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Chapter 5: Evidence

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CHAPTER 5

Evidence

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§ 5.1. Right to Show Witness Bias Outweighs Rape Complainant's Privacy Interests.* The defendant in a criminal prosecution is guaranteed, under the sixth amendment of the United States Constitution[1] and article 12 of the Massachusetts Declaration of Rights,[2] the right to confront an adverse witness.[3] The essential purpose of confrontation is to secure for the defendant a fair trial by providing the defendant with an opportunity to cross-examine the witness.[4] Cross-examination is the principal means to test the believability of the witness and the truth of the testimony.[5] This right of cross-examination includes not only the right to test the witness' perception and memory, but also permits the cross-examiner to impeach the witness.[6]

One method commonly used to impeach the credibility of an adverse witness is to reveal, either through cross-examination or by extrinsic testimony, that the witness is biased, prejudiced or has ulterior motives in testifying.[7] Cross-examination on the issue of bias is an essential part of the defendant's right to confront an adverse witness.[8] Refusal to allow cross-examination for the purpose of showing bias, therefore, may be reversible error that requires a new trial.[9]

In potential conflict with a defendant's right to show witness bias, however, is the trial judge's broad discretion to control the scope of cross-examination pursuant to evidentiary rules.[10] Evidentiary rules are

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§ 5.1. [1] U.S. CONST. amend. VI. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.*

[2] MASS. CONST. art. XII. Article 12 provides in part: "And every subject shall have the right . . . to meet the witnesses against him face to face . . . ." *Id.*

[3] Commonwealth v. Elliot, 393 Mass. 824, 828, 473 N.E.2d 1121, 1123–24 (1985).

[4] *See* Davis v. Alaska, 415 U.S. 308, 315–16 (1974).

[5] *Id.* at 316.

[6] *Id.*

[7] *See* MCCORMICK ON EVIDENCE § 40 (E. Cleary 3d ed. 1984) [hereinafter MCCORMICK].

[8] *See* P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 145 (5th ed. 1981).

[9] *See id.* at 145–46.

[10] *See Davis*, 415 U.S. at 316.

designed, in part, to exclude evidence where the prejudicial effect of such evidence is considered to outweigh its probative value,[11] where the evidence is cumulative,[12] or where the evidence relates to a collateral matter and admission of such evidence would unnecessarily distract the jury and prolong the trial.[13] In several instances, however, evidence may be admitted pursuant to the defendant's right to establish witness bias in spite of specific evidentiary rules which otherwise may be invoked to exclude such evidence.[14] The United States Supreme Court has stated, in *Davis v. Alaska*,[15] that where facts are relevant to a showing of bias, general evidentiary rules of exclusion must give way to the constitutionally based right of effective cross-examination.[16] This rationale has been followed by Massachusetts courts, which consider admitting such evidence as prior arrests,[17] juvenile records[18] and pending criminal indictments[19] in situations where evidentiary rules otherwise would bar admission. Moreover, in recent cases involving rape assaults, the Supreme Judicial Court has admitted such evidence as specific instances of prior sexual conduct[20] and prior false accusations of rape,[21] despite the specific prohibition against such evidence included in the Massachusetts rape shield statute.[22] Where facts of a rape victim's sexual conduct are

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[11] *See* McCormick, *supra* note 8, § 185, at 544–47.

[12] *See id.*

[13] *See id.*

[14] Commonwealth v. Joyce, 382 Mass. 222, 231, 415 N.E.2d 181, 187 (1981).

[15] 415 U.S. 308 (1974).

[16] *See* Commonwealth v. Ferrara, 368 Mass. 182, 190, 330 N.E.2d 837, 843 (1975) (citing *Davis*, 415 U.S. at 320).

[17] Commonwealth v. Haywood, 377 Mass. 755, 760–61, 388 N.E.2d 648, 652 (1979) (evidence of arrest records where charges are pending against witness at time of his testimony may be admissible to show bias).

[18] *Ferrara*, 368 Mass. at 189, 330 N.E.2d at 842 (juvenile records may be admitted as evidence if they have a rational tendency to show bias of the witness).

[19] Commonwealth v. Hogan, 379 Mass. 190, 191, 396 N.E.2d 978, 979 (1979) (evidence of pending indictments against witness admissible as part of defendant's right to cross-examine on issue of bias).

[20] *Joyce*, 382 Mass. at 230, 415 N.E.2d at 187 (1981) (evidence of specific instances of rape complainant's sexual conduct admissible when the evidence is relevant to show bias).

[21] Commonwealth v. Bohannon, 376 Mass. 90, 94–95, 378 N.E.2d 987, 991 (1978) (evidence of prior false allegations of rape admissible on the issue of the complainant's credibility).

[22] G.L. c. 233, § 21B. The rape shield statute provides in part:

> Evidence of specific instances of a victim's sexual conduct . . . shall not be admissible except evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim . . . . If . . . the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudical effect to the victim, the evidence shall be admitted; otherwise not.

Id.

relevant to show bias, the Supreme Judicial Court has reasoned, the evidentiary prohibitions of the rape shield statute must not be construed to abridge the defendant's right to effective cross-examination.[23]

During the *Survey* year, the Supreme Judicial Court, in *Commonwealth v. Elliot*,[24] considered whether the defendant's right to establish witness bias permitted cross-examination of a rape complainant concerning her financial situation and her stake in a civil action based on the criminal offense. The Court held that the trial judge erred in excluding such cross-examination, which was designed to elicit evidence of the complainant's bias.[25] Moreover, because this error, according to the Court, was not harmless, the defendant was entitled to a new trial.[26] The defendant's right to confront adverse witnesses through cross-examination designed to reveal possible bias, the Court noted, is guaranteed under both the federal and state constitutions.[27] Thus, because questions concerning the witness' financial situation and her intentions to institute a civil suit based on a criminal offense were unquestionably relevant to the issue of the witness' credibility, the Court reasoned, these questions should have been admitted.[28]

In *Elliot*, the defendant was charged with rape and breaking and entering a dwelling house at night with intent to commit a felony.[29] At the time of the alleged assault, the defendant was on parole from a rape conviction and was employed as a maintenance man by the complainant's landlord.[30] The complainant allegedly was in financial arrears at that time and was in the process of being evicted from her apartment.[31] In addition, charges were being brought against her by her landlord concerning an automobile accident in which she allegedly was the driver.[32]

On cross-examination of the complainant at trial, the defendant sought to impeach the complainant's credibility by probing into her possible financial motives for securing the defendant's conviction.[33] Specifically, the defendant sought to elicit on cross-examination evidence of the complainant's financial difficulties.[34] In addition, the defendant attempted to inquire into the complainant's possible intentions to bring an action

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[23] *Joyce*, 382 Mass. at 229, 415 N.E.2d at 186.
[24] 393 Mass. 824, 473 N.E.2d 1121 (1985).
[25] *Id.* at 828, 473 N.E.2d at 1123.
[26] *Id.*
[27] *Id.* at 828, 473 N.E.2d at 1123–24.
[28] *Id.* at 828–29, 473 N.E.2d at 1124.
[29] *Id.* at 824–25, 473 N.E.2d at 1122.
[30] *Id.* at 825, 473 N.E.2d at 1122.
[31] *Id.* at 831, 473 N.E.2d at 1125.
[32] *Id.* at 826 n.2, 473 N.E.2d at 1123 n.2.
[33] *Id.* at 826, 473 N.E.2d at 1123.
[34] *Id.*

against her landlord, the defendant's employer, to recover compensation for the assault.[35] The defendant contended that, in view of the complainant's financial difficulties and possible eviction from her apartment, the complainant's personal financial interests might have caused her to testify falsely in order to secure a guilty verdict in the criminal case, thereby potentially aiding her recovery in the civil case.[36] The trial judge, however, excluded this line of questioning, reasoning that it improperly impeached the witness by introducing evidence of unrelated matters in order to show "bad character."[37]

On appeal, the defendant alleged, inter alia,[38] that he was entitled to a new trial because the trial judge erred in excluding those questions intended to show the complainant's bias.[39] The Supreme Judicial Court agreed that the defendant was entitled to a new trial, holding that the defendant had the right to cross-examine the rape complainant concerning both her financial difficulties and her intention to institute a civil action against her landlord.[40] Notwithstanding the trial judge's ruling that the evidence was offered for the improper purpose of showing "bad character," the Court held that this evidence was relevant to the issue of the complainant's possible bias.[41] Therefore, under the defendant's sixth amendment right to confront adverse witnesses in order to reveal possible biases, prejudices, or ulterior motives, the Court reasoned, the defendant must be allowed to pursue this line of questioning.[42] The ability to cross-examine rape complainants, the Court reasoned, may be the "'last refuge

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[35] *Id.* at 827–28, 473 N.E.2d at 1123.

[36] *Id.*

[37] *Id.* at 826–27, 473 N.E.2d at 1123. Impeachment through proving bad character is a collateral issue in Massachusetts and cannot be proven by evidence of specific acts of "misconduct." *See* LIACOS, *supra* note 9, at 146–47.

[38] The defendant also alleged that he was entitled to a new trial on two other grounds. First, the defendant alleged that there was a conflict of interest on the part of the defendant's originally retained attorney due to his representation of the complainant in her subsequent civil action. *Elliot*, 393 Mass. at 825, 473 N.E.2d at 1122. The Court disagreed with this contention, finding that there was no conflict of interest because of the attorney's timely withdrawal from the case prior to the defendant's probable cause hearing. *Id.* at 832, 473 N.E.2d at 1126. The defendant also alleged that the trial judge abused his discretion by allowing introduction into evidence for impeachment purposes the defendant's prior rape conviction. *Id.* at 825, 473 N.E.2d at 1122. The Court did not decide whether the trial judge had abused his discretion, however, in light of its holding that the defendant was entitled to a new trial on other grounds. *Id.* at 833, 473 N.E.2d at 1127.

[39] *Id.* at 825, 473 N.E.2d at 1122.

[40] *Id.*

[41] *Id.* at 828, 473 N.E.2d at 1124.

[42] *Id.* at 828, 473 N.E.2d at 1123–24.

of an innocent defendant.'"[43] Accordingly, the Court concluded, the trial judge erred in excluding this line of questioning by the defendant.[44]

In granting the defendant a new trial, the Supreme Judicial Court rejected the Commonwealth's contention that although the trial judge did err in excluding the defendant's questions, such error was harmless and did not entitle the defendant to a new trial.[45] The Commonwealth contended that since the record indicated that the complainant never considered the possibility of a civil suit until after the criminal trial was over, the complainant's testimony in response to the defendant's cross-examination would not have had a material effect on the jury.[46] The Court rejected this reasoning, noting that since the complainant never actually testified as to when she first considered the possibility of pursuing a civil claim, neither the Court nor the trial judge could know with certainty how the complainant might have answered the defendant's questions.[47]

The Supreme Judicial Court also rejected the Commonwealth's argument that, since equivalent information had reached the jury through alternate means, exclusion of the defendant's cross-examination was harmless error.[48] The Court noted that while the jury did hear some testimony about the complainant's financial difficulties,[49] the defendant was not allowed to cross-examine the complainant about these matters or about her civil suit, and therefore, the jury was not given a sufficient basis to discern the possible bias or financial motive of the complainant.[50] Only when equivalent information is communicated to the jury or the excluded testimony is cumulative, the Court concluded, may the trial

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[43] *Id.* at 828, 473 N.E.2d at 1124 (quoting *Joyce*, 382 Mass. at 229, 415 N.E.2d at 186).

[44] *Id.* at 834, 473 N.E.2d at 1127.

[45] *Id.* at 828, 473 N.E.2d at 1123.

[46] *Id.* at 829, 473 N.E.2d at 1124.

[47] *Id.* at 829–30 & 829 n.3, 473 N.E.2d at 1124–25 & 1124 n.3. The *Elliot* Court also noted that uncertainty over when the complainant first entertained the idea of bringing a civil suit distinguished this case from the Court's earlier decision in *Haywood*. *Id.* at 830, 473 N.E.2d at 1125 (discussing *Commonwealth v. Haywood*, 377 Mass. 755, 388 N.E.2d 648 (1979)). In *Haywood*, the Court upheld the exclusion of the witness' arrest records where the arrests occurred after the witness' initial statements incriminating the defendant. 377 Mass. at 763, 388 N.E.2d at 654. The *Elliot* Court noted that the witness' testimony in *Haywood* clearly predated any incentive he might have had to falsify his testimony in order to seek government favor because of his subsequent arrests. *Elliot*, 393 Mass. at 830, 473 N.E.2d at 1125. Thus, the *Elliot* Court reasoned, unlike the trial judge in *Haywood* who correctly excluded questions concerning the witness' subsequent arrests, the trial judge in *Elliot* incorrectly excluded questions which may have revealed the witness' prior intentions to commence a civil suit. *Id.*

[48] *Elliot*, 393 Mass. at 831, 473 N.E.2d at 1125.

[49] *Id.* The jury did hear witnesses testify that at the time of the assault the complainant was in financial arrears, she was in the process of being evicted and her account with the telephone company was delinquent. *Id.*

[50] *Id.*

judge's decision to exclude questions designed to impeach a witness' credibility be harmless, and therefore irreversible, error.[51] Thus, the Court concluded, since the trial judge's exclusion of questions designed to demonstrate bias of the rape complainant could not be termed harmless error, the defendant was entitled to a new trial.

Although the *Elliot* Court expressed awareness of the legislative concern for the rape complainant, as evidenced by the Massachusetts rape shield statute enacted in 1977,[52] the Court correctly indicated that, in the circumstances of this case, the rape complainant's financial privacy interests were outweighed by the defendant's constitutional rights to cross-examination. In *Elliot*, the defendant sought to introduce evidence of the rape complainant's financial difficulties and her intention to institute a civil suit. This type of evidence does not undermine the rape shield statute, which was enacted to prevent the rape victim from experiencing trauma, invasion of privacy, jury prejudice and character assassination as a result of admitting evidence of the victim's reputation for unchastity or specific instances of prior sexual conduct.[53] Evidence of a civil suit based on a criminal offense is admissible because it is gender-neutral evidence which has a rational tendency to show specific bias on the part of the witness, unlike evidence of prior sexual conduct, which may be inadmissible because it is an element "'of a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assassination in open court.'"[54]

Moreover, the Supreme Judicial Court has stated, in *Commonwealth v. Joyce*,[55] that even evidence of a rape victim's sexual history may be admissible under the sixth amendment, notwithstanding the rape shield

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[51] *Id.* at 831–32, 473 N.E.2d at 1125–26. The necessity of providing the jury with equivalent information before exclusion of evidence may be ruled harmless error was stressed by the Court in a decision later in the *Survey* year. In *Commonwealth v. Rodwell*, 394 Mass. 694, 477 N.E.2d 385 (1985), the Supreme Judicial Court upheld exclusion of evidence of the prosecution witness' past cooperation with the Commonwealth since this evidence, although relevant to the issue of bias, was cumulative. The Court noted that the jury already had more compelling evidence of the witness' potential bias through disclosure of the seven criminal charges pending against the witness. *Id.* at 700, 477 N.E.2d at 389.

[52] G.L. c. 233, § 21B.

[53] *See* Case Comment, *Massachusetts Rape Shield Statute: The Need to Balance the Defendant's Constitutional Rights with Victim Protections*—Commonwealth v. Joyce, 15 SUFFOLK U.L. REV. 1023, 1023 (1981).

[54] Commonwealth v. Bohannon, 376 Mass. 90, 95, 378 N.E.2d 987, 991–92 (1978) (quoting Commonwealth v. Manning, 367 Mass. 605, 613–14, 328 N.E.2d 496, 501 (1975) (Braucher, J., dissenting)); *see also* Commonwealth v. Dutra, 15 Mass. App. Ct. Adv. Sh. 542, 549, 446 N.E.2d 1091, 1097 (1983) (evidence of civil suit relevant to the issue of rape victim's credibility); Commonwealth v. Carty, 8 Mass. App. Ct. 793, 795, 397 N.E.2d 1138, 1140 (1979) (evidence of rape complainant's probationary status admissible to show bias).

[55] 382 Mass. 222, 415 N.E.2d 181 (1981).

statute, when such evidence is relevant to demonstrate bias or motive to lie.[56] Although the trial judge should consider the important policies underlying the rape shield statute, as the *Joyce* Court advised,[57] the trial judge should exclude evidence of specific instances of sexual conduct only to the extent that such exclusion does not unduly infringe upon the defendant's right to show bias. Thus, as the Supreme Judicial Court has held, reasonable cross-examination for the purpose of showing bias and prejudice of the witness is a protected right which outweighs other interests of the state and the rape victim, and which should be limited, but not excluded, within the discretion of the trial judge.

In sum, the *Elliot* decision is significant in two respects. First, it displays the continued vitality of the defendant's confrontation clause right to demonstrate witness bias and second, it emphasizes the importance of that right. The defendant is guaranteed the right to cross-examine adverse witnesses to reveal possible biases, prejudices or ulterior motives. Moreover, this right supercedes general evidentiary rules, and specific rules such as the rape shield statute, which otherwise limit the scope of cross-examination. Accordingly, the *Elliot* Court recognized that in a rape prosecution, the defendant has a right to probe into the institution of a civil suit by the victim and into her financial difficulties, since this evidence can create a financial motive for the victim to testify falsely in order to secure a conviction which would aid in her quest for civil monetary damages.

§ 5.2. Waiver of the Attorney-Client Privilege.* For more than a century, the issue of whether a witness waives the attorney-client privilege by testifying has troubled the Massachusetts courts.[1] One line of decisions, beginning with *Woburn v. Henshaw* in 1869, holds that a witness who testifies at trial automatically waives the attorney-client privilege.[2] The *Woburn* line of decisions reasons that once a client agrees to testify, he or she "makes himself liable to full cross-examination like any other

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[56] *Id.* at 230, 415 N.E.2d at 187. For a discussion of *Joyce*, see Augustyn, *Evidence*, 1981 ANN. SURV. MASS. LAW § 5.2, at 127.

[57] *Joyce*, 382 Mass. at 231, 415 N.E.2d at 188. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980) (concluding that rape shield statutes violate the sixth amendment).

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§ 5.2. [1] *See* Neitlich v. Peterson, 15 Mass. App. Ct. 622, 626–27, 447 N.E.2d 671, 673–74 (parallel and inconsistent lines of decisions govern selective assertion of privilege). *See* P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 215 (5th ed. 1981) [hereinafter LIACOS]; Spalding, *The Uncertain State of the Law as to Waiver of Professional Privilege as to Confidential Communications*, 20 MASS. L.Q. no. 3, 16 (1935).

[2] 101 Mass. 193 (1869).

witness."[3] The contrary line of cases, holding that a witness's testimony is not a de facto waiver of the attorney-client privilege, began in 1874 with *Montgomery v. Pickering*.[4] This line of cases reasons that a witness waives the privilege only when the subject matter of that witness's testimony is within the specific context of a cited confidential communication.[5]

Courts also have wrestled repeatedly with whether a defendant may consent to representation by counsel with divided loyalties.[6] This issue is particularly troublesome when the privilege-bound attorney must cross-examine a former client pertaining to a privileged matter. Balancing the defendant's sixth amendment right to effective assistance of counsel with the defendant's right to representation by counsel of his or her choice, courts occasionally have disqualified the conflict-hindered attorney.[7] In *United States v. Dolan*,[8] for example, the Court of Appeals for the Third Circuit concluded that the defendant's attorney was properly disqualified because he could not effectively cross-examine his former client, an important prosecution witness, without "intruding into matters protected by the attorney-client privilege."[9] The Third Circuit, stressing the court's "supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation,"[10] held that the district court properly refused to accept the defendant's waiver of his right to the effective assistance of counsel. Thus, waiver of the

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[3] *Id.* at 200. The Supreme Judicial Court in *Woburn* ruled that "[t]he policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client; but if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness." *Id. See also* Knowlton v. Fourth-Atlantic Nat'l Bank, 264 Mass. 181, 196, 162 N.E. 356, 360–61 (1928); Gossman v. Rosenberg, 237 Mass. 122, 124, 129 N.E. 424, 425–26 (1921); Commonwealth v. Barronian, 235 Mass. 364, 367, 126 N.E. 833, 834 (1920).

[4] 116 Mass. 227, 231 (1874).

[5] *See* McCooe v. Dighton Somerset & Swansea St. Ry., 173 Mass. 117, 119, 53 N.E. 133, 134 (1899). *Montgomery* was followed in *McCooe* and more recently by implication in Kendall v. Atkins, 374 Mass. 320, 325, 372 N.E.2d 764, 767 (1978). The position taken in *Montgomery* was also the view adopted by Proposed Mass. R. Evid. 510 (1980), which provided that a privilege against disclosure is waived if the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." *Id. reprinted in* LIACOS, *supra* note 1, at 215.

[6] *See, e.g.*, United States v. Provenzano, 620 F.2d 985, 1004–05 (3d Cir. 1980); United States v. Dolan, 570 F.2d 1177, 1183–84 (3d Cir. 1978); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.) (per curiam) (adopting district court's findings and conclusions), *cert. denied*, 444 U.S. 843 (1979).

[7] See cases cited in note 6, *supra*.

[8] 570 F.2d 1177 (3d Cir. 1978).

[9] *Id.* at 1183–84.

[10] *Id.* at 1184.

attorney-client privilege has compelling ethical, as well as evidentiary, implications.

The principles set forth by the United States Supreme Court in *Johnson v. Zerbst*[11] govern both waiver of the attorney-client privilege and waiver of the right to conflict-free counsel. *Zerbst* requires that one's waiver of a constitutional right be an "intentional relinquishment or abandonment of a known right."[12] Thus to be valid, a witness's waiver of the attorney-client privilege, and a defendant's waiver of the right to unhindered counsel, must be voluntary, knowing and intentional.[13]

During the *Survey* year, in *Commonwealth v. Goldman*,[14] the Supreme Judicial Court of Massachusetts considered whether a witness automatically waives the attorney-client privilege when he or she takes the stand to testify.[15] Resolving a century old conflict, the Court held that a witness's testimony regarding an event which happened to have been the topic of a conversation between a client and his or her attorney, rather than testimony regarding the actual content of the substance of the attorney-client consultation, is not a per se waiver of the privilege.[16] The *Goldman* Court also addressed whether a defendant may consent to representation by a privilege-bound attorney.[17] The Court found that if the defendant voluntarily, knowingly and intelligently consents he or she may relinquish the right to an attorney with undivided loyalty.[18]

In *Commonwealth v. Goldman*, the defendant, Lawrence Goldman, was charged with conspiracy to murder former Boston Police Officer John Glenn.[19] Soon after Goldman's attorney, Davis, agreed to represent the defendant it became apparent to Davis that Glenn would be called as a witness at Goldman's trial.[20] Glenn's testimony at Goldman's trial, however, presented a conflict of interest to Davis as counsel because Glenn was a former client of Davis.[21]

Davis's association with Glenn began in January, 1982, shortly after

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[11] 304 U.S. 458 (1938). The Supreme Court in *Zerbst* asserted that courts should indulge "'every reasonable presumption against waiver' of [a] fundamental constitutional [right]." *Id.* at 464.

[12] *Id.*

[13] *Goldman*, 395 Mass. at 507, 480 N.E.2d at 1031 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

[14] 395 Mass. 495, 480 N.E.2d 1023 (1985).

[15] *Id.* at 498, 480 N.E.2d at 1026.

[16] *Id.* at 499–500, 480 N.E.2d at 1027.

[17] *Id.* at 505–07, 480 N.E.2d at 1030–31.

[18] *Id.* at 498, 480 N.E.2d at 1026.

[19] *Id.* at 496, 480 N.E.2d at 1025.

[20] The Commonwealth believed that Glenn was hired by the defendant to murder an individual named Leo Shorter. *Id.*

[21] *Id.*

Glenn was indicted for assault with intent to murder an individual named Leo Shorter.[22] Glenn met with Davis regarding the possibility of retaining him as counsel.[23] Glenn discussed the indictment with Davis and disclosed confidential information to Davis regarding his case.[24] They reached no agreement concerning representation and in fact Glenn was not represented by Davis at trial.[25]

Davis's representation of the defendant began in June 1982, or shortly thereafter, when a grand jury indicted Goldman for conspiracy to murder Glenn.[26] The Commonwealth alleged that the defendant conspired with a co-defendant to kill Glenn because Glenn had failed to murder Shorter.[27]

Subsequent to his conviction in March 1983, Glenn began to cooperate with the Quincy police concerning his association with the defendant.[28] Principally, Glenn had given statements regarding the attempted murder of Leo Shorter.[29] Davis, as Goldman's defense counsel was furnished with a transcript of the statements Glenn made to the Quincy police.[30] The statements Glenn made to the Quincy police were "diametrically opposed" to the statements Glenn made to Davis shortly after his indictment in January, 1982.[31]

Glenn would be a key witness for the prosecution in the case against Goldman, and as such, his credibility would be a central issue in the forthcoming Goldman trial.[32] If Glenn were to testify in accordance with his post-conviction statements to the Quincy police and Davis were to cross-examine him regarding those statements his credibility could be greatly diminished because Glenn's testimony at trial would be inconsistent with the statements he had made during his consultation with Davis.[33] Accordingly, Glenn invoked, and consistently refused to waive, the attorney-client privilege with respect to his conversation with Mr. Davis.[34]

Cognizant of the potential conflict of interest associated with cross-examining Glenn in his capacity as Goldman's defense attorney, Davis

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* Ultimately Glenn was convicted in the Superior Court in Norfolk County. *Id.* Glenn's sentencing was postponed until after his testimony for the Commonwealth in its case against Goldman. *Id.* at 496, 480 N.E.2d at 1025–26.

[27] *Id.* at 496, 480 N.E.2d at 1025. Shorter apparently had cheated Goldman in a drug deal. *Id.*

[28] *Id.* at 496–97, 480 N.E.2d at 1026.

[29] *Id.* at 497, 480 N.E.2d at 1026.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

filed a motion in limine[35] seeking a pretrial ruling on the attorney-client privilege issue.[36] Pursuant to Davis's motion, the superior court held a hearing at which Davis testified as to the substance of his conversation with Glenn.[37] Based on the testimony and exhibits offered, the judge found that a witness does not waive the attorney-client privilege when that witness takes the stand at trial and testifies regarding events which are the subject matter of trial, but specifically refuses to waive the privilege as to confidential communications.[38] The judge concluded that the facts and circumstances of the Goldman case did not require her to override the attorney-client privilege.[39] The lower court did, however, require Davis to withdraw as counsel to Goldman due to the conflict of interest inherent in his continued representation of the defendant.[40] The court further held that the defendant could not consent to counsel's continued representation.[41]

Defendant appealed the trial court's ruling to the appeals court and filed a petition for direct appellate review.[42] This request was later granted by the Supreme Judicial Court.[43] Justice Liacos, writing for the Court, held that Glenn's testimony would not operate as a de facto waiver of the attorney-client privilege which protected the statements Glenn made to Davis during the initial consultation.[44] Further, the Court ruled that although Davis' representation of the defendant was tainted by a conflict of interest which might require his withdrawal, Goldman could continue to be represented by Davis provided Goldman "voluntarily, knowingly and intelligently" consented.[45] The Supreme Judicial Court vacated the superior court's order which required Mr. Davis to withdraw and remanded the case to the superior court for further consideration.

The *Goldman* Court reasoned that the determination whether a witness waives his or her privilege turns on whether the witness's testimony concerns "the *specific content* of an identified privileged communication,"[46] or merely is about "*events* which happen to have been a topic of

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[35] In limine is the latin term meaning "on or at the threshold; at the very beginning; preliminarily." BLACKS LAW DICTIONARY 708 (5th ed. 1979). *See generally* Redding v. Ferguson, 501 S.W.2d 717, 722 (Tex. Civ. App. 1979) (purpose of motion in limine is to avoid introduction into trial of matters which "are irrelevant, inadmissible and prejudicial").

[36] *Goldman*, 395 Mass. at 496, 480 N.E.2d at 1025.

[37] *Id.* at 497–98, 480 N.E.2d at 1026.

[38] *Id.* at 497, 480 N.E.2d at 1026.

[39] *Id.*

[40] *Id.* at 498, 480 N.E.2d at 1026.

[41] *Id.*

[42] *Id.* at 496, 480 N.E.2d at 1025.

[43] *Id.*

[44] *Id.* at 498, 480 N.E.2d at 1026.

[45] *Id.*

[46] *Id.* at 500, 480 N.E.2d at 1027 (emphasis added).

a privileged communication."[47] According to the Court, when a witness testifies regarding the specific content of an identified attorney-client consultation the witness waives the privilege.[48] The court ruled, however, that when the witness's testimony is limited to an event that the witness had occasion to discuss during the course of a confidential communication, that the witness does not automatically waive the attorney-client privilege.[49]

The *Goldman* Court also refused to find that the interests of justice required the attorney-client privilege to be overridden in those instances where the witness/former client cooperates with the prosecution.[50] The defendant argued that an accomplice who aids the police by favorable and often self-incriminating, testimony automatically waives the attorney-client privilege.[51] The defendant advanced that the basis for the privilege ends when, by testifying, one exposes himself or herself to the very consequences that the privilege was intended to prevent.[52] The Court rejected this argument and stated that the attorney-client privilege serves the "interest of the administration of justice."[53] The attorney-client privilege, held the Court, has a dual purpose. First, the privilege protects a client's disclosures to an attorney which the client would not have made in the absence of the privilege.[54] Second, the privilege enables the attorney to give well informed advice by encouraging clients to both seek advice from, and be honest with, their attorney.[55] Finding that these important public policy aspects would not be compromised, the Court held that Glenn would not automatically waive the attorney-client privilege by testifying at Goldman's trial, and that the facts of *Goldman* did not require that the attorney-client privilege be overridden.[56]

The Supreme Judicial Court next discussed the ethical considerations

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[47] *Id.* at 499–500, 480 N.E.2d at 1027 (emphasis added).

[48] *Id.* at 500, 480 N.E.2d at 1027.

[49] *Id.* at 499–500, 480 N.E.2d at 1027.

[50] *Id.* at 501–02, 480 N.E.2d at 1028.

[51] *Id.* at 501, 480 N.E.2d at 1028.

[52] *Id.* The Court denounced the reasoning of the Mississippi Supreme Court in Jones v. State, 65 Miss. 179, 184, 3 So. 379, 380 (1887).

[53] *Goldman*, 395 Mass. at 502, 480 N.E.2d at 1029.

[54] *Id.* at 502, 480 N.E.2d at 1028.

[55] *Id.* at 502, 480 N.E.2d at 1028–29.

[56] *Id.* at 498, 480 N.E.2d at 1026. The Court adopted the rule stated in Wigmore's treatise on evidence:

> The client's offer of his *own testimony* in the cause *at large* is not a waiver for the purpose either of cross-examining him to communications or of calling the attorney to prove them. Otherwise the privilege of consultation would be exercised only at the penalty of closing the client's own mouth on the stand. 8 J. WIGMORE, EVIDENCE § 2327, at 637 (McNaughton rev. ed. 1961) (emphasis in original).

Id. at 502, 480 N.E.2d at 1029.

underlying Davis's representation of Goldman and his necessary cross-examination of Glenn.[57] The Court noted that an attorney's successive representation of clients with conflicting interests is compromised in two ways. First, counsel must affirmatively avoid using any information obtained from the first client during their privileged communication.[58] Next, counsel's defense and advocacy of his second client's case subconsciously may be inhibited.[59] In this regard, the Court stated that "'[t]he conflict . . . in the attorney's own mind may have unmeasurable adverse effects on the client's interests.'"[60] Due to the conflict of interest inherent in Davis's cross-examination of Glenn, the *Goldman* Court concluded that unless the defendant waives his right to be represented by counsel with undivided loyalty, Mr. Davis would be required to withdraw as defense counsel.[61]

Turning to the issue of whether a client may waive the right to uninhibited representation, the Court first recognized that the sixth amendment to the United States Constitution grants to the defendant a right to representation which is "untrammeled and unimpaired . . . free of any conflict of interest and unrestricted by commitments to others."[62] The Court further noted that the defendant has a right to present a defense and be represented by counsel of his or her choice.[63] Balancing the individual's right to effective assistance of counsel against the individual's right to be represented by counsel of his or her choice, the Court found that the defendant may waive the right to a conflict-free attorney.[64]

Next, the Court addressed the question of whether the defendant may knowingly and intelligently waive his or her right to the undivided loyalty of counsel when his attorney ethically may not reveal any substance of the privileged conversation.[65] The Court rejected the trial court's reasoning that without the benefit of the privileged, and therefore undisclosable, information the defendant cannot make "a 'knowing and intelligent' waiver."[66] Rather, the Court concluded that the defendant did not need to know the exact substance of the privileged communication to make

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[57] *Id.* at 503–08, 480 N.E.2d at 1029–32.

[58] *Id.* at 503, 480 N.E.2d at 1029.

[59] *Id.* at 504, 480 N.E.2d at 1030.

[60] *Id.* (quoting Commonwealth v. Rondeau, 378 Mass. 408, 416 n.7, 392 N.E.2d 1001, 1006 n.7 (1979)).

[61] *Id.* at 505, 480 N.E.2d at 1030.

[62] *Id.* at 505, 480 N.E.2d at 1030 (quoting Commonwealth v. Davis, 376 Mass. 777, 780–81, 384 N.E.2d 181, 185 (1978)); *see* Glasser v. United States, 315 U.S. 60, 76 (1942).

[63] *Goldman*, 396 Mass. at 505–06, 480 N.E.2d at 1031.

[64] *Id.* at 505–06, 480 N.E.2d at 1030–31.

[65] *Id.* at 506, 480 N.E.2d at 1031.

[66] *Id.*

an informed decision as to Davis's representation.[67] The Court stated that in the instant case, the attorney presumptively would notify the defendant that Glenn's statements on the stand were likely to be "diametrically opposed" to his earlier privileged communication.[68] As a result, the Court found, the defendant would be capable of making a reasonably accurate assessment of the impact of the conflict on his attorney's representation.[69]

The *Goldman* Court then offered some guidelines for a valid waiver of the right to effective assistance of counsel. The Court first emphasized the presumption against waiver of constitutional rights set forth by the United States Supreme Court in *Johnson v. Zerbst*.[70] Relying on the principles set forth in *Zerbst*, the *Goldman* Court stated that such valid waiver must be not only voluntary, but also a "knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences."[71] The Court then stressed that the trial judge should play an active role in the defendant's waiver decision.[72] The Court stated the judge should require that the defendant be fully informed of the attorney's conflict of interest and its potential impact on his or her defense.[73] Other factors the *Goldman* Court considered important in the waiver decision included the defendant's "background, experience and conduct"[74] and the "integrity of the entire adversary system."[75] Although the Court recognized that the public has a fundamental interest in the fair, proper and swift administration of justice, the Court concluded that the defendant's right to choose his or her own counsel will prevail, provided the defendant's decision to be represented by a conflict-bound attorney is "voluntary, knowing and intelligent."[76] Practically, the *Goldman* Court advised a discussion between the judge and the defendant to insure that the defendant understands his or her rights and waives them knowingly.[77] A written record of the waiver dialogue which is "clear, unequivocal, and unambiguous" should be made, the Court suggested, to safeguard the defendant's consent from a challenge on the basis of the sixth amendment.[78]

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 507, 480 N.E.2d at 1031. *See supra* notes 11–13 and accompanying text.
[71] *Id.* (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).
[72] *Id.* at 507–08, 480 N.E.2d at 1031–32.
[73] *Id.* at 507, 480 N.E.2d at 1031–32.
[74] *Id.* at 508, 480 N.E.2d at 1032.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

The Supreme Judicial Court's decision in *Goldman* is consistent with the approach followed by other jurisdictions.[79] The Court recognized that the purpose of the attorney-client privilege is to preserve the confidentiality of information.[80] The *Goldman* Court further stressed that the privilege continues even after the threat of punishment disappears.[81] Thus the Supreme Judicial Court, by allowing the attorney-client privilege to be waived only to the extent that the witness's testimony concerns the substance of the privileged communication, preserves and furthers the purpose of the attorney-client privilege.

The Court in deciding the *Goldman* case, however, loosely construed the requisites for a valid waiver of the right to effective assistance of counsel. Although the Court underscored the presumption against waiver of constitutional rights as set forth by the United States Supreme Court in *Johnson v. Zerbst*, the Court nonetheless ruled that the "defendant need not know the exact content of the privileged communication to make an informed decision."[82] How a defendant's rights can be served by the application of this rule is far from clear. A question remains whether one can make an informed waiver of the constitutional right to the effective assistance of counsel when one cannot be informed completely as to the content of the privileged communication. It is difficult to conceive of a client being made thoroughly aware of all of the potential deleterious effects which may flow from representation by an attorney with divided loyalties without the benefit of knowing the precise nature of his or her counsel's conflicting loyalties. Such precise knowledge cannot be gained without receiving disclosure of the privileged information.

The Court's analysis of the consent to counsel issue in *Goldman* stressed the manner in which the waiver of the right to effective assistance of counsel can best be preserved for appeal,[83] rather than the

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[79] *See, e.g.*, People v. Lynch, 23 N.Y.2d 262, 271, 244 N.E.2d 29, 34–35, 296 N.Y.S.2d 327, 334, (1968) ("testimony about an event . . . should not be construed as a waiver of the privilege, merely because the subject matter of the testimony may also have been discussed in the privileged communication"); People v. Shapiro, 308 N.Y. 453, 457–60, 126 N.E.2d 559, 561–62 (1955) (waiver of the attorney-client privilege should not be implied from a witness taking the stand); Littlefield v. Superior Court, 136 Cal. App. 3d 477, 483–85, 186 Cal. Rptr. 368, 371–72 (1982) (testimony of witness as to facts does not waive substance of the conversation with his lawyer); *cf.* Dunn v. Commonwealth, 350 S.W.2d 709, 713 (Ky. 1961) ("the protection afforded by the [attorney-client privilege] is for the client's exclusive benefit and if the privileged communication, which is precluded in the attorney's direct testimony, can be obtained indirectly by cross-examination of the client, then the privilege . . . would be worthless").

[80] *See Goldman*, 395 Mass. at 501 n.7, 400 N.E.2d at 1028 n.7.

[81] *See id.* at 501–02, 480 N.E.2d at 1028.

[82] *Id.* at 506, 480 N.E.2d at 1031.

[83] *Id.* at 507–08, 480 N.E.2d at 1031–32. The Court stated:

defendant's right to make intelligent and well-informed decisions regarding his or her criminal defense. Consequently, the Court failed to accord proper weight to the countervailing ethical considerations surrounding Davis's representation of the defendant Goldman. The lower court required that counsel withdraw from the case based on its determination that Goldman could not give a valid and knowing consent to Davis's representation. In requiring Davis to withdraw, the trial court was exercising its supervisory powers over the members of the bar.[84] Moreover, Davis, as a member of the bar, was bound to the ABA Code of Professional Responsibility. Disciplinary Rule 5-105 requires that an attorney refuse to accept or continue employment if the interests of another client might impair the attorney's independent professional judgment.[85] In addition, Canon 9 of the ABA Code of Professional Responsibility states that a lawyer must avoid giving the appearance of impropriety.[86] The facts and circumstances of the *Goldman* case, particularly since a member of the Boston Police Department was implicated in a capital offense, suggest that the Supreme Judicial Court should have given more weight to the ethical considerations attendant to attorney Davis's representation of the defendant, Goldman. By loosely construing the conditions necessary for a valid waiver of the right to conflict-free counsel, the *Goldman* Court may have undermined the high level of professional ethics to which we aspire in the Commonwealth. Had Davis not accepted Goldman as a client from the start, thereby complying with the spirit and letter of Disciplinary Rule 5-105 of the ABA Code of Professional Responsibility, the Supreme Judicial Court would not have been confronted with the troublesome task of balancing Goldman's right to effective assistance of counsel against his right to counsel of his choice.

In sum, in *Commonwealth v. Goldman* the Court resolved the conflict in Massachusetts law regarding the continued existence of attorney-client privilege when a witness takes the stand to testify. The Court held that the attorney-client privilege is not waived when the witness testifies as to certain events which took place and happened to be the topic of a privileged communication. The Court also applied the rule of non-waiver to instances where the witness selectively cooperates with the Commonwealth in a criminal prosecution and ruled that justice does not require

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A record of the waiver colloquy between the defendant and the judge should be made in which the language of the waiver is clear, unequivocal and unambiguous. Such a record should help shield any potential conviction from collateral attack on Sixth Amendment grounds.

Id.

[84] *See Dolan*, 570 F.2d at 1184.

[85] ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A).

[86] *Id.* Canon 9.

the attorney-client privilege be overridden. The Court noted, however, that waiver of the privilege may be found when the witness testifies as to the specific content of his or her conversation with counsel. Finally, the Court ruled that a criminal defendant can waive the right to an attorney unhindered by conflict of interest without knowledge of the exact nature of the privileged communication.

§ 5.3. Substantial Risk of Miscarriage of Justice–Aggregation of Prejudicial Errors.* In Massachusetts, a criminal defendant is not entitled to appellate review of alleged errors occurring at trial unless the defendant preserves his or her right to a review by proper objection below.[1] Rule 22 of the Massachusetts Rules of Criminal Procedure sets forth the requirements for preserving an issue for appellate review by proper objection at trial.[2] Requiring proper objection to preserve the right of appellate review ensures that an alleged error is brought clearly to the judge's attention, allowing the judge to consider and decide the issue and rectify the error.[3] In addition, courts require proper objection below to prevent

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§ 5.3. [1] Counsel must make an objection if he or she wishes to preserve an issue for review.

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.
>
> If a party objects to a ruling or order of the court, he may state the precise legal grounds of his objection, but he shall not argue or further discuss such grounds unless the court calls upon him for such argument or discussion.

MASS. R. CRIM. P. 22. Rule 22 restates Rule 51 of the Federal Rules of Criminal Procedure and is substantially similar to Rule 46 of both the Massachusetts and Federal Rules of Civil Procedure. *See* FED. R. CRIM. P. 51; MASS. R. CIV. P. 46; FED. R. CIV. P. 46.

[2] Rule 22 eliminated the necessity of counsel claiming an exception in order to obtain appellate review. K.B. SMITH, CRIMINAL PRACTICE AND PROCEDURE, 30A MASS. PRACTICE SERIES §§ 1772, 1774 (2d ed. 1983). To preserve an issue for review, Rule 22 requires that counsel object at an appropriate time to action or inaction of the judge. *Id.* at § 1775. The objection should be made at the time that the ruling or order of the judge is made. *Id.* at § 1776. If a party desires the judge to take some affirmative step, counsel must clearly indicate the action that he or she desires the judge to take. *Id.* at § 1777. If counsel wishes to indicate disapproval of the judge's action, objection must be made. *Id.* at § 1777. Counsel may specify the grounds for objection but cannot argue or discuss the grounds unless the judge requests such argument or discussion. *Id.* at § 1778.

[3] *Id.* at § 1775. Judicial economy is served when the error is brought to the judge's attention. *See* State v. Applegate, 39 Or. App. 17, 21, 591 P.2d 371, 373 (1979). The public should not be put to the expense of a retrial that could have been avoided had proper objection been made. *Id.*

counsel from gaining unfair tactical advantage.[4] Courts have noted the possibility that a party knowing of a secret defect could proceed and take its chance for a favorable verdict, all the while possessing "the power and intent to annul it as erroneous and void" if the verdict should be adverse.[5] Similarly, the availability of review in spite of the lack of objection would free a party to make tactical trial decisions which, if they should backfire, could be deemed error warranting reversal of a conviction.[6]

Under Massachusetts law, however, the reviewing court may consider an issue which was not preserved by proper objection, in order to prevent a substantial risk of a miscarriage of justice.[7] A reviewing court which finds that a substantial risk of miscarriage of justice exists may reverse the defendant's conviction,[8] or may remand the case for a new trial.[9] Permitting appellate review of errors not objected to at trial protects defendants from unjust conviction attributable to defense counsel's mistake or inadvertence.[10]

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[4] *See infra* notes 5–6 and accompanying text.

[5] Commonwealth v. Cancel, 394 Mass. 567, 571–72, 476 N.E.2d 610, 614 (1985) (citing Cady v. Norton, 14 Pick. 236, 237 (1833)).

[6] *See, e.g.*, Commonwealth v. Askins, 18 Mass. App. Ct. 927, 929, 465 N.E.2d 1224, 1227 (1984)(in responding to defendant's argument that judge erred in failing to instruct jury that lack of consent was an element of the crime of indecent assault and battery of a person under the age of fourteen, the Massachusetts Appeals Court reasoned that "[a]s a matter of trial tactics, however, it is apparent that there was little point in doing so . . . . Indeed, pressing the point would doubtless have been counterproductive to the defendant's position that the acts alleged never occurred at all."), *further appellate review denied*, 469 N.E.2d 830 (1984). *See also* Commonwealth v. Cartagena, 386 Mass. 285, 288–89, 435 N.E.2d 352, 354–55 (1982) (in responding to defendant's argument that the trial judge erred in failing to consider voluntariness of defendant's confession on his own motion, the Supreme Judicial Court reasoned that, in addition to the absence of any evidence of involuntariness which would have triggered a voir dire, the trial tactic of not challenging admissibility of defendant's statement appeared to have been a reasonable one at time it was chosen).

[7] Commonwealth v. Mahdi, 388 Mass. 679, 690, 448 N.E.2d 704, 711 (1983); Commonwealth v. Wood, 380 Mass. 545, 547, 404 N.E.2d 1223, 1225 (1980); Commonwealth v. Freeman, 352 Mass. 556, 563–64, 227 N.E.2d 3, 9 (1967). G.L. c. 278, § 33E expressly grants the Supreme Judicial Court authority to review issues not objected to in capital cases. *See, e.g.*, Commonwealth v. Tavares, 385 Mass. 140, 147–48, 430 N.E.2d 1198, 1209 (1982); Commonwealth v. Cole, 380 Mass. 30, 38–39, 402 N.E.2d 55, 60–61 (1980).

[8] *See, e.g.*, Commonwealth v. Mahdi, 388 Mass. at 699, 448 N.E.2d at 715; Commonwealth v. Freeman, 352 Mass. at 564, 227 N.E.2d at 9.

[9] *See, e.g.*, Commonwealth v. Cancel, 394 Mass. 567, 576, 476 N.E.2d 610, 617 (1985); Commonwealth v. Wood, 380 Mass. at 551, 404 N.E.2d at 1228.

[10] In cases reversing convictions under the substantial risk of miscarriage of justice standard, the prejudice to defendant probably would have been avoided had counsel properly objected at trial. *See generally*, Commonwealth v. Pickles, 393 Mass. 775, 778–80, 473 N.E.2d 694, 697 (1985) (prejudicial jury charge misled jury as to who had burden

Applying the substantial risk of miscarriage of justice standard of review, Massachusetts courts have found reversible error in a variety of contexts.[11] In determining whether an error not objected to below created a substantial risk of miscarriage of justice to the defendant, these courts have considered the following factors:[12] the relationship between the alleged error and the premise of defense,[13] which party introduced the allegedly erroneous issue at trial,[14] the quantum of evidence of guilt already present against the defendant,[15] the frequency of the allegedly

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of proof); Commonwealth v. Clary, 388 Mass. 583, 594, 447 N.E.2d 1217, 1223 (1983) (prosecutor made three inflammatory, irrelevant, and non-evidentiary lines of argument prejudicing defendant; absence of proper objection by defendant). In these cases, the prejudice created the substantial risk of miscarriage of justice to defendant. *See, e.g.*, Commonwealth v. Pickles, 393 Mass. at 780, 473 N.E.2d at 697; Commonwealth v. Clary, 388 Mass. at 594, 447 N.E.2d at 1223. Thus it follows that the substantial risk of miscarriage of justice was attributable to defense counsel's mistake or inadvertence.

[11] Reviewing courts have found a substantial risk of miscarriage of justice where there were improper jury instructions or charges. *See, e.g.*, Commonwealth v. Pickles, 393 Mass. at 779–80, 473 N.E.2d at 697 (jury instruction which could have been interpreted to mean that defendant had burden of proving his innocence and was confusing as to what elements of crime defendant had stipulated created substantial risk of miscarriage of justice); Commonwealth v. Wood, 380 Mass. 545, 549, 404 N.E.2d at 1223, 1227. *But see* Commonwealth v. Howell, 386 Mass. 738, 740, 437 N.E.2d 1067, 1069 (1982) (instruction that there was evidence that defendant assaulted victim with intent to rape her did not impermissibly invade province of jury, was "but a slip of the tongue," was adequately cured by balance of instructions, and therefore did not create substantial risk of miscarriage of justice). A substantial risk of miscarriage of justice has also been found where the prosecution made improper arguments or references. *See, e.g.*, Commonwealth v. Mahdi, 388 Mass. 679, 692–99, 448 N.E.2d 704, 713–15 (1983) (prosecutor's questions on cross-examination of defendant referring to religious tenets which were without probative value and tended only to inject racial hatred into trial coupled with prosecutor's comment on defendant's exercise of Miranda rights created substantial risk of miscarriage of justice). *But see* Commonwealth v. Askins, 18 Mass. App. Ct. at 928, 465 N.E.2d at 1226 (1984) (prosecutor's reference to foreign accent of doctor who testified for defendant did not constitute appeal to racial or religious bigotry amounting to prejudicial error).

[12] The list of factors appears in Commonwealth v. Mahdi, 388 Mass. at 696–97, 448 N.E.2d at 714–15.

[13] *See, e.g.*, Commonwealth v. Clary, 388 Mass. at 592–93, 447 N.E.2d at 1222–23 (in finding substantial risk of miscarriage of justice, Court noted that prosecutor's argument was not confined to collateral issues; rather, the overreaching argument struck impermissibly at defendant's sole defense by suggesting that defendant's alleged stabbing of victim was motivated by desire to defend her lover); Commonwealth v. Mahdi, 388 Mass. at 695, 697–98, 448 N.E.2d at 713, 715 (in finding substantial risk of miscarriage of justice, Court considered that the prosecutor's argument concerning defendant's post-arrest silence struck at "the jugular" of defendant's insanity defense by suggesting defendant was sane enough to recognize importance of remaining silent).

[14] *See, e.g.*, Commonwealth v. Mahdi, 388 Mass. at 696–98, 448 N.E.2d at 714–15 (in finding a substantial risk of miscarriage of justice, Court noted that the improper evidence was introduced and pursued by the district attorney).

[15] *See, e.g.*, Commonwealth v. Clary, 388 Mass. at 593–94, 447 N.E.2d at 1223 (in finding

improper reference,[16] and the availability or effect of curative instructions.[17] In virtually all of the cases in which the reviewing court found reversible error using the substantial risk of miscarriage of justice standard, the court considered the error or errors individually, and found the error or errors themselves to be sufficiently prejudicial to require reversal.[18]

During the Survey year, in *Commonwealth v. Cancel*,[19] the Massachusetts Supreme Judicial Court reversed a criminal conviction and remanded the case for a new trial, holding that while none of the errors at trial considered individually were sufficiently prejudicial to warrant reversal of defendant's conviction, they *combined* to create a substantial risk of miscarriage of justice.[20] The Court applied the substantial risk of miscarriage of justice standard of review because one of the errors had not been preserved properly by objection below under Rule 22.[21] *Cancel* demonstrates an unusual application of review under the substantial risk of miscarriage of justice standard because the cumulative effect of error, not an individual error, was the cause for reversal.[22] The Court did not express what quantum of prejudice was necessary to meet the standard of a substantial risk of miscarriage of justice.[23] By implication, the Supreme Judicial Court has left this issue to case-by-case determination.[24]

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that three errors combined to create a substantial risk of miscarriage of justice, Court noted that other proof against defendant was "far from overwhelming").

[16] *See, e.g.*, Commonwealth v. Mahdi, 388 Mass. at 698, 448 N.E.2d at 715 (Court noted that district attorney made not one, but two separate improper references to defendant's exercise of his Miranda rights).

[17] *See, e.g.*, Commonwealth v. Clary, 388 Mass. at 591, 447 N.E.2d at 1221–22 (in finding substantial risk of miscarriage of justice, Court reasoned that generally termed instruction that statements of counsel are not evidence did not adequately cure the prejudicial impact of prosecutor's argument); Commonwealth v. Mahdi, 388 Mass. at 698, 448 N.E.2d at 715 (Court considered lack of curative instructions).

[18] *See, e.g.*, Commonwealth v. Pickles, 393 Mass. at 780, 473 N.E.2d at 697 (instruction was prejudicial error resulting in a substantial risk of miscarriage of justice); Commonwealth v. Wood, 300 Mass. at 549, 404 N.E.2d at 1227 (jury charge was prejudicial error resulting in a substantial risk of miscarriage of justice); Commonwealth v. Freeman, 352 Mass. at 563–64, 227 N.E.2d at 9 (jury charge was prejudicial error resulting in substantial risk of miscarriage of justice). *But see* Commonwealth v. Clary, 388 Mass. at 594, 447 N.E.2d at 1223 (Court considered "combined effect" of three improper arguments by prosecutor in finding substantial risk of miscarriage of justice); Commonwealth v. Mahdi, 388 Mass. at 698–99, 448 N.E.2d at 715 (Court concluded that prosecutor's exploitation of defendant's exercise of his Miranda rights "coupled with" improper questions and argument on religion created a substantial risk of miscarriage of justice).

[19] 394 Mass. 567, 476 N.E.2d 610 (1985).

[20] *Id.* at 576, 476 N.E.2d at 617 (emphasis added).

[21] *See id.* at 570, 476 N.E.2d at 614. *See also infra* notes 49–53 and accompanying text.

[22] *See supra* note 20 and accompanying text.

[23] *See Cancel*, 394 Mass. at 576, 476 N.E.2d at 617.

[24] *See supra* note 23 and accompanying text.

Thus, it is within the Court's discretion to determine when individual errors, each insufficiently prejudicial to require reversal, add up to create a substantial risk of miscarriage of justice.[25]

The defendant in *Commonwealth v. Cancel* was convicted of arson.[26] In May, 1982, a fire broke out in a closet of the defendant's apartment.[27] In the trial court, two witnesses testified that they saw the defendant set the fire.[28] Both witnesses admitted to bias and their testimony differed on several details.[29] In addition, a member of the fire department's arson squad testified that he believed the fire had been set.[30]

The owner of the building testified that while he was on a back porch of the building shortly after the fire, he saw the defendant standing on a street corner approximately 150 feet from the building.[31] The owner also testified that the defendant later told him that he was out of town on the day of the fire.[32] Because the building owner's testimony included hearsay which the judge improperly allowed into evidence, the Appeals Court summarily reversed the conviction.[33] The Supreme Judicial Court granted the Commonwealth's application for further review.[34]

The Supreme Judicial Court affirmed the Appeal Court's reversal of the defendant's conviction and remanded the case to the trial court for a new trial.[35] The Court held that several rulings which were made by the trial court were erroneous and, when considered in the aggregate, had created a substantial risk of undue prejudice to the defendant at trial.[36] In reaching this conclusion, the Court considered three rulings made by the trial court.[37] First, the Court considered the trial court's admission over the defendant's general objection, of hearsay testimony to establish the content of an out of court statement.[38] Second, the Court considered the trial court's admission over the defendant's objection, of collateral evidence for purposes of impeachment.[39] Third, the Court considered the trial court's failure to instruct the jury regarding the impro-

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[25] *See supra* notes 23–24 and accompanying text.

[26] *Cancel*, 394 Mass. at 567, 476 N.E.2d at 610.

[27] *Id.* at 567, 476 N.E.2d at 612.

[28] *Id.* at 568, 476 N.E.2d at 613.

[29] *Id.*

[30] *Id.* at 569, 476 N.E.2d at 613.

[31] *Id.* at 568–69, 476 N.E.2d at 613.

[32] *Id.* at 569, 476 N.E.2d at 613.

[33] *Id.* at 567–68, 476 N.E.2d at 612 (citing Commonwealth v. Cancel, 18 Mass. App. Ct. 1114, 469 N.E.2d 831 (1984)).

[34] Commonwealth v. Cancel, 394 Mass. at 568, 476 N.E.2d at 612.

[35] *Id.* at 576, 476 N.E.2d at 617.

[36] *Id. See also infra* notes 55–78 and accompanying text.

[37] *See infra* notes 38–40 and accompanying text.

[38] *Cancel*, 394 Mass. at 569–71, 476 N.E.2d at 613–14.

[39] *Id.* at 572–73, 476 N.E.2d at 614–15.

priety of the prosecutor's comments implying the absence of alibi witnesses after defendant's objection.[40] In considering these three rulings, the Supreme Judicial Court addressed whether the issues raised had been preserved for review by proper objection by the defendant, and, if so, whether the trial court's rulings were correct.[41]

In considering the admissibility of the hearsay statements, the Court first reviewed the testimony of a witness of the Commonwealth regarding an out of court conversation he had with the defendant.[42] In addition, the Court noted that defense counsel had objected only generally to this testimony and had not renewed the objection or moved to strike after it was overruled.[43] The Court held that the building owner's statement was inadmissible hearsay relevant only for its truth.[44] In addition, the Court found that the defendant had failed to preserve the issue for review by proper objection under Rule 22.[45] With respect to the admissibility of the hearsay, the Court reasoned that where a witness reports that he or she made an accusation and the accused responded, both the reported accusation and reported response are admissible if the accused responds in an "equivocal, evasive, or irresponsive way inconsistent with his innocence."[46] If, however, the accused unequivocally denies the accusation, neither the accusation nor the response are admissible into evidence.[47]

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[40] *Id.* at 573–76, 476 N.E.2d at 615–17.

[41] *See infra* notes 43–75 and accompanying text.

[42] Before the Supreme Judicial Court, the defendant argued that the statement, "a lot of people told me you're responsible for it" was inadmissible hearsay. 394 Mass. at 569, 476 N.E.2d at 613. The building owner testified at trial that a day or two after the fire, he saw the defendant and a conversation commenced. *Id.* at 569, 476 N.E.2d at 613. The building owner testified that the conversation consisted in part of the defendant volunteering that he had nothing to do with the fire, to which the building owner responded, "a lot of people told me that you're responsible for it." *Id.* At this point in the building owner's testimony, defense counsel injected with one word, "objection". *Id.* at 570 n.2, 476 N.E.2d at 613 n.2. The trial judge ruled the statement admissible for showing what the conversation was, not for the truth of the statement. *Id.* at 569, 476 N.E.2d at 613. The building owner proceeded to testify that in response to this accusation, defendant had said that he was out of town and had just returned. *Id.* at 570 n.2, 476 N.E.2d at 613 n.2. Defense counsel did not object or move to strike this testimony. *Id.* at 569, 476 N.E.2d at 613.

The Commonwealth contended that the statement was admissible because it was necessary to place other "consciousness of guilt" evidence into context. *Id.* The Court found that the hearsay statement was not necessary for that purpose, concluding that the statement was relevant only for its truth. *Id.* at 569–70, 476 N.E.2d at 613–14.

[43] *Id.* at 570, 476 N.E.2d at 614. The Commonwealth argued that the objection was insufficient under Rule 22 to preserve the right to dispute the judge's ruling on admissibility of the hearsay testimony. *Id.* at 569, 476 N.E.2d at 613.

[44] *Id.* at 570, 476 N.E.2d at 613–14.

[45] *Id.* at 570, 476 N.E.2d at 614.

[46] *Cancel*, 394 Mass. at 571, 476 N.E.2d at 614 (quoting Commonwealth v. Machado, 339 Mass. 713, 715–16, 162 N.E.2d 71, 73 (1959)).

[47] *Cancel*, 394 Mass. at 570–71, 476 N.E.2d at 614 (citing Commonwealth v. Pleasant,

Thus, the Court found that the defendant's out of court denial of the witnesses' accusation was not admissible under the hearsay exception for admission against interest.[48]

With respect to the propriety of defense counsel's objections, the Court reasoned that the defendant's general objection was untimely under Rule 22 because when the objection was made, it was not yet clear whether the statement would be relevant other than for its truth.[49] The Court noted that in the instant case, defense counsel's objection had been interposed before the witness testified as to the defendant's response to the accusation.[50] The Supreme Judicial Court reasoned that, as the trial judge could not then know what the nature of defendant's alleged response would be, the judge could not at that time rule upon admissibility.[51] In addition, the Court maintained that once it became clear that the defendant's response to the accusation was an unequivocal denial, the defendant should have either renewed his objection or moved to strike the testimony.[52] The Court held that defendant's failure to act at this juncture destroyed his right to appellate review of this error.[53] While the Court found the hearsay testimony prejudicial to the defendant, the Court maintained that it was not sufficiently prejudicial to require reversal of the conviction.[54]

In considering the trial court's admission of collateral evidence for impeachment purposes, the Court first reviewed the line of questioning in which the prosecutor attempted to impeach a defense witness by eliciting information regarding his membership in a street gang.[55] The

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366 Mass. 100, 102, 315 N.E.2d 874, 876 (1974); Commonwealth v. Twombly, 319 Mass. 464, 465, 66 N.E.2d 362, 363 (1946)).

[48] *See Cancel*, 394 Mass. at 570, 476 N.E.2d at 613–14.

[49] *Id.* at 570, 476 N.E.2d at 614.

[50] *Id.* at 571, 476 N.E.2d at 614.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 576, 476 N.E.2d at 617. The Court noted that it was not apparent that the defendant was dissatisfied with the judge's ruling. *Id.* at 571, 476 N.E.2d at 614. The Court further stated that the judge's ruling was not unequivocably adverse. *Id.* (This is presumably because the defendant's response to the accusation was consistent with innocence.) *See id.* at 569 n.2, 476 N.E.2d at 613 n.2.

[55] *Id.* at 572, 476 N.E.2d at 614–15. The witness testified that an unknown woman approached him in the courthouse, offered to "stop the case" against the defendant for 300 dollars, and then walked away laughing. *Id.* at 572, 476 N.E.2d at 614. In attempting to impeach the witness' testimony, the Commonwealth introduced several prior convictions of the witness into evidence. *Id.* The Commonwealth then questioned the defendant about a street gang in Springfield and succeeded in eliciting that the witness used to be a gang member. *Id.* at 572 n.5, 476 N.E.2d at 615 n.5. Before the Supreme Judicial Court, the defendant argued that it was improper for the judge to allow impeachment of the witness by reference to his membership in a street gang. *Id.* at 568, 476 N.E.2d at 612.

Court also noted that the defendant objected generally to the line of questioning seeking to elicit this information and that the trial judge overruled this objection.[56] The Court found that the testimony was improperly admitted[57] and that defendant's objection was sufficient under Rule 22 to preserve the ruling for review.[58] Yet, the Court maintained that the improper admission of the testimony was not prejudicial enough to warrant reversal.[59]

In addressing the propriety of the line of questioning, the Court first cited the settled rule regarding the introduction of evidence used to impeach a witness, that the inquiry is limited to the witness' reputation for truth and veracity.[60] The Court reasoned that the witness' past membership in a street gang was clearly a collateral issue irrelevant to his veracity, and could only tend to appeal to the juries prejudice against street gangs.[61] Thus, the Court reasoned, the impeachment evidence should not have been admitted.[62]

Turning to the sufficiency of defense counsel's objection, the Court found the objection proper because it was timely and because there was no need to specify the ground where the ground should have been obvious to the judge.[63] Although the Court held that the trial judge erred in admitting this impeachment evidence, the Court maintained that this error alone was not sufficiently prejudicial to the defendant to require reversal.[64] The Court found no prejudice because the witness' credibility had already been impeached with several prior convictions and the evidence the witness provided was not particularly relevant to the defendant's guilt.[65]

Considering the trial court's failure to give instructions regarding the prosecutor's comments on the absence of alibi witnesses, the Court first

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[56] *Id.* at 573, 476 N.E.2d at 615. *See also id.* at 572 n.5, 476 N.E.2d at 614–15 n.5. The Commonwealth argued that the objection was insufficient under Rule 22 to preserve the right to appellate review of this error. *Id.* at 573, 476 N.E.2d at 615. The Commonwealth also argued that even if an error was made, it was harmless. *Id. See also infra* notes 60–62 and accompanying text.

[57] *Cancel*, 394 Mass. at 573, 476 N.E.2d at 615. *See also infra* notes 60–62 and accompanying text.

[58] *Cancel*, 394 Mass. at 573, 476 N.E.2d at 615.

[59] *Id.*

[60] *Id.* at 572, 476 N.E.2d at 615 (citing Eastman v. Boston Elevated Ry., 200 Mass. 412, 413, 86 N.E. 793, 793 (1909); F.W. Stock & Sons v. Dellapenna, 217 Mass. 503, 506, 105 N.E. 378, 379 (1914); P.J. LIACOS, MASSACHUSETTS EVIDENCE 146–47 (5th ed. 1981)).

[61] 394 Mass. at 573, 476 N.E.2d at 615.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

reviewed the prosecutor's remarks to determine their propriety.[66] The Court reasoned that the jury could have construed the prosecutor's closing remarks as a comment on the defendant's failure to call any alibi witnesses.[67] The Court explained that comment on the defendant's failure to call any alibi witnesses is permissible only if there is some evidence that witnesses other than the defendant were available for that purpose.[68] The Court found that as there was no indication that the defendant had any alibi witnesses available, the prosecutor's comment on the defendant's failure to call alibi witnesses was improper.[69]

Furthermore, the Court noted that defense counsel had objected generally to the remarks in a bench conference following the trial and had not requested curative instructions.[70] However, the Court reasoned that although defense counsel's objection fell short of the desired clarity in expressing a problem and suggesting a remedy,[71] the objection was sufficient to preserve the issue for review because it was timely and sufficiently apprised the judge of the grounds on which it was based.[72] Although the Court held that the defendant's objection was sufficient to preserve the issue for review, albeit minimally,[73] and that the prosecutor committed error in the closing argument by commenting on the defen-

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[66] *Id.* at 573–76, 476 N.E.2d at 615–17. As part of his closing argument, the prosecutor essentially suggested that people do not tend to make intentionally false accusations of crime against specific individuals because it is likely that the accused persons are "out there somewhere with some people doing things" at the time of the crime. *See id.* at 573 n.6, 476 N.E.2d at 615 n.6. Before the Supreme Judicial Court, the defendant did his best to argue that because the defendant had a constitutional right not to testify and the choice not to call alibi witnesses, prosecutor's argument implying that if defendant had an alibi he would have testified or called alibi witnesses, was improper. *Id.* at 574 n.7, 476 N.E.2d at 616 n.7. *See also id.* at 573, 476 N.E.2d at 615. The Commonwealth argued that the prosecutor's remarks merely responded to the defense counsel's suggestions that several witnesses were lying. *Id. See also infra* notes 67–69 and accompanying text.

[67] 394 Mass. at 575, 476 N.E.2d at 616. In reviewing the prosecutor's closing arguments, the Supreme Judicial Court found no remarks which could reasonably be construed as referring to the defendant's decision not to testify. *Id.* The Court reasoned that even if the jury were to have construed the prosecutor's remarks as referring to the defendant's decision not to testify, any resulting prejudice towards the defendant was dissipated by the judge's strong instruction on the defendant's right not to testify. *Id.* The judge's instruction is set forth *id.* at 575 n.8, 476 N.E.2d at 616 n.8.

[68] *Id.* at 575, 476 N.E.2d at 616, and cases cited therein.

[69] 394 Mass. at 576, 476 N.E.2d at 617.

[70] *Id.* at 574 n.7, 476 N.E.2d at 616 n.7. The Commonwealth argued that the defendant did not preserve this issue for review under Rule 22 because the objection occurring at the end of the prosecutor's argument was untimely, and furthermore, neither a mistrial nor curative instruction was sought. *Id.* at 573–74, 476 N.E.2d at 616. *See infra* notes 71–73 and accompanying text.

[71] *Id.* at 574, 476 N.E.2d at 616.

[72] *Id.*

[73] *See supra* notes 71–72 and accompanying text.

dant's failure to call alibi witnesses,[74] the Court maintained that this error alone was not sufficiently prejudicial to the defendant to require reversal.[75]

In spite of the Court's finding that none of the three errors considered individually was sufficiently prejudicial to require reversal of the defendant's conviction,[76] the Court had "serious doubt" as to whether the defendant was unduly prejudiced by the combination of these errors.[77] Considering all three errors in combination, the Court reasoned that the errors resulted in a substantial risk of a miscarriage of justice.[78] Consequently, the Court reversed the judgment, set aside the jury verdict and remanded the case for a new trial.[79]

In sum, the Supreme Judicial Court in *Commonwealth v. Cancel* reversed the trial court's conviction under the substantial risk of miscarriage of justice standard of review in an unusual application of this standard.[80] The Court found that the cumulative effect of several errors, each of which was not prejudicial, in combination created the substantial risk of miscarriage of justice.[81] While the Court reversed on the basis of

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[74] *See supra* notes 67–69 and accompanying text.

[75] *Cancel*, 394 Mass. at 576, 476 N.E.2d at 617. In holding that the error was not in itself sufficiently prejudicial to require reversal, the Court considered the context of the improper comments, the inadequate defense response, and the judge's instructions to the jury. *Id.* The second consideration, that of the inadequate defense response, seems irrelevant to whether the error was prejudicial. Instead, the response seems more relevant to defendant's right to review of this error. *See* MASS. R. CRIM. P. 22, *supra* note 1.

[76] *Cancel*, 394 Mass. at 576, 467 N.E.2d at 617.

[77] *Id. See also* Commonwealth v. Wood, 380 Mass. at 550, 404 N.E.2d at 1227 (in reversing conviction because of a substantial risk of miscarriage of justice, Court maintained that "serious doubt" existed as to whether judge's instructions prejudiced defendant and reasoned that such doubt must be resolved in defendant's favor).

[78] *Cancel*, 394 Mass. at 576, 467 N.E.2d at 617. In finding a substantial risk of miscarriage of justice, the Court did not expressly consider factors such as the relationship between the errors and premise of defense, which party introduced the erroneous issue at trial, the weight or quantum of evidence of guilt already present against the defendant, or the frequency of the erroneous reference. *See supra* notes 12–16 and accompanying text. The Court did expressly consider the effect of jury instructions on the alleged error of the prosecutor's comments on the defendant's decision not to testify. *Cancel*, 394 Mass. at 575, 476 N.E.2d at 616. This consideration went to whether there was error at all, however, and not to the prejudicial effect of the alleged error. *See id.* Thus, in finding a substantial risk of miscarriage of justice due to the prejudicial effect of the combination of these errors, the Court did not explain what factors they considered in finding prejudice to the defendant, or how the errors added up to create the substantial risk of miscarriage of justice to the defendant.

[79] *Id.* at 576, 476 N.E.2d at 617.

[80] *See infra* note 81 and *supra* note 18 and accompanying text.

[81] *Cancel*, 394 Mass. at 576, 476 N.E.2d at 617.

the combination of errors, it recognized that no one error was sufficiently prejudicial to warrant reversal.[82]

The *Cancel* opinion expressed no measurement or quantum to determine when errors, not sufficiently prejudicial themselves, combine to create sufficient prejudice to warrant reversal.[83] Thus, while extending the application of the substantial risk of miscarriage of justice standard to a new situation,[84] the Court gave no guidance as to how this extension would be applied in the future.[85] Instead, the propriety of reversal under the substantial risk of miscarriage of justice standard of review involves a case-by-case determination entirely within the Court's discretion.[86]

The Court's case-by-case application of this standard of review strikes a practical balance between protecting defendants from unjust prosecution due to counsel's mistake[87] and enforcing the requirement that counsel comply with Rule 22 to preserve the right of appellate review.[88] That the Court has not articulated how or when individual errors not sufficiently prejudicial themselves to require reversal, combine to create a substantial risk of miscarriage of justice,[89] enforces the requirement of Rule 22 that proper objection be made below.[90] As the application of the substantial risk of miscarriage of justice standard of review remains discretionary with the Court, counsel would be imprudent to rely on the availability of this review when they discover that there was an error unobjected to at trial, or that a tactical decision not to object backfired.[91] The case-by-case application of the substantial risk of miscarriage of justice standard of review does not ensure the losing defendant a second chance.[92] Rather,

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[82] *Id.* While not finding the hearsay error prejudicial enough to warrant reversal, the Court did find the hearsay testimony prejudicial— the only error expressly defined as such. *Id.*

[83] *See id. See supra* note 78 and accompanying text. Arguably, the Court is applying a "serious doubt" standard. *See supra* note 77 and accompanying text. Whether "serious doubt" exists is still a discretionary decision resting with the court. *See* note 77.

[84] *See supra* note 19 and accompanying text.

[85] *See supra* notes 7, 83 and accompanying text. In contrast, by stating the factors that were considered, the opinions in Commonwealth v. Clary, 388 Mass. 583, 477 N.E.2d 1217, and *Commonwealth v. Mahdi*, 388 Mass. 679, 448 N.E.2d 704, offer some guidance as to when the cumulative effect of individual errors creates a substantial risk of miscarriage of justice. *See supra* notes 12–17 and accompanying text.

[86] *See supra* note 7 and cases cited therein. *See also supra* notes 83–85, and accompanying text.

[87] *See infra* notes 94–98 and accompanying text.

[88] *See infra* notes 89–93 and accompanying text.

[89] *See supra* note 85.

[90] *See infra* notes 91–93 and accompanying text.

[91] *See supra* note 6 and cases cited therein. *See also infra* notes 92–93.

[92] *See, e.g.*, Commonwealth v. Askins, 18 Mass. App. Ct. at 927–30, 465 N.E.2d at 1225–

the trial record is strictly scrutinized, warranting reversal or new trial only where the error or errors were egregious enough to convince the reviewing court that the risk of a miscarriage of justice was *substantial*.[93] Thus, counsel should comply with the requirements of Rule 22 to preserve the right to review of error. For the practitioner, an assured right of review is preferable to a discretionary decision to review by the reviewing court. As *Cancel* demonstrates, however, where it is clear that the trial as a whole was not conducted properly and unduly prejudiced the defendant, failure to preserve the right to review by proper objection below will not operate as a complete bar to appellate review.[94]

Permitting a court to review alleged errors on appeal notwithstanding counsel's lack of proper objection is sometimes necessary to avoid a miscarriage of justice.[95] *Cancel* exemplifies such a situation.[96] The defendant was prejudiced to the degree that the trial created a substantial risk of injustice.[97] Instead of remaining powerless to correct the probable injustice suffered by defendant, the Court was able to order a new trial under the substantial risk of miscarriage of justice standard of review.[98] The *Cancel* cumulative approach affords the defendant prejudiced solely by the *combination* of errors the same protection from unjust prosecution

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27 (none of six alleged errors created substantial risk of miscarriage of justice; conviction affirmed); Commonwealth v. Howell, 386 Mass. at 738–40, 437 N.E.2d at 1068–69 (alleged erroneous jury instruction did not create substantial risk of miscarriage of justice; conviction affirmed).

[93] *See supra* note 7 (emphasis added).

[94] *See Cancel*, 394 Mass. at 576, 476 N.E.2d at 617.

[95] *See supra* note 7 and accompanying text. In applying the substantial risk of miscarriage of justice standard of review, courts manifest their concern with the realities of trial practice: trials are fast-paced, often calling for split-second judgment of counsel. Error may occur which escapes both defense counsel and the judge. Accordingly, courts will allow an exception to the requirement of proper timely objection to preserve an issue for review. W.R. LaFave & J.H. Israel, Criminal Procedure, § 26.5 (abridged 1985). *See* Mass. R. Crim. P. 22 (if a party has no opportunities to object to a ruling or order, the absence of an objection does not thereafter prejudice the party). The refusal to consider a claim where the procedural rule arbitrarily imposes an impossible time limit on the defense may in itself constitute a violation of due process. *See, e.g.*, Reece v. Georgia, 350 U.S. 85, 89–90 (1975).

A defendant should not be unjustly prosecuted due to counsel's mistake or inadvertence. *See generally* Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974) (test is whether behavior of counsel falls measurably below that which might be expected from an ordinarily fallible lawyer, thereby depriving defendant of an otherwise substantial ground of defense); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (if counsel's inadequacy deprives defendant of a fair trial, conviction may be reversed).

[96] *See infra* notes 97–98 and accompanying text.

[97] *Cancel*, 394 Mass. at 576, 476 N.E.2d at 617.

[98] *Id.*

which courts have afforded defendants prejudiced from single reversible error.[99]

The case-by-case application of the substantial risk of miscarriage of justice standard of review affords the Court useful flexibility in determining whether a defendant was unduly prejudiced by the combination of errors. Courts could not possibly fashion a concise measurement whereby they could determine when individual errors, not sufficiently prejudicial themselves to require reversal, add up to create a substantial risk of miscarriage of justice. Determining whether a particular defendant was prejudiced necessarily involves a case-by-case analysis of the individual errors involved. Thus, case-by-case application of this standard of review serves not only to enforce the requirement of proper objection under Rule 22, but also permits the Court to protect defendants from unjust prosecution.

§ 5.4. Expert Testimony in Rape Cases — Extrajudicial Identification.* Under Massachusetts law, a witness may not be asked directly whether a rape or sexual assault has occurred.[1] Because such testimony would substantially prejudice the jury's decision on an ultimate issue of fact, Massachusetts courts have ruled the testimony to be inadmissible.[2] In the 1966 decision, *Commonwealth v. Gardner*,[3] the Supreme Judicial Court first ruled on the admissibility of an expert's testimony that a rape had occurred.[4] Based on the expert's examination of the alleged victim's person and clothing, his observance of her emotional state, and her account of "what happened," the trial court permitted a gynecologist to testify that a rape had taken place.[5] Because medical testimony that acts of intercourse had been accomplished by a "forcible entry" was tantamount to testimony that the victim was raped, the Supreme Judicial Court

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[99] *Id.* (Emphasis added). *Compare Cancel, id.* (cumulative errors created substantial risk of miscarriage of justice; conviction reversed) *with* Commonwealth v. Pickles, 393 Mass. at 780, 473 N.E.2d at 697 (single erroneous instruction created substantial risk of miscarriage of justice; conviction reversed); Commonwealth v. Wood, 380 Mass. at 549–50, 404 N.E.2d at 1227 (single erroneous jury charge created substantial risk of miscarriage of justice; conviction reversed).

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§ 5.4. [1] *See, e.g.*, Commonwealth v. Montmeny, 360 Mass. 526, 528, 276 N.E.2d 688, 690 (1971); Commonwealth v. Gardner, 350 Mass. 664, 666–67, 216 N.E.2d 558, 560–61 (1966).

[2] *Gardner*, 350 Mass. at 667, 216 N.E.2d at 560–61.

[3] 350 Mass. 664, 216 N.E.2d 558 (1966).

[4] *Id.* at 665–67, 216 N.E.2d at 559–61.

[5] *Id.* at 665–66, 216 N.E.2d at 559–60.

ruled that the medical testimony should have been excluded.[6] The Court found, moreover, that the expert witness's opinion, presented as the unbiased testimony of an expert, could have improperly and substantially influenced the jury's decision as to whom to believe, and thus should have been excluded.[7]

In addition to the issue of the admissibility of an expert's testimony that a rape has occurred, the Massachusetts courts have dealt with the admissibility of extrajudicial identifications.[8] In the 1984 decision, *Commonwealth v. Daye*,[9] the Supreme Judicial Court held that an extrajudicial identification cannot be used substantively unless the identifying witness acknowledges that the identification was, in fact, made.[10] In *Daye*, testimony by a police officer that a witness had identified a photograph of the defendant from a pre-trial photographic array was held to be invalid because the witness denied making the identification.[11]

During the *Survey* year, in *Commonwealth v. Mendrala*,[12] the Massachusetts Appeals Court reaffirmed the well-established principle that an expert witness may not be asked directly whether a victim has suffered from a rape or other sexual assault.[13] In addition, the *Mendrala* court ruled that the complainant's hysterical identification of the defendants was admissible as a spontaneous utterance exception to the hearsay rule, even though the complainant did not acknowledge this extrajudicial identification at trial.[14] Although the complainant failed to acknowledge that

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[6] *Id.* at 666, 216 N.E.2d at 560.

[7] *Id.* at 667, 216 N.E.2d at 561. The court noted, "We are not persuaded that a gynecologist, or other expert, possesses skills or special experience which might enable him to determine . . . that acts of intercourse amounted to rape." *Id.*, 216 N.E.2d at 560.

[8] *See, e.g.*, Commonwealth v. Daye, 393 Mass. 55, 469 N.E.2d 483 (1984). An extrajudicial identification is one in which the identification has occurred outside of the trial proceeding. *Id.* at 57, 469 N.E.2d at 487–88.

[9] *Id.*

[10] *Id.* at 61, 469 N.E.2d at 488.

[11] *Id.* at 61–62, 469 N.E.2d at 488.

[12] 20 Mass. App. Ct. 398, 480 N.E.2d 1039 (1985).

[13] *Id.* at 404, 480 N.E.2d at 1042. In *Commonwealth v. Montmeny*, 360 Mass. 526, 528, 276 N.E.2d 688, 690 the Supreme Judicial Court reasserted *Gardner's* reasoning by stating that a direct opinion by an expert witness that a rape occurred is beyond the witness's province as an expert witness. *Id.* The Court found that where the jury is equally competent in drawing the conclusion sought from the expert witness, the expert's testimony is inadmissible. *Id.* at 528, 276 N.E.2d at 689.

[14] *Mendrala*, 20 Mass. App. Ct. at 401, 480 N.E.2d at 1041. Although the court did not explicitly state that an acknowledgment was not made, it can be inferred from the opinion that this was the case. The complainant testified that one of her assailants had been one of the front seat passengers, that Mendrala was the driver, and that she could not identify Bailey. *Id.* at 400, 480 N.E.2d at 1040. However, the court states, "although at the time the Commonwealth rested its case, there was evidence that he [Bailey] was one of three men in the car with the complainant, there was no evidence, other than the hearsay

the identification was made, the *Mendrala* court held that *Daye*[15] does not prevent the admissibility of her identification through the use of another exception to the hearsay rule, such as a spontaneous utterance.[16]

In *Mendrala*, the complainant, a twenty-one year old woman, was picked up by three men in a car.[17] She was, by her own account, "drunk."[18] In the vehicle, she joined the men in drinking more alcohol, and smoking marijuana.[19] The driver of the automobile refused to take the route she requested, and when she asked the men to turn the car around, they started laughing.[20] After repeated requests, she was allowed to relieve herself in an isolated area outside of the car.[21] When she ran to some bushes, two of the men followed her, prevented her from pulling her pants up, and took turns touching her vagina with their fingers.[22]

Thereafter, the two men dragged her back toward the car at which time the headlights of another vehicle became visible.[23] This other vehicle was a police car.[24] One of the officers in the car that night testified that he noticed a young woman with her pants down near the rear of the first car.[25] She tried to escape but was apprehended and placed in the back of the police car.[26] The officer also noticed a person wearing a white hat enter the car through the driver's door.[27] The car, which appeared to have two people[28] in the front seat, backed away, turned around, and was followed by the police car at a rapid rate of speed.[29] After a short car pursuit, the two men were stopped by the police.[30] At the direction

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testimony of the officers, that he was one of the two men who allegedly assaulted her." *Id.* at 400, 480 N.E.2d at 1040. Furthermore, the court stated, "although the identification could not qualify under the exception to the hearsay rule set forth in *Daye* . . . ," acknowledgment of identification is required for the *Daye* exception to apply. *Id.* at 401, 480 N.E.2d at 1041. Accordingly, it appears that the complainant never made an acknowledgment of her extrajudicial identification.

[15] 393 Mass. 55, 469 N.E.2d 483 (1984).

[16] *Mendrala*, 20 Mass. App. Ct. at 401, 480 N.E.2d at 1041.

[17] *Id.* at 399, 480 N.E.2d at 1040.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 400, 480 N.E.2d at 1040.

[28] *Id.* It is difficult to ascertain from the facts what happened to the third man. It appears that he alighted from the car when the complainant was relieving herself, and escaped when the police arrived on the scene. *Id.* at 400, 480 N.E.2d at 1040.

[29] *Id.*

[30] *Id.*

of the police officers, the two occupants emerged from their vehicle, were handcuffed, and placed on the ground in the beam of the police car's headlights.[31] According to the police officers, the complainant was hysterical, and "began to approach the two subjects on the ground screaming that they were the ones who had hurt her."[32] After these events, the complainant was taken to the emergency room where she was examined by Dr. Conway.[33]

At trial, both police officers identified Bailey as the passenger and Mendrala as the driver.[34] The complainant identified Mendrala as the driver, but did not identify Bailey.[35] Dr. Conway, the complainant's examining physician, testified that, when the complainant arrived at the hospital, her clothes were in disarray and her face was dirty and appeared tear-stained.[36] Dr. Conway further testified that the complainant had bruises on her wrists, knees and buttocks, and there was increased redness in her vaginal area.[37] He recorded her history and described her as emotionally upset.[38] After an extensive voir dire, Dr. Conway was asked, in each case over the defendants' objection, to form an opinion to a medical certainty as to the cause of the complainant's state when he examined her.[39] Dr. Conway responded by testifying that, based on his experience, the history, and the physical examination, the complainant was sexually assaulted.[40] On cross-examination, Dr. Conway admitted that he could not have reached his conclusion solely on the basis of his physical examination of the victim.[41]

After being convicted of indecent assault and battery and attempted rape, the defendants appealed claiming error in evidentiary rulings by the trial judge.[42] The Appeals Court held that the doctor's testimony was improperly admitted, and that the defendants were entitled to a new trial on this basis.[43] The Appeals Court began its opinion by stating that where there are charges of sexual assault, the question of guilt or innocence

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[31] *Id.*

[32] *Id.*

[33] *Id.* at 402, 480 N.E.2d at 1041.

[34] *Id.* at 400, 480 N.E.2d at 1040.

[35] *Id.*

[36] *Id.* at 402, 480 N.E.2d at 1041.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* He admitted that if the victim had "said she had fallen off her bike, the bruises that I found could be those caused by falling off a bicycle, that's true." *Id.* at 404, 480 N.E.2d at 1043.

[42] *Id.* at 399, 480 N.E.2d at 1039.

[43] *Id.* at 399–404, 480 N.E.2d at 1040–43.

rests in large part "upon whether the jury believed the victim's version of what happened or the defendant[s']."[44] The unbiased testimony of an expert, the court noted, could substantially influence the jury's decision as to whom to believe.[45] Therefore, the court held, an expert's opinion that there was a rape, could "possibly prejudice" the defendant.[46]

Under current standards, the court further stated, expert testimony is admissible even if the expert's opinion touches on the ultimate issues that the jury must decide.[47] The court stated the evidence is only admissible, however, when the testimony is of assistance to the jury in reaching their decision.[48] An expert may not, the court stated, "offer his opinion on issues that the jury are equally competent to assess, such as the credibility of witnesses."[49] Where such issues are present, the court noted, the influence of an expert's opinion may threaten the independence of the jury's decision.[50]

Unless there are special factual circumstances,[51] the court held that an expert witness, no matter how well qualified, may not be asked directly whether a rape or sexual assault has occurred.[52] The court stated that "[s]uch a direct opinion . . . [is] beyond the witness's appropriate province as an expert witness."[53] An expert, like the doctor in *Gardner*, the court noted, does not possess the skills or experience to determine that acts of intercourse amounted to rape.[54] As did the doctor in *Gardner*,[55] the court further analogized, Dr. Conway admitted that he could not have reached his opinion solely on the basis of his examination of the victim.[56] Moreover, the court stated, the jury in this case, as in *Gardner*,[57] "w[as]

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[44] *Id.* at 402–03, 480 N.E.2d at 1041–42 (quoting *Gardner*, 350 Mass. at 667, 216 N.E.2d at 561).

[45] *Id.* at 403, 480 N.E.2d at 1042.

[46] *Id.* (citing *Gardner*, 350 Mass. at 667, 216 N.E.2d at 560–61).

[47] *Id.* (quoting Simon v. Solomon, 385 Mass. 91, 105, 431 N.E.2d 556, 566 (1982); citing Commonwealth v. Montmeny, 360 Mass. at 527–29, 276 N.E.2d at 689–90).

[48] *Id.* at 403, 480 N.E.2d at 1042.

[49] *Id.* (quoting *Simon*, 385 Mass. at 105, 431 N.E.2d at 566).

[50] *Id.* (citing *Gardner*, 350 Mass. at 667, 216 N.E.2d at 561).

[51] *Id.* at 404, 480 N.E.2d at 1042. The court noted that in certain cases involving children, expert testimony may be helpful. *Id.* at 404 n.7, 480 N.E.2d at 1042 n.7.

[52] *Id.* at 404, 480 N.E.2d at 1042.

[53] *Id.* (quoting *Montmeny*, 360 Mass. at 528, 276 N.E.2d at 690).

[54] *Id.* at 404, 480 N.E.2d at 1042–43. The court noted that there is an equal danger of enhancing the victim's testimony when the expert relates statements made by the complainant, *see* Commonwealth v. Spare, 353 Mass. 263, 266, 230 N.E.2d 798, (1967), or bases his opinion on the history taken from the victim, *see* Commonwealth v. Russ, 232 Mass. 58, 73–74, 122 N.E. 176 (1919). Both, the *Mendrala* court further noted, occurred in the case before it. *Mendrala*, 20 Mass. App. Ct. at 404 n.8, 480 N.E.2d at 1043 n.8.

[55] 350 Mass. at 665–66, 216 N.E.2d at 559–60.

[56] *See supra* note 41.

[57] 350 Mass. 664, 216 N.E.2d 558.

equally capable of drawing the conclusion sought from an expert witness," and thus the doctor's testimony was improperly admitted.[58]

Although the doctor's testimony was the deciding factor in granting the defendants a new trial, the court also ruled on the admissibility of the complainant's identification of her attackers.[59] The court stated that the testimony of the police officers, recounting the complainant's scream identifying the two men, was critical evidence.[60] The court then examined what impact the *Daye*[61] decision should have on the issue. The *Daye* decision, the *Mendrala* court stated, prevents substantive use of an extrajudicial identification unless the identifying witness acknowledges that the identification was made.[62] If such an acknowledgment cannot be made, according to the *Mendrala* court, the identification's "probative worth is outweighed by the hazard of error or falsity in reporting."[63] Because the complainant failed to make an acknowledgment,[64] the court reasoned, the identification could not qualify under the exception to the hearsay rule set forth in *Daye*.[65]

In spite of the fact that the identification could not be admitted under the *Daye* analysis, the court ruled that it could be admitted under the spontaneous utterance exception to the hearsay rule.[66] Nothing in *Daye*, the court noted, precludes an identification whose reliability is established by another exception to the hearsay rule.[67] The *Mendrala* court ruled that the trial judge had discretion to admit this identification, which appeared to be "instinctual" and not "contrived and calculated," as a spontaneous exclamation.[68] Because there was sufficient evidence of the pre-trial identification, the court held that the denial of the defendant's motion for a not guilty verdict was proper.[69]

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[58] *Mendrala*, 20 Mass. App. Ct. at 404, 480 N.E.2d at 1043.

[59] *Id.* at 400–01, 480 N.E.2d at 1040–41.

[60] *Id.* at 400, 480 N.E.2d at 1040.

[61] 393 Mass. 55, 469 N.E.2d 483 (1984).

[62] *Mendrala*, 20 Mass. App. Ct. at 400–01, 480 N.E.2d at 1040–41.

[63] *Id.* at 401, 480 N.E.2d at 1041 (quoting *Daye*, 393 Mass. at 61, 469 N.E.2d at 488, *quoting* McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 588 (1947).

[64] *See supra* note 14.

[65] 20 Mass. App. Ct. at 401, 480 N.E.2d at 1041.

[66] *Id.*

[67] *Id.*

[68] *Id.* In order to be admitted as a spontaneous utterance, the utterance "must have been before there has been time to contrive and misrepresent. . . . It is to be observed that the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. . . . [T]here can be no definite and fixed limit of time. Each case must depend on its own circumstances." Commonwealth v. Hampton, 351 Mass. 447, 449, 221 N.E.2d 766, 767 (1966).

[69] *Mendrala*, 20 Mass. App. Ct. at 402, 480 N.E.2d at 1041.

Mendrala is significant in two respects. First, the decision reaffirms the long-standing principal of Massachusetts law that an expert may not be asked directly, at trial, whether a person has suffered a rape or other sexual assault. Second, *Mendrala* clarifies the *Daye* standard for the admissibility of extrajudicial identifications by holding that such an identification may be admitted through the use of a hearsay exception other than the one outlined in *Daye*.

The *Mendrala* court properly respected the jury's fact-finding role[70] and the limits of expert testimony. Part of the jury's function is to listen to the testimony from the victim, the defendant, experts and other witnesses to determine the ultimate issues of whether a rape or sexual assault occurred and whether the defendant committed it. The question of the defendant's guilt or innocence rests in large part upon whether the jury believes the victim's version of what happened or the defendant's version.[71] If a doctor were allowed to offer a direct opinion that a rape or sexual assault occurred, the independence of the jury's opinion surely would be affected.[72] Furthermore, the admission of the expert's testimony as to whether a rape or sexual assault occurred could result in improper prejudice to the defendant.[73] It is probable that a jury would regard questions put to a doctor as to whether a rape occurred as tantamount to asking the expert if, in his opinion, the defendant was guilty.[74]

Moreover, the role of the expert witness is to help the jury understand issues of fact beyond their common experience.[75] An expert witness, therefore, may not offer an opinion on issues that the jury is equally competent to assess.[76] If a doctor were allowed to offer a direct opinion on whether a rape had occurred, he or she clearly would be outside of his or her province as an expert.[77] The doctor, moreover, improperly would be giving his or her opinion based on factors outside the area of his or her professional competence.[78] Although a doctor is able to determine that sexual intercourse took place, the doctor is no more capable than the jury of determining whether this act of intercourse was consented to or not. Consent cannot be ascertained from a physical examination of the complainant. Where the jury is equally competent of reaching the conclusion sought from a doctor or other expert witnesses, the expert's

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[70] *See, e.g.*, Simon v. Solomon, 385 Mass. 91, 105, 431 N.E.2d 556, 566 (1982).
[71] *Gardner*, 350 Mass. at 667, 216 N.E.2d at 561.
[72] *See, e.g., Simon*, 385 Mass. at 105, 431 N.E.2d at 566.
[73] *See, e.g., Gardner*, 350 Mass. at 667, 216 N.E.2d at 560–61.
[74] *Id.* at 666, 216 N.E.2d at 560.
[75] *See Simon*, 385 Mass. at 105, 431 N.E.2d at 566.
[76] *Id.*
[77] *Montmeny*, 360 Mass. at 528, 276 N.E.2d at 690.
[78] *See supra* note 12.

testimony should be inadmissible.[79] Therefore, because the ultimate issue was beyond the doctor's province to decide, and because of the possible prejudice to the defendant, the *Mendrala* court was correct in disallowing the direct questioning of the doctor as to whether a sexual assault had occurred. Consequently, *Mendrala* reaffirms that practicing Massachusetts attorneys cannot directly ask an expert whether an alleged victim has suffered a rape or sexual assault.

The *Mendrala* court's ruling on the admissibility of an extrajudicial identification is also a significant development in Massachusetts evidence law. *Mendrala* states that the testimony by a person other than the identifying witness concerning an extrajudicial identification can be admissible for its probative worth, even when the witness does not acknowledge the identification, as long as it comes within another recognized exception to the hearsay rule.[80] By stating that such an identification can be admitted under a hearsay exception other than the stated exception in *Daye*, the *Mendrala* court effectively clarified the scope of the *Daye* decision.

The *Mendrala* ruling on the identification issue was proper. The defendants in *Mendrala* argued that the *Daye* decision precludes the admission of hearsay identifications, unless the identification is acknowledged at trial by the person who made the identification.[81] In response, the *Mendrala* court correctly pointed out that nothing in *Daye* precludes the use of another hearsay exception for having the extrajudicial identification admitted.[82] The *Daye* court never mentioned the possibility that another exception may be used but rather restricted its holding to admitting into evidence an extrajudicial identification where a witness acknowledges making such an identification.[83] By stating that other permissible hearsay exceptions can be used to admit extrajudicial identifications, the court effectively cleared up any confusion that the 1984 *Daye* decision may have created. Thus, because other exceptions are not precluded by *Daye*, the *Mendrala* court was correct in allowing the trial judge to use his discretion in admitting the identification under the spontaneous utterance exception to the hearsay rule. Furthermore, because the complainant was hysterical and made her identification immediately after the incident occurred, the trial judge's use of the spontaneous utterance rule clearly was warranted.[84] Consequently, Massachusetts attorneys can use *Men-*

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[79] *See Gardner*, 350 Mass. at 667, 216 N.E.2d at 560.

[80] *Mendrala*, 20 Mass. App. Ct. at 400–01, 480 N.E.2d at 1040–41.

[81] *Id.* at 400, 480 N.E.2d at 1040.

[82] *Id.* at 401, 480 N.E.2d at 1041.

[83] *Daye*, 393 Mass. at 60–61, 469 N.E.2d at 487–88.

[84] *See supra* note 68.

drala as their basis for admitting an extrajudicial identification under any permissible hearsay exception.

In sum, the *Mendrala* decision has affected two areas of Massachusetts law. First, *Mendrala* appropriately reaffirmed the principle that an expert witness, basing his opinion on factors other than a physical examination of the victim, may not be asked directly whether a rape or other sexual assault has occurred. In addition, the *Mendrala* court effectively eliminated any confusion surrounding the *Daye* decision in holding that *Daye* does not preclude the admission of an extrajudicial identification through the use of a hearsay exception other than the one outlined in *Daye*.