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# Police Legal News

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Police Legal News is a free newsletter designed to provide police officials with the latest news and information regarding court and administrative agency decisions affecting the Massachusetts law enforcement community.

Topic areas will include: summaries of SJC & Appeals Court decisions, search & seizure, motor vehicle, and criminal law, labor relations law & highlights of recent decisions of the Mass. Labor Relations Commission, Civil Service Commission cases, police civil liability, etc...

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## [Boston Police Department v. Cawley](#): Superior Court Upholds Psychological Bypass Appeal

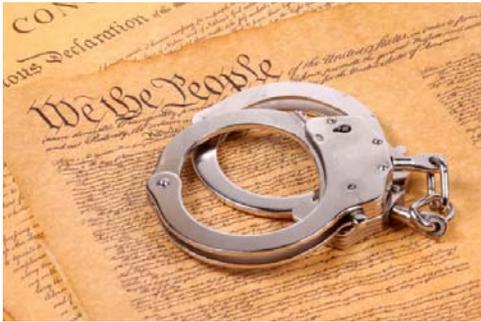
In the case of [Kerri Cawley v. Boston Police Department](#), the Civil Service Commission overturned the psychological bypass of a police officer candidate on the grounds that the BPD's psychiatrist, Dr. Julia M. Reade, "has unwittingly established an unattainable bar for this Appellant that appears to be tinged with personal bias. Dr. Reade *first* disqualified the Appellant for psychological reasons primarily because she had difficulty "offering up information" demonstrating her rigid and

inflexible manner. When the Appellant sought to be more forthcoming during an interview that was part of a second round of hiring, filling in the blanks to questions in which she had previously offered no information, Dr. Reade concluded that the Appellant's forthright answers during this second interview were actually *contradictory* to the answers given in the first interview, thus making the Appellant a liar." The City appealed to Superior Court and the Court upheld the bypass.

[Download the Superior Court Decision](#)

[Attorney Brian Simoneau](#) currently has Boston Police psychological bypass cases pending before the Civil Service Commission where, Doctors Marcia Scott & Julia Reade disqualified candidates who had previously passed psychological exams for other police departments and were employed as sworn, armed, and very successful police officers in the City of Boston. It appears that the BPD has a pattern of improperly and unfairly rejecting qualified candidates. Hopefully, with the Commission's intervention, the BPD will end this practice.

# Commonwealth v. Giovanni DeJesus: Firearm Surprisingly Suppressed



In the case of [Commonwealth v. Giovanni DeJesus](#), the Appeals Court upheld a suppression order "because at the time the police ordered the defendant to step out of the vehicle in which he was seated, police had no reasonable suspicion that he had committed, or was about to commit, a crime, and there was no imminent threat to public safety."

At approximately 3:30 P.M. on September 1, 2006, a caller to a 911 emergency line stated as follows: "I just wanted to tell you that I looked out the window and there was [sic] some kids in a white van with a, I seen [sic] a few handguns."

After a few questions by the 911 operator, the caller stated that he observed a white van with a few kids standing around it just outside of his building and one person, with a black gun, inside the van. The caller described the person inside the van as a kid who "looks Hispanic from here, but a little dark-skin though [sic]." The 911 operator issued a radio dispatch stating "[Inaudible] 20 Dixwell for a person with a gun. [Inaudible] three Hispanic males getting out around a white van. Inside the van is a Hispanic male, dark skin. Says suspect has the gun."

Boston Police Officer Antonio Nunez heard the dispatch while on routine patrol with his partner, Officer Mike Santry, in a marked cruiser in the area of Dixwell Street in the Jamaica Plain section of Boston. Nunez had made prior arrests for illegal possession of drugs and handguns in the area.

Approximately 37 minutes after receiving the dispatch, Nunez and Santry, accompanied by additional police officers in separate cruisers, arrived at 20 Dixwell Street. When he arrived, Nunez observed four or five Hispanic males outside a white van. Officers other than Nunez pat frisked those persons, but found no gun. Nunez and Santry proceeded to the front of the van, where two Hispanic males were seated inside. In the driver's seat was a person later determined to be the defendant's father.

He was ordered out of the van and frisked, but no weapon was found. The defendant, who appeared to Nunez to be in his early twenties, was in the passenger seat. Nunez asked him to step out of the van. The defendant remained seated and asked Nunez why he was being asked to leave the van. Nunez informed him that the police had received a report of a man with a firearm, "and, for officers' safety, we need to check everybody out at that given moment." The defendant, then, "seemed a little nervous. . . just looking from side to side," and told the officers that they needed a warrant to get him out of the vehicle.

Nunez again asked the defendant to step out of the van and, after the defendant again refused, Nunez informed him that he would be arrested unless he complied. The defendant then left the vehicle and Nunez pat frisked him, finding a handgun in his waistband.

**The police had no reasonable suspicion either "of a threat to anyone's physical well being or of the commission of a crime (other than the possibility of the possession of an unlicensed weapon)." [Commonwealth v. Alvarado](#), 423 Mass. 266, 274 (1996). See [Commonwealth v. Couture](#), 407 Mass. 178, 183, cert. denied, 498 U.S. 951 (1990). The case is unlike those which have distinguished [Commonwealth v. Couture](#) on the ground that the report of a gun, viewed in the circumstances taken as a whole, raised a likelihood either of criminality or of an imminent threat to public safety. See, e.g., [Commonwealth v. Alvarado](#), 427 Mass. 277, 282-283 (1998) (rarity of lawful possession of a sawed-off shotgun, coupled with its lethal character, discloses imminent threat to public safety); [Commonwealth v. McCauley](#), 11 Mass. App. Ct. 780, 781 (1981) (dropping gun on floor more than once suggested carelessness with firearms and possible intoxication, creating threat to public safety); [Commonwealth v. Johnson](#), 36 Mass. App. Ct. 336, 337 (1994) (individual carrying handgun in her purse, shouting obscenities and gesticulating in an angry manner); [Commonwealth v. Foster](#), 48 Mass. App. Ct. 671, 676-677 (2000) (display of gun in high crime area at 5:30 A.M. by individual who had just come from an after-hours party).**

In the present case, police encountered the defendant while he was seated in an automobile. There were no grounds to believe that he had committed, or was about to commit, a crime. Though the area was described as a high crime area, it was 3:30 in the afternoon. **There had been no reports that a gun had been fired. There was no reasonable basis for the officer to believe that he was in danger,** and the motion judge so found. See [Commonwealth v. Knowles](#), 451 Mass. 91, 99-100 (2008). **There was likewise no basis to support a reasonable suspicion that the defendant's possession of the gun constituted a crime.** Though the 911 tip described a "kid" with a gun, the officers' observations upon arrival dispelled any belief that the defendant was a minor; the officer's testimony at the suppression hearing was that he believed the defendant to be in his "early twenties." Compare [Commonwealth v. Garden](#), 451 Mass. 43, 46 (2008) (justification for stop evaporated once officer observed that driver was male, and therefore could not be vehicle's female owner with suspended license). **There was, accordingly, no basis to justify the officer's order to the defendant to exit the automobile.**

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# [Commonwealth v. Amenhotep Smith:](#) Search of Student by School Administrators



In this case, the Court held that **a public school administrator may search a student based on that student's violation of a school rule and of procedures that were intended to secure a safe learning environment within the school.**

The juvenile defendant was observed in "unauthorized area" of Brighton High School and brought to an office to be searched by an administrator. It was known that he did not enter the school through the main entrance and therefore was not subjected to metal detector screening. Two school administrators and two school police officers were in the office at the time and, when the defendant resisted the search, they summonsed an Assistant headmaster who had good relationship with the defendant. While encouraging the defendant to permit a search, the headmaster took the defendant's jacket, which he noted was heavy, and found a .380 caliber handgun in a pocket. He called for the school police, who entered the office, retrieved the firearm, and arrested the defendant.

Three administrative directives govern administrative searches within the Boston public schools, all of which were admitted as exhibits during the motion hearing. The Boston public schools code of discipline (code) requires that each school establish written, school-based rules of conduct and procedures to include, among other issues, searches and seizures. The code also sets forth "Rights of Students" which include a right not to be searched except by designated school administrators based on reasonable cause. Section 7.9.2 of Brighton High School's school-based rules, which were published in the 2003- 2004 student handbook, states that "[s]tudents that are found in the hallway 10 minutes after the second bell rings and without a pass [are] in violation of this rule." The section of the handbook entitled "Student Searches" further provides notice that students are subject to search based on reasonable cause to suspect violations of the code.

The SJC has acknowledged that "notwithstanding the legitimate goal of school administrators to maintain a safe learning environment, students continue to have a legitimate expectation of privacy in their persons and in the items they bring to school." [Commonwealth v. Damian D.](#), 434 Mass. 725, 727 (2001), citing [New Jersey v. T.L.O.](#), 469 U.S. 325, 353 (1985) (*T.L.O.*)

"In ordinary circumstances, a search will be justified at its inception 'when there are reasonable grounds [reasonable suspicion] that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.'" [Damian D.](#), 434 Mass. at 728, quoting from [T.L.O.](#), *supra* at 342. Reasonable suspicion cannot be based on an "inchoate and unparticularized suspicion or 'hunch,' *Terry v. Ohio*, [*supra*] at 27; rather it [is] the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people'--including government officials--are entitled to rely. *United States v. Cortez*, 449 U.S. 411, 418 (1981) ... [T]he requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment....' *Hill v. California*, 401 U.S. 797, 804 (1971)." [T.L.O.](#), *supra* at 346.

Second, if a search is justified at its inception, it must next be determined if it was limited in scope to those measures "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

The judge was correct in concluding that the search of the defendant was both reasonable at its inception and limited in scope to an extent "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." [T.L.O.](#), 469 U.S. at 342. At the time the headmaster searched the defendant, he was aware that the defendant had not entered the building through the metal detectors, thereby avoiding the standard administrative search, and had avoided leaving his belongings in the headmaster's office, as was the usual practice. In addition, the headmaster was informed of the incident from the previous day, where the defendant had been told not to return to school unless accompanied by a parent. Furthermore, he was aware of the defendant's presence in an unauthorized area, which he knew violated school rules. The knowledge of all these circumstances created a reasonable suspicion that the defendant was in possession of contraband of some type, which could pose a safety risk to himself and to others in and around the school building.

[Download](#) the case.

## D.C. v. Heller:

### **Certain District of Columbia Gun Control Laws Struck Down as Unconstitutional**

In the case of [D.C. v. Heller](#), the Supreme Court held that the Second Amendment validates a pre-existing individual right to keep and bear arms. Some specific District of Columbia statutes were struck down because they violated the Second Amendment. The Court also suggested, however, that state and federal governments can reasonably restrict this right. The opinion suggests that most existing federal firearms laws do not violate the Constitution. The specific effect is that D.C. residents can: (1) license a handgun to possess in their homes and (2) may possess loaded, functional firearms in their homes. Important issues remain.

The District of Columbia had arguably the most restrictive gun control measures in the nation. A group of D.C. residents sued the District, claiming that the net effect of three of these laws violated the Second Amendment. The first law [*D.C. Code § 7-2502.02(a)(4)*] sets out licensing requirements. The second law [*D.C. Code § 22-4504*] prohibits carrying handguns without a license (apparently even when moving a gun from one place to another inside one's home). The third law [*D.C. Code § 7-2507.02*] mandates that all lawfully-owned firearms be kept both unloaded and either disassembled or secured by a trigger lock or similar device.

Most of the plaintiffs claimed that these three laws violated their individual rights under the Amendment to possess what they describe as "functional firearms" - those that could be "readily accessible to be used effectively when necessary" for self-defense in the home. The plaintiffs did not assert a right to carry such weapons outside their homes. Nor did they challenge the District's authority *per se* to require the registration of firearms.

Heller was a guard at the Federal Judicial Center who carried a handgun while on duty and he wanted to keep a handgun in his D.C home for self-defense, so he applied for a license and was refused. This gave rise to a neat anomaly: **Heller was required to carry a loaded sidearm while guarding the Judicial Center in the District, but was denied the right to keep a loaded firearm of any sort to protect himself in his D.C. home.** Heller's situation nicely framed the general controversy discussed above. If the Amendment guarantees the individual right to keep and bear arms, surely these D.C. laws violate that right in his case.

**Because D.C.'s statutes absolutely ban the exercise of that right in a citizen's home for the fundamental purpose of self-defense, the statutes violate the Constitution.** "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." This is now the law.

This Supreme Court case will likely have important ramifications in Massachusetts. [G.L. c. 140 § 131L](#), the "safe storage" law may be challenged. License denials will also likely be challenged.

[Download](#) the Full text of the *Heller* case.

**Attorney Patrick M. Rogers will be discussing this case in detail & its ramifications in Massachusetts at an upcoming [CPS Firearms Seminar](#). Police Chiefs & Firearms Licensing Officials Should Attend!!!!**

This article was excerpted from an article written by Jeff Fluck  
Senior Instructor, Legal Division, FLETC

## Commonwealth Police Service Topical Seminars 2008

- [Firearms Law](#) Struck Down by Supreme Court, Sept. 4, 2008, Bridgewater Police Training Center
- [Bullying](#): Identifying & Regulating Bullying on and off School Property Under MA Law, Sept. 19, 2008, Andover Police Training Center, Nov. 14, Grafton PD Training Center
- [2 Day Advanced Detective for 2008](#), Wednesday & Thursday September 24 & 25, 2008, Leicester Police Department Training Center
- [CORI & Public Records, & the Sex Offender Registry Law](#), October, Springfield Police Training Center
- [Advanced Internal Affairs](#), 2-Day Internal Affairs Updated Legal Presentation Based on 2008 Massachusetts Law & Procedure
- [Managerial Prerogatives of Policing in Massachusetts](#) Beyond the Collective Bargaining Agreement, Nov. 5, 2008, Springfield PD
- [Command Staff Critical Training Issues Under Massachusetts Law & Procedure](#), Nov. 12 & 13, Medford PD.
- [Police Promotional Exams for 2009](#) - The Roundtable - A Dedicated Study Group Session. This seminar will meet approximately every Sunday morning from January 11, 2009 through May 3, 2009.

## From the Courts: Recent Labor & Employment Cases

In the case of [Calvao v. Town of Framingham](#), a group of Framingham Police Officers brought a class action suit against the Town for overtime compensation under the Fair Labor Standards Act (“FLSA”). 29 U.S.C. § 216. In their complaint, the officers alleged that the Town failed to include certain augments such as stipends and Quinn Bill Payments in the Officers’ overtime rate. Under the FLSA employee’s must receive compensation equal to at least time and ½ the employee’s “regular rate.” This “regular rate” must include not only base pay, but also any stipends, augments, or salary enhancements such as shift differentials, educational incentive payments, stipends, etc... Normally, the employer’s FLSA overtime exemption is triggered when an employee works in excess of forty hours in one week. See [29 U.S.C. § 207\(a\)](#). However, [29 U.S.C. § 207\(k\)](#) allows cities and towns to adopt a work period of up to 28 days in length, so that their FLSA overtime obligation is not triggered unless and until an employee works in excess of 171 hours in the 28 day period.

In Framingham, by virtue of a memorandum dated April 11, 1986, the Town adopted a 24 day qualifying work period pursuant to [29 U.S.C. § 207\(k\)](#). Under this period, by Department of Labor Regulation, the Town was not obligated to pay FLSA overtime unless and until an officer worked in excess of 147 hours in a 24 day work period. It is important to note that only actual hours worked count towards the 147 hour threshold. If, for example, an officer takes sick, compensatory, personal, or vacation time off, he or she is not credited with those hours towards the employer’s FLSA obligation.

The question raised in [Calvao v. Town of Framingham](#) was whether the Town’s adoption of the 24 day work period under [29 U.S.C. § 207\(k\)](#) was effective. An employer cannot simply adopt a work period in a vacuum. It must take certain steps to make the adoption effective. Under the Calvao case, the Court held that not much is required. The Court held “that the Town was required to announce the adoption of a qualifying work period and to take bona fide steps toward implementing the announced work period.” The Court ruled that the Town satisfied both steps.

“On April 11, 1986, the Town announced its adoption of a qualifying work period. On that date, the Town’s former Executive Administrator, Matthew P. Clarke, sent a Memorandum (“1986 Memorandum”) to the Police and Fire Chiefs, Personnel Director, and the Town Counsel, the subject of which was “Declared Work Period – Police and Fire Personnel.” In that Memorandum, The Town announced: ‘Pursuant to section 207(K) of the Fair Labor Standards Act and 29 C.F.R. Part 553, the declared work period for Police and Fire regular shifts is 24 days.

This declaration is effective with work periods commencing April 13, 1986.’ In declaring this adoption effective, the Court held that “[t]he work period requirement is ordinarily not a high hurdle” and that it can be satisfied by “[v]irtually any bona fide, fixed, recurring period of between 7 and 28 days will suffice.” 350 F.3d 291 n.21. “Here, the 1986 Memorandum clearly states that the Town adopted a recurring and fixed work period of twenty-four days. The critical difference between this case and other precedents is that here the Town explicitly announced its intention to invoke [§ 207\(k\)](#). The 1986 Memorandum directly states that the Town is adopting a “work period” – the exact terminology used in the statute – of twenty-four days.

Attorneys Christopher J. Petrini & Peter L. Mello of [Petrini & Associates, P.C.](#) represented the Town of Framingham.

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# **Step out of the Car Please: Motor Vehicle Exit Orders in Massachusetts**

Excerpts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 9)

**Motor Vehicle Exit Orders (Continued from the [June](#) issue of [Police Legal News](#))**

## **MVs—Requesting Passengers For ID on CMVI Routinely Asking Passengers to Produce ID—Unlawful Seizure**

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the Massachusetts Court of Appeals held that where police effected a stop for merely speeding, the continued delay in order to request identification of the backseat passengers amounted to an unlawful seizure under the line of decisions culminating in **Commonwealth v. Torres**, 424 Mass. 153 (1997).

### **Standard Required in Massachusetts**

The Massachusetts Court of Appeals stated that police, “may not interrogate passengers in [a lawfully stopped] car unless [they have] a ‘reasonable suspicion, grounded in specific, articulable facts,’ that a particular passenger in the car is involved in criminal activity or ‘engaged in other suspicious conduct.’” citing **Commonwealth v. Torres**, 424 Mass. 153 (1997).

### **Protection From Dragnet Interrogation**

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the investigating State Trooper testified that he asked for passengers identification as a matter of practice. Additionally, he testified that if the driver had seven passengers, he would have asked all seven of them for identification. The Court stated that, “[t]hat response illustrates the sort of dragnet interrogation about which the cases culminating in **Torres** express concern.”

### **Constitutionality of [c. 85 § 16](#) Strongly Drawn Into Question**

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the Court discussed the constitutionality of [c. 85 § 16](#) which states: Every person shall while driving or in charge of or occupying a vehicle during the period from one hour after sunset to one hour before sunrise, when requested by a police officer, give his or her true name and address.

**IMPORTANT NOTE:** The Court stated that if this statute were to permit “dragnet interrogation” of the sort in the instant case, “questions about the constitutionality would necessarily arise.”

### **Simply Asking Name Compared to Produce Documentation**

The Court did not reach the constitutionality question of [c. 85 § 16](#) in the **Alvarez** case because the Trooper, when he asked for identification, i.e., documents, went significantly beyond simply asking an occupant of a vehicle to give her or his true name and address. The statute “does not authorize the more searching inquiry that a random request for identification papers constitutes...” stated the Court.

### **No LEAPS/NCIC Passenger Checks**

A delayed detention to check on a MV passenger’s status will trigger a 4th AMD violation once police have checked out the operator. Therefore, before police conduct a LEAPS/NCIC check of a passenger, they should be able to demonstrate specific and articulable facts concerning criminal activity committed by that passenger. See the case of **State v. Damm**, 246 Kan. 220, 224-225 (1990), cited with approval by **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998).

**NOTE:** Where police unnecessarily delay the vehicle while checking on the status of a passenger’s I.D., any evidence discovered connected with the detention will be suppressed.

### **MVs—Requesting Passengers for ID—Asking Passengers to Produce ID—Non-Investigatory Reason (safety)**

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the Massachusetts Court of Appeals held that a police officer cannot request passenger ID as a matter of routine practice. However, if there is a plausible, non-investigatory reason, the request will be permissible.

**VALID EXIT ORDER:** In **Commonwealth v. Vanderlinde**, 27 Mass. App. Ct. 1103 (1989), when a police officer has sufficient reason to order the passenger out from the MV, a request can be made concerning production of ID.

**SOP SEIZURE:** In **Commonwealth v. King**, 389 Mass. 233 (1983), the SJC treated as appropriate the request for licenses from both the occupant of the driver’s seat and the occupant of the passenger’s seat when the trooper approached a car sitting at a rest stop during the winter. The SJC noted that the purpose of the detention, to determine whether the occupants were in need of assistance or aid, was “entirely different” from the purpose for a vehicle use regulation stop.

[...to be continued in the next issue of [Police Legal News](#)]

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[Attorney Patrick M. Rogers](#), has lectured to thousands of police officers on various legal topics. He has over twenty years of police law enforcement experience and has authored a number of textbooks that are used state-wide by thousands of police officers everyday.

[Attorney Brian E. Simoneau](#) is an experienced police labor law practitioner with particular expertise in Massachusetts Civil Service matters.

# Police Promotional Exams for 2009

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**NO CANCELLATIONS:** There will be absolutely **no refunds for any reason**—including cancelled examinations, changed reading lists, changed examination format, city/town going to an assessment center rather than written test, city/town taking position out of civil service, ineligibility or missed deadlines in applying for the examination itself, or for any other reason including weather.

**NOTE:** Any additions or deletions from the reading list will be made part of the seminar. It is strongly suggested however, that if you are seriously considering taking either one of the upcoming 2009 examinations, that you start studying these managements texts today.

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