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Case Focus

Commonwealth v. Rosa: The Appeals Court Elaborates the Massachusetts Law on the Parental Privilege to Use Reasonable Force in Disciplining a Child

By David Deakin

In ***Commonwealth v. Rosa***, 94 Mass. App. Ct. 458 (2018), *further app. rev. denied*, 481 Mass. 1104 (Jan. 24, 2019), a case about the parental privilege to use corporal punishment, the Massachusetts Appeals Court grappled with the extent to which a fact finder should consider a defendant's approach to parenting. The Appeals Court unanimously upheld the conviction of a father who kicked his five-year-old daughter in the chest hard enough to knock her down and cause her to cry. The Court, however, was divided about the basis for the holding that the Commonwealth had overcome the defense. As each of the three justices on the panel authored an opinion, the criminal bar should expect continuing litigation not only about the scope of the privilege but also about the type and quantum of evidence necessary for the prosecution to overcome the defense.

Legal Standard

The Supreme Judicial Court established in ***Commonwealth v. Dorvil***, 472 Mass. 1, 12 (2015) that a parent can use reasonable force in disciplining a child. The SJC explained that "no criminal liability will attach to a parent's use of force against his or her child as long as '(1) the force used against the minor child is reasonable; (2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and (3) the force used neither causes, nor creates a substantial risk of causing physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress.'" ***Rosa***, 94 Mass. App. Ct. at 461 (parentheses in original), *quoting* ***Dorvil***, 472 Mass. at 12. Because the parental privilege described above is an affirmative defense, once it is raised by the defendant, the prosecution bears the burden of disproving at least one of the requirements of the defense beyond a reasonable doubt. *See Dorvil*, 472 Mass. at 13. Each requirement is a question of fact. *See id*.

Facts

After a bench trial, the defendant in ***Rosa*** was convicted of assault and battery by means of a dangerous weapon (shod foot) for kicking his five-year-old daughter in her chest, knocking her to the ground, and causing both her and her two-year-old brother to cry. The defendant, who had brought his children with him to a drug store, became angry when his daughter ran and hid from him in the store. The defendant yelled and cursed at the girl. After a few minutes, the defendant went into the line to check out of the store. As he did, his daughter approached him and "grabbed his legs." He "shoved" her away. The scene repeated itself, and the defendant spoke angrily to his daughter. When she approached him a third time, the defendant kicked her in the chest. As a result, she fell to the ground and cried briefly. In response to a question from a responding police officer about why he had kicked his daughter, the defendant replied, "I don't raise pussies." At trial, the defendant testified, claiming that he had "nudged," rather than kicked, his daughter. The defendant first maintained that he had been concerned that his daughter would be kidnapped and thus used "reverse psychology," pushing her away so she would stay near him. At another point in his testimony, however, he acknowledged that, by the time he kicked her, he was no longer concerned about kidnapping, and he did not want her close to him. Finally, he claimed his comment that "I don't raise pussies" was meant to convey that he did not want to raise his children to be victims of bullies.

Holding

Justice Wendlandt authored the Court's opinion affirming the conviction. Justices Englander and Rubin each wrote a concurring opinion. Justice Englander's concurrence primarily emphasized his dissatisfaction with the second prong of the ***Dorvil*** standard. Justice Rubin wrote to express his view that kicking a child could never constitute reasonable force in disciplining a child.

Writing for the Court, Justice Wendlandt explained that "[p]arenting is essential to the reason underlying the privilege, and that aspect of the privilege is embodied in prong two [force used must be "reasonably related to . . . safeguarding and promoting the welfare of the minor"]." ***Rosa***, 94 Mass. App. Ct. at 463. In determining whether the force used by the defendant was reasonable (under both the first and second prongs of the standard), therefore, "the trier of fact should take into account a variety of factors, including 'the child's age, the physical and mental condition of the child, and the nature of the child's offense." ***Id***. at 461. The Court seemed to conclude unanimously that evidence of a defendant's "subjective" "emotional state" cannot, by itself, satisfy the Commonwealth's burden of disproving the defense. ***Id***. at 462 n.2. In his concurrence, however, Justice Englander faulted the prosecution for focusing "unduly on what the defendant *said* to his child, rather than what he did." ***Id***. at 470 (Englander, J., concurring) (emphasis in original). Left for another case to resolve is the extent to which the prosecution can rely on the defendant's subjective emotional state. Justices Wendlandt and Rubin – and possibly also Justice Englander – agreed that the prosecution can introduce evidence "that the defendant's supposedly legitimate parenting purpose is false . . . ." ***Id.***, 94 Mass. App. Ct. at 463. Justices Wendlandt and Rubin viewed such evidence as relevant to disproving reasonableness under both the first and second prongs of the defense. It seems that Justice Englander, who would abandon the second prong entirely, see below, would nonetheless agree that the falsity of an asserted parenting purpose is relevant to reasonableness under the first prong, although this is less clear.

Justice Englander concurred because he agreed that the Commonwealth met its burden to disprove the first prong of the defense, the reasonableness of the force used. He noted, however, that, in his view, "the evidence of unreasonable force here was thin." ***Id***. at 468. The defendant's abuse in this case, Justice Englander concluded, was more serious than the "spank" that was held in ***Dorvil***, 472 Mass. at 3, to be justified by the parental privilege, and less serious than "the striking of a child in the face with a belt . . . [leaving] a mark" that was held to be outside the privilege's scope in ***Commonwealth v. Dobson***, 92 Mass. App. Ct. 355, 357-359 (2017). He thus concurred that the Commonwealth had satisfied its burden of disproving the reasonableness of the force under the first prong, albeit in a close case.

Justice Englander wrote separately also because of his concern that the second prong of the defense "can be understood as an invitation to pass judgment on how a parent has chosen to parent." ***Rosa***, 94 Mass. App. Ct. at 469 (Englander, J., concurring). Thus, Justice Englander envisioned a "troubl[ing]" scenario in which "a parent will have shown that the force used was reasonable under prong one, but nevertheless is convicted of assault because (in the fact finder's judgment) the parent's reasonable force was not reasonably related to disciplining the child." ***Id.*** (parentheses in original). Justice Englander would omit the second prong from the defense to prevent courts from "becom[ing] involved . . . in evaluating the parent's judgment about how to discipline their child." ***Id***. at 470. Ultimately, Justice Englander concluded that the reasonableness requirement in the first prong fully captures the requirement that the discipline not be abusive. Encouraging finders of fact to focus on the reasonableness of parental discipline, rather than on the force used to implement it, Justice Englander concluded, creates "the risk . . . that less articulate parents will have more difficulty justifying their actions," ***id***. at 470 n. 3, and thus be convicted in cases in which more sophisticated parents might be acquitted (or not charged at all).

Justice Rubin also concurred with Justice Wendlandt's opinion for the Court. He agreed with the Court's opinion that the Commonwealth had satisfied its burden of proof as to all three prongs. As to the third prong, however, he would have gone even further than the Court. He wrote separately to note that, in his

view, kicking a child can never be justified by the parental privilege "because kicking a child always 'creates a substantial risk of . . . physical harm . . . , gross degradation or severe mental distress.'" ***Id***. at 466 (first ellipses in original; second ellipses added), *quoting* ***Dorvil***, 472 Mass. at 12.

Conclusion

Although the requirements of the parental privilege are now settled, their limits are anything but. Not only is the case law still in an early stage of development, *see* ***Rosa*** at 468 n.2 ("[o]ur case law is not yet very developed as to what force can qualify as reasonable . . . ."), but also there is still disagreement about whether and/or to what extent the defendant's subjective intent and purpose in disciplining the child is relevant to the fact finder's assessment of the reasonableness of the force used. In future cases, therefore, defense counsel will likely rely on language from Justice Englander's concurrence and, indeed, from footnote 2 of the Court's opinion, to argue that the prosecution should be prohibited from introducing evidence of the defendant's emotional state and/or intent or, at least, limited in its ability to do so. Prosecutors will respond that even Justice Englander's concurrence leaves room for introduction of evidence of the defendant's animus toward the child and that, at a minimum, the sincerity of the defendant's stated reason for disciplining the child is always relevant in applying the defense's second prong.

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Voice of the Judiciary

Probate and Family Court

By Hon. John D. Casey

I have always considered it an honor to be a part of the Probate and Family Court, first as a practicing attorney, and then as a judge. Now as Chief Justice, I more fully realize and appreciate the special nature of this Court and its judges and staff. I have met with people from every division to discuss my vision for the Court, and, in the process, have learned about their hopes for and commitment to the Court. On a daily basis, the judges and staff rise to the challenges of working in a court that interacts with people during some of the most difficult times in a person's life.

The Probate and Family Court is different than the other Trial Court departments. Domestic relations litigation and probate litigation are unique in that each case involves a family situation or dynamic and has the potential to span years. In most cases, the parties must continue to interact with each other during and after difficult litigation. Because of this, litigants require compassion and must be treated with dignity and sensitivity. Many need to be educated on court processes because they do not have attorneys to explain what they will encounter and what is expected of them.

The mission of the Probate and Family Court is to "deliver timely justice to the public by providing equal access to a fair, equitable and efficient forum to resolve family and probate legal matters and to assist and protect all individuals, families and children in an impartial and respectful manner." Since the economic downturn of 2008-2009, the ability of the Court to accomplish this mission has been severely strained. In the ensuing years, the Court relied on judges and staff to go above and beyond, and so many did. In addition, the bar volunteered to help in various ways, such as the Lawyer of the Day program, bar association conciliation programs, and Attorneys Representing Children (ARC) programs, to name a few. The challenges for the Probate and Family Court were noted by Chief Justice Ralph Gants in his State of the Judiciary address in October 2017 when he stated, "The burdens we place on our Probate and Family Court judges are simply not sustainable; we need to reimagine how we do justice in our Probate and Family Court." To that end, different groups worked toward creative solutions for case management and staffing, while Chief Justice Gants and Chief Justice of the Trial Court Paula Carey advocated for additional funding for the Probate and Family Court at the State House. In the fiscal year 2019 budget, the Court received additional funds to address the specific needs of the Court – the need to hire sessions clerks and legal research and writing staff, the need for case management triage, and the need for alternative dispute resolution resources. I am proud to report that as a result of these additional funds, the Probate and Family Court has taken steps to start the reimagination of the Court, as Chief Justice Gants envisioned.

As part of this process, the Court set a goal of having one sessions clerk for each judge, so that judicial case managers and assistant judicial case managers could then spend their time outside of the courtroom working on case management. With the additional funds, the Court met that goal, hiring sessions clerks throughout the Commonwealth. In addition, three law clerks and two research attorneys have been hired. The Court now has eleven law clerk positions and seven research attorney positions dedicated to assisting the judges with their legal research and writing.

With regard to case management, I plan to solidify and build on ideas that have been discussed for many years. First, I want to emphasize to all staff, judges, and attorneys that every case is not the same, and should not be treated the same. By engaging in the early screening of cases, staff will put each case on its own path, taking into consideration various issues, including whether the case is uncontested or contested, straightforward or complex, whether the parties are self-represented or have counsel, and whether the case is ripe for alternative dispute resolution such as conciliation, mediation, or dispute intervention. Second,

litigants will be educated on court processes and referred to services like alternative dispute resolution. This model has proven successful in the Middlesex Division and Essex Division on so-called "block days" with cases that involve child support with the Department of Revenue and also parenting issues. Litigants are referred to on-site mediators who assist the parties in resolving both child support and parenting issues at the same time, and with only one court appearance. We are not the first or only Trial Court department to use differentiated case management. We are, however, the Trial Court department that faces the challenge of implementing a new case management process with a population that is overwhelmingly unrepresented by counsel and that has recurring issues. Training is required to successfully implement these changes to case management. We have begun this process by conducting trainings for sessions clerks and assistant judicial case managers. We will continue to train all members of the Probate and Family Court so that we can rise to the challenges we face and meet our mission.

As I start my second year as Chief Justice, I am aware that nothing we do to improve the Probate and Family Court is done without the help of many different people and organizations – legislators, attorneys, bar associations, staff, judges, Chief Justice Gants, Chief Justice Carey, Court Administrator Jon Williams, and Deputy Court Administrator Linda Medonis. To all of you, I say thank you. Thank you for sharing your ideas about how the Probate and Family Court can be better. Thank you for your patience, as we all know that successful change takes time. But most of all, thank you for supporting me and the staff and judges of the Probate and Family Court as we make changes to enhance everyone's experience with the Court.

The Honorable John D. Casey was appointed to the Probate and Family Court in 2006 and became the Chief Justice in July 2018. He previously served as the First Justice of the Norfolk Division of the Probate and Family Court. Chief Justice Casey graduated from Bates College and Suffolk University School of Law.

Case Focus

Bellalta: A Flowchart for the Owner of a Nonconforming Home

By Kate M. Carter

In *Bellalta v. Zoning Board of Appeals of Brookline,* **481 Mass. 372** (2019), the Supreme Judicial Court reaffirmed the process by which a preexisting, non-conforming single- or two-family structure can be altered or expanded, clarifying the framework established by courts wrestling with the "difficult and infelicitous" language of G.L. c. 40A, Section 6 for nearly four decades. *Bellalta* confirmed that changes to such structures can be made by special permit *without* the additional need for a variance.

The Section 6 Quicksand

Section 6 regulates the application of local zoning to preexisting, nonconforming structures and uses. Its language reflects a tension between competing philosophies governing the use and development of Massachusetts land. On the one hand zoning is interested in the elimination of nonconformities. But zoning also reflects the notion that "rights once acquired by existing use or construction of buildings in general ought not to be interfered with." *Opinion of the Justices*, **234 Mass. 597, 606** (1920). Thus, under Section 6, a zoning ordinance or by-law *shall not apply to structures or uses lawfully in existence or lawfully begun* … but shall apply to any change or substantial extension of such use … to any reconstruction, extension or structural change of such structure … except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority … that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood.

(Emphasis added). In two sentences, the statute (i) protects previously compliant structures and uses from the effect of subsequently enacted zoning bylaws, (ii) preserves the need to comply with zoning if one wants to change or alter a nonconforming structure or use, and (iii) creates a separate exemption for certain changes or alterations to single- and two-family structures. In *Bellalta,* the SJC examined the extent of the protections afforded by the "second except clause" to owners of single- and two-family preexisting, nonconforming structures.

Underlying Facts and Procedural Posture

Defendant homeowners owned a unit in a two-unit Brookline condominium. They proposed adding a dormer to add 677 square feet of living space. The building did not comply with the floor area ratio ("FAR") – the ratio of building gross floor area to lot area – for the zoning district in which it was located. The FAR for the zoning district was 1.0. The FAR for the defendants' building was 1.14, which would increase to 1.38 with the new dormer.

After being denied a building permit, the defendants applied for, and were granted, a "Section 6 finding" by the Brookline Zoning Board of Appeal. The Board found that the proposed addition and resulting increase in FAR would not be substantially more detrimental to the neighborhood than the nonconforming structure was prior to renovation. Plaintiff abutters appealed, arguing that because Brookline's bylaw expressly prohibited FAR increases of more than 25%, defendants also needed to apply for a variance – a more difficult and narrowly-available type of zoning relief.

The "Interpretative Framework"

Beginning with *Fitzsimmonds v. Board of Appeals of Chatham,* **21 Mass. App. Ct. 53** (1985), and culminating with *Bjorklund v. Zoning Board of Appeals of Norwell*, **450 Mass. 357** (2008), the courts have established a three-step framework to analyze a homeowner's request to alter, reconstruct, extend, or change a preexisting, nonconforming, single- or two-family home. First, how does the structure violate current zoning? Second, does the proposed change intensify that non-conformity? If the answer to question two is "no", the proposed change is allowed by right, without the need for relief. Only if the answer to question two is "yes" must a homeowner apply for a finding by the local board that the proposed change will "not be substantially more detrimental than the existing nonconforming use to the neighborhood." *Bellalta,* 481 Mass. at 380-81.[1]

In *Bellalta*, the defendants argued that the new dormer would make the building more consistent with the architecture and dimensions of other buildings on the street. Moreover, the proposed addition was modest – it only increased the habitable space by 675 square feet.[2] Thus, they argued that the new dormer would not be substantially more detrimental to the neighborhood than the existing, nonconforming building. The Board agreed, issued the Section 6 finding, and allowed the project to proceed without a variance. *Bellalta,* 481 Mass. at 383; *see also Gale v. Zoning Board of Appeals of Gloucester,* **80 Mass. App. Ct. 331** (2011).

In upholding the Board's decision *not* to require a variance, the *Bellalta* court explained that since the "second except" clause was adopted in 1975, the Legislature has amended Section 6 on multiple occasions, and never clarified the language – thereby ratifying the courts' interpretative framework. *Bellalta*, 481 Mass. at 383. To require the defendants to *also* apply for a variance would allow the Brookline bylaw to eliminate the special protections otherwise afforded preexisting, non-conforming single- or two-family structures by Section 6. *Id.* at 386 – 87.

***Bellalta's* Significance Amidst a Growing Housing Crisis**

Underlying the language of Section 6, the resulting interpretative framework, and the *Bellalta* decision is a value judgment that *extra* effort should be taken to protect a particular segment of housing stock: single- and two-family homes. The protections afforded preexisting, nonconforming single- and two-family homes would be illusory if owners were obligated to undertake the burden of applying for a Section 6 finding *and* a variance. *Bellalta,* 481 Mass. at 383. The time and costs associated with such a process might mean that homeowners would forego the renovation and maintenance of older, "starter" homes leaving them to be torn down and replaced with new, more expensive housing. *Id.* at 384. *Bellalta's* re-affirmation of the "special protections" afforded to single- and two-family homes is particularly important amid today's housing crisis. Section 6 provides a valuable counterbalance to municipalities seeking to stifle housing production by increasing minimum lot sizes or other dimensional requirements. *Bellalta,* 481 Mass. at 384 – 85. The Section 6 process allows homeowners to make changes to accommodate evolving housing needs, without adding additional demand to an undersupplied housing market. By affirming the streamlined process by which homeowners of preexisting, nonconforming single- and two-family homes can make changes to their homes, the SJC in *Bellalta*, reaffirmed the Legislature's decision to protect single- and two-family homes. Section 6's protections will continue to play an important part in

[1] If the proposed change will create *new* nonconformities, a variance will be required.

[2] In *Bjorklund,* the SJC sanctioned certain types of improvements, without the need for a Section 6 finding, because the small-scale nature of such improvements "could not reasonably be found to increase the nonconforming nature of the structure." 450 Mass. at 362 – 63. Although the *Bellalta* court implied that the defendants' proposed dormer was the type of small-scale improvement, that would not require a Section 6 finding, the defendants had conceded that the proposed increase in FAR from 1.4 to 1.38 would increase the structure's nonconforming nature. *Bellalta,* 481 Mass. at 381 – 82.

helping to address Massachusetts' growing need for more habitable living space within an increasingly expensive and diminishing pool of available land.

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Heads Up

Massachusetts Expands Voter Access

By Pratt Wiley

The Automatic Voter Registration Act ("**AVR Act**"), **St. 2018, c. 205**, signed into law in 2018 by Governor Baker, promises to expand the number of enrolled voters able to participate in our democracy by removing some of the administrative burdens of registration. Effective January 1, 2020, AVR will replace the current "opt-in" voter registration system with an "opt-out" system through which the Registry of Motor Vehicles ("RMV") and MassHealth will identify and add eligible citizens residing in Massachusetts to the voter rolls. Individuals will automatically be registered to vote when they apply for or renew their: (1) driver's license, (2) state-sponsored health insurance, (3) Medicaid benefits, or (4) complete another qualifying transaction at a future-designated AVR agency. The AVR system will use citizenship information, already collected by AVR agencies to enroll voters. The AVR Act directs the Secretary of State to promulgate implementing regulations by July 31, 2019.

AVR expands on the landmark National Voter Registration Act of 1993 (popularly known as the "**Motor Voter Act**."). The Motor Voter Act eased the voter registration and maintenance process by requiring states to provide citizens with the opportunity to register to vote when applying for a driver's license or otherwise engaging with a state agency that provides public assistance. Agencies that already participate in the Motor Voter Registration will continue to do so even if they are not designated as AVR agencies.

How It Will Work

Individuals transacting business at AVR agencies will be asked to provide sworn or verified information of their (a) legal name, (b) age, (c) residence, (d) citizenship, and (e) an electronic signature. AVR agencies must inform individuals of voter eligibility requirements and specify that non-citizens are ineligible and must decline to register to vote. The AVR Act requires AVR agencies to inform applicants that, unless they opt-out, their transaction at the agency will operate as a registration and attestation of their eligibility to vote. Eligible residents who do not decline will automatically be registered to vote as of the date of the qualifying agency transaction. The AVR Act does not change the requirement that voters be registered at least 21 days prior to an election.

AVR agencies will electronically transmit the collected personal information and signatures to the Secretary of State, unless an address is designated as confidential pursuant to G.L. c. 9A, § 8, or any collected information is not internally consistent or otherwise reliable. **G.L. c. 51, § 42G ½(e)**, as amended by the AVR Act. The Secretary in turn will transmit the received data to the board of registrars or election commission in the registrant's home city or town. *Id*.

Individuals automatically registered by an AVR agency will have a second opportunity to decline registration (or to select a party affiliation) by responding within 21 days to the notification of registration mailed by their local voter registrars. Voters who do not respond within the 21 days will be deemed registered as of the date they completed their eligible transaction with the designated AVR agency. Additionally, to reduce inaccurate registrations, local registrars will use the **Electronic Registration Information Center** to notify and confirm registrars new registration addresses.

Protections Afforded by the AVR Act

The Secretary of State is directed by the AVR Act to promulgate regulations to protect the confidentiality of addresses and the reliability of citizenship information.

- **Address Confidentiality**

Victims of domestic violence, sexual assault, or stalking in particular are concerned that their name and address information will not remain confidential when provided to a government agency. Recognizing that public policy is not served if people refrain from registering to vote or, more critically, obtaining necessary driver licenses or health services, out of fear for their safety, states that have implemented AVR have taken great care to assure the public that AVR will not increase the risk that their contact information will be publicly shared.

In Massachusetts, **current election regulations** prohibit registrars and election commissioners from publishing on the voter rolls, the name and residence of voters who are protected by the **Address Confidentiality Program** ("ACP") administered by the Secretary of State, protected by a court order, residents in protective shelters, or for whom a chief of police has submitted an affidavit attesting that the voter is entitled to have certain information withheld from the public under G.L. c. 265, § 24C. Under the ACP, domestic violence victims who have relocated are also provided with a substitute address to use in transactions with the RMV and other state entities. As inserted by the AVR Act, G.L. c. 51, § 65(e) requires the Secretary of State to adopt regulations addressing confidentiality program participants under the ACP who interact with the RMV, MassHealth, and other AVR agencies.

- **Citizenship Questions**

A common concern regarding AVR and other voter registration modernization is that ineligible residents will be unintentionally registered to vote. Massachusetts, like every other state, **allows documented noncitizens to obtain driver's licenses** with proof of lawful residence. California, unlike Massachusetts, allows undocumented aliens to obtain a special driver's license and implemented AVR in 2018. While California did experience some initial technical difficulties after implementing AVR, **state officials reported** that "**no people in the country illegally — who are eligible to get a special driver's license in California — were mistakenly registered to vote**," and the Brenner Center for Justice did not report any incidents of non-citizens voting in California.

G.L. c. 51, § 42G ½ (a)(1), as inserted by the AVR Act, allows only state agencies that collect "reliable citizenship information" to participate in the AVR program. Agencies are deemed to collect reliable citizenship information if they "(i) request, in a clear, understandable and consistently stated manner, that customers affirm their citizenship status; and, (ii) collect a signed affirmation of citizenship status or documentary proof of citizenship status such that records of citizens are segregable from non-citizens." In Massachusetts, **citizenship and immigration status** is also verified when determining eligibility for Medicaid benefits and state-subsidized healthcare insurance. Voters registered under the AVR will not be liable for a false claim to citizenship unless they affirmatively assert such eligible citizenship after being notified that their transaction with the agency serves as an attestation of eligibility unless they decline to register and that noncitizens are not eligible to vote.

Impact of AVR

With the **AVR Act**, Massachusetts joins California, Georgia, Oregon, West Virginia, and eleven other states and the District of Columbia to enact AVR. The AVR policy represents a continued progression in Massachusetts towards the "**modernization of the registration process through continued expansion of online voter registration and expanded state collaboration in improving the accuracy of voter lists.**" According to the Brennan Center, which has published a **comprehensive report** measuring the impact of AVR across the nation, since first being adopted by Oregon in 2014, "AVR markedly increases the number of voters being registered — increases in the number of registrants ranging from 9 to 94 percent. These registration increases are found in big and small states, as well as states with different partisan makeups." For example, **Oregon** registered more than 200,000 citizens in the first six months

following implementation, a rate over 16 times greater than registered by the DMV under the previous system. Rhode Island and Connecticut, have implemented variations of AVR, and Rhode Island's voter registration has **increased 47%** since its implementation. In **California**, more than 1.4 million voter registration files were transmitted from the DMV to state election officials in the first four months of implementation. In fact, an **estimated 27 million eligible persons** would be added to voter rolls across the country if every state adopted automatic voter registration.

President Obama reminded us that we cure the ills in our democracy with more democracy. Automatic voter registration promises to do that by removing outdated and unnecessary barriers to voter engagement. As with all reforms, we must ensure AVR's implementation adheres to the spirit and intent of the law. But once fully implemented, thousands of our family members, friends, and neighbors in Massachusetts will finally be able to have their voices heard from town halls to the White House

Pratt Wiley is the President & CEO of the Partnership, Inc. He formerly served as the National Director of Voter Expansion for the Democratic National Committee, where he oversaw the Party's voting rights and voter protection initiatives, from 2013 to 2017.

Case Focus

Can Law Enforcement Officers Commit Any Crime While Off-Duty and Retain Their Pension?

By Michael Sacco

In a unanimous decision in two companion cases, *Essex Regional Retirement Board v. Swallow* and *State Board of Retirement v. O'Hare*, **481 Mass. 241** (2019) (*Swallow*/*O'Hare*), the Supreme Judicial Court (SJC) has determined that a law enforcement officer will not be required to forfeit his pension after a criminal conviction unless there is a direct link — either factual or legal — between the officer's off-duty conduct and his position. This is the same standard to which other public employees in Massachusetts are held. This decision startled many in the public pension community. Only the legislature may change the standard to which law enforcement officers are held, by expanding the pension forfeiture statute's narrow scope.

A Brief History of the Public Pension Forfeiture Law

Pension forfeiture provisions have existed in the retirement statute since the retirement law was codified in Chapter 32 of the Massachusetts General Lawsin 1945. The statute states that if a public employee is convicted of certain enumerated statutory offenses or misappropriation of the employer's funds or property, the employee forfeits any right to a pension and receives a return of any contributions made to their annuity savings account. In 1986 however, the SJC held in *Collatos v. Boston Retirement Board*, **396 Mass. 684** (1986), that the legislature intended G. L. c. 32, § 15 (3A) to require forfeiture of a public employee's pension only if the employee was convicted of two state crimes, G. L. c. 268A, § 2 (corrupt gifts, offers or promises to influence official acts, corruption of witnesses) and G. L. c. 265, § 25 (attempted extortion), and thus the public employee's guilty plea to violating 18 U.S.C. Section 1951 (extortion) would not require pension forfeiture. The SJC construed the statute narrowly because of its penal character.

Shortly after the *Collatos* decision, the legislature amended the statute by inserting G. L. c. 32, § 15 (4), which provided an intermediate level of pension forfeiture if the criminal conviction was a "violation of the laws applicable to his office or position." While Section 15 (3A) required a complete forfeiture of pension rights, Section 15 (4) provided that a pension forfeiture would entitle the public employee to a return of his accumulated total deductions (funds withheld from the employee's weekly check and paid to the retirement system), less any interest accrued thereon.

The first SJC decision interpreting Section 15 (4) was *Gaffney v. Contributory Retirement Appeal Board*, **423 Mass. 1** (1996). In *Gaffney*, the SJC held that a pension forfeiture was warranted when the superintendent of the Shrewsbury water and sewer department was convicted of larceny by common scheme for stealing the Town's money and property. *Id*. The SJC acknowledged that the legislature did not intend that a pension forfeiture should follow any and all criminal convictions. *Id*. at 5. Rather, "the substantive touchstone intended by the General Court is criminal activity connected with the office or position. . . . Looking to the facts of each case for a direct link between the criminal offense and the member's office or position best effectuates the legislative intent of § 15 (4)." *Id*. In *Gaffney*, the direct factual link between his employment and his criminal conviction was clear, and thus pension forfeiture was warranted.

Criminal Activity Not Limited to On-Duty Conduct

In *Maher v. Justices of the Quincy Division of the District Court Department*, **67 Mass. App. Ct. 612** (2006), the Appeals Court determined that a public employee's off-duty criminal conduct can result in pension forfeiture even if the criminal conviction did not involve a violation of a statute that specifically pertains to public employees or, unlike *Gaffney*, did not involve misappropriating the employer's funds or property. In *Maher*, the plaintiff was the chief plumbing and gas inspector for the City of Quincy. *Id*. at 613. He and another city employee broke into and entered the personnel office at city hall. There, the plaintiff reviewed his personnel file and stole a document or documents from the file. A few weeks later, a new mayor took office. The plaintiff took superannuation retirement and subsequently pleaded guilty breaking and entering in the daytime with intent to commit a felony, wanton destruction of property, and stealing personnel records and various documents. *Id*. His pension was forfeited, and the Appeals Court upheld the pension forfeiture, specifically referencing *Gaffney* and stating that the statutory requirement that the criminal activity be connected with the office or position "does not mean that the crime itself must reference public employment or the employee's particular position or responsibilities." *Id*. at 616.

The *Durkin* and *Finneran* Decisions

Similarly in *Durkin v. Boston Retirement Board*, **83 Mass. App. Ct. 116** (2013), a law enforcement officer's off-duty conduct resulted in forfeiture of his pension. Paul Durkin was a Boston Police Officer who became inebriated off-duty and used his service revolver to shoot a fellow off-duty police officer who was giving him a ride home. *Id*. at 117. Durkin pleaded guilty to assault and battery by means of a dangerous weapon, and the Boston Retirement Board forfeited his rights to a pension. *Id*. The Appeals Court upheld the retirement board's decision, noting that "Durkin engaged in the very type of criminal behavior he was required by law to prevent. This violation was directly related to his position as a police officer as it demonstrated a violation of the public's trust as well as a repudiation of his official duties. Clearly, at the heart of a police officer's role is the unwavering obligation to protect life, which Durkin himself recognized at his hearing. His extreme actions violated the integrity of the system which he was sworn to uphold." *Id*. at 119.

In *State Board of Retirement v. Finneran*, **476 Mass. 714** (2017), the SJC discussed the pension forfeiture statute's twenty-year evolution into two recognized types of "direct links" between a public employee's position and the crime committed: factual links and legal links. In cases involving factual links, a public employee's pension is subject to forfeiture under Section 15 (4) only when there is a direct factual connection between the public employee's crime and position. *Id*. at 720-21. Surprisingly, the court cited the *Durkin* case as an example of a direct factual link, noting that that crime had been committed with the police officer's service revolver. *Id*. at 721. In cases involving direct legal links, forfeiture is mandated under Section 15 (4) when a public employee commits a crime directly implicating a statute that applies to the employee's position. *Id*.

***Swallow* and *O'Hare* in the Appeals Court**

The *Durkin* and *Finneran* decisions implied that the plaintiff in *Durkin* may have kept his pension had he merely committed the offense with his personal weapon. In *Swallow*, a police officer who was on administrative leave was with his wife at their home. *Swallow/O'Hare*, 481 Mass. at 243. Swallow was drinking heavily and, after an argument, he grabbed his wife by the shirt, yelled at her, and waved his personal handgun in her face. *Id*. As she left the home and walked to a neighbor's driveway, she heard a single gunshot. *Id*. Swallow was subsequently arrested and ultimately pleaded guilty to assault and battery, discharge of a firearm within 500 feet of a building, assault by means of a dangerous weapon, multiple counts of improper storage of a firearm, and intimidation of a witness. *Id*. The retirement board forfeited Swallow's pension, largely relying on *Durkin*. *Id*. Although the District and Superior Courts reversed the retirement board's decision, the Appeals Court reinstated it, noting that Swallow's "use of a gun to threaten another's life violated the public's trust and repudiated his official duties." *Id*. at 244. *See*

Essex Reg'l Ret. Bd. v. Justices of the Salem Div. of the Dist. Ct. Dep't, **91 Mass. App. Ct. 755**, 760 (2017).

Finally, in *O'Hare*, a state trooper communicated online with, and eventually arranged to meet with, an individual whom he believed to be a fourteen-year-old boy but was actually an undercover agent with the Federal Bureau of Investigation (FBI). *Swallow/O'Hare*, 481 Mass. at 244. The FBI arrested O'Hare and he pleaded guilty to a charge of using the Internet to attempt to coerce and entice a child under the age of eighteen years to engage in unlawful sexual activity. *Id*. The retirement board forfeited O'Hare's pension rights, finding that his conviction went "directly to the heart" of his responsibilities and obligations as a state police trooper. *Id*. The District and Superior Courts reversed the retirement board's decision. *Id*. at 244-45. Like the posture of *Swallow*, the Appeals Court reversed, holding that forfeiture was required because O'Hare's conduct violated the fundamental tenets of his role as a state police trooper, because protecting the vulnerable, including children, is at the heart of a police officer's role, and this repudiation of his official duties violated the public's trust and the integrity of the Massachusetts State Police. *Id*. at 245. *See State Bd. of Ret. v. O'Hare*, **92 Mass. App. Ct. 555**, 559 (2017).

SJC Changes Course

As perhaps prophetically foretold in the reference to *Durkin* in the *Finneran* case, the SJC reversed both *Swallow* and *O'Hare* along similar lines. With respect to *Swallow*, the SJC held the retirement board should not have relied on *Durkin* for the proposition that forfeiture is mandatory after "a police officer violates the public trust and shirks his or her official duties." Although *Durkin* discussed the fundamental nature of the police officer's position and noted that the officer had violated the public trust by "engag[ing] in the very type of criminal behavior he was required by law to prevent," forfeiture was ultimately grounded on the factual connections between the officer's position and the criminal activity. *Swallow/O'Hare*, 481 Mass. at 251. In *O'Hare*, the SJC rejected the retirement board's argument that there is an exception to the proposition that pension forfeiture should not follow "as a consequence of any and all criminal convictions" for law enforcement officials because of their "special position" in our society. In rejecting this position, the SJC stated emphatically, "[t]his is precisely the kind of unfettered breadth that we have consistently avoided." *Id*. Accordingly, in both cases the SJC acknowledged the repugnant nature of the criminal offenses, but nevertheless reinstated the pensions. *Id*. at 254. In *O'Hare*, the SJC also summarily rejected the argument that there was a "legal link" between the criminal conduct and a violation of the "laws" applicable to State police. *Id*. at 252-53. The retirement board, relying on *State Board of Retirement v. Bulger*, **446 Mass. 169** (2006), in which the SJC found that perjury and obstruction of justice convictions violated the Code of Professional Responsibility for Clerks of the Courts and thus were a violation of the laws applicable to the office or position, had posited that the "laws" applicable to State police include the rules and regulations issued by the colonel of the State police pursuant to G. L. c. 22C §§ 3 and 10. *O'Hare* at 252. It argued that they function as a "code of conduct" and require that State troopers "avoid conduct that brings the State police into disrepute and obey all laws of the United States and the local jurisdiction." *Id*. at 252. Unpersuaded, the SJC found that if the legislature wanted to include rules and regulations that do not have the force of law, it would have said so, as it had in the preceding section of the statute. *Id*. at 252-53. The SJC distinguished the circumstances in *Swallow* and *O'Hare* from the holding in *Bulger*, where a clerk-magistrate committed perjury in violation of the Code of Professional Responsibility for Clerks of Court — because the Code has "the force of law." *Id*. at 253.

Many were surprised by the SJC's refusal to hold police officers to the higher standard under pension forfeiture laws that had previously been applied to discharge for off-duty conduct, such as in *Police Commissioner of Boston v. Civil Service Commission,* **39 Mass. App. Ct. 594**, 601 (1996) (officer lost his firearm while intoxicated and verbally abused other officers); *McIsaac v. Civil Serv. Comm'n*, **38 Mass. App. Ct. 473**, 475-76 (1995*)* (officer negligently handled firearm while intoxicated and verbally abused

other officers); *Comm'rs of Civil Serv. v. Mun. Ct. of the Brighton Dist.*, **369 Mass. 166**, 170-71 (1975), and *Patuto v. Comm'rs of Civ. Ser.*, 429 U.S. 845 (1976) (upholding discharge of off-duty police officer who accompanied others while they uttered forged money orders). Perhaps less surprising is the SJC's rejection of the argument that pension forfeiture can be triggered under Section 15 (4) by a violation of a rule or regulation or code of conduct which does not have the force of law. Implicit in its ruling, however, is that had the statute so provided, pension forfeiture would have surely resulted in *O'Hare*.

Looking Forward

Unless the legislature further amends Section 15 (4), police officers will be treated no differently than other public employees in assessing pension forfeiture for criminal activity. Interestingly, legislation has been filed to further restrict the scope of Section 15 (4). If enacted, it would limit a complete pension forfeiture to cases in which the prosecutor included such a penalty in the sentencing recommendation, and in the absence of such a recommendation, the local retirement board could implement a partial forfeiture based on its discretion and the facts and circumstances of the particular criminal conviction. In my view, the Legislature should follow the Court's lead in extending the pension forfeiture's statute's reach to off-duty law enforcement officers' conduct as it has in upholding employment termination proceedings. As the Appeals Court noted in *Police Commissioner of Boston v. Civil Service Commission*, **22 Mass. App. Ct. 364, 371** (1986): "Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." *See also Falmouth v. Civ. Serv. Comm'n*, **61 Mass. App. Ct. 796, 801-802** (2004) ("[p]olice officers must … behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. This applies to off-duty as well as on-duty officers.") While I recognize the financial impact a pension forfeiture will often have on the pensioner's family, that should be a consideration before the law enforcement officer commits a crime that puts their family at perilous financial risk.

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Legal Analysis

Gelfgatt, Jones, and the Future of Compelled Decryption

By Eric A. Haskell

As great quantities of data have come to repose in electronic devices, obtaining access to the content of those devices has come to be greatly important to law enforcement in many criminal investigations. It sometimes happens that law enforcement has a right—typically pursuant to a search warrant—to search for data on a particular device, but is prevented from doing so by the presence of a password or other "key" that makes the data inaccessible or unreadable. Law enforcement sometimes can bypass the password on its own. See generally O.S. Kerr & B. Schneider, Encryption Workarounds, 106 Geo. L.J. 989 (2018). But, other times, the only practical way law enforcement can execute the search is with the help of a person who knows the password. Because the person who knows the password often is the suspect, their help generally is available only if compelled by court order. Such "compelled decryption" implicates not only the constitutional requirement that the search of the device be "reasonable," but also the suspect's constitutional privilege against compelled self-incrimination.

Basic Principles of the Privilege Against Self-Incrimination

The Fifth Amendment to the federal Constitution provides that "[n]o person . . . shall be compelled . . . to be a witness against himself . . . ." Article 12 of the Massachusetts Declaration of Rights similarly provides that "[n]o subject shall . . . be compelled to accuse, or furnish evidence against himself." Decisional law has interpreted these privileges to bar the government from: (1) compelling a person; (2) to make a testimonial communication; (3) that is incriminating. Fisher v. United States, 425 U.S. 391, 408 (1976); Commonwealth v. Burgess, 426 Mass. 206, 218 (1997).

The privilege does not protect against compelled provision of a physical identifier such as fingerprints, a blood sample, or a handwriting exemplar. See generally Schmerber v. California, 384 U.S. 757, 767 (1966); Commonwealth v. Brennan, 386 Mass. 772, 776-83 (1982). This is because such identifiers do not "extort[] . . . information from the accused" or "attempt to force him to disclose the contents of his own mind," and thus are not viewed as sufficiently "testimonial" for the privilege to attach. Doe v. United States, 487 U.S. 201, 210-11 (1988). Nor does the privilege shield documents from being disclosed pursuant to compulsion, even if their contents are incriminating. United States v. Hubbell, 530 U.S. 27, 35-36 (2000). This is because "the creation of those documents was not 'compelled' within the meaning of the privilege." Id.

The privilege may apply where the mere act of producing a document or a thing is "testimonial" in that it implies an incriminating assertion of fact, such as: that the demanded object exists; that the object produced is authentic; or that the suspect possesses or controls the object. Fisher, 425 U.S. at 410; Commonwealth v. Hughes, 380 Mass. 583, 588-93 (1980). But this "act of production" doctrine does not apply where law enforcement already has independent evidence of the incriminating assertions that the act of production would imply. In other words, if the act of production "adds little or nothing to the sum total of [law enforcement's] information," then any facts implied by the act of production are "foregone conclusions" and the privilege does not apply. Fisher, 425 U.S. at 411; Hughes, 380 Mass. at 592.

Commonwealth v. Gelfgatt

In Gelfgatt, the defendant was arrested in connection with a complex fraud scheme that involved the creation and recording of forged mortgage assignments. Commonwealth v. Gelfgatt, 468 Mass. 512, 514-15 (2014). On the day of his arrest, investigators seized several encrypted devices from his home and also interviewed the defendant, who asserted that he was capable of decrypting them. Id. at 516-17. After the

defendant was charged with forgery, uttering, and attempted larceny, the Commonwealth filed a motion seeking to compel him to enter the passwords into the encrypted devices. Id. at 517-18 & n.10. The Superior Court denied the motion and reported the case to the SJC.

The SJC determined that the contents of the devices were not privileged on self-incrimination grounds because they had been "voluntarily created by the defendant in the course of his real estate dealings." Id. at 522 n.13. The SJC then held that the defendant's act of entering the passwords would be a testimonial act of production, because it would implicitly acknowledge his "ownership and control of the computers and their contents." Id. at 522. But, the SJC continued, the defendant had already acknowledged as much in his statement to the police; thus, any facts implied by his entering the passwords were foregone conclusions. Id. at 523-24. In doing so, the SJC commented that the "foregone conclusion" exception would apply where law enforcement already was aware of "(1) the existence of the evidence demanded; (2) the possession or control of that evidence by the defendant; and (3) the authenticity of the evidence." Id. at 522 (citing Fisher, 425 U.S. at 410-13).

Commonwealth v. Jones

In Jones, the defendant was arrested and later charged with sex trafficking and deriving support from prostitution. Commonwealth v. Jones, 481 Mass. 540, 543-44 (2019). At the time of his arrest, he possessed a cellular telephone that, the police learned from other sources, he had used to facilitate prostitution transactions. Id. The Commonwealth filed a motion seeking to compel him to decrypt the telephone (although, as discussed below, the motion imprecisely described what it sought to compel him to do). The motion judge demurred, interpreting Gelfgatt to require the Commonwealth to establish "(1) the existence of the evidence demanded; (2) the possession or control of that evidence by the defendant; and (3) the authenticity of the evidence," and concluding that the Commonwealth had failed to demonstrate those propositions with "reasonable particularity." Id. at 545, 548, 553 n.14. The Commonwealth subsequently made a renewed motion, furnishing additional evidence that, it argued, showed that the defendant's knowledge of the telephone's password was a foregone conclusion. Id. But the motion judge declined to consider the newly-furnished evidence without a showing that it had been unknown or unavailable to the Commonwealth at the time of the initial motion. Id. at 545, 558-59. The Commonwealth then sought relief before a single justice of the SJC, who reserved and reported the case to the full Court on three questions: (1) what burden of proof the Commonwealth must bear to establish the "foregone conclusion" exception to the privilege under Gelfgatt; (2) whether the Commonwealth had met that burden; and (3) whether the Commonwealth was required, in a renewed Gelfgatt motion, to show that any newly-furnished evidence had been unknown or unavailable at the time of the initial motion.

Before answering those questions, the SJC addressed a threshold issue: What factual assertions must the Commonwealth demonstrate are "foregone conclusions" in order to obtain a Gelfgatt order? The SJC answered that, when the Commonwealth seeks to compel a defendant to enter a password into a device, "the only fact conveyed . . . is that the defendant knows the password, and can therefore access the device." Id. at 547-48. The Court rejected the proposition that the compelled entry of a password also asserts the defendant's ownership and control of the device, observing that "individuals may very well know the password to an electronic device that is owned and controlled by another person." Id. at 547 n.8. Accordingly, the SJC concluded, the Commonwealth may invoke the "foregone conclusion" exception simply by showing that the defendant knows the password. Id.

Turning to the reported questions and relying on article 12, the SJC held that the Commonwealth must make that showing beyond a reasonable doubt. Id. at 551-55. Applying that standard, the Court found that the Commonwealth had shown the defendant's knowledge of the password beyond a reasonable doubt, where: (1) the defendant possessed the telephone at the time of his arrest; (2) one month before his arrest, when asked by the police for his number, the defendant had provided the telephone's number; (3) a

woman told the police that the defendant used the telephone to facilitate prostitution transactions; (4) the telephone's subscriber records were associated with a second number that was associated with the defendant; and (5) the telephone's cellular site location information (CSLI) placed it in the same locations at the same times as another telephone that was confirmed to belong to the defendant. Id. at 555-58 ("[S]hort of a direct admission, or an observation of the defendant entering the password himself and seeing the phone unlock, it is hard to imagine more conclusive evidence of the defendant's knowledge of the [telephone's] password."). Finally, the Court found that the motion judge abused his discretion by declining to consider evidence presented in the Commonwealth's renewed motion that was not shown to have been unknown or unavailable at the time of the initial motion. Id. at 558-61. The Court observed that a Gelfgatt motion, "[m]uch like a search warrant application," is an "investigatory tool," the factual support for which may evolve over the course of an investigation. Id. at 559-60.

The Future of Compelled Decryption

Although Gelfgatt and Jones mark the SJC as a national leader on compelled decryption issues, important questions remain to be answered.

- **Non-Gelfgatt Decryption Procedures**

The order in Gelfgatt required the defendant to appear at a digital forensic lab, to enter the password into each device, and "immediately [to] move on . . . ." 468 Mass. at 517 n.10. It also forbade the Commonwealth from viewing or recording the password entered by the defendant. Id. In contrast, the order sought in Jones was "not perfectly clear" as to what it would require the defendant to do, but "suggested that it sought to require the defendant to make a written disclosure of the actual password." 481 Mass. at 546 n.9. Acknowledging the possible infirmity with such a procedure, the SJC construed the order sought in Jones as tracking the one sought in Gelfgatt, and approved its issuance on that basis. Id.

The SJC was correct to hesitate when faced with a request to compel the defendant to disclose his password to law enforcement. This is because the compelled disclosure of a password is not a testimonial act of production to which the "foregone conclusion" exception might apply: Rather, it is a "pure" testimonial statement to which the "foregone conclusion" exception cannot apply. See id. (acknowledging as much in dicta); see also United States v. Oloyede, Nos. 17-4102, 17-4186, 17-4191, & 17-4207, — F.3d —, 2019 WL 3432459 (4th Cir. Jul. 31, 2019) (distinguishing between suspect's typing password into device and giving password to law enforcement).

Furthermore, in both Gelfgatt and Jones, the suspect was not compelled to produce any particular files from the device after decrypting it; that was left to the analyst executing the warrant. In Jones, the SJC highlighted this aspect of the decryption procedure, observing that "the analysis would have been different" if the suspect had been compelled to produce particular files, because doing so "would implicitly testify to the existence of the files, [the suspect's] control over them, and their authenticity." 481 Mass. at 548 n.10. In that situation, the Commonwealth would have been obligated to prove, beyond a reasonable doubt, that those additional assertions were foregone conclusions before it could obtain a corresponding Gelfgatt order. Cf. Hubbell, 530 U.S. at 44-45 (act of production is privileged where grand jury subpoena would require recipient to produce documents whose existence and location were previously unknown to government).

- **Cloud-Based Storage**

Gelfgatt and Jones both involved a tangible device that was in the physical possession of law enforcement. But their holdings as to the privilege against compelled self-incrimination can also be

applied to a request to compel decryption of a cloud-based digital space. Such a request would follow the same analysis, with law enforcement required to: (1) have a right to search the cloud location; (2) show beyond a reasonable doubt that the suspect knows the password to access the cloud location, thereby availing itself of the "foregone conclusion" exception; and (3) allow the suspect to input the password in a way that law enforcement does not see or record.

- **Biometric Keys**

In both Gelfgatt and Jones, the sought-after "key" was an alphanumeric password. But a key can also take the form of a biometric such as a facial scan, retinal scan, or fingerprint. Biometric keys introduce two novel questions: (1) is compelled biometric decryption properly viewed as a testimonial act of production, and thus within the scope of the privilege against compelled self-incrimination?; and, if so, (2) what must law enforcement show is a "foregone conclusion" before it can compel such biometric decryption?

Courts have answered the first question both ways. Some have viewed the compelled biometric decryption as no different than compelled provision of a traditional physical identifier, and thus nontestimonial.[1] See, e.g., State v. Diamond, 905 N.W.2d 870, 875-76 (Minn. 2018); In re Search of [Redacted], 317 F. Supp. 3d 523, 535-37 (D.D.C. 2018); In re Search Warrant Application for [Redacted], 279 F. Supp. 3d 800, 803-05 (N.D. Ill. 2017); Commonwealth v. Baust, 89 Va. Cir. 267, 2014 WL 10355635 (Va. Cir. Ct. Oct. 28, 2014). Others have reasoned that, unlike providing a physical identifier, compelled biometric decryption implies factual assertions about the suspect's relationship with the device. See, e.g., Seo v. State, 109 N.E.3d 418 (Ind. App. 2018), vacated and transferred to Ind. Supreme Court, 112 N.E.3d 1082 (Ind. 2018); In re Application for Search Warrant, 236 F. Supp. 3d 1066, 1073-74 (N.D. Ill. 2017); In re Search of a Residence in Oakland, Cal., 354 F. Supp. 3d 1010, 1015-16 (N.D. Cal. 2019); In re Search of White Google Pixel 3 XL Cellphone, No. 1:19-mj-10441, 2019 WL 2082709 at *3-4 (D. Idaho May 8, 2019). No Massachusetts court has yet issued a published opinion on this issue.

In this author's view, law enforcement should be prepared for a Massachusetts court to depart from the traditional treatment of compelled provision of a physical identifier, and instead to view compelled biometric decryption as a testimonial act of production. Compelled provision of a physical identifier has been deemed nontestimonial not because it does not assert facts, but rather because the facts that it does assert are so "self-evident" as to be "[in]sufficiently testimonial for purposes of the privilege." Fisher, 425 U.S. at 411 (compelled handwriting exemplar is nontestimonial for purposes of the privilege, despite its asserting both that handwriting belongs to suspect and that suspect is literate); accord Commonwealth v. Nadworny, 396 Mass. 342, 363-64 (1985) (fact that defendant is right-handed, unlike handwriting exemplar itself, is testimonial, although "trivial"). But, when law enforcement seeks to compel biometric decryption, its object is not merely provision of the biometric standing alone: If it were, the method of capturing the biometric would not matter, and investigators could just as well take a photograph of the suspect's face, or ink-and-paper impressions of his fingerprints. Rather, the object of compelled biometric decryption is the interaction of the biometric, in a pre-programmed fashion, with a particular device. The successful interaction of biometric and device, in contrast to the biometric standing alone, asserts at least one fact that neither is trivial nor is self-evident from the biometric—specifically, it asserts that the suspect's biometric is capable of decrypting the device.[2] See In re Application for Search

[1] To ensure that even the act of placing a finger on the screen of a device does not disclose the suspect's thoughts, the orders in some of those cases have required the police—not the suspect—to select the finger that the suspect must place on the screen. See In re Search of [Redacted], 317 F. Supp. 3d at 537, 539; In re Search Warrant Application for [Redacted], 279 F. Supp. 3d at 804.

[2] It also strongly implies that the suspect was the person who previously programmed the device to decrypt in response to his biometric; unlike an alphanumeric password, a biometric is unique and non-transferable. Contrast

Warrant, 236 F. Supp. 3d at 1073. In other words, compelled biometric decryption asserts facts that are basically similar to those asserted by compelled decryption using a password.

This reasoning simultaneously answers both the first question of whether compelled biometric decryption should be viewed as a testimonial act of production (it should) and the second question of what law enforcement must establish is a "foregone conclusion" before it can compel such a biometric. If the assertion implied by the compelled biometric decryption is that the suspect's biometric is capable of decrypting the device, then, pursuant to Jones, that is what the Commonwealth must prove beyond a reasonable doubt. As in Jones, the Commonwealth can do so through either direct evidence (e.g., that the suspect actually used his biometric to decrypt the device) or circumstantial evidence (e.g., that the suspect used the device in a manner indicating that he must have had the ability to do so).

As a practical matter, the utility of compelled biometric decryption to law enforcement may be circumscribed. This is because some biometric-based security technologies—including Apple's popular fingerprint-based Touch ID—self-disable if, since the last time the device was unlocked, too much time has passed, or the device has been restarted or has lost power, or multiple attempts to unlock the device have been unsuccessful. See About Touch ID Advanced Security Technology. In addition, law enforcement may have limited ability to both maintain power to a biometrically locked device and to secure it from network activity (i.e., to minimize the risk of remote wiping or deletion of data). Perhaps for these reasons, federal practice has often encountered requests to compel biometric decryption made as part of an application for an omnibus search warrant to also authorize law enforcement: (1) to seize the device; and (2) to search the device for particular data after it has been seized and decrypted using the compelled biometric. See, e.g., In re Search of a Residence in Oakland, 354 F. Supp. 3d at 1013; In re Search of [Redacted], 317 F. Supp. 3d at 525-26; In re Search Warrant Application for [Redacted], 279 F. Supp. 3d at 801-02; In re Application for Search Warrant, 236 F. Supp. 3d at 1066-67.

- **Ex Parte Gelfgatt Proceedings**

Gelfgatt and Jones each arose in the posture of a motion filed in a criminal case in the Superior Court. This posture suggests that, in those cases, any evidence contained on the encrypted device was not necessary to support charges against the defendant. But some investigations will require a compelled decryption before charges can be brought. It thus seems likely that some Gelfgatt motions will arise in an ex parte posture.

The Appeals Court has already addressed a Gelfgatt motion arising out of a grand jury investigation, concerning a device that the police had previously obtained a warrant to search. See In re Grand Jury Investigation, 92 Mass. App. Ct. 531 (2017), further appellate review denied, 478 Mass. 1109 (2018). The Commonwealth filed a sealed Gelfgatt motion in the Superior Court and attached documents containing grand jury evidence that, the Commonwealth argued, satisfied its burden under the "foregone conclusion" exception. Id. at 532. The Commonwealth served the motion, but not the attachments, on counsel for the individual whom it sought to compel. The Appeals Court affirmed the Superior Court's issuance of a Gelfgatt order, concluding that the attachments showed that it was a foregone conclusion that the individual knew the password, among other things. Id. at 534-35; see also Burgess, 426 Mass. at 215-16 (Fifth Amendment applies in same way to grand jury witness/target as to indicted defendant). The Appeals Court also specifically affirmed the non-disclosure of the attachments to counsel, reasoning that grand jury materials are secret, and that both the Superior Court judge and the appellate court could review the attachments on an ex parte basis. Id. at 535-36.

Jones, 481 Mass. at 547 n.8 (suspect's knowledge of password to device does not necessarily imply that he owns or controls device, because password can be transferred between persons).

It is a small step from In re Grand Jury Investigation to think that at least some Gelfgatt orders may be sought as part of a search warrant application. Indeed, search warrant applications bear similarities to the motions sustained in Gelfgatt, Jones, and/or In re Grand Jury Investigation: They are ex parte, they rely on affidavits rather than live testimony, and they form an "investigatory tool that aids investigators in obtaining material and relevant evidence related to a defendant's conduct." Jones, 481 Mass. at 559. As noted, search warrant applications seeking compelled biometric decryption have appeared in federal practice. See, e.g., In re Search of a Residence in Oakland, 354 F. Supp. 3d at 1015-16; In re Search of [Redacted], 317 F. Supp. 3d at 535-37; In re Search Warrant Application for [Redacted], 279 F. Supp. 3d at 803-05; In re Application for Search Warrant, 236 F. Supp. 3d at 1073-74. Nonetheless, a search warrant application seeking a Gelfgatt order in state court would entail innovations to Massachusetts search warrant practice that the applicant must be prepared to address.

The applicant must be prepared to show that the act sought to be compelled is of a type of evidence for which the Legislature has authorized issuance of a search warrant. See G.L. c. 276, § 1 (enumerating categories of evidence that may be sought by search warrant). Compelled biometric decryption likely will fall into that category. See, e.g., In re Lavigne, 418 Mass. 831, 834-35 (1994) (statute authorizes use of warrant to procure bodily sample from suspect); cf. In re Search of [Redacted], 317 F. Supp. 3d at 540 n.13 (declining to decide whether Fed. R. Crim. P. 41 authorizes issuance of warrant to compel biometric decryption, and instead issuing warrant under All Writs Act, 28 U.S.C. § 1651). Compelled decryption using a password, on the other hand, might not.

The applicant must also be prepared to show that the application does not trigger an adversarial hearing, which the SJC has required as a prerequisite for issuance of warrants for some especially invasive searches. E.g., Lavigne, 418 Mass. at 835 (warrant to extract blood sample from suspect must be preceded by adversarial hearing at which court can weigh intrusiveness of procedure against need for evidence); Commonwealth v. Banville, 457 Mass. 530, 539-40 (2010) (warrant to obtain suspect's DNA using buccal swab would have been preceded by adversarial hearing if it had occurred in Massachusetts). So long as compelled biometric decryption "[does] not involve penetration into [the suspect's] body," Banville, 457 Mass. at 539 n.2, it likely will not trigger such a hearing. See also Commonwealth v. Miles, 420 Mass. 67, 83 (1995) (ex parte order compelling suspect to appear and have his body inspected for poison ivy need not be preceded by hearing).

The applicant must take care to particularly identify the person whose biometric is to be compelled, perhaps by including a photograph and/or detailed physical description of that person in the warrant application papers. This stems in part from the "particularity" requirement applicable to any search warrant. See G.L. c. 276, § 2. It also follows from this author's view (above) that compelled biometric decryption may be analyzed under the "foregone conclusion" exception to the "act of production" privilege: If that view is accepted, the identity of the person whose biometric is to be compelled would form one aspect of the "foregone conclusion" that, under Jones, the Commonwealth must prove beyond a reasonable doubt. The need for particularity in identifying the person whose biometric is to be compelled likely precludes law enforcement from obtaining a warrant to compel "any person present" at the warrant execution to apply his/her biometrics to a device. Cf. In re Search of a Residence in Oakland, 354 F. Supp. 3d at 1014 (denying such authorization); In re Application for Search Warrant, 236 F. Supp. 3d at 1068-70 (same).

And the applicant should be explicit about the different burdens it must sustain to obtain such a warrant. That a crime has occurred and that evidence related to the crime reasonably may be expected to be found in a particular place—requirements for issuance of any search warrant—need be demonstrated only to the level of probable cause. That it is a foregone conclusion that a particular person's biometric is capable of decrypting the device, however, must be demonstrated beyond a reasonable doubt in

accordance with Jones.[3] The applicant should consider explicitly articulating the applicable burdens in the warrant application papers, for the benefit of the reviewing judicial officer.

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[3] An additional showing might be required to authorize the suspect's temporary detention for the purpose of compelling his biometric, although that showing may well be subsumed by the two discussed in the body text. See **Hayes v. Florida**, 470 U.S. 811, 816-17 (1985) (holding that police cannot transport suspect to station for fingerprinting without probable cause or prior judicial authorization, but suggesting that seizure of suspect in field for fingerprinting may be permissible based on less than probable cause in some circumstances); see also In re Search of [Redacted], 317 F. Supp. 3d at 532-33 (applying Hayes to authorize warrant to detain person for compelled biometric decryption if: "(1) the procedure is carried out with dispatch and in the immediate vicinity of the premises to be searched, and if, at time of the compulsion, the government has (2) reasonable suspicion that the suspect has committed a criminal act that is the subject matter of the warrant, and (3) reasonable suspicion that the individual's biometric features will unlock the device, that is, for example, because there is a reasonable suspicion to believe that the individual is a user of the device"); cf. **Commonwealth v. Catanzaro**, 441 Mass. 46, 52 (2004) (search warrant implies authority to detain occupants of premises while search is conducted).