

Massachusetts Criminal Justice Reform: ESSENTIAL POLICE IMPACT

John Sofis Scheft, Esq. & Law Enforcement Dimensions, LLC Revised 5/25/18

Chapter 69 of the Acts of 2018 signed April 13, 2018. All changes go into effect *immediately* unless otherwise noted.



Drugs

Fentanyl and Carfentanil added to Class A under 94C, § 31. Also, any synthetic opioid defined in Schedule I and II by federal law.

No mandatory minimum for manufacture, distribution or possession with intent Class B, 94C, § 32A, **Class C**, § 32B, or **Class D**, § 32C.

Trafficking fentanyl & carfentanil. Fentanyl – *10 grams or more* – mandatory 3½ years. 94C, § 32E(c½). Carfentanil – *in any amount* – mandatory 3½ years. However, if it is a mixture, must prove offender knew it contained carfentanil. 94C, § 32E(c¾).

School and park zone change. 94C, § 32J. Violation must occur within 100' of a public park or playground, or within 300' of a public or private accredited pre-school, Headstart, elementary, secondary or vocational school, between 5:00 a.m. and midnight, & only if offender: (1) used violence or threat, or possessed a firearm, rifle, shotgun, machine gun or dangerous weapon [defined by 269, § 10(b)], or induced another participant to do so; or (2) directed another person who committed any 94C felony; or (3) committed or attempted 94C, § 32F (distribution to minor of Class A, B or C) or § 32K (inducing a minor to help distribute or carry cash).

Crime of “being present with heroin” repealed. 94C, § 35.

No probation violation for possessing or using a *lawfully* prescribed drug or medical marijuana. 276, § 87A.

Juveniles & Schools

Public police log cannot mention any juvenile’s arrest. 41, § 98F (effective 12/31/18).

Delinquent child must be at least 12 and under 18 years old. 119, § 52 (effective 7/13/18; delinquency no longer includes a civil infraction; violation of any ordinance or bylaw; or 1st offense misdemeanor punishable by a fine and/or HC NMT 6 months).

Detaining delinquent child. 119, § 67.

- Whenever child 12 to 18 arrested, and court not in session, OIC must immediately notify a legal custodian (parent, guardian, resident caretaker, DCF). Child must be released upon custodian’s written promise. *Note:* child cannot be released to “reputable person” anymore.
- At the same time, may detain in DYS-approved lockup if (1) arresting officer requests in writing for child 14 to 18; or (2) arrest warrant directs it. However, child held *only* until bail hearing. Bail commissioner makes final decision.

Parent/child privilege. 233, § 20. Parent cannot testify against minor child, or minor against parent, in any criminal proceeding in which victim not a family member *and* not reside in household. Parent = biological or adoptive, stepparent, legal guardian or person in loco parentis.

School Resource Officers (SROs). School superintendents and police chiefs shall create a detailed memorandum of understanding (MOU) regarding SRO program. 71, § 37P (effective 7/13/18). MOU must state that SROs shall not serve as school disciplinarians or in place of counselors; and SROs shall not use police powers to address non-violent disruptive behavior.

Elementary or secondary students may be arrested *but not found delinquent of Disorderly Conduct or Disturbing the Peace* (272, § 53) or *Interrupting Assembly* (272, § 40) for conduct within school buildings, on school grounds, or at a school-related event. *Note:* The desire is for officers to avoid disorderly/disturbing arrests in school, *but* it is still legal (see 272, § 54). The juvenile, once arrested, cannot be found delinquent. The case would have to be diverted or dismissed. This limitation does not apply to anyone *18 and over* on school grounds or to off-school behavior by juveniles.

MV

OUI by inhalants. OUI now covers being under the influence of “the fumes of *any* substance . . . releasing toxic vapors as defined in 270, § 18.”

MV homicide by reckless operation is now 5 year felony. 90, § 24G(c). License revoked 10 yrs.

Police Protection

New crime: A&B on Police Officer Causing Serious Bodily Injury (SBI). 265, § 13D. Mandatory minimum 1 year. SBI = permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ or substantial risk of death [same as felony under 265, § 13A; superior ct. only if SBI].

Justice System Integrity

Witness intimidation. 268, § 13B now protects victim witness advocates, correction officers, court reporters, and family members of all potential victims. Harassment can be directed at a group. Crime also covers *retaliation* for participation in a past investigation or other proceeding. All 13B offenses may be charged in district court or superior court (218, § 76).

Furnishing false name/social security number post-arrest. 268, § 34A now covers false date of birth, home or mailing address, phone number, or other information requested to establish person’s identity.

DNA. Convicted felons must submit DNA sample on probation or within 10 days of incarceration. 22E, § 3. Probation officers now collect DNA. Offender who willfully fails to provide DNA: HC NMT 6 months and/or Fine \$2,000. 22E, § 11 (full implementation by 4/13/19).

Seal/expunge records. Sealed record no longer used to screen an applicant for employment, housing or professional license. May seal misdemeanor NLT 3 yrs after conviction; felony NLT 7 yrs. Separate process to expunge (i.e., permanently erase) record. 276, §§ 100A-100U.

No bail bonds. No person or organization may be compensated for acting as a surety for someone on bail. 276, § 61B.

Theft & Economic Crime

Larceny & Receiving Stolen Property over \$1,200 felony. 266, §§ 30, 60. Warrantless arrest still on PC if value of property stolen over \$250.

Jailable misdemeanor shoplifting must be \$250 or over. 266, § 30A. Warrantless arrest still on PC for shoplifting of any retail value.

Credit card crimes apply to debit cards or using the applicable code number. 266, § 37A. Felony credit card misuse must be over \$1,200.

Identity fraud’s new violation. 266, § 37E(c½): (1) possess a tool or instrument; (2) designed or used for accessing a person’s number or code for financial services, savings, checking, brokerage, credit or debit card, ATM, computer password, electronic signature, or biometric data (e.g., fingerprint, voice, retinal image); (3) with intent to commit larceny. Penalty: HC NMT 2½ years and/or Fine NMT \$5,000. Arrest on PC always.

Sexual Assault Kits

Sexual Assault Evidence Kits. EOPSS will establish a statewide evidence tracking system.

- *Hospitals* must notify local police within *24 hours* of processing a kit. 41, § 97B½.
- *Police* must take possession of kit within *3 business days* of notification and submit kit to crime lab within *7 business days*.
[Note: Non-investigatory kits associated with victims who have not yet filed a report with police not subject to 7 day requirement, but the kits must be preserved by police for entire statute of limitations period for applicable charges.]
- *Crime lab* must test kit within *30 days* of receipt. [Note: Current backlog must be tested by 10/13/18 and entered into EOPSS system.]

Other Laws

Solicitation of crime. No longer a common law offense. 274, § 8 punishes offender who solicits, counsels, or advises another to commit a felony.
[Note: If intended crime punishable by Life imprisonment: SP NMT 20 yrs or HC NMT 2½ yrs; +/-or Fine NMT \$10,000; if SP 10 yrs or more: SP NMT 10 yrs or HC NMT 2½ yrs; +/-or Fine NMT \$10,000; if SP 5 yrs or more: HC NMT 2½ yrs; +/-or Fine NMT \$5,000; or if SP for less than 5 yrs: HC NMT 2½ yrs; +/-or Fine NMT \$2,000.]

“Good Samaritan” alcohol incapacitation. 138, § 34E. Person under 21 who, in good faith, seeks medical assistance for someone experiencing alcohol incapacitation, or seeks help for himself, or is the subject of a request for help, shall not be charged under §§ 34 (furnishing, “social host”), 34A (procurement) or 34C (minor in possession). [Note: Does not protect adult hosts or participants.]



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LED UPDATE on CJ REFORM

Although their decision will receive heightened scrutiny, police officers retain the power to arrest juveniles on school grounds for disorderly, disturbing or interrupting an assembly. The arrested juvenile simply may not be adjudicated delinquent for these crimes.

- **Exact amended language.** Criminal justice reform became law on April 13, 2018. Specifically, the statutes that create disorderly conduct (272, § 53), disturbing the peace (272, 53), and interrupting a lawful assembly (272, § 40) now include this identical language: “provided, however, that an **elementary or secondary student** shall not be **adjudged a delinquent child** for an alleged violation of this section for such conduct within school buildings or on school grounds or in the course of school-related events.” [emphasis added]¹
- **Arrest power remains in all cases.** This new language does not mention or affect an officer’s legal power of arrest which, for disorderly and disturbing the peace, appears in 272, § 54², and for interrupting an assembly, which is authorized by common law for any misdemeanor involving a breach of peace in an officer’s presence. *Comm. v. Ceria*, 13 Mass. App. Ct. 230 (1982).³

Moreover, the chosen language, “adjudicated delinquent,” refers to a finding of delinquency at the end of the court process. Essentially, “adjudicated delinquent” is the juvenile version of conviction. Therefore, while a juvenile court may not find an elementary or secondary (i.e., high school) student, who is under 18, delinquent for these school-based offenses, it could certainly arraign the student and dismiss, divert or otherwise resolve the matter prior to “adjudication.”⁴

¹ If you want to look up the exact language, see SECTION 159 and 160 of Chapter 69 of the Acts of 2018 (which you can Google).

² If the legislature had intended to limit an officer’s power of arrest, it would have had to modify 272, § 54, which it did not do.

³ In *Ceria*, the court affirmed this longstanding rule. Even though a statute confers no right of arrest for the crime of operating to endanger under 90, § 24, the officer could still arrest for this obvious breach of peace when he saw a motorist driving dangerously. Remember, a breach of peace may also be anticipated: “An officer, who sees a person committing a misdemeanor [where] a breach of the peace is likely to follow . . . need not delay an arrest until the harm has been done.” *Comm. v. Gorman*, 288 Mass. 294 (1934).

⁴ If the legislature had intended to limit the authority of the police to charge an offender in the juvenile court with these offenses, it would have used different language.

This approach is not unprecedented. Retaining arrest authority for offenses that may not be fully prosecuted has been recognized in other areas. See, e.g., 90B, § 13 (arrest authorized for civil infractions in a recreational vehicle)⁵; 272, § 60 (arrest authorized for civil infraction of littering if suspect refuses to identify himself but, upon identification, suspect must be released by police).

- **Recommended protocol.** Until further legislation or court modification, officers should:
 - **Understand that the trend in Massachusetts is to attempt to avoid charging elementary and high school students with crimes for behavior that is disruptive but non-violent.** Ideally, teachers, staff and SROs will predominantly rely on their communication skills to diffuse misbehavior. Educational intervention, including school discipline, is the preferred approach. De-escalation is *the* critical skill for SROs and officers who arrive at school-related incidents.
 - **Be able to explain why an arrest for disorderly conduct, disturbing the peace (DTP), or interrupting an assembly was the preferred response for a juvenile student on school grounds or at a school event.**⁶ Officers should indicate in their arrest report the nature of the disturbance and why arrest was the preferred intervention.
 - **Recognize that no legal limitation applies to the disposition of disorderly, DTP or interrupting outside of campus or school events, or involving students or other individuals who are 18 and over.**
 - **Recognize that no legal limitation applies to the disposition of other crimes in the school context that are critical to public safety,** such as trespass (266, § 120); violence or other assaults (Chapter 265); theft and destruction or defacement of property (Chapter 266); and harassment and domestic violence (265, § 43 and Chapters 209A and 258E).

Hope this helps you on the street,
John Sofis Scheft

⁵ 90B, § 13 makes all violations under 90B and 323 CMR subject to warrantless arrest on probable cause, including “any provision . . . or any rule or regulation made under authority hereof.” As a result, even offenses that now only draw civil penalties – see 90B, § 25 (operation on public ways) and § 26 (age and operation requirements) – are subject to arrest. Typically, civil penalty offenses for which an officer makes an arrest are remanded for a clerk’s hearing at arraignment since the arrest is valid, but the final penalty is a civil fine.

⁶ Police officers are used to the concept of “preferred response” in the context of domestic violence arrest decisions. It basically means that, absent compelling information, officers should arrest for domestic assaults. The same quantum of justification should apply in the context of an arrest decision for a disorderly juvenile student – except that, for students, the common conclusion should be to avoid arrest.