquency or criminal proceedings in the same manner and to the same extent that prior criminal convictions can be used. (This does not include use of adjudications based on violations of local by-laws or ordinances.)

   b. It also rewords the provision regarding other use of evidence, adjudications and dispositions from juvenile

proceedings, and appears to delete the provision allowing general use of the records in subsequent delinquency proceedings, reducing its application to bail determinations in subsequent delinquency or criminal proceedings and in the imposition of sentence in subsequent criminal proceedings only:

> "[the evidence may not be used] except in subsequent delinquency or criminal proceedings in determining bail and in imposing sentence in any criminal proceeding against the same person."

This is in contrast to the previous language which read:

> "...except in subsequent proceedings for delinquency against the same child and except in determining bail and in imposing sentence in any criminal proceedings against the same person...."

2. SECTION 2: Amends the second paragraph of G.L. c. 119, §61 regarding when a transfer hearing must be held. This section now requires that a transfer hearing be held in all cases involving murder in the first or second degree, manslaughter, rape, kidnapping, armed assault with intent to rob or murder, forcible rape of a child, and armed burglary [underlined offenses were added]. Armed robbery which results in serious bodily injury, present in the prior statute, has been deleted.

3. SECTION 3: Amends G.L. c. 119, § 61 by striking out the third and fourth paragraphs regarding the conduct of the transfer hearing. The following changes have been made:

a. If the offense charged is one of the aforementioned 8 crimes where a transfer hearing is mandated, then the probable cause (Part A) portion of the hearing shall be held within 15 days of the child's first

appearance before the court after the complaint has been brought. Failure to hold this portion of the hearing within the specified 15 days does not bar a hearing at a later date as determined by the court.

b. If probable cause is found for one of the 8 offenses specifically designated, then the Part B or dangerousness and amenability portion of the transfer hearing shall be held within 30 days of Part A. Again, failure to meet this time standard does not bar a hearing at a later date as determined by the court.

Note: These time standards are not applicable to any offenses other than the 8 crimes specifically designated.

Query: If a judge declines to grant a request by the Commonwealth for a continuance, given these time standards, what rights does the Commonwealth have?

c. A new paragraph has been inserted allowing the commonwealth to proceed by filing a complaint or an indictment in juvenile court or in a juvenile session of district court in cases where the offense alleged is murder in the first or second degree.

If the commonwealth chooses to proceed by indictment, then no probable cause (Part A) hearing shall be held and the next step in the process is the Part B hearing.

The juvenile is also given the right to proceed by indictment, i.e., the Commonwealth must indict after the Part B hearing if it has not done so before, presumably because the juvenile faces a mandatory sentence which will include imprisonment in state prison, as described below.

See also §10, infra.

Query: At what point does the juvenile's right to be proceeded against by indictment attach? Presumably, paralleling adult proceedings, it would attach after the Part B hearing and prior to adjudication on the merits, i.e., trial.

> Note: There are several potential problems with this section. The legislation fails to address the problem of how the Commonwealth is to "fil(e) an indictment" (the statutory language) in juvenile court. Under current law, rules of court, and established practice, the grand jury is an arm of the Superior Court (G.L. c. 263, s. 4; Mass. R. Crim. P. Rules 3 and 5); the grand jury is supervised by a Superior Court judge; any concerns raised about the grand jury process are addressed by a Superior Court judge; and indictments are returned to Superior Court. There is no established mechanism for remitting an indictment to juvenile court or to the juvenile session of the District Court.
>
> Also, an indictment is clearly a criminal charging document. Therefore, these provisions create a sort of hybrid. If a prosecutor decides to seek an indictment instead of holding a Part A/probable cause hearing, this procedure would appear to be in direct conflict with c. 119, §74 which prohibits criminal proceedings from being commenced against a juvenile in the absence of a transfer hearing and a judicial decision to try the juvenile as an adult. In addition, within this section itself there is specific reference to an indictment in juvenile court/session.
>
> Until this issue is resolved, it appears that the prosecutor, upon obtaining an indictment, should request the Superior Court judge to "remit" the indictment to the juvenile court/session, paralleling the procedure by which cases can be remanded by the Superior Court to the District Court.

4. SECTION 4: Purports to amend the fourth paragraph of G.L. c. 119, § 61; however, this is a scrivener's error as this section actually is intended to amend the fifth paragraph of § 61.

The inserted sentence provides that if the court decides not to transfer a juvenile, the court shall state

its reasons in writing and the Commonwealth may appeal said decision within 10 days to the Appeals Court pursuant to G.L. c. 278, § 28E. If the time for appeal expires, then the court proceeds on the delinquency complaint. See also §§ 11 and 12, infra.

5. SECTION 5: Purports to amend the fifth paragraph of G.L. C. 119, § 61; however, this is also a scrivener's error. This section intends to amend the sixth paragraph. This amendment also gives the Commonwealth the right to appeal to the Appeals Court an adverse decision in a transfer case involving the 8 "rebuttable presumption" crimes (see §6), within 10 days of the decision. If the 10 days expire, then the court proceeds on the delinquency complaint (or, presumably, the indictment in a murder case, if one was obtained by the prosecutor, although the statute only refers to complaints). See also §§ 11, 12 infra.

6. SECTION 6: Amends the sixth paragraph of G.L. c. 119, § 61 by expanding the category of offenses which carry with them a rebuttable presumption that the child is not amenable to rehabilitation and is a danger to the public. The amendment broadens the designation of crimes beyond murder 1 and 2 to include: manslaughter, armed assault with intent to rob or murder, rape, forcible rape of a child, and armed burglary.

7. SECTION 7: Amends G.L. c. 119, § 72 regarding the continuing jurisdiction of the juvenile session. This section is substantially altered in several ways:

    a. First, the amendments make it clear that the

courts retain jurisdiction in their juvenile sessions (it neglects to refer to the full time juvenile courts) until the juvenile reaches age 19 while the transfer hearing is pending.

In addition, a sentence is added to the first paragraph of §72 which states that if a child is charged with murder 1 or 2, manslaughter, rape, forcible rape of a child, or kidnapping (armed burglary and armed assault with intent to rob or murder are not included), and the offense was committed prior to the child's 17th birthday but the child is not apprehended until after his 18th birthday, then the court shall immediately conduct a transfer hearing pursuant to § 61. This language is at best duplicative of C. 119 § 72A and at worst is inconsistent with § 72A.

Query: Does this more specific language supersede the general provisions of § 72A and require the Commonwealth to prove pursuant to § 61 that a person over the age of 18 - an adult - is not amenable to treatment as a juvenile before the juvenile complaint can be dismissed and an adult complaint issued? § 72A simply requires a finding of probable cause and a showing that the defendant is dangerous and that it would be in the best interest of the public to try him as an adult.

b. The last sentence of the existing second paragraph is omitted which provides that a child who has been adjudicated delinquent by reason of murder in the first or second degree shall not be committed beyond age 21. However, this language is still present in §58 and thus is

inconsistent with the addition of another paragraph to § 72 which provides for mandatory minimum and maximum sentences for juveniles adjudicated delinquent by reason of murder in the first or second degree.

In the case of first degree murder, a child shall be committed to a maximum confinement of 20 years. The mandatory minimum incarceration period is 15 years, and the child is not eligible for parole before such time has been served. This confinement shall be in a secure facility of DYS until age 21, and thereafter the offender shall be transferred to the custody of the Department of Correction.

If the offense is murder in the second degree, the child shall be committed to a maximum confinement of 15 years. The mandatory minimum incarceration shall be for 10 years, and until such time has been served, the offender shall not be eligible for parole. After reaching age 21, the offender shall be transfered into the custody of the Department of Correction.

If the adjudication is for manslaughter, the child shall be committed to the custody of DYS until he reaches age 21.

In cases of murder 1 or 2, the commitment is to a secure facility while in the custody of DYS.

> Note: This is in conflict with § 58 which prohibits a court from designating where the juvenile shall be placed when committed to the Department of Youth Services, vesting discretion in the Commissioner. As in a number of the other provisions of the new legislation, it is likely that the former statute will be held to have been "amended by implication". However, corrective legislation to address the conflicts and to bring the statutes and rules in harmony would be desirable.

Query: Does the juvenile accrue "good time"? G.L. c. 127, s. 129 provides:

> "The officer in charge of each correctional institution or other place of confinement, except a defective delinquent department, shall keep a record of each prisoner in his custody whose term of imprisonment is four months or more. Every such prisoner ... shall be entitled [to have his sentence reduced by 'good time'] ....

It appears that the non-transfered juvenile would be entitled to good time for the portion of his sentence served after his transfer (at age 18 or 21) to the Department of Correction on murder adjudications.

> Note: a. There is no minimum age requirement before these sentences can be imposed (i.e., they apply to 7-year-olds as well as 16-year-olds). See also § 9 infra.
>
> b. The judge is not explicitly precluded from imposing a suspended sentence for the mandated term.
>
> c. Under c. 119, s. 83, a Superior Court judge may commit a transfered juvenile back to the custody of DYS, rather than sentencing him as an adult. This provision was not amended, creating a situation whereby a juvenile may fare better if transfered rather than if jurisdiction is retained in the juvenile court.

8. SECTION 8: Amends the first paragraph of subsection (a) of G.L. c. 120, § 10 regarding the use of public and private facilities by DYS. The amendment gives the commissioner of DYS the authority to transfer a person who has attained his 18th birthday into the custody of the Department of Correction if such person was adjudicated delinquent for murder 1 or 2 and the Commissioner of DOC concurs with the transfer instead of waiting until age 21. See also c. 120, §19.

9. SECTION 9: Amends G.L. c. 218, § 27 regarding the imposition of penalties for the district courts. The

statute currently states that the district courts may not impose a sentence to the state prison. The new language attempts to create an exception whereby a juvenile court or the juvenile session of the district court would have the power to commit a child adjudicated delinquent for murder 1 or 2 to the Department of Youth Services until the age of 21 and thereafter to state prison for a mandatory minimum term of years.

10. SECTION 10: Amends G.L. c. 263, § 4 regarding the manner in which prosecution of certain offenses are brought. The amendment gives a juvenile charged in juvenile court or a juvenile session of district court with murder 1 or 2, the right to be proceeded against by indictment. See Section 3, supra, and Mass. R. Crim. P. Rule 3.

11. SECTION 11: Amends G.L. c. 278, § 28E regarding appeals by the commonwealth. The new language provides that an appeal may be taken from the district court to the appeals court in all delinquency cases where the court has allowed a motion to dismiss or suppress. See §12 infra.

12. SECTION 12: Also amends G.L. c. 278 § 28E regarding the commonwealth's right to appeal by adding a new subcategory: "or, (3) denying a motion to transfer pursuant to section sixty-one of chapter one hundred and nineteen." Note: The Commonwealth would still not be able to appeal the denial of a transfer in a c. 119, § 72A proceeding.

HANDOUTS

§ 74. Limitations on criminal proceedings against children

Except as hereinafter provided, no criminal proceeding shall be begun against any person who prior to his seventeenth birthday commits an offense against the law of the commonwealth or who violates any city ordinance or town by-law, unless proceedings against him as a delinquent child have been begun and dismissed as required by section sixty-one or seventy-two A; provided, however, that a criminal complaint alleging violation of any city ordinance or town by-law regulating the operation of motor vehicles, which is not capable of being judicially heard and determined as a civil motor vehicle infraction pursuant to the provisions of chapter ninety C may issue against a child between sixteen and seventeen years of age without first proceeding against him as a delinquent child.

JUVENILE BINDOVERS

YEAR	ARRAIGNMENTS	PART B HEARING	NUMBER BOUNDOVER	NUMBER TRANSFERRED AS % OF PART B HEARINGS
1981	22,129	563	36	.06
1982	20,799	406	28	.07
1983	18,122	251	27	.11
1984	18,408	224	14	.06
1985	19,931	223	12	.05
1986	19,906	206	15	.07
1987	18,782	177	14	.08
1988	18,429	160	19	.12
1989	18,688	169	11	.07
1990	UNKNOWN	118	11	.11

9970A

Handout 3

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 86-36

A JUVENILE

VS.

COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION

The petitioner seeks relief pursuant to G.L. c. 211, sec. 3 from an order of the District Court denying his motion to dismiss a criminal charge against him and ordering that a transfer hearing be held on that charge under G.L. c. 119, sec. 61.

The pertinent facts may be summarized on the basis of the affidavits of counsel. The petitioner, a juvenile, was complained of in District Court on the charge of delinquency by reason of one instance of indecent assault and battery of a child under fourteen, G.L. c. 265, sec. 13B, and one instance of rape of a child (statutory rape), G.L. c. 265, sec. 23.[1] He filed a motion to dismiss the

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[1] This complaint was substituted for an earlier complaint which charged the petitioner with delinquency by reason of two counts of forcible rape of a child in violation of G.L. c. 265, sec. 22A. The incidents alleged in the original complaint correspond to those alleged in the substituted complaint.

complaint, asserting that by virtue of his age, he lacked the capacity to be guilty of statutory rape under G.L. c. 265, sec. 23. The judge denied the motion to dismiss and ordered sua sponte that a transfer hearing be held under G.L. c. 119, sec. 61 on the statutory rape charge. The petitioner now seeks relief from both of these orders.

1. Motion to Dismiss

On requests to review interlocutory rulings in criminal cases, the single justice should only exercise his superintendence power under G.L. c. 211, sec. 3 "in the most exceptional circumstances and only to avoid errors which might be irremedial." Costarelli v. Municipal Court of the City of Boston, 367 Mass. 35, 41 (1975). See also Morissette v. Commonwealth, 380 Mass. 197, 198 (1980). No such showing has been made on the record before me. If the petitioner is adjudged guilty on the statutory rape charge after a bench trial in the juvenile session of the District Court, he may appeal for a trial de novo before a jury in the juvenile appeals session. See G.L. c. 119, secs. 55A, 56. At that time he may renew his motion to dismiss and thereby obtain de novo review on the merits. See G.L. c. 218, secs. 26A, 27A; G.L. c. 278, sec. 18. In addition, once the trial proceedings have run their course he has the right of appellate review. The petitioner

may at that time reassert his argument that a juvenile lacks the capacity to commit statutory rape. Accordingly, he will suffer no irreparable harm if he is not permitted to appeal the denial of his motion to dismiss at this juncture of the proceedings.

2. Transfer Hearing

This court has approved review under G.L. c. 211, sec. 3 in the past for purposes of monitoring juvenile transfer practices in the District Court. For example, in A Juvenile v. Commonwealth, 375 Mass. 104 (1978), a juvenile invoked the Court's superintendence power to enjoin the holding of a transfer hearing. The court held that relief could be granted because no remedy other than review under G.L. c. 211, sec. 3 was available to provide the juvenile with the relief sought, that is, the avoidance of a transfer hearing. Id. at 106. Similarly, in A Juvenile v. Commonwealth, (No. 1), 380 Mass. 552 (1980), a juvenile applied to a single justice of this court under G.L. c. 211, sec. 3 to stay his trial as an adult in the Superior Court on a rape charge, contending that the trial would be unlawful because of infirmities in the transfer of the case from the Boston Juvenile Court. We stated that although the concern that a defendant should be spared the anxiety and expense of a trial where the conviction would ultimately have to be

overturned might not suffice to justify an exercise of the superintendence power, because the case before us involved a question of proper transfer practice, it called for supervision and immediate settlement. Id. at 555-556. These cases indicate that review of the District Court's order scheduling a transfer hearing on the statutory rape charge against the petitioner in the instant case is appropriate under G.L. c. 211, sec. 3.

General laws c. 119, sec. 61 provides in pertinent part:

> If it is alleged in a complaint made under sections fifty-two to sixty-three, inclusive, that a child... (b) has committed an offense involving the infliction or threat of serious bodily harm; and... if such alleged offense was committed while the child was between his fourteenth and seventeenth birthdays,... the court may, after a transfer hearing held in accordance with such rules of court as shall be adopted for such purpose, dismiss the complaint.

Rule 208 of the District Courts Special Rules further states:

> A transfer hearing shall be held (1) whenever requested by the Commonwealth or ordered by the court, on the basis that either condition denominated "a" or "b" in G.L. c. 119, s. 61, paragraph 1 exists, whether or not the same appears from the complaint; and (2) pursuant to court order in every case where the condition denominated "b" in said statute is met by reason of the fact that the offense is punishable by life imprisonment if committed by an adult.

The petitioner maintains that the District Court erred in ordering a transfer hearing because the statutory prerequisites for invoking the transfer

procedure have not been satisfied. More specifically, the petitioner asserts that statutory rape is not an "offense involving the infliction or threat of serious bodily harm." Relying on Rule 208, the Commonwealth argues that a transfer hearing may properly be held because statutory rape is an offense punishable by life imprisonment if committed by an adult. It also contests the petitioner's characterization of statutory rape as a nonviolent crime.[2]

Rule 208 purports to modify G.L. c. 119, sec. 61 in at least two respects. First, it provides that a transfer hearing shall be held when the conditions specified in the statute exist, "whether or not the same appears from the complaint;" the statute, by contrast, states that the existence of these predicate conditions must be "alleged in the complaint." Second, Rule 208 apparently establishes an irrebuttable presumption that an offense charged to a juvenile involves the infliction or threat of serious bodily harm where that offense carries a possible punishment of life imprisonment if committed by an adult. These modifications

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[2] The Commonwealth does not contend that the petitioner has previously been committed to the department of youth services as a delinquent child. Therefore condition "a" of G.L. c. 119, sec. 61 is inapplicable in the instant matter. The only issue before me involves the question whether condition "b" of G.L. c. 119, sec. 61 was satisfied, thus justifying commencement of transfer proceedings.

conflict with the substantive provisions of G.L. c. 119, sec. 61 and thus exceed the authority conferred upon the court to fashion appropriate procedural rules.

Rule 208 notwithstanding, a transfer hearing may only be held in the instant case if, as the statute requires, the complaint alleges that the petitioner committed an offense involving the infliction or threat of serious bodily harm. The complaint alleges, however, only that the petitioner "did unlawfully have sexual intercourse with. . . a child under sixteen years of age, in violation of G.L. c. 265, sec. 23. This allegation by itself is insufficient under G.L. c. 119, sec. 61 to permit commencement of transfer proceedings.

Statutory rape is defined as sexual intercourse with a child under sixteen years old with or without her consent. See Commonwealth v. McClean, 277 Mass. 199, 203 (1931); Commonwealth v. Ellis, 321 Mass. 669, 669-670 (1947). Therefore, unlike other rape offenses, statutory rape may not be characterized in the abstract as a crime of violence. A defendant may be convicted of statutory rape for the forcible rape of a child, or, in the alternative, for what is in essence a consensual act of sexual intercourse with a minor. Which of these two characterizations more aptly describes the offense in a particular case is necessarily factually dependent.

In the instant case there is no indication on the face of the complaint, nor anywhere else in the record for that matter, that the alleged rape involved the threat or use of force or violence. Consequently, the statutory prerequisites for holding a transfer hearing have not been satisfied. The District Court erred in ordering such a hearing. An order shall enter vacating the order of the District Court. The case shall proceed as a juvenile matter in the juvenile session.

Paul J. Liacos,
Associate Justice

May 2, 1986

A true copy,

Attest:

John E. Louis
Clerk

May 5, 1986

§ 61. Trial of certain juveniles as adults; dismissal of juvenile complaint; transfer hearing

If it is alleged in a complaint made under sections fifty-two to sixty-three, inclusive, that a child (*a*) who had previously been committed to the department of youth services as a delinquent child has committed an offense against a law of the commonwealth which, if he were an adult, would be punishable by imprisonment in the state prison; or (*b*) has committed an offense involving the infliction or threat of serious bodily harm, and in either case if such alleged offense was committed while the child was between his fourteenth and seventeenth birthdays, and if the court enters a written finding based upon clear and convincing evidence that the child presents a significant danger to the public as demonstrated by the nature of the offense charged and the child's past record of delinquent behavior, if any, and is not amenable to rehabilitation as a juvenile, the court may, after a transfer hearing held in accordance with such rules of court as shall be adopted for such purpose, dismiss the complaint.

At said transfer hearing, which shall be held before any hearing on the merits of the charges alleged, the court shall find whether probable cause exists to believe that the child has committed the offense or violation as charged. If the court so finds, the court shall then consider, but shall not be limited to, evidence of the following factors: (*a*) the seriousness of the alleged offense; (*b*) the child's family, school and social history, including his court and juvenile delinquency record, if any; (*c*) adequate protection of the public, (*d*) the nature of any past treatment efforts for the child, and (*e*) the likelihood of rehabilitation of the child.

If the court determines that the child should be treated as a delinquent child, the court shall forthwith, on motion by or on behalf of the child, continue the proceedings until such further time as the court shall determine; provided, however, that when the child is alleged in a complaint to have violated the provisions of section one of chapter two hundred and sixty-five, the court shall make written findings upon which the determination was made to treat such child as a delinquent.

If the court orders that the delinquency complaint against a child be dismissed it shall cause to be issued a criminal complaint. The case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen and section eighteen of chapter two hundred and seventy-eight. When such a complaint is issued, section 68 shall apply to any person committed under this section for failure to recognize pending final disposition in the superior court.

Unless the child by counsel shall waive this provision, the judge who conducts the transfer hearing shall not conduct any subsequent proceeding arising out of the facts alleged in the delinquency complaint.

Amended by St.1975, c. 840, § 1; St.1977, c. 829, § 11; St.1985, c. 744.

Historical Note

1975 Amendment. St.1975, c. 840, § 1, approved Dec. 24, 1975, and by § 3 made effective upon its passage, rewrote the section to include subject matter previously contained in former section 75 of this chapter.

1977 Amendment. St.1977, c. 829, § 11, an emergency act, approved Dec. 20, 1977, correctively substituted "section thirty" for "section forty" in the second sentence of the fourth paragraph.

1985 Amendment. St.1985, c. 744, approved Jan. 3, 1986, added the proviso in the third paragraph.

Related Laws:

St.1986, c. 537, § 5, approved Nov. 18, 1986, provides:

"Notwithstanding the provisions of the fourth paragraph of section sixty-one of said chapter one hundred and nineteen, in Essex and Hampden counties, if the court orders that the delinquency complaint against a child be dismissed it shall cause to be issued a criminal complaint. The case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen of the General Laws. When such complaint is issued, section sixty-eight of said chapter one hundred and nineteen shall apply to any person committed under this section for failure to recognize pending final disposition in the superior court."

For provisions relating to pleas and to suspension or expiration of St.1986, c. 537, see the Historical Note under c. 90, § 24.

Handout 4B

presumption; criminal complaint.

Section 61. The commonwealth may request a transfer hearing whenever it is alleged in a complaint that a child, who is fourteen years old or older, has committed an offense against a law of the commonwealth, which, if he were an adult, would be punishable by imprisonment in the state prison, and that the offense has allegedly been committed by a child who had previously been committed to the department of youth services, or involves the threat or infliction of serious bodily harm.

The court shall hold a transfer hearing whenever the commonwealth so requests. The court shall order a transfer hearing, in every case in which the offense alleged is murder in the first or second degree, manslaughter, rape, kidnapping, or armed robbery that has resulted in serious bodily injury.

At said transfer hearing, which must be held before any hearing on the merits of the charges alleged the court shall find whether probable cause exists to believe that the child has committed the offense or violation charged. If probable cause is found, the court shall then determine whether the child presents a danger to the public, and whether the child is amenable to rehabilitation within the juvenile system. In making this determination the court shall consider but is not limited to evidence of the following factors:

The nature, circumstances, and seriousness of the alleged offense; the child's court and delinquency record; the child's age and maturity; the family, school and social history of the child; the success or lack of success of any past treatment efforts for the child; the nature of services available through the juvenile justice system; the adequate protection of the public; and the likelihood of rehabilitation of the child.

If, at the conclusion of the hearing, the court enters a written finding based upon clear and convincing evidence that the child presents a significant danger to the public and that the child is not amenable to rehabilitation within the juvenile justice system, the court shall dismiss the delinquency complaint and cause a criminal complaint to be issued. The case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen and section eighteen of chapter two hundred and seventy-eight. If the court fails to make such findings that the child presents a significant danger to the public and that the child is not amenable to rehabilitation, the court shall proceed on the delinquency complaint.

If a child is charged with murder in the first or second degree, and a finding of probable cause has been made, there shall exist a rebuttable presumption that the child presents a significant danger to the public and that such child is not amenable to rehabilitation within the juvenile justice system. If, at the hearing, the court enters a written finding based upon a preponderance of the evidence that the child presents a significant danger to the public and that the child is not amenable to rehabilitation within the juvenile justice system, the court shall dismiss the delinquency complaint and cause a criminal

complaint to be issued. The case shall thereafter shall proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen and section eighteen of chapter two hundred and seventy-eight. If the court fails to make such findings the court shall proceed on the delinquency complaint.

Whenever a criminal complaint is issued in accordance with this section, the provisions of section sixty-eight shall apply to any person, under the age of eighteen, who is committed for failure to recognize pending final disposition in the district or superior court.

Unless the child waives the provisions of this paragraph, the judge who conducted the transfer hearing shall not conduct any subsequent criminal delinquency proceeding arising out of the facts alleged in the delinquency complaint.

§ 61. Trial of certain juveniles as adults; dismissal of juvenile complaint; transfer hearing

The commonwealth may request a transfer hearing whenever it is alleged in a complaint that a child, who is fourteen years old or older, has committed an offense against a law of the commonwealth, which, if he were an adult, would be punishable by imprisonment in the state prison, and that the offense has allegedly been committed by a child who had previously been committed to the department of youth services, or involves the threat or infliction of serious bodily harm.

The court shall hold a transfer hearing whenever the commonwealth so requests. The court shall order a transfer hearing in every case in which the offense alleged is murder in the first or second degree, manslaughter, or a violation of section eighteen, twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six.

At said transfer hearing, which shall be held before any hearing on the merits of the charges alleged, the court shall first determine whether probable cause exists to believe that the child has committed the offense or violation charged. If the offense alleged is murder in the first or second degree, manslaughter, or a violation of section eighteen, twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six, the probable cause portion of said transfer hearing shall be held within fifteen days of the child's first appearance before the court following the date of the complaint; provided, however, that a failure to hold such probable cause portion of the hearing within said fifteen days shall not prohibit such hearing from being held at a later time as determined by the court. If probable cause is found, the court shall then determine whether the child presents a danger to the public,

and whether the child is amenable to rehabilitation within the juvenile justice system. In making such determination the court shall consider, but shall not be limited to, evidence of the nature, circumstances, and seriousness of the alleged offense; the child's court and delinquency record; the child's age and maturity; the family, school and social history of the child; the success or lack of success of any past treatment efforts of the child; the nature of services available through the juvenile justice system; the adequate protection of the public; and the likelihood of rehabilitation of the child.

If the offense alleged is murder in the first or second degree, manslaughter, or a violation of section eighteen, twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six, this portion of the transfer hearing shall be held within thirty days of the probable cause portion; provided, however, that a failure to hold such portion of the transfer hearing within said thirty days shall not prohibit such hearing from being held at a later time as determined by the court.

If the offense alleged is murder in the first or second degree, the commonwealth may proceed by filing a complaint in juvenile court or in a juvenile session of a district court, as the case may be, or by filing an indictment in such court. In such proceedings initiated by the filing of a complaint, a probable cause hearing shall be held within the time set forth in this section, unless the commonwealth shall have proceeded by indictment prior to such hearing. If the commonwealth has proceeded by indictment, no probable cause hearing shall be held, and a transfer hearing shall be held as provided by this section. In all cases brought pursuant to the provisions of this paragraph, the child shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three, unless such child, upon advice of counsel, duly waives indictment.

If, at the conclusion of the hearing, the court enters a written finding based upon clear and convincing evidence that the child presents a significant danger to the public and that the child is not amenable to rehabilitation within the juvenile justice system, the court shall dismiss the delinquency complaint and cause a criminal complaint to be issued. The case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen and section eighteen of chapter two hundred and seventy-eight. If the court fails to make such findings the court shall state its reasons in writing and the commonwealth may appeal the decision of the court under the provisions of section twenty-eight E of chapter two hundred and seventy-eight. Any such appeal shall be taken within ten days after the court's failure to make said findings and further proceedings shall be stayed pending the entry of an order of the appellate court. If the time for the commonwealth to appeal expires, or if such appeal is denied then the court shall proceed on the delinquency complaint.

If a child is charged with murder in the first or second degree, manslaughter, or any violation of section eighteen, twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six, and a finding of probable cause has been made, there shall exist a rebuttable presumption that the child presents a significant danger to the public and that such child is not amenable to rehabilitation within the juvenile justice system. If, at the hearing, the court enters a written finding based upon a preponderance of the evidence that the child presents a significant danger to the public and that the child is not amenable to rehabilitation within the juvenile justice system, the court shall dismiss the delinquency complaint and cause a criminal complaint to be issued. The case shall thereafter shall [1] proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen and section eighteen of chapter two hundred and seventy-eight. If the court fails to make such findings the court shall state its reasons in writing and the commonwealth may appeal the decision of the court under the provisions of section twenty-eight E of chapter two hundred and seventy-eight. Any such appeal shall be taken within ten days after the courts failure to make such findings and further proceedings shall be stayed pending the entry of an order of the appellate court. If the time for the commonwealth to appeal expires, or if such appeal is denied then the court shall proceed on the delinquency complaint.

Whenever a criminal complaint is issued in accordance with this section, the provisions of section sixty-eight shall apply to any person, under the age of eighteen, who is committed for failure to recognize pending final disposition in the district or superior court.

Unless the child waives the provisions of this paragraph, the judge who conducted the transfer hearing shall not conduct any subsequent criminal delinquency proceeding arising out of the facts alleged in the delinquency complaint.

Amended by St.1975, c. 840, § 1; St.1977, c. 329, § 11; St.1985, c. 744; St.1990, c. 267, § 3; St.1991, c. 488, §§ 2 to 6.

[1] So in enrolled bill.

DISTRICT COURTS OF MASSACHUSETTS

Bulletin No. 10-75

DATE: December 31, 1975

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(With Enclosures)

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2. District Court Statistics, 7/1/74 - 6/30/75
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15. January 15 - Martin Luther King, Jr.'s Birthday

1. New Statute on Transfer Hearing to Determine Whether to Try Juvenile as an Adult. After the decision in Breed v. Jones, 43 U.S.L.Week 4644 (5/27/75), the constitutionality of G.L. c. 119, s. 61 appeared doubtful. The memorandum change in Rule 85A (now Rule 208) to require the so-called transfer hearing before instead

of after a hearing on the merits of the juvenile complaint was deemed a bootstrap measure. After the opinion in Stokes v. Commonwealth, Mass. Adv. Sh. (10/24/75) 3030, however, section 61 could be said to be only battered and bruised, but still viable. Nevertheless, the General Court did, in fact, give it "the deep six".

Chapter 840 of the Acts of 1975, signed by the Governor on December 24, 1975, by its terms to "take effect upon its passage", repeals both sections 61 and 75. A copy of the new statute is enclosed herein. This is not the same text distributed by Judge Poitrast at his recent lecture, but rather an earlier draft. Not about to win a prize for precision or clarity, this statute will need to be further amended. With the help of the Committee on Juvenile Procedure I shall try to promulgate very shortly the necessary rules of implementation. Meanwhile, let me point out the following aspects of this new legislation:

A. The statute does not expressly provide for any procedure between arraignment and the transfer hearing itself. This should be covered by the rules. Ideally the moving party to request the transfer hearing should be the prosecution.

B. A transfer hearing applies only to a juvenile who was between 14 and 17 at the time of the alleged offense and who fits into category (a) or (b) as set forth in the first sentence of the new section 61. Probably category (a) will be unavailing as stated because prior commitments and the nature of prior offenses are not likely to be alleged in the complaint. However, category (b) will cover most of the cases about which we are concerned, since it includes offenses "involving the infliction or threat of serious bodily harm."

C. The transfer hearing itself is a two-step process. The first step is an evidentiary probable cause hearing. See first sentence of second paragraph of the new section 61. The second step is commenced only if a finding of probable cause has been made. This is the only probable cause hearing and takes the place of the probable cause hearing heretofore held after the juvenile complaint was dismissed and a criminal complaint issued.

D. The second step is an evidentiary hearing involving, but not limited to, the five considerations set forth in the second sentence of the second paragraph of new section 61, to determine whether "the child presents a significant danger to

the public as demonstrated by the nature of the offense charged and the child's past record of delinquent behavior, if any," and whether the child "is not amenable to rehabilitation as a juvenile." In order to dismiss the complaint and try the juvenile as an adult the court must enter a "written finding based upon clear and convincing evidence." This probably means the judge will have to set forth his reasons based on the evidence by which he has been clearly convinced that the child should be tried as an adult.

E. In the event of such a finding the juvenile complaint is dismissed, a criminal complaint is issued and the defendant is bound over to the Superior Court. This is true even if the offense is within the final jurisdiction of the District Courts (contrary to the version of this bill discussed by Judge Poitrast). Section 40 of chapter 218 referred to in the fourth paragraph of new section 61 is a mistake. It should be section 30. In the event the juvenile is to be tried on the delinquency complaint the judge who conducted the transfer hearing is disqualified to conduct any subsequent proceeding arising out of that complaint "unless the child by counsel shall waive this provision."

DISTRICT COURTS OF MASSACHUSETTS

Bulletin No. 3-76

DATE: February 17, 1976

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(With Enclosures)

1. New Rules on Transfer Hearings for Juveniles
2. Recordation Guidelines
3. Judge Nolan's Notes
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(Without Enclosures)

5. Driver Alcohol Education Problems
6. Limitation on Revision or Revocation of Sentence
7. The Bartley-Fox Gun Control Law
8. Correction on Neglected Child Case Total in 1975 Statistics
9. Judges Travel Vouchers
10. Small Claims Fees
11. Reimbursement of Counsel Appointed for Patients in Mental Health Facilities
12. Civil Rules Notes
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15. Case Notes
    - A. Commonwealth v. Delorey
    - B. Commesso v. Commonwealth
    - C. Commonwealth v. Sawicki
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    - F. Commonwealth v. Richards

1. New Rules on Transfer Hearings for Juveniles. Enclosed herein is the final draft of amendments to Rules 205 and 208 of the Special Rules of the District Courts of Massachusetts which will be officially promulgated in this form as soon as the printing work on the uniform forms incorporated therein has been completed. These amendments represent the consensus and have the unanimous support of the District Courts Committee on Juvenile Procedure and all of the Juvenile Court Justices. They tend to implement Item 1 of Bulletin No. 10-75 (12/31/75) which accompanied the distribution of the new statute on transfer hearings, St.1975, ch.840.

Please note: There is only one probable cause hearing. That is held in the context of the transfer hearing as suggested by the United States Supreme Court in Breed v. Jones. The repeal by the new statute of G.L. ch. 119, sec. 75 makes it clear that there is no probable cause hearing after the issuance of a criminal complaint. The determination of probable cause or no probable cause in the transfer hearing should proceed in the same manner as a probable cause hearing in a District Court criminal case. Notwithstanding some ambiguities in the new statute, the Committee, the Juvenile Court Justices and I are all satisfied that this was the legislative intent.

Also ambiguous and perhaps more doubtful is the binding over to the Superior Court of those criminal complaints caused to be issued after a transfer hearing which would otherwise be within the final jurisdiction of the District Courts. However, the new statute does not establish this new jurisdiction with sufficient clarity and specificity to provide the necessary means to replace the express holding in Commonwealth v. A Juvenile, 1974 Mass. Adv. Sh. 61, 306 N.E.2d 822. There would be no authority for the District Court upon a plea or finding of guilty to impose an adjudication of delinquency and a disposition as a juvenile delinquent in the manner provided for the Superior Court pursuant to G.L. ch. 119, se. 83. Also, the new statute requires the application of G.L. ch. 119, sec. 68 to cases "pending final disposition in the Superior Court." Moreover, there would be no provision whatsoever for the manner of transferring such a case from one of the four Juvenile Courts to a District Court.

In transferring (or binding over) any criminal cases to the Superior Court, regardless of the offense, the Juvenile Courts intend to follow the same practice as the District Courts. They will prepare on their own forms the criminal complaints and forward them directly to the Superior Court in their respective counties. For their authority in this respect, see G.L. ch. 119, sec. 59.

Please note further certain features of the amended Rule 208:

A. A transfer hearing must be held if the offense involves the infliction or threat of serious bodily harm and would be punishable by life imprisonment if committed by an adult. In other cases a transfer hearing will be held whenever ordered by the Court or requested by the Commonwealth pursuant to the provisions and forms as set forth in the Rule.

B. If the Court is satisfied at the hearing that either of the two statutory conditions has been met, the juvenile delinquency complaint shall be amended, if necessary, to allege the appropriate condition.

C. Multiple offenses warrant common-sense handling by keeping them together even though there is no express authority for this in the statute.

The Committee and the Juvenile Court Justices have also agreed on the amendments to the statute which they feel are necessary to clear up all of the ambiguities and also to render the application of the statute more effective. As soon as the wording has been agreed upon among us, these proposed amendments will be filed with the appropriate officials of the Legislative and Executive branches.

DISTRICT COURTS OF MASSACHUSETTS

Bulletin No. 6-76

DATE: May 12, 1976

CONTENTS:

1. Promulgation of Juvenile Transfer Rules. The Administrative Committee and the Committee on Juvenile Procedure have considered and reconsidered the proposed amendments to Rules 208 and 210 and accompanying forms distributed with Bulletin 3-76 (Feb. 17, 1976) and are satisfied that they represent the proper approach to the transfer hearing under St. 1975, c. 840 (enclosed with Bulletin 10-75). The rules and forms are officially promulgated herewith.

STATUTORY EVOLUTION OF THE TRANSFER ISSUE

The statutory evolution of the transfer issue involves three sections of the juvenile delinquency code (Chapter 119) of the Massachusetts General Laws: section 52, the definitional section; section 61, on waiver of juvenile jurisdiction; and the repealed section 75, on the institution of criminal proceedings against juveniles.

The material of section 75 was incorporated into section 61 in the comprehensive 1975 amendment of that section.

Statutory Evolution of Ch. 119, s. 52's Definition of "Delinquent Child"

Prior to 1948, a delinquent child was defined as "a child between seven and seventeen who violates any city ordinance or town by-law or commits an offense not punishable by death or by imprisonment for life." [1921 Edition of M.G.L.] Children between seven and seventeen who were accused of an offense which ordinarily was punishable by death or life imprisonment were entirely outside of the protection of the delinquency code, and were dealt with in the same manner as adults. This was in effect an "automatic waiver" provision. Original and exclusive jurisdiction over juveniles accused of certain offenses was in the criminal courts.

The 1948 amendment [St. 1948, c. 310, s. 3] deleted the reference to "imprisonment for life," thereby reducing the scope of the "automatic waiver" provisions to children charged with crimes punishable by death.

The 1960 amendment [St. 1960, c. 353, s. 1] deleted the reference to offenses "punishable by death," thereby effectively eliminating the "automatic waiver" provisions of the delinquency code. Since then the juvenile courts have had original jurisdiction over all cases of children under seventeen accused of crimes, and transfers have been effectuated only after a hearing in conformity with the provisions of section 61.

Statutory Evolution of Ch. 119, s. 61

Prior to 1948, section 61 provided that children between seven and seventeen could be transferred to criminal court only after a hearing and only if the court was of the opinion that the child's "welfare, and the interests of the public" required transfer.

The 1948 amendment [St. 1948, c. 310, s. 7] limited the transfer provisions of the section to children between the ages of fourteen and seventeen.

The 1964 amendment [St. 1964, c. 308, s. 2] eliminated the reference to consideration of the child's welfare in making the transfer decision.

The 1975 amendment [St. 1975, c. 840, s. 1] rewrote the transfer statute into its present form (see copy of Ch. 119, s. 61).

Statutory Evolution of Ch. 119, s. 75

Prior to 1948, section 75 provided that, except for children charged with offenses punishable by death or imprisonment for life, a criminal complaint and its attendant warrant could only be issued against a child between the ages of seven and seventeen if delinquency proceedings had been previously begun and dismissed as required by section 61.

The 1948 amendment [St. 1948, c. 310, s. 13] limited the effect of its provisions to children between the ages of fourteen and seventeen, and eliminated the reference to offenses punishable by "imprisonment for life." Henceforth, only children charged with offenses punishable by death or children between fourteen and seventeen against whom a delinquency complaint was brought and dismissed in accordance with the provisions of section 61 could be charged before the Superior Court.

The 1960 amendment deleted the reference to offenses punishable "by death." Henceforth, no child under seventeen could be charged in the superior courts without first having a delinquency complaint brought and dismissed as required by section 61.

The section was repealed in 1975 [by St. 1975, c. 840, s. 2A]. The material formerly contained in this section became the basis for the fourth paragraph of section 61 (see copy of Ch. 119, s. 61).

"Statutory Evolution of the Transfer Issues," Governor's Anti-Crime Council, Juvenile Code Study and Revision Project, 1986

RULE 208. TRANSFER HEARING UNDER G.L. C. 119, S. 61

A transfer hearing shall be held (1) whenever requested by the Commonwealth or ordered by the court, on the basis that either condition denominated "a" or "b" in G.L. c. 119, s. 61, paragraph 1 exists, whether or not the same appears from the complaint; and (2) pursuant to court order in every case where the condition denominated "b" in said statute is met by reason of the fact that the offense is punishable by life imprisonment if committed by an adult. A request by the Commonwealth for a transfer hearing shall be filed in writing with the clerk not later than seven days after the arraignment on Uniform Form DCM–10, "Request for Transfer Hearing," promulgated herewith. Notice of the transfer hearing shall be given to the child or to his counsel, and to his parent or guardian, at least seven days prior to said transfer hearing upon Uniform Form DCM–11, "Notice of Transfer Hearing," promulgated herewith. If after the transfer hearing the court decides to dismiss the delinquency complaint it shall make a written finding and order upon Uniform Form DCM–12, "Finding and Order After Transfer Hearing," promulgated herewith.

Amended May 10, 1976, effective June 1, 1976.

Rules

The Special Rules of the District Courts are amended by repealing Rule 208 as promulgated on January 8, 1975 and by substituting therefor the following, to be effective June 1, 1976:

"Rule 208.

Transfer Hearing Under G.L. c. 119, s. 61.

A transfer hearing shall be held (1) whenever requested by the Commonwealth or ordered by the court, on the basis that either condition denominated "a" or "b" in G.L. c. 119, s. 61, paragraph 1 exists, whether or not the same appears from the complaint; and (2) pursuant to court order in every case where the condition denominated "b" in said statute is met by reason of the fact that the offense is punishable by life imprisonment if committed by an adult. A request by the Commonwealth for a transfer hearing shall be filed in writing with the clerk not later than seven days after the arraignment on Uniform Form DCM-10, "Request for Transfer Hearing," promulgated herewith. Notice of the transfer hearing shall be given to the child or to his counsel, and to his parent or guardian, at least seven days prior to said transfer hearing upon Uniform Form DCM-11, "Notice of Transfer Hearing," promulgated herewith. If after the transfer hearing the court decides to dismiss the delinquency complaint it shall make a written finding and order upon Uniform Form DCM-12, "Finding and Order After Transfer Hearing," promulgated herewith."

George E. Dewey

GEORGE E. DEWEY
Acting Chief Justice
District Courts of Massachusetts

Promulgated: May 10, 1976

Note:

The rule provides that the Commonwealth may have a transfer hearing as of right by filing Uniform Form DCM-10 with the clerk. The court may also order a transfer hearing on its own initiative and must order such a hearing if the offense satisfies condition

"b" in the statute and is punishable by life imprisonment if committed by an adult. In any event, notice of the hearing shall be given by the court upon Uniform Form DCM-11.

At the transfer hearing the Commonwealth must first establish to the court's satisfaction that either condition "a" or "b" of paragraph 1 of G.L. c. 119, s. 61 has been met. If the court is satisfied that one of the other of the conditions is met the court should then order that the complaint be amended to allege condition "a" or "b", as appropriate, if it is not already so alleged in the complaint.

The court should then proceed with the two parts of the determination contemplated by the statute. First it should determine whether probable cause exists to believe that the child has committe the offense or violation charged. If the court does find probable cause it should so announce. Only then should the court proceed to determine, based on the factors set forth in s. 61, paragraph 2, second sentance, whether to dismiss the juvenile complaint, cause to be issued a criminal complaint and bind over the defendant to the Superior Court. If the court determines that the child should be treated as a juvenile, "any subsequent proceeding arising out of the facts alleged in the delinquency complaint" shall be conducted by a different judge, unless the child by counsel shall waive this provision.

With regard to the standards applicable to each stage of the two-part hearing, the Myers standard (see Myers v. Commonwealth, Mass. Adv. Sh. (1973) _____, 298 N.E.2d 819) applies during the first stage wherein probable cause is to be determined, and then, if probable cause is found, the "clear and convincing" standard applies for the second stage, the transfer determination.

Multiple offenses arising out of the same transaction or occurence should be treated as a unit. If the court determines to dismiss the juvenile complaint and cause a criminal complaint to be issued as to one or more of the offenses, it will be better practice (although not expressly authorized by the statute) to cause criminal complaints to be issued on all offenses, so that the Superior Court will then receive all of the offenses charged together against the same defendant. Co-defendants, however, are to be treated individually. Transfer hearings of co-defendants may be heard together (particularly with respect to probable cause) but separate decisions, findings and orders shall be made as to each defendant.

The forms attached hereto are hereby prescribed for use in the District Courts pursuant to the provisions of this rule. These forms are to be printed by the District Courts in strict conformity with these samples, except that the name of the court may be printed, typed, stamped or otherwise placed below the words "District Courts of Massachusetts."

Ed. Note: See Administrative Bulletins 10-75 and 3-75 for a discussion of the history of this new rule, made necessary by Breed v. Jones, 95 S.C. 1779 (1975).

Handout 8

SPECIAL RULES OF THE DISTRICT COURTS OF MASSACHUSETTS

Table of Rules

For Consolidated Index for State Rules, see infra

RULE 200. HOUR OF OPENING COURT

In each District Court the hour of opening the daily session shall be 9:00 a.m.

RULE 201. CLERK'S OFFICE HOURS

The office of the clerk shall be open in each District Court from 8:30 a.m. to 4:00 p.m. Monday through Friday; and 8:30 a.m. to 12:00 noon on Saturdays.

RULE 202. SITTING FOR SMALL CLAIMS

In each District Court there shall be at least one sitting each week for the consideration of small claims, provided, however, that when so ordered by the justice of any court, such sittings may be held bi-weekly during the summer vacation period as established in said court.

RULES APPLICABLE TO JUVENILE PROCEEDINGS

RULE 203. FORMS IN JUVENILE CASES

Forms for use in juvenile session prescribed on and after January 1, 1943 are hereby ordered to be continued in use.

RULE 204. APPLICABILITY OF DISTRICT COURT RULES

Rules of the District Courts which are applicable to proceedings against adults shall, so far as pertinent, be applicable in proceedings against children between the ages of seven and seventeen, except as otherwise expressly provided.

RULE 205. NOTICE OF RIGHTS

A summons issued upon a complaint against a child alleged to be wayward or delinquent shall have attached thereto the following:

(1) A copy of the complaint.

(2) You have a right to legal counsel at all stages of the proceedings. If you are unable to afford counsel the court will appoint counsel for you.

(3) If you are of the opinion that all or any of the allegations contained in the complaint are not true, you have a right to deny the same and are entitled to a hearing before this court thereon.

(4) You have the privilege against self-incrimination and in consequence, you have a right to remain silent and to require the complainant to prove any and all charges made against you.

(5) You have the right to be confronted by the person making any accusation against you and to cross-examine that person and any other persons called to testify against you.

(6) You may produce witnesses in your own behalf at the hearing of the complaint.

(7) If there should be an adjudication or order of commitment against you, you have a right of appeal to the Superior Court of this county at the time thereof.

(8) You may, for cause, request a continuance of the hearing.

(9) Any questions relating to your rights may be submitted by you to the court at the hearing.

(10) Before the above mentioned hearing on the juvenile complaint the court, as provided by G.L. c. 119, s. 61, may hold a transfer hearing to determine whether you should be tried as an adult rather than a child and subject to adult criminal proceedings. If there will be such a transfer hearing, you will receive at least seven days notice of that hearing. See G.L. c. 119, s. 61 and Rule 208 of the Special Rules of the District Courts.

Said information in written form shall also be given to a child and his parent, guardian or other person or agency whose presence in court is or may be required by law when first appearing in court pursuant to such a complaint otherwise than upon a summons.

Amended May 10, 1976, effective June 1, 1976.

RULE 206. COPY OF COMPLAINT TO BE ATTACHED TO SUMMONS TO PARENT, GUARDIAN OR AGENCY

A summons to a parent, guardian or other person or agency whose presence in court is or may be required by law, shall have attached thereto a copy of the complaint.

RULE 207. REPRESENTATION BY COUNSEL

A child between seven and seventeen years of age against whom a complaint is made that he or she is a wayward or delinquent child, shall be represented by counsel at every stage of the proceedings if it shall appear to the court that such child may be committed to the custody of the Youth Service Board as the result of such complaint.

The court may require psychological testing and psychiatric examination whenever expedient.

Appointment of counsel, or an election to proceed without counsel, shall be governed by the provisions of Rule 3:10 of the General Rules of the Supreme Judicial Court and Rule 10 of the Initial Rules of Criminal Procedure of the District Courts.

Handout 9

COMMONWEALTH OF MASSACHUSETTS

_____, SS. TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT
_____ DISTRICT COURT
DOCKET NO._____

COMMONWEALTH

V.

_____
(A JUVENILE)

COMMONWEALTH'S MOTION FOR TRANSFER HEARING

Now comes the Commonwealth in the above-captioned matter and respectfully moves this Honorable Court, pursuant to G.L. c. 119, § 61 to conduct a transfer hearing.

As grounds therefore, the Commonwealth states as follows:

a. The juvenile is 14 years of age or older and;

b. The juvenile is charged, inter alia, with the crime of unarmed robbery, G.L. c. 265, § 19, an offense which if s/he were an adult would be punishable by imprisonment in the state prison, and

[c. has been previously committed to the Department of Youth Services]

[c. is charged with an offense involving the threat or infliction of serious bodily harm]

Respectfully Submitted
For the Commonwealth

Thomas F. Reilly
DISTRICT ATTORNEY

_____
_____
Assistant District Attorney
Middlesex Superior Courthouse
40 Thorndike Street
Cambridge, MA 02141
(617) 494-_____

9827A

Handout 10

COMMONWEALTH OF MASSACHUSETTS

_____ SS,

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT
_____ DISTRICT COURT
DOCKET NO._____

COMMONWEALTH

V.

_____
(A JUVENILE)

COMMONWEALTH'S MOTION TO AMEND COMPLAINT

Now comes the Commonwealth and respectfully moves this Court to amend the complaint in the above-captioned matter as follows:

To allege as required by G.L. c. 119, § 61, that the juvenile in this action is 14 years of age or older and:

a) has committed an offense against a law of the Commonwealth which, if s/he were an adult, would be punishable by imprisonment in the state prison, and

b) has been previously committed to the Department of Youth Services, or

c) is charged with an offense involving the threat or infliction of serious bodily harm

Respectfully Submitted
For the Commonwealth

Thomas F. Reilly
DISTRICT ATTORNEY

_____
_____
Assistant District Attorney
Middlesex Superior Courthouse
40 Thorndike Street
Cambridge, MA 02141
(617) 494-_____

9829A

FORM DCM–11. NOTICE OF TRANSFER HEARING

Commonwealth of Massachusetts

District Court of Massachusetts

Commonwealth
v. No. _____
_____, A Juvenile

NOTICE OF TRANSFER HEARING

This is to inform you that [at the request of the Commonwealth] [at the order of the court] a transfer hearing pursuant to G.L. c. 119, s. 61 and Rule 208 of the Special Rules of the District Court of Massachusetts will be held in this court on _____ [Date] at _____ [A.M.] [P.M.]. The purpose of this hearing is to determine whether to dismiss the juvenile complaint in this action, cause to be issued a criminal complaint and bind over the juvenile to the Superior Court.

THE JUVENILE, HIS ATTORNEY AND HIS PARENT OR LEGAL GUARDIAN SHOULD BE PRESENT AT THIS HEARING.

_____
(Assistant) Clerk

_____
Date

White copy to clerk
Pink copy to juvenile or counsel of record
Yellow copy to parent or guardian
This form prescribed by the Chief Justice of the District Court

STANDING ORDER 2-88. CASEFLOW MANAGEMENT OF JUVENILE CASES

Applicable to All Divisions With Juvenile Jurisdiction

I. Authority. This Order is promulgated by the Administrative Justice of the District Court pursuant to his statutory responsibility over caseflow management, G.L. c. 211B, s. 10, and uniform practices, G.L. c. 218, s. 43A.

II. Purpose. The purpose of this Order is to facilitate compliance with the standards for juvenile cases issued by the Supreme Judicial Court on April 7, 1986.

III. Juvenile Delinquency Cases.

1. *Bail Hearings.* As required by Mass. R. Crim. P. 7(a)(1), the court shall provide for each juvenile who has been arrested and not released a hearing on the issue of detention and bail on the same day as the arrest, if the court is then in session, and if not, at the next court session.

2. *Non-Jury Trials and Transfer Hearings.* Non-jury trials for the adjudication of delinquency and juvenile transfer hearings should be scheduled by the court as follows:

Juvenile in detention: Hearing date within 30 days of issuance of complaint.

Juvenile not in detention: Hearing date within 60 days of issuance of complaint.

The periods listed in Mass. R. Crim. P. 36(b)(2) shall be excluded from the 30- or 60-day period.

STANDING ORDERS OF THE JUVENILE COURT

Received Through January 15, 1992

Table of Standing Orders

STANDING ORDER 1–82. COURT HOURS

The hours during which the Divisions of the Juvenile Court Department shall be open for business to the general public shall be 8:30 a.m. to 4:30 p.m., Monday through Friday.

Adopted Feb. 3, 1982.

STANDING ORDER 1–84. JUVENILE COURT CASE RECORDS AND REPORTS

Applicable to All Divisions

All juvenile court case records and reports are confidential and are the property of the court.

Reports loaned to or copied for attorneys of record, or such other persons as the court may permit, shall be returned to the court after their use or at the conclusion of the litigation, whichever occurs first.

Said reports shall not be further copied or released without permission of the court.

Adopted May 8, 1984.

STANDING ORDER 1–88. TIME STANDARDS

Applicable to All Divisions

The time standards set forth below for the trial, settlement or other disposition of cases are applicable to cases entered in any division of the Juvenile Court Department on or after July 1, 1988:

Arraignment/Bail Determination: within the next court business day of entering any detention facility by any person under arrest.

Transfer Hearing Part A: within 30 days of complaint.

Transfer Hearing Part B: within 45 days of Part A.

Adjudication (Non-Jury) for Person in Detention: within 21 days of complaint or Transfer Hearing Part B.

Adjudication (Non-Jury) for Person not in Detention: within 30 days of complaint or Transfer Hearing Part B.

Adjudication (Jury): within 60 days of complaint * (including discovery and pre-trial conference).

Adjudication (Care and Protection): within 75 days of petition.** Pre-trial agreements do not satisfy this standard unless they go to judgment.

Determination to Issue Petition or Continue Information Assistance (CHINS): within 45 days of application.

* Date of docketing in the appellate session.

** Adjudication means full hearing and determination, whether or not children are in need of care and protection. It is recognized that there are situations where, in the opinion of the trial judge, an adjudication on the record may be contra-indicated. Such a determination should be deemed extraordinary and never routine. In such a case, adjudication may be satisfied by a close of the evidence to be taken and a finding of facts sufficient to warrant an adjudication. All parties must have rested their cases.

While the standard provides for adjudication within 75 days of petition, the case shall be called within 60 days of petition, at which time the sitting judge will read the investigator's report.

Adopted June 9, 1988, effective July 1, 1988.

§ 72. Continuing jurisdiction of courts in juvenile sessions; murder adjudication

Courts shall continue to have jurisdiction in their juvenile sessions over children who attain their seventeenth birthday pending a hearing under section sixty-one of this chapter, or adjudication of their cases, or pending hearing and determination of their appeals, or during continuances or probation, or after their cases have been placed on file; and if a child commits an offense prior to his seventeenth birthday, and is not apprehended until between his seventeenth and eighteenth birthdays, the court shall deal with such child in the same manner as if he had not attained his seventeenth birthday, and all provisions and rights applicable to a child under seventeen shall apply to such child; provided, however, that if said child is charged with a violation of murder in the first or second degree, manslaughter, or any violation of section twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five and is not apprehended until after his eighteenth birthday the court shall immediately conduct a hearing under the provisions of section sixty-one.

Courts shall continue to have jurisdiction in their juvenile sessions over persons who attain their eighteenth birthday pending the determinations allowed under section sixty-one of this chapter, or pending adjudication of their cases, or pending hearing and determination of their appeals, or during continuances or probation, or after their cases have been placed on file. Nothing herein shall authorize the commitment or [1] a person to the department of youth services after he has attained his nineteenth birthday, or give any court in its juvenile session any power or authority over a person after he has attained his nineteenth birthday.

If a child is adjudicated a delinquent by reason of having violated section one of chapter two hundred and sixty-five shall if the adjudication is for murder in the first degree such child shall be committed to a maximum confinement of twenty years. Such confinement shall be to the custody of the department of youth services in a secure facility until a maximum age of twenty-one years and thereafter shall be to the custody of the department of correction for the remaining portion of that commitment but in no case shall the confinement be for less than fifteen years and said child shall not be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven until said child has served fifteen years of said confinement. Thereafter said child shall be subject to the provisions of law governing the granting of parole permits by the parole board. If said child is adjudicated a delinquent by reason of having violated section one of chapter two hundred and sixty-five and if that adjudication is for murder in the second degree such child shall be committed to a maximum confinement of fifteen years. Such confinement shall be to the custody of the department of youth services in a secure facility until a maximum age of twenty-one years and thereafter to the custody of the department of correction for the remaining portion of that sentence, but in no case shall the confinement be for less than ten years and said child shall not be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven until said child has served ten years of said confinement. Thereafter said child shall be subject to the provisions of law governing the granting of parole permits by the parole board. Notwithstanding any other provisions of this section, if said adjudication is for manslaughter said child shall be committed to the custody of the department of youth services until he reaches twenty-one years of age.

Amended by St.1969, c. 838, § 23; St.1978, c. 478, § 65; St.1990, c. 267, § 5; St.1991, c. 488, § 7.

[1] So in enrolled bill; probably should read "of".

§ 72A. Proceedings upon apprehension after eighteenth birthday

The case of any person who commits an offense or violation prior to his seventeenth birthday, and who is not apprehended until after his eighteenth birthday, shall be heard and determined in accordance with sections fifty-three to sixty-three, inclusive. In any such case, the court, after a hearing shall determine whether there is probable cause to believe that said person committed the offense as charged, and shall, in its discretion, either order that the person be discharged, if satisfied that such discharge is consistent with the protection of the public, or shall order that the complaint be dismissed, if the court is of the opinion that the interests of the public require that such person be tried for such offense or violation instead of being discharged. Said hearing shall be held prior to, and separate from, any trial on the merits of the charges alleged.

Amended by St.1975, c. 840, § 2.

NOTE: contradictory provisions in underlined sections.

COMMONWEALTH OF MASSACHUSETTS

_____, SS. TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT
_____ DISTRICT COURT
DOCKET NO. _____

COMMONWEALTH

V.

_____
(A JUVENILE)

COMMONWEALTH'S MOTION FOR TRANSFER HEARING

Now comes the Commonwealth in the above-captioned matter and respectfully moves this Honorable Court, pursuant to G.L. c. 119, § 72A, and G.L. c. 119, § 61 to conduct a transfer hearing. In support of this request, the Commonwealth alleges that the defendant in this action:

1. Committed the offense between the ages of 14 and 17.

2. Was not apprehended until after his eighteenth birthday

3. That the interests of the public require that the defendant be tried for the offense instead of being discharged.

Respectfully Submitted
For the Commonwealth

_____
DISTRICT ATTORNEY

by: _____
Assistant District Attorney

_____
_____
_____

9831A

CAVEAT: Note that the actual proceedings in the "Patrick Find" case were conducted prior to the 1991 amendments to the statute. Therefore, the documents serve as an example of the pleadings to be used in all juvenile transfer cases except where the charge is first or second degree murder, manslaughter, armed assault with intent to murder or rob, rape, forcible rape of a child, kidnapping, or armed burglarly. For the latter charges, appropriate changes should be made in the documents, e.g. change the burden of proof from clear and convincing evidence to a preponderance of the evidence.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 92 JV 3000

COMMONWEALTH)
)
V.)
)
PATRICK FIND)

STIPULATION
AS TO
PROBABLE CAUSE

Now come the parties in the above entitled action and stipulate and agree to the following:

1. Patrick Find, born on December 11, 1975, was sixteen years of age at the time the acts complained of allegedly occurred.

2. The Commonwealth could present evidence from Mr. Alfred Abbott, born on February 29, 1920, that on November 14, 1991, while armed with a large barbeque fork and wearing a ski mask, forced his way into Abbott's home, repeatedly beat Abbott and stole cash and coins from Abbott's home.

3. The testimony of Mr. Abbott would support a finding by this Court of probable cause that Patrick Find committed the acts, which if committed by an adult, would constitute the crimes, punishable by imprisonment in the state prison, of Armed Robbery while Masked, Armed Assault in a Dwelling and Assault and Battery with a Dangerous Weapon on a Person over sixty-five, although Patrick Find does not admit the truth of the allegations against him.

4. Patrick Find has previously been committed to the Department of Youth Services.

Respectfully Submitted
For the Commonwealth

_____

_____
Assistant District Attorney
Lawrence District Court
381 Common Street
Lawrence, MA 01840
(508) 683-4570

_____
James Smith
Smith and Jones
100 Main Street
Salem, MA 01970
(508) 745-1234
Juvenile Attorney

Dated: _____
9833A

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 92 JV 3000

COMMONWEALTH)
)
V.)
)
PATRICK FIND)

STIPULATION
AS TO TRANSFER HEARING
PART B

Now come the parties in the above entitled action and stipulate and agree as follows:

1. Patrick Find, born on December 14, 1975, was sixteen years old at the time the acts allegedly occurred.

2. Probable cause exists that on November 14, 1991, Patrick Find committed the acts, which, if committed by an adult, would constitute the crimes, punishable by imprisonment in the state prison, of Armed Robbery while Masked, Armed Assault in a Dwelling and Assault and Battery with a Dangerous Weapon upon a Person Over Sixty-Five upon Mr. Alfred Abbott.

3. Patrick Find has previously been committed to the Department of Youth Services.

*4. The Commonwealth is unable to present clear and convincing evidence that Patrick Find, if found delinquent of the alleged offenses, is not amenable to rehabilitation within the juvenile system.

[*NOTE: If the offense alleged in one of the 8 designated offenses under G.L. c. 119, § 61, the burden of proof is preponderance of the evidence rather than clear and convincing evidence.]

Respectfully Submitted
For the Commonwealth

_____

_____

Assistant District Attorney
Lawrence District Court
381 Common Street
Lawrence, MA 01840
(508) 683-4570

_____

James Smith
Smith and Jones
100 Main Street
Salem, MA 01970
(508) 745-1234
Juvenile Attorney

Dated: _____
9833A

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 87 JV 3000

COMMONWEALTH)
)
V.)
PATRICK FIND)
(A JUVENILE))

FINDINGS
AND ORDER IN
TRANSFER HEARING

Upon stipulation of the parties and after argument by counsel, the Court hereby makes the following findings of fact and orders in the above captioned case:

1. Probable cause exists that on November 14, 1991,Patrick Find, born on December 11, 1975, did commit the acts, which, if committed by an adult, would constitute the crimes, punishable by imprisonment in the state prison, of Armed Robbery while Masked, Armed Assault in a Dwelling and Assault and Battery with a Dangerous Weapon on a Person over sixty-five upon Mr. William Abbott.

2. Patrick Find has previously been committed to the Department of Youth Services.

3. No clear and convincing evidence exists to prove that Patrick Find is not amenable to rehabilitation within the Juvenile system.

WHEREFORE, IT IS HEREBY ORDERED that this transfer hearing be dismissed and that any further proceedings against Patrick Find in this matter be conducted as delinquency proceedings in the Juvenile Session of this Court.

_____
John Doe Justice
Lynn District Court

Dated: _____

9985A

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 92 JV 3000

COMMONWEALTH)
)
V.)
)
PATRICK FIND)
(A JUVENILE))

COMMONWEALTH'S MOTION FOR PRODUCTION OF RECORDS

Now comes the Commonwealth in the above-captioned action and moves this Honorable Court to order production of all records described below concerning the juvenile Patrick Find, born December 11, 1975, from the following institutions:

1. Lynn School Department
All records of any kind including, but not limited to academic, attendance, guidance, disciplinary, special education (including any testing and CORE evaluational and educational plans.

2. Department of Youth Services:
All records of any kind specifically, but not limited to, in-take reports, staffing reports, activity logs, incident reports, monthly progress reports, educational reports, contracts, psychiatric or psychological evaluations and the entire file kept by caseworker Mark Prisco.

3. Lynn District Court Juvenile Probation Department
All records of any kind.

4. Human Resource Institute:
All records concerning a psychological evaluation completed on October 28, 1990.

5. North Shore Children's Hospital:
All records of treatment and evaluation of the juvenile specifically, but not limited to, evaluations completed on December 8, 1983, September 18, 1985, April 28, 1986 and October 23, 1988.

6. Greater Lynn Community Mental Health Center:
All records of any kind concerning treatment and evaluations of the juvenile specifically, but not limited to an evaluation completed on or about September 12, 1991.

7. Department of Social Services:
All records concerning investigation, treatment and services provided for the juvenile.

As grounds therefor, the Commonwealth states that the Court found that probable cause exists that the juvenile committed the crimes of Armed Robbery while Masked, Armed Assault in a Dwelling, and Assault and Battery with a Dangerous Weapon on a Person Over Sixty-Five upon Mr. Alfred Abbott.

At the Part B hearing of this transfer proceeding, scheduled on August 1, 1992, the Commonwealth must present evidence to this Court on the following two issues: whether the juvenile represents a danger to the community and whether he is amenable to rehabilitation within the juvenile system. G.L. c. 119, § 61.

The requested documentation is essential to the Commonwealth's effective and completed presentation of the evidence on the above issues relating to whether the juvenile should be transferred to the adult court.

Respectfully Submitted
For the Commonwealth

_____

_____

Assistant District Attorney
Lawrence District Court
381 Common Street
Lawrence, MA 011840
(508) 683-4570

9838A

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 92 JV 3000

COMMONWEALTH)
)
V.)
)
PATRICK FIND)
(A JUVENILE))

COMMONWEALTH'S MEMORANDUM IN SUPPORT OF MOTION TO PRODUCE DEPARTMENT OF SOCIAL SERVICE RECORDS

I. PROCEDURAL HISTORY

On November 15, 1991, Patrick Find, date of birth 12/14/75, was complained of in the Juvenile Session of the Lynn District Court for the crimes of Armed Robbery while Masked, Armed Assault in a Dwelling and Assault and Battery with a Dangerous Weapon on a Person Over Sixty-Five. The complaints alleged that these crimes occurred on November 14, 1991. The juvenile was arraigned on November 16, 1991. The Commonwealth filed a motion for the transfer of the juvenile to the adult court.

The Part A hearing was held on June 1, 1992. The Court found probable cause that the juvenile committed each of the acts charged, The Court must now hold a second hearing, Part B, to determine whether to retain the case for a hearing in the juvenile system or transfer the case on a new criminal complaint for trial in the adult court. The Part B hearing is scheduled on August 1, 1992.

II. ISSUE PRESENTED

WHETHER PATRICK FIND'S CLAIM OF PRIVILEGE SHOULD BLOCK THE PRODUCTION OF DEPARTMENT OF SOCIAL SERVICES RECORDS RELEVANT TO THIS TRANSFER PROCEEDING.

III. LEGAL ARGUMENT

A. THE JUVENILE PREVIOUSLY WAIVED ALL APPLICABLE CLAIMS OF PRIVILEGE.

The juvenile waived any possible claim of privilege concerning his DSS records when he allowed the psychiatrist evaluating him for the purpose of these transfer to review them. Although he was warned that such a review might be considered a waiver of any claims of privilege, the juvenile allowed his records to be produced to the psychiatrist.

Allowing that review constituted a waiver of claims of privilege for purposes of this entire proceeding. See Usen v. Usen, 359 Mass. 453, 457 (1971) (recognizing waiver of psychotherapist-patient privilege). Compare Allen v. Holyoke Hospital, 398 Mass. 372, 378 (1986) (instituting wrongful death action did not constitute waiver of social worker privilege). The Department of Social Services records should, therefore, be produced to the Commonwealth and to the Court as a result of the juvenile's prior waiver.

B. PRIVILEGE CLAIMED UNDER G.L. c. 112, § 135 MUST YIELD TO THE REQUIREMENTS OF G.L. c. 119, § 61.

Should this Court find that the juvenile has not waived any claim of privilege relating to this DSS records, that privilege must yield to the requirements of G.L. c. 119, § 61 . See Allen v. Holyoke Hospital, Id. at 381 (party seeking materials arguable protected by FIPA must show that the collective public interest in disclosure warrants an invasion of the subject's right to privacy). Here, the public will best be served by allowing the Commonwealth access to the records it needs to effectively present its case during the Part B hearing.

At the Part B hearing, the Commonwealth must present by "clear and convincing evidence" that the juvenile poses a signification danger to the public and that he is not amenable to rehabilitation within the juvenile system. Two Juveniles v. Commonwealth, 381 Mass. 736, 740 (1980). In order to meet its burden, the Commonwealth must submit evidence pertaining to eight specific factors delineated in G.L. c. 119, § 61: "(a) the nature, circumstances and seriousness of the offense; (b) the child's court and delinquency record; (c) the child's age and maturity; (d) the family, school, and social history of the child; (e) success or lack of success of any past treatment efforts of the child (f) the nature of services available through the juvenile justice system; (g) the adequate protection of the public; (h) and the likelihood of rehabilitation of the child." Patrick Find's DSS records clearly pertain to several of the factors which the Commonwealth must attempt to address during the Part B hearing.

When the Supreme Judicial Court was confronted with a similar conflict between the psychotherapist-patient privilege and the need for the Government to examine patient records under the Medicaid False Claim Act, it created an exception to the privilege no broader that necessary to allow for such review. See Commonwealth v. Kobrin, 395 Mass. 284, 293-295 (1985). The possible conflict between G.L. c. 112, § 135 (the social worker-client privilege) must be resolved in a similar fashion. Patrick Find's claim of privilege must yield to the need for information to determine whether Patrick Find is amenable to rehabilitation within the juvenile system. The Court could certainly preclude the records for any other purpose. Moreover, the evidentiary standard of fundamental

fairness which governs Part B proceedings will protect the juvenile from the introduction of fundamentally unfair evidence. See Commonwealth v. Watson, 388 Mass. 536, 539-540 (1983). Production of records, therefore, should be allowed to allow the Commonwealth to present to the Court evidence essential to the Court's final determination of whether the juvenile should be transferred.

C. IF FIND'S CLAIM OF PRIVILEGE APPLIES, THE RECORDS SHOULD BE REVIEWED IN CAMERA TO ALLOW PRODUCTION OF DOCUMENTS NOT PROTECTED.

Finally, should this Court determine that the juvenile's claim of privilege has not been waived, and does not yield to G.L. c. 119, § 61, the Commonwealth requests an in camera review of DSS records to determine what protections are not protected by the privilege granted in G.L. c. 112, § 135. For example, information acquired through personal observation rather than client communications, of social workers may be disclosed. Allen v. Holyoke Hospital, Id. at 378. In addition, communication that reveal the contemplation or commission of a crime or harmful act are not protect. G.L. c. 112, § 135 (b). Finally, information gathered in the investigation of child abuse or to initiate a care and protection petition is exempt from the privilege. G.L. c. 112, § 135 (d), (f). See Commonwealth v. O'Brien, 27 Mass. App. Ct. 184 (1989). An in camera review will ensure that records to which the Commonwealth is entitled will be produced.

IV. CONCLUSION

The Commonwealth must be allowed access to the Department of Social Service records to prepare an effective and complete presentation for the Court at the Part B hearing of this transfer proceeding. Find previously waived all claims of privilege when he allowed an earlier review of his records by the psychiatrist. If the claim of privilege was not waived, that claim must yield to the requirements of G.L. c. 119, § 61. Should the Court find that Find's claim of privilege remains viable in spite of the statutory requirements, the Court must conduct an in camera review of Find's records to ensure the Commonwealth's and the Courts access to information that is not privileged.

Respectfully Submitted
For the Commonwealth

_____

_____

Assistant District Attorney
Lawrence District Court
381 Common Street
Lawrence, MA 01840
(508) 683-4570

9843A

Handout 20

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

TRIAL COURT OF THE
COMMONWEALTH
DISTRICT COURT DEPARTMENT
LOWELL DISTRICT COURT
No. 92-

COMMONWEALTH

v.

COMMONWEALTH'S MOTION FOR A DIAGNOSTIC STUDY

Now comes the Commonwealth in the above entitled matter and moves this Honorable Court to refer the aforesaid juvenile to the Department of Youth Services, a court clinic, or the Department of Mental Health for a diagnostic study during the pendancy of this action, as provided in M.G.L. Chapter 119, section 68A, or for such other orders in this regard as the Court may deem appropriate under the law and the facts of this case.

Respectfully Submitted
For the Commonwealth,

THOMAS F. REILLY
DISTRICT ATTORNEY

by: _____

Anne M. Cosco
Assistant District Attorney
Lowell Regional Office
44 Church Street
Lowell, MA 01852
(617) 458-4440

Dated: Aug. 7, 1992

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 92 JV 3000

COMMONWEALTH)
)
V.)
)
PATRICK FIND)
(A JUVENILE))

ORDER TO PRODUCE
DEPARTMENT OF SOCIAL SERVICES
RECORDS

The Department of Social Services is hereby ordered to comply with the subpoena duces tecum issued by the Commonwealth and served upon the Department of Social Services in the above-captioned matter. Alternatively, the Department of Social Services is hereby ordered to appear on August 1, 1992 at 9:00 a.m. in the Lynn District Court to show cause why such records should not be produced.

_____
John Doe, Justice
Lynn District Court

Dated: _____

9841A

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 92 JV 3000

COMMONWEALTH)
)
V.)
)
PATRICK FIND)
(A JUVENILE))

JUDICIAL ORDER
FOR PRODUCTION OF
MEDICAL RECORDS

The juvenile Patrick Find is currently charged with delinquency and is alleged to have committed Armed Robbery while Masked, Armed Assault in a Dwelling and Assault and Battery with a Dangerous Weapon on a Person Over Sixty-Five. The Court is conducting hearings to determine whether he will be treated as a juvenile or transferred to the adult court.

In order to make this determination, the Court requires all information regarding the juvenile's background and treatment history. Therefore, it is ordered that the North Shore Children's Hospital produce all records pertaining to the treatment, evaluation and/or history of Patrick Find, date of birth 12/14/75, at the Lynn District Court on or before September 15, 1992 at 9:00 a.m.

_____
John Doe, Justice
Lynn District Court

Dated: _____

9841A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

TRIAL COURT OF THE
COMMONWEALTH
DISTRICT COURT DEPARTMENT
LOWELL DISTRICT COURT

COMMONWEALTH

v.

MOTION OF THE COMMONWEALTH FOR DISCLOSURE OF DIAGNOSTIC AND/OR PROBATION RECORDS

Now comes the Commonwealth in the above entitled matter and moves this Honorable Court to order production by the Probation Department, the Department of Youth Services, the Department of Social Services, the Department of Mental Health, the Billerica School Department and the Shawsheen Valley Technical High School to the Commonwealth of all reports and/or evaluations done of and presently within the custody and/or control of said Department. As grounds therefor, the Commonwealth notes its obligation to present evidence at the Part B hearing to be held in this matter pusuant to M.G.L. Chapter 119, section 61.

The Commonwealth further moves that said records and/or evaluations be produced no later than August 21, 1992.

Respectfully Submitted
For the Commonwealth,

THOMAS F. REILLY
DISTRICT ATTORNEY

by: _____

Anne M. Cosco
Assistant District Attorney
Lowell Regional Office
44 Church Street
Lowell, MA 01852
(508) 458-4440

Dated: Aug. 7, 1992

Handout 24

THE COMMONWEALTH OF MASSACHUSETTS

OFFICE OF THE

DISTRICT ATTORNEY FOR MIDDLESEX COUNTY

CAMBRIDGE 02141

THOMAS F. REILLY
DISTRICT ATTORNEY

August 7, 1992

Keeper of Records
Juvenile Probation Department
Lowell District Court
41 Hurd Street
Lowell, MA 01852

Re: Commonwealth v. _____
Ind. No. 92-

Dear Sir/Madam:

Enclosed is a subpoena ordering production of the Shawsheen Valley Technical High School's records pertaining to , date of birth .

It will not be necessary for you to appear in court if you simply mail or deliver a copy of the requested records to:

Cheryl Willard
Juvenile Clerk
Lowell District Court
41 Hurd St.
Lowell, Mass. 01852

Please sign and forward with the records the attached affidavit.

The envelope containing the records should indicate that the enclosed records pertain to the case of Commonwealth v. , Ind. No. 92- .

If you find that you have no records pertaining to this juvenile or if you have any questions regarding the subpoena, please feel free to contact me at (508) 458-4440.

Sincerely,

Anne M. Cosco
Assistant District Attorney
Lowell Regional Office
40 Church St.
Lowell, Mass. 01852
(508) 458-4440

(0009R)

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

TRIAL COURT OF THE
COMMONWEALTH
DISTRICT COURT DEPARTMENT
LOWELL DISTRICT COURT
92

COMMONWEALTH

v.

AFFIDAVIT OF CUSTODIAN OF RECORDS

I am the custodian of the annexed records for the Shawsheen Valley Technical High School.

I certify that said records are true and complete.

Signed under the pains and penalties of perjury.

_____
Custodian of Records

Dated: _____

(0009R)

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

DISTRICT COURT DEPARTMENT
LYNN DIVISION
JUVENILE SESSION
DOCKET NO. 87 JV 3000

COMMONWEALTH)
)
V.)
)
PATRICK FIND)
(A JUVENILE))

COMMONWEALTH'S MOTION FOR A PSYCHIATRIC EXAMINATION OF THE JUVENILE

Now comes the Commonwealth in the above entitled action and requests that the Court order the juvenile, Patrick Find, to undergo a psychiatric examination by a psychiatrist selected by the Commonwealth.

As reason therefor, the Commonwealth states that the Court conducted the "Part A" portion of this transfer hearing and made a determination that probable cause exists to believe that the juvenile has committed the crimes of Armed Robbery while Masked, Armed Assault in a Dwelling and Assault and Battery on a Person Over Sixty-Five. The second part of the transfer hearing, "Part B", is scheduled for hearing beginning on October 1, 1989.

At the conclusion of "Part B", the Court must decide whether or not the juvenile is amenable to rehabilitation within the juvenile system. M.G.L. c. 119, § 61. In order to make that determination, the court shall consider, along with other factors, the following: the juvenile's social history, adequate protection of the public, the nature of any past treatment efforts for the juvenile, and the likelihood of rehabilitation of the juvenile.

The requested examination will provide valuable information concerning each of those factors to assist the Court in deciding whether the juvenile should be retained within the juvenile system or transferred as an adult offender.

Respectfully Submitted
For the Commonwealth

by: _____

Assistant District Attorney
381 Common Street
Lawrence, MA 01840

9982A

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1978 Act. House Report No. 95–1137 and House Conference Report No. 95–1753, see 1978 U.S.Code Cong. and Adm.News, p. 4971.

Codifications

A prior section 1232f was renumbered by Pub.L. 95–561, § 1231(a)(2), and is now set out as section 1221e–1a of this title.

Effective Dates

1978 Act. Section effective with respect to appropriations for fiscal year 1980 and subsequent fiscal years, see section 1261 of Pub.L. 95–561, set out as a note under section 1232c of this title.

LIBRARY REFERENCES

American Digest System

Access to records, see Records ⇐30 to 35.

Encyclopedias

Access to records, see C.J.S. Records §§ 35 to 41.

1979 Act. Amendment by Pub.L. 96–46 effective Oct. 1, 1978, see section 8 of Pub.L. 96–46, set out as a note under section 240 of this title.

WESTLAW ELECTRONIC RESEARCH

Records cases: 326k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(I) financial records of the parents of the student or any information contained therein;

(II) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(III) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

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(B) The term "education records"

(I) records of instructional, s

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the student, and are not available

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sional of the student's choice.

(5)(A) For the purposes of this sec

mation" relating to a student include

name, address, telephone listing, date

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(B) Any educational agency or inst

ry information shall give public notic

tion which it has designated as such

(I) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to

each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 1221e-3(c) of this title), or (iv) State educational authorities under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering

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student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided,* That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than

those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(c) Surveys or data-gathering activities; regulations

The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights

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(e) Informing parents

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(f) Enforcement; term

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Aug. 21, 1974, 88 Stat
1974, 88 Stat. 1858; P
96–88, Title III, § 301,
99–514, § 2, Oct. 22, 1

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Revision Notes and Legi

1974 Acts. House Re
and Senate Conferenc
93–1026, see 1974 U.S.C
Adm.News, p. 4093.

House Report No. 93–
Conference Report No
1974 U.S.Code Cong. an
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1979 Acts. House Re
see 1979 U.S.Code Cong.
p. 819.

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(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department of Education for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(Pub.L. 90–247, Title IV, § 438, as added Pub.L. 93–380, Title V, § 513(a), Aug. 21, 1974, 88 Stat. 571, and amended Pub.L. 93–568, § 2(a), Dec. 31, 1974, 88 Stat. 1858; Pub.L. 96–46, § 4(c), Aug. 6, 1979, 93 Stat. 342; Pub.L. 96–88, Title III, § 301, Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. House Report No. 93–805 and Senate Conference Report No. 93–1026, see 1974 U.S.Code Cong. and Adm.News, p. 4093.

House Report No. 93–1056 and Senate Conference Report No. 93–1409, see 1974 U.S.Code Cong. and Adm.News, p. 6779.

1979 Acts. House Report No. 96–338, see 1979 U.S.Code Cong. and Adm.News, p. 819.

Senate Report No. 96–49 and House Conference Report No. 96–459, see 1979 U.S.Code Cong. and Adm.News, p. 1514.

Amendments

1986 Amendment. Subsec. (b)(1)(H). Pub.L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "Title 26" thus requiring no change in text.

1979 Amendment. Subsec. (b)(5). Pub.L. 96–46 added subsec. (b)(5).

1974 Amendment. Subsec. (a)(1). Pub.L. 93–568, § 2(a)(1)(A) to (C), (2)(A) to (C), (3), designated existing par. (1) as subpar. (A), and in subpar. (A) as so designated, substituted reference to educational agencies and institutions for reference to state or local educational agencies, institutions of higher education, community colleges, schools, agencies offering preschool programs, and other educational institutions, substituted the generic term education records for the enumeration of such records, and extended the right to inspect and review such records to parents of children who have been in attendance, and added subpars. (B) and (C).

Subsec. (a)(2). Pub.L. 93–568, § 2(a)(4), substituted provisions making the availability of funds to educational agencies and institutions conditional on the granting of an opportunity for a hearing to parents of students who are or have been in attendance at such institution or agency to challenge the contents of the student's education records for provisions granting the parents an opportunity for such hearing, and added provisions authorizing insertion into the records a written explanation of the parents respecting the content of such records.

Subsec. (a)(3). Pub.L. 93–568, § 2(a)(1)(G), added subsec. (a)(3).

Subsec. (a)(4), (5). Pub.L. 93–568, § 2(a)(2)(F), added subsec. (a)(4) and (5).

Subsec. (a)(6). Pub.L. 93–568, § 2(a)(5), added subsec. (a)(6).

Subsec. (b)(1). Pub.L. 93–568, § 2(a)(1)(D), (2)(D), (3), (8)(A) to (C), (10)(A), in provisions preceding subpar. (A), substituted "educational agency or institution which has a policy of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section)" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of permitting the release of personally identifiable records or files (or personal information contained therein)", in subpar. (A), substituted "educational agency, who have been determined by such agency or institution to have" for "educational agency who have", in subpar. (B), substituted "the student seeks or intends to" for "the student intends to", in subpar. (C), substituted reference to "section 408(c)" for reference to "section 409 of this Act" which for purposes of codification has been translated as "section 1221e–3(c) of this title", and added subpars. (E) to (I).

Subsec. (b)(2). Pub.L. 93–568, § 2(a)(1)(E), (2)(E), substituted "educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b)(1) of this section".

Subsec. (b)(3). Pub.L. 93–568, § 2(a)(8)(D), substituted "information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements" for "data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected".

Subsec. (b)(4). Pub.L. 93–568, § 2(a)(9), substituted provisions that each educational agency or institution maintain a record, kept with the education records of each student, indicating individuals, agencies, or organizations who obtained access to the student's record and the legitimate interest in obtaining such information, that such record of access shall be available only

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Subsec. (e). Pub.L. 9
§ 2(a)(1)(F), substituted "to any
cational agency or institution
such agency or institution" for "
the recipient of such funds".

Subsec.(g). Pub.L. 93–568, § 2
(10)(B), struck out reference to §§
and 1232f of this title and added
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Education of handicapped
School records of homele

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Administrative Law
Privacy provisions, generally,
Privacy rights of parents and
American Digest System
Access to records, see Record
Federal remedies for actions
198.
Records and transcripts, see C
Encyclopedias
Access to records, see C.J.S. R
Federal remedies for actions
§§–92, 114 to 125.
Students in general, see C.J.S.
Law Reviews
Employee privacy rights. Th
B.J. 1104 (1985).
Financial record privacy—wh
depository institution.
Privacy. Symposium, 1985, 1
Rights of students in need of
(1987).

Effective Dates

1990 Act. Amendment by Pub.L. 101–589 effective on Nov. 16, 1990, except as otherwise provided, see section 731 of Pub.L. 101–589, set out as a note under section 5301 of this title.

§ 1232. Regulations

NOTES OF DECISIONS

3. Uniformity of application

Chula Vista City School Dist. v. Bennett, 824 F.2d 1573 [main volume] certiorari denied 108 S.Ct. 774, 484 U.S. 1042, 98 L.Ed.2d 861.

§ 1232g. Family educational and privacy rights

[See main volume for text of (a)]

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

[See main volume for text of (1) to (5)]

(6) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime.

[See main volume for text of (c) to (g)]

(As amended Pub.L. 101–542, Title II, § 203, Nov. 8, 1990, 104 Stat. 2385.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Act. House Report No. 101–518, see 1990 U.S. Code Cong. and Adm. News, p. 3363.

Amendments

1990 Amendment. Subsec. (b)(6). Pub.L. 101–542, § 203, added par. (6).

NOTES OF DECISIONS

Access to judicial proceedings 12

3. Educational records

Family Educational Rights and Privacy Act did not prohibit disclosure of records specifying reasons for teacher certificate revocations; that statute protects student records, not teacher records. Brouillet v. Cowles Pub. Co., Wash.1990, 791 P.2d 526, 114 Wash.2d 788.

7. Procedure for access to records

School superintendent did not violate established school district policy and complied with federal law when he refused to release to citizen names and addresses of school district students and names of their parents, though there was evidence that district had "Special Education Plan," which provided that directory information, including student's name, address, and telephone number, could be disclosed without parental consent, where that plan did not contain any provisions concerning public notice or comment by parents, as required by federal law. Brent v. Paquette, N.H.1989, 567 A.2d 976.

10. Private right of action

No private right of action exists under Family Educational Rights and Privacy Act. Tarka v. Franklin, C.A.5 (Tex.) 1989, 891 F.2d 102, certiorari denied 110 S.Ct. 1809, 108 L.Ed.2d 940, rehearing denied 110 S.Ct. 2605, 110 L.Ed.2d 285.

12. Access to judicial proceedings

Any right of public access, whether based on First Amendment or common law, would not have entitled newspaper publisher to attend proceeding on school district's motion to preliminarily enjoin handicapped student from attending school pending exhaustion of administrative remedies to challenge expulsion; restricting access would protect confidentiality of information under Family Educational Rights and Privacy Act; and there was strong public policy favoring special protection of minors where their privacy and sensitive and possibly stigmatizing matters were concerned. Webster Groves School Dist. v. Pulitzer Pub. Co., C.A.8 (Mo.) 1990, 898 F.2d 1371.

12. Students within section

Person whose application to graduate school of university has been rejected, but who nevertheless audited some classes at university, was not "student" as defined in Family Educational Rights

and Privacy Act. Tarka v. Franklin, C.A. 1989, 891 F.2d 102, certiorari denied 1

1974 Amendment. Subsec. (a)(1). Pub.L. 93–568, § 2(a)(1)(A) to (C), (2)(A) to (C), (3), designated existing par. (1) as subpar. (A), and in subpar. (A) as so designated, substituted reference to educational agencies and institutions for reference to state or local educational agencies, institutions of higher education, community colleges, schools, agencies offering preschool programs, and other educational institutions, substituted the generic term education records for the enumeration of such records, and extended the right to inspect and review such records to parents of children who have been in attendance, and added subpars. (B) and (C).

Subsec. (a)(2). Pub.L. 93–568, § 2(a)(4), substituted provisions making the availability of funds to educational agencies and institutions conditional on the granting of an opportunity for a hearing to parents of students who are or have been in attendance at such institution or agency to challenge the contents of the student's education records for provisions granting the parents an opportunity for such hearing, and added provisions authorizing insertion into the records a written explanation of the parents respecting the content of such records.

Subsec. (a)(3). Pub.L. 93–568, § 2(a)(1)(G), added subsec. (a)(3).

Subsec. (a)(4), (5). Pub.L. 93–568, § 2(a)(2)(F), added subsec. (a)(4) and (5).

Subsec. (a)(6). Pub.L. 93–568, § 2(a)(5), added subsec. (a)(6).

Subsec. (b)(1). Pub.L. 93–568, § 2(a)(1)(D), (2)(D), (3), (8)(A) to (C), (10)(A), in provisions preceding subpar. (A), substituted "educational agency or institution which has a policy of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section)" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of permitting the release of personally identifiable records or files (or personal information contained therein)", in subpar. (A), substituted "educational agency, who have been determined by such agency or institution to have" for "educational agency who have", in subpar. (B), substituted "the student seeks or intends to" for "the student intends to", in subpar. (C), substituted reference to "section 408(c)" for reference to "section 409 of this Act" which for purposes of codification has been translated as "section 1221e–3(c) of this title", and added subpars. (E) to (I).

Subsec. (b)(2). Pub.L. 93–568, § 2(a)(1)(E), (2)(E), substituted "educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b)(1) of this section".

Subsec. (b)(3). Pub.L. 93–568, § 2(a)(8)(D), substituted "information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements" for "data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected".

Subsec. (b)(4). Pub.L. 93–568, § 2(a)(9), substituted provisions that each educational agency or institution maintain a record, kept with the education records of each student, indicating individuals, agencies, or organizations who obtained access to the student's record and the legitimate interest in obtaining such information, that such record of access shall be available only to parents, school officials, and their assistants having responsibility for the custody of such records, and as a means of auditing the operation of the system, for provisions that with respect to subsecs. (c)(1), (c)(2), and (c)(3) of this section, all persons, agencies, or organizations desiring access to the records of a student shall be required to sign forms to be kept with the records of the student, but only for inspection by the parents or the student, indicating specifically the legitimate educational or other interest of the person seeking such information, and that the form shall be available to parents and school officials having responsibility for record maintenance as a means of auditing the operation of the system.

Subsec. (e). Pub.L. 93–568, § 2(a)(1)(F), substituted "to any educational agency or institution unless such agency or institution" for "unless the recipient of such funds".

Subsec.(g). Pub.L. 93–568, § 2(a)(7), (10)(B), struck out reference to §§ 1232c and 1232f of this title and added provisions that except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

Effective Dates

1974 Acts. Section 2(b) of Pub.L. 93–568 provided that: "The amendments made by subsection (a) [amending this section] shall be effective, and retroactive to, November 19, 1974."

Section 513(b)(1) of Pub.L. 93–380 provided that: "The provisions of this section [classified to this section and provisions set out as a note under section 1221 of this title] shall become effective ninety days after the date of enactment [Aug. 21, 1974] of section 438 of the General Education Provisions Act [this section]."

Transfer of Functions

"Department of Education" was substituted for "Department of Health, Education, and Welfare" in subsec. (g) pursuant to sections 301 and 507 of Pub.L. 96–88, which is classified to sections 3441 and 3507 of this title and which transferred functions and offices (relating to education) of the Department of Health, Education, and Welfare to the Department of Education.

CROSS REFERENCES

Privacy rights accorded information collected regarding—
Education of handicapped, see 20 USCA § 1417.
School records of homeless youth, see 42 USCA § 11432.

LIBRARY REFERENCES

Administrative Law
Privacy provisions, generally, see West's Federal Practice Manual § 14200 et seq.
Privacy rights of parents and students, see 34 C.F.R. § 99.1 et seq.

American Digest System
Access to records, see Records ⇐30 to 67.
Federal remedies for actions under color of state law, see Civil Rights ⇐196 to 198.
Records and transcripts, see Colleges and Universities ⇐9.40.

Encyclopedias
Access to records, see C.J.S. Records §§ 35 to 40.
Federal remedies for actions under color of state law, see C.J.S. Civil Rights §§ 92, 114 to 125.
Students in general, see C.J.S. Colleges and Universities § 24.

Law Reviews
Employee privacy rights. Thomas J. Barnes and John Patrick White, 64 Mich. B.J. 1104 (1985).
Financial record privacy—what are and what should be rights of customer of depository institution. Dan L. Nicewander, 16 St. Mary's L.J. 601 (1985).
Privacy. Symposium, 1985, 18 John Marshall L.Rev. 815.
Rights of students in need of special education. Diana Pullin, 66 Mich.B.J. 30 (1987).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].
Colleges and universities cases: 81k[add key number].
Records cases: 326k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

1. Educational institutions within section

Michigan State University, because it is a recipient of federal funds, falls within purview of this section. Kestenbaum v. Michigan State University, 1980, 294 N.W.2d 228, 97 Mich.App. 5, affirmed 327 N.W.2d 783, 414 Mich. 510.

2. Directory information

Where college had chosen not to include students' names and addresses in classification of "directory information," college properly refused requested disclosure of that information pursuant to both this section and State Freedom of Information Law, McKinney's Public Officers Law § 87, subd. 2. Krauss v. Nassau Community College, 1983, 469 N.Y.S.2d 553, 122 Misc.2d 218.

Since notice published in student handbook and Michigan State University Bulletin concerning release of student information complied with requirements of regulations promulgated pursuant to this section governing "directory information," requiring University to release computer tape containing student's names and addresses was not contrary to this section. Kestenbaum v. Michigan State University, 1980, 294 N.W.2d 228, 97 Mich.App. 5, affirmed 327 N.W.2d 783, 414 Mich. 510.

3. Educational records

Records maintained by intercollegiate athletic conference as to amount of money member institutions dispersed to student athletes during school year were not "educational records" required to be closed to public under this section. Arkansas Gazette Co. v. Southern State College, 1981, 620 S.W.2d 258, 273 Ark. 248, appeal dismissed, certiorari denied 102 S.Ct. 1416, 455 U.S. 931, 71 L.Ed.2d 640.

4. Independent sources of information

In connection with letter printed in official high school student newspaper, which stated, among other things, that a particular student had been suspended from school, school official, being sued by former editor in chief and present assistant editor of student newspaper on ground that his action of seizing newspaper violated U.S.C.A. Const. Amend. 1, mistakenly relied upon this section, which prevents disclosure by a school district of certain information about students which is deemed to be confidential, since, although suspension information in such letter would fall within scope of this section if source of information had been school records, prohibitions of this section did not extend to information which was derived from a source independent of school records. Frasca v. Andrews, D.C.N.Y.1979, 463 F.Supp. 1043.

5. Persons entitled to access

Exception to confidentiality provision of Family Educational and Privacy Rights Act [General Education Provisions Act, § 438(b)(2)(B), as amended, 20 U.S.C.A. § 1232g(b)(2)(B)], which allows state and local educational officials access to records necessary in connection with audit and evaluation of any federally or state supported educational program, does not create two classifications of exempt officials: all state officials and local educational officials. Board of

Regan, 1986, 500 N.Y.S.2d 978, 131 Misc.2d 514.

Where petitioner did not offer any explanation or reason for request that college provide names and addresses of all students, petitioner did not demonstrate a need for the requested disclosure, and thus was not entitled to court-ordered access pursuant to this section. Krauss v. Nassau Community College, 1983, 469 N.Y.S.2d 553, 122 Misc.2d 218.

Where natural father and mother were living separate and apart under terms of separation agreement providing for custody of child in the mother with rights of visitation to the father and parents were not divorced nor was there any court order affecting custody, visitation or support, natural father was entitled to inspect and review education records of child, a fifth grade student at public elementary school, even though natural mother had signed statement indicating that she did not wish or authorize school district to transmit school records to the natural father. Page v. Rotterdam-Mohonasen Central School Dist., 1981, 441 N.Y.S.2d 323, 109 Misc.2d 1049.

6. Consent to disclosure

Where student data constitutes both "personal identifiable information" and "direct information" within meaning of regulations implementing this section, no written consent to disclosure of such matter is required so long as no purely personal information is released, an example being names and addresses only. Kestenbaum v. Michigan State University, 1980, 294 N.W.2d 228, 97 Mich.App. 5, affirmed 327 N.W.2d 783, 414 Mich. 510.

7. Procedure for access to records

State university's regulation providing that no person be given credit or other official recognition for work completed until all charges had been paid to the university was not inconsistent with this section, which gives to each educational agency or institution the right to establish appropriate procedures for the granting of a request by parents for access to the educational records of their children. Spas v. Wharton, 1980, 431

8. Notice of compliance with judicial order

Provision of this section that no funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in educational records unless furnished in compliance with judicial order, upon condition that parents and students are notified of all such orders in advance, relates to "privacy" and rather than establish a privilege would appear to establish procedures for advising or notifying a person what educational records pertaining to said person are to be released pursuant to judicial order. Reeg v. Fetzer, D.C.Okl.1976, 78 F.R.D. 34.

If subpoenaed documents in relation to placing children with handicapping conditions in specialized classes were considered to be in a personally identifiable form, this section placed the burden on the educational agency or institution, and not on the party who subpoenaed the documents, to make reasonable effort to notify students or parents of the subpoena in advance of compliance therewith. Mattie T. v. Johnston, D.C. Miss.1976, 74 F.R.D. 498.

Requirement of the section that school district give notice to parents and students of disclosure, under court order, of school records and of opportunity of students or parents to contest disclosure did not create unreasonable administrative burden upon district, inasmuch, as under Department of Health, Education and Welfare guidelines, district would be only required to make reasonable effort to notify parents of impending disclosure, notice could be effected by publication or other reasonable method chosen by district and, since case was one to vindicate civil rights, cost or inconvenience was less weighty factor than in other cases. Rios v. Read, D.C.N.Y.1977, 73 F.R.D. 589.

In action in which teacher sued city, its board of education and two pupils and their parents to recover damages for injuries allegedly sustained when pupils attacked him in his classroom, court would not order release of medical and personal records of the students prior to their being given notice, independently

complaint, specifically advising them of proposed release of records; failure to appear to defend suit did not absolve teacher of giving them notice of application to compel production of their records. Sauerhof v. City of New York, 1981, 438 N.Y.S.2d 982, 108 Misc.2d 805.

9. Disclosure orders

When disclosure of public school students' records to private party is directed by court order, disclosure order should require that recipients of records avoid revealing data to individuals unconnected with litigation and destroy data when it is no longer needed, but it is not required that names of students be redacted from records and neutral identifying information be substituted. Rios v. Read, D.C.N.Y.1977, 73 F.R.D. 589.

Disclosure of certain standardized reading and mathematics test scores, in a "scrambled" order and with names deleted, would protect privacy of students, provide parent with records which she sought, and impose no onerous burden upon school district; therefore, trial court erred in failing to order disclosure of test scores on ground that in their existing order the scores would be identifiable to some students through correlation to alphabetical list. Kryston v. Board of Ed., East Ramapo Central School Dist., 1980, 430 N.Y.S.2d 688, 77 A.D.2d 896.

10. Private right of action

Family Educational Rights and Privacy Act itself does not give rise to private cause of action. Fay v. South Colonie Cent. School Dist., C.A.2 (N.Y.) 1986, 802 F.2d 21.

This section giving students and their parents right to access to student educational records does not say that private remedy is given, but rather, enforcement is solely in hands of Secretary, and under such circumstances, no private cause of action arises by inference. Girardier v. Webster College, C.A.Mo.1977, 563 F.2d 1267.

No private federal cause of action existed against university under Family Educational Rights and Privacy Act [20 U.S.C.A. § 1232g] for denial of him access to educational records. Smith v. Duquesne University, D.C.Pa.1985, 612 F.Supp. 72, affirmed 787 F.2d 583.

No private right of action existed under this section arising out of rejection of student for inclusion in an honor society. Price v. Young, D.C.Ark.1983, 580 F.Supp. 1.

Buckley Amendment, section 513 of Pub.L. 93-380, which amended this section, does not forbid disclosure of information concerning a student and therefore does not forbid opening to public a faculty meeting at which such matters are discussed; such amendment simply cuts off federal funds otherwise available to an educational institution which has a policy or practice of permitting release of such information. Student Bar Ass'n Bd. of Governors, of School of Law, University of North Carolina at Chapel Hill v. Byrd, 1977, 239 S.E.2d 415, 293 N.C. 594.

11. Persons entitled to maintain action

Teacher was employee of school district, not student with respect to whom educational agency or institution maintained education records, and her college transcript was not education record subject to protection from disclosure pursuant to Family Educational Rights and Privacy Act, and thus teacher did not fall within class of persons for whose benefits Act was created and Act bestowed no enforceable rights, privileges or immunities which she could enforce. Klein Independent School Dist. v. Mattox, C.A.5 (Tex.) 1987, 830 F.2d 576, certiorari denied 108 S.Ct. 1473, 99 L.Ed.2d 702.

§ 1232h. Protection of pupil rights

(a) Inspection by parents or guardians of instructional material

All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for

ans of the children engaged in such program or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.

(b) Psychiatric or psychological examinations, testing, or treatment

No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

(1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or his family;

(3) sex behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;

(6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

(Pub. L. 90-247, Title IV, § 439, as added Pub. L. 93-380, Title V, § 514(a), Aug. 21, 1974, 88 Stat. 574, and amended Pub. L. 95-561, Title XII, § 1250, Nov. 1, 1978, 92 Stat. 2355.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Act. House Report No. 93-805 and Senate Conference Report No. 93-1026, see 1974 U.S.Code Cong. and Adm.News, p. 4093.

1978 Act. House Report No. 95-1137 and House Conference Report No. 95-1753, see 1978 U.S.Code Cong. and Adm.News, p. 4971.

Amendments

1978 Amendment. Pub.L. 95-561 designated existing provisions as subsec. (a)

Effective Dates

1978 Act. Amendment by Pub.L. 95-561 effective Oct. 1, 1978, see section 1530(a) of Pub.L. 95-561, set out as a note under section 1221-3 of this title.

1974 Act. Section 514(b) of Pub.L. 93-380 provided that: "The amendment made by subsection (a) [enacting this section] shall be effective upon enactment of this Act [Aug. 21, 1974]."

BOSTON JUVENILE COURT

"TRANSFER HEARING"

(Preliminary Report)

DATE: .....

NAME: ..... AGE: .....

ADDRESS: .....

COMPLAINT: .....PROBATION OFFICER: .....

BRIEF DESCRIPTION OF OFFENSE:

(Describe what offender is accused of)

SOCIAL INVESTIGATION:

1. SUMMARY OF HOME

(In addition to face sheet data, present a picture of a family life, i.e., the general family atmosphere; the way parents handle and regard the children, the discipline used and the quality of relationships among family members. Describe general physical conditions of the home as well as other pertinent data.)

2. SUMMARY OF OFFENDER:

(Give brief developmental history, sibling interaction with family members. Include health factors, arrest and activities, religious affiliations, and other important related matters.)

3. EDUCATIONAL BACKGROUND

(Include school history and any significant data as to behavior, attitudes, etc. Copy of recent report material, comments by teachers, principal, etc., would be helpful.)

EVALUATION:

(PO's personal comments, observations, and evaluations of child and family in relation to strengths and weaknesses.)

Investigated by: .....
(Probation Officer)

Approved by: .....
(Supervisor)

Date: .....

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

LYNN DISTRICT COURT
JUVENILE SESSION

COMMONWEALTH

V.

PATRICK FIND
(A JUVENILE)

COMMONWEALTH'S PROPOSED FINDINGS OF FACT
PURSUANT TO M.G.L. c. 119, s. 61

Now comes the Commonwealth in the above entitled case and respectfully proposes that the Court find the following facts relative to the Transfer Hearing conducted pursuant to M.G.L. 119, s. 61.

PART A

Based upon the evidence introduced at the Transfer Hearing, the Court finds that there is probable cause to believe that the above-named juvenile committed each of the offenses as charged.

PART B

Upon further hearing, including consideration of evidence on, but not limited to, the seriousness of the alleged offense, the child's family, school, and social history, including said child's court and juvenile delinquency record, adequate protection of the public, the nature of past treatment efforts for the child and the likelihood of rehabilitation of the child, the court finds, based upon clear and convincing evidence, that the child presents a significant danger to the public as demonstrated by the nature of the offenses charged and the child's past record of delinquent behavior and that the child is not amenable to rehabilitation as a juvenile. (Form DCM-12, Rule 208). The Court makes this ruling based upon the following facts:

1. The alleged offenses-- Armed Assault in a Dwelling, Masked Armed Robbery and an Assault and Battery With A Dangerous Weapon on a Person Over Sixty-Five Years Old, are extremely serious.

2. The facts underlying these complaints demonstrate their serious and violent nature: the juvenile made a conscious decision to commit the burglary, knowing that an elderly man was in the home alone. He dressed in dark clothing and a mask. He carried a large barbeque fork into the house and repeatedly beat the victim with it and with its shod foot. Additionally, the juvenile threw the victim through a glass door. He left the victim unconscious lying in a pool of blood.

3. The victim's medical records reflect serious and permanent physical injuries which were a direct result of the juvenile's actions.

4. As a direct result of the burglary and beating, the victim suffered serious and permanent psychological injury.

5. The juvenile's family history has been characterized by: (a) a history of alcohol abuse, (b) involvement with the Department of Social Services stemming from neglect of the children, (c) placement of the children in foster homes and (d) a lack of physical care, emotional support, discipline or direction. The family continues to be unable to provide the juvenile with the support and supervision he needs.

6. The juvenile has a school history of behavioral and educational problems, dating back to first grade. His test scores are low and indicate a poor prognosis for success, which has been consistent with his actual performance. He is dyslexic, resulting in serious reading and comprehension difficulties. Additionally, he has limited language skills. The juvenile's difficulties in school have contributed to feelings of low self-esteem.

7. Since his commitment to the Department of Youth Services in 1985, the juvenile's social history has been characterized by intermittent violent and explosive behavior. For example, Find's longest and most successful Department of Youth Services placement, was at the ten month Pilgrim Center Program. As his wrap-up date approached, his mother informed him that he could not return to their home. This rejection resulted in a violent outburst culminating in Find's short term hospitalization for pyschiatric treatment. Find was given a "last chance" at the Pilgrim Center when he was re-admitted to the program on September 13, 1990. On September 14, 1990, Find was terminated from the program when he attempted to strangle another resident. This impulsive, acting out behavior has been consistent throughout Find's commitment to the Department of Youth Services. The Department has been unable to assist the juvenile in understanding or curbing his explosive behavior.

8. The juvenile's delinquency record dates back to 1988,

when he was 13 years old. His record includes a series of serious assault and batteries and a burglary. Find's juvenile probation record reflects a history of violent behavior.

9. Find has had a history of running away from his placements with the Department of Youth Services. Since his commitment the Department in June, 1988, all but one of his numerous have been committed while he was A.W.O.L. from a Department of Youth Services Program. This history demonstrates that the Department has been unable to treat and/or restrain the juvenile from criminal activity. His record clearly demonstrates that absent strong external controls, Find presents a substantial risk to public safety. In fact, he had been A.W.O.L. from the Department for one month previous to the commission of the pending crime.

10. Find admitted to Dr. Joss that he has a serious alcohol and drug abuse problem. In fact, proceeds from the robbery of Abbot were used to purchase cocaine. The Department of Youth Services has been unable to address this problem.

11. Rehabilitation for the juvenile must include his gaining insight into and control over his impulsive, violent acting out behavior. Dr. Joss recommends a secure facility which emphasized behavior management. This treatment, to be successful, would require a minimum of two years of intensive therapy.

12. The juvenile has failed in the past to respond to the supervision, support and treatment provided by the Department of Youth Services. The Department does not have a program of long term treatment which will adequately address the juvenile's needs.

13. Clearly the juvenile presents a significant and continuing danger to the community. His juvenile record and the facts surrounding the pending case demonstrate his violent, uncontrollable behavior. Despite his long term commitment to and treatment by, the Department of Youth Services, he has failed to respond to his commitment in any positive way. There is no Department of Youth Services program which will provide secure, long term treatment. Therefore, the juvenile cannot be rehabilitated in the juvenile justice system.

FOR THE COMMONWEALTH

_____

Assistant District Attorney

9900A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT
LOWELL DIVISION/JUVENILE SESSION
NO. 92 JV

COMMONWEALTH

v.

COMMONWEALTH'S MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER PURSUANT TO G.L. C. 119, § 61

I. PROCEDURAL HISTORY

On January 2, 1992, the above-named juvenile (date of birth) was complained of in the Lowell District Court, Juvenile Session, for the crimes of armed assault with intent to murder, and assault and battery by means of a dangerous weapon, to wit a knife, and assault and battery. The complaint alleges that these crimes took place on December 31, 1991, in the town of Tyngsboro.

The juvenile was arraigned on January 3, 1992. On January 10, 1992, the Commonwealth filed a request for a transfer hearing. At that time, the Commonwealth also amended the complaint to allege that the Juvenile, while between the ages of fourteen and seventeen, committed an offense involving the infliction of serious bodily harm. The Part A hearing was held on February 7, 1992. The Court found probable cause that the juvenile committed each of

the crimes charged. With the finding of probable cause, the law requires a Part B hearing to determine whether the Court should retain the case for a trial in the Juvenile Session or should transfer the case on a new criminal complaint for trial in adult court. The Part B hearing is presently scheduled for May 19, 1992.

II. PROPOSED FINDINGS OF FACT

A. Applicable Law

Since the incident in this case occurred just prior to the enactment of the 1991 Juvenile Transfer legislation that took effect on December 31, 1991, the prior version of G.L. c. 119, §61 applies. Under the law as previously written at the Part B Hearing, to transfer a juvenile the Court must find by "clear and convincing evidence" that 1) the youth presents a danger to the public, and 2) the youth is not amenable to rehabilitation within the juvenile justice system. To do so, the Judge shall consider, but shall not be limited to, evidence of the following factors: (1) the nature, circumstances, and seriousness of the alleged offense; (2) the child's court and delinquency record; (3) the child's age and maturity; (4) the family, school and social history of the child; (5) the success or lack of success of any past treatment efforts for the child; (6) the nature of services available through the juvenile justice system; (7) the adequate protection of the public; and (8) the likelihood of rehabilitation of the child. G.L. c. 119, § 61.

The court, however, is not limited to these factors. Nor is there a requirement that the court weigh these factors in a certain manner or achieve some predesigned balance. A Juvenile v. Commonwealth, 370 Mass. 272, 282 (1976). Any factor which bears on the protection of the public and the amenability of the juvenile to treatment within the juvenile system may be considered. A Juvenile v. Commonwealth, supra at 282.

"[The] [s]eriousness of the offense is included as an element in the statute, G.L. c. 119, §61, and there is considerable precedent in favor of according this factor significant weight in the juvenile transfer process." Ward v. Commonwealth, 407 Mass. 434 (1990). See also Two Juveniles v. Commonwealth, 381 Mass. 736 (1980); A Juvenile v. Commonwealth, supra at 282; Commonwealth v. Costello, 392 Mass. 393, 397 (1984).

The transfer statute requires the court to focus on "the minor's potential for successful treatment before the age of majority within the existing juvenile facilities (emphasis added)." Ward v. Commonwealth, supra. See also, Commonwealth v. Matthews, 406 Mass. 380, 387 (1990); A Juvenile, supra at 283; Two Juveniles, supra at 742; Commonwealth v. Hill, 387 Mass. 622 (1982).

In both Matthews and Ward, the Supreme Judicial Court determined that there was sufficient evidence to support the conclusion that treatment would be necessary beyond the juvenile's eighteenth birthday. In Commonwealth v.

Matthews, the District Court judge determined that "there is little or no likelihood of rehabilitation [of the defendant] within the juvenile system due to the length of time treatment would be required and for the reason that there are no guarantees or assurances that rehabilitation or a measure thereof could be accomplished." 406 Mass. 380, 385. In Ward, the judge implied that even though the juvenile may eventually be amenable to rehabilitation, he ordered the transfer based upon his conclusion that such treatment would take over two years and that the Department of Youth Services would not be likely to retain jurisdiction after the juvenile's eighteenth birthday. Ward v. Commonwealth, supra.

B. Serious Nature Of The Offense

The juvenile here is charged with three very serious crimes: (1) armed assault with the intent to murder; (2) assault and battery by means of a dangerous weapon, a knife: and (3) assault and battery. The facts underlying these complaints demonstrate their serious violent nature.

During an uninvited visit to a small gathering of friends at a home in Tyngsboro, the juvenile and his cohorts assaulted the victim and some of his friends. In the course of the mele the victim pulled the juvenile off of one of his friends, whom [redacted] was assaulting at the time. Another juvenile, (who had come with [redacted]), grabbed the victim from behind, wrapped his arms around him, effectively pinning the victim's arms down. As

held the victim smacked the victim in the face. The victim struggled to break free from the other juvenile's grasp. took a knife out from his jacket pocket; the knife blade was three or four inches long. The victim told to put the knife away. As the other juvenile let go of the victim lunged foward with the knife, stabbing the victim in the lower chest. then said, "I stabbed him" as he jumped up and down excitedly. Shortly thereafter and his friends fled the scene and the victim was taken to the hospital. The victim was later treated for a single stab wound to the abdomen. knife had struck the victim just below the last rib on the left side.

C. Court And Delinquency Record

The juvenile has been before this Court on several prior occasions, first appearing on June 6, 1990 for the charge of receiving stolen property. At that time, his case was continued without a finding for six months. On April 8, 1991, the juvenile was charged with breaking and entering in the daytime with the intent to commit a felony, larceny over $250, and receiving stolen property. He was adjudicated a delinquent child and placed on probation. On January 17, 1992, that sentence was revoked (as a result of the present offense) and he was committed to the Department of Youth Services. The juvenile was next before the Court on August 26, 1991, for a series of motor vehicle offenses for which he was adjudicated delinquent. At the same time

he was found not delinquent of receiving stolen property. The juvenile also had a Child in Need of Services (CHINS) petition filed against him on October 10, 1991, by his mother. The petition alleged that the juvenile was a stubborn child. Two weeks later, at the mother's request, the petition was dismissed.

D. Age And Maturity

The juvenile turned seventeen on January 16, 1992. This incident occurred just two weeks prior to that date. According to the records that have been reviewed, it appears that due to the difficulties within the family, the juvenile, as the oldest child, was forced into a parental role at an early age. He has worked part time for over two years and seems to be the adult male model in the family.

E. Family, School and Social History

Prior to this incident the juvenile lived in Lowell with his mother and two younger brothers. His mother is thirty-five years old, gave birth to the juvenile when she was seventeen, and has never been married. The juvenile never mey his father, who died in 1989 as a result of a heart condition. Ms. n had an on and off relationship with one male for 11 years (which resulted in the births of the juvenile's two brother) and another male for approximately 3 years. Both of these relationships were abusive.

The juvenile's two most recent school years could be characterized at best as non-productive. For the 1990-1991

school year the juvenile failed six classes, withdrew from two, failed to complete one, and earned no credits for the year. He was absent 100 days, tardy twenty-eight days, and dismissed four days. In March, 1991, he was given 10 days detention for cutting class. His highest cummulative grade was 50 (the lowest possible year end score given). The juvenile's final class rank was 434 of 551. With respect to the 1991-1992 school year, as of February 24, 1992, the juvenile was absent 54 out of 101 days and tardy 27 days. In October, 1991, he was given a three day suspension for refusing to report to the office and a two day suspension for arguing with a teacher. His acedemic performance was on par with the previous school year. Additionaly, the juvenile has never been involved in any school sports, clubs, or other activities while at the high school.

Curiously, the juvenile's mother indicated that throughout the juvenile's schooling she has found the school to be a very supportive environment. To the contrary, Lowell School Department records indicate that the juvenile has been a constant problem since arriving at Lowell High School in 1990, with attendance (or lack thereof) being a major problem. School officials believed that on occasion the juvenile's mother would cover for the juvenile when he was absent from school. Furthermore, even when the juvenile did attend school he was often so disruptive that school officials almost preferred he did not attend. One School official has had several meetings

with the juvenile and his mother. A number of these meetings became disruptive to the point that the official had to physically separate the juvenile and the mother. Finally, when contacted by the juvenile's mother to solicit letters of recommendation from the juvenile's teachers for the purpose of the Part B hearing, none of those teachers was willing to write a recommendation for the juvenile. In sum the juvenile's educational experience, at least at the at the high school level, has not been a positive one.

Although the juvenile's mother was less than forthcoming with respect to the details of what, if any, prior involvement the family had had with state agencies, the DSS records (covering 1980 to 1988) on file with the Court paint a picture of a troubled family. Those records show allegations of physical and sexual abuse of the juvenile's younger brothers in the early 1980's. They also indicate that the home was often unkempt, that the mother was often out of the home, that the children may have been left alone from time to time, and that the mother had or exercised little control over the older children. On one occasion it was reported that lidocaine and benadryl was found in the system of the middle child, and the youngest child at times had nightmares and appeared frightened during diaper changes. In late 1982, the juvenile's mother (who seemed to have a negative self-image) displayed anger at the fact that she was viewed by some as not being a good mother. In 1987, the records indicate that the mother was

under a great deal of strees due to her living arrangement, e.g., violence in their apartment building, chidren being subjected to drug abuse of mother's boyfriend, etc. Finally, in early 1988, DSS closed the family's case due to a series of missed appointments. Thus, it appears that at least through most of the 1980s, the juvenile was part of a household which provided no support and structure, cared not to confront its various problems, and chose not to avail itself of necessary services that might have made a difference.

Lastly, the juvenile's peer associates are well known to the court system. One of the co-venturers in the present case has been involved in the juvenile system on a number of times. And the juvenile's prior probationary matter involved two friends who remain in default of the court to this day. Observations of the Probation Department suggest that the juvenile is a leader not a follower, which is cause for concern regarding not only his selection of friends but his amenability to rehabilitation. Even the juvenile admits he is a leader and not a follower, and he states that everything he does is of his own free choice.

F. Adequate Protection Of The Public

While the juvenile has a limited prior record, the present charges are are extremely violent and serious in nature. The victim, nineteen year old , is extremely lucky to be alive today. Fortunately,

knife glanced off one of the victim's ribs and struck no vital organ. Although the stabbing occurred in the course of a fight, went to the scene of the incident armed with a large knife and assaulted the victim while he was in an essentially defenseless position. After punching the victim in the face and then stabbing him in the abdomen became excited and cried out to his friends as if proud of his behavior.

It is the Commonwealth's contention that this juvenile is a danger to the public and that the community can only be protected by removing him from the community for a lengthy period of time. Due to his age, 17 years and 4 months, the only realistic way for this to happen is by transferring the juvenile to the adult criminal justice system.

The juvenile's recent life history indicates a youth who is totally out of control in the community. He has been arrested four times in an eighteen month period, in addition to his mother seeking assistance from the court through a CHINS petition. His schoolwork has drastically diminished during that same time period and it is unlikely that the juvenile can be promoted this year, based on his marks for the first half of the school year. This is all at a time when facing serious charges and where his future may depend on his performance in the community. Furthermore, the juvenile committed the present offense as well as being the subject of a CHINS petition while on probation for his

April, 1991, offense. This subsequent behavior strongly suggests that the juvenile is inclined to act contrary to the law and community standards regardless of the consequences. Finally, although the juvenile has managed to remain out of trouble while in the custody of the Department of Youth Services over the past several months due to prior incidents, the juvenile acknowledges he is manipulative and will do what is necessary to benefit himself. Thus, the juvenile has made little serious attempt to show the court that he can function in the community during a time when he is under a microscope. Since he has been unable to perform in a positive manner over the past two years in spite of regular court intervention, there is certainly no reason to believe that the juvenile's conduct will change once he is no longer under the control of the system. This all leads to the reasonable conclusion that the community can only be adequately protected from the juvenile by transferring him to the Superior Court for trial as an adult.

G. Past Treatment Efforts

Based upon information from both the juvenile and his mother, the juvenile has undergone counselling in the past through a couple of different agencies. However, the juvenile stopped participating in these past treatment efforts because he did not feel the need to go on and was unresponsive to it. Additionally, it appears that the juvenile was evaluated when he was 11 or 12 years old in

order to determine whether his mother's life experiences were hindering the juvenile and his siblings. The results concluded that the juvenile had not been traumatized by the dysfunction in the family. (As for the 1991 CHINS petition, that matter was both initiated and terminated at the mother's request.) Thus, it is obvious that all prior attempts at treatment have proved to be unproductive, primarily because the juvenile himself believed he stood nothing to gain from those efforts.

H. Likelihood Of Rehabilitation

On January 16, 1993, [redacted] will turn 18 years old. It is unlikely that between now and the juvenile's eighteenth birthday there will be enough time for the juvenile justice system to successfully rehabilitate this juvenile. Over the past few years, the juvenile has continued on a downward trend in his school and social history. He has been arrested, he has failed in school and is failing again, and has made no attempt to improve his station in life during the pendancy of these proceedings.

Moreover, the present case is extremely serious. Prior case law, as quoted in Ward v. Commonwealth, 407 Mass. 434 at 439, allows a judge to "attach substantial significance to the seriousness of the offense, as this bears on both the danger to the public and a juvenile's prospects for rehabilitation. Seriousness of the offense is also included as an element in the statute, G.L. c. 119, § 61, and there is considerable precedent in favor of according

this factor significant weight in the juvenile transfer process. Two Juveniles v. Commonwealth, supra at 743; A Juvenile v. Commonwealth, supra at 282; Commonwealth v. Costello, supra at 397."

In addition, there is no reason to believe at this time that the Department of Youth Services, if the juvenile were committed to its care, would petition the court to extend the juvenile's committment beyond his eighteenth birthday. This very issue is also addressed in Ward, and the Supreme Judicial Court states that "[t]he transfer statute only requires the judge 'to focus on the minor's potential for successful treatment before the age of majority within existing juvenile facilities (emphasis supplied).' A Juvenile, supra at 283." Ward, supra at 440.

With all of the recent misbehavior, social and criminal, by the juvenile, it is unlikely that in the remaining seven and one half months before his eighteenth birthday, the juvenile can be successfully rehabilitated within the existing juvenile justice system, particularly given his self-described manipulative bent. With this inability for rehabilitation, it is in the community's best interest that the juvenile be held accountable for his violent attack on the victim in this case and that his case be transferred to the Superior Court for trial.

III. CONCLUSION

For all of the above reasons, the Commonwealth believes that it has met the burden required by the statute to

transfer the juvenile, , to the Superior Court for trial as an adult. He presents a significant danger to the public and based on the information provided above, he is not amenable for treatment within the existing juvenile justice system.

Respectfully Submitted
For the Commonwealth,

SCOTT HARSHBARGER
DISTRICT ATTORNEY

by: _____

MICHAEL FABBRI
Assistant District Attorney
Lowell Regional Office
44 Church Street
Lowell, MA 01852
(508) 458-4440

Dated: May 19, 1992
0117R

Handout 31

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

LOWELL DISTRICT COURT
DOCKET NO.

COMMONWEALTH

V.

COMMONWEALTH'S MOTION FOR THE RETENTION OF JURISDICTION IN THE DISTRICT COURT

Now comes the Commonwealth and respectfully moves the Court to retain jurisdiction in the above-entitled case pursuant to G.L. c. 218, s.30 and G.L. c. 119, s.61.

As reasons therefor, the Commonwealth refers this Court to the Commonwealth's Memorandum on Jurisdiction filed in the above entitled matter on July 14, 1992.

Respectfully submitted
For the Commonwealth,

THOMAS REILLY
DISTRICT ATTORNEY

By: _____

Assistant District Attorney
Middlesex Superior Courthouse
40 Thorndike Street
Cambridge, MA 02141
(617) 494-_____

Received this 14th day of July, 1992

_____
Attorney for the Defendant

9678A

§ 83. Proceedings in superior court; disposition

The indictment of any person bound over under section seventy-five shall be tried before the superior court in the same manner as any criminal proceeding, and upon conviction such person may be sentenced to such punishment as is provided by law for the offense, or placed on probation, with or without a suspended sentence for such period of time and under such conditions as the court may order. But, if such person has not attained his eighteenth birthday prior to a finding or plea of guilty, the superior court may, in its discretion, and in lieu of a judgment of conviction and sentence, adjudicate such person as a delinquent child, and make such disposition as may be made by a district court or a juvenile court under section fifty-eight; but no person adjudicated a delinquent child under the provisions of this section shall, after he has attained his eighteenth birthday, be committed to the department of youth services or continued on probation or under the jurisdiction of the court.

Amended by St.1969, c. 838, § 24; St.1978, c. 478, § 66.

M.G.L. c. 120, sec. 16

§ 16. Discharge

Every person committed to the department until the age of eighteen as a delinquent child, if not already discharged, shall be discharged when he reaches his eighteenth birthday, unless a petition is filed by the department under section seventeen. Every person committed to the department until the age of nineteen as a delinquent child, if not already discharged, shall be discharged when he reaches his nineteenth birthday, unless a petition is filed by the department under section seventeen. Every person committed to the department until the age of twenty-one as a delinquent child, if not already discharged, shall be discharged when such person reaches his twenty-first birthday. The department may continue to have responsibility for any person provided for in this chapter under twenty-one years of age for the purposes of specific educational or rehabilitative programs, under conditions agreed upon by both the department and such persons terminable by either.

Amended by St.1969, c. 838, § 46; St.1973, c. 925, § 44; St.1990, c. 267, § 6.

§ 58. Adjudication as delinquent child

At the hearing of a complaint against a child the court shall hear the testimony of any witnesses that appear and take such evidence relative to the case as shall be produced. If the allegations against a child are proved beyond a reasonable doubt, he may be adjudged a delinquent child, or in lieu thereof, the court may continue the case without a finding and, with the consent of the child and at least one of the child's parents or guardians, place said child on probation; provided, however, that any such probation may be imposed until such child becomes age eighteen or age nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday. Said probation may include a requirement, subject to agreement by the child and at least one of the child's parents or guardians, that the child do work or participate in activities of a type and for a period of time deemed appropriate by the court.

If a child is adjudged a delinquent child, the court may place the case on file, or may place the child in the care of a probation officer for such time and on such conditions as may seem proper, or may commit him to the custody of the department of youth services but the probationary or commitment period shall not be for a period longer than until such child becomes eighteen or age nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday, except that the commitment period shall be no longer than until the age twenty-one for a child adjudicated a delinquent child by reason of having violated section one of chapter two hundred and sixty-five. If it is alleged in the complaint upon which the child is so adjudged that a penal law of the commonwealth, a city ordinance or a town by-law has been violated, the court may commit such child to the custody of the commissioner of youth services and authorize him to place such child in the charge of any person, and, if at any time thereafter the child proves unmanageable, to transfer such child to that facility or training school which in the opinion of said commissioner, after study, will best serve the needs of the child. The department of youth services shall provide for the maintenance, in whole or in part, of any child so placed in the charge of any person.

If a child adjudged a delinquent child is placed on probation by the justice in the juvenile appeals session, he may be placed in the care of a probation officer of the district court, including in that term a division of the juvenile court department, for the judicial district in which such child resides.

The court may commit such delinquent child to the department of youth services, but it shall not commit such child to a jail or house of correction, nor to the Lyman school, the industrial school for boys, or the industrial school for girls, nor to any other institution supported by the commonwealth for the custody, care and training of delinquent children or juvenile offenders.

The court may make an order for payment by the child's parents or guardian from the child's property, or by any other person responsible for the care and support of said child, to the institution, department, division, organization or person furnishing care and support at times to be stated in an order by the court of sums not exceeding the cost of said support after ability to pay has been determined by the court; provided, that no order for the payment of money shall be entered until the person by whom payments are to be made shall have been summoned before the court and given an opportunity to be heard. The court may from time to time, upon petition by, or notice to the person ordered to pay such sums of money, revise or alter such order or make a new order, as the circumstances may require.

Amended by St.1969, c. 838, § 15; St.1969, c. 859, § 10; St.1972, c. 731, § 10; St.1973, c. 925, § 42; St.1973, c. 1073, §§ 13 to 15; St.1976, c. 533; St.1978, c. 478, § 58; St.1986, c. 557, § 116; St.1990, c. 267, §§ 1, 2.

§ 17. Control beyond age limit; persons physically dangerous to public

Whenever the department is of the opinion that discharge of a person from its control at the age limit stated in section sixteen would be physically dangerous to the public, the department shall make an order directing that the person remain subject to its control beyond the period and shall make application to the committing court for a review of that order by the court. The order and application shall be made at least ninety days before the time of discharge stated in said section sixteen; provided, however, that if the date on which the child has been committed to the department is less than ninety days from the time of discharge stated in said section sixteen, the order and application may be made at any time prior to the date of discharge. The application shall be accompanied by a written statement of the facts upon which the department bases its opinion that discharge from its control at the time stated would be physically dangerous to the public, but no such application shall be dismissed nor shall the order be discharged, merely because of its form or an asserted insufficiency of its allegations; every order shall be reviewed upon its merits.

Amended by St.1969, c. 838, § 47; St.1990, c. 267, § 7.

FORMS

Form 1

JUVENILE COURT DEPARTMENT
BOSTON DIVISION OF THE
MASSACHUSETTS TRIAL COURT

No. .....

COMMONWEALTH

VS.

....., A Juvenile

REQUEST FOR TRANSFER HEARING

The Commonwealth requests that a transfer hearing as provided by G.L. c. 119, s. 61 be held in this case. In support of its request the Commonwealth alleges that the juvenile in this action

☐ has previously been committed to the department of youth services as a delinquent child and has committed an offense against a law of the Commonwealth which, if said juvenile were an adult, would be punishable by imprisonment in the state prison.

☐ has committed an offense involving the infliction or threat of serious bodily harm.

.....
(signature of Commonwealth representative)

.....
(title)

.....
Date

ORIGINAL

JUVENILE COURT DEPARTMENT
BOSTON DIVISION OF THE
MASSACHUSETTS TRIAL COURT

No. .....

COMMONWEALTH

VS.

....., A Juvenile

NOTICE OF TRANSFER HEARING

This is to inform you that (at the request of the Commonwealth) (at the order of the court) a transfer hearing pursuant to G.L. c. 119, s. 61 will be held in this court on ..... at ..... (A.M.) (P.M.). The
(date)
purpose of this hearing is to determine whether there is probable cause to believe that the Defendant committed the alleged offense or violation charged, and if so whether he can be rehabilitated in the juvenile justice system or whether a criminal complaint should issue and transfer the juvenile to the Superior Court, to be tried as an adult rather than as a juvenile and subject to adult proceedings.

THE JUVENILE, HIS ATTORNEY AND HIS PARENT OR LEGAL GUARDIAN SHOULD BE PRESENT AT THIS HEARING.

.....
Assistant Clerk

.....
Date

ORIGINAL

Form 3

The Commonwealth of Massachusetts

SUFFOLK, s.s.

At the BOSTON JUVENILE COURT, holden at Boston, within the county of Suffolk on the ..... day of ....., in the year of our Lord one thousand nine hundred and ....., ... a child between fourteen and seventeen years of age, appears to answer to the Commonwealth of Massachusetts, on the complaint under oath of ....., setting forth that he, the said defendant, on the ..... day of ..... at Boston aforesaid, and within the Judicial District of said Court, ...

.....

and the complainant says that on the ..... day of ..... in said year the Court finds that probable cause exists to believe that the defendant committed the offense as alleged, and upon further consideration the Court ordered the said complaint to be dismissed and caused to be issued a criminal complaint, all in accordance with Chapter 840 of the Acts of 1975 of the General Laws of Massachusetts.

Wherefore said court orders that said ..... be transferred to appear before the Superior Court for the County of Suffolk, and he is ordered to recognize personally with sufficient surety in the sum of ..... dollars to answer to said complaint or to any indictment which may be returned therein against him for the crime aforesaid as the law directs.

A true copy attest

.....
Assistant Clerk
Boston Juvenile Court

ordered issued, and the defendant is bound over to the Superior Court.

_____ _____

Date (Special) Justice

NOTE: If no probable cause is found such a finding shall be recorded on the papers together with the finding that the juvenile is not delinquent. If it is determined to treat the child as a juvenile, this determination shall be recorded on the papers.

This form prescribed by the Chief Justice of the District Court

FORM DCM–12. FINDING AND ORDER AFTER TRANSFER HEARING

Commonwealth of Massachusetts

District Court of Massachusetts

Commonwealth
v. No. _____
_____, A Juvenile

FINDING AND ORDER AFTER TRANSFER HEARING

Upon consideration at a transfer hearing held pursuant to G.L. c. 119, s. 61 and Rule 208 of the Special Rules of the District Court of Massachusetts, the court finds that probable cause exists to believe that the child has committed the offense or violation charged.

Upon further hearing, including consideration of evidence on, but not limited to, the seriousness of the alleged offense, the child's family, school and social history, including said child's court and juvenile delinquency record, if any, adequate protection of the public, the nature of any past treatment efforts for the child and the likelihood of rehabilitation of the child, the court finds, based upon clear and convincing evidence, that the child presents a significant danger to the public as demonstrated by the nature of the offense charged and the child's past record of delinquent behavior, if any, and that the child is not amenable to rehabilitation as a juvenile. The court's reasons are as follows:

WHEREUPON the delinquency complaint against the child is hereby dismissed, a criminal complaint is