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CHAPTER 3

Criminal Law and Procedure

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§3.1. Effective assistance of counsel. Massachusetts has been in the forefront of the nation in providing indigent defendants the right to the appointment of counsel in criminal cases. The Supreme Judicial Court adopted its Rule 3:10, guaranteeing counsel to all indigent defendants charged with a crime punishable by imprisonment in 1967, well before the United States Supreme Court ruled in *Argersinger v. Hamlin*[1] that, absent a valid waiver, no defendant may be imprisoned unless represented by an attorney.[2] The procedural aspects of the right to an attorney, involving the question of at what stages of the proceedings an appointment must be made, present far easier issues than does the question of defining the substantive content of the right to counsel. The mere presence of an attorney is not sufficient to satisfy the essence of the right to counsel as it is guaranteed by the Sixth Amendment of the United States Constitution[3] and Article XII of the Declaration of Rights for the Commonwealth.[4] For example, in *Avery v. Alabama*[5] the Supreme Court stated:

> [T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.[6]

Although Massachusetts has had an expansive view of the procedural right to the appointment of counsel, several decisions handed

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§3.1. [1] 407 U.S. 25 (1972).
[2] Id. at 37.
[3] U.S. Const. amend. VI. See Avery v. Alabama, 308 U.S. 444 (1940).
[4] See Commonwealth v. Bernier, 359 Mass. 13, 267 N.E.2d 636 (1971).
[5] 308 U.S. 444 (1940).
[6] Id. at 446.

down during the Survey year reveal a restrictive attitude toward defining the substantive right to assistance of counsel.

A. *Commonwealth v. Saferian* [7]

In *Commonwealth v. Saferian*, the Supreme Judicial Court attempted to set out a standard by which claims for a new trial based on ineffective counsel will be evaluated. John Saferian was convicted by a jury of armed robbery and several other offenses. He was represented at trial by private counsel, appointed at the arraignment by the superior court to serve without compensation.[8] At arraignment, counsel advised the defendant to plead not guilty and to waive commitment for observation of his mental condition. Counsel did not consult thereafter with the defendant during the next six weeks preceding the trial; counsel "said it was likely he had spoken in the interim to the prosecutor, but he had no definite recollection of it."[9] The only pretrial activity of counsel apparent from the record was his participation in a two-day hearing on a motion to suppress filed in conjunction with a co-defendant. Counsel's performance during the hearing on the motion to suppress and during the trial "was by no means lackadaisical or perfunctory."[10] Indeed, the Court noted that: "One can speculate that with superior effort or advocacy on the part of the defendant's counsel the case against the defendant might have been made to appear less formidable, but that would be empty conjecture; the truth is that the case by any lights was very strong."[11]

Against this background, the Court proceeded to assess the defendant's claim of ineffective assistance of counsel. On the one hand, "[c]ounsel did not go over the facts with the defendant, or seek to interview the prospective witnesses, or ask the prosecutor for material, or make routine pre-trial motions apart from the motion to suppress. He relied on cross-examination and argument."[12] On the other hand, "[t]he case ... was relatively simple and the evidence straightforward."[13] The Court first reviewed the various formulae by which a standard for judging effective assistance of counsel has been cast: (1) whether the inadequacy of counsel resulted in the trial's

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[7] 1974 Mass. Adv. Sh. 1267, 315 N.E.2d 878.

[8] The superior court is now authorized to compensate private counsel who receive court appointments. Superior Court Rule 95A. Sup. Jud. Ct. R. 3:10 provides that appointments shall go to attorneys from the Massachusetts Defenders Committee or other volunteer organization, unless exceptional circumstances exist.

[9] 1974 Mass. Adv. Sh. at 1271, 315 N.E.2d at 881.

[10] Id. at 1271, 315 N.E.2d at 881 n.5.

[11] Id. at 1270-71, 315 N.E.2d at 881.

[12] Id. at 1275, 315 N.E.2d at 883.

[13] Id. at 1276, 315 N.E.2d at 883.

being "a farce and a mockery"[14] or "an apparency instead of the reality of contest and trial;"[15] (2) whether "the attorney has in effect blotted out the substance of a defense;"[16] or (3) whether counsel has been "reasonably likely to render *and* [*is*] *rendering* reasonably effective assistance."[17]

Rather than endorsing one of these existing formulations, the Court chose to make explicit that a two-step analysis is required in adjudicating a claim of ineffective assistance of counsel. The first step focuses on what counsel actually did at trial. It entails "a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer . . . ."[18] If such inadequacy is found, then the second step requires a determination of whether counsel's action has "likely deprived the defendant of an otherwise available, substantial ground of defence."[19] The burden of demonstrating both the initial inadequacy and the resulting prejudice is on the defendant.

The Court applied its two-pronged test in *Saferian* and found no constitutional error. With respect to the first step, the Court agreed with the defendant that counsel should have done more preparatory work for the trial, but felt that this deficiency was substantially repaired by counsel's participation in the two-day proceedings on the motion to suppress.[20] With respect to the second step, the Court seized upon the fact that the defendant could point to no specific issue of fact or law that could have been used for his benefit at trial but which was overlooked.[21]

By forcing defendants to fit the mold of the two stage process set out in *Saferian*, the Court is assuring two consequences: (1) it will be exceedingly difficult for a successful claim of ineffective assistance of counsel to be raised; and (2) no guidance is provided for the future benefit of trial judges, defense counsel, or defendants as to what effective assistance of counsel actually requires. The first result is primarily a function of the Court's requirement that the defendant must sustain the burden of proving that the trial counsel's neglect re-

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[14] Id. at 1274, 315 N.E.2d at 882, citing Commonwealth v. Lussier, 1971 Mass. Adv. Sh. 731, 732, 269 N.E.2d 647, 649.

[15] 1974 Mass. Adv. Sh. at 1274, 315 N.E.2d at 882, citing Commonwealth v. LeBlanc, 1973 Mass. Adv. Sh. 1091, 1104, 299 N.E.2d 719, 726.

[16] 1974 Mass. Adv. Sh. at 1274, 315 N.E.2d at 883, citing Matthews v. United States, 449 F.2d 985, 994 (D.C. Cir. 1971).

[17] 1974 Mass. Adv. Sh. at 1274, 315 N.E.2d at 883, citing MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).

[18] 1974 Mass. Adv. Sh. at 1274, 315 N.E.2d at 883.

[19] Id.

[20] Id. at 1275, 315 N.E.2d at 883.

[21] Id. at 1276, 315 N.E.2d at 884.

sulted in actual prejudice. The second result is a function of the Court's conclusory, shorthand description of the demands placed on trial counsel.[22]

Saferian represents the Court's reluctance to commit itself to firm guidelines by which to judge a trial counsel's conduct against the constitutional guarantee of the Sixth Amendment and Article XII of the Declaration of Rights for the Commonwealth. Despite the Court's statement that a surface impression of guilt does not end the inquiry as to whether there was adequate assistance of counsel,[23] implicit throughout the decision is the underlying assumption that a compelling case for the defendant's guilt ameliorates the shortcomings of defendant's court appointed attorney.[24]

This assumption is demonstrated in both stages of the Court's analysis. In determining whether counsel's actions fell measurably below those expected of an ordinary lawyer (the first stage), the Court seems to excuse counsel's glaring deficiencies on the basis that guilt was so obvious that there was little real preparation to do.[25] The explanation that counsel's participation in a two-day hearing on the motion to suppress acted as adequate preparation for the trial itself[26] seems insufficient. This is due to the Court's failure to meet the objection that counsel was not adequately prepared for the hearing on the motion itself. A motion to suppress in a case where the police have seized a gun from the defendant, as in *Saferian*, often presents the

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[22] The shortcomings of the rule in *Saferian* are more readily apparent when a comparison is made with other standards used to evaluate claims of ineffective counsel. See, e.g., United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968). In *DeCoster,* Chief Judge Bazelon announced a two stage analysis. The first stage set forth explicit guidelines, incorporating ABA Standards Relating to the Defense Function (1971) for the conduct of defense counsel. 487 F.2d at 1203. Once a substantial violation of any of these requirements has been shown, the second stage requires a determination of whether any prejudice thereby resulted. Id. at 1204. At this stage, the burden is placed on the prosecution. Id.

[23] 1974 Mass. Adv. Sh. at 1277, 315 N.E.2d at 884.

[24] Cf., Bazelon, The Defective Assistance of Counsel, 42 Cin. L. Rev. 1 (1973):

> The final reason why judges are reluctant to reverse convictions on grounds of inadequate assistance is particularly disturbing to me. It is the belief— rarely articulated, but, I am afraid, widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account. This may be an important reason why appellate courts commonly require appellants to show not only that their constitutional right to effective counsel was denied but also that the denial was prejudicial.
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> This "guilty anyway" syndrome underlies much of the current push for greater "efficiency" in the criminal courts. On all sides these days we hear the clamor for "judicial reform," which too often looks like a euphemism for dealing with more defendants in less time. Why allow men who are "guilty anyway" to clutter the courts with all sorts of difficult legal and constitutional questions?

Id. at 26.

[25] See 1974 Mass. Adv. Sh. at 1276, 315 N.E.2d at 883.

[26] Id. at 1271, 1275, 315 N.E.2d at 881, 883.

only triable issue in the case. It is certainly a "critical stage" of the proceedings at which counsel is required.[27] Failure to prepare for a motion hearing is just as fatal as failure to prepare for a trial.

An assumption of guilt also underlies placing the burden of proof of prejudice on the defendant. Certain failures on the part of defense counsel may never be amenable to discovery by a defendant. Who can tell, for example, in what ways a lack of preparation for an argument on disposition can affect the sentence? If it is indeed true that claims of prejudice involve only degrees of speculation, it seems contradictory to require the defendant to substantiate the speculation. One reason given for putting the burden on the defendant is that he has already been tried and found guilty, and therefore the presumption of regularity of the verdict requires the party seeking to rebut the presumption to sustain his contention. The point of the claim of ineffective assistance of counsel is that the process by which the guilty verdict was arrived at is itself suspect since it was procured at a trial where the defendant was deprived of an essential right.

The other reason given for placing the burden on the defendant is that the evidence supporting proof of prejudice is more readily available to the defendant than to the prosecutor. This assumption about which party has easier access to relevant information may be true when it is applied to the first stage of the analysis. Certainly defendants are in a better position than prosecutors to tell the court in what way their defense attorneys shirked their duty. Such complaints as failure to confer with defendants or to interview witnesses that the defendant relies upon for an alibi are easily within the knowledge of the defendant. It is quite another matter to talk about what result followed from counsel's failures. Defendants who are in the position of having to raise a claim of ineffective assistance of counsel are almost always in jail, hardly the place from which to conduct an investigation designed to demonstrate prejudice. Since often these claims come up only by way of a collateral attack on the conviction—for if trial counsel continues to represent the defendant on appeal, he is not likely to make an issue of his own incompetence—a long period of time has passed, hampering any investigation that a newly appointed attorney could conduct. It is no easier for the defendant to prove prejudice than it is for the prosecution to prove the absence of prejudice. Placing the burden of proving a lack of prejudice on the prosecution has precedent in cases involving illegally suggestive identifications, where once it is established that, absent a valid waiver, a lawyer was not present at the line-up, the prosecution must establish that the identification was not tainted by the illegality.[28]

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[27] Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).

[28] See Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967).

The importance of the right to effective assistance of counsel extends beyond the concern of ensuring that innocent defendants are acquitted. The system of criminal justice has a stake in providing fair trials especially to those defendants who are found to be, and are in fact, guilty. An essential component of a fair trial is an effective defense.[29] If such a defense has been denied to a defendant, even a guilty defendant, the system suffers to that extent. *Saferian*, by sidestepping the issue of what constitutes effective performance of a criminal defense and by placing the burden on the defendant to demonstrate prejudice, may indicate that the Supreme Judicial Court does not wish to come to grips with the problem.

B. *Commonwealth v. Dominico*[30]

In *Commonwealth v. Dominico* the Appeals Court was faced with defendant Merlino's claim that he had been denied the effective assistance of counsel. An attorney from the Massachusetts Defenders Committee was appointed to represent him one month prior to the start of his trial for participation in the Brinks armored car robbery. The attorney—faced with a heavy caseload and frustrated by prison officials in attempts to interview the defendant and by the district attorney's office in efforts to see necessary papers—filed a motion for a continuance, alleging that his lack of preparation would result in ineffective assistance of counsel. The motion was denied by the superior court, and the defendant was convicted. Despite counsel's affidavit that the denial of a continuance would result in his inability to properly investigate the facts, the Appeals Court merely held that the trial was not "a farce and mockery" and therefore the Sixth Amendment had not been violated.[31]

The circumstances which led to the claim of ineffective assistance of counsel in this case present a difficult choice for a trial attorney. It has been suggested in one practice manual[32] that in cases where absolutely no time has been afforded for preparation, the attorney should not participate in the trial at all: "The danger of participating in a trial when you are unprepared is that you give some semblance of assistance of counsel without in fact providing competent representation."[33] Of course, in a felony trial in superior court where the appointment was made one month in advance, it would be much harder to justify not participating.

The Appeals Court's opinion recognized the increasingly burden-

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[29] See Powell v. Alabama, 287 U.S. 45 (1932).
[30] 1974 Mass. App. Ct. Adv. Sh. 49, 306 N.E.2d 835.
[31] Id. at 60, 306 N.E.2d at 846.
[32] Dick & Rosenberg, Manual for New Attorneys: New York Family Court (1971).
[33] Id. at 25.

some caseload of public defenders,[34] but offered no further comment on the problem it raises. Since there is such a difficult barrier to raising claims of ineffective assistance of counsel on appeal, appointed counsel—including public defenders—who face the possibility that their overloaded schedule may not permit adequate time to prepare, should decline at the outset to accept an appointment.

C. *Commonwealth v. Geraway*[35]

The Survey year produced one case in which the Supreme Judicial Court took an expansive view of one aspect of the question of effective assistance of counsel. In *Commonwealth v. Geraway*, the Court dealt with the question of a potential conflict of interest on the part of counsel for the defendant. Geraway was tried and convicted of murder in the first degree. His conviction was affirmed on appeal,[36] and he subsequently raised the issue of effective assistance of counsel in a motion for a new trial.

The web of circumstances which led to defendant's claim centered around the relationship between the appointed defense attorney's law firm and various prosecution witnesses. Unbeknown to the defendant's counsel, other members of his law firm had represented, and were representing, prosecution witnesses and their families in various civil and criminal matters. Some of them, in fact, were advised by members of the firm to cooperate with the police department in the investigation of the murder with which the defendant was charged. The defendant repeatedly questioned the firm's interest in representing him and whether it could give him its undivided loyalty since it represented a specific prosecution witness as well. The defendant was mistakenly told that the firm did not represent the witness in question.[37]

The Court accepted the findings of the trial judge that defendant's counsel had no knowledge of the conflict of interest and that counsel conducted himself free from any influence instigated by the conflict.[38] In fact, the trial judge had found that the defense was conducted in a competent and skillful manner.[39] Aside from accepting these findings, the Court went on to find "slight, if any, possibility of prejudice."[40]

On the basis of the Court's willingness in *Saferian* to reject claims of ineffective assistance of counsel unless they were documented both by

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[34] 1974 Mass. App. Ct. Adv. Sh. at 59, 306 N.E.2d at 845.
[35] 1973 Mass. Adv. Sh. 1281, 301 N.E.2d 814.
[36] Commonwealth v. Geraway, 355 Mass. 433 (1969).
[37] 1973 Mass. Adv. Sh. at 1283-86, 301 N.E.2d at 815-17.
[38] Id. at 1287, 301 N.E.2d at 817.
[39] Id. at 1281 n.1, 301 N.E.2d at 815 n.1.
[40] Id. at 1287, 301 N.E.2d at 817.

a showing of a specific instance of counsel's negligent conduct and a demonstration of prejudice, one would hardly think that *Geraway* would require much discussion. The Court, however, chose to reverse the conviction,[41] based upon the fact that "the situation was replete with potential constraints, both ethical and economic, on the firm's representation of the defendant."[42] The majority opinion did not decide whether the Constitution would require a new trial, but rather based the reversal on the Court's power under section 33E of General Laws, chapter 278,[43] to determine if a miscarriage of justice has occurred.[44]

The sensitivity shown in the opinion to the requirement of undivided loyalty placed upon defense counsel by the Sixth Amendment[45] is admirable. The precedential value is apt to be negligible, however, due to the basis for the Court's result. The case was decided on a 3-2 vote, with Chief Justice Tauro and Justice Braucher vigorously dissenting.[46] The dissent was based on a recent Massachusetts case, *Commonwealth v. Smith*,[47] which held that "[a] conflict of interest such as to deny to a defendant the effective assistance of counsel must be shown by evidence"[48] and not by speculation. Rather than stressing the potential for conflict that existed in the situation, the dissent would focus the investigation on whether the multiple representation actually affected defense counsel's actions in some way. The dissenters found that it did not, noting that the defendant was in no way prejudiced by his attorney's conduct of the case.[49]

The differences in approach between the two opinions are clear. What is not clear is whether the majority opinion will operate as a definitive precedent in the future. The *Smith* case, relied upon so heavily by the dissent, indicated in dicta that there are strong indications in the federal decisions that "a harmless error rule has no place in a case where a conflict of interest appears in the record."[50] However, the

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[41] Id. at 1289, 301 N.E.2d at 819.

[42] Id. at 1286, 301 N.E.2d at 817.

[43] G.L. c. 278, § 33E, which provides in part:

> In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence or because of newly discovered evidence, or for any reason that justice may require (a) order a new trial or (b) direct the entry of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. . . .

[44] 1973 Mass. Adv. Sh. at 1289, 301 N.E.2d at 819.

[45] Glasser v. United States, 315 U.S. 57, 70 (1942).

[46] 1973 Mass. Adv. Sh. at 1289, 301 N.E.2d at 819 (dissenting opinion). Justices Kaplan and Hennessey did not participate.

[47] 1973 Mass. Adv. Sh. 61, 291 N.E.2d 607.

[48] Id. at 63, 291 N.E.2d at 609.

[49] 1973 Mass. Adv. Sh. at 1297, 301 N.E.2d at 823.

[50] 1973 Mass. Adv. Sh. at 63, 291 N.E.2d at 609.

majority in *Geraway* did not deal with this suggestion raised by the *Smith* decision. The effect of the opinion, insofar as it elucidates the law of conflict of interest, is thus limited. With the dissent arguing that no conflict existed in the first place and the majority stressing the peculiar web of circumstances found in this particular case, the Court may well limit *Geraway* to its own facts. The real impact of the decision in this area may be upon the operation of large criminal law firms, and in particular the Massachusetts Defenders Committee, which are often in the position of defending clients caught up in a web of interconnecting circumstances. Defense firms should view the *Geraway* opinion as a strong recommendation that they should be on guard for potential conflicts.

Outside of the area of conflict of interests, the opinion has wider ramifications with respect to the willingness of the Court to exercise its power to award a new trial under section 33E "for any other reason that justice may require."[51] The dissent protested that this power should rest primarily in the hands of the trial judge rather than an appellate court: since the trial judge is closer to the case, he can detect "an aroma of unfairness" more reliably than can appellate judges examining a "stale transcript."[52]

Trial judges, however, may be more reluctant to reverse the results of a trial over which they presided than would be an appellate court. Since granting a motion for a new trial acts in an implicit way as a censure of the conduct of the original proceedings, trial judges are placed in an anomalous position by such requests. So long as the Supreme Judicial Court has the power to grant new trials based on their review of the record for the fairness or justice of the proceedings, it may be unwise to give undue deference to the opinion of a trial judge that no new trial is required.

§3.2. Validity of waiver of right to counsel. Closely related to the question of defining effective assistance of counsel is the question of determining a valid waiver of the right to counsel. The right will become an empty one if defendants acting out of ignorance choose not to avail themselves of its benefits. While the right to counsel can be waived, constitutional standards require a knowing, intelligent, and voluntary waiver; otherwise the lack of counsel deprives the defendant of a fair trial.[1] In *Commonwealth v. Deeran*,[2] the defendant claimed that records of a prior conviction could not constitutionally be introduced to impeach his credibility because at that time he was not represented by counsel and had not validly waived counsel.[3] The only

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[51] G.L. c. 278, § 33E.

[52] 1973 Mass. Adv. Sh. at 1297-98, 301 N.E.2d at 824.

§3.2. [1] Brady v. United States, 397 U.S. 742, 748 (1970).

[2] 1973 Mass. Adv. Sh. 1309, 302 N.E.2d 912.

[3] See Loper v. Beto, 405 U.S. 473 (1972) (impeachment by use of convictions invalid under Gideon v. Wainwright, 372 U.S. 335 (1963), constitutes a denial of due process).

notation about waiver in the records sought to be introduced was a statement that "defendant did not want counsel" signed by the district court judge before whom the defendant pleaded guilty.[4] The Supreme Judicial Court held that although the statement in the record fell short of the requirements for waiver set out in its Rule 3:10,[5] it sufficed to meet the constitutional standard for establishing a waiver.[6] The Court went on to state that:

> We are confirmed in our holding by the defendant's testimony on voir dire that pleading guilty "was the only sensible thing to do, and we were out of there in an hour." He further stated that the police "recommendation, I think, was six months' probation, and he says if I don't go along with it, I'd get a lot more, and that was the only reason I waived counsel, and plus the fact that I could be out of there in an hour."[7]

The Court's treatment of the waiver issue is as restrictive as its treatment of claims of ineffective assistance of counsel. The opinion stands for the proposition that a mere statement in the record that the defendant did not want counsel is sufficient to satisfy the constitutional requirement of a knowing and intelligent waiver in the face of uncontroverted evidence that the defendant waived counsel only to avoid a harsher sentence than the one held out to him by the prosecution.

It is well settled that a valid waiver cannot be presumed from a silent record[8] and that a waiver induced by threats is not valid.[9] In this case, the record is silent beyond the fact that the defendant did not want counsel. This state of affairs could be entirely consistent with a situation where the defendant refuses counsel because of improper threats (involuntary), where he does not understand the seriousness of the charge (not intelligent), or where he does not realize that he does not have to retain his own lawyer since he is indigent (not knowing). In none of these three examples would a waiver meet the constitutional standard. The defendant's statement on voir dire revealed two reasons for "waiving" his right to counsel: (1) his desire to get the matter over with; and (2) the threat of loss of a police recommenda-

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[4] 1973 Mass. Adv. Sh. at 1313, 302 N.E.2d at 915.

[5] Sup. Jud. Ct. R. 3:10 provides in part:

> If the defendant elects to proceed without counsel, a waiver and a certificate of the judge on a form herein established shall be signed, respectively, by the defendant and the judge and filed with the papers in the case. If the defendant elects to proceed without counsel and refuses to sign the waiver, the judge shall so certify on a form herein established, which shall be filed with the papers in the case.

[6] 1973 Mass. Adv. Sh. at 1314, 302 N.E.2d at 915.

[7] Id.

[8] See Carnley v. Cochran, 369 U.S. 506 (1962).

[9] See Machibroda v. United States, 368 U.S. 487 (1962).

tion of six months' probation.[10] The only evidence as to the character of the defendant's waiver indicates that the circumstances prevented a truly voluntary waiver. The Commonwealth should not condition its recommendation for a lenient sentence on a defendant's waiver of counsel. Although the United States Supreme Court has held that a defendant's guilty plea was not rendered involuntary due to the fact that it was induced by the defendant's desire to receive a more lenient sentence than he might have received if he went to trial, the Court emphasized that the possible coercion involved was dissipated by the presence and advice of counsel.[11] The right to counsel is far more important in ensuring a fair trial for a defendant than any of the rights which are waived by a guilty plea. Without counsel, a defendant cannot properly evaluate the merits of the Commonwealth's case or the benefits of the plea bargain that is offered. Moreover, a desire to get the matter over with quickly—though in itself a questionable reason to allow waiver of such a fundamental right—is entirely suspect because it was formed without the benefit of an attorney who could inform the defendant of the advantages, if any, of seeking a continuance. These considerations led the American Bar Association to recommend that no waiver of counsel be accepted unless the defendant first spoke with an attorney about the waiver.[12] On the other hand, the *Deeran* decision condones the practice of pressuring defendants into abandoning rights intended for their protection in order to allow the system to operate more efficiently.

The two pressures which resulted in the defendant's waiver in this case are symptomatic of a method of administering criminal justice which has been likened to an "assembly-line."[13] The United States Supreme Court has recognized that the pressure of a high volume of cases often results in shoddy attention to procedural safeguards.[14] When a defendant is faced with the dilemma either of asserting a constitutional right which will only add to the caseloads of his counsel and the court and delay the disposition of his case or of waiving that right upon the urging of those who are in a position to do him a great deal of harm, the course of waiver is all too easy.

Since district court proceedings are only rarely recorded, far less attention is paid to the niceties of ensuring for the record that a waiver is valid than is the case in superior court. Since the absence of a record makes reconstruction of the events surrounding a waiver most difficult, the very minimum required of district court judges should be a written statement that the defendant was informed of the right

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[10] 1973 Mass. Adv. Sh. at 1314, 302 N.E.2d at 915.
[11] Brady v. United States, 397 U.S. 742, 756-58 (1970).
[12] ABA Standards Relating to the Defense Function, § 7.3 (1971).
[13] Argersinger v. Hamlin, 407 U.S. 25, 36 (1972).
[14] Id. at 34-36.

to an appointed attorney and that this right was waived with a full understanding of the seriousness of the consequences of such a decision. Even the statement required by Rule 3:10[15] falls short of providing assurance to an appellate court that the defendant was not pressured into waiving his right to counsel; but short of recording a colloquy between the defendant and judge akin to that required in superior court before allowing a guilty plea, it is the best that can be done. Where the statement on waiver is as sparse as in *Deeran* and where circumstances exist to indicate that invalid reasons motivated the waiver, the burden should be on the Commonwealth to demonstrate that the constitutional standard was met.

§3.3. District court procedure: Bindover hearings. In two cases decided in the Survey year, the Supreme Judicial Court clarified the procedure to be followed in hearings at which a defendant may be bound over for action by the superior court. In *Corey v. Commonwealth*,[1] the Court met the question in the context of a hearing involving an offense, the ultimate disposition of which is within the jurisdiction of both the district court and the superior court. In *A Juvenile, Petitioner*,[2] the Court dealt with the question of a district court's declining juvenile jurisdiction and instituting adult criminal proceedings.

Corey followed closely in the footsteps of *Myers v. Commonwealth*,[3] which was decided on July 17, 1973. *Myers* dealt with the procedure to be followed by district courts in conducting probable cause hearings for offenses not within their final jurisdiction.[4] *Myers* set forth both the standard to be used in determining probable cause and the procedure to be followed in reaching that determination. Since the primary purpose of a probable cause hearing is to screen out of the criminal process those cases that should not go to trial, the Supreme Judicial Court adopted a "directed verdict" rule in defining the standard of probable cause.[5] This rule requires (1) that there be sufficient cred-

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[15] Sup. Jud. Ct. R. 3:10. See note 5 supra.

§3.3. [1] 1973 Mass. Adv. Sh. 1237, 301 N.E.2d 450.

[2] 1974 Mass. Adv. Sh. 61, 306 N.E.2d 822.

[3] 1973 Mass. Adv. Sh. 1045, 298 N.E.2d 819.

[4] G.L. c. 218, § 26 enumerates those offenses over which the district court may exercise final jurisdiction. For those specified offenses, the district court has concurrent jurisdiction with the superior court, and it can, if it does so in accordance with the procedures set out in *Corey*, see note 17 infra, make a final determination of guilt. A defendant convicted of a crime in district court may appeal the finding of guilty and shall thereafter be entitled to a trial de novo in superior court. G.L. c. 278, § 18. For those offenses not within the district court's jurisdiction, G.L. c. 218, § 30 requires that a bindover or a probable cause hearing be held in order to determine if the defendant is probably guilty. If a person is found probably guilty in district court, he is bound over for trial in superior court. G.L. c. 218, § 30.

[5] 1973 Mass. Adv. Sh. at 1052, 298 N.E.2d at 824.

ible, admissible evidence that a crime has been committed and (2) that the defendant's guilt be demonstrated to the same degree necessary for submission to a jury over the objection of the defendant's motion for a directed verdict.[6] This standard is significantly more demanding than is the standard of probable cause needed to justify an arrest; the arrest standard would be a meaningless screening tool since it may rest upon hearsay or other evidence not admissible at a trial.[7]

In order to effectuate this standard, *Myers* indicated that the procedure to be followed at a probable cause hearing requires that the defendant be given an opportunity to fully cross-examine the Commonwealth's witnesses and to present evidence in his own behalf.[8] This means that affirmative defenses, such as lack of mental responsibility, may be litigated at a probable cause hearing. The Court rested its conclusions in *Myers* on its interpretation of the statute governing probable cause hearings[9] and on the constitutional implications that would be raised by a contrary holding.[10]

The *Corey* case followed *Myers* by two months. Corey was charged with possession of marijuana and unlawfully carrying a firearm, both of which are within the final jurisdiction of the district court (so called "dual jurisdiction" offenses).[11] At Corey's arraignment, the district court judge listened to a statement by the police officer of the facts leading to the arrest, examined the probation report, and then set a date for trial. Corey was then examined by the court clinic to determine if he was drug dependent. After the judge read the clinic's report, the judge declined jurisdiction and bound the defendant over for action by the superior court. The defendant was never given an opportunity to cross-examine the police officer or to present any evidence of his own.[12]

The Court entertained, by way of a supervisory writ,[13] the merits of Corey's complaint concerning the procedure followed in the district court. The Court held that the same statute upon which it rested its decision in *Myers*[14] requires that a defendant charged with a dual

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[6] Id.

[7] Id.

[8] Id. at 1057-58, 298 N.E.2d at 828.

[9] Id., interpreting G.L. c. 276, § 38.

[10] Id. at 1056-57, 298 N.E.2d at 827, citing Goldberg v. Kelly, 397 U.S. 254 (1970); Armstrong v. Manzo, 380 U.S. 545 (1965); Gruttis v. Ordean, 234 U.S. 385 (1914).

[11] See note 4 supra.

[12] 1973 Mass. Adv. Sh. at 1238-39, 301 N.E.2d at 452.

[13] A supervisory writ can be brought under G.L. c. 211, § 3 which provides in part:

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts . . . which may be necessary to the furtherance of justice and to the regular execution of the law.

[14] G.L. c. 276, § 38.

jurisdiction offense be given the same rights at a probable cause hearing as a defendant charged with a crime solely within the jurisdiction of the superior court.[15] The screening function performed by a preliminary hearing is just as necessary for one type of offense as for the other. Moreover, the constitutional requirements of due process, mentioned in dicta in *Myers,* would be equally applicable to a defendant bound over to the grand jury.[16]

Even more significant for the administration of criminal justice than the holding that *all* defendants in district court bindover hearings are entitled to a full hearing on the question of probable cause is the requirement of *Corey* that the district court judge must announce prior to the start of the proceedings whether he is conducting a probable cause hearing or a full trial on the merits.[17] The prior practice in district courts had been for a judge to reserve his decision on this question until he had heard the Commonwealth's evidence. If the offense seemed serious enough, the judge would hold a probable cause hearing; otherwise he would retain jurisdiction and render a verdict. The significance of *Corey* in this regard lies in the implications for trial tactics for both the prosecution and the defense. If the district court proceeding is a determination of probable cause, defense counsel will ordinarily seek to use the hearing solely as a vehicle for discovery, making no objections to inadmissible evidence and presenting no defense witnesses. Likewise, the prosecution may wish to use different evidence and tailor its presentation to the *Myers* "directed verdict" standard. Obviously, both defense and prosecution must conduct the case differently if it is a trial.

Corey suggested that district court judges may conduct an initial examination of counsel for both the defense and the Commonwealth to determine if a trial or a probable cause hearing should be conducted. The decision suggested that one possible basis for declining jurisdiction would be the existence in superior court of pending cases which arose out of the same incident against the defendant or a co-defendant.[18] In general, as the Supreme Judicial Court has previously noted, district court judges should make their decision based upon:

> the circumstances of each particular case, . . . the penalty which may be called for, and . . . the necessity which may seem to be shown of an examination by the grand jury of any apparent ramifications that may need to be searched into more thoroughly than conveniently can be done in the lower court.[19]

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[15] 1973 Mass. Adv. Sh. at 1242-43, 301 N.E.2d at 454.
[16] Id. at 1240-41, 301 N.E.2d at 453.
[17] Id. at 1242 n.7, 301 N.E.2d at 454 n.7.
[18] Id.
[19] Commonwealth v. Rice, 216 Mass. 480, 481, 104 N.E. 347, 349 (1914).

Since this initial determination may provide information to the judge which would be inadmissible at a trial on the merits, *Corey* requires the case to be tried before another judge if the defendant so moves.[20]

The *Corey* case, together with *Myers*, represents a significant reform in the administration of justice in the district courts. The conduct of probable cause hearings was often so arbitrary that defendants were summarily processed rather than accorded a fair hearing. The willingness of the Supreme Judicial Court to review the issues raised by both cases by means of a supervisory writ indicates a new sensitivity to the fairness of district court procedures. The impact of the decisions, along with other proposed changes such as recording district court proceedings, should go a long way in improving the image of justice in the district courts.[21]

The Supreme Judicial Court in *A Juvenile, Petitioner*[22] dealt with bindover hearings in the context of juvenile proceedings and disposed of a wide range of challenges to the procedure by which a juvenile court may decline jurisdiction over an offense and institute adult criminal proceedings.

The petitioner in this case was arraigned as a juvenile and was charged with being a delinquent child on account of an attempted larceny of a motor vehicle. He was found indigent and counsel was appointed. A delinquency hearing was held, and the judge found sufficient facts to warrant a finding of delinquency. After examining the petitioner's record, however, the judge determined that the petitioner was not a fit subject for treatment as a juvenile and dismissed the complaint.[23] However, no written statement of the facts on which the judge relied in making his determination was made, as required by Rule 85 of the District Court Rules then in effect.[24] Immediately following the dismissal, an adult complaint was issued and a trial on the merits was held before the same judge, at which the petitioner admitted sufficient facts to warrant a finding of guilty. He received a suspended sentence of three months in the house of correction and was placed on probation for one year. One month subsequent to the trial, the petitioner's probation was revoked and he was committed to serve his sentence. He brought a writ of habeas corpus to test the legality of the confinement, and the case was subsequently reported to the Supreme Judicial Court.[25]

The Court granted the relief sought by the petitioner on the basis

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[20] 1973 Mass. Adv. Sh. at 1242 n.7, 301 N.E.2d at 454 n.7.

[21] See generally S. Bing and S. Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston (1970).

[22] 1974 Mass. Adv. Sh. 61, 306 N.E.2d 822.

[23] Id. at 62-63, 306 N.E.2d at 824.

[24] Amended Rule 85 of the Rules of the District Courts became effective May 7, 1973.

[25] 1974 Mass. Adv. Sh. at 62-63, 306 N.E.2d at 824-25.

that the district court had no jurisdiction to try him on an adult complaint.[26] The Court also dealt with three other claims challenging the statutory scheme by which juvenile jurisdiction is waived.[27]

Section 61 of General Laws, chapter 119[28] authorizes a district court judge trying certain juveniles,[29] after a hearing on the complaint, to dismiss the complaint "if the court is of the opinion that the interests of the public require that he should be tried [as an adult] . . . instead of being dealt with as a delinquent child."[30] If the court makes such a determination, section 75 of General Laws, chapter 119[31] requires that a criminal complaint issue forthwith, that the complainant and his witnesses be examined under oath and "if the person appears to be guilty of the offense or violation, the court shall commit him or bind him over for trial in the superior court according to the usual course of criminal proceedings."[32]

The Court ruled that section 75 provides only one function for the district court after it has dismissed a juvenile complaint pursuant to section 61: to hold a probable cause hearing to determine if the defendant should be bound over to superior court.[33] By its terms, section 75 permits the district court to take action with respect to the adult complaint only "if the person appears to be guilty of the offense or violation."[34] Such a standard is consonant with the function of the district court in determining probable cause, and not in adjudicating the ultimate merits of a criminal charge.[35] The statute's reference to the "usual course of criminal proceedings" taken in this context is a direction that the ensuing probable cause hearing should be held as are other probable cause hearings, and not that the district court may try those adult violations within its final jurisdiction under the procedure set out in *Corey v. Commonwealth*.[36]

In addition, the Court upheld the standard by which the district court may decline juvenile jurisdiction.[37] The only guidance provided

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[26] Id. at 63-64, 306 N.E.2d at 825.

[27] In addition to the issues mentioned in this discussion, the Court also held that in the case before it adequate notice of the fact that the district court might decide the issue of whether to waive jurisdiction or not had been provided to the petitioner. Id. at 73, 306 N.E.2d at 830.

[28] G.L. c. 119, § 61.

[29] The procedure for waiving jurisdiction over a juvenile is possible only with respect to juveniles between their 13th and 17th birthdays who are charged with adult offenses. G.L. c. 119, § 61.

[30] Id.

[31] G.L. c. 119, § 75.

[32] Id.

[33] 1974 Mass. Adv. Sh. at 65, 306 N.E.2d at 826.

[34] G.L. c. 119, § 75.

[35] 1974 Mass. Adv. Sh. at 65, 306 N.E.2d at 826.

[36] 1973 Mass. Adv. Sh. 1237, 301 N.E.2d 450. See text at notes 1-21 supra.

[37] 1974 Mass. Adv. Sh. at 66-69, 306 N.E.2d at 826-28.

in the statute to district court judges is that juvenile jurisdiction should be declined when "the interests of the public" so dictate.[38] The petitioner argued that this standard was unconstitutionally vague and overbroad. The Court declined the opportunity to provide guidelines for the operation of juvenile justice. Rather than striking down the standard because it was so general, the Court made a virtue of its apparent overbreadth by stating that "any reasonable argument" bearing on the course of treatment for the juvenile is relevant to the standard.[39] Although the opinion acknowledged that factors relevant to the decision could be identified, the Court seemed to dismiss the utility of fleshing out the standard by concluding that a juvenile court would still be left with the task of balancing whatever factors were identified in light of the general public interest in any case.[40]

While refusing to find that a more specific juvenile waiver standard was constitutionally required, the Court made reference to Rule 85A of the District Court Rules, which identifies several factors that should be taken into account in considering whether to decline juvenile jurisdiction.[41] Since the petitioner in this case was tried prior to the adoption of Rule 85A, the Court did not deal either with the question of what effect a failure to abide by the Rule would have or with the issue of the failure of the district court judge to specify in writing the reasons for his waiver decision. Although not directly before the Court, these two issues remain key factors in the protection of the rights of juveniles in waiver hearings.

The Court has consistently avoided recognizing any constitutionally required procedural rights in the operation of a juvenile waiver

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[38] G.L. c. 119, § 61.

[39] 1974 Mass. Adv. Sh. at 68, 306 N.E.2d at 827.

[40] Id. at 69, 306 N.E.2d at 828.

[41] Id. at 69 n.8, 306 N.E.2d at 828 n.8. Rule 85A of the Rules of the District Courts provides in part:

> On the question of whether to try the child as an adult because "the interests of the public require" the court shall consider factors such as:
>
> (1) the seriousness of the alleged offense;
>
> (2) the child's family, school and social history, including his court and juvenile delinquency record, if any;
>
> (3) the apparent emotional, social and psychological condition of the child; and
>
> (4) adequate protection of the public, the likelihood of rehabilitation of the child and the rehabilitation facilities available.
>
> If the court shall determine to dismiss the juvenile complaint and try the child as an adult, such determination shall be accompanied by a finding in writing of the facts demonstrating that the interests of the public require such determination, and the case shall be set down for a hearing on the adult criminal complaint as to probable cause to bind over the child to the next sitting of the Superior Court.
>
> The same justice or special justice hearing the juvenile complaint shall make the determination as aforesaid, but he shall not make a finding of probable cause unless the child shall have waived the probable cause hearing.

hearing.[42] In spite of the fact that many other jurisdictions have recognized that *In re Gault*[43] and *McKeiver v. Pennsylvania*[44] made clear the constitutional basis for requiring that procedural rights, as set forth by the United States Supreme Court in *Kent v. United States*,[45] be guaranteed to a juvenile in a waiver hearing,[46] the Supreme Judicial Court has not yet done so. Its decisions recognizing procedural rights in a waiver hearing, such as the right to adequate notice, have been based on the Court's control over the administration of justice rather than on constitutional grounds.[47] Left without a constitutional basis, the question of asserting procedural rights at a waiver hearing is still in limbo. Whether a juvenile can challenge a waiver decision because no statement of reasons was given or because the "public interest" would in fact not be served by a waiver is still unresolved.

In rejecting any constitutional requirement for a more specific waiver standard, the Court analogized the transfer decision to a decision on sentencing.[48] Since sentencing judges may exercise their power without any statutory guidelines other than a maximum and a minimum sentence, the Court reasoned that juvenile judges may likewise exercise the power to waive jurisdiction with a similar absence of guidelines.[49] Perhaps a better analogy to the juvenile waiver process exists in the procedure whereby a district court judge decides whether to hold a probable cause hearing or a trial on the merits of a dual jurisdiction offense. The importance of this analogy can be better understood if the implications of a lack of standards are first examined.

Lack of standards in the exercise of power implies that a defendant faces the task of trying to present his case in the best light without knowing what the decision-maker considers relevant. Lack of standards also implies that the decision reached will not be reviewed since the absence of a standard by which to judge the decision makes review meaningless. The same holds true if the decision is made without any statement setting forth its rationale[50] since hiding the process by

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[42] E.g., Commonwealth v. Roberts, 1972 Mass. Adv. Sh. 1477, 1487, 285 N.E.2d 919, 926; Commonwealth v. Martin, 355 Mass. 296, 301, 244 N.E.2d 303, 306 (1969). But see Commonwealth v. Anderson, 13 Cr. L. Rep. 2061 (Suff. Super. Ct. 1973).

[43] 387 U.S. 1 (1967).

[44] 403 U.S. 528 (1971).

[45] 383 U.S. 541 (1966).

[46] E.g., In re Harris, 67 Cal. 2d 876, 434 P.2d 615, 64 Cal. Rptr. 319 (1967). Carver & White, Constitutional Safeguards for the Juvenile Offender, 14 Crime & Delinq. 63 (1968).

[47] See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 811, 296 N.E.2d 194.

[48] 1974 Mass. Adv. Sh. at 68, 306 N.E.2d at 827.

[49] Id.

[50] "The only purpose of such a requirement [a statement of reasons for declining Federal Youth Act sentencing under 18 U.S.C. §§ 5005 et seq.] would be to facilitate appellate supervision of, and thus to limit, the trial court's sentencing discretion." Dorszynski v. United States, 418 U.S. 424, 441-42 (1974).

which the decision was reached makes impossible a judgment as to whether all the relevant factors were taken into account.

If the Court had held that the Constitution required a more specific standard for juvenile waiver hearings, it would also have had to face, sooner or later, the issue of lack of standards in the context of an adult waiver hearing for a dual jurisdiction offense. As with the juvenile waiver statutes, the statute governing dual jurisdiction bindover hearings[51] provides no guidelines by which a judge can decide whether to retain jurisdiction.

Although the Court in *A Juvenile* avoided placing the need for standards in a juvenile waiver hearing on a constitutional footing, it referred several times to the requirements placed on district courts by Rule 85A.[52] Rule 85A requires a written statement of reasons and provides a series of factors relevant to the decision.[53] It thus accomplishes by court rule what the petitioner sought to establish as a constitutional mandate. By setting standards and requiring reasons, Rule 85A seems to contemplate some review of the decision to waive juvenile jurisdiction. If in subsequent decisions the Court holds that Rule 85A confers rights upon a juvenile which must be remedied if they are violated, then the Court's reluctance to rely on constitutional grounds would be moot. The same relief would be granted, but on different grounds. Perhaps the Court's reference to Rule 85A in *A Juvenile* was meant to indicate that for future cases the existence of the district court rule will obviate the need for a constitutional ruling. The constitutional issue still lurks in the shadows, however, both in juvenile waiver hearings and in dual jurisdiction bindovers.[54]

The remaining issue dealt with in *A Juvenile* was whether trying a juvenile on an adult complaint after he had already been adjudicated delinquent in a juvenile hearing violated the constitutional ban on being placed twice in jeopardy. This particular application of double jeopardy arises only because Massachusetts procedure requires that the waiver decision be made *after* the hearing on the delinquency complaint has been held and the complaint dismissed.[55]

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[51] G.L. c. 276, §38. See text at notes 18-20 supra.

[52] 1974 Mass. Adv. Sh. at 66 nn.5-6, 69 n.8, 306 N.E.2d at 826 nn.5-6, 828 n.8.

[53] Id. at 69 n.8, 306 N.E.2d at 828 n.8. See note 41 supra.

[54] In terms of numbers, neither procedure represents a large share of the criminal business of the district courts. In 1968, for example, juvenile jurisdiction was waived for only 140 juveniles out of almost 20,000 cases pending in juvenile sessions. Statistical Reports of the Commissioner of Correction, Commonwealth of Massachusetts 116 (1969). Although there are no comparable statistics for the number of hearings held in dual jurisdiction offenses to determine whether to hold a probable cause hearing or a trial, that situation does not often arise. The district courts decline jurisdiction in perhaps no more than three per cent of appropriate cases. S. Bing and S. Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston 78 (1970).

[55] See G.L. c. 119, §§ 61, 75.

The double jeopardy clause of the United States Constitution[56] is designed to protect defendants not only from being subject to multiple punishment for the same offense, but to deter multiple prosecutions.[57] There are, however, exceptions to this rule. The primary one occurs when the defendant obtains a new trial upon motion or appeal. His subsequent prosecution for the same offense does not constitute double jeopardy.[58] The rationale for this exception has been expressed both in terms of waiver and of continuing jeopardy.[59] This latter concept implies that the double jeopardy bar is aimed not at successive trials, but at successive prosecutions, and that prosecution for a crime does not end until the defendant has finally received a fair trial affirmed on appeal. The United States Supreme Court's recent double jeopardy opinions have indicated, however, that more important than placing a definitive label on the rationale for the bar is the operation of its mandate.[60] Instead of searching to find a waiver or a continuing jeopardy, the operation of the double jeopardy clause requires that in each situation the defendant's interest in not being subjected to multiple prosecutions be weighed against society's interest in its ability to secure an adjudication of the question of guilt.[61] Rather than undertaking this type of balancing process, however, the Supreme Judicial Court in *A Juvenile* chose to summarily reject the double jeopardy claim by stating:

> The dismissal of the juvenile complaint and the issuance of an adult complaint are contemplated by the statute (G.L. c. 119, § 75) to be in effect one event, and, as such, any jeopardy to which a juvenile was initially subjected under the juvenile complaint continues under the adult complaint.[62]

The opinion conceded that the Commonwealth is bound by the federal double jeopardy clause and that jeopardy extends to proceedings in a juvenile court.[63] Thus, a second juvenile complaint could not be sought based upon the same offense alleged in a prior juvenile complaint which had already been adjudicated (unless the first complaint had been reversed on appeal). Since there is no jury in a juvenile court, the usual benchmark for the commencement of

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[56] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

[57] United States v. Jorn, 400 U.S. 470, 479 (1971).

[58] See United States v. Ball, 163 U.S. 662 (1896) (retrial after appeal); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) (retrial after mistrial due to hung jury).

[59] See Green v. United States, 355 U.S. 184, 189 (1957).

[60] See Illinois v. Somerville, 410 U.S. 458, 463 (1973); United States v. Tateo, 377 U.S. 463, 466 (1964).

[61] Id.

[62] 1974 Mass. Adv. Sh. at 71, 306 N.E.2d at 829.

[63] Id. at 70-71, 306 N.E.2d at 829.

jeopardy—the empaneling of the jury—cannot be used. The Court accepted for the purposes of this case that jeopardy attaches to a juvenile when the juvenile proceedings commence[64]—presumably when the judge begins to hear the evidence on the delinquency complaint.

Given this initial analysis, the Court's treatment of the merits of the double jeopardy claim is disappointing. The conclusory statement that the jurisdictional waiver system is one of continuing jeopardy[65] overlooks the very real disadvantage to which the juvenile is placed because of the Massachusetts procedure. The juvenile is not only forced to undergo the burden of having to face two consecutive trials on the merits, but is also disadvantaged by having to reveal in the hearing on the juvenile complaint his defenses to the charge which will subsequently be tried in adult court. These are the very evils to which the double jeopardy clause was directed in the first place. These disadvantages faced by the juvenile could easily be avoided by holding the waiver hearing before any hearing on the merits of the juvenile complaint. This order of proceeding is in fact the procedure recommended in the Uniform Juvenile Court Act[66] and the Legislative Guide for Drafting Family and Juvenile Court Acts.[67] The only reason for the Massachusetts procedure offered by the opinion was that requiring a waiver decision prior to the delinquency hearing would expose the judge to information which has no bearing on the question of delinquency if in fact no waiver is made.[68]

This reason hardly seems to merit pause. The same problem arises in the context of adult bindover hearings, and the Court in *Corey* solved it by requiring a judge other than the judge who made the decision not to hold a bindover hearing to preside at the trial if the defendant so requests.[69] The same expedient could avoid the problem in juvenile waiver hearings. If the prosecuting officials wish to proceed with the juvenile in superior court, they can, prior to the hearing on the complaint, move for a hearing on the issue of waiver of jurisdiction. If the judge declines to waive jurisdiction, the defendant can move that the hearing on the complaint be before another judge.

This double jeopardy problem is not a fanciful one. Although the Court's opinion states that no contrary authority exists with respect to its result, one of the cases relied upon by the Court, *Jones v. Breed*,[70]

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[64] Id. at 71, 306 N.E.2d at 829.

[65] Id.

[66] National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act § 34(a) (1968).

[67] Children's Bureau, U.S. Dept. of H.E.W., Legislative Guide for Drafting Family and Juvenile Court Acts § 31(a) (1969).

[68] 1974 Mass. Adv. Sh. at 72 n.10, 306 N.E.2d at 829 n.10.

[69] 1973 Mass. Adv. Sh. at 1242 n.7, 301 N.E.2d at 454 n.7.

[70] 343 F. Supp. 690 (C.D. Cal. 1972), rev'd, 497 F.2d 1160 (9th Cir.), cert. granted, 95 S. Ct. 172 (1974), cited in 1974 Mass. Adv. Sh. at 72, 306 N.E.2d at 829.

was reversed on appeal several months after *A Juvenile* was decided.[71] In *Jones*, the Ninth Circuit Court of Appeals held that a California procedure similar to the one used in Massachusetts did in fact violate the ban on double jeopardy.[72]

§3.4. Indigent defendants: Equal Protection. In cases decided during the Survey year, both the Supreme Judicial Court and the United States Supreme Court adjudicated claims by indigent criminal defendants that the state must provide them benefits equivalent to those which a defendant with the financial means could purchase for himself. In *Blazo v. Superior Court*,[1] the Supreme Judicial Court held that indigent defendants must be provided with stenographers to record their superior court trials and with subpoenas to summons witnesses for their defense, both at the Commonwealth's expense.[2] In *Ross v. Moffit*,[3] the United States Supreme Court held that the state need not provide assistance of counsel to indigent defendants seeking a discretionary appeal.[4]

Blazo arose as a result of a challenge, based upon an extraordinary writ, to the procedure followed by the superior court in conducting de novo trials on appeal from district court misdemeanor convictions. The Court's opinion is essentially based upon the constitutional doctrine of equal protection,[5] as was the *Ross* decision. *Blazo* extended the doctrine while *Ross* limited it, although both cases relied upon the same antecedents. These precedents are referred to as the "transcript cases," beginning in 1956 with *Griffin v. Illinois*[6] which recognized a right of indigent defendants to receive at state expense a transcript of their trial proceedings for use in appellate review.[7] The Supreme Court extended *Griffin* to include transcripts of preliminary hearings,[8] transcripts of trials involving misdemeanors[9] or violations of city ordinances,[10] and state procedures which restricted transcripts either to the request of a public defender[11] or by means of a requirement

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[71] Jones v. Breed, 497 F.2d 1160 (9th Cir.), cert. granted, 95 S. Ct. 172 (1974).
[72] Id. at 1168.

§3.4.[1] 1974 Mass. Adv. Sh. 1325, 315 N.E.2d 857. *Blazo* was decided together with a companion case, Lopez v. Commonwealth.
[2] Id. at 1329, 1335, 315 N.E.2d at 860, 863.
[3] 417 U.S. 600 (1974).
[4] Id. at 619.
[5] See U.S. Const. amend. XIV. Although *Blazo* is essentially an equal protection case, the opinion mentions that the precedents on which it relies rest on due process grounds as well as equal protection. 1974 Mass. Adv. Sh. at 1327 n.3, 315 N.E.2d at 859 n.3.
[6] 351 U.S. 12 (1956).
[7] Id. at 19.
[8] Roberts v. LaVallee, 389 U.S. 40 (1967).
[9] Mayer v. Chicago, 404 U.S. 189 (1971).
[10] Williams v. Oklahoma City, 395 U.S. 458 (1969).
[11] Lane v. Brown, 372 U.S. 477 (1963).

for certification by the trial judge that the appeal was not frivolous.[12]

The *Griffin* proposition that the type of justice a person receives cannot depend upon his financial status was applied to areas other than transcripts. So long as the "basic tools of an adequate defense or appeal" are available to those defendants with the means to pay, then the state must, within reason, provide them to those who cannot pay.[13] The Supreme Court has used this reasoning to invalidate filing fees which were a prerequisite to an appeal from a criminal conviction[14] and fees required to file a petition for a writ of habeas corpus.[15] In Massachusetts, *Griffin* has been applied to require the defendant to receive at state expense a blood test to defend in a paternity case.[16]

This equality principle was also applied to the area of representation by counsel on appeal. *Douglas v. California*[17] held that a state must provide indigent criminal defendants with counsel for an appeal of right.[18] *Douglas* long represented, along with *Griffin*, the linchpin of equal protection in the area of criminal procedure. Nevertheless, the Supreme Court has recently begun to chip away at the foundations of *Douglas*, thus narrowing the scope of the equality principle. *Ross* presented the question of whether *Douglas* would be extended to cover the appointment of counsel for a discretionary appeal taken after court-appointed counsel had represented the defendant at the first appeal of right. The Court held that neither due process nor equal protection required a state to provide an indigent defendant with counsel for such discretionary appeals.[19]

Although past Supreme Court opinions applying the equality principle to extend benefits to indigent defendants uniformly contained the caveat that a state could still make distinctions based on ability to pay, so long as they were not unreasonable distinctions,[20] the only real check placed on the scope of the equality principle had been, prior to *Ross*, confined to cases holding that the benefit sought by the defendant was either unnecessary or was substantially supplied through another means. Thus, in *Britt v. North Carolina,*[21] a transcript of a defendant's first trial was held not necessary at a retrial because all

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[12] Draper v. Washington, 372 U.S. 487 (1963).

[13] Britt v. North Carolina, 404 U.S. 226, 227 (1971).

[14] Burns v. Ohio, 360 U.S. 252 (1959).

[15] Smith v. Bennet, 365 U.S. 708 (1961).

[16] Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969).

[17] 372 U.S. 353 (1963).

[18] Id. at 357-58.

[19] 417 U.S. at 610, 612. The Court in *Ross* noted that, as with all rights, equal protection—if left unchecked—would tend "to declare [itself] absolute to [its] logical extreme." Id. at 611-12.

[20] See Rinaldi v. Yaeger, 384 U.S. 305, 310 (1966).

[21] 404 U.S. 226 (1971).

the original parties were present at the second proceeding.[22] The rule seemed to be that if the benefit sought was superfluous, then equal protection did not require the state to provide it.

In *Ross*, the Court was presented with two situations in which the defendant sought the appointment of counsel to represent him in a discretionary review beyond his first appeal: a discretionary review by a state supreme court of an intermediate appeals court decision and a review by way of a writ of certiorari to the United States Supreme Court from a state supreme court. In these situations, denying the benefit of counsel to the defendant left him in a situation far from equivalent to having received the advantage which he sought. The benefit of counsel to help prepare a request for a discretionary review is far from superfluous. The requirements demanded by the "somewhat arcane art of preparing petitions for discretionary review"[23] are not likely to be satisfied by a brief intended for a direct appeal, since the criteria by which the reviewing court chooses to exercise its discretion to hear the case is not always as narrow as the legal issues raised by the trial. The Supreme Court in *Ross* seemed to change the focus of the test of equal protection in the area of criminal procedure from whether the benefit sought by the defendant was unnecessary or otherwise supplied to how important the benefit was to the defendant. Since a discretionary appeal arises only after a conviction and an initial affirmance, continued judicial review is not as vital as the first appeal.[24] The fact that the transcript cases were extended to circumstances beyond a first appeal—to include even collateral attack on a conviction[25]—indicates the extent of the Court's retreat.

Blazo, unlike *Ross*, reached the result that the equal protection doctrine required the state to provide the benefit sought by the defendant.[26] The difference in result is not so much a consequence of a more expansive view of the equality principle as it is due to the difference in circumstances. *Blazo* dealt with subpoenas and trial stenographers, both of which have wider application and are more fundamental to the protection of the rights of a defendant than is the assistance of counsel in a discretionary appeal.

Subpoenas for defense witnesses are necessary not only to ensure a fair trial, but to implement the Sixth Amendment's guarantee of "compulsory process for obtaining witnesses in [the accused's] favor."[27] The Supreme Judicial Court in *Blazo* prescribed a procedure to be followed by an indigent defendant seeking process for needed

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[22] Id. at 228-30.
[23] 417 U.S. at 616.
[24] See 417 U.S. at 610-11.
[25] E.g., Long v. District Court, 385 U.S. 192 (1966).
[26] 1974 Mass. Adv. Sh. at 1328, 315 N.E.2d at 860-61.
[27] U.S. Const. amend. VI.

witnesses. First, an affidavit setting forth the defendant's indigency and a statement explaining why the witness is necessary to the defense must be presented.[28] The defendant may make this representation ex parte in order to avoid disclosing to the prosecution why a certain witness will be subpoenaed, but must still satisfy the trial judge, who may require further information. As to where the line is drawn, the opinion stated only that a defendant may not demand "excessive and therefore pointless expenditure."[29] Thus, the Court, by giving trial judges this means by which to control requests they consider unreasonable, left open the possibility of an indigent defendant being deprived of the means to summons a necessary witness. The need to guard against frivolous requests which would be time-consuming and expensive could be achieved without requiring an affidavit if the court were to rely on the professional responsibility of defense counsel as was done in regard to stenographers.[30] However, if the discretion of trial judges is exercised so that only superfluous requests for subpoenas are denied, the constitutional requirements will be satisfied.

The Court held in the portion of the opinion dealing with a stenographic record that a request for a trial stenographer must be granted without any need for the defendant to show why a record is necessary or why a tape recording would not be an adequate substitute.[31] The Court was mindful of the expense involved, but considered that the speculative nature of a defendant's need for a stenographic record would make any attempt at justification too unwieldly.[32] Thus, the Court felt that defense counsel's professional responsibility would have to be sufficient to prevent abuses.[33] Moreover, since prior to *Blazo* stenographers were supplied in all superior court cases except for appeals from misdemeanor convictions, there will not be that many requests. Subpoenas, on the other hand, are necessary in almost every criminal case and the requirement of justification therefore serves as a safeguard against a much greater drain on the state's financial resources.

The transcript portion of *Blazo* also reveals how the Court is influenced in its application of the equality principle by its view of how important the benefit is to the defendant. *Blazo* involved a request that the state provide to indigent defendants a service that the state does *not* provide for a price to non-indigent defendants, but one that they purchase themselves from outside sources. The distinction be-

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[28] 1974 Mass. Adv. Sh. at 1329, 315 N.E.2d at 860.

[29] Id. The Court noted that new Rules of Criminal Procedure for Massachusetts are being formulated, and set out this procedure pending adoption of an appropriate new Rule. Id.

[30] See id. at 1335, 315 N.E.2d at 863.

[31] Id.

[32] Id.

[33] Id.

tween the source of the service appears at first blush to be inconclusive: so long as nonindigent defendants can avail themselves of a significant defense tool and indigents cannot, the source is immaterial. This distinction, however, was the ground for the Court's decision in *Commonwealth v. Britt*[34] that the state did not have to provide indigent defendants with transcripts of their probable cause hearings.[35] With a certain degree of illogic, the *Britt* case reasoned that the state operated equally with respect to rich and poor defendants: neither class could get a transcript of the probable cause hearing from the state since the state was not in the business of providing them.[36]

Since the state is not in the business of providing stenographers at misdemeanor de novo trials either, the *Britt* case would indicate that there was no violation of equal protection in *Blazo*. Rather than follow *Britt*, however, the Court in *Blazo* emphasized the difference between a probable cause hearing and a trial: because a trial actually determines guilt or innocence and is subject to review for errors, it is therefore more important than a probable cause hearing.[37] The distinction is an accurate one, but it does not bear on the question that is pertinent to the Court's own analysis—whether a trial transcript is in fact more important to a defendant than a probable cause transcript. A trial transcript is important only if the case is appealed and even then only if the appeal is based on something that occurred at trial. If those two conditions are met, which is not often the case, then a transcript certainly is important. A probable cause transcript is of use in every instance where the case is bound over to the superior court, especially in light of its value to the defendant as a tool for discovery and for impeachment. The fact that a probable cause transcript is as important to the defendant as a trial transcript does not mean that *Blazo* should have followed *Britt*. It does indicate, however, the difficulty of trying to parcel out rights based on a court's assessment of their importance to the defendant.

STUDENT COMMENT

§3.5. Burden of proof of probable cause in a warrantless search: *Commonwealth v. Antobenedetto.*[1] On the afternoon of June 9, 1971, two officers of the Framingham police department were informed by a radio broadcast from police headquarters that two young men had

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[34] 1972 Mass. Adv. Sh. 1443, 285 N.E.2d 780. *Britt* was the subject of a student comment in 1972 Ann. Surv. Mass. Law § 7.6, at 155.

[35] 1972 Mass. Adv. Sh. at 1448, 285 N.E.2d at 784.

[36] Id.

[37] 1974 Mass. Adv. Sh. at 1332, 315 N.E.2d at 862.

§3.5. [1] 1974 Mass. Adv. Sh. 1225, 315 N.E.2d 530.

attempted to pass a bad check at the Framingham Trust Company.[2] The bulletin described the vehicle used by the men, including the registration number. Shortly thereafter, the officers stopped a vehicle matching that description and recognized the driver, defendant Richard Antobenedetto, and his companion as "known drug users and suspected bad check passers."[3] After ordering the occupants from the vehicle, one of the officers proceeded to search the car without first obtaining a warrant.[4] The officer discovered in the glove compartment a cellophane-wrapped package containing marihuana, a foil-wrapped package of hashish, and a corncob pipe.[5] The two men were arrested, and Antobenedetto was charged with two counts of unlawful possession of narcotic drugs.[6]

Antobenedetto, tried without a jury in superior court, moved to suppress the evidence seized during the warrantless search of the automobile. The trial judge denied the motion, holding that the information received in the radio bulletin together with the officers' recognition of the car's occupants as bad check passers afforded probable cause to stop the car and arrest its occupants.[7] The defendant was found guilty on both counts and appealed.

The Supreme Judicial Court reversed the lower court's denial of the motion to suppress and held that the prosecution failed to sustain its burden of establishing probable cause for the warrantless search of the automobile. Writing for the majority, Justice Reardon reasoned that the Commonwealth did not establish the reliability of the information received by the arresting officers in the radio bulletin.[8] In reaching this conclusion, the majority relied upon the recent United States Supreme Court case *Whiteley v. Warden*,[9] which was interpreted as requiring that probable cause be supported by "evidence . . . demonstrating that the police officer responsible for issuing the radio communication had reliable information that a crime had occurred and that the instrumentalities or evidence of that crime would be found in the vehicle described in the broadcast."[10] In *Antobenedetto*, no evidence was presented by the prosecution at the suppression hearing as to the reliability of the information which resulted in the radio communication.[11] The majority held, contrary to prior decisions,[12]

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[2] Id. at 1226, 315 N.E.2d at 532.

[3] Id.

[4] Id.

[5] Id.

[6] Id. at 1225, 315 N.E.2d at 531. Antobenedetto was charged under G.L. c. 94, § 205, repealed by Acts of 1971, c. 1071, § 2.

[7] 1974 Mass. Adv. Sh. at 1226, 315 N.E.2d at 532.

[8] Id. at 1230, 315 N.E.2d at 534.

[9] 401 U.S. 560 (1971).

[10] 1974 Mass. Adv. Sh. at 1229-30, 315 N.E.2d at 534.

[11] Id. at 1230, 315 N.E.2d at 534.

[12] See, e.g., Commonwealth v. Pignone, 1972 Mass. Adv. Sh. 739, 741, 281 N.E.2d 572, 573; Commonwealth v. Roy, 349 Mass. 224, 229, 207 N.E.2d 284, 287 (1965).

that the burden of proving probable cause for the warrantless search rested with the state, and felt compelled by *Whiteley* to grant the motion to suppress.[13]

This casenote will present a discussion of *Antobenedetto* in light of relevant United States Supreme Court decisions and pertinent policy considerations. It will be submitted that although the Supreme Judicial Court erred in applying *Whiteley* to the facts in *Antobenedetto*, the Court reached the correct result.

The Fourth Amendment requires that all searches and seizures not be "unreasonable."[14] There is no precise formula to determine reasonableness, however, and the Supreme Court has frequently stated that each case must be decided on its particular facts.[15] The existence of probable cause is essential for a search to be reasonable.[16] Probable cause has been defined as "facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information . . . sufficient in themselves to warrant a man of reasonable caution in the belief" that a crime has been or is being committed.[17]

The Supreme Court in *Whiteley* emphasized the need for proving probable cause for an arrest or a search pursuant to a warrant as well as for a warrantless arrest or search.[18] In *Whiteley*, a sheriff acting on an informer's tip swore out a complaint against the defendant for breaking and entering before a justice of the peace, who then issued an arrest warrant.[19] A radio message was transmitted giving the names and descriptions of the suspected perpetrators, and descriptions of the vehicle they were driving and the amount and type of money that was taken.[20] A patrolman, relying on the information contained in the broadcast, stopped a vehicle and arrested defendant Whiteley and his companion.[21] A subsequent search uncovered the contraband described in the radio bulletin.[22]

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[13] 1974 Mass. Adv. Sh. at 1229-30, 315 N.E.2d at 533-35.

[14] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV. The Fourth Amendment applies to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). See note 54 infra.

[15] E.g., United States v. Rabinowitz, 339 U.S. 56, 63 (1950); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

[16] E.g., Wong Sun v. United States, 371 U.S. 471, 479 (1963).

[17] Carroll v. United States, 267 U.S. 132, 162 (1925).

[18] 401 U.S. at 566.

[19] Id. at 562-63.

[20] Id. at 563.

[21] Id.

[22] Id.

The Court upheld the defendant's challenge to the warrant because the record was devoid of any information which would support either the reliability of the informer or the informer's conclusion that the men were connected with the crime.[23] It then disagreed with the state's argument that regardless of the sufficiency of information to support an arrest warrant the arresting officer possessed adequate factual information to sustain a finding of probable cause for a warrantless arrest.[24] In support of this contention, the state argued that the standards applied by a reviewing court in evaluating a police officer's assessment of probable cause for an arrest or search without a warrant should be lower than those such a court would require to support a magistrate's finding of probable cause.[25] In rejecting this argument, the Court held that the standards of probable cause applicable in a warrantless search must be at least as stringent as those used in deciding whether a warrant should be issued.[26]

Finally, the Court noted that the officer receiving the radio transmission was entitled to assume that the officer who obtained the warrant provided an adequate factual basis to support a finding of probable cause.[27] While holding that the officer was entitled to act on this assumption, the Court cautioned that the arrest or search would be subject to a successful challenge where the "contrary" turned out to be true, *i.e.*, where there were insufficient facts to justify issuing the bulletin.[28]

Chief Justice Tauro, dissenting in part in *Antobenedetto*,[29] argued that the majority had mistakenly relied upon *Whiteley* in determining who should have the burden of establishing probable cause because the *defendant* in *Whiteley* had demonstrated the unreliability of the police bulletin. It logically followed, if *Whiteley* was applicable at all, that the defendant should have the burden of proving lack of probable cause for a warrantless search.[30] Chief Justice Tauro supported

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[23] Id. at 564-65.
[24] Id. at 565-66.
[25] Id. at 566.
[26] Id.
[27] Id. at 568.
[28] Id.
[29] 1974 Mass. Adv. Sh. at 1233, 315 N.E.2d at 536. Justice Braucher joined in the Chief Justice's dissent. Justice Hennessey also dissented in part, with Justice Kaplan joining. Id. at 1246, 315 N.E.2d at 543. While agreeing with the majority that there was no showing of probable cause and that the burden of proving probable cause rested with the Commonwealth, Justice Hennessey argued that the majority should not remand the case for a new trial and that judgments of not guilty should be entered. Relying on the fact that the defendant had borrowed the car only an hour before his arrest and may not have known that there were illegal drugs in it, he argued that the Commonwealth had failed to prove knowledge, a requisite element of the crime of unlawful possession of narcotics. Id. at 1248-49, 315 N.E.2d at 543-44. Since this issue is beyond the scope of this note, Justice Hennessey's opinion will not be discussed further.
[30] Id. at 1234, 315 N.E.2d at 536.

this conclusion by referring to the language in *Whiteley*[31] which indicated that although the officers were entitled to depend on the reliability of the radio bulletin, where "the contrary [unreliability of the bulletin] turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."[32] His dissent contended that the Court's use of the language "the contrary" indicated that the defendant must prove the unreliability of the information which resulted in the police bulletin. The Chief Justice felt that although Antobenedetto had satisfied his initial burden by establishing a prima facie case for suppression of the evidence by proving at trial that the search had been conducted without a warrant, the prosecution had rebutted its presumptive force by showing that the arresting officers had conducted the search on the basis of information contained in a radio bulletin received in the normal course of performing their duties.[33] Since Antobenedetto did not offer any evidence to demonstrate the bulletin's unreliability, unlike the defendant in *Whiteley*, Chief Justice Tauro reasoned that the trial judge was entitled to infer that proper police action had led to the broadcast of the bulletin.[34]

In examining the relevance of *Whiteley* to *Antobenedetto*, it should be noted that although *Whiteley* involved probable cause for an *arrest*, the Supreme Court has indicated that the same principles are applicable to probable cause for *searches*.[35] The Court in *Whiteley* also dealt with the issue of probable cause for a warrantless arrest or search,[36] similar to the search conducted by the Framingham police in *Antobenedetto*.

Although *Whiteley's* reasoning as to the quantum of evidence necessary to establish probable cause is applicable to a warrantless search such as that in *Antobenedetto*, it is submitted that *Whiteley* does not deal with the question of who has the burden of proving probable cause. The defendant in *Whiteley* was arrested pursuant to a warrant. The well-recognized rule in the federal system is that where a search or arrest is conducted with a warrant, the party moving to suppress the evidence has the burden of proving that a search or arrest is illegal.[37] In order to attack the warrant, Whiteley had to show that the infor-

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[31] Id. at 1233, 315 N.E.2d at 536-37 (dissenting opinion), citing 401 U.S. at 568.

[32] 401 U.S. at 568.

[33] 1974 Mass. Adv. Sh. at 1242, 315 N.E.2d at 540-41 (dissenting opinion).

[34] Id. at 1243, 315 N.E.2d at 541 (dissenting opinion). The Chief Justice objected to the majority's characterization of the decision as a "departure" from prior law, rather than as an outright reversal. Id. at 1239, 301 N.E.2d at 539. The majority claimed to be merely excepting warrantless searches from the "general rule" that on a motion to suppress the burden of proving the illegality of a search is on the movant, noting that such searches are presumed unreasonable, in contrast to searches conducted pursuant to a warrant. Id. at 1230-31, 315 N.E.2d at 534. See text at notes 41-51 infra.

[35] Carroll v. United States, 267 U.S. 132, 164 (1925).

[36] 401 U.S. at 565-66.

[37] See C. Wright, Federal Practice and Procedure § 675, at 126-27 (1969).

mation relied upon by the magistrate in issuing the warrant did not constitute probable cause. Once lack of probable cause for the issuance of the warrant had been established by the defendant, the prosecution's argument that there was probable cause for a warrantless arrest, regardless of the sufficiency of the information to support a warrant, was futile. The prosecution had to rely on the information received in the bulletin by the arresting officers, the same information that the magistrate had improperly relied upon in issuing the warrant. Since the standards used in evaluating probable cause for a warrantless search or arrest are at least as stringent as those used by a reviewing court in evaluating a magistrate's assessment of probable cause in issuing a warrant,[38] there could not be probable cause for a warrantless search or arrest on the facts in *Whiteley*. The issue of which party has the burden of proving probable cause in a warrantless search or arrest was not before the Court in *Whiteley*, for by proving that the warrant was invalid, the defendant necessarily proved that the arresting officer did not have sufficient information to justify a warrantless search. In short, *Whiteley* dealt with the quantum of facts necessary to support a finding of probable cause, not with the question of allocation of the burden of proving those facts.[39]

Because the burden of proof was not at issue in *Whiteley*, the majority's decision in *Antobenedetto* can only be said to be compelled by *Whiteley* if it is presupposed that the burden of proving probable cause for a warrantless search is on the prosecution. If the Supreme Judicial Court first reached such a conclusion, the holding in *Antobenedetto* of lack of probable cause would appear to be correct. The Commonwealth offered no background information in *Antobenedetto* as to the circumstances which resulted in the radio bulletin;[40] thus, the quantum of facts which *Whiteley* held was necessary to support a finding of probable cause did not exist. It is thus submitted that *Whiteley* should control the decision in *Antobenedetto* only on the issue of probable cause, not on that of burden of proof.

To support its conclusion that the burden of establishing the reasonableness of a warrantless search is on the Commonwealth, the majority in *Antobenedetto* cited numerous Supreme Court cases which indicate that searches conducted without a warrant are presumed invalid, and that the state must therefore demonstrate that the search falls within a permissible exception.[41] For example, in *Coolidge v. New*

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[38] 401 U.S. at 566.

[39] For this reason, it is submitted that *Whiteley* is not authority for the position that a warrantless search should be considered legal and the evidence seized admissible unless the defendant proves the unreliability of the information which resulted in the radio bulletin. See text at notes 29-35 supra.

[40] 1974 Mass. Adv. Sh. at 1230, 315 N.E.2d at 534.

[41] Id. at 1231, 315 N.E.2d at 534-35, citing Vale v. Louisiana, 399 U.S. 30, 34 (1970); Chimel v. California, 395 U.S. 752, 762 (1969); Recznik v. Lorain, 393 U.S. 166 (1968);

Hampshire[42] the Supreme Court stated:

> The most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions .... [T]here must be a showing by those who seek the exemption ... that the exigencies of the situation made that course imperative. *[T]he burden is on those seeking the exemption to show the need for it.*[43]

Whether the Supreme Court's language compels allocating the burden of proving probable cause for a warrantless search to the prosecution depends on the interpretation given to the requirement that the prosecution "show the need" for the exemption from the warrant requirement. The majority in *Antobenedetto* equated the burden of showing the need for the exemption with the burden of proving probable cause.[44] This interpretation of the Supreme Court's language is supported by numerous lower federal court decisions which hold that, while the defendant still has the burden of proving the lack of probable cause in a search conducted pursuant to a warrant,[45] the government has that burden in a warrantless search.[46]

These lower federal court decisions are not binding on the states, however.[47] That the question is still unsettled is shown by the suggestion that "[t]he Supreme Court has never been squarely confronted with the question of which party has the burden of proof on a motion to suppress for lack of probable cause."[48] The Supreme Court has

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United States v. Jeffers, 342 U.S. 48, 51 (1951). Chief Justice Tauro was critical of cases which put the burden of proving probable cause on the prosecution, claiming that they improperly rely either on judicial speculation as to what the Supreme Court might decide if confronted with the question of which party has the burden of proof, or on inapplicable language in Miranda v. Arizona, 384 U.S. 436 (1966). 1974 Mass. Adv. Sh. at 1237-38, 315 N.E.2d at 538 (dissenting opinion). However, no authority which explicitly relies on *Miranda* in placing the burden of proving probable cause for a warrantless search on the prosecution is cited by the dissent. In addition, the dissent inexplicably ignored the Supreme Court cases cited by the majority which deal with the per se unreasonableness of warrantless searches.

[42] 403 U.S. 443 (1971).

[43] Id. at 454-55 (emphasis added), citing Katz v. United States, 389 U.S. 347, 357 (1967); Jones v. United States, 357 U.S. 493, 499 (1958); United States v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. United States, 335 U.S. 451, 456 (1948). Accord, Vale v. Louisiana, 399 U.S. 30, 34 (1970); Recznik v. Lorain, 393 U.S. 166, 169-70 (1968).

[44] 1974 Mass. Adv. Sh. at 1231, 315 N.E.2d at 535.

[45] See C. Wright, supra note 37, § 675, at 127.

[46] Id. See, e.g., Rogers v. United States, 330 F.2d 535 (5th Cir. 1964); Joseph v. United States, 239 F.2d 524 (5th Cir. 1957); Wilson v. United States, 218 F.2d 754 (10th Cir. 1955).

[47] See Lafave, Search and Seizure: "The Course of True Law ... Has Not ... Run Smooth", 1966 U. Ill. L.F. 255, 347 n.566.

[48] Symposium, 25 Ohio St. L.J. 501, 527 (1964).

only stated that the prosecution must "show the need" for an exemption from the warrant requirement[49] and has not explicitly held that the prosecution has the burden of proving probable cause. As a result, many states continue to require that the defendant bear the ultimate burden of proving lack of probable cause for a warrantless search.[50] If the Supreme Court intended that the burden of showing the need for an exemption and the burden of proving probable cause should be synonymous, the choice of the words "show the need" was unfortunate. In contrast, in other areas involving the exclusionary rule, such as the voluntariness of a confession or the consent to a search, the Supreme Court has used explicit language to indicate that the prosecution has the burden of proof.[51] Thus, it is arguable that the holding in *Antobenedetto* that the burden of proving probable cause is on the prosecution is not compelled by decisions of the Supreme Court.

Conceding that the Supreme Court has not specifically answered the question of which party has the burden of proving probable cause for a warrantless search, it is submitted that the underlying policies of the Fourth Amendment[52] require that the prosecution bear the burden. This would help in deterring illegal police activity,[53] one of the primary purposes of the exclusionary rule, a judicially-created rule designed to effectuate the guarantees of the Fourth Amendment.[54]

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[49] Coolidge v. New Hampshire, 403 U.S. at 454-55. See text at note 43 supra.

[50] See 1974 Mass. Adv. Sh. at 1236-37, 315 N.E.2d at 537-38 (dissenting opinion) and cases cited therein.

[51] E.g., Lego v. Twomey, 404 U.S. 477, 489 (1972) (prosecution must prove at least by a preponderance of the evidence that the confession was voluntary); Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (prosecution has the burden of proving that consent to a search was freely and voluntarily given).

[52] For a discussion of the history and purpose of the Fourth Amendment, see Weeks v. United States, 232 U.S. 383, 389-92 (1914).

[53] The Court has recognized that all too frequently law enforcement officers, perhaps believing that the end justifies the means, have "taken matters into their own hands" in violation of the Fourth Amendment. United States v. Jeffers, 342 U.S. 48, 51 (1951). "Power is a heady thing; and history shows that police acting on their own cannot be trusted." McDonald v. United States, 335 U.S. 451, 456 (1948).

[54] The exclusionary rule prevents the admission of evidence in a criminal prosecution obtained in violation of the Fourth Amendment. The rule was first applied in Weeks v. United States, 232 U.S. 383 (1914), to bar illegally seized evidence from federal prosecutions. Id. at 392. The Court recognized that if illegally seized evidence could be used, "the protection of the Fourth Amendment declaring [a citizen's] right to be secure against unreasonable . . . searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Id. at 393. The exclusionary rule, in effect, prevented reducing the Fourth Amendment to a mere "form of words" in federal prosecutions. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). In addition, in holding that the Fourteenth Amendment fully incorporates the Fourth Amendment guarantee against unreasonable searches and seizures and that the exclusionary rule is an essential element of that guarantee, the Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), emphasized that the exclusionary rule, by removing the incentive to disregard the Fourth Amendment, constituted the only effectively available way to compel respect for the constitutional guaranty. Id. at 656.

When police act without a warrant, the defendant knows little or nothing about the circumstances preceding the search. Without a warrant specifying the basis for probable cause, the defendant has no readily available information upon which to attack the police action.[55] Because of the difficulty a defendant has in attacking a warrantless search, successful objections may be raised so infrequently as to invite noncompliance with Fourth Amendment requirements by law enforcement agents, and render the exclusionary rule ineffective.[56]

Placing the burden of proving probable cause for a warrantless search on the prosecution is consistent with the aim of deterring illegal police activity. The prosecution would be forced to set forth the circumstances upon which the officer based his determination of probable cause, not an unrealistic burden for the prosecution since, in a situation involving a warrantless search, "the evidence comprising probable cause is particularly within the knowledge and control of the arresting agencies."[57] With this information, the defendant would have a more realistic opportunity to prove the illegality of the search. The increased possibility of successful attack by the defendant would eliminate the possible incentive for law enforcement agents to search and arrest persons on the basis of mere suspicion and not probable cause.[58] In brief, placing the burden of proving probable cause on the prosecution furthers the fundamental purpose which the Court sought in adopting the exclusionary rule — to impress upon law enforcement agents that "[i]t is better . . . that the guilty sometimes go free than that citizens be subject to easy arrest."[59]

The fact situation in *Antobenedetto* highlights the reasonableness of placing the burden of establishing probable cause on the prosecution in terms of the underlying policies of the Fourth Amendment and the dangers the Court sought to eliminate by creating the exclusionary rule. Antobenedetto was convicted of unlawful possession of narcotics

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[55] "From a practical standpoint, it would be impossible for a defendant to prove a lack of probable cause in the abstract. The defendant cannot be expected to prove a lack of some item until he knows on what the government bases its claim of its existence." Symposium, supra note 48, at 528.

[56] For a discussion of the ineffectiveness of the exclusionary rule, see McCormick's Handbook of the Law of Evidence § 166, at 367 (2d ed. E. Cleary 1972) [hereinafter cited as McCormick].

[57] Rogers v. United States, 330 F.2d 535, 543 (5th Cir. 1964). Particular knowledge of the facts to be proved is one of the well-recognized factors in assigning the burden of proof. See, e.g., McCormick, supra note 56, § 337, at 787.

[58] "Under our system suspicion is not enough for an officer to lay hands on a citizen." Henry v. United States, 361 U.S. 98, 104 (1959).

[59] Id. In certain cases, placing the burden of proving the illegality of a warrantless search on the accused can also operate to violate the basic Fourth Amendment proposition that "no man is to be convicted on unconstitutional evidence." Mapp v. Ohio, 367 U.S. 643, 657 (1961). As argued by Chief Judge Fuld in his dissenting opinion in People v. Berrios, 28 N.Y.2d 361, 270 N.E.2d 709 (1971), placing the burden of proving probable cause on the prosecution will allow the trial judge to suppress evidence in those cases where he finds the evidence of the defendant and the prosecution equally credible and is unsure which side is telling the truth. Id. at 370-71, 270 N.E.2d at 714.

on the basis of a radio bulletin describing a vehicle being driven by suspected bad check passers.[60] Yet, the prosecution offered no evidence of the circumstances which led to the broadcast.[61] The bulletin could have been the result of a desire by the police to harass the defendant. There is nothing to prevent an officer from arresting someone who is a "known drug user and suspected bad check passer"[62] by fabricating the receipt of a radio bulletin nor to prevent another officer from causing fellow officers to arrest a person by transmitting a false broadcast. Alternatively, a bulletin might result from an anonymous call to police headquarters. In order to obtain a search warrant on the basis of an anonymous tip, the police would have to produce evidence to support the reliability of the informant and the reliability of the informant's information which led to the conclusion that Antobenedetto and his companion were connected with the alleged passing of bad checks.[63] Yet, a radio bulletin might nevertheless be issued on the basis of an anonymous tip not meeting these standards. Because of the difficulty of proving a lack of probable cause when the burden is on the defendant, the result could be to insulate an unreliable, anonymous tip from successful challenge. This would allow law enforcement officers to use unreliable information which could not support the issuance of a warrant to obtain evidence on which a conviction might be based. In short, if the defendant has the burden of proof with its attendant evidentiary difficulties, it is more likely that an unreliable tip or police harassment could result in the arrest and conviction of the defendant. This situation could hardly be said to be consistent with the goal of deterring illegal police activity.

In analyzing the purposes of the Fourth Amendment and the exclusionary rule in relation to the allocation of the burden of proof, important distinctions between searches conducted pursuant to a warrant and searches conducted without a warrant should be emphasized. The administrative necessity of discouraging non-meritorious challenges to warrants is an important reason advanced for requiring the party who is attacking the validity of the warrant to prove the inaccuracy of the information on which the warrant was issued.[64] In addition, the test of probable cause was specifically designed to balance the rights of the individual citizen with the countervailing reasonable necessities of law enforcement for the protection of the community.[65] The Supreme Court has consistently recognized the magistrate's fun-

[60] 1974 Mass. Adv. Sh. at 1226, 315 N.E.2d at 531-32.

[61] Id. at 1230, 315 N.E.2d at 534.

[62] Id. at 1226, 315 N.E.2d at 532.

[63] See Whiteley v. Warden, 401 U.S. 560, 564-65 (1971). Accord, Aguilar v. Texas, 378 U.S. 108 (1964), in which the Court held that to support a finding of probable cause, a police officer seeking a warrant based on an informer's tip must describe the underlying circumstances supporting the belief that the informant is credible and that there is a valid basis for the conclusions reached by the informant. Id. at 114.

[64] See McCormick, supra note 56, § 172, at 394, and cases cited therein.

[65] Brinegar v. United States, 338 U.S. 160, 176 (1949).

damental role in preserving this balance.[66] Where a warrant has been obtained, the party whose privacy has been invaded has already had a prior judicial determination of probable cause; his interests in privacy have already been balanced against the evidence justifying the invasion. In a warrantless search, however, a "neutral and detached" magistrate has not balanced the interest of the individual to be free from unreasonable searches with the interest of society in law enforcement.[67] It is the same law enforcement officer that the courts have recognized as prone to error[68] who decides to conduct a search without a warrant. Thus, the need to give finality to a previously-made judicial decision,[69] which is a reason advanced for placing the burden of attacking a warrant on the defendant, does not apply in a warrantless search. If the state is to bypass the safeguards provided by the Fourth Amendment, it should at least be required to provide after-the-fact justification in seeking a conviction based on evidence seized without a warrant.

Placing the burden of proving the illegality of a warrantless search on the defendant is not only inconsistent with the policies of the Fourth Amendment as effectuated by the exclusionary rule, but is also inconsistent with the Supreme Court decisions in analogous Fifth Amendment cases.[70] In cases involving the admissibility of a confession, the Supreme Court has held that the prosecution has the burden of proving that a confession was voluntary before it can be admitted.[71] This determination by the Court should be applicable in situations involving warrantless searches since the Court has consistently recognized the "intimate relation" between the Fourth and Fifth Amendments.[72] The general purpose of these two amendments is similar — to preserve inviolate the "principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle."[73] Both the Fourth and Fifth Amendments seek to establish a proper balance between state and individual interests.[74]

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[66] See Spinelli v. United States, 393 U.S. 410, 436 (1969). See also Henry v. United States, 361 U.S. 98, 100 (1959); Trupiano v. United States, 334 U.S. 699, 700 (1948).

[67] Perhaps the classic statement of the reasons for the warrant requirement is set forth in Johnson v. United States, 333 U.S. 10 (1948), in which the Court contrasted the judgment of "a neutral and detached magistrate" with that of "an officer engaged in the often competitive enterprise of ferreting out crime." Id. at 14.

[68] See note 53 supra.

[69] See McCormick, supra note 56, § 172, at 394.

[70] See, e.g., Lego v. Twomey, 404 U.S. 477 (1972); Miranda v. Arizona, 384 U.S. 436 (1966). In both cases the Court held that the prosecution has the burden of proving that a confession was voluntary.

[71] Lego v. Twomey, 404 U.S. 474, 489 (1966).

[72] Mapp v. Ohio, 367 U.S. 643, 657 (1961); Bram v. United States, 168 U.S. 532, 543 (1897); Boyd v. United States, 116 U.S. 616, 633 (1886).

[73] Bram v. United States, 168 U.S. 532, 544 (1897). "All these policies point to one overriding thought: the constitutional foundation underlying the privilege against self-incrimination is the respect a government — state or federal — must accord to the integrity of its citizens." Miranda v. Arizona, 384 U.S. 436, 460 (1966).

[74] Compare Miranda v. Arizona, 384 U.S. 436, 460 (1966) with Brinegar v. United States, 338 U.S. 160, 176 (1949).

Under the Fifth Amendment, the exclusionary rule operates to eliminate the use of "physical brutality and violence" in obtaining confessions.[75] Under the Fourth Amendment, the exclusionary rule operates to insure that searches and seizures are supported by probable cause, not mere suspicion.[76] The Court has recognized in the area of voluntary confessions that putting the burden of proof on the prosecution is consistent with the purpose of the exclusionary rule in that it serves to deter illegal police activity.[77] Logically, it should follow that the burden of proving probable cause for a warrantless search should be on the prosecution.

The Court has also recognized that the state's control of the circumstances of the interrogation and of the sole means of producing evidence that proper warnings were given makes it necessary that the prosecution bear the burden of proving that a confession was voluntary.[78] Similarly, only the prosecution has knowledge of the circumstances of a warrantless search.[79] In fact, the knowledge that the prosecution has in a warrantless search is even greater than in the case of a confession, since the defendant who confesses is at least present at the interrogation, whereas the defendant arrested pursuant to a warrantless search might know nothing of the circumstances preceding the search.

In conclusion, the policy reasons which led the Court to place the burden of proving the voluntariness of a confession on the prosecution apply with equal, if not greater, force to warrantless searches and compel a similar allocation of the burden to the state. It is thus submitted that, in view of the fact that the Supreme Court has not explicitly stated which party has the burden of proof in a warrantless search, the Supreme Judicial Court in *Antobenedetto* correctly interpreted the implicit mandate of the Fourth Amendment. Nonetheless, the question of what impact the *Antobenedetto* decision will have on future warrantless searches in Massachusetts remains unanswered.[80]

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[75] Miranda v. Arizona, 384 U.S. 436, 446 (1966). The Court realized that "[u]nless a proper limitation upon custodial interrogation is achieved — such as these decisions will advance — there can be no assurance that practices of this nature will be eradicated . . . ." Id. at 447.

[76] Henry v. United States, 361 U.S. 98, 104 (1959).

[77] See note 75 supra.

[78] "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during an incommunicado interrogation, the burden is rightly on its shoulders." Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[79] See text at note 57 supra.

[80] In Commonwealth v. Riggins, 1974 Mass. Adv. Sh. 1259, 315 N.E.2d 525, decided the same day as *Antobenedetto*, the Court considered the quantum of evidence necessary to establish probable cause in a warrantless search instigated by a police radio broadcast. The Court did not discuss burden of proof in its finding that probable cause was present, noting that "[u]nlike the situation in the *Antobenedetto* case, we have findings in the record which disclose the existence of a reliable source for the information which was broadcast over the police radio." Id. at 1265 n.5, 315 N.E.2d at 529 n.5.