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policing with perspective

MPTC IN-SERVICE: UPDATE¹

Clarifying an officer's right of arrest under the harassment prevention law, G.L. Chapter 258E

Based on the language of the law, is there an unlimited right of arrest for past assaults? Here is the dilemma.² Under the new harassment prevention law, G.L. c. 258E, § 8 states: "Whenever a law officer has reason to believe that a person has been abused *or* harassed or is in danger of being abused *or* harassed, such officer shall use all reasonable means to prevent further abuse or harassment. Law officers shall make every reasonable effort to do the following as part of the emergency response . . . [A]rresting the person shall be the preferred response if the law officer witnessed *or has probable cause to believe* that a person . . . has committed a misdemeanor involving harassment *or* abuse as defined in section 1; or . . . has committed an assault and battery in violation of section 13A of chapter 265 . . ." [emphasis added]

Abuse is defined in G.L. c. 258E, § 1 as "attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm."

Based on these statutes, some officers argue that the use of the word "or" between the words "harassment" and "abuse" creates a warrantless right of arrest for any past assault or A&B. In other words, since the definition of abuse basically defines the crimes of assault and A&B, and since 258E does not limit its coverage to "family or household members" like 209A, and since 258E allows arrest on probable cause for "abuse" alone, it follows that all people who were assaulted come under the protective umbrella of the arrest rights conferred by 258E!

Even the officers who make this brilliant legal argument acknowledge that it was probably not the intent of the legislature!

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² Attorney Scheft thanks Lt. Daniel McCabe, an MPTC in-service instructor and member of the Taunton Police Department, for bringing this issue to his attention.

What is the better practice in view of the overall scope of this law? I strongly suggest that the better practice is to honor the legislature's intent and avoid using the harassment law as an unconditional "green light" to make a warrantless arrest for any past assault or A&B.

In support of this more restrained view, note the sections of 258E before the arrest discussion in section 8. These sections only allow a person to get a protection order for "harassment," not for "abuse." The term "abuse" is simply added to the statute as a condition for violating an existing order. For example, if a complainant said to a judge: "Your honor, my brother abused me, give me a Harassment Prevention Order (HPO)," that person would *not* qualify for an HPO (unlike a 209A order). The only time the complainant would be protected from "abuse" under the terms of 258E is if she or he *already* had an HPO based on harassment.

The fact that harassment (not abuse) is the trigger for police obligations and arrest powers is demonstrated in other portions of G.L. 258E, § 8 -- for example, it states that officers must write an incident report when responding to any incidents of harassment (abuse is not mentioned in this context).

The legislature created an accident which, for policy reasons, I do not think departments and officers should take advantage of. Do we really want officers acting on a pervasive and unyielding duty to arrest for past assaults and A&Bs in any situation? Will the police be able to explain their discretion if they extend the HPO law beyond all recognition? The problem officers now fear is that the HPO law will become so watered down and used in so many confrontations that it will become useless (e.g., my neighbor yells at me and I get an HPO!). Ironically, officers may have themselves to blame if they use this law to justify arrests in all past assaults and A&Bs.

In short, I think the "preferred response" only calls for an arrest in cases of past assaults and A&Bs that occur as part of an overall pattern of harassment (typically requiring three prior incidents). Mandatory arrest will, of course, follow any assault or A&B that occurs in violation of an existing HPO (because the term "abuse" was really intended to modify the violation of an HPO).

I wish, as I say often, that legislators would have a "working cop" in the room when they write laws, because an officer would have sniffed out this issue before the language became enshrined in the statute. In spite of its flaws, however, we are bound to do our best to preserve the integrity of this new law.

New laws on explosives, hoax devices and other dangerous items

**EXPLOSIVES, WMD & OTHER DANGEROUS
OR HOAX DEVICES
G.L. c. 266, §§ 101-102D**

<p>Purpose & Summary</p>	<p>“7 Up” coverage. This new series of statutes broadens the coverage of Massachusetts laws pertaining to explosives and other dangerous devices. Seven activities, listed from least to most dangerous, are prohibited:</p> <ol style="list-style-type: none"> (1) Possession of a hoax device; (2) Possession of an explosive ingredient; (3) Possession of an ingredient for a weapon of mass destruction (WMD); (4) Possession an explosive, incendiary, or destructive device or substance; (5) Placing an explosive, incendiary or destructive device or substance; (6) Exploding an explosive, incendiary or destructive device or substance; (7) Possession of a WMD or delivery system.
<p>Definitions</p>	<p>Police tip: When in doubt, <u>always</u> call the Hazardous Devices Unit of the Fire Marshal’s Office:</p> <ul style="list-style-type: none"> • <i>During normal business hours: 978-567-3365.</i> • <i>During nighttime hours: 508-820-2121</i> [This is the number for State Police Operations, which can contact a specially trained member of this unit for either consultation or response.] <p>All definitions appear in G.L. c. 266, § 101. Knowing the definitions is critical to applying this law properly.³</p> <ul style="list-style-type: none"> • <i>Ammunition.</i> Cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any weapon utilizing a propellant including, but not limited to, ammunition produced by or for the military for national defense and security.

³ Only definitions necessary to apply this law in the field are included. Consult with a specialist if in doubt about the properties of the device, and whether it is covered by this law.

Definitions
Continued

- **Biological weapon.** Any microorganism, virus, infectious substance or biological product (or any component) specifically prepared in a manner to cause death, disease or other biological malfunction in humans, other living organisms, food, water, or the environment.
- **Black powder.** A compound/mixture of sulfur, charcoal and an alkali nitrate.
- **Chemical weapon.** A toxic chemical or substance (including the device designed to release it) designed to cause death or bodily harm.
- **Delivery system.** Any equipment designed or adapted for use in connection with the deployment of chemical, biological or nuclear weapons.
- **Destructive or incendiary device or substance.** An explosive, article or device designed or adapted to cause physical harm to persons or property by means of fire, explosion, deflagration or detonation, whether or not contrived to ignite or explode automatically.
- **Explosive.** Any element, compound or mixture that is manufactured, designed or used to produce an explosion and that contains an oxidizer, fuel or other ingredient, in such proportion, quantity or packing that an ignition by fire, friction, concussion, percussion or detonation . . . is capable of producing destructive effects on contiguous objects or of destroying life or causing bodily harm [including classified explosives under federal law].

An explosive shall not include:

- **A pyrotechnic**, which is defined as “any commercially manufactured combustible or explosive composition or manufactured article designed and prepared for the purpose of producing an audible effect or a visible display and regulated by Chapter 148 including, but not limited to: (i) fireworks, firecrackers; (ii) flares, fuses and torpedoes, so-called, and similar signaling devices.
- **Small arms ammunition**, which is defined as “any shotgun, rifle, pistol, or revolver cartridge, and cartridges for propellant-actuated power devices and industrial guns.”
- **Small arms ammunition primers**
- **Smokeless powder weighing less than 50 pounds and black powder weighing less than 5 pounds**, *unless* possessed or used for an illegal purpose. Smokeless powder is defined as “a rapid-burning solid material containing nitrocellulose used as a propellant.”

<p>Definitions <i>Continued</i></p>	<ul style="list-style-type: none"> • Hoax explosive, device or weapon. Any device, article or substance that would cause a person to reasonably believe that it is: (i) an explosive; (ii) a destructive or incendiary device or substance; or (iii) a chemical, biological or nuclear weapon, harmful radioactive substance or poison capable of causing bodily injury, but which is actually an inoperable facsimile. • Nuclear weapon. A device designed for the purpose of causing bodily injury, death or denial of access through the release of radiation or radiological material either by . . . nuclear fission or by means of any other energy source. <p>Denial of access is defined as “contamination to an area . . . which poses a health risk to humans, animals or plants.”</p>
<p>Elements</p>	<p>Type 1: Hoax Explosive, Device or WMD [G.L. c. 266, § 102(b)]</p> <ul style="list-style-type: none"> • Without lawful authority, the suspect possessed or placed (or caused another person to knowingly or unknowingly do this); • Any hoax explosive; hoax destructive or incendiary device or substance; or hoax chemical, biological or nuclear weapon; • With intent to cause anxiety or “personal discomfort” to any person or group of persons. <p>Type 2: Explosive Ingredient [G.L. c. 266, § 102(a)]</p> <ul style="list-style-type: none"> • Without lawful authority, the suspect possessed or had under his control; • An explosive or ingredient which, alone or in combination, could be used to make a destructive or incendiary device or substance; • With the intent to make a destructive or incendiary device or substance. <p>Key note: It is not a defense that the suspect did not possess or control every ingredient necessary to make a fully functional device. Compare with <i>Comm. v. Carter</i>, 442 Mass. 822 (2004).</p>

Elements
Continued

Type 3: WMD Ingredient [G.L. c. 266, § 102(a)]

- Without lawful authority, the suspect possessed or had under his control;
- An ingredient which, alone or in combination, could be used to make a chemical, biological, or nuclear weapon (aka WMD);
- With the intent to make a WMD.

Key note: It is not a defense that the suspect did not possess or control every ingredient necessary to make a fully functional WMD.

Type 4: Explosive Device [G.L. c. 266, § 102(c)]

- Without lawful authority, the suspect possessed or had under his control;
- Any explosive or destructive or incendiary device or substance.

Key note: The suspect does not need to “intend” to use the device, he must simply possess it. This was also true under an earlier version of this law. *Comm. v. Lombardo*, 23 Mass. App. Ct. 1006 (1987) (no need to prove that defendant possessed the explosive device for an unlawful purpose because it constituted an “infernal machine”; here, defendant had a cigarette package containing wadding, gunpowder and a fuse).

Type 5: Place Explosive Device [G.L. c. 266, § 102A]

- Without lawful authority, the suspect placed, hid, threw or launched;
- An explosive or a destructive or incendiary device or substance;
- With the intent to:
 - Cause fear, panic or apprehension in any person; or
 - Ignite, explode or discharge the device or substance; or
 - Release or discharge any chemical, biological or nuclear weapon.

<p>Elements Continued</p>	<p>Type 6: Device Explodes [G.L. c. 266, § 102B]</p> <ul style="list-style-type: none"> Without lawful authority, the suspect willfully ignited, exploded or discharged; Any destructive or incendiary device or substance. <p><i>Key note:</i> Again, notice how there is no “intent” requirement; purposefully causing the device to explode, ignite or discharge is sufficient for conviction.</p> <p>Type 7: WMD Device or Delivery System [G.L. c. 266, § 102C]</p> <ul style="list-style-type: none"> Without lawful authority, the suspect knowingly developed, stockpiled, acquired, transported, possessed, controlled, placed or hid; Any biological, chemical or nuclear weapon or delivery system; With the intent to cause death, bodily injury or property damage.
<p>Right of Arrest & Procedures</p>	<p><i>Right of arrest for <u>all</u> offenses:</i> Felony.</p> <p><i>Seizure of any device, substance or component parts:</i> Under G.L. c. 266, § 102D, the officer who seizes any materials or components outlawed by these statutes must immediately notify, in all cases, the Fire Marshal. The Marshal has sole authority to determine how items will be held and “rendered safe.”</p> <p><i>Forfeiture.</i> Section 102D also requires that, upon conviction, all items will be forfeited to and disposed by the Fire Marshal or his designee.</p>
<p>Penalty</p>	<p>Type 1: SP NMT 5 yrs; or HC NMT 2½ yrs; and/or Fine NMT \$10,000.</p> <p>Types 2 and 3: SP NLT 5 yrs, NMT 10 years; or HC NMT 2½ yrs; and/or Fine NMT \$25,000.</p> <p>Type 4: SP NLT 10 yrs, NMT 20 years; or HC NMT 2½ yrs; and/or Fine NMT \$25,000.</p> <p>Type 5: SP NLT 10 yrs, NMT 25 years; or HC NMT 2½ yrs; and/or Fine NMT \$25,000.</p> <p>Type 6: SP NLT 15 yrs, NMT 25 years; or HC NMT 2½ yrs; and/or Fine NMT \$50,000.</p> <p>Type 7: SP NMT 25 years; or HC NMT 2½ yrs; and/or Fine NMT \$50,000.</p>

<p>Penalty Continued</p>	<p><i>Mandatory restitution in all cases:</i> The convicted offender must pay restitution to local, county or state government for any costs and damages incurred. Restitution must be in addition to the penalty imposed. However, the court must consider the defendant's ability to pay in determining the amount of restitution.</p>
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