SJC-12967

COMMONWEALTH vs. MANOLO M., a juvenile
(and three consolidated cases[1]).

Suffolk. Plymouth. November 4, 2020. - January 26, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Delinquent Child. Juvenile Court, Delinquent child, Jurisdiction. Jurisdiction, Delinquent child, Juvenile Court, Juvenile delinquency proceeding. Statute, Construction. Riot. Words, "First offense."

Civil actions commenced in the Supreme Judicial Court for the county of Suffolk on November 27, 2019.

The cases were reported by Budd, J.

Complaints received and sworn to in the Plymouth County Division of the Juvenile Court Department on October 4, 2019.

Motions to dismiss were heard by Mark Newman, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

[1] Commonwealth vs. Frederick F., a juvenile; Commonwealth vs. Angela A., a juvenile; and Commonwealth vs. Manolo M., a juvenile, & others.

Johanna S. Black, Assistant District Attorney, for the Commonwealth.
Eva G. Jellison for Frederick F.
Melissa Allen Celli for Angela A.
Michelle Menken for Manolo M.
Joshua M. Daniels, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.
Dennis M. Toomey, for Committee for Public Counsel Services & another, amici curiae, submitted a brief.

KAFKER, J. Four juveniles with no prior offenses were charged with varying combinations of minor misdemeanors and greater offenses, including a felony charge of inciting a riot, all arising from the same episode.[2] The primary issue presented is which of the charges constitutes a first offense of a minor misdemeanor pursuant to G. L. c. 119, § 52. We conclude that all of the minor misdemeanors arising out of this single episode for each juvenile constitute a first offense for which the Legislature intended a second chance, and thus must be dismissed. Because § 52 makes no exception for greater offenses, the Commonwealth may proceed directly to arraignment on the greater offenses; however, in this case there is not probable cause to support the felony charge of inciting a riot in violation of G. L. c. 264, § 11. Although we decline the

[2] For purposes of this opinion, we will refer to all misdemeanors "for which the punishment is a fine, imprisonment in a jail or house of correction for not more than [six] months or both such fine and imprisonment" as minor misdemeanors, and all other misdemeanors as major misdemeanors. G. L. c. 119, § 52.

invitation to declare the entirety of § 11 unconstitutional on its face, as we do not decide constitutional questions unnecessarily, we do emphasize that the statute must be read consistently with the requirements of Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).[3]

1. Facts.[4] Shortly after Brockton High School students were dismissed on October 3, 2019, Brockton police officers, including Officer Raymond Parrett and school police Officer Daniel Vaughn, were dispatched in response to the presence of a large crowd of teenagers who were walking in the street and refusing to disperse to let traffic pass. Police officers unsuccessfully used their cruisers' public address microphones, lights, and sirens to encourage the teenagers to move. While Parrett was driving on the same street, Frederick F. looked inside the police cruiser and yelled, "Fuck the police!" Parrett then got out of his cruiser to speak to the juvenile.

Angela A. approached Parrett as he spoke to Frederick. Angela shoved a cell phone in Parrett's face, while numerous

---

[3] We recognize the amicus briefs submitted by the youth advocacy division of the Committee for Public Counsel Services and Citizens for Juvenile Justice, and by the Massachusetts Association of Criminal Defense Lawyers.

[4] The juveniles have agreed to the following facts for the purposes of this appeal only. The facts are drawn from the various police reports, but the juveniles contest the police reports' characterization of the incident. There has been no fact finding or discovery in the lower court.

other teenagers surrounded Parrett and Vaughn, shouting at them. Parrett told Angela several times to take the camera out of his face, and then pushed her hand from his face. Thomas[5] then approached and shoved Parrett's shoulder, saying, "Yo what the fuck are you doing?" and "She's a female!" Parrett pushed Thomas back. Thomas then lunged at Parrett and swung his fist at Parrett's head. Parrett attempted to place Thomas into custody, and as Thomas physically resisted attempts to handcuff him, the two fell to the ground. Vaughn attempted to keep anyone else from approaching the arrest.

Manolo M. attempted to run past Vaughn, and Vaughn pushed him back several times. Manolo took up a fighting stance and yelled at Vaughan, "Mother fucker you wanna go! Let's go!" He then swung at Vaughn's head. Vaughn blocked his fist and struck him with a forward kick in an attempt to stop his momentum, and the two fell to the ground as Manolo resisted Vaughn's attempts to handcuff him.

Two other officers arrived and ordered the crowd of teenagers to stay back. Many of the teenagers, including Angela, filmed the officers. Another officer assisted Vaughn in handcuffing Manolo and placing him in a police cruiser.

---

[5] A pseudonym. Thomas has been dismissed from this appeal, but we include facts regarding his behavior where they are pertinent to the event as a whole.

While police attempted to disperse the crowd, Frederick began yelling, refusing to move and "enticing the crowd to stay." Vaughn advised Frederick that he was under arrest and ordered him to place his arms behind his back, but Frederick tensed up and pulled his arm away. Two officers attempted to handcuff Frederick, but he continued to pull away, move side to side, and throw his arms forward and away from the officers' grips. After warning Frederick that if he did not comply the officer would use his stun gun, a third officer issued a three-second drive stun to Frederick. Frederick then placed his hands behind his back and was handcuffed.

During the struggle with Frederick, Angela again approached and filmed the officers at close range, asking them why they were doing what they were doing and swearing at them. After telling her several times to back away, Parrett attempted to arrest her. She pulled away, and Parrett brought her to the ground. She refused several times to put her hands behind her back, and after warning her, Parrett gave her a one-second burst of pepper spray and placed her in handcuffs.

At the time of the event, Manolo, Frederick, and Angela were seventeen years of age, and none of them had ever been charged with a delinquency offense or criminal conduct.

2. Procedural history. Manolo, Frederick, and Angela[6] were all charged with disorderly conduct (a minor misdemeanor), disturbing the peace (a minor misdemeanor), resisting arrest (a major misdemeanor), and inciting a riot (a felony). In addition, Manolo and Frederick were charged with the common-law offense of interfering with a police officer (a minor misdemeanor). Manolo also was charged with assault and battery on a police officer (a major misdemeanor).[7]

Following motions to dismiss pursuant to Commonwealth v. Humberto H., 466 Mass. 562 (2013), and over the Commonwealth's objection, a Juvenile Court judge dismissed the charges of inciting a riot in violation of G. L. c. 264, § 11, against all three juveniles. The judge stated that the statute is "not an appropriate law to apply," that "it has lost its vitality," and that it was not applicable to this particular situation, involving juveniles, as a matter of law.

---

[6] Prior to his dismissal, Thomas pleaded delinquent to a greater charge and was arraigned on minor misdemeanor charges.

[7] General Laws c. 272, § 53, provides for a maximum fine of $150 for a first offense of disorderly conduct or disturbing the peace. General Laws c. 268, § 32B, provides for a maximum sentence of two and one-half years for resisting arrest. General Laws c. 264, § 11, provides for a maximum sentence of three years for inciting a riot. General Laws c. 265, § 13D, provides for a maximum sentence of two and one-half years for assault and battery on a police officer. Interfering with a police officer is a common-law offense. See Commonwealth v. Adams, 482 Mass. 514, 526 (2019). The lower court judge treated this charge as a minor misdemeanor.

Manolo moved to dismiss the minor misdemeanor charges pursuant to Wallace W. v. Commonwealth, 482 Mass. 789 (2019). The Commonwealth moved for arraignment on all of the charges, arguing that Wallace W. is inapplicable to a complaint charging multiple, simultaneous offenses. The Juvenile Court judge rejected this argument, concluding that the juveniles could be arraigned on the major but not the minor misdemeanors. The minor misdemeanors were continued for a Wallace W. hearing, at which the Commonwealth would be given the opportunity to prove that those charges were not subject to dismissal for lack of jurisdiction as "first offense" misdemeanors. The Commonwealth appealed from the dismissal of the felony charges to the Appeals Court and also petitioned this court for extraordinary relief from the judge's decision not to immediately arraign on the minor misdemeanor charges. The single justice reserved and reported the cases to the full court, regarding the application of G. L. c. 119, § 52, to charges arising from the same incident; transferred sua sponte the Commonwealth's pending appeal from the dismissal of the felony charges to this court; and ordered that the matters be consolidated.

3. Discussion. a. Multicount complaints and Wallace W. hearings. General Laws c. 119, § 52, excludes from the definition of "delinquent child," and therefore from the jurisdiction of the Juvenile Court, any child between the ages

of twelve and eighteen years old who commits "a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than [six] months or both such fine and imprisonment." See G. L. c. 218, § 60 (Juvenile Court shall have jurisdiction over cases of delinquent children). In Wallace W., 482 Mass. at 800-801, we delineated the process for establishing a first offense: so-called Wallace W. hearings, at which the Commonwealth must prove beyond a reasonable doubt that the juvenile has committed a prior offense. We also described how an adjudication of delinquency at a Wallace W. proceeding would be reported and recorded. We explained that where a juvenile had no prior delinquency adjudications, the first offense of a minor misdemeanor would be dismissed, even if the first offense was proved at a Wallace W. hearing. The Commonwealth could then, however, proceed to arraignment on subsequent minor misdemeanor charges. Id. at 799-800.

We anticipated, however, apparently correctly, analytical complexities in the application of Wallace W. to cases involving "a juvenile accused of committing two or more six months or less misdemeanors, or a six months or less misdemeanor and a greater offense or offenses." Id. at 800. The instant cases present these issues to the court for resolution in the context of a single episode of criminal misconduct. We now affirm, for the

reasons explained in more detail infra, that the Legislature's clear intention was to provide juveniles with a second chance in regard to minor misdemeanor conduct. The Legislature did not intend that this second chance would be defeated simply because multiple minor misdemeanors could be charged based on the same isolated incident. An isolated instance of misconduct was to be distinguished from a pattern of behavior. See id. at 795. Therefore, multiple minor misdemeanors arising from the juvenile's first episode of minor misdemeanor misconduct must all be dismissed as a "first offense." The Commonwealth may, however, proceed to arraign the juvenile on major misdemeanors or felonies accompanying the minor misdemeanors. The second chance provided by § 52 expressly applies to minor misdemeanors, not major misdemeanors or felonies.

"Our primary goal in interpreting a statute is to effectuate the intent of the Legislature . . . ." AIDS Support Group of Cape Cod, Inc. v. Barnstable, 477 Mass. 296, 300 (2017). "We also consider the 'cause of [the statute's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'" Wallace W., 482 Mass. at 793, quoting Adoption of Daisy, 460 Mass. 72, 76-77 (2011). In addition, we consider the legislative history where it is informative. Wallace W., supra. Finally, where a juvenile

justice statute "can 'plausibly be found to be ambiguous,' . . . the rule of lenity requires that the juvenile be given 'the benefit of the ambiguity.'" Id. at 798, quoting Commonwealth v. Hanson H., 464 Mass. 807, 813 (2013).

We begin with the statutory language and our interpretation of that language in Wallace W. At issue is the meaning of "a first offense of a [minor] misdemeanor" in the statute. G. L. c. 119, § 52. In Wallace W. we found the language, to put it mildly, to be less than a model of clarity. There, the Commonwealth argued that "the exclusion under § 52 is a one-time exclusion from jurisdiction over the first time a juvenile commits a six months or less misdemeanor." Wallace W., 482 Mass. at 793. The juvenile argued that "the exclusion applies to the first time a juvenile commits each individual six months or less misdemeanor. Under the juvenile's interpretation, a juvenile could conceivably commit every individual six months or less misdemeanor once without the Juvenile Court ever having jurisdiction." Id. We rejected the juvenile's interpretation, concluding that the statute was "intended to excuse a juvenile's first isolated instance of such misconduct," but "provid[es] the Juvenile Court with jurisdiction over repeat offenders." Id. at 790, 791. In that case, however, we were not presented with multiple charges arising out of a juvenile's first episode of delinquent misconduct.

We are now asked to determine whether the exclusion of a "first offense of a [minor] misdemeanor" in the statute should excuse a first episode of minor misdemeanor misconduct or a single minor misdemeanor charge. As demonstrated by this case and others, it is possible for a first episode of delinquent misconduct to result in multiple charges of minor misdemeanors against a juvenile, even if such a first episode is of very brief duration. See, e.g., Commonwealth v. Newton N., 478 Mass. 747, 748-749, 755-756 (2018) (within prosecutor's discretion to bring multiple, different charges based on single episode of misconduct). Whether the Legislature intended to excuse just one of such offenses is not clear from the statutory language alone. Section 52 refers to "a first offense of a [minor] misdemeanor" without further definition. We therefore turn to the entire statutory scheme and legislative history for further guidance.

The statutory scheme governing juvenile justice is designed to be rehabilitative rather than punitive, and to "act in the best interests of children by encouraging and helping them to become law-abiding and productive members of society, and not to label and treat them as criminals" (citation omitted). Commonwealth v. Magnus M., 461 Mass. 459, 466 (2012). The Legislature has mandated that the statutory scheme "shall be liberally construed so that the care, custody and discipline of

the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance." G. L. c. 119, § 53.

The particular amendment at issue was enacted as part of a comprehensive act to reform the criminal justice system. St. 2018, c. 69. This legislation was designed to protect juveniles from involvement with the juvenile justice system by increasing opportunities for juvenile diversion, raising the age at which children may be deemed delinquent, and eliminating jurisdiction over violations of local ordinances, certain episodes of misconduct at school, and first offenses of minor misdemeanors. St. 2018, c. 69, §§ 72, 75, 79, 159, 160. The act was intended to "decriminaliz[e] childhood behaviors" in an effort to "cut the chains that hold people down when they're trying to get back up on their feet." Lazlo L. v. Commonwealth, 482 Mass. 325, 333 (2019), quoting State House News Service (Senate Sess.), Oct. 26, 2017 (statement of Sen. William N. Brownsberger, co-chair, Joint Committee on Judiciary) (Brownsberger statement). "[O]ne of the Legislature's aims was to reduce recidivism for juvenile offenders." Lazlo L., supra at 333 n.13. The Legislature noted that early involvement in the juvenile justice system -- not just an adjudication of delinquency -- made it more likely that

the child would remain in the system for the rest of his or her life. Id. at 333, citing State House News Service (House Sess.), Nov. 13, 2017 (statement of Rep. Claire D. Cronin, co-chair, Joint Committee on Judiciary) (Cronin statement).[8]

The first offense provision itself was specifically designed to give juveniles who commit delinquent acts a "second chance" for minor misconduct. Wallace W., 482 Mass. at 795, quoting State House News Service (House Sess.), Apr. 4, 2018 (statement of Rep. Kay Khan). Studies have indicated that more than one-half of Massachusetts adolescents engage in potentially chargeable behavior when they are teenagers, but the Legislature recognized that criminalizing these behaviors causes more harm than good. See Brownsberger statement, supra; Cronin statement, supra; Citizens for Juvenile Justice, Less Crime for Less Money 2-3 (Nov. 2016), citing Department of Public Health data, and Department of Elementary and Secondary Education, Health and Risk Behaviors of Massachusetts Youth (2013); National Research Council of the National Academies, Reforming Juvenile Justice: A Developmental Approach 59-60 (2013) (National Academies). The majority of young people who are involved in initial stages of

[8] The act reforming the criminal justice system also created a juvenile justice policy and data board, responsible for collecting data and making recommendations regarding, among other things, the reduction of racial and ethnic disparities. St. 2018, c. 69, § 89 (b) (2).

the delinquency process never return to court on subsequent offenses, especially where the misconduct is minor. National Academies, supra at 24-25, 151.

Charging juveniles for this behavior and moving them into the juvenile justice system increases the odds that they will reoffend -- the precise opposite of the Legislature's intent. See, e.g., Annie E. Casey Foundation, Expand the Use of Diversion from the Juvenile Justice System 2-3 (2020) (multiple studies in different locations found system involvement increases odds of recidivism); Cronin statement, supra; Petrosino, Turpin-Petrosino, & Guckenburg, Formal System Processing of Juveniles: Effects on Delinquency, Campbell Systematic Reviews, at 6 (2010). A juvenile delinquency record -- even just an arraignment -- can also be used to enhance future sentencing or affect charging or probation decisions. See Humberto H., 466 Mass. at 572-573 (discussing consequences of court activity record information [CARI] records); Dennis, Decriminalizing Childhood, 45 Fordham Urb. L.J. 1, 4-5 (2017). In addition to the legal consequences of a delinquency record, court-involved youth are more likely to have present or future problems with physical or mental health, educational outcomes, employment opportunities, and housing access, among other things. See, e.g., Annie E. Casey Foundation, supra at 8-9; Dennis, supra; Kirk & Sampson, Juvenile Arrest and Collateral

Educational Damage in the Transition to Adulthood, 88 Sociol. Educ. 36 (2013); Sweeten, Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement, 23 Justice Q. 462 (Dec. 2006).

Rather than subject a juvenile to the long-term consequences of court involvement for minor misconduct that is typical of youth, the Legislature mandated that all youth be given a second chance for this behavior. Section 52 was also enacted with a keen awareness of the racial disparities in our criminal justice system, which led to some youth being given a second chance while others were denied it. See, e.g., St. 2018, c. 69, § 89 (b) (2) (seeking recommendations for how to decrease racial and ethnic disparities). The Legislature purposefully sought to combat those disparities through the passage of the act containing the amended § 52. Recognizing the significant consequences of criminalizing childhood behavior and the unfairness of inconsistently granting grace to some youth but not others, the Legislature enacted a statutory mandate that all youth be given a second chance for minor misdemeanor misconduct.

Reading § 52's "first offense" to refer to a single minor misdemeanor charge, as the Commonwealth would have us do, rather than the first episode of misconduct, would clearly contradict the Legislature's express intent to give juveniles this "second chance" and decrease their involvement with the juvenile justice

system. "The rehabilitative purposes of the act [containing the amended § 52] recognize the difference between an isolated act of misbehavior, for which a second chance can and should be granted, and a pattern of such misbehavior, which cannot be ignored." Wallace W., 482 Mass. at 795. It would also violate the statutory mandate to liberally construe statutes governing delinquency proceedings to provide "aid, encouragement, and guidance" to children, rather than treat them as criminals. Id. at 799 n.3. See G. L. c. 119, § 53. This mandate also incorporates the rule of lenity, which requires us to give the benefit of any doubt to the juvenile where there is ambiguity in the application of a statute. See, e.g., Wallace W., supra at 798 (rule of lenity requires juvenile be given benefit of ambiguity). Given the uncertainty of the meaning of "first offense," where the first episode of misconduct results in multiple minor misdemeanor charges, we conclude that the rule of lenity applies here. In sum, our holding here is driven by our understanding of the clear legislative intent to give juveniles a meaningful second chance for minor misdemeanor conduct, and the salutary rules of construction for statutes related to delinquency, all of which are designed to aid, encourage, and guide juveniles to enable their future success. See G. L. c. 119, § 53.

Although our interpretation is specific to this statute, we have, in other contexts, recognized that a separate incident or episode is required to satisfy statutory requirements. In Commonwealth v. Garvey, 477 Mass. 59, 59 (2017), we concluded that G. L. c. 279, § 25 (a), the habitual criminal statute, "requires that the underlying convictions arise from separate incidents or episodes of criminal behavior" in order to satisfy the definition of habitual criminal as one "twice convicted." The statutory language at issue was as follows:

> "Whoever is convicted of a felony and has been previously twice convicted and sentenced to [S]tate prison or [S]tate correctional facility or a [F]ederal corrections facility for a term not less than [three] years . . . shall be considered a habitual criminal and shall be punished . . . for such felony for the maximum term provided by law."

Garvey, supra at 61, quoting G. L. c. 279, § 25 (a).

The statute itself, like the one before us, did not expressly require separate incidents. It simply stated, "[w]hoever is twice convicted." G. L. c. 279, § 25 (a). Recognizing that the statutory language was not clear as to "the issue whether the necessary two prior convictions must relate to different criminal incidents," we looked to the history of the statute, our past decisions, the statutory effects, and the rule of lenity, as we do in the instant case. Garvey, 477 Mass. at 62. We emphasized that "the constant concept throughout [the legislative history] was the Legislature's focus on separate

prior incidents." Id. at 63. Here, we do not have past statutory language for guidance, but we do have clear legislative intent to limit juvenile involvement in the juvenile justice system, avoid criminal records and the consequences thereof, and provide juveniles with a second chance, all of which support the separate incident approach.

As for the statutory effects, we stated in Garvey, 477 Mass. at 66-67:

> "taking the Commonwealth's proposed interpretation of § 25 (a) to its logical conclusion, the Commonwealth, in its discretion, could seek a habitual offender enhancement for any single incident in which a defendant committed three felonies, by parsing them into two separate prosecutions . . . . Thus, the statute's application would depend not on habitual criminal conduct but on how the Commonwealth chooses to prosecute any one criminal episode. This cannot be what the Legislature intended."

The same logic applies here. As explained above, the Commonwealth's decision to charge juveniles with multiple minor misdemeanors cannot defeat the Legislature's intention of providing juveniles with a second chance for minor misdemeanor conduct and protection from criminal records for such first offenses. See Wallace W., 482 Mass. at 790 ("Legislature intended to excuse a juvenile's first isolated instance of such misconduct"); Humberto H., 466 Mass. at 572-573 (discussing how creation of CARI record may adversely affect juveniles). A

single brief episode can too easily generate multiple minor misdemeanor charges.[9]

Finally, we concluded in Garvey that to the extent the statute was ambiguous, "the rule of lenity supports the interpretation advocated by the defendant and accepted by us." Garvey, 477 Mass. at 67, citing Commonwealth v. Resende, 474 Mass. 455, 469 (2016). The same is true here. Indeed, as explained above, the rule of lenity is not only a canon of construction in the juvenile delinquency context, but also a statutory mandate. See Commonwealth v. Samuel S., 476 Mass. 497, 506 (2017). This statutory command of lenient construction supports the interpretation that "a first offense of a [minor] misdemeanor" in § 52 refers to a first episode of minor misdemeanor misconduct.

Our interpretation of "first offense of a [minor] misdemeanor" has no effect on charges of major misdemeanors or felonies. Where a juvenile is charged with greater offenses alongside minor misdemeanors and all charges arise from the same episode of misconduct, the Commonwealth may proceed with the

[9] Of course, even without the adoption of the first episode interpretation, there is no support whatsoever for the Commonwealth's argument that all it needs to do is allege two offenses to avoid the statutory exclusion. We rejected this probable cause approach in Wallace W. Until a first offense has been proved beyond a reasonable doubt, no such offense has been established. See Wallace W., 482 Mass. at 801.

greater offenses without a Wallace W. hearing. Neither § 52 nor our holding in Wallace W. excludes the first commission of greater offenses from the definition of delinquent child.[10] However, the inclusion of greater charges in a complaint that also charges one or more minor misdemeanors does not mean that the minor misdemeanors may move to arraignment. To do so would be contrary to legislative intent to excuse instances of minor misdemeanor behavior where that behavior is the juvenile's first instance of misconduct. First episodes of minor misdemeanor level conduct must be dismissed as a first offense, even if they are accompanied by more serious charges.[11]

Because the juveniles before the court today do not have any prior adjudications of delinquency, the minor misdemeanor

---

[10] Frederick and Angela dispute the notion that resisting arrest, a major misdemeanor, should not be dismissed on a first episode of misconduct, particularly where it is the only remaining charge after the dismissal of minor misdemeanors. Section 52 does not forbid the Commonwealth from proceeding with this charge; the Legislature has made no exception in § 52 for the major misdemeanor of resisting arrest, and "[w]here the Legislature did not include an exception in a statute, this court will not create one." Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 604 (2019). We do note, however, that the charge of resisting arrest, particularly when brought in a marginal case, may defeat the Legislature's over-all intent of providing the juvenile with a second chance.

[11] The Legislature has not clarified the ambiguity in § 52 that led to the Wallace W. decision, but we repeat that the Legislature could enact further legislation to specify the definition of "first offense of a [minor] misdemeanor" and the mechanism by which such an offense is to be proved.

charges against them must be dismissed. The dismissal of charges against Manolo, Frederick, and Angela of disorderly conduct and disturbing the peace, and the dismissal of charges against Frederick and Angela of interfering with a police officer, were therefore proper. The major misdemeanor of resisting arrest charges against Manolo, Frederick, and Angela, as well as the major misdemeanor assault and battery on a police officer charge against Manolo, may proceed directly to arraignment without a Wallace W. hearing.[12]

b. Humberto H. motions. Angela argues that a Juvenile Court judge is compelled to hold a hearing to establish probable cause pursuant to Humberto H. whenever the Commonwealth brings a charge that might be a child's first offense of a misdemeanor. See Humberto H., 466 Mass. at 575-576. Only after a Humberto H. probable cause hearing, Angela argues, should a Juvenile Court judge proceed to conduct a Wallace W. analysis in some limited circumstances. We disagree.

---

[12] Prior to his dismissal, Thomas pleaded delinquent to a greater charge, and he indicated that he did not oppose his arraignment on minor misdemeanor charges. The record does not include Thomas's age or any indication whether he had a delinquency record prior to the events. However, our holding today makes clear that if he was between twelve and eighteen years of age at the time of the incident and had no prior record, the Juvenile Court has no jurisdiction over his minor misdemeanor charges. Those proceedings must cease, and the case must be dismissed. See Lazlo L., 482 Mass. at 335. Any judgment on those charges is void for lack of jurisdiction. See Commonwealth v. Martin, 476 Mass. 72, 76 (2016).

Humberto H. allows, but does not require, a juvenile to move to dismiss a complaint for lack of probable cause before arraignment. Humberto H., 466 Mass. at 575-576 (Juvenile Court judge has discretion to hear and rule on motion to dismiss prior to arraignment due to lack of probable cause). A judge is certainly not mandated to require a Humberto H. hearing in every case. As we stated in Humberto H., "[p]robable cause is considerably less than proof beyond a reasonable doubt, so evidence that is insufficient to support a guilty verdict might be more than sufficient to establish probable cause." Id. at 565. Given this much lower burden of proof, many cases do not merit a Humberto H. challenge or hearing.

c. General Laws c. 264, § 11. Manolo, Frederick, and Angela were all charged with inciting a riot[13] in violation of G. L. c. 264, § 11, which states in part:

> "Whoever by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official, or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of the United States, shall be punished by imprisonment in the state prison for not more than three years, or in jail for not more than two and one half years, or by a fine of not

[13] The words "inciting a riot" appear nowhere in the statute, nor does the statute deal with assembly. The phrase "riot, incite" was used as a charge code for § 11 on the complaints against the juveniles, but it is unclear from where this language comes. We focus our analysis on the language of the statute, not this extrastatutory idea of a riot.

> more than [$1,000]; provided, that this section shall not be construed as reducing the penalty now imposed for the violation of any law."

The statute also prohibits anyone convicted of a violation from working as a teacher or school administrator, regardless of whether any punishment was imposed. G. L. c. 264, § 11.[14]

In its brief to this court, the Commonwealth conceded that there was not probable cause to support the charge against Frederick and Angela. It is pursuing the charge against Manolo, who yelled, "Mother fucker you wanna go! Let's go!" at an officer and took up a fighting stance against him. The Commonwealth contends that the Juvenile Court judge's dismissal of the charge against Manolo was improper both because there was sufficient probable cause and because the judge's determination that the statute lacked vitality and was inapplicable was incorrect. Manolo counters that there is no probable cause to support the complaint, and that we should further find that G. L. c. 264, § 11, is overbroad and unconstitutional in violation of the First Amendment to the United States

---

[14] The ban on teaching or working as a school administrator for anyone convicted in violation of § 11 is presumably a remnant of historical concern for spreading communist thought. See St. 1948, c. 160, § 1 (enacting this part of statute); 1948 House Doc. No. 220 (bill proposed in same year banning communists from teaching in Massachusetts). The validity of this ban was not raised by the parties and is outside the scope of our analysis.

Constitution and art. 16 of the Massachusetts Declaration of Rights.[15]

i. Probable cause. We begin with the probable cause determination. Our review of the dismissal of a complaint is de novo, as the question of probable cause is a question of law (as is the Juvenile Court judge's complete dismissal of the statute in this case). Humberto H., 466 Mass. at 566. "To establish probable cause, the complaint application must set forth reasonably trustworthy information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense" (quotation and citation omitted). Id. at 565. The complaint clearly does not meet this burden. Manolo's only speech was yelling at Vaughan, "Mother fucker you wanna go! Let's go!" These words, in combination with his fighting stance and attempts to hit Vaughn, may be sufficient to establish probable cause of an assault and attempted battery against the officer, but they were not speech that "advocates, advises, counsels or incites" anyone else to assault the officer. G. L. c. 264, § 11. See G. L. c. 265, § 13D (punishment for assault and battery on public employee engaged in performance of

[15] In this context, "we apply the same analysis under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights." Commonwealth v. Carter, 481 Mass. 352, 365 n.13 (2019), cert. denied, 140 S. Ct. 910 (2020).

duties).[16] The complaint does not allege, directly or indirectly, that Manolo intended anyone other than the person at whom his speech and actions were directed, Vaughn, to react. Nor does the complaint allege that Manolo took any action that could be understood as communicating a desire for others to join him, like gesturing for his peers to join him in the assault. Even presuming constitutionality of the relevant part of the statute, there would not be probable cause to support a complaint here. Manolo's angry reaction does not attempt to "incite[] assault upon any public official" by anyone else; it merely accompanies his own violent actions. G. L. c. 264, § 11.

ii. Constitutionality. It is our general practice not to decide constitutional questions "unless they must necessarily be reached" (citation omitted). Commonwealth v. Raposo, 453 Mass. 739, 743 (2009). We follow this guidance here, but with one caveat. The statute must be read consistently with the requirements of the United States Supreme Court's decision in Brandenburg, which addressed a statute containing similar language and sharing a similar historic purpose.

Section 11 was passed during the "first red scare" in the late 1910s and early 1920s and was expressly aimed at combatting

---

[16] The parties contest whether a police officer is a public official for purposes of this statute. Because we find that there is no probable cause even assuming a police officer is a qualifying public official, we need not reach this argument.

anarchist political activity. St. 1919, c. 191.[17] It was amended and further used in the "second red scare" of the 1940s and 1950s as part of a legislative package increasing penalties related to "subversive organizations" such as the Communist Party. See St. 1954, c. 584, §§ 3-5 (similarly amending statutes in G. L. c. 264 pertaining to membership in subversive organizations, destruction or concealment of records of subversive organizations, and funding of subversive organizations). See also St. 1951, c. 805, § 3 (declaring Communist Party "unlawful" and "subversive organization"). The origins and purpose of the statute considered by the Supreme Court in Brandenburg also date back to syndicalism concerns that informed the passage of § 11.[18]

---

[17] The preamble to § 11 states, in part, "There is now in this commonwealth a considerable number of persons, mainly non-residents, who are striving to promote anarchy in the community and who are inciting others to acts of violence with a view to the overthrow of all government; and . . . Legislation is necessary to provide for the prompt repression of these attempts; therefore this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety." St. 1919, c. 191.

[18] Other States also passed syndicalism statutes in the early 1900s. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("From 1917 to 1920, identical or quite similar [syndicalism] laws were adopted by [twenty] States and two territories"). The Supreme Court originally found these laws constitutional in Whitney v. California, 274 U.S. 357, 372 (1927), but later reversed in Brandenburg, supra at 447-449. Some Federal courts had already found such State laws unconstitutional as vague and overly broad. See McSurely v. Ratliff, 282 F. Supp. 848, 850-852 (E.D. Ky. 1967) (Kentucky sedition law both

The Ohio criminal syndicalism statute at issue in Brandenburg punished

> "persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy; or who 'justify' the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism'; or who 'voluntarily assemble' with a group formed 'to teach or advocate the doctrines of criminal syndicalism.'"

Brandenburg, 395 U.S. at 448. In interpreting this statute, the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments [to the United States Constitution].

---

unconstitutional and preempted as applied to communist sedition); Ware v. Nichols, 266 F. Supp. 564, 569 (N.D. Miss. 1967) (Mississippi syndicalism statute facially invalid as overbroad). One State court held that the laws were valid but required reading in constitutional limitations. People v. Epton, 19 N.Y.2d 496, 505-506 (1967). Since Brandenburg, at least one State court has acknowledged the invalidity of these statutes, and many States have repealed them. See In re Harris, 20 Cal. App. 3d 632, 634 (1971); White, The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927, 85 Or. L. Rev. 649, 760-761 & n.628 (2006). Montana amended its criminal syndicalism statute to a criminal incitement statute, the elements of which mimic the Brandenburg test. See 1999 Mont. Laws c. 350.

It sweeps within its condemnation speech which our Constitution has immunized from governmental control." Id. at 447-448. The same limiting principle obviously applies here. Its specific application, however, to the different parts of this multipart statute we decline to decide, absent an actual case or controversy requiring resolution of the constitutional question. Compare United States v. Miselis, 972 F.3d 518, 535-548 (4th Cir. 2020) (in context of addressing "Unite the Right" rally in Charlottesville, Virginia, court assessed constitutionality of Federal Anti-Riot Act in light of Brandenburg, concluding that statute could validly proscribe riot-related activity described by verbs "organize," "incite," "participate in," and "instigate," but could not prohibit other protected activity).

4. Conclusion. We hold that "a first offense of a [minor] misdemeanor" in G. L. c. 119, § 52, refers to a first episode of minor misdemeanor level misconduct. Accordingly, we affirm the dismissal of the charges of disorderly conduct and disturbing the peace against Manolo, Frederick, and Angela, and the charges of interfering with a police officer against Manolo and Frederick. The Commonwealth may proceed against Manolo, Frederick, and Angela with the arraignment of the charges of resisting arrest, and against Manolo with the arraignment of the

charge of assault and battery on a police officer.[19] We also conclude that there is no probable cause to support the charge of incitement in violation of G. L. c. 264, § 11, and hold that G. L. c. 264, § 11, must be read consistently with the limitations in Brandenburg.

So ordered.

[19] Our holding as applied to the facts of this case will result in no Wallace W. hearings for these juveniles. For that reason, we do not address the question whether the full rules of evidence apply in Wallace W. hearings. This question is before the court in a related case, Commonwealth v. Nick N., 486 Mass. (2021), and is addressed there.