

Annual Survey of Massachusetts Law

Volume 1980

Article 4

1-1-1980

Chapter 1: Evidence

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Recommended Citation

Fragetta, William A.; Hoffman, Janet L.; and Robertson, Marjory D. (1980) "Chapter 1: Evidence," *Annual Survey of Massachusetts Law*: Vol. 1980, Article 4.

CHAPTER 1

Evidence

SURVEY Staff†

§ 1.1. Hearsay Exceptions—Dying Declarations and Prior Recorded Testimony.* It is the general rule in all courts of the United States that out-of-court statements are inadmissible for the purpose of proving the truth of the matter stated therein.¹ This “hearsay” doctrine developed to encourage and to ensure the accuracy and reliability of testimony.² One reason that courts generally exclude hearsay statements is that since the out-of-court declarant does not speak under oath, he is not subject to any special inducement, such as religious belief or fear of perjury, to speak the truth.³ A second reason is that because the declarant is not present at trial when making the statement, his demeanor cannot be evaluated appropriately by the trier of fact.⁴ A third, and perhaps the most crucial, reason for the general hearsay rule is the lack of any opportunity for the adversary to cross examine the out-of-court declarant whose statements are reported at trial by another person or means.⁵ Cross examination theoretically exposes the declarant’s falsehoods, faulty perceptions, or lapses of memory.⁶ It is generally agreed, therefore, that the unavailability of cross examination increases the likelihood of inaccurate and unreliable testimony.⁷

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§ 1.1. ¹ See, e.g., *City of Boston v. Santosuosso*, 307 Mass. 302, 328, 30 N.E.2d 278, 295 (1940).

² C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 245, at 581 (2d ed. 1972 & 1978 Supp.) [hereinafter cited as McCORMICK].

³ *Id.* § 245, at 582. See, e.g., *Bartlett v. Emerson*, 73 Mass. (7 Gray) 174, 176 (1856); *Commonwealth v. Starkweather*, 64 Mass. (10 Cush.) 59, 60 (1852); *Lund v. Tyngsborough*, 63 Mass. (9 Cush.) 36, 40 (1851). See generally, 5 J. WIGMORE, EVIDENCE § 1362, at 10 (Charbourn rev. 1974 & 1981 Supp.) [hereinafter cited as WIGMORE].

⁴ McCORMICK, *supra* note 2, § 245, at 582. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495 (1951); *Mattox v. United States*, 156 U.S. 237, 242-3 (1895), quoted with approval in, *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965). Personal presence at trial may also be important insofar as it eliminates the danger of inaccurate reporting of the witness’ statements. McCORMICK, *supra* note 2, § 245, at 582. Written hearsay statements, however, are not subject to this danger because they can be produced in court and tested for genuineness. *Id.*

⁵ McCORMICK, *supra* note 2, § 245, at 583; WIGMORE, *supra* note 3, § 1362, at 10. See, e.g., cases cited at note 3 *supra*.

⁶ McCORMICK, *supra* note 2, § 245, at 583.

⁷ See, e.g., *McClesky v. Leadbetter*, 1 Ga. 551, 555 (1846). See also McCORMICK, *supra* note 2, § 245, at 583.

Despite the general rule that hearsay statements are inadmissible, many exceptions to the rule have developed over the years.⁸ Courts have allowed exceptions where a need for the hearsay statements exists⁹ and where a circumstantial guaranty of trustworthiness of the testimony can be demonstrated.¹⁰ During the *Survey* year, the Supreme Judicial Court examined two widely recognized exceptions to the hearsay rule. In *Commonwealth v. Key*,¹¹ the Court considered the dying declarations exception, and in *Commonwealth v. Meech*,¹² it discussed the prior recorded testimony exception. Both cases involved criminal prosecutions for homicide,¹³ and in both cases the declarants were deceased at the time of trial.¹⁴ If the trials had been civil proceedings, the hearsay statements of both witnesses would have been admissible by statute since both witnesses were deceased at the time of trial.¹⁵ Despite these and other similarities between the two cases, the Court's treatment of the two hearsay exceptions varied significantly.

Commonwealth v. Key—The Dying Declarations Exception. An exception to the hearsay rule known as the dying declaration is well-embedded in the common law of Massachusetts¹⁶ and of other states.¹⁷ Courts have long held that a statement regarding the manner in which the declarant met his death is admissible, provided: that it is offered in a prosecution for homicide¹⁸

⁸ See, e.g., *Standard Oil Co. of New York v. Johnson*, 299 F. 93, 98 (1st Cir. 1924). See also *Dallas County v. Commercial Union Assurance Co., Ltd.*, 286 F.2d 388, 392 (5th Cir. 1961); *De La Salle Institute v. United States*, 195 F. Supp. 891, 894 (N.D. Cal. 1961); FED. R. EVID. 803, 804.

⁹ See, e.g., *Hamilton v. Huebner*, 146 Neb. 320, 332-33, 19 N.W.2d 552, 559 (1945). See text and notes at notes 23 & 83 *infra*.

¹⁰ See, e.g., *Ferguson v. Smazer*, 151 Conn. 226, 232, 196 A.2d 432, 435 (1963). See text and notes at notes 24 & 84 *infra*.

¹¹ 1980 Mass. Adv. Sh. 1551, 407 N.E.2d 327.

¹² 1980 Mass. Adv. Sh. 1065, 403 N.E.2d 1174.

¹³ *Key*, 1980 Mass. Adv. Sh. at 1551, 407 N.E.2d at 329; *Meech*, 1980 Mass. Adv. Sh. at 1065, 403 N.E.2d at 1176.

¹⁴ *Key*, 1980 Mass. Adv. Sh. at 1552, 407 N.E.2d at 330; *Meech*, 1980 Mass. Adv. Sh. at 1065, 403 N.E.2d at 1176.

¹⁵ Mass. G.L. c. 233, § 65.

¹⁶ *Commonwealth v. Bishop*, 165 Mass. 148, 152, 42 N.E. 560, 561 (1896); *Commonwealth v. Roberts*, 108 Mass. (12 Browne) 296, 301 (1871); *Commonwealth v. Casey*, 65 Mass. (11 Cush.) 417, 421-22 (1853).

¹⁷ WIGMORE, *supra* note 3, § 1430, at 275-76; MCCORMICK, *supra* note 2, § 281, at 680.

¹⁸ WIGMORE, *supra* note 3, § 1431-32, at 277-79; MCCORMICK, *supra* note 2, § 283, at 681-82. The origin of this requirement appears to be the misconstrued words of a treatise writer. East, 1 Pleas of the Crown 353 (1803), quoted in WIGMORE, *supra* note 3, § 1431, at 277-78. Mr. East discussed the dying declarations exception as it applied in homicide cases but demonstrated no intent to limit its use to such proceedings. WIGMORE, *supra* note 3, § 1431, at 277 n.4. In Massachusetts, Mass. G.L. c. 233, § 64 allows the introduction by the prosecution of the dying declarations of a woman dying from an abortion. See *Commonwealth v. Viera*, 329 Mass. 470, 472-73, 109 N.E.2d 171, 173 (1952). Also G.L. c. 233, § 65 allows the introduction in *civil judicial proceedings* of all declarations by a deceased person. No similar statute ex-

committed upon the declarant;¹⁹ that the declarant believed²⁰ at the time of making the statement that he would die imminently;²¹ and, that the declarant did in fact die shortly thereafter.²² The rationale for the exception is attributed, in part, to necessity—since the witness has died, he is unavailable and, therefore, cannot be heard unless his dying declarations are admitted.²³ Furthermore, these statements, made under an impression of impending death, are considered trustworthy and reliable because the approach of death is viewed as creating a state of mind free from all ordinary motives to misstate.²⁴ Despite the relative ease of application of the standards for admitting dying declarations, courts and legislatures recently have criticized many of the doctrine's limitations as arbitrary.²⁵

During the *Survey* year, the Supreme Judicial Court, in *Commonwealth v. Key*,²⁶ considered the dying declarations exception to the hearsay rule. In particular, the Court addressed four aspects of this exception. First, the Court discussed the standards to be used by the trial court judge in evaluating the admissibility of a dying declaration.²⁷ Second, it commented

ists with respect to criminal prosecutions. *Commonwealth v. Dunker*, 363 Mass. 792, 794 n.1, 298 N.E.2d 813, 815 n.1 (1973).

¹⁹ WIGMORE, *supra* note 3, § 1433, at 281; MCCORMICK, *supra* note 2, § 283, at 682. See text and notes at notes 55-62 *infra*.

²⁰ MCCORMICK, *supra* note 2, § 282, at 680-81. This requirement entails that the declarant be alert and conscious of his injuries and of his approaching death. *Commonwealth v. Haney*, 127 Mass. 455, 457 (1879).

²¹ WIGMORE, *supra* note 3, § 1440-41, at 292-95; MCCORMICK, *supra* note 2, § 282, at 680-81. The belief must be in the certainty, not the probability, of impending death. *Commonwealth v. Polian*, 288 Mass. 494, 497, 193 N.E. 68, 69 (1934). See text and notes at notes 45-54 *infra*.

²² WIGMORE, *supra* note 3, § 1431, at 276; MCCORMICK, *supra* note 2, § 283, at 681.

²³ MCCORMICK, *supra* note 2, § 283, at 681; WIGMORE, *supra* note 3, § 1431, at 276.

²⁴ WIGMORE, *supra* note 3, § 1438, at 289. A theological belief by the declarant may not be required where the trustworthiness rationale is explained as either human awe at the approach of an unknown future or the lack of any motive to issue self-serving statements immediately prior to death. *Id.* § 1443, at 302. Despite the assumed reliability of dying declarations, their admissibility has been limited to homicide cases. See note 18 *supra*. McCormick explains this limitation as the result of judges' beliefs that dying declarations are a kind of testimony that is likely to be handled too emotionally by the jury. MCCORMICK, *supra* note 2, § 283, at 682. Therefore, courts desired to curtail the use of these statements. See text and note at note 75 *infra*. Nevertheless, the reliability of dying declarations even in homicide cases may be diminished by the declarant's feeling of hatred or revenge. See WIGMORE, *supra* note 3, § 1443, at 302.

²⁵ See, e.g., *Thurston v. Fritz*, 91 Kan. 468, 470-74, 138 P. 625, 626-27 (1914). In *Thurston*, the court overruled the limitation of the admissibility of dying declarations to cases involving criminal prosecutions for homicide on the grounds that "[t]he sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and the necessity being the same the admissibility should be the same." [quoting] 2 Wigmore on Ev. § 1436." *Id.* at 474, 138 P. at 627. See also WIGMORE, *supra* note 3, § 1436, at 286-89.

²⁶ 1980 Mass. Adv. Sh. 1551, 407 N.E.2d 327.

²⁷ *Id.* at 1553-54, 407 N.E.2d at 330-31.

upon the nature and extent of evidence required to demonstrate that the declarant had abandoned all hope of recovery.²⁸ Third, the common law rule that a dying declaration is admissible only in a prosecution for homicide committed upon the declarant was examined by the Court.²⁹ Finally, the Court applied the standard to be used by the judge in instructing the jury on the weight to be accorded the dying declaration.³⁰

The *Key Court's* analysis focused upon the dying declarations made by one of two victims allegedly murdered by the defendant.³¹ In an explosion and fire at an apartment, firefighters had found the declarant and another victim with their hands and feet bound with wire.³² They were taken to a hospital where one victim died a few hours later and the declarant died early the next morning.³³ While the declarant was in the hospital, he made several incriminating statements to the effect that the defendant had tied the two victims, poured gasoline on them and set them afire.³⁴ After being found guilty of murder in the first degree, the defendant appealed, challenging both introduction of the statements and the judge's instructions to the jury regarding the statements.³⁵

In his appeal to the Supreme Judicial Court,³⁶ the defendant alleged four errors regarding the trial court's disposition of the dying declarations issue. First, he argued that the trial judge had employed an improper standard in his preliminary finding of admissibility.³⁷ The defendant pointed to the jury instructions as an example of this error.³⁸ The defendant claimed that the

²⁸ *Id.* at 1555-57, 407 N.E.2d at 331-32.

²⁹ *Id.* at 1557-58, 407 N.E.2d at 332-33.

³⁰ *Id.* at 1558-59, 407 N.E.2d at 333.

³¹ *Id.* at 1552, 407 N.E.2d at 330.

³² *Id.* at 1551-52, 407 N.E.2d at 330.

³³ *Id.* at 1552, 407 N.E.2d at 330.

³⁴ *Id.*

³⁵ *Id.* at 1551-53, 407 N.E.2d at 329-30.

³⁶ The defendant appealed pursuant to G.L. c. 278, § 33E. 1980 Mass. Adv. Sh. at 1551, 407 N.E.2d at 329.

³⁷ 1980 Mass. Adv. Sh. at 1553, 407 N.E.2d at 330. In Massachusetts, the judge makes a preliminary finding of admissibility but the jury is entitled to overrule it. See note 38 *infra*.

³⁸ The Massachusetts courts follow the so-called "humane rule," which gives the defendant a second opportunity to have a dying declaration, already found admissible by the judge, to be excluded from the jury by allowing the jury to override the judge's preliminary finding of admissibility. *Commonwealth v. Polian*, 288 Mass. 494, 498-99, 193 N.E. 68, 70 (1934). In *Polian*, however, the Court refused to require the trial judge to instruct the jury that it could give no weight to the dying declaration unless it found beyond a reasonable doubt the preliminary facts necessary to make it admissible. *Id.* at 498, 193 N.E. at 70. The Court stated that "[e]very necessary element of the crime must be proved beyond reasonable doubt, but it does not follow that every piece of evidence must be admissible beyond reasonable doubt." *Id.*

The Massachusetts rule has been criticized as being less, not more, humane than the traditional view under which the judge resolves the question of admissibility. In *Morgan, The Law of Evidence 1941-1945*, 49 HARV. L. REV. 481 (1946), Professor Morgan commented:

The courts which favor making the jury in effect a court of review of the judge's find-

instructions revealed the judge's belief that even if the declarant had retained a hope of recovery, the dying declaration exception would operate to admit his statement.³⁹ A further manifestation of the trial judge's adoption of an improper standard, the defendant contended, was that the judge did not make a finding that the declarant had abandoned all hope and lacked even the slightest expectation of recovery.⁴⁰ The Supreme Judicial Court rejected the defendant's arguments with respect to the judge's findings and to his jury instructions.⁴¹ Examining the instructions⁴² and the findings as a whole, the Court concluded that the trial judge "obviously appreciated that 'consciousness of . . . certain doom' is the *sine qua non* of admissibility."⁴³

ing, do so on the theory that they are favoring the accused by giving him a second tribunal. Whether this will not operate to make the trial judge more liberal, if not more careless, in passing on the preliminary issue since he must later submit it to the jury if he allows them to hear the evidence, is at least open to debate. . . . Thus, an illogical attempt to give the accused an added benefit may be but a step in a process of subtracting from what he already enjoys.

Id. at 488-89. See also Quick, *Some Reflections on Dying Declarations*, 6 How. L.J. 109, 129 (1960).

³⁹ 1980 Mass. Adv. Sh. at 1554 n.1, 407 N.E.2d at 331 n.1. Specifically, the defendant relied upon the following comments by the judge to the jury:

"And when I say convinced, I don't mean beyond all possibility, because we all know that a person, although he's pretty certain, he's sure that he's going to die, could always have a hope that he's going to live. But that's not what we're talking about. Did the man rationally, reasonably feel in his own heart, in his own mind, 'I'm going to die'?"

Id. The defendant argued that this statement clearly revealed the standard upon which the judge relied in determining admissibility. *Id.*

⁴⁰ The judge made the following findings regarding the declarant's state of mind at the time of the declaration:

"I am satisfied that he was under the impression, turned out to be right, that his chances of living were minimal at the time when he made these statements to Sergeant Whalen." "Fobbs [the declarant] knew he was about to die imminently." "Fobbs understood that he wasn't going to make it past morning." "Fobbs had been informed and understood that death was imminent and inevitable as most things are." "Fobbs knew that his death was imminent." "Fobbs knew about and was certain that he was about to die in a short time."

Id. at 1553, 407 N.E.2d at 331.

⁴¹ *Id.* at 1554 and n.1, 407 N.E.2d at 331 and n.1.

⁴² The Court concluded that the defendant must demonstrate substantial prejudicial harm for the judge's error in giving the instructions to be reversible because the defendant made no objections and took no exceptions to the judge's standard as employed in the judge's charge to the jury. *Id.* at 1554 n.1, 407 N.E.2d at 331 n.1. See also *Commonwealth v. Garcia*, 1980 Mass. Adv. Sh. 21, 38, 399 N.E.2d 460, 471 (1980). Accordingly, the Court determined that the instructions must be viewed as a whole in evaluating whether substantial prejudice occurred. 1980 Mass. Adv. Sh. at 1554 n.1, 407 N.E.2d at 331 n.1.

⁴³ 1980 Mass. Adv. Sh. at 1554, 407 N.E.2d at 331 (quoting *Shepard v. United States*, 290 U.S. 97, 100 (1933)). In particular, the Court noticed the judge's statements to the jury when they requested additional instructions:

"Now we all realize that all of us may have some hope for a miracle. That's not what we're talking about. He's got to be convinced that he's going to die . . . at the time he

Specifically, the Court explained that the trial judge's allowance for a hope of a miracle on the declarant's part was not an incorrect interpretation of the law, because such hope is not the equivalent of an expectation of recovery.⁴⁴ Thus, in the Court's view, the trial judge's allowance was not a dilution of the traditional standard governing the admissibility of statements under the dying declaration rule.

The defendant next argued that the evidence in the case did not support the finding of the judge and the jury that the declarant had abandoned all hope of recovery.⁴⁵ The defendant relied specifically upon the declarant's only transcribed statement, taken the afternoon after the fire, wherein the declarant did not directly acknowledge that he was about to die.⁴⁶ The Court rejected the defendant's claim, reasoning that the declarant need not explicitly state that he has abandoned every hope of recovery⁴⁷ and that apprehension of impending death may be inferred from surrounding circumstances.⁴⁸ A police officer, a nurse, and a doctor all had told the declarant that he would die within twenty-four to forty-eight hours.⁴⁹ The Court concluded that the declarant's replies to these statements, intimating acceptance, indicated that he had abandoned all significant hope of recovery.⁵⁰ The declarant's refusal to acknowledge expressly his impending death in response to explicit questions⁵¹ was consistent, according to the Court, with abandoned hope, since a person who knows that he is about to die characteristically will attempt to comfort those around him.⁵² In addition, the Court reasoned that testimony given by several individuals who had seen the declarant prior to his death was a proper aid in determining the declarant's condition and attitude.⁵³ Finally, the seriousness of injuries sustained by the declarant, his awareness of them, and his response to the death of his fellow

makes the statement."

Id. at 1554 n.1, 407 N.E.2d at 332 n.1.

⁴⁴ *Id.* at 1554 n.1, 407 N.E.2d at 331 n.1.

⁴⁵ 1980 Mass. Adv. Sh. at 1555, 407 N.E.2d at 331.

⁴⁶ *Id.* at 1555, 407 N.E.2d at 331. In particular, the following exchange took place:

"*The sergeant*: Do you think you are going to come through this all right, do you think you are going to live? *The declarant*: I feel okay . . . *The sergeant*: You heard the nurse say you have a fifty-fifty chance, do you think you are going to make it? (No answer.) *The sergeant*: Louis, I'll see you in a couple of days? *The declarant*: All right. What does the house look like up there?"

Id. at 1555 n.2, 407 N.E.2d at 331 n.2 (emphasis supplied).

⁴⁷ *Id.* at 1555, 407 N.E.2d at 331-32. See *Commonwealth v. Vierra*, 329 Mass. 470, 473, 109 N.E.2d 171, 173 (1952).

⁴⁸ 1980 Mass. Adv. Sh. at 1555, 407 N.E.2d at 332.

⁴⁹ *Id.* at 1555-56, 407 N.E.2d at 332.

⁵⁰ *Id.* at 1556, 407 N.E.2d at 332.

⁵¹ See note 46 *supra*.

⁵² 1980 Mass. Adv. Sh. at 1556, 407 N.E.2d at 332.

⁵³ *Id.* Two doctors, two nurses, and a police officer observed the declarant and concluded that he realized that he was about to die. *Id.*

victim were sufficient, in the Court's opinion, to justify both the trial judge's and the jury's findings that the declarant had abandoned all hope of recovery.⁵⁴

The third challenge brought by the defendant in *Key* focused upon the admissibility of the declarant's statement in the defendant's trial for the murder of the non-declaring victim.⁵⁵ The defendant claimed that the judge should have instructed the jury to limit their consideration of the declarant's dying declarations to the issue of the declarant's homicide and not that of the other victim.⁵⁶ The Court dismissed the defendant's challenge, rejecting the common law rule that a dying declaration is admissible only if the declarant is the person whose death is the subject of the charge.⁵⁷ The Court noted that the issue of admissibility of a declarant's statements in an indictment charging the murder of a fellow victim was a question of first impression in Massachusetts.⁵⁸ It then relied upon decisions by the Louisiana⁵⁹ and South Carolina courts⁶⁰ in rejecting the common law rule as arbitrary and irrational.⁶¹ In upholding the trial court judge's admission of the declarations to prove both murders, the Court emphasized that the judge had recognized the probable trustworthiness of the declarant's statements and commented that the statements did not become less trustworthy when offered to prove a fellow victim's murder.⁶²

Finally, the defendant argued that the judge should have instructed the

⁵⁴ *Id.* at 1556-57, 407 N.E.2d at 332.

⁵⁵ *Id.* at 1557, 407 N.E.2d at 332.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *State v. Wilson*, 23 La. Ann. 558, 559-60 (1871). In *Wilson*, the appellate court affirmed the trial judge's admission of the dying declaration of a wife who was shot at the same time as her husband, even though the defendant was being tried for the husband's and not the wife's murder. *Id.* at 559. Despite the court's rejection of the common law rule in this case, in a later case, *State v. Simon*, 131 La. 520, 59 So. 975 (1912), the same court appeared to endorse the rule that a dying declaration is admissible only if the declarant is the person whose murder is being tried. *Id.* at 526-28, 59 So. at 977-78. The issue was not squarely raised in this case; nevertheless, the court proffered acceptance of the common law rule and cited *State v. Wilson* in support thereof. *Id.* at 528, 59 So. at 978.

⁶⁰ *State v. Terrell*, 46 S.C.L. (12 Rich.) 321 (1859). In *Terrell*, the court upheld the admissibility of the statements of a declarant who had died of the same poison taken at the same time as the person whose murder was the subject of the indictment. *Id.* at 329-31.

⁶¹ 1980 Mass. Adv. Sh. at 1557-8, 407 N.E.2d at 333. The Court noted that some states have reworked the common law through judicial decision or legislative action. *Id.* at 1557 n.3, 407 N.E.2d at 333 n.3. The Court also cited *Commonwealth v. Stallone*, 281 Pa. 41, 44-46, 126 A. 56, 57-58 (1924) as support for its rejection of the common law rule. 1980 Mass. Adv. Sh. at 1558, 407 N.E.2d at 333. The Court's reliance upon *Stallone* appears misplaced, however, since the court in that case expressly endorsed the common law rule. 281 Pa. at 44-45, 126 A. at 57-58.

⁶² 1980 Mass. Adv. Sh. at 1558, 407 N.E.2d at 333.

jury to receive the dying declarations with caution.⁶³ The Court concluded that the trial judge was not required to charge the jury in this manner and that he was not expected to expound extensively upon “the niceties of the hearsay rule per se.”⁶⁴ Rather, the Court reasoned, pursuant to the “humane rule” followed in Massachusetts,⁶⁵ the trial judge only had to instruct the jury on the preliminary facts that they must find before considering any of the declarant’s statements as dying declarations.⁶⁶ The Court held that the judge had satisfied this standard in that he had instructed the jury repeatedly that, despite the legal theory supporting the trustworthiness of dying declarations in general, the truth of the specific statement in the case at bar remained a jury question.⁶⁷ Since charging the jury is a discretionary function of the trial judge,⁶⁸ and since the defendant could show no abuse thereof, the Court refused to reverse.⁶⁹

The Court’s treatment of the initial determination of admissibility and the sufficiency of the evidence to support a finding that the declarant had abandoned all hope of recovery was justified by judicial precedent.⁷⁰ The declarant died shortly after making the statements,⁷¹ thereby indicating both the seriousness of his injuries and his probable state of mind. Furthermore, the declarant never took any actions inconsistent with a belief in impending death. Indeed, his tendency to become reflective and his request to telephone his grandfather were highly indicative of an overriding sense of doom.⁷² Although the Court did not stress these facts in its resolution of the issue, such behavior by the declarant supports the Court’s conclusion that the common law standard had been met.⁷³ Therefore, the Court’s disposition of this issue was consistent with the common law requirement of an

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See note 38 *supra*.

⁶⁶ 1980 Mass. Adv. Sh. at 1558, 407 N.E.2d at 333.

⁶⁷ *Id.* Specifically, the judge told the jury: “[Y]ou don’t have to believe anybody.” He also explained that the jury “might consider whether Fobbs was ‘competent to say what [he allegedly] said’ and whether he answered questions ‘in a manner that showed he knew what he was saying.’” *Id.* (brackets original).

⁶⁸ See, e.g., *Commonwealth v. Roberts*, 1979 Mass. Adv. Sh. 1302, 1320, 389 N.E.2d 989, 998.

⁶⁹ 1980 Mass. Adv. Sh. at 1558-59, 407 N.E.2d at 333.

⁷⁰ See, e.g., *Commonwealth v. Polian*, 288 Mass. 494, 496-500, 193 N.E. 68, 69-71 (1934); *Commonwealth v. Nolin*, 373 Mass. 45, 50-51, 364 N.E.2d 1224, 1227-28 (1977).

⁷¹ 1980 Mass. Adv. Sh. at 1552, 407 N.E.2d at 330. Speediness of death is required, but periods extending into several weeks or months have been held not too long. *MCCORMICK*, *supra* note 2, § 282, at 681. *Cf.* *Commonwealth v. Cooper*, 87 Mass. (5 Allen) 495, 497 (1862) (the issue is not the length of interval between the death and the declaration but the state of the declarant’s mind at the time of making the declaration).

⁷² 1980 Mass. Adv. Sh. at 1555, 407 N.E.2d at 332.

⁷³ See also *People v. Gonzales*, 87 Cal. App. 2d 867, 879, 198 P.2d 81, 89 (1948).

acknowledgment of impending death and an abandonment of all hope of recovery.

The Court's treatment of the defendant's challenges regarding the admissibility of these declarations was supported, as well, by policy considerations behind the hearsay rule and its exceptions. Rejection of the common law rule limiting the admissibility of dying declarations to cases involving a homicide on the declarant is supported by many commentators.⁷⁴ At common law, however, courts have not allowed the admission of a dying declaration in a prosecution against the defendant for the homicide of a victim other than the declarant on the ground that absolute necessity was not present.⁷⁵ Nevertheless, the Supreme Judicial Court in *Key* and other courts rejecting the common law rule⁷⁶ have recognized that the need and reliability of these dying declarations outweighs this technical limitation. All statements of a person now deceased are admissible in civil proceedings in Massachusetts.⁷⁷ Thus, the expansion of the admissibility of dying declarations in criminal prosecutions for homicide to encompass a situation where the defendant is being tried for the murder of both the declarant and another victim of the same homicide is hardly an unwarranted dilution of the hearsay rule.

The Court's decision to abolish the common law rule limiting a dying declaration's admissibility to cases involving a homicide on the declarant, was, however, probably gratuitous in *Key*. Challenges of the common law rule have been considered only in cases where the defendant was not actually charged with the murder of the declarant.⁷⁸ No courts prior to *Key* had considered the rule where both murders—the declarant's and the fellow victim's—were subjects of the charges in the prosecution. Therefore, the Court easily could have confined its rejection of the common law standard to the narrow situation in *Key* where the defendant is being tried for the homicide of both the declarant and the other victim.⁷⁹ The Court's choice to abolish

⁷⁴ See, e.g., 5 WIGMORE, *supra* note 3, § 1433, at 281 n.1 (calling the limitation "crass stupidity") and 282; MCCORMICK, *supra* note 2, § 283, at 682.

⁷⁵ See, e.g., *State v. Bohan*, 15 Kan. 407, 418 (1875). In *Bohan*, the court commented that dying declarations are:

not received upon any other ground than that of necessity, in order to prevent murder going unpunished. . . . Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, generally the sole witness of his crime, beyond the power of the court by killing him, shall not thereby escape the consequences of his crime.

Id. at 418.

⁷⁶ See, e.g., *Thurston v. Fritz*, 91 Kan. 468, 470-74, 138 P. 625, 626-27 (1914).

⁷⁷ G.L. c. 233, § 65.

⁷⁸ See, e.g., *Westberry v. State*, 175 Ga. 115, 117, 164 S.E. 905, 907 (1932). See also cases cited in 5 WIGMORE, *supra* note 3, § 1433, at 281-82 n.1.

⁷⁹ 1980 Mass. Adv. Sh. at 1551, 407 N.E.2d at 329.

the common law requirement entirely is, nevertheless, a significant step towards the elimination of an arbitrary standard surrounding the admissibility of dying declarations.

The Key Court's overall analysis of the dying declaration exception to the hearsay rule was, accordingly, thorough and justifiable. The facts surrounding the making of the statements by the declarant were well within the ambit of the exception as it has developed in Massachusetts and in other jurisdictions. Furthermore, the Court perceived that the trial judge's treatment of the issue displayed neither carelessness nor misapprehension of the law. Finally, the Court's total rejection of the common law requirement that the declarant's murder be the subject of the homicide charge was consonant with the growing trend⁸⁰ to eliminate the limitations surrounding the dying declaration exception.

Commonwealth v. Meech—The Prior Recorded Testimony Exception.

As hearsay principles have developed, courts in Massachusetts⁸¹ and in other states⁸² have allowed, as an exception to the general hearsay rule, the introduction of prior recorded testimony of a witness, provided that certain requirements are satisfied. The rationales for admitting prior recorded testimony are the necessity of receiving the testimony⁸³ and the trustworthiness of testimony given under oath.⁸⁴ Under the common law, the party attempting to introduce either a written transcript⁸⁵ or an oral report⁸⁶ of the former testimony of a witness must demonstrate that five conditions are fulfilled.⁸⁷ First, the party must demonstrate that the former testimony was given under the sanction of oath.⁸⁸ Second, the witness must now be

⁸⁰ See 5 WIGMORE, *supra* note 3, § 1436, at 287-89 and n.4.

⁸¹ See, e.g., *Commonwealth v. Canon*, 373 Mass. 494, 499-500, 368 N.E.2d 1181, 1184-85 (1977); *Commonwealth v. Mustone*, 353 Mass. 490, 492-93, 233 N.E.2d 1, 3-4 (1968).

⁸² See, e.g., *Gaines v. Thomas*, 241 S.C. 412, 415-18, 128 S.E.2d 692, 694-96 (1962); *Lone Star Gas Co. v. State*, 137 Tex. 279, 308, 153 S.W.2d 681, 697 (1941); *George v. Davie*, 201 Ark. 470, 472-73, 145 S.W.2d 729, 730-31 (1940). See also McCORMICK, *supra* note 2, § 254 at 614-16.

⁸³ McCORMICK, *supra* note 2, § 255, at 617.

⁸⁴ J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE, ¶ 804(b)(1)[03], at 804-62 (1979 & 1980 Supp.).

⁸⁵ *Commonwealth v. Gallo*, 275 Mass. 320, 328-29, 175 N.E. 718, 722 (1931).

⁸⁶ *Commonwealth v. Glassman*, 253 Mass. 65, 74, 147 N.E. 833, 835 (1925); *McGivern v. Steele*, 197 Mass. 164, 165, 83 N.E. 405, 405 (1908); *Commonwealth v. Richards*, 35 Mass. (18 Pick.) 434, 437-40 (1836).

⁸⁷ McCORMICK, *supra* note 2, § 255, at 616-17; § 266, at 617-20; § 257, at 620-22.

⁸⁸ See *Ibanez v. Winston*, 222 Mass. 129, 130, 109 N.E. 814, 814 (1915); McCORMICK, *supra* note 2, § 255, at 616 & n.15. Although the party attempting to introduce the former testimony has been required to make an affirmative showing that an oath was administered and the witness sworn, *Monahan v. Clemons*, 212 Ky. 504, 507-08, 279 S.W. 974, 975 (1926), other courts maintain that evidence that the witness testified justifies an inference that he was sworn. See, e.g., *Keith v. State*, 53 Ohio App. 58, 72, 4 N.E.2d 220, 226 (1936).

unavailable.⁸⁹ Third, the party against whom the testimony is being offered must have had a reasonable opportunity to cross-examine the witness when the testimony was given.⁹⁰ Fourth, there must be an identity of parties between the litigation at which the testimony was given and the one at which it is offered as evidence.⁹¹ Finally, there must be substantial identity between the issues at the earlier and pending proceedings.⁹² The thrust of these requirements is that the party against whom the testimony is offered must have had an adequate opportunity to cross examine the witness about the issues for which the testimony is being introduced.⁹³ In recent years, many of the requirements of this hearsay exception have been criticized as outmoded because they are reflections of an earlier period when there were no court reporters.⁹⁴ Commentators also have urged that testimony given under the sanction of oath is intrinsically more reliable than statements admitted pursuant to some of the other hearsay exceptions and, therefore, should not be subject to burdensome limitations.⁹⁵

During the *Survey* year, the Supreme Judicial Court, in *Commonwealth v. Meech*,⁹⁶ addressed several issues relating to the admission of prior recorded testimony. In *Meech*, the defendant was charged with murdering the victim by cutting his throat.⁹⁷ At trial, the defendant claimed that the

⁸⁹ *Commonwealth v. Canon*, 373 Mass. 494, 499-500, 368 N.E.2d 1181, 1184 (1977); McCORMICK, *supra* note 2, § 255, at 617.

⁹⁰ *Commonwealth v. Canon*, 373 Mass. 494, 500, 368 N.E.2d 1181, 1185; McCORMICK, *supra* note 2, § 255, at 616-17. Actual cross examination at the prior trial is not required; nevertheless, the party attempting to introduce the testimony must demonstrate that the party against whom it is being offered had an adequate opportunity to exercise the right to cross examine if desired. *Canon*, 373 Mass. at 500, 368 N.E.2d at 1185; *State v. Roebuck*, 75 Wash. 2d 67, 72, 448 P.2d 934, 938 (1968); McCORMICK, *supra* note 2, § 255, at 616.

⁹¹ *Warren v. Nichols*, 47 Mass. (6 Met.) 261, 264 (1843). The requirement of identity of parties has been expanded in two ways. First, the condition includes a successor in interest to the corresponding party in the original suit. *Yale v. Comstock*, 112 Mass. (16 Browne) 267, 268 (1873); McCORMICK, *supra* note 2, § 256, at 618 and n.32. Second, some courts have held that only the party against whom the former testimony is now offered need have been the same. See, e.g., *Commonwealth v. Canon*, 373 Mass. 494, 500, 368 N.E.2d 1181, 1185 (1977); *Bryant v. Trinity Universal Ins. Co.*, 411 S.W.2d 945, 949 (Tex. Civ. App. 1967); McCORMICK, *supra* note 2, § 256, at 618 and n.35. Wigmore has advocated that the identity of parties test be satisfied where the cross-examining party at the former proceeding had the same interest and motive in cross-examining the witness as the present party against whom the testimony is offered. 5 WIGMORE, *supra* note 3, § 1388, at 111.

⁹² *Commonwealth v. Canon*, 373 Mass. 494 500, 368 N.E.2d 1181, 1185 (1977); McCORMICK, *supra* note 2, § 257, at 620-22.

⁹³ McCORMICK, *supra* note 2, § 255, at 616, § 257, at 620. See text and notes at notes 5-7 *supra* for a discussion behind the importance of an adequate opportunity to cross examine.

⁹⁴ See, e.g., McCORMICK, *supra* note 2, § 261, at 625-26. See the requirements in text at notes 88-92 *supra*.

⁹⁵ See, e.g., *id.* § 261, at 625-27.

⁹⁶ 1980 Mass. Adv. Sh. 1065, 403 N.E.2d 1174 (1980).

⁹⁷ *Id.* at 1065, 403 N.E.2d at 1176. The murder allegedly occurred after the defendant had

former testimony of a witness, now deceased, given at a grand jury proceeding should be admitted.⁹⁸ The witness had testified before the grand jury that he had encountered the defendant, who was covered with blood, shortly after the alleged murder. The witness further had stated that he and the defendant had shared some beer together at this time, that the defendant had threatened the witness with a knife,⁹⁹ and that the defendant had made homosexual advances towards him.¹⁰⁰ The defendant sought to introduce the witness' testimony to demonstrate that the defendant had lacked criminal responsibility at the time of the homicide.¹⁰¹ The trial court judge denied the defendant's request to submit the testimony to the jury.¹⁰² After being found guilty of murder in the first degree, the defendant appealed.¹⁰³

On appeal to the Supreme Judicial Court, the defendant claimed that the former testimony should have been admitted under either the prior recorded testimony exception¹⁰⁴ or an "innominate" exception to the hearsay rule.¹⁰⁵

been drinking with the victim and arguing with him about money earlier in the day. *Id.* at 1065-66, 403 N.E.2d at 1176.

⁹⁸ *Id.* at 1065, 403 N.E.2d at 1176.

⁹⁹ This knife was allegedly the murder weapon. *Id.* at 1068, 403 N.E.2d at 1177.

¹⁰⁰ The Court also remarked that the witness had testified that he then fled the room yelling " 'Meech, [the defendant] you're loony.' " *Id.* at 1068 n.4, 403 N.E.2d at 1177 n.4. The Court concluded that even if the remainder of the witness' testimony was admissible, this statement could be excluded. This statement would be inadmissible because persons " 'having no peculiar skill or professional experience, can testify only to facts within their own knowledge, from which the condition of mind may be inferred, and are not permitted to state whether in their opinion, though derived from personal observation, a certain person was sane or insane at a particular time.' " *Commonwealth v. Spencer*, 212 Mass. 438, 447, 99 N.E. 266, 270 (1912), (quoting *Hastings v. Rider*, 99 Mass. (3 Browne) 622, 624-25 (1868)) *cited in* 1980 Mass. Adv. Sh. at 1068 n.4, 403 N.E.2d at 1177 n.4.

¹⁰¹ 1980 Mass. Adv. Sh. at 1068, 403 N.E.2d at 1177. In particular, the testimony would be used to demonstrate his callousness or indifference after the alleged murder. *Id.* The defendant did not, however, deny committing the murder. *Id.* at 1065, 403 N.E.2d at 1176.

¹⁰² *Id.* at 1065, 403 N.E.2d at 1176.

¹⁰³ *Id.* The defendant appealed pursuant to G.L. c. 278, §§ 33A-33G and Mass. R.A.P. 1B (effective July 1, 1979). 1980 Mass. Adv. Sh. at 1065, 403 N.E.2d at 1176.

¹⁰⁴ 1980 Mass. Adv. Sh. at 1068, 403 N.E.2d at 1177. See text and notes at notes 107-21 *infra*.

¹⁰⁵ 1980 Mass. Adv. Sh. at 1071, 403 N.E.2d at 1179. See text and notes at notes 122-29 *infra*. The defendant urged two additional grounds for admission that were dismissed summarily by the Court. He suggested that the witness' former testimony should have been admitted through one of his experts who relied upon it in reaching his conclusions about the defendant's mental condition. 1980 Mass. Adv. Sh. at 1070-71, 403 N.E.2d at 1178. The Court dismissed this challenge on the ground that an expert's use of hearsay to form an opinion does not render the hearsay admissible. *Id.* at 1071, 403 N.E.2d at 1179. See, e.g., *Wing v. Commonwealth*, 359 Mass. 286, 290, 268 N.E.2d 658, 660 (1971). Compare FED. R. EVID. 703 and 705 which provide, respectively, that an expert may base his opinion upon hearsay evidence and that the expert may be required to disclose the underlying facts or data on cross-examination. See also, McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 481-82 (1977).

The Court rejected both of the defendant's challenges.¹⁰⁶ As to the first argument, the Court began its analysis with a discussion of the scope of the prior recorded testimony exception in Massachusetts. It reasoned that such testimony is admissible where it was given by a person, now unavailable, in a proceeding that addressed substantially the same issues as the pending proceeding and that provided a reasonable opportunity and similar motivation for cross examination by the party against whom the testimony is now offered.¹⁰⁷ Where these conditions are met, the Court explained, Massachusetts courts have allowed testimony from one criminal trial,¹⁰⁸ and from a preliminary hearing,¹⁰⁹ to be admitted at subsequent criminal trials. The Court distinguished *Meech* from these situations, however, on the ground that the prosecution was presenting the testimony of the witness at the grand jury hearing on direct examination.¹¹⁰ The Court, accordingly, reasoned that the state was not in the position of cross-examiner at the hearing.¹¹¹ Nevertheless, the Court noted that certain commentators¹¹² and some courts¹¹³ have concluded that a party tendering the testimony on direct has

The defendant also suggested that a similar account of the witness' encounter with the defendant, given to the police by the witness before the grand jury hearing, 1980 Mass. Adv. Sh. at 1068, 403 N.E.2d at 1177, should have been admitted under the business records exception. *Id.* at 1071 n.10, 403 N.E.2d at 1179 n.10. The Court concluded that the judge did not err in refusing this suggestion. *Id.* See *Kelly v. O'Neill*, 1 Mass. App. 313, 316-17, 296 N.E.2d 223, 225-26 (1973).

¹⁰⁶ 1980 Mass. Adv. Sh. at 1068-73, 403 N.E.2d at 1177-80.

¹⁰⁷ *Id.* at 1068-69, 403 N.E.2d at 1177.

¹⁰⁸ *Id.* at 1069, 403 N.E.2d at 1177. See, e.g., *Commonwealth v. Clark*, 363 Mass. 467, 470, 295 N.E.2d 163, 165-66 (1973). The Court also has allowed testimony from a civil trial to be introduced at a later criminal trial. *Commonwealth v. Canon*, 373 Mass. 494, 500, 368 N.E.2d 1181, 1185 (1977).

¹⁰⁹ 1980 Mass. Adv. Sh. at 1069, 403 N.E.2d at 1178. See, e.g., *Commonwealth v. Caine*, 366 Mass. 366, 371-72, 318 N.E.2d 901, 906 (1974).

¹¹⁰ 1980 Mass. Adv. Sh. at 1069, 403 N.E.2d at 1178. Although the issue was not raised, the Court remarked that the grand jury testimony would not be admissible *against* the defendant under the prior recorded testimony exception to the hearsay rule since the defendant did not have the opportunity to cross-examine the witness. *Id.* at 1069, 403 N.E.2d at 1178. The Court also addressed in a footnote the possible violation of the defendant's sixth amendment right of confrontation that would result if the testimony were admitted against him. *Id.* at 1069 n.5, 403 N.E.2d at 1178 n.5. *But see* *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), *cert. denied*, 439 U.S. 939 (1978); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978).

¹¹¹ 1980 Mass. Adv. Sh. at 1069, 403 N.E.2d at 1178.

¹¹² See, e.g., *McCORMICK*, *supra* note 2, § 255, at 617; see generally 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, ¶ 804(b)(1)[03], at 804-63-64 (1979 & 1980 Supp.).

¹¹³ See, e.g., *Dwyer v. State*, 154 Me. 179, 183-85, 145 A.2d 100, 102-03 (1958). *Cf.* *Commonwealth v. Canon*, 373 Mass. 494, 501, 368 N.E.2d 1181, 1185 (1977) ("We do not think the Court intended to lay down an absolute requirement of actual cross-examination as well as adequate opportunity for cross-examination. . . ."). See also *FED. R. EVID.* 804(b)(1) which provides:

"(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the

an adequate opportunity for cross-examination.¹¹⁴ Therefore, under this theory, the government should be considered bound to the trustworthiness of the evidence it chose to present to the grand jury.¹¹⁵

Having raised these arguments, the Court chose not to indicate its position with respect to the admissibility, under this hearsay exception, of prior testimony given on direct examination.¹¹⁶ Instead, it rejected the defendant's invocation of the prior recorded testimony exception on an independent ground. The Court reasoned that the witness' testimony in *Meech* was of "dubious acceptability,"¹¹⁷ regardless of the distinction between direct and cross examination, because the substantial identity of issues requirement¹¹⁸ of this hearsay exception was not satisfied.¹¹⁹ The Court noted that the prosecution's purpose in examining the witness before the grand jury had been to provide eyewitness proof about the defendant's possession of the murder weapon.¹²⁰ Since the defendant at trial sought to introduce the testimony as evidence of his criminal irresponsibility, the Supreme Judicial Court held that the evidence was properly excluded.¹²¹

The defendant's second claim was that the witness' former testimony should have been admitted under an "innominate" exception to the hearsay rule applicable in federal courts.¹²² The defendant referred to Rule 804(b)(5) of the Federal Rules of Evidence, which allows hearsay statements not covered by any specific exception to be introduced where the statement is reliable and is probative on a material fact.¹²³ The Court noted that such a

declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Id.

¹¹⁴ 1980 Mass. Adv. Sh. at 1069-70, 403 N.E.2d at 1178.

¹¹⁵ *Id.* at 1070, 403 N.E.2d 70 at 1178. See *United States v. Henry*, 448 F. Supp. 819, 821 (D. N.J. 1978); *United States v. Driscoll*, 445 F. Supp. 864, 866-67 (D. N.J. 1978); *Commonwealth v. Shagoury*, 1978 Mass. App. Ct. Adv. Sh. 927, 940, 380 N.E.2d 708, 716 (1978) (assumption of admissibility).

¹¹⁶ Indeed, the Court indicated nonacceptance of the view that the presentation of testimony on direct would satisfy the requirement of an adequate opportunity for cross examination: "[The prior recorded testimony exception] is [not] nominally fulfilled where, as here, the defendant offers the testimony against the Commonwealth, for the Commonwealth . . . was presenting the testimony through direct examination." 1980 Mass. Adv. Sh. at 1069, 403 N.E.2d at 1178.

¹¹⁷ *Id.* at 1070, 403 N.E.2d at 1178.

¹¹⁸ See text and note at note 92 *supra*.

¹¹⁹ 1980 Mass. Adv. Sh. at 1070, 403 N.E.2d at 1178.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 1980 Mass. Adv. Sh. at 1071, 403 N.E.2d at 1179.

¹²³ Under the heading "Hearsay Exceptions; Declarant Unavailable;" FED. R. EVID.

rule had not yet been adopted in Massachusetts, but admonished that “we do not regard the common hearsay exceptions as frozen in their established contours.”¹²⁴ Nevertheless, the Court reasoned that the Federal Rule was inapplicable to the witness’ grand jury testimony for two reasons. First, the Court explained that the application of the innominate exception is a matter within the discretion of the trial court judge.¹²⁵ Thus, the Court determined that reversing a conviction for the judge’s failure to admit hearsay would be inappropriate in light of the trial judge’s familiarity with the evidence.¹²⁶ Second, the Court noted that the hearsay should not be admitted unless it is “‘more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.’”¹²⁷ In this case, the Court reasoned, other evidence presented by the defendant was equally if not more probative of the defendant’s criminal irresponsibility, or indifference, at the time of the alleged homicide.¹²⁸ Thus, the Court

804(b)(5) reads in relevant part:

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and interests of justice will best be served by admission of the statement into evidence.

Id.

¹²⁴ 1980 Mass. Adv. Sh. at 1072, 403 N.E.2d at 1179. *See also* Commonwealth v. White, 370 Mass. 703, 713, 352 N.E.2d 904, 911 (1976).

¹²⁵ 1980 Mass. Adv. Sh. at 1072, 403 N.E.2d at 1179.

¹²⁶ *Id.* Although the Court did not stress this point, the defendant did not assert the innominate exception at the trial court level. *Id.* at 1071, 403 N.E.2d at 1179. The Court, however, did rely upon a case, Solomon v. Dabrowski, 295 Mass. 358, 359-60, 3 N.E.2d 744, 744-45 (1936), which emphasized that the objecting party must inform the judge specifically of any limitations or deficiencies in the judge’s determination in order to ensure careful and orderly progression of the case and to avoid confusion and unfairness to the opposing parties. *Id.* The defendant’s failure to assert this exception at trial, therefore, necessarily reduced the scope of review available to the Court.

¹²⁷ 1980 Mass. Adv. Sh. at 1072, 403 N.E.2d at 1179 (quoting FED. R. EVID. 804(b)(5)(B)).

¹²⁸ 1980 Mass. Adv. Sh. at 1072, 403 N.E.2d at 1179. The Court relied upon the following: “his drinking beer with bloodied hands after the event; leaving the knife in open view; making no effort to clean up before calling a cab to his sister’s house, or for some time after arriving there.”

Id. (footnotes omitted). The Court also noted in a footnote that the trustworthiness of the witness’s testimony was questionable because the defendant never mentioned the encounter with the witness in accounts that the defendant gave of the crime and subsequent actions. 1980 Mass. Adv. Sh. at 1072 n.12, 403 N.E.2d at 1179 n.12. Thus, the Court suggested that insufficient corroboration existed for the testimony to be introduced. *Id.* Although the Court cited cases requiring extensive corroboration, the Court’s reliance upon these cases was misplaced. *See* United States v. Garner, 574 F.2d 1141, 1143, 1146 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. West, 574 F.2d 1131, 1135-36 (4th Cir. 1978). Both of these cases involved grand jury testimony offered by the government *against* the defendant wherein the

concluded that any error that may have been committed by the trial court judge in excluding the testimony was insignificant since it barred only cumulative evidence.¹²⁹

The Court's interpretation of the requirements of both exceptions was extremely narrow, though correct. As to the prior recorded testimony exception, the Court properly noted that there was not a substantial identity of issues between the grand jury proceeding and the later trial since the prosecution obviously had no need or desire to examine the witness at the grand jury hearing concerning the defendant's defense of criminal irresponsibility. Indeed, the prosecution may not have known, at that time, that the defendant intended to assert this defense.

In light of the policies behind the hearsay rule and its exceptions, however, the Court could have admitted the testimony to salvage the now-deceased witness' observations, notwithstanding the absence of a precise similarity between the issues at the two proceedings. Such admission would not substantially prejudice the prosecution. The testimony of the witness was given at the grand jury under oath and, therefore, arguably was more trustworthy than out-of-court statements admitted under other hearsay exceptions.¹³⁰ Furthermore, the witness had reported a similar account of the events to the police a month and a half before the grand jury proceeding.¹³¹ In addition, the prosecution already had used the witness' grand jury testimony to connect the defendant with the alleged murder weapon.¹³² Therefore, the prosecution had had at least a minimal opportunity to assess the

defendant neither had the opportunity to cross-examine nor actually cross examined the witnesses. *Garner*, 574 F.2d at 1143; *West*, 574 F.2d at 1134. The admission of this testimony against the defendants thus involved a possible violation of their sixth amendment right of confrontation. *Garner*, 574 F.2d at 1146; *West*, 574 F.2d at 1136-37.

No issue of the constitutional right of confrontation was raised, however, in the *Meech* case. In addition, the prosecution did examine the witness at the grand jury hearing. 1980 Mass. Adv. Sh. at 1070, 403 N.E.2d at 1178. Indeed, the prosecution specifically relied upon the witness's testimony at the hearing, *id.*, thereby indicating its belief in the declarant's credibility. Finally, the witness had given a similar account of the encounter with the defendant a month and a half before the grand jury proceeding. *Id.* Since the prosecution actually examined the witness and since some corroboration existed, substantial guarantees of the trustworthiness of the witness' testimony existed. Although the Court stated that the *defendant* had never mentioned the encounter, 1980 Mass. Adv. Sh. at 1072 n.12, 403 N.E.2d at 1179, n.12, the defendant's trustworthiness was not at issue. Rather, the deceased witness's reliability was questioned. Accordingly, this discrepancy should have affected the weight, not the admissibility, of the statements. Furthermore, the defendant's failure to mention the encounter with the witness in accounts that the defendant gave of the crime should not affect the admissibility of the witness' statements if the prosecution is allowed to impeach the defendant. *See Commonwealth v. West*, 312 Mass. 438, 440, 45 N.E.2d 260, 262 (1942).

¹²⁹ 1980 Mass. Adv. Sh. at 1073, 403 N.E.2d at 1180.

¹³⁰ *See* McCORMICK, *supra* note 2, § 261, at 626.

¹³¹ *See* note 128 *supra*.

¹³² 1980 Mass. Adv. Sh. at 1070, 403 N.E.2d at 1178.

reliability of the witness. Other exceptions to the hearsay rule frequently provide no opportunity for the party against whom the testimony is introduced to examine in any manner the declarant's reliability or trustworthiness.¹³³

Although the *Meech* Court refused to accept the assertion that the presentation of testimony on direct satisfies the requirement of an adequate opportunity for cross examination, future practitioners could attempt to distinguish *Meech* on the ground that a substantial identity of issues could not be demonstrated. The Court itself, however, did not confine its decision to the particular facts of *Meech*. Indeed, the Court declined to indicate that the presentation of testimony on direct by any party, in any circumstances, would ever satisfy the requirement of an adequate opportunity for cross examination.

The Court's treatment of the defendant's challenge under the innominate exception to the hearsay rule was narrower than its discussion of the prior recorded testimony exception. Since consideration of the innominate exception is a matter largely within the discretion of the trial court judge, the Court's refusal to apply it to *Meech* was justified in light of the defendant's failure to assert this challenge to the trial court.¹³⁴ If the defendant, however, had informed the trial court of this issue and then had reasserted it on appeal, the Court's conclusion would appear less justified. Although cumulative evidence existed, the Court improperly concluded that other evidence was presented that was equally probative of the defendant's callousness or indifference as it pertained to his defense of criminal irresponsibility. The grand jury witness' description of the defendant's behavior shortly after the alleged murder was the only eyewitness account of grossly callous behavior by the defendant. Although the defendant's sister also testified about an encounter she had with the defendant shortly after the homicide, her testimony did not provide substantial insight into his state of mind.¹³⁵ Admission of the testimony of the grand jury witness, accordingly, may have been sufficient to create a reasonable doubt for the jury.

¹³³ McCORMICK, *supra* note 2, § 257, at 620.

¹³⁴ See note 126 *supra*.

¹³⁵ 1980 Mass. Adv. Sh. at 1066, 403 N.E.2d at 1176. Specifically, she testified that: the defendant, intoxicated and unruly, appeared at her apartment in North Billerica about 7 P.M. His clothes were stained with blood. He had arrived by taxi which he apparently had summoned from a bar near the murder scene. To McLaughlin [the defendant's sister] and her friend Kenneth Moody, the defendant volunteered that he 'had cut [a] guy's throat.' Concerned about her children seeing the defendant in his dishevelled condition, McLaughlin urged the defendant to clean himself, which, after a while, he did. He washed and changed and told Moody to burn his discarded clothes. Instead, Moody placed them in a back hall outside the apartment. The defendant fell asleep about 10:30 P.M. and did not awaken until 3 A.M., just before the arrival of the police.

Conclusion. The Court's treatment of challenges to the prior recorded testimony exception in *Meech* and the dying declarations exception in *Key* appear inconsistent. In both cases, the hearsay statements of witnesses deceased at the time of trial were offered as testimony in prosecutions for homicide.¹³⁶ In Massachusetts, all statements of a person now deceased are admissible by statute in civil proceedings.¹³⁷ In light of this liberal statutory policy, the Court should not be overly reluctant to allow minor expansions of the admissibility of statements by persons now deceased under certain hearsay exceptions in criminal proceedings. In *Key*, the Court was willing to undertake a gratuitous expansion of the scope of the common law dying declarations exception. In *Meech*, however, the Court declined to indicate any support for a similar expansion of the prior recorded testimony exception. Although differences between the criminal and civil judicial process might warrant stricter standards of admissibility in criminal trials, the situation involved in the *Meech* case did not warrant such a conclusion. The defendant, and not the prosecution, was attempting to introduce the prior recorded testimony and, therefore, no constitutional right of confrontation¹³⁸ was involved. Furthermore, the declarant had spoken under oath, had already reported a similar account of his encounter with the defendant, and had been examined by the prosecution on direct at the grand jury proceeding. This combination of factors supporting trustworthiness compensates for any variations between civil and criminal trials. Nevertheless, the Court may have been willing to extend the dying declarations exception and not the prior recorded testimony exception because the dying declarations doctrine requires that the declarant actually be dead while the prior recorded testimony exception requires only unavailability. Expanding the dying declarations exception is, therefore, consistent with the liberal statutory policy of admitting all statements of a person deceased at the time of trial in a civil proceeding. In contrast, a similar broadening of the prior recorded testimony exception would affect the admissibility of statements by the living as well as by the deceased.

§ 1.2. Polygraph Evidence: Costs for Indigents Requesting Polygraph Examination.* In a 1974 case, *Commonwealth v. A Juvenile*,¹ the Supreme Judicial Court departed from its long-standing ban on the admissibility of polygraph² evidence in criminal trials. In *A Juvenile* the Court adopted the

Id. (Brackets of [a] in original).

¹³⁶ See notes 13 and 14 *supra*.

¹³⁷ Mass. G.L. c. 233, § 65.

¹³⁸ See note 128 *supra*.

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§ 1.2 ¹ 365 Mass. 421, 313 N.E.2d 120 (1974). For a general discussion of the admissibility of polygraph evidence in criminal proceedings, see *Evidence*, 1979 ANNUAL SURVEY OF MASS. LAW § 4.1 at 81.

² Polygraphy is the science of lie detection. The polygraph machine records a subject's

view that such evidence could be admitted at the discretion of the trial judge if the defendant had requested the examination³ and had agreed in advance that the results of the test would be admitted regardless of the outcome.⁴ Four years later, in *Commonwealth v. Vitello*,⁵ the Court modified *A Juvenile* by defining the purpose for which polygraph evidence may be used in criminal trials and by eliminating the requirement that the defendant waive objections to admission of the results prior to taking the test.⁶ In *Vitello*, the Court rejected the use of polygraph evidence as independent proof of either guilt or innocence and held that such evidence should be admissible, at the discretion of the trial judge, for the limited purposes of corroborating or impeaching the defendant's testimony.⁷ A defendant who chooses to testify can call the polygraph examiner as an "expert character witness" on the issue of credibility.⁸

One issue not addressed by *A Juvenile* or *Vitello* is whether an indigent defendant would be allowed expenses for the cost of a polygraph examination. General Laws chapter 261, section 27C allows an indigent defendant "extra fees and costs" for documents or services reasonably necessary to assure him a defense as effective as that available to a defendant with adequate financial resources.⁹ Under this provision, a trial court must hold a hearing to determine whether a defendant is eligible for state funding of

physiological responses to questions asked by a polygraph examiner. On the basis of these responses, polygraph experts claim to be able to tell whether the subject is lying or telling the truth. See *Commonwealth v. Vitello*, 1978 Mass. Adv. Sh. 2603, 2609-17, 381 N.E.2d 582, 586-89 (1978).

³ 365 Mass. at 430-31, 313 N.E.2d at 126.

⁴ *Id.* at 431, 313 N.E.2d at 126-27. The Court listed other safeguards in *A Juvenile*: (a) The defendant must be informed that he is waiving his fifth amendment right against self incrimination; *Id.* at 431-32, 313 N.E.2d at 127; (b) the waiver must be voluntary; *Id.* at 432, 313 N.E.2d at 127 and (c) the polygraph examiner must be qualified, the defendant must be competent to take the examination, and the test must be administered properly. *Id.* at 425-27, 313 N.E.2d at 124.

⁵ 1978 Mass. Adv. Sh. 2603, 381 N.E.2d 582. The companion case to *Vitello* was *Commonwealth v. Moynihan*, 1978 Mass. Adv. Sh. 2654, 381 N.E.2d 575.

⁶ 1978 Mass. Adv. Sh. at 2637-39, 381 N.E.2d at 598-99.

⁷ *Id.* at 2632, 381 N.E.2d at 596.

⁸ *Id.* at 2636, 381 N.E.2d at 598.

⁹ G.L. c. 261, § 27C, states in pertinent part:

Court's Findings as to Indigency: Hearings; Posting of Notice of Indigency Limits.

* * *

(4) If the court makes a finding of indigency, it shall not deny any request with respect to normal fees and costs, and it shall not deny any request with respect to extra fees and costs if it finds the document, service or object is reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay. The court shall not deny any request without first holding a hearing thereon; and if there is an appeal pursuant to section twenty-seven D following a denial, the court shall, within three days set forth its written findings and reasons justifying

“extra fees and costs.”¹⁰ In a case decided during the *Survey* year, *Commonwealth v. Lockley*,¹¹ the Court interpreted General Laws chapter 261, section 27 for the first time.¹² Specifically, the Court set out the standards for deciding under what circumstances the expenses of a polygraph test would be covered by chapter 261, section 27C.

In *Lockley*, the defendant was convicted of robbery.¹³ Prior to trial, he had filed a motion in the trial court to order a polygraph examination of himself, and to allow payment under General Laws chapter 261, section 27 to cover the cost of the examination.¹⁴ Both motions were denied.¹⁵ The court neither conducted a hearing to make an initial finding of indigency nor inquired into the desirability or necessity of a polygraph examination of Lockley, as required by General Laws chapter 261, section 27. The court reasoned that the purpose for which such evidence is admissible is too limited to justify the outlay of public funds for an indigent defendant to take the test.¹⁶ In denying the motions, the judge held that *Vitello* did not require state-financed polygraph examinations for indigent defendants.¹⁷ The judge stated that this outlay of public funds for the test would be “based on the bare possibility that in the event that they pass it then they can use it to enhance their credibility at the trial, and in the event that they don’t pass it then it is not admissible . . . [s]imply by their not taking the stand . . .”¹⁸

The Supreme Judicial Court reversed the conviction and ordered a new trial.¹⁹ Noting that the case was one of first impression with respect to the

such denial, which document shall be part of the record on appeal.

G.L. c. 261, § 27C (1978 & 1981 Supp.).

G.L. c. 261, § 27A defines “extra fees and costs” as:

the fees and costs, in addition to those a party is normally required to pay in order to prosecute or defend his case, which result when a party employs or responds to a procedure not necessarily required in the particular type of proceeding in which he is involved. They shall include, but not necessarily be limited to, the costs of transcribing a deposition, expert assistance and appeals bonds, and appeal bond premiums.

G.L. c. 261, § 27A. These provisions reflect amendments since the *Lockley* trial decision. The changes with respect to the provision cited above were minor. See G.L. c. 261, §§ 27A, 27C(4) (1978).

¹⁰ See note 9 *supra*.

¹¹ 1980 Mass. Adv. Sh. 1699, 408 N.E.2d 834.

¹² *Id.* at 1703, 408 N.E.2d at 838.

¹³ *Id.* at 1699, 408 N.E.2d at 836.

¹⁴ *Id.* at 1701, 408 N.E.2d at 837.

¹⁵ *Id.*

¹⁶ *Id.* at 1704, 408 N.E.2d at 838. The trial judge stated: “[a]s I read the *Vitello* case I just don’t see where courts in any way should authorize those examinations, as far as I am personally concerned.” *Id.* at 1701, 408 N.E.2d at 837.

¹⁷ *Id.* at 1702, 408 N.E.2d at 837.

¹⁸ *Id.*

¹⁹ *Id.* at 1706-07, 408 N.E.2d at 840.

interpretation of General Laws chapter 261, section 27C, the Court determined that the defendant had not had a sufficient hearing on the issue, as required by that statute.²⁰

In interpreting the statute, the Court observed that the standard for deciding whether to grant a request for “extra fees and costs” to an indigent defendant is one of reasonable necessity.²¹ The Court pointed out that, under this standard, the test is not simply whether a defendant with unlimited resources would choose a particular item or service, or whether an item “might conceivably” assist in the defense.²² Nor must it be shown that the item or service “would necessarily change” the outcome of the case.²³ Rather, in determining if an indigent is entitled to costs under chapter 261, section 27C, the Court stated, the aim is to prevent the indigent from suffering a disadvantage in the preparation of his defense, as compared with the preparation available to a paying defendant.²⁴

In further defining this reasonable necessity standard, the *Lockley* Court suggested five factors that a trial judge may consider in deciding whether a request for a financed polygraph test should qualify under General Laws chapter 261, section 27C:²⁵

1. cost of the test;²⁶
2. whether the requirements of admissibility defined in *Vitello* have been met;²⁷
3. the limited use to which such evidence may be used at trial;²⁸
4. whether the defendant has a criminal record which might deter him from testifying;²⁹
5. the possibility that an unfavorable test would work to a defendant’s disadvantage should he wish to take the stand.³⁰

²⁰ *Id.* at 1702-03, 408 N.E.2d at 837-38. The Court noted that the defendant had not availed himself of the statutory appeal provision of c. 261, § 27D. *Id.* Nevertheless, the Court proceeded to review the case since the trial judge had not informed Lockley of his right to appeal, as required by § 27D, and because the Court wished to take this opportunity to construe the statute for the first time. *Id.* In a later case, the Appeals Court advised the bar that “we may conclude in some future case that the appeal provided for in G.L. c. 261, § 27D, is the exclusive means of securing appellate review of a denial under § 27C.” *Commonwealth v. Bolduc*, 1980 Mass. App. Ct. Adv. Sh. 1911, 1914 n.10, 411 N.E.2d 483, 485-86 n.10.

²¹ 1980 Mass. Adv. Sh. at 1703, 408 N.E.2d at 838. See note 9 *supra* for the statutory definition of “extra fees and costs.”

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1706, 408 N.E.2d at 839.

²⁶ *Id.*

²⁷ *Id.* See text and notes at notes 5-7 *supra*.

²⁸ 1980 Mass. Adv. Sh. at 1706, 408 N.E.2d at 839.

²⁹ *Id.*

³⁰ *Id.*

While the *Lockley* decision appears to be concerned primarily with the matter of costs, the Court, in setting forth the five factors, was not simply defining the criteria for determining indigent defendants' rights to extra fees and costs in connection with a defense. Rather, the Court made the accessibility to indigent defendants of state-funded polygraph examinations dependent on whether the polygraph evidence could be used at trial.³¹ In this sense, the determination with respect to costs in *Lockley* becomes secondary to the threshold question of admissibility. For example, by including the second factor—that the *Vitello* requirements must be met—the *Lockley* Court reinforced the *Vitello* standard for procedural safeguards and the *Vitello* limitation on the purposes for which such evidence may be used.³² *Lockley*, thus, incorporated the notion that polygraph results may be introduced only on the issue of a defendant's credibility, and only if the defendant chooses to take the stand.³³ Furthermore, by suggesting in the third and fourth criteria that a judge consider the limited use of polygraph evidence and the defendant's criminal record when applying chapter 261, section 27C, the Court reiterated the concerns it addressed in *Vitello* with respect to a defendant's decision whether to testify. In *Vitello* the Court held that admissibility of favorable polygraph results would encourage the innocent defendant with a criminal record to testify.³⁴ Such test results, the Court noted in *Vitello*, would tend to offset the impact of a defendant's criminal record.³⁵ *Lockley* reaffirmed this policy of encouraging defendants to testify by listing among the considerations the possibility that a prior criminal record might deter a defendant from testifying.³⁶ Thus, factors two through four incorporated the admissibility standards and the policy adopted in *Vitello*.

By introducing the fifth factor, the *Lockley* Court raised a concern not resolved by the *Vitello* decision. Specifically, the Court considered whether the risk that an innocent defendant wishing to testify might be severely inhibited from taking the stand because of an unfavorable polygraph test result.³⁷ Since polygraphy is not considered infallible,³⁸ the innocent

³¹ *Id.* at 1705 n.3, 408 N.E.2d at 839 n.3. The Court noted that “[i]t may be appropriate to observe that the accessibility of polygraph examinations to indigent defendants is another of the questions . . . which a study of that general subject might be able to consider more broadly than is possible on the limited record in the present case.” *Id.* In making this comment, the Court referred to *A Juvenile*, *Vitello* and *People v. Barbara*, 400 Mich. 352, 255 N.W.2d 171 (1977), as cases containing a general discussion of the admissibility of polygraph evidence. 1980 Mass. Adv. Sh. at 1705-06 n.3, 408 N.E.2d at 839 n.3.

³² 1978 Mass. Adv. Sh. at 2637-39, 381 N.E.2d at 598-99.

³³ See *Commonwealth v. Vitello*, 1978 Mass. Adv. Sh. at 2637-38, 381 N.E.2d at 598.

³⁴ 1978 Mass. Adv. Sh. at 2637, 381 N.E.2d at 598.

³⁵ *Id.*

³⁶ 1980 Mass. Adv. Sh. at 1705, 408 N.E.2d at 839.

³⁷ *Id.* at 1706, 408 N.E.2d at 839.

³⁸ See Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70

defendant with a prior criminal record still faces the possibility that the results will be unfavorable to him.³⁹ *Vitello* suggested that a *voir dire* hearing prior to trial might serve to minimize the risk of an improperly administered test, and that proper instructions to the jurors would advise them sufficiently of the limited purposes for which the results could be used.⁴⁰ As a practical matter, such precautions might not eliminate the possibilities either of inhibiting a defendant from testifying or of contributing additional unfavorable evidence against an innocent defendant who chooses to testify.

Aside from the possible adverse effect on an innocent defendant, the *Vitello-Lockley* standard may provide a windfall to guilty defendants who otherwise would not take the stand. The standard leaves the decision of whether to introduce the test results in the hands of the defendant.

Thus, a guilty defendant who does not have a history of prior convictions might decide that he has nothing to lose by taking the test at public expense on the chance that he might pass it. This is the concern that the trial judge in *Lockley* raised when he denied the defendant's request for a polygraph examination and for costs under General Laws chapter 261, section 27C.⁴¹ The Supreme Judicial Court avoided addressing this practical matter by basing its decision on statutory construction and the requirement that the trial judge hold a full hearing.

In applying chapter 261, section 27C to polygraph examinations, then, the *Lockley* Court really addressed not the public funding aspect of the case, but, rather, the desirability of admitting polygraph test results. In doing so, the Court appears to have stepped beyond the role of judicial discretion and into the realm of trial strategy, an area more appropriately reserved for counsel. Specifically, the *Lockley* decision seems to suggest that, in determining "reasonable necessity," the trial judge consider whether the defendant's criminal record might deter him from testifying and whether an unfavorable test might work to his disadvantage if he testifies.⁴² This approach empowers a judge to make decisions that the defendant should make in consultation with his attorney. Even more disturbing is the notion that a

YALE L.J. 694, 700 (1961) where the author noted that "[l]ying can conceivably result in satisfaction, excitement, humor, boredom, sadness, hatred, as well as guilt, fear or anxiety. Not uncommon are pathological individuals who, for various reasons, believe in their lies or are unconcerned about them." This observation tends to undermine the reliability of polygraphy as an analytical tool.

³⁹ Another notable distinction between *A Juvenile* and *Vitello* is that the earlier case suggests that a defendant could introduce the results of a lie detector test without taking the stand. 365 Mass. at 425-26, 313 N.E.2d at 124. In *Vitello*, and, consequently, *Lockley*, the Court precluded such evidence unless the defendant chose to testify. 1978 Mass. Adv. Sh. at 2637-39, 381 N.E.2d at 598-99; 1980 Mass. Adv. Sh. at 1704-05, 408 N.E.2d at 838-39.

⁴⁰ 1978 Mass. Adv. Sh. at 2639, 381 N.E.2d at 599.

⁴¹ See text and notes at notes 16-18 *supra*.

⁴² See text and notes at notes 25-30 *supra*.

defendant might be compelled to reveal his intent to testify or not to testify at a pretrial chapter 261, section 27C, hearing.

The novelty of admitting polygraph evidence no doubt explains the dearth of case law on the issue of public funding for polygraph examinations. Courts in other jurisdictions that have reached this issue have defined the standards for allowing costs in terms of necessity and admissibility, as in *Lockley*.⁴³ This standard is not unlike the approach taken with respect to state funding for other types of experts for indigent defendants.⁴⁴ The parallel is not complete, however, because polygraphy does not yet enjoy the same general acceptability of other scientific disciplines.⁴⁵

In *Lockley*, the Supreme Judicial Court indicated that it would allow costs for polygraph tests under General Laws chapter 261, section 27C, to the extent that such evidence would be admissible. In linking such determinations to the general subject of admissibility, the Court observed that further examination of polygraphy as an evidentiary tool may enter into later Court decisions concerning state funding for such tests under the statute.⁴⁶ Based on *Lockley*, the practitioner representing an indigent defendant can request a polygraph test at state expense and expect a hearing on the issues of indigency and "reasonable necessity" under chapter 261, section 27C. *Lockley* also indicates that defense attorneys can expect the court to play an active role in the defendant's decision to submit to a polygraph examination. Thus, proceeding with the matter of polygraph evidence, the practitioner would be well advised to review the Court's posture on polygraphy as an evidentiary tool, and to balance his client's request against the five admissibility-oriented factors suggested by the Court in *Lockley*.

§ 1.3. Hypnotically-Aided Testimony—Admissibility at Criminal Trials.*

Most jurisdictions neither allow a witness to testify while under hypnosis nor admit evidence of pretrial statements made by a hypnotized subject.¹ While evidence elicited under hypnosis is held inadmissible, many jurisdic-

⁴³ See *U.S. v. Sims*, 617 F.2d 1371, 1375 (9th Cir. 1980) (admissibility is a prime factor); *State v. Acosta*, 41 Or. App. 257, 587 P.2d 1282 (1979) (judge's discretion); *State v. Martinez*, 90 N.M. 595, 566 P.2d 843 (Ct. App. 1977) (defendant must show necessity); *United States v. Penick*, 496 F.2d 1105, 1109-10 (7th Cir.), cert. denied, 419 U.S. 897 (1974) (judge's discretion).

⁴⁴ In fact, the Massachusetts statute allowance for the cost of "experts" is explicitly contemplated. See note 9 *supra*.

⁴⁵ This view was expressed in a 1979 Massachusetts Appeals Court case, *Commonwealth v. Foley*, 1979 Mass. App. Ct. Adv. Sh. 999, 1003-04, 389 N.E.2d 762, 765-66. In *Foley*, the court noted that lie detectors and their operators cannot be treated equally with scientific methods and practitioners of more established fields. *Id.* at 1704, 389 N.E.2d at 766.

⁴⁶ See note 31 *supra*.

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§ 1.3 ¹ See, e.g., *People v. Smrekar*, 68 Ill. App. 3d 379, 385, 385 N.E.2d 848, 853 (1979);

tions do not bar post-hypnotic statements that were developed as a result of hypnosis.² In fact, the most common use of hypnosis as a forensic tool in criminal cases is where a witness testifies after having had his memory refreshed through hypnosis. In this context, many courts view the hypnosis underlying a witness' testimony as a factor going to credibility, and not a matter of admissibility.³

During the *Survey* year, the Supreme Judicial Court, in *Commonwealth v. A Juvenile*,⁴ addressed the issue of whether the hypnotically-aided testimony⁵ of a prosecution witness should be admissible at trial. In *A Juvenile*, a seventeen-year-old defendant was found delinquent as a result of numerous counts of rape and assault against a young woman.⁶ After the assault, the victim, the sole eyewitness, was unable to identify her attacker accurately.⁷ To assist in the identification process, a Boston police detective hypnotized her.⁸ After the officer refreshed her memory through hypnosis, the victim was able to participate in the preparation of a composite sketch that led to charges against the juvenile⁹ and, later, to offer identification testimony at trial.¹⁰ Both the composite sketch and the victim's testimony ultimately led to the finding of delinquency.¹¹ The juvenile appealed this finding through a motion to suppress the victim's identification testimony, claiming that the suggestiveness of the hypnotic procedure had tainted the evidence.¹²

The Supreme Judicial Court determined that it could not reach the issue of whether the hypnotically-aided evidence should be suppressed because

People v. Hangsleben, 86 Mich. App. 718, 728-29, 273 N.W.2d 539, 544 (1978); Emmett v. State, 232 Ga. 110, 115, 205 S.E.2d 231, 235 (1974); Greenfield v. Commonwealth, 214 Va. 710, 715-16, 204 S.E.2d 414, 419 (1974).

In one jurisdiction, statements made under hypnosis were allowed for the limited purpose of corroborating an expert opinion. See *People v. Modesto*, 59 Cal. 2d 722, 732-33, 382 P.2d 33, 39 (1963). *But see* *State v. Harris*, 241 Or. 224, 405 P.2d 492 (1965) (value of corroborating expert opinion outweighed by danger of confusing the jury).

² See, e.g., *United States v. Awkward*, 597 F.2d 667, 669 (9th Cir. 1979); *United States v. Narciso*, 446 F. Supp. 252, 277 (E.D. Mich. 1977); *Clark v. State*, 379 So. 2d 372, 374-75 (Fla. App. 1979); *State v. McQueen*, 295 N.C. 96, 112-13, 244 S.E.2d 414, 427-28 (1978); *Harding v. State*, 5 Md. App. 230, 236, 246 A.2d 302, 306 (1968), *cert. denied*, 395 U.S. 949 (1969).

³ See cases cited in note 2 *supra*.

⁴ 1980 Mass. Adv. Sh. 2319, 412 N.E.2d 339.

⁵ The phrase "hypnotically-aided testimony" was used by the Court "to describe testimony that was not available from the hypnotized witness before hypnosis and became available from that witness after hypnosis." *Id.* at 2320 n.3, 412 N.E.2d at 341 n.3.

⁶ Report, Juvenile Court Dept., Boston App. Div. Nos. AD790199D-AD790211D at 1.

⁷ 1980 Mass. Adv. Sh. at 2319, 412 N.E.2d at 340.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 2320, 412 N.E.2d at 340.

¹¹ *Id.*

¹² *Id.*

the trial judge had not made crucial findings of fact concerning the reliability of the identification testimony and the "suggestibility" of the procedures that were followed.¹³ Therefore, the Court remanded the case for further findings.¹⁴ Although it did not decide whether or under what circumstances hypnotically-aided testimony would be admissible,¹⁵ the Court identified several factors that may serve as a guide, should the question arise in future cases.¹⁶ In doing so, the Court set forth the following considerations: (1) the suggestiveness of the hypnotic process both in a general and constitutional sense;¹⁷ (2) the applicability of the "general acceptance" standard to hypnotically-aided testimony;¹⁸ (3) procedures that might serve to minimize or eliminate suggestiveness;¹⁹ and (4) the evidentiary role to be played by the pretrial use of hypnosis to refresh a witness' memory.²⁰

In discussing these matters, the Court reviewed the varied treatment of hypnotically-aided testimony in different jurisdictions.²¹ The Court first observed that most jurisdictions bar both testimony given under hypnosis and statements made by a hypnotized subject prior to trial.²² The Court

¹³ *Id.* at 2320-21, 412 N.E.2d at 341.

¹⁴ *Id.* at 2326, 412 N.E.2d at 344. The juvenile initially had appealed to the Appellate Session of the Boston Juvenile Court. The trial judge reported the following questions to the Appeals Court:

1. Whether the composite picture assembled by the witness on November 30, 1978, should be suppressed because her memory was enhanced by hypnosis, although she was not in an hypnotic trance when the composite was made (though there may be a question of whether she was subject to posthypnotic suggestion).
2. If there is no record of the hypnosis, is this a critical defect or may inferences be drawn about the absence of a record of the process.
3. If the composite is to be suppressed, should the court admit the testimony concerning the witness' later identifications of the defendant in a photograph and in person? Are these later identifications to be excluded as tainted?
4. Should the fact that the police officer who administered the composite 'kit' knew the defendant from the past be considered "unduly suggestive"?
5. If the composite is to be suppressed, shall the court permit the witness to identify the defendant as her assailant in her testimony before the jury as an independent in-court identification?
6. What if any standards should be followed by a trial judge in deciding whether to admit evidence which is the product of a witness' hypnotically-enhanced recollection?
7. Should the person who administers hypnosis have any defined training, background or education?

Id. at 2320 & n.1, 412 N.E.2d at 340 & n.1. The Supreme Judicial Court took the case on its own motion. *Id.* at 2320, 412 N.E.2d at 340-41.

¹⁵ *Id.*

¹⁶ *Id.* at 2321, 412 N.E.2d at 341.

¹⁷ *Id.* at 2322, 412 N.E.2d at 341-42.

¹⁸ *Id.* at 2322-24, 412 N.E.2d at 341-43.

¹⁹ *Id.* at 2324-26, 412 N.E.2d at 343.

²⁰ *Id.* at 2321-22, 412 N.E.2d at 341.

²¹ *Id.* at 2321-25, 412 N.E.2d at 341-43.

²² See note 1 *supra*.

noted one case, however, where statements made under hypnosis were admitted for the limited purpose of corroborating an expert opinion.²³ Turning to the specific treatment of hypnotically-aided testimony, the Court stressed that most jurisdictions admit this evidence and view the fact of hypnosis as going merely to the credibility of the witness, rather than to the admissibility of the evidence.²⁴ The Court noted that the most striking position among these jurisdictions is that of the Ninth Circuit, which held hypnotically-aided testimony generally admissible without requiring consideration of the suggestiveness of the hypnotic process.²⁵

Finally, the Court discussed a number of decisions that approached the admissibility of hypnotically-aided testimony by assessing the reliability of such testimony in terms of the "general acceptance" standard first stated in *Frye v. United States*.²⁶ In that case, the United States Court of Appeals for the District of Columbia held that for an expert opinion to be admissible, the principles upon which the opinion is based "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."²⁷ The Supreme Judicial Court, in *A Juvenile*, observed that jurisdictions that have applied the *Frye* general acceptance standard to hypnosis have produced varied results. For example, recent Minnesota²⁸ and Arizona²⁹ decisions have held hypnotically-aided testimony inadmissible because the procedure used fell short of ordinary standards of reliability as a scientific tool.³⁰ Conversely, the Court observed, a New Jersey trial court judge in *State v. Hurd*³¹ concluded that the *Frye* test was met to the extent that hypnotized subjects "have the ability to concentrate on a past event and volunteer previously unrevealed statements concerning the event."³² The *Hurd* court concluded, however, that the procedures used in the case did not meet the due process standards required by *United States v. Wade*³³ and *Neil v. Biggers*.³⁴ The *Hurd* court based its conclusion on a finding that

²³ *Id.*

²⁴ See cases cited in note 2 *supra*.

²⁵ See, e.g., *United States v. Awkward*, 597 F.2d 667, 669-70 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *United States v. Adams*, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1069-70 (9th Cir. 1975).

²⁶ 293 F. 1013, 1014 (D.C. Cir. 1923).

²⁷ *Id.*

²⁸ *State v. Mack*, 292 N.W.2d 764, 772 (Minn. 1980).

²⁹ *State v. La Mountain*, 125 Ariz. 547, 550-52, 611 P.2d 551, 554-56 (1980).

³⁰ See cases cited at notes 28, 29 *supra*.

³¹ 173 N.J. Super. 333, 414 A.2d 291 (1980), *aff'd*, ___ N.J. ___, 432 A.2d 86 (1981).

³² 173 N.J. Super. at 361, 414 A.2d at 305.

³³ 388 U.S. 218 (1967). In *United States v. Wade*, the Supreme Court of the United States stated that the sixth amendment requires substantial procedural safeguards with respect to pretrial identification procedures. *Id.* at 228-32, 235, 236-39.

³⁴ 409 U.S. 188 (1972). In *Neil v. Biggers*, the Supreme Court applied a two-pronged test to determine the admissibility of pretrial identification evidence: (1) whether the procedures in-

the state had failed to prove either that there was no impermissibly suggestive conduct, or that the hypnotically-aided testimony was reliable under the "totality of circumstances."³⁵

In contrast to *Hurd*, in *A Juvenile*, the Supreme Judicial Court noted that considerations surrounding the suggestiveness of pretrial identification procedures may bear no relevance to the admissibility of hypnotically-aided testimony.³⁶ Thus, *A Juvenile* suggests that the Supreme Judicial Court may adopt a different approach than that of *Hurd*. With respect to the applicability of the *Frye* general acceptance rule for hypnotically-aided testimony, the Court remarked in *A Juvenile* that it had applied the rule in previous cases, for example on the use of spectrography³⁷ polygraphy.³⁸ The Court also noted that it previously had criticized the rule³⁹ and that the rule, which deals with the admissibility of expert testimony based on the application of scientific principles, may not apply to hypnosis.⁴⁰ Nonetheless, the Court concluded that some form of the *Frye* standard may be considered in future cases addressing hypnotically-aided testimony.⁴¹

Having reviewed cases in other jurisdictions, the Court concluded that the ultimate question raised by hypnotically-aided testimony is whether the process is so suggestive as to preclude reliability.⁴² In this regard, the Court observed that there may be no procedures that would prevent such testimony from being tainted.⁴³ The Court remarked that even if there were no such procedures, the evidence might still be admitted as a discretionary mat-

involved were unduly suggestive; and (2) whether the identification was reliable under the totality of the circumstances. *Id.* at 198-200.

³⁵ 173 N.J. Super. at 369, 414 A.2d at 309.

³⁶ 1980 Mass. Adv. Sh. at 2325, 412 N.E.2d at 343.

³⁷ Spectrography is the science of voice identification based on "voice prints" recorded on so-called spectrograms. *See* Commonwealth v. Lykus, 367 Mass. 191, 196, 327 N.E.2d 671, 677-78 (1975).

³⁸ The polygraph, or "lie detector," is a machine that measures a subject's physiological responses to questions asked by a polygraph examiner. On the basis of these responses, polygraph experts claim to be able to tell whether the subject was lying or telling the truth when answering the questions. *See* Commonwealth v. Vitello, 1978 Mass. Adv. Sh. 2603, 2609-17, 381 N.E.2d 582, 586-89 (1978).

³⁹ In Commonwealth v. Vitello, the Court made the following observation:

McCormick maintains that '[g]eneral scientific acceptance is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time.' (Footnotes omitted).

1978 Mass. Adv. Sh. at 2623 n.17, 381 N.E.2d at 592 n.17 (1978).

⁴⁰ 1980 Mass. Adv. Sh. at 2324, 412 N.E.2d at 342-43.

⁴¹ *Id.*

⁴² *Id.* at 2325, 412 N.E.2d at 343.

⁴³ *Id.*

ter, and its reliability could be challenged before the jury.⁴⁴ The Court concluded that further findings would be necessary concerning the general reliability of hypnotically-aided testimony and on the reliability of the procedures used in the particular case.⁴⁵

The Supreme Judicial Court's decision in *A Juvenile* leaves many questions unanswered—especially whether the Court will allow hypnotically-aided testimony by a prosecution witness in future cases. While the Court pinpointed one of the gravest dangers of using such testimony—its inherent suggestiveness—the opinion indicates that the Court will use a method similar to the approach it adopted for admissibility of polygraph results. In *Commonwealth v. Vitello*⁴⁶ the Supreme Judicial Court determined that the results of polygraph tests are admissible at the discretion of the trial judge if sufficient reliability is established, and that such results would be admitted only for the limited purposes of corroborating or impeaching the defendant's testimony.⁴⁷ Similarly, in *A Juvenile*, the Court appears to accept the notion that if reliability is established, a jury may consider the use of pretrial hypnosis of a witness as a factor in assessing credibility. Thus, the reliability of the hypnotic procedures used in a particular case would be a matter for judicial discretion, and the hypnotically-aided nature of the testimony would affect only credibility.

In *A Juvenile*, the Court cited a number of cases that took the “credibility” approach, noting *Harding v. State*⁴⁸ as the leading case.⁴⁹ In *Harding*, the Maryland Court of Appeals addressed the issue of whether the testimony of a prosecution witness who had been placed under hypnosis to restore her lost memory was admissible.⁵⁰ The witness in question was the victim of the defendant's alleged attack.⁵¹ The court admitted the evidence.⁵² In doing so, the court found three factors persuasive: (1) the hypnosis procedure used was fully exposed in the evidence; (2) the person who conducted the session was a qualified expert in the field; and (3) there was sufficient independent corroboration of the witness' testimony.⁵³ *Harding* makes a strong statement for allowing the use of hypnosis to go to credibility rather than admissibility. Nonetheless, the *Harding* court also noted the current controversy among experts concerning the use of hypnosis

⁴⁴ *Id.* at 2325-26, 412 N.E.2d at 343.

⁴⁵ *Id.* at 2326, 412 N.E.2d at 344.

⁴⁶ 1978 Mass. Adv. Sh. 2603, 381 N.E.2d 582 (1978).

⁴⁷ *Id.* at 2635-39, 381 N.E.2d at 597-99.

⁴⁸ 5 Md. App. 230, 246 A.2d 302 (1968).

⁴⁹ 1980 Mass. Adv. Sh. at 2321, 412 N.E.2d at 341.

⁵⁰ 5 Md. App. at 236, 246 A.2d at 306.

⁵¹ *Id.* at 233-34, 246 A.2d at 306.

⁵² *Id.* at 236, 246 A.2d at 306.

⁵³ *Id.* at 247, 246 A.2d at 312.

in the courtroom.⁵⁴ Those authorities, the court observed, warn that “fancy can be mingled with fact in some cases.”⁵⁵ Thus, in *Harding*, the court was aware of the shortcomings of hypnosis as a forensic tool. That court concluded, however, that the safeguards used in the procedure, and the sufficiency of the corroborating evidence, outweighed the possible pitfalls of using hypnotically-aided testimony.⁵⁶

In *A Juvenile*, the Supreme Judicial Court took an approach similar to that used by the *Harding* court. The Court’s apparent inclination to accept this “credibility” standard is disturbing. For example, this approach would rely heavily on the effectiveness of limiting instructions to the jury in order to prevent the jury from placing undue weight on the testimony of a witness whose recollection has been refreshed through hypnosis. While this approach might be viable in circumstances where a jury can rely on common knowledge or on experts in settled areas of scientific endeavor, such as medicine or ballistics, the reliability of hypnosis as a forensic tool is far from settled.⁵⁷ In fact, authorities in the field are themselves wary of the legal community’s use of hypnosis to develop testimony.⁵⁸ The use of cumbersome procedures and limiting instructions to the jury to justify ad-

⁵⁴ *Id.* at 246, 246 A.2d at 311-12.

⁵⁵ *Id.*

⁵⁶ *Id.* at 246-47, 246 A.2d at 311-12.

⁵⁷ In *State v. Harris*, the Oregon court affirmed a trial judge’s refusal to admit a defendant’s pretrial hypnotically-aided statements. In barring this evidence, the judge had expressly mentioned the futility of limiting instructions to the jury with respect to the hypnotic evidence. 241 Or. 224, 240-42, 405 P.2d 492, 499-500 (1965).

⁵⁸ One authority has stated:

It is extremely difficult to know which aspects of hypnotically-aided recall are historically accurate and which aspects have been confabulated. The details of material that are confabulated depend upon the subject’s total past experience and all available cues relevant to the hypnotic task. Subjects will use prior information and cues in an inconsistent and unpredictable fashion; in some instances, such information is incorporated in what is confabulated, while in others the hypnotic recall may be virtually unaffected.

Orne, Martin T., M.D., *The Use and Misuse of Hypnosis in Court*, 27 INT’L J. OF CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 317-18 (1979).

In 1978, the Society for Clinical and Experimental Hypnosis adopted a resolution in response to the increasing use of hypnosis in criminal investigations. That resolution states, in part:

Because we recognize that hypnotically-aided recall may produce either accurate memories, or at times may facilitate the creation of pseudo-memories, or fantasies that are accepted as real by subject and hypnotist alike, we are deeply troubled by the utilization of this technique among the police. It must be emphasized that there is no known way of distinguishing with certainty between actual recall and pseudo-memories except by independent verification . . . [P]olice officers understandably have strong views as to who is likely to be guilty of a crime and may easily inadvertently bias the hypnotized subject’s memories even without themselves being aware of their actions.

27 INT’L J. OF CLINICAL AND EXPERIMENTAL HYPNOSIS 452 (1979).

mission of hypnotically-aided recall obscures the basic issue of the inherent suggestiveness and unreliability of hypnosis for evidentiary purposes.⁵⁹ As a practical matter, the hypnotic procedure, as it has been applied in criminal prosecutions, is often conducted under the supervision of a police investigatory unit. The possibility for bias in this context is a stark reality.⁶⁰

Another disturbing feature of the Court's discussion of hypnotically-aided testimony is its apparent failure to give weight to due process arguments. The Court noted that some courts have approached this issue by applying principles developed in *Simmons v. United States*⁶¹ and *United States v. Wade*.⁶² These cases raised the question of safeguards for pretrial identification procedures. In *Simmons*, the United States Supreme Court held, *inter alia*, that pretrial identification procedures should be conducted so as to avoid impermissible suggestiveness.⁶³ In *Wade*, the Court stressed that in-court identification of witnesses must have an independent origin.⁶⁴ The Supreme Judicial Court in *A Juvenile*, however, noted that the concerns raised by the suggestiveness of pretrial identification procedures may not be relevant in determining the admissibility of hypnotically-aided testimony.⁶⁵ Although the two situations may not be identical, the Court's distinction between them is unconvincing. Indeed, the witness whose

⁵⁹ In *A Juvenile* the Supreme Judicial Court noted the procedural safeguards suggested by Dr. Martin Orne in *State v. Hurd*:

- (1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.
- (2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense.
- (3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.
- (4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of the events.
- (5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.
- (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.

1980 Mass. Adv. Sh. at 2324-25 n.8, 412 N.E.2d at 343 (citing 173 N.J. Super. at 362-63, 414 A.2d at 306).

⁶⁰ See notes 58-59 *supra*.

⁶¹ 1980 Mass. Adv. Sh. at 2325-26 n.10, 412 N.E.2d at 343 n.10 (citing 390 U.S. 377, 384 (1968)).

⁶² 1980 Mass. Adv. Sh. at 2325-26 n.10 (citing 388 U.S. 218, 241 (1967)). See note 33 *supra*.

⁶³ 388 U.S. at 342.

⁶⁴ 390 U.S. at 384.

⁶⁵ 1980 Mass. Adv. Sh. at 2325, 412 N.E.2d at 343. See note 33 *supra*.

memory has been revived through hypnosis during a pretrial identification proceeding is the same witness whose hypnotically-aided testimony is used to convict the defendant. Although the Court did not ignore these considerations in *A Juvenile*,⁶⁶ the thrust of the opinion appears to be more directed at finding an appropriate procedure to counterbalance the defects of hypnosis, rather than examining due process considerations.

While the Court's inadequate attention to the suggestiveness and general unreliability of hypnosis as a forensic tool, and the attendant constitutional concerns appear to be the primary shortcomings of the Court's approach, other more practical problems are raised by the decision. For example, if the Court imposes safeguards similar to those proposed in *Hurd*,⁶⁷ cumbersome procedures to ensure the accuracy of such testimony will arise. Although such considerations may not at first seem as serious as those bearing more directly on constitutional protections, they surely will need to be resolved if the Court decides to follow the lead of *Harding v. State* and other decisions that have allowed the use of hypnosis to affect credibility but not admissibility.

The significance of *A Juvenile* for the practitioner is twofold. First, the case indicates that the question of admissibility of hypnotically-aided testimony in criminal trials is still open. Therefore, the defense attorney wishing to have such evidence excluded should raise the issue at a pretrial motion to suppress. Second, such a motion can attack admissibility of hypnotically-aided testimony on two grounds: (1) the inherent suggestiveness of the procedure generally, and (2) the procedures followed in the particular case. Statements by experts in the field of medicine who question the advisability of using such evidence in the courtroom would support the defense attorney's position. In addition, although the Court stated in *A Juvenile* that due process considerations may play an insignificant role in deciding admissibility of hypnotically-aided testimony, the issue should still be raised. In addressing due process considerations, the Court's own concern that no procedural safeguards may suffice to counter the shortcomings of such evidence could undermine its reluctance to exclude it.

⁶⁶ The Court acknowledged that a witness' confidence in his testimony and his willingness to fill in missing elements may be affected by hypnosis. Such an alteration of memory, the Court observed, arguably presents the constitutional question of whether the use of hypnotically-aided testimony denies a defendant the right to confront the witnesses against him. The Court noted further that "[s]uch alteration might also be characterized as the destruction of exculpatory evidence. Moreover, the unavailability of a record of the circumstances during the surrounding the hypnotic procedure might be termed a failure to disclose exculpatory evidence or a denial of the effective assistance of counsel." 1980 Mass. Adv. Sh. at 2326 n.11, 412 N.E.2d at 344 n.11. The Court's detailed consideration of procedural safeguards in *A Juvenile*, however, indicates that the Court may consider such safeguards adequate to counterbalance these constitutional considerations.

⁶⁷ See note 59 *supra*.

§ 1.4. Jury Instructions—Shifting of Burden of Proof.* In *Sandstrom v. Montana*,¹ the United States Supreme Court held that a judge's instructions in a homicide case may not create a presumption against the defendants on the issue of intent.² The *Sandstrom* Court found that instructions creating such presumptions violated the defendant's fourteenth amendment rights.³ During the *Survey* year, there were four cases decided by the Massachusetts Supreme Judicial Court in which a criminal defendant challenged a judge's instructions to the jury on grounds similar to those successfully raised by the defendant in *Sandstrom*. In two of these cases the Court upheld the original verdicts, but in the other two it reversed convictions on the basis of improper instructing. Nevertheless, the decisions followed a generally consistent pattern.

In the first of these four cases, *Commonwealth v. Medina*,⁴ the two defendants were found guilty of first and second degree murder, respectively, in the brutal slaying of the latter's former mistress.⁵ Subsequently, one defendant filed a motion for a new trial, claiming errors in the trial judge's instructions on malice.⁶ The most substantial ground for appeal concerned the judge's references to a "presumption" of malice automatically arising from an unlawful killing.⁷ The defendant argued that the judge's instruction may have shifted impermissibly the burden of proof on the issue of malice from the commonwealth to the defendant.⁸

In ruling on this claim, the Supreme Judicial Court held that the trial court judge's use of the word "presumption," while "regrettable," did not shift the burden of proof onto the defendant.⁹ The Court found it significant that, in the same sentence that he referred to "presumption," the trial judge properly instructed that malice may be inferred only from the circumstances present in the case.¹⁰ In addition, the Supreme Judicial Court noted that the trial judge dwelt on the meaning of "inference" and its applicability to the instant case.¹¹ Accordingly, the Court decided that the trial judge compensated sufficiently for any erroneous reference to a presumption. The *Medina* Court found further support for its decision from a Massachusetts

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§ 1.4 ¹ 442 U.S. 510 (1979).

² *Id.* at 519.

³ *Id.*

⁴ 1980 Mass. Adv. Sh. 1143, 404 N.E.2d 1228.

⁵ 1980 Mass. Adv. Sh. at 1143, 404 N.E.2d at 1230.

⁶ *Id.* at 1154, 404 N.E.2d at 1235.

⁷ *Id.* at 1154-55, 404 N.E.2d at 1235-36.

⁸ *Id.*

⁹ *Id.* at 1155, 404 N.E.2d at 1236.

¹⁰ *Id.* at 1156, 404 N.E.2d at 1236.

¹¹ *Id.* at 1155-56, 404 N.E.2d at 1236.

¹² *Id.*

case, *Commonwealth v. McInerney*,¹³ decided before the United States Supreme Court decision in *Sandstrom*. In *McInerney*, the words “presumption” and “inference” had been used interchangeably in the jury charges.¹⁴ Despite the errors in the charges, the *McInerney* Court decided that the instructions as a whole had described accurately the commonwealth’s burden of proving malice.¹⁵ Consequently, the *McInerney* Court declined to reverse the defendant’s conviction.¹⁶ Similarly, because the jury charges in *Medina* had explained the commonwealth’s burden sufficiently, one slight error was held insufficient to overturn the defendant’s conviction.¹⁷

In contrast, a defendant’s conviction was overturned because of improper jury instructions in *Commonwealth v. Callahan*,¹⁸ decided three months after *Medina*. In *Callahan*, the Court found that the jury instructions impermissibly shifted the burden of proof to the defendant.¹⁹ At trial, Callahan was convicted of first degree murder.²⁰ When he appealed to the Supreme Judicial Court, the Court found no error in the appeal points raised by the defendant.²¹ On its own initiative, however, the Court reviewed the entire record and found error in the trial judge’s jury instructions.²²

The trial judge in *Callahan* had correctly defined malice for the jury but also had explained that a presumption of malice necessarily arises from the intentional use of a deadly weapon.²³ The Supreme Judicial Court found this mandatory presumption impermissible in light of previous Supreme Court and Massachusetts decisions.²⁴ In addition, the Court took exception to the judge’s reference to the “principle that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do and that he must intend all the natural, probable and usual consequences of his own act.”²⁵ The Court reasoned that although malice may indeed be *inferred* from the intentional use of a deadly weapon,²⁶ these instructions imper-

¹³ 373 Mass. 136, 365 N.E.2d 815 (1977).

¹⁴ *Id.* at 141, 365 N.E.2d at 818.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 1980 Mass. Adv. Sh. at 1156, 404 N.E.2d at 1236. The Court did grant this defendant a new trial, however, based on certain questionable testimony and potential prejudice because of his connection at trial with defendant Medina. *Id.* at 1159-60, 404 N.E.2d at 1238.

¹⁸ 1980 Mass. Adv. Sh. 1411, 406 N.E.2d 385.

¹⁹ *Id.* at 1412, 406 N.E.2d at 386.

²⁰ *Id.* at 1411, 406 N.E.2d at 385-86.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1412-13, 406 N.E.2d at 386.

²⁴ *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Commonwealth v. Rodriguez*, 370 Mass. 684, 352 N.E.2d 203 (1976).

²⁵ *Commonwealth v. Callahan*, 1980 Mass. Adv. Sh. at 1413, 406 N.E.2d at 386.

²⁶ *Commonwealth v. Campbell*, 375 Mass. 308, 312, 376 N.E.2d 872, 875 (1978).

missibly created a *presumption* of malice.²⁷ The Court ruled that the language of the charge shifted at least part of the burden of proving malice onto the defendant.²⁸ This shift runs counter to the constitutional mandate that the commonwealth prove each element of its case beyond a reasonable doubt.²⁹

The *Callahan* Court encountered little difficulty in distinguishing *Medina*. It characterized the judge's incorrect statements in *Medina* as an "occasional lapse"³⁰ into the mistaken use of the word "presumption." It found the *Medina* instructions *in toto*, however, to be careful and thorough, while the judge's charge at Callahan's trial did not rise to that level.³¹ While the *Medina* Court deemed a single use of the word "presumption" to be "regrettable"³² but acceptable, the judge at Callahan's trial had used "presumption" or some form of that word *six* times, and "inference" not at all.³³ Because the trial judge in *Callahan* clearly defined "presumption" to the jury as having a mandatory effect, the substitution of words forced the defense to rebut the "presumption" of malice defined as inherent in the defendant's acts.³⁴ Because such a charge violated Callahan's fourteenth amendment rights, the Court overturned his conviction.³⁵

The Court employed the same approach in a comparable case, *DeJoinville v. Commonwealth*,³⁶ later in the *Survey* year. The *DeJoinville* case involved a set of jury instructions similar to those in *Callahan*. A jury of the superior court had convicted Dennis DeJoinville of arson and second degree murder in his uncle's death by fire.³⁷ DeJoinville petitioned for a writ of error relating to that portion of the superior court judge's charge dealing with intent.³⁸

As in *Callahan*, the trial judge in *DeJoinville* had charged the jury that an individual was presumed to have intended the natural consequences of his voluntary acts.³⁹ DeJoinville asserted two grounds on which these instructions could be found to have unconstitutionally shifted the burden of proof from the prosecution to the defense. The first ground was that the jury may

²⁷ *Commonwealth v. Callahan*, 1980 Mass. Adv. Sh. at 1414, 406 N.E.2d at 387. The Court stressed that "the word 'presumption' was defined as having a mandatory effect, while 'inferences' were described as permissibly drawn from the facts proved." *Id.*

²⁸ *Id.* at 1415, 406 N.E.2d at 387.

²⁹ *Id.* at 1414, 406 N.E.2d at 387.

³⁰ *Id.*

³¹ *Id.*

³² 1980 Mass. Adv. Sh. at 1155, 404 N.E.2d at 1236.

³³ 1980 Mass. Adv. Sh. at 1414, 406 N.E.2d at 387.

³⁴ *Id.* at 1415, 406 N.E.2d at 388.

³⁵ *Id.*

³⁶ 1980 Mass. Adv. Sh. 1797, 408 N.E.2d 1353.

³⁷ *Id.* at 1797, 408 N.E.2d at 1353-54.

³⁸ *Id.* at 1798-99, 408 N.E.2d at 1353-54.

³⁹ *Id.* at 1798, 408 N.E.2d at 1354.

have viewed the charge as creating a *conclusive* presumption that the defendant possessed the intent necessary to support a verdict of guilty of second degree murder.⁴⁰ If there were a conclusive presumption, no evidence or testimony which the defense might introduce could rebut the presumption.⁴¹ The alternate ground claimed by DeJoinville was that the judge's remarks had created a *mandatory* presumption in the minds of the jury,⁴² which, while potentially rebuttable, would still wrongly shift the burden.⁴³

The Court did not find that the trial judge's charge had created a conclusive presumption of intent in this case. It agreed, however, with the defendant's claim that the jury reasonably could have interpreted the charge as creating a rebuttable presumption of intent.⁴⁴ The Court found support for this conclusion in much of the language of the judge's charge.⁴⁵ The judge had noted, in reference to his charge on intent, that the mandatory presumption was a "general rule" that had "repeatedly been applied and to a great variety of cases."⁴⁶ This statement differentiated the instructions from those in *Medina*, in which the mention of "presumption" had been more of an isolated instance, and had not been an emphasized section of the judge's charge. Accordingly, the *DeJoinville* Court reversed the defendant's conviction.

The Court's decisions in *DeJoinville* and *Callahan* remain consistent with its *Medina* ruling, while at the same time they accurately and effectively apply the United States Supreme Court's reasoning in *Sandstrom*. In both *Callahan* and *DeJoinville*, the trial judge had made his discussion of presumption of malice a major part of the overall charge. The trial judge in *Callahan* clearly delineated the differences between an inference and a presumption of malice and then referred explicitly to *presumption* as arising from the intentional use of a deadly weapon.⁴⁷ The trial judge in *DeJoinville* had gone so far as to characterize his mistaken explanation of presumption as a well-settled principle of law.⁴⁸ Thus, the Court was well within the boundaries set out in *Sandstrom* in deciding that there could have existed in the minds of the jury an unconstitutional shifting of the burden of proof. Consequently, the Court was correct in overturning these defendants' con-

⁴⁰ *Id.* at 1799-1800, 408 N.E.2d at 1355. The Court based its ideas on "conclusive presumption" upon the rules set out in *Morisette v. United States*, 342 U.S. 246 (1952), and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

⁴¹ *Sandstrom v. Montana*, 442 U.S. at 522.

⁴² *DeJoinville v. Commonwealth*, 1980 Mass. Adv. Sh. at 1803, 408 N.E.2d at 1357.

⁴³ *Sandstrom v. Montana*, 442 U.S. at 524.

⁴⁴ *DeJoinville v. Commonwealth*, 1980 Mass. Adv. Sh. at 1805, 408 N.E.2d at 1358.

⁴⁵ *Id.* at 1798 n.1, 408 N.E.2d at 1354 n.1.

⁴⁶ *Id.* at 1805, 408 N.E.2d at 1358.

⁴⁷ 1980 Mass. Adv. Sh. at 1414, 406 N.E.2d at 387.

⁴⁸ 1980 Mass. Adv. Sh. at 1805, 408 N.E.2d at 1358.

victions. Another case in the *Survey* year, however, was to demonstrate that the Supreme Judicial Court had not embraced a more liberal standard for reversal than the one it set out in *Medina*.

In *Commonwealth v. Repoza*,⁴⁹ which came before the Court only four months after *DeJoinville*, the defendant had been indicted for first degree murder in regard to a stabbing death.⁵⁰ The victim had received his wounds in the aftermath of a fight in which Repoza allegedly had delivered the fatal blow.⁵¹ A jury in the superior court had found the defendant guilty of first degree murder.⁵² On appeal, Repoza attacked the superior court proceedings on various grounds, including a claim that the trial judge had erred seriously in his instructions to the jury on the element of malice needed to support a murder conviction.⁵³

In the trial judge's charge to the jury on malice, he twice mentioned a "presumption" of malice arising from the intentional use of a deadly weapon.⁵⁴ The Supreme Judicial Court acknowledged that these instructions were "incorrect,"⁵⁵ but the Court did not agree that the instructions demonstrated a sufficient shifting of the burden to the defendant to require reversal.⁵⁶ The Court found the situation in *Repoza* more analogous to that in *Medina* than to those in *Callahan* and *DeJoinville*. As in *Medina*, the *Repoza* trial judge had compensated for his erroneous references to "presumed" intent by "his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth."⁵⁷ Thus, the Court distinguished the *Repoza* case from *Callahan* and *DeJoinville*, because the incorrect reference to presumption did not permeate the entire charge.⁵⁸ The trial judge in *Repoza* "left no doubt" that the commonwealth was obligated to prove its case beyond a reasonable doubt.⁵⁹ Therefore, reversible error was avoided in *Repoza*, as "the charge, read as a whole, ma[de] clear the Commonwealth's burden."⁶⁰

The Court's ruling in *Repoza* is consistent with its previous decisions concerning a judge's instructions on intent. Although the mistaken reference by the trial judge in *Repoza* may have been more misleading than the reference

⁴⁹ 1980 Mass. Adv. Sh. 2499, 414 N.E.2d 591.

⁵⁰ *Id.* at 2499, 414 N.E.2d at 592.

⁵¹ *Id.* at 2502, 414 N.E.2d at 594.

⁵² *Id.* at 2499, 414 N.E.2d at 592.

⁵³ *Id.* at 2512, 414 N.E.2d at 599.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 2515, 414 N.E.2d at 601.

⁵⁷ *Id.* at 2514, 414 N.E.2d at 600.

⁵⁸ *Id.*

⁵⁹ *Id.* at 2515, 414 N.E.2d at 600.

⁶⁰ *Commonwealth v. Medina*, 1980 Mass. Adv. Sh. at 1155, 404 N.E.2d at 1236.

in controversy in *Medina*, in both cases the judge gave a lucid general charge on the necessary elements of the offense in question.⁶¹ The Court deemed this general charge to outweigh any individual mistakes in word usage that the judge may have made at some point in the charge.

The Supreme Judicial Court has, then, by four decisions during the *Survey* year, recognized that in certain cases a judge's instructions to the jury can result in an unconstitutional shifting of the burden of proof onto the defendant. The *Medina* and *Repoza* cases, however, indicate that the Court will not overturn a conviction on the basis of a trial judge's isolated errors in using the word "presumption" in place of "inference" in his jury instructions on intent and malice. The *Callahan* and *DeJoinville* decisions, conversely, demonstrate that the Court will reverse a guilty verdict if a judge's complete instructions on intent or malice could give the jury an incorrect understanding of the commonwealth's burden. Despite a trial judge's misstatement, the Court will not find such error to be reversible, provided that the charge clearly demonstrates the commonwealth's burden.

The standard developed by the Court is a most appropriate one. In ascertaining that the judge's instructions have not shifted the burden of proof, it remains true to the *Sandstrom* decision. At the same time, by examining a trial judge's alleged misstatements in the context of the complete charge, the Court avoids having to reverse valid convictions on the basis of harmless judicial error. Therefore, the Court's standard neatly accommodates both constitutional and practical considerations.

⁶¹ Interestingly, in both *Medina* and *Repoza*, the Court, at the outset of the opinions, discussed the factual background of the case at great length and described the violent deaths of the victims in some detail. In *Callahan* and *DeJoinville*, however, the relevant crimes are described only briefly if at all. This may indicate that, when presented with a particularly sordid crime and a substantial body of evidence incriminating the defendant, the Court may be somewhat reluctant to reverse an otherwise valid conviction on the basis of a partially mistaken charge by the trial judge.