How goes the resistance?

SORB & SDP Cases:

April 2016 to March 2017

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Saying Nope to the CAB

- Green, Petitioner, 475 Mass. 624 (2016)
  - CAB=Community Access Board
    - Administrative body within DOC
  - QE= Qualified Examiner
    - Experts required by law in SDP cases
  - The DOC historically presented the CAB as just another expert. Oftentimes the main expert.
  - But QE is the operative witness. Johnston, 453 Mass. 544 (2009)(Robert Fox)
  - SJC in Green holds the jury needs to be instructed that the QE opinion must be credible to merit SDP verdict

Green instruction is critical

- In Pariseau, petitioner, No. 15-P-1597, slip op. (2017) (Ethan Stiles)
  - Case in which 2 QEs found petitioner SDP
  - Error not to give "CAB Instruction" dictated by Green even without 'split QEs'
- Since Pariseau DOC has assented to several new trials where Green instruction should have been given
- Need to look at cases from as early as 2009 on
- Definitely cases since Souza, petitioner, 87 Mass. App. Ct. 162 (2015) where Appeals Court got this wrong

No SORB for you kid

- Commonwealth v. Samuels, 476 Mass. 497 (2017)(Laura Edmonds, Ryan Schiff & Caroline Alpert)
  - A defendant maybe relieved of SORB registration at sentencing under G.L. c. 6, § 178E(e)-(f)
  - § 178E(e) is a motion by the Commonwealth
  - § 178E(f) is a motion by the defendant, which precludes relief if the person has been "sentenced to immediate confinement"
  - SJC in Samuels held that DYS commitment is not "sentenced to immediate confinement"
  - Therefore, a delinquent or YO who is sent to DYS is eligible for possible relief
  - Person must still merit relief via individualized risk assessment

SDP expert tools subject to Daubert

- Esteraz, petitioner, 90 Mass.App.Ct. 330 (2016)(Ethan Stiles)
  - Petitioner expert used the "MATS-1" risk assessment tool
  - Attorney failed to timely request *Daubert-Lanigan* hearing
  - Panel held risk assessment tools are (1) not expressly admissible under G.L. c. 123A § 9 and (2) not essential to expert report
  - Given line of cases up to this point (*Gammell (PPG), Ready (Abel), & Bradway*) any new 'tool' should be challenged or defended

We will eventually succeed

- Commonwealth v. Sylvester, 476 Mass. 1 (2016)(Susanne O'Neil & Merritt Schnipper)
  - Defendant pleas to sex offense in November 2002
  - Was not told of consequences of SORB registration
  - SJC holds 6th Amendment does not require counsel to warn of same before a plea (Mass.R.Crim.P. 12(c)(3)(B) does now)
  - SORB in 2002 did not have "uniquely 'close connection'" to criminal process as deportation did in *Padilla*
  - SJC leaves open argument under Art. 12 and for a client facing SORB post 2002
  - Since 2002 SORB added internet dissemination, *inter alia*
  - Pleas post 2002 (2014) is now before SJC in Commonwealth v. Lastowski, SJC-12280 (Ed Gauthier)

Roll up your sleeves

1. Doe No. 209081 v. SORB, SJC-12282 (Rebecca Rose)
   - SJC will decided if Hearing Examiner must inquire if waiver of the statutory right to counsel is knowing, intelligent and voluntary.
2. Lapan, petitioner, No. 15-P-768, slip.op. (2016)(Fred Bartmon)
   - Appeals Court still confused about standard for unpreserved error in SDP cases
   - We're not confused
   - SJC in Commonwealth v. Fay, 467 Mass. 574, 583 n. 9 (2014) applied "substantial risk of miscarriage of justice": See also Commonwealth v. Hunt, 462 Mass. 807, 826 (2012)