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Chapter 3: Criminal Law and Procedure

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CHAPTER 3

Criminal Law and Procedure

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§ 3.1. Summary Criminal Contempt.** Rule 43 of the Massachusetts Rules of Criminal Procedure governing summary contempt proceedings is not an exact duplicate of its federal counterpart, Rule 42(a) of the Federal Rules of Criminal Procedure. Present in the Massachusetts Rule, but absent from the Federal Rule, is the qualification that summary proceedings must be "*necessary to maintain order in the courtroom*" before they may be used.[1] A reasonable inference from this difference between the two rules is that a more rigorous standard will be applied in Massachusetts than is used in the federal courts when determining when summary contempt proceedings may be used. During the *Survey* year, however, in *Commonwealth v. Corsetti,*[2] the Supreme Judicial Court apparently rejected that inference when it held that a newspaper reporter who made an erroneous but good faith claim of privilege at a hearing on a motion to suppress could be held in summary criminal contempt without violating Rule 43 of the Massachusetts Rules of Criminal Procedure.[3]

Paul Corsetti was a reporter for the Boston Herald American in 1979 when he interviewed a murder suspect, named Edward Kopacz, in a Florida jail.[4] He subsequently published a story entitled "Convict, 18, Admits Role in Gay Murder."[5] On March 24, 1980 he was subpoenaed to a Middlesex County Grand Jury to testify about his conversations with Kopacz. He refused, claiming a reporter's privilege, and was held in civil contempt.[6] That case, *Corsetti I,*[7] was dismissed by the Supreme Judicial Court as moot when the grand jury which had summoned Corsetti ex-

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§ 3.1. ** Mr. Reilly's former firm was counsel for the defendant in the focal case of this section, Commonwealth v. Corsetti, 387 Mass. 1, 438 N.E.2d 805 (1982).

[1] MASS. R. CRIM. P. 43(a) (emphasis added).

[2] 387 Mass. 1, 438 N.E.2d 805 (1982).

[3] The Court's holding on the issue of the existence of an evidentiary privilege for reporters is not discussed in this section.

[4] 387 Mass. at 2 & n.2, 438 N.E.2d at 807 & n.2.

[5] *See id.* at 3, 438 N.E.2d at 807.

[6] *Id.* at 7, 438 N.E.2d at 810.

[7] Commonwealth v. Corsetti, 381 Mass. 778, 411 N.E.2d 466 (1980).

pired.[8] That grand jury returned an indictment charging Kopacz with first degree murder.

Prior to the murder trial Kopacz filed a motion to suppress his statements to Corsetti on the grounds that Corsetti had acted as an arm of the Commonwealth and that he, therefore, should have given Kopacz his Miranda Rights prior to taking a statement.[9] Kopacz also attempted to suppress his statements to Corsetti on the grounds that they were not voluntary.[10] Corsetti was called as a witness on March 6, 1981 during the hearing on the defendant's motion to suppress.[11] He refused to state whether he was the author of the story about the murder published under his byline.[12] He claimed a reporter's privilege.[13] The Court held him in summary criminal contempt and set a hearing on March 11, 1981 for disposition of the case against Corsetti.[14] That finding of contempt was dismissed on March 11 when Corsetti acknowledged his authorship of the article.[15] Corsetti answered several questions concerning the circumstances of these trips to Florida and to the jail where Kopacz had been incarcerated.[16] Corsetti was then asked to tell the Court the content of a telephone conversation with Kopacz which Corsetti felt was confidential.[17] His answer, "[a]s a result of the conversation I wrote the article," was stricken as unresponsive. He was instructed to provide a more complete answer. Corsetti stated, "I respectfully refuse to answer that question based on my rights under the First Amendment, Article 16 of the Massachusetts Constitution and the common law."[18] Consequently, Corsetti was summarily found in contempt.[19] The trial judge then held Corsetti in summary criminal contempt and sentenced him to the house of correction for three months.[20] The Supreme Judicial Court took the case on direct appellate review and Corsetti's sentence was stayed until the Court issued its decision.[21]

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[8] 387 Mass. at 7, 438 N.E.2d at 810.

[9] *Id.* at 2, 438 N.E.2d at 807. The irony of Kopacz claiming that Corsetti was a tool of the Commonwealth while Corsetti was being prosecuted for his refusal to cooperate with the Commonwealth was heightened by the final outcome of the proceedings; Kopacz was found not guilty of murder and Corsetti, the alleged agent of the Commonwealth, served several weeks in jail on his summary contempt conviction.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id. See supra* note 3.

[14] *Id.*

[15] *Id.* at 3, 438 N.E.2d at 807.

[16] *Id.*

[17] *Id.*

[18] *See id.*

[19] Record Appendix.

[20] 387 Mass. at 3, 438 N.E.2d at 808.

[21] *Id.* at 4, 438 N.E.2d at 808. The trial judge issued a 48-hour stay. A single justice of the

The Supreme Judicial Court upheld the trial court's decision to hold Corsetti in summary criminal contempt rather than give him the right to a trial on the issue of his contempt.[22] The Court initially noted that summary proceedings are disfavored.[23] The Court went on to state, however, that this defendant was not surprised by the contempt proceedings since the prior proceedings in *Corsetti I*[24] had put him on notice that this issue would arise.[25] The Court indicated that a polite claim of privilege could be said to disturb order in the courtroom when it delayed or disrupted a trial.[26] The Court determined that this type of conduct could be as unsettling to order as a more violent type of disruption.[27] Finally, the Court noted that as a practical matter a full jury trial in this case on the issue of contempt would serve "no useful purpose" for the Commonwealth or the defendant Corsetti.[28]

In its decision the Court blurred the distinction between criminal and civil contempt. Civil contempt is remedial. Its purpose is to coerce a reluctant witness to testify by use of the stick of imprisonment and the carrot of the ability to gain freedom by being purged of the contempt.[29] Criminal contempt "is punitive: its aim is to indicate the court's authority and to punish the contemner for . . . failing to act as ordered."[30] Most of the rationale used by the Court to justify summary criminal contempt proceedings is appropriate to civil contempts but not criminal. The Court noted, for instance, that without summary contempt the defendant's contempt trial would have either inordinately delayed the Kopacz trial or denied evidence to the Commonwealth.[31] Since there was no possibility of Corsetti changing his mind and testifying, and since the decision to hold him in criminal contempt precluded the possibility of purging himself from contempt, it was inevitable that the Commonwealth would not have its testimony. The decision to hold him in summary *criminal* contempt made it no more likely that the Commonwealth would get its evidence. Unlike a

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Appeals Court granted a stay of execution pending further appellate review and a single justice of the Supreme Judicial Court denied the Commonwealth's petition to vacate the Appeal's Court stay. *Id.*

[22] *Id.*

[23] *Id.* at 7, 438 N.E.2d at 809.

[24] *See supra* notes 6-8 and accompanying text.

[25] 387 Mass. at 7, 438 N.E.2d at 810.

[26] *Id.* at 8-9, 438 N.E.2d at 810-11.

[27] *Id.*

[28] *Id.* at 9-10, 438 N.E.2d at 811.

[29] *See* Sodones v. Sodones, 366 Mass. 121, 129-30, 314 N.E.2d 906, 912 (1974).

[30] *Id.* at 130, 314 N.E.2d at 912.

[31] 387 Mass. at 8 n.10, 438 N.E.2d at 810 n.10.

civil contempt, there is no necessity arising from the need for the evidence to justify rapidly imposed sanctions since the purpose of a criminal contempt is not remedial but punitive.

The Court's decision also makes it difficult to understand the significance of the requirement in Rule 43(a) of the Massachusetts Rules of Criminal Procedure that "[a] criminal contempt may be punished summarily when it is determined that *such summary punishment is necessary to maintain order in the courtroom.*"[32] Rule 43(a) mirrors the Federal Rule of Criminal Procedure 42(a) except that the emphasized language above is absent from the Federal Rule. The *Corsetti* Court in its holding relies heavily on the precedent of *United States v. Wilson.*[33] *Wilson,* however, interpreted Rule 42(a) of the Federal Rules. The Massachusetts Rule considered by the Court in *Corsetti* differs from the Federal Rule and apparently altered the standard for summary contempt. Although the court noted the difference in language between the rules,[34] it made no attempt to explain what impact or meaning the new Massachusetts language had. This is particularly disturbing in light of the reporter's notes to Rule 43(a) of the Massachusetts Rules of Criminal Procedure which emphasized the disfavor for summary contempt.[35] The Court's decision in this case appears to have rendered a deliberate attempt to make Massachusetts summary contempt proceedings less available into a nullity and merged the Massachusetts rule into the more lax federal practice.

Finally, it should be noted that there was no claim of actual prejudice by Corsetti.[36] The trial judge allowed Corsetti's counsel the full opportunity to argue.[37] The Court emphasized that its holding was limited to cases in which there was no claim that the summary proceedings were procedurally defective.[38] As a practical matter, it is difficult to imagine what more could have been gained for the defendant at a jury trial. The facts were undisputed and the real issue in any trial would be decided by the judge's decision in jury instructions.[39] In that regard, the summary nature of the proceedings probably had little if any effect on the outcome of the instant case. In terms of the more long range implications, however, the *Corsetti* Court's decision ends any hope that Massachusetts would limit the use of summary criminal contempt more strictly than the federal courts.

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[32] MASS. R. CRIM. P. 43(a) (emphasis added).

[33] 421 U.S. 309 (1975).

[34] 387 Mass. at 7-8 & n.9, 9, 438 N.E.2d at 810 & n.9, 811.

[35] MASS. ANN. LAWS, Rules of Criminal Procedure, at 595-96 (1979) (Reporter's Notes to Rule 43(a)).

[36] 387 Mass. at 7 & n.8, 438 N.E.2d at 809 & n.8.

[37] *Id.* at 7, 438 N.E.2d at 810.

[38] *Id.* at 9, 438 N.E.2d at 811.

[39] As a practical matter there is also the possibility that the defendant could benefit from jury nullification at a jury trial.

§ 3.2. Operation of Rule 29 — Upwards Revision of a Criminal Sentence After Its Execution — Double Jeopardy. The idea that a criminal sentence could be lawfully increased once its execution had begun seemed to be an established principle under Massachusetts law. During the *Survey* year, however, the Supreme Judicial Court held that under Rule 29 of the Massachusetts Rules of Criminal Procedure a criminal defendant's lawfully imposed sentence may be imposed despite the partial execution of the sentence. The Court in *Aldoupolis v. Commonwealth*[1] held that such an increased sentence does not violate double jeopardy.

In *Aldoupolis* five co-defendants were charged with rape, unnatural rape and malicious destruction of property.[2] On October 5, 1981 the defendants pleaded guilty and the judge imposed suspended sentences of three to five years in state prison, two years probation and court costs of $500.[3] The defendants contacted the Probation Department, signed probation contracts and began payments of the court costs.[4] Three days later on October 8th, however, the judge ordered all defendants to appear in court on the next day.[5] On October 9th the judge revoked his sentencing of October 5th and imposed actual three to five year sentences.[6] The judge acted under the authority of Rule 29 of the Massachusetts Rules of Criminal Procedure.[7] The judge further provided that each defendant could withdraw his guilty plea and go to trial on the merits.[8] Without

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§ 3.2. [1] 386 Mass. 260, 435 N.E.2d 330 (1982). Four companion cases involving Mr. Aldoupolis' co-defendants were joined before the Court.

[2] *Id.* at 261, 435 N.E.2d at 331.

[3] *Id.*

[4] *Id.* Court costs were imposed at a rate of $5.00 a week over the two-year probationary period. *Id.* at 261 n.3, 435 N.E.2d at 331 n.3. Payment schedules for court costs are normally based on the defendant's ability to pay as determined by the Probation Department.

[5] *Id.* at 261, 435 N.E. 2d at 331. The Court's opinion does not mention that on the morning of October 8, 1981 the Boston Herald American's front page consisted of a headline concerning the alleged light sentences in this case. The story went on to discuss the sentence imposed by the judge in a disapproving manner. Boston Herald American, October 7, 1981. Prior to this headline the case had received little or no publicity. (Author's interview with P.J. Piscatelli, defense counsel).

[6] *Id.* Because the sentences were to state prison, the defendants would have to serve two years before they were eligible for parole. G.L. c. 127, § 133.

[7] The rule provides in relevant part that:

> (a) *Revision or Revocation.* The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after the receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done.

[8] 386 Mass. at 261, 435 N.E.2d at 331. The court's decision is silent on whether this option was mandatory because the pleas had been offered pursuant to MASS. R. CRIM. P.

providing opportunity to defense counsel to argue, respond or object to the proceedings the trial judge ruled that the revocation of the sentence was necessary for three reasons.[9] First, because of the "public interest in the sentences,"[10] second, because of the question of the legality of a suspended sentence under chapter 279, sections 1 and 1(A) of the General Laws for the crime of rape charged under chapter 265, section 22, and finally, because of the District Attorney's objection to the suspended sentence and desirability of having the case go to trial on its merits.[11] The defendant Aldoupolis filed with a single justice of the Supreme Judicial Court for relief under chapter 211, section 3.[12] A stay was granted.[13] All five co-defendants petitioned the single justice and he transferred the case to the full court.[14]

The first question addressed by the Court was one of statutory construction. Chapter 279, section 1 of the General Laws forbids suspended sentences for "a person convicted of a crime punishable by death or imprisonment for life."[15] At the time the defendants committed the offense, chapter 265, section 22 provided that a person convicted of rape "shall be punished by imprisonment in the state prison for life or for any term of years."[16] Nevertheless, the Court ruled that the punishment clause in chapter 265, section 22 did not preclude the possibility of a suspended sentence under chapter 279, section 1.[17]

The Court explained that the meaning of the language, "a crime punishable by death or imprisonment for life," in chapter 279, section 1 was ambiguous in that it could apply to crimes which were only punishable by death or life imprisonment, or it could apply to any crime for which death or life imprisonment was a possible punishment.[18] The Court reviewed the legislative history of chapter 279, section 1 and found it unhelpful in discerning the legislative intent.[19] The Court then looked to chapter 266,

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12(c)(2)(A) which gives the defendant a right to withdraw his plea if the judge exceeds an agreed upon recommendation.

[9] 386 Mass. at 262, 435 N.E.2d at 331.

[10] *See supra* note 5.

[11] 386 Mass. at 262, 435 N.E.2d at 331.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See id.* at 263, 435 N.E.2d at 332.

[16] *See Id.*

[17] *Id.* at 267, 435 N.E.2d at 334.

[18] *Id.* at 264, 435 N.E.2d at 332.

[19] *Id.* at 265, 435 N.E.2d at 332-33. The legislature from 1925 through 1967 added and subtracted various crimes to the list of those which could not be suspended until the list in 1967 was reduced to "those crimes punishable by death or life imprisonment."

section 14.[20] That statute provides that burglary while being armed or coupled with an assault is punishable by "imprisonment in the state prison for life or for any term of years not less than ten years."[21] In 1966, one month after the Legislature amended chapter 279, section 1 to forbid suspended sentences for crimes punishable by life imprisonment, the Legislature amended chapter 266, section 14 to provide that the sentence for a second offense under chapter 266, section 14 could not be suspended.[22] The Court noted that the adoption of the Commonwealth's position that the possibility of life imprisonment precluded a suspended sentence under chapter 279, section 1, would render the 1966 amendment to chapter 266, section 14 "surplusage" since a suspended sentence would already be banned under chapter 279, section 1.[23] The Court concluded that chapter 279, section 1 prohibits suspended sentences only when punishment for a crime is limited to death or life imprisonment.[24] The Court determined therefore that the original sentences were legally suspended.[25]

The Court next considered whether the trial judge had the power to revise and revoke the legal sentence initially imposed.[26] The Court held that the literal language of Rule 29 of the Massachusetts Rules of Criminal Procedure which gives the trial judge the power to revise and revoke a sentence within sixty days "upon such terms and conditions as he shall order"[27] must be interpreted to allow such a course of action[28] despite the reporter's notes to the rule which indicated that the illegality of an increase in a legally imposed sentence "has, however, long been settled."[29] A review of the cases discussed by the Court indicates that the reporter was correct in noting that once execution of a sentence has begun it has "long been settled" that a legal sentence may not be increased. The Court, however, used the first case it discussed, *Commonwealth v.*

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[20] *Id.* at 265-66, 435 N.E.2d at 333-34.

[21] *Id.* at 266, 435 N.E.2d at 333.

[22] *Id.*

[23] *Id.* at 266, 435 N.E.2d at 333. The Court's interpretation of this complicated interplay between statutes was based on the rule of statutory interpretation that presumes the Legislature in passing a later amendment has passed enactments in mind and is deliberately designing an integral whole. Commonwealth v. King, 202 Mass. 379, 88 N.E. 454 (1909). It must be noted that this presumption of legislative omniscience is pushed to its limits when applied to legislative action, such as the above, which seems to be haphazard and unplanned.

[24] 386 Mass. at 267, 435 N.E.2d at 334.

[25] *Id.*

[26] *Id.* at 268-75, 435 N.E.2d at 334-38.

[27] MASS. R. CRIM. P. 29(a).

[28] 386 Mass. at 268-71, 435 N.E.2d at 334-36.

[29] MASS. ANN. LAWS, Rules of Criminal Procedure, at 474 (1979) (Reporter's Notes to Rule 29(a)).

Weymouth,[30] to contradict this apparently settled legal principle. The *Aldoupolis* Court accomplished this result by interpreting the *Weymouth* Court's decision as not relying on the fact that the original sentence had not yet been executed in allowing that initial sentence to be increased.[31] A close reading of *Weymouth* does not support this interpretation of its holding. The *Weymouth* Court held that "the true test" for whether or not a sentence could be revised was "whether it will affect the legal rights of the parties."[32] The revising of the original sentence in *Weymouth* was justified by explaining:

> That sentence (the original sentence) never went into operation, and in effect was the same as if it had never been passed. So long as it remained unexecuted, it was, in contemplation of the law, in the breast of the court and subject to revision and alteration.[33]

The Court's holding in *Weymouth* squarely ruled that a sentence could not be revised unless it was unexecuted.

That rule was followed by every case decided on this issue until the 1982 session of the Court.[34] The case relied upon by the *Aldoupolis* Court to support its claim that the question of execution was not crucial to the holdings in *Weymouth* and its progeny was *District Attorney for the Northern District v. Superior Court*.[35] Yet in that case the Court emphasized at several points that its holding was solely that a sentence could be revised *downward* after execution. The Court in that case, in fact, distinguished *Weymouth* by noting that in *Weymouth* the issue was not whether a sentence could be reduced after execution had begun but rather whether a sentence could be *increased* "during the same term of court before the defendant had started to serve his sentence."[36] Finally, the court in the *District Attorney* case noted that the concern in *Weymouth* that an *increase* in sentence after execution would raise the possibility of unfairness and double jeopardy was not present when a court *reduced* a sentence after execution since the prisoner "is not likely to complain. . . ."[37]

In summation, the Court in *Commonwealth v. Aldoupolis* overturned

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[30] 84 Mass. (2 Allen) 144 (1861).

[31] 386 Mass. at 270-71, 435 N.E.2d at 336.

[32] 84 Mass. (2 Allen) 144, 147 (1861).

[33] *Id.*

[34] *See* Commonwealth v. O'Brien, 175 Mass. 37, 55 N.E. 466 (1899) (sentence amended during stay of execution); Commonwealth v. Sitko, 372 Mass. 305, 361 N.E.2d 1258 (1977) (defendant defaulted prior to execution of sentence, thus revision is permissible); Commonwealth v. Foster, 122 Mass. 317 (1877) (sentence on additional counts after execution is improper).

[35] 342 Mass. 119, 172 N.E.2d 245 (1961).

[36] *Id.* at 126, 172 N.E.2d at 249-50 (emphasis added).

[37] *Id.* at 123-24, 172 N.E.2d at 248.

its long-standing rule that a sentence could not be revised upwards after execution. In doing so, the Court first denied that such a rule existed and secondly, relied upon very weak precedent to support its interpretation of the *Weymouth* case. The Court should have held that under Massachusetts practice the legally imposed, partially executed sentences in this case could not be revised upwards.

The Court next addressed the defendant's claim that a rule allowing such an increased sentence would violate double jeopardy. The Court, relying on *United States v. DiFrancesco*,[38] first explained that the fifth amendment protection against multiple punishment was not offended by the procedure in this case because the defendants were not ultimately sentenced to a term greater than that prescribed by the Legislature for the crime of rape.[39] It must be noted that *DiFrancesco* explicitly withheld judgment on whether a sentence may be increased after it has begun to be served.[40] The Court did not discuss the dicta in the *DiFrancesco* case which noted that the double jeopardy clause was drafted with the common law in mind, and at common law the principle against increasing a sentence once the sentence had begun was an accepted one.[41]

The second prong of double jeopardy analysis by the Court focused on the finality interest of the double jeopardy clause.[42] The clause protects defendants against repeated attempts to convict them for the same crime. Traditionally once a judgment in a criminal case was final, a defendant could not be punished again.[43] The Court, again relying on *DiFrancesco*, held that since it had determined earlier in the decision that the trial court had the right under Rule 29 of the Massachusetts Rules of Criminal Procedure to revise a sentence within sixty days of sentencing,[44] the defendant had no expectation of finality until that point.[45] In light of the fact that this was apparently the first case in the history of the Commonwealth which allowed an *increase* of sentence after the execution had issued, it seems disingenuous of the Court to suggest that "the defendants should not have had an expectation of finality in their sentences in the face of this rule."[46] In *United States v. DiFrancesco*,[47] a statute explicitly granted the government a right to appeal and discussed at great length the

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[38] 449 U.S. 117 (1980).

[39] 386 Mass. at 274, 435 N.E.2d at 337.

[40] 449 U.S. 117, 134 (1980).

[41] *Id.*

[42] 386 Mass. at 274-75, 435 N.E.2d at 337-38.

[43] United States v. Jorn, 400 U.S. 470 (1971); Fine v. Commonwealth, 312 Mass. 252, 44 N.E.2d 659 (1952).

[44] *See* 386 Mass. at 268-71, 435 N.E.2d at 334-36.

[45] *Id.* at 274, 435 N.E.2d at 338.

[46] *Id.*

[47] 449 U.S. 117 (1980).

procedures for a review of sentence by the court of appeals.[48] The expectations of a defendant sentenced pursuant to that federal statute are not comparable to the expectations of the defendants in the instant case. Mr. Aldoupolis and his co-defendants had every legitimate expectation, based on prior law and experience, that once they began to serve their sentences they would not later receive more severe ones. That expectation is protected under the double jeopardy clause and should have been upheld by the Court.[49]

In summary, the *Aldoupolis* Court made several major pronouncements. First, the Court restricted the application of chapter 279, section 1 by holding that its prohibition of suspended sentences would operate only where the designated punishment for the crime in question was *limited* to "death or imprisonment for life."[50] The Court thereby left open the possibility of a suspended sentence for a number of serious crimes which are punishable by life imprisonment, but which also allow for sentencing to a term of years. While this was not a key issue for the defendants in the instant case,[51] it may well prove to be a controversial point in the future.[52] Secondly, the Court reversed a long-standing rule against increasing a criminal sentence once it has been executed.[53] The Court interpreted Rule 29(a) of the Massachusetts Rules of Criminal Procedure in a manner which gives trial judges virtually unlimited discretion in altering sentences within sixty days of the sentencing date. Finally, the Court held that its new rule was perfectly consistent with state and federal double jeopardy concepts.[54] Accordingly, criminal defendants will now have to sit tight for 60 days after being sentenced, regardless of whether or not they begin serving any sentence which is imposed, before they will know with any certainty what exactly the full extent of their punishment will be.

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[48] *See* 18 U.S.C. § 3576.

[49] The final portion of the decision held that the resentencing procedure followed by the trial judge denied the defendants their right to be heard at sentencing. 386 Mass. at 275-76, 435 N.E.2d at 338-39. The Court indicated that a judge revising a sentence should provide notice, a hearing and specific reasons for his finding that "[j]ustice may not have been done." *Id.* at 276, 435 N.E.2d at 338. The Court remanded the case for retrial and suggested that the original judge excuse himself from participating in the resentencing. *Id.* at 276, 435 N.E.2d at 339.

[50] *Id.* at 263-67, 435 N.E.2d at 331-34.

[51] Even though the Court held that the defendants could legally have received suspended sentences for their crimes, the rest of the opinion ensures that these defendants will serve actual time in prison and will in no way benefit from the Court's generous interpretation of chapter 279, section 1.

[52] Aside from the legal arguments to be mustered against the majority's interpretation of chapter 279, section 1, *see* 386 Mass. at 276-77, 435 N.E.2d at 339 (Nolan, J., dissenting), a crime-conscious Legislature may well be unpleasantly surprised by the Court's handling of the apparently "tough" sentencing provision it passed.

[53] *See supra* notes 26-36 and accompanying text.

[54] 386 Mass. at 271-75, 435 N.E.2d at 336-38.

§ 3.3. Grand Jury Proceedings — Unauthorized Persons — Invalidation of Indictments. Under the Massachusetts Constitution indictment by a grand jury is required as a prerequisite to prosecution of "capital or otherwise infamous" crimes.[1] During the *Survey* year, the Supreme Judicial Court strongly reaffirmed the Massachusetts rule that unauthorized persons in the grand jury room will invalidate such an indictment. The Court in *Commonwealth v. Pezzano*[2] used that rule to dismiss kidnapping, armed robbery and conspiracy charges against two men, Sylvano Pezzano and Dante Ferrara.

In late 1977 or early 1978 an inmate, Alphonse Mellone, agreed after negotiations with the district attorney's office to provide information to State Trooper John W. Brien against Ferrara, Pezzano, and two other men.[3] In June of 1978 Trooper Brien and another trooper went to the Billerica House of Correction and attempted to talk to Ferrara who was being held there on other matters.[4] Ferrara refused to talk to them.[5] Ferrara did agree to talk to the second trooper several days later after receiving a promise that he would not be indicted.[6] On July 13, 1978 Ferrara met with the assistant district attorney, Trooper Brien and three other state troopers.[7] Trooper Brien and Ferrara did not talk to each other.[8] Later on that day, Trooper Brien was appointed by a superior court judge to provide security while Mellone and Ferrara testified before the grand jury.[9] Brien was sworn to uphold the secrecy of the grand jury proceedings.[10] He was present while Mellone and Ferrara testified.[11] He was dressed in plain clothes and was introduced to the jurors.[12] He stayed in the rear of the room and did not question the witness or make any comments.[13]

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§ 3.3. [1] Jones v. Robbins, 74 Mass. (8 Gray) 329, 344-47 (1857) (construing article 12 of the Declaration of Rights); *see* Opinion of the Justices, 373 Mass. 915, 918, 371 N.E.2d 422, 423 (1977).

[2] 387 Mass. 69, 438 N.E.2d 841 (1982).

[3] *Id.* at 70-71, 438 N.E.2d at 842.

[4] *Id.* at 71, 438 N.E.2d at 842-43.

[5] *Id.* at 71, 438 N.E.2d at 843.

[6] *Id.* The decision is silent on why Ferrara was ultimately indicted despite this promise. A promise not to indict if a defendant cooperates is enforceable by the defendant. It may be that the defendant did not keep his side of the bargain and thereby released the Commonwealth from its obligation.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id. See* MASS. R. CRIM. P. 5(d) which presently governs the secrecy of grand jury proceedings.

[11] 387 Mass. at 71, 438 N.E.2d at 843.

[12] *Id.*

[13] *Id.* at 71 & n.4, 438 N.E.2d at 843 & n.4.

The defendants filed a motion to dismiss because of Trooper Brien's unauthorized presence in the grand jury room.[14] The superior court judge found that Brien was a potential witness in the case[15] but denied the motion and found that Trooper Brien's presence did not influence the grand jury or the testimony of Ferrara.[16] The judge reported the issue to the Appeals Court[17] and the Supreme Judicial Court took the case on its own motion.[18]

In overturning the superior court justice, the Court found that the question presented when the issue of unauthorized presence is raised is whether "the presence of a certain person could interfere with the truth-seeking goal of grand jury."[19] The Court explained that even if a guard was necessary in this case for the security of the grand jury, there was no reason why that guard should be the chief investigator in the case.[20] The Court also held that the codification in Rule 5(c) of the Massachusetts Rules of Criminal Procedure of those persons who would be allowed to be present at the grand jury proceeding should not be interpreted as a liberalization of the rule against unauthorized persons in the grand jury room.[21] The Court concluded that once it found that an unauthorized person had been present the sanction of dismissal of the indictment was automatic.[22] The defendant was not required to show actual prejudice.[23] The Court also indicated that it disagreed with the superior court's factual finding that there was no risk of prejudice involved.[24]

Justice Nolan dissented. He argued that the Court's decision in *Commonwealth v. Favuli*,[25] which allowed multiple prosecutors in the grand jury room at one time, should have controlled in this case.[26] He also pointed to the fact that Trooper Brien had been authorized by a superior court judge to be present for security at the grand jury proceeding.[27]

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[14] *Id.* at 70, 438 N.E.2d at 842.

[15] *Id.* at 71, 438 N.E.2d at 843.

[16] *Id.*

[17] *See* MASS. R. CRIM. P. 34.

[18] *See* 387 Mass. at 69, 438 N.E.2d at 842.

[19] *Id.* at 73, 438 N.E.2d at 844.

[20] *Id.* at 74, 438 N.E.2d at 844.

[21] *Id.* at 72 & n.5, 438 N.E.2d at 843 & n.5.

[22] *Id.* at 72-73, 76, 438 N.E.2d at 843-44, 845-46.

[23] *Id.* at 76, 438 N.E.2d at 845-46.

[24] *Id.* at 77, 438 N.E.2d at 846. The Court does not explain the basis for its disagreement on this factual issue other than to say it is based on "our reading of the transcript of the hearing on the motion." *Id.* This fact-finding by the Court is particularly surprising since the decision indicates that the superior court justice had the opportunity to see Ferrara testify at the hearing on the motion. *Id.*

[25] 352 Mass. 95, 224 N.E.2d 422 (1967).

[26] 387 Mass. at 78, 438 N.E.2d at 846.

[27] *Id.*

Finally, Justice Nolan objected to the majority's failure to accept the superior court's finding that Ferrara was not influenced by the presence of Trooper Brien.[28]

The *Pezzano* Court did not explain in exactly what manner the presence of Trooper Brien interfered with the truth-seeking goal of the grand jury. Several general concerns were cited by the Court, some of which are inapposite in this case. For instance, there is no reason to believe that the secrecy of the grand jury[29] was imperiled by the presence of Trooper Brien. Rule 5(d) of the Massachusetts Rules of Criminal Procedure specifically forbids him, as "a person performing an official function in relation to the grand jury," from disclosing matters before the grand jury.[30] Similarly, the related concern that innocent witnesses or potential grand jury targets might be harmed by a breach in grand jury secrecy[31] should not have been a concern in this case. A second type of concern arising from the presence of unauthorized persons at the grand jury proceeding is the possibility that the grand jurors or witnesses would be affected by their presence.[32] The chance that the grand jurors were influenced in this case seems slight. Trooper Brien was dressed in plain clothes and said nothing to the grand jury.[33]

The most likely legitimate source for the Court's concern is the possibility that the witness[34] was awed or intimidated by the presence of the state trooper. The Court's decision in *Opinion of the Justices*[35] is particularly illuminating on this issue. There the Court considered a bill being contemplated by the Legislature which would have allowed police to assist the district attorneys in the grand jury room and rejected it primarily because of the possibility that police officers would subject witnesses to fear or intimidation.[36] In this case the danger was even more acute. Trooper Brien had personally interviewed Ferrara and had apparently been unable

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[28] *Id.*

[29] *See id.* at 73, 438 N.E.2d at 844. *See also* MASS. R. CRIM. P. 5(d).

[30] The action of the superior court in appointing Brien seems to clearly put him within the definition of "a person performing an official function" for the purposes of MASS. R. CRIM. P. 5(d).

[31] 387 Mass. at 73, 438 N.E.2d at 844.

[32] *Id.; see* Opinion of the Justices, 232 Mass. 601, 604, 123 N.E. 100, 101 (1919).

[33] Nevertheless, the possibility that the jurors would infer that the defendants were particularly vicious or that the case was particularly important from the fact that a guard was present only for this case cannot be rejected lightly. The Court in Commonwealth v. Favuli, 352 Mass. 96, 224 N.E.2d 422 (1967), rejected a similar argument only because in that case the importance of the matter was apparent to the grand jury even without the presence of extra persons in the grand jury room.

[34] Ferrara, who was the witness, subsequently became a co-defendant.

[35] 232 Mass. 601, 123 N.E. 100 (1919).

[36] *Id.* at 603, 123 N.E. at 101.

to get him to talk.[37] It is not difficult to imagine that his presence in the grand jury room would cause fear or concern in Ferrara. Justice Nolan in his dissent[38] relies almost exclusively on the Court's decision in *Commonwealth v. Favuli*.[39] That reliance is misplaced. The *Favuli* Court held that having multiple assistant attorneys general before the grand jury did not constitute the presence of unauthorized persons. The decisions of the Supreme Judicial Court, however, have consistently pointed out that the presence of district attorneys or assistant attorneys general will be measured by a different standard than the presence of police. The presence of prosecutors before the grand jury is presumed acceptable while police in the grand jury room are considered unacceptable unless some necessity can be established.[40] Justice Nolan glosses over this distinction in his dissent by adopting language written to justify the presence of prosecutors before the grand jury and applying it to justify the presence of police before the grand jury.[41] The majority of the Court in *Pezzano* correctly decided that since a police officer, in contrast to a prosecutor, has no legitimate purpose for being before a grand jury when he is not testifying, the danger of his presence intimidating or affecting witnesses cannot be tolerated.

§ 3.4. Administrative Searches — Statutory Procedures. Chapter 94C, section 30 of the General Laws allows administrative searches of "controlled premises" to be made pursuant to an administrative search war-

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[37] 387 Mass. at 71, 438 N.E.2d at 843.

[38] *Id.* at 77, 438 N.E.2d at 846.

[39] 352 Mass. 95, 224 N.E.2d 422 (1967).

[40] This distinction was discussed in Opinion of the Justices, 232 Mass. 601, 123 N.E. 100 (1919), and adopted in In Re Lebowitch, 235 Mass. 357, 126 N.E. 831 (1920), and Commonwealth v. Favuli, 352 Mass. 95, 224 N.E.2d 422 (1967). It was codified by MASS. R. CRIM. P. 5(c).

[41] 387 Mass. at 77-78, 438 N.E.2d at 846. Justice Nolan quotes the following language from Commonwealth v. Favuli, 352 Mass. 95, 107, 224 N.E.2d 422, 430 (1967):

> The presence of a particular person who has previously interviewed a witness being interrogated may tend to hold the witness to previous testimony. That is always the possibility if the prosecutor is the one who has interviewed the witness in the course of the investigation. There is no intimidation involved in this.

This should be contrasted with the language in Opinion of the Justices, 232 Mass. 601, 603, 123 N.E. 100, 101 (1919), concerning the dangers of police being present in the grand jury room:

> The essential characteristics of the Grand Jury would be broken down if a police officer or other person who had investigated the evidence, interviewed the witness and formulated a plan for prosecuting the accused should be permitted to be present during the hearing of testimony.

The only way to reconcile these two cases is to recognize that the Court has used a different standard for prosecutors than for police.

rant.[1] In 1980, in *Commonwealth v. Accaputo,*[2] the Supreme Judicial Court established detailed guidelines to be followed when applying for an administrative warrant pursuant to section 30.[3] During the *Survey* year the Court clarified *Accaputo* and the nature of the procedural requirements for administrative searches in two decisions involving searches of pharmacies. In *Commonwealth v. Lipomi,*[4] and *Commonwealth v. Frodyma,*[5] the Court insisted that the procedures established under section 30 for the issuance of administrative warrants be followed precisely.

In *Commonwealth v. Lipomi* a state police officer visited Salvatore Lipomi, a licensed pharmacist, at Lipomi's store on March 22, 1978 as part of an investigation of invalid prescriptions.[6] Lipomi allowed the officer to review his drug registration book.[7] The officer discovered at least thirty-two altered or invalid prescriptions.[8] The officer obtained an administrative warrant and returned to the pharmacy on May 4, accompanied by a second trooper and Joseph LaBelle, an inspector from the Board of Registration in Pharmacy.[9] LaBelle conducted an audit of Lipomi's records.[10] The state police officer removed some records on that date and returned the next day to remove other records.[11]

Lipomi was indicted on seven counts of illegally distributing controlled substances.[12] The trial judge granted his motion to suppress the evidence obtained as a result of the May 4 search.[13] The Commonwealth's interlocutory appeal was allowed by a single justice, and reported to the entire Court for decision.[14]

The Commonwealth conceded that the seizure of records was invalid because the warrant and affidavit failed to satisfy the requirements of

§ 3.4. [1] G.L. c. 94C, § 30. "Controlled premises" are defined as "any place or area, including but not limited to any building, conveyance, warehouse, factory or establishment, in which persons registered under the provisions of this chapter or required thereunder to keep records, are permitted to hold, manufacture, compound, process, distribute, deliver, dispense or administer any controlled substance or in which such persons make or maintain records pertaining thereto." G.L. c. 94C, § 30(a). Warrantless administrative searches of such premises are allowed where there is consent or where there are exigent circumstances. G.L. c. 94C, § 30(g).

[2] 380 Mass. 435, 404 N.E.2d 1204 (1980).

[3] The *Accaputo* decision is discussed in *Criminal Practice and Procedure,* 1980 ANN. SURV. MASS. LAW § 4.9, at 166-75.

[4] 385 Mass. 370, 432 N.E.2d 86 (1982).

[5] 386 Mass. 434, 436 N.E.2d 925 (1982).

[6] 385 Mass. at 371, 432 N.E.2d at 88.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 371-72, 432 N.E.2d at 88.

[10] *Id.* at 372, 432 N.E.2d at 88.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 371, 432 N.E.2d at 87.

[14] *Id.* at 371, 432 N.E.2d at 87-88.

Commonwealth v. Accaputo, but argued that the audit by Inspector LaBelle should be admissible because the warrant with the affidavit was sufficient to justify an audit as opposed to a seizure.[15] The Commonwealth further asserted that no warrant should be required at all[16] for two reasons: (1) because chapter 13, section 25 of the General Laws provided independent authority for the search absent a valid warrant,[17] and (2) because pharmacies are traditionally a heavily regulated industry, and therefore no warrant was required for an administrative search under the Supreme Court's rulings in *Colonnade Catering Corp. v. United States*[18] and *United States v. Biswell.*[19]

The Court first reviewed its holding in *Commonwealth v. Accaputo* and emphasized that the search in this case failed to satisfy the requirements of chapter 94, section 30 as they were interpreted in that decision.[20] It rejected the Commonwealth's argument distinguishing an audit from a search followed by a physical seizure of evidence by emphasizing that "[t]he principles governing our analysis in *Accaputo* are . . . as applicable to administrative inspections as they are to seizures made pursuant to such inspections."[21] The Court also adopted the trial judge's findings that the audit conducted by Inspector LaBelle was not an administrative audit pursuant to chapter 13, section 25.[22] LaBelle's testimony that he would not have entered but for the police, that this was not a normal "random check" audit, and that he waited outside the pharmacy until the police entered, supported the conclusion that this was a search pursuant to chapter 94C, section 30 rather than chapter 13, section 25.[23] The Court concluded that this was a search by police and that chapter 94C, section 30 clearly established the legislative intent that searches by police meet the more stringent guidelines of section 30.[24]

The Court next discussed at length the interplay between chapter 13, section 25, which grants a general authorization for inspectors to search pharmacies without obtaining a warrant, and chapter 94C, section 30, which provides detailed guidelines for administrative searches made pursuant to a warrant.[25] The Court reviewed the *Colonnade* and *Biswell*

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[15] *Id.* at 372, 432 N.E.2d at 88.

[16] *Id.*

[17] G.L. c. 13, § 25 authorizes warrantless searches by inspectors of the Board of Pharmacists.

[18] 397 U.S. 72 (1970).

[19] 406 U.S. 311 (1972).

[20] 385 Mass. at 373-74, 432 N.E.2d at 89.

[21] *Id.* at 374, 432 N.E.2d at 89.

[22] *Id.* at 375-78 & nn.3, 4, 432 N.E.2d at 90-91 & nn.3, 4.

[23] *Id.* at 376-77 & n.4, 432 N.E.2d at 90-91 & n.4.

[24] *Id.* at 377-78, 432 N.E.2d at 91.

[25] *Id.* at 378-87, 432 N.E.2d at 91-96.

cases[26] and concluded that a warrantless administrative search must pass a three part test: the search must involve an industry that is heavily regulated; the search must be crucial to an urgent governmental interest; and the search must be statutorily limited as to time, place and scope.[27] A review of the history of pharmaceutical regulation since 1885 satisfied the Court that the drug industry was a "pervasively regulated" industry and that searches of pharmacies served a legitimate governmental interest.[28] The Court concluded, however, that since chapter 13, section 25 contains no limits as to time, place or scope of searches, the statute fails the third prong of the *Colonnade/Biswell* test.[29] The Court also rejected the Commonwealth's argument that the restrictions contained in chapter 94C, section 30 could be grafted onto chapter 13, section 25.[30] The Court explained that 21 U.S.C., section 880, the federal statute which served as a model for chapter 94C, section 30, had been interpreted to exclude such a definition.[31] The Court followed the federal precedent and ruled that all administrative searches of pharmacies must be pursuant to chapter 94C, section 30, and therefore a valid administrative warrant under section 30 was required.[32]

Justice Nolan in his dissent[33] argued that chapter 13, section 25 does contain limits as to time, place and scope because only searches of pharmacies for the purpose of investigating violations of laws relating to pharmacy are permitted.[34] The dissent asserted that chapter 94C, section 30 still acts as a valuable control since no seizures are permitted under chapter 13, section 25.[35] Only a warrant pursuant to chapter 94C, section 30 would justify a seizure from a pharmacy.[36]

The Court next discussed chapter 94C, section 30 and the *Accaputo* decision in *Commonwealth v. Frodyma*.[37] On March 5, 1980, Joseph LaBelle, a pharmacy agent[38] conducted an investigation of the books of

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[26] *See supra* notes 18 and 19 and accompanying text.

[27] 385 Mass. at 380, 432 N.E.2d at 92-93.

[28] *Id.* at 381, 432 N.E.2d at 93.

[29] *Id.* at 382, 432 N.E.2d at 94.

[30] *Id.* at 383, 432 N.E.2d at 94.

[31] *Id.* at 383-86, 432 N.E.2d at 93-95.

[32] *Id.* at 386-87, 432 N.E.2d at 96.

[33] *Id.* at 387, 432 N.E.2d at 96 (Nolan, J., dissenting, joined by Lynch, J.).

[34] *Id.* at 388-89, 432 N.E.2d at 97. Despite the fact that even Justice Nolan could find no limit as to the time of the search in section 25 he insisted that the language of the statute "impart[ed] into [section] 25 the limitations of *time*, place and scope of inspection stated explicitly in [chapter 94C, section 30]." *Id.*

[35] *Id.*

[36] *Id.*

[37] 386 Mass. 434, 436 N.E.2d 925 (1982).

[38] LaBelle was also the agent involved in *Lipomi*. *See supra* notes 9 and 10 and accompanying text.

Edward Frodyma's pharmacy pursuant to chapter 13, section 25 with the consent of Frodyma on duty, and discovered various discrepancies indicating that drugs were missing.[39] LaBelle went to district court and filled out a form for an administrative warrant which required only that the pharmacy and the person seeking the warrant be identified.[40] The warrant was issued and LaBelle served it accompanied by a state trooper.[41] LaBelle seized the records which he had previously reviewed.[42] The warrant authorized the seizure of any and all items which were involved in any violation of chapter 94C and included a long list of various types of documents which could be seized.[43]

The trial court granted a motion to suppress the evidence obtained by LaBelle because the warrant description of property to be seized was overbroad, but held that since LaBelle's initial audit was consensual he could testify concerning it, and further held that a new seizure of the documents could be made with a properly drawn warrant.[44] The Supreme Judicial Court affirmed the result reached below, but based its ruling on a much broader ground than the trial court's.[45]

The Court began its analysis by explaining that "the purposes for which a warrant is sought should determine the standards under which it is issued."[46] The Court explained that the purpose of administrative warrants was to allow routine, neutrally selected inspections of regulated establishments.[47] An administrative search is authorized either upon a showing that an establishment has been selected on a neutral basis or from information supplied by a neutral source,[48] or upon a showing of probable cause that an administrative violation exists.[49] Because of the limited scope of administrative warrants courts apply a relaxed standard of probable cause.[50] Typically, when a violation is alleged there is no possibility of criminal action. The Court noted, however, that several courts have authorized administrative searches when there was a possibility of criminal prosecution.[51] The Court noted that it is often difficult to draw the line

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[39] 386 Mass. at 435, 436 N.E.2d at 927.
[40] *Id.* at 435 & n.3, 436 N.E.2d at 927 & n.3.
[41] *Id.* at 436, 436 N.E.2d at 927.
[42] *Id.*
[43] *Id.* at 435-36 & n.4, 436 N.E.2d at 927 & n.4.
[44] *Id.* at 436-37, 435 N.E.2d at 927-28.
[45] *Id.* at 437-38, 436 N.E.2d at 928.
[46] *Id.* at 438, 436 N.E.2d at 928.
[47] *Id.* at 438-42, 436 N.E.2d at 928-30.
[48] *Id.* at 441-42, 436 N.E.2d at 930.
[49] *Id.* at 442, 436 N.E.2d at 930-31.
[50] *Id.* at 440-42, 436 N.E.2d at 929-30.
[51] *Id.* at 443, 436 N.E.2d at 931 (citing cases).

between searches for administrative violations and searches for criminal violations.[52]

Turning to the case before it, the Court explained that it is clear in the area of pharmacies when a case changes from an administrative to a criminal investigation.[53] The Court insisted that when a search is for purposes of criminal investigation the Commonwealth cannot take advantage of the lesser probable cause standard for administrative searches.[54] The administrative warrant cannot be used as a "subterfuge in avoidance of the probable cause burden that must be met to support a criminal investigation."[55]

The Court also addressed the particularity of the description of what was to be seized.[56] Inspector LaBelle used a "canned" form which authorized seizure of all documents which were listed in chapter 94C as being subject to seizure.[57] The Court held that the warrant did not identify what was to be seized with sufficient particularity.[58] It was clear on the record that Inspector LaBelle knew exactly which documents he wished to seize and the warrant should have been limited to those documents.[59] The Court also noted that even in a routine administrative inspection the documents to be seized could be limited to a certain time period and certain particularly described documents.[60] In accordance with the above reasoning, the Court affirmed the superior court's order granting the motion to suppress.[61]

The Court's decisions in the area of administrative search warrants indicate a willingness to provide guidance, by way of dicta, for following the complex procedural requirements of chapter 94C. The Court's decision in *Commonwealth v. Accaputo*[62] contained considerable dicta which provided guidelines for complying with the statute.[63] In *Commonwealth*

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[52] *Id.* at 443-44, 436 N.E.2d at 931.

[53] *Id.* In this case, the fact that Agent LaBelle had a state police trooper accompany him to the store made the criminal nature of the investigation particularly clear.

[54] *Id.* at 443-46, 436 N.E.2d at 931-33.

[55] *Id.* at 445, 436 N.E.2d at 932.

[56] *Id.* at 446-49, 436 N.E.2d at 933-34.

[57] *Id.* at 446, 436 N.E.2d at 933.

[58] *Id.* at 447, 436 N.E.2d at 933.

[59] *Id.* at 447-48, 436 N.E.2d at 933-34.

[60] *Id.* at 447, 436 N.E.2d at 933.

[61] *Id.* at 449, 436 N.E.2d at 934. The defendant's victory was pyrrhic because the Court also affirmed the trial court's holding that a new warrant could be issued on the basis of the information obtained in the consensual search and the documents could thereby be seized properly. The new warrant can be issued by the trial court prior to the defendant obtaining an order to have the illegally seized documents returned.

[62] 380 Mass. 435, 404 N.E.2d 1204 (1980).

[63] *See, e.g., id.* at 438-39, 441-42, 404 N.E.2d at 1207, 1208.

v. Frodyma the Court explicity went beyond the narrow issue before it to prevent future confusion. The Court explained:

> While we agree with the judge, we conclude further that merely to affirm the suppression order because the seizure language of the warrant lacked specificity (which was available and could be supplied) is to create the unwarranted impression that an administrative inspection warrant may be issued for the purpose of seizing evidence to be used in a criminal prosecution.[64]

The Court then went on to explain its alternative holding.

The Court has adopted a similar approach in its decisions interpreting the statutory provisions governing wiretapping.[65] That statute also contains detailed procedural steps for the issuance of a warrant. The Court's decision in *Commonwealth v. Vitello*[66] laid out in great detail, much of it dicta, the procedures to be followed in drafting and executing a wiretrap warrant. The Court's attempt to give guidance to practitioners in these new and complex areas of law should be applauded.

It is worth noting that the *Lipomi* and *Frodyma* decisions are likely to have an important impact on the sale of liquor as well as prescription drugs. The federal courts have made it clear that the liquor industry is a heavily regulated industry which could be subject to administrative searches.[67] It is therefore instructive to compare the statutory authorization for searches of liquor establishments with the authorization for searches of pharmacies.

Chapter 138 of the General Laws sets up a statutory scheme which could be fairly characterized as pervasively regulating the liquor industry in Massachusetts.[68] Seizures of alcohol "intended for sale contrary to law"are authorized and regulated by sections 42-46. Those provisions limit and regulate what is to be seized and the showing of probable cause which must be made prior to seizure.[69] Sections 42-46 cannot be used as a basis for administrative searches, however, since they only authorize the seizure of alcohol. Accordingly, no records could be searched or seized under the authority of those sections.

Administrative searches are authorized by sections 18 and 63 of chapter 138. Section 63 authorizes local licensing authorities to enter onto the premises of a licensee "to ascertain the manner in which he conducts the business." Section 18 requires that the Alcohol Beverage Control Com-

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[64] 386 Mass. at 437-38, 436 N.E.2d at 1206.

[65] Procedures for wiretaps are set out in G.L. c. 272, § 99.

[66] 367 Mass. 224, 327 N.E.2d 819 (1975).

[67] *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

[68] G.L. c. 138, §§ 1-78.

[69] Section 46 authorizes only the seizure of alcohol and only upon a showing that two persons have reason to believe that it will be found at a particular location. Sections 43 and 44 place even more stringent controls on searches of dwellings.

mission "have access to all books, records and other documents of every licensed wholesaler and importer." Both of these sctions provide an unlimited right to search the records of licensees. The provisions of chapter 94c provide a clear contrast.[70] In that statute the nature and extent of pharmacy searches are extensively regulated. These general provisions for searches of alcohol licensees are similar to the general grant of power to search found in chapter 13, section 25, which the Court in *Commonwealth v. Lipomi* found to be an insufficent basis for a warrantless administrative search.[71]

In summary, the Supreme Judicial Court has indicated that administrative searches in Massachusetts will be proper only where there is a statutory procedure which provides *definite guidelines* for searching officials.[72] It seems clear that the statutory scheme for administrative searches of alcohol licensees in chapter 138 does not meet the requirement set out in *Commonwealth v. Lipomi* that there be a statutorily authorized procedure which carefully limits the time, place and scope of such searches.[73] The legislature should enact provisions similar to chapter 94C if it intends to authorize administrative searches of alcohol licensees.

STUDENT COMMENTS†

§ 3.5. Respondent's Rights in "Sexually Dangerous Person" Proceedings.* Chapter 123A of the General Laws provides for involuntary commitment proceedings for person asserted by the Commonwealth to be "sexually dangerous."[1] Under this law, a person found to be a "sexually dangerous person"[2] by the Superior Court[3] can be committed to a treat-

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[70] *See supra* notes 1-3, 25-32, and 56-60 and accompanying text.

[71] *See supra* notes 25-32 and accompanying text.

[72] *See supra* notes 25-32 and accompanying text.

[73] *See supra* notes 68-71 and accompanying text.

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[2] A "sexually dangerous person" is defined in chapter 123A as:

> Any person whose misconduct in sexual matters indicates general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive behavior and either violence, or aggression by an adult against a victim under the age of sixteen years, and who as a result is likely to attack or otherwise inflict injury on objects of his uncontrolled or uncontrollable desires.

G.L. c. 123A, § 1. *See* Commonwealth v. Rodriguez, 376 Mass. 632, 642-45, 382 N.E.2d 725, 732-34 (1978).

[3] G.L. c. 123A, §§ 4-6.

ment center[4] for an indeterminate period ranging from one day to life.[5] While the Supreme Judicial Court has made it clear that it considers chapter 123A hearings to be civil, not criminal,[6] the Court has also recognized that the "potential deprivation of liberty" at stake for the respondent in these proceedings is "massive."[7]

In recognition of the gravity of the rights at stake in a chapter 123A commitment hearing, both the courts[8] and the legislature[9] have accorded various protective rights to respondents in these proceeding. This protection, however, has never been held to equal the full panoply of rights which are available to the criminal defendant.[10] During the *Survey* year, in *Commonwealth v. Barboza*,[11] the Supreme Judicial Court was faced with the issue of whether the protection of the respondent in chapter 123A proceedings should include certain constitutional rights which are afforded the accused in criminal prosecutions.[12]

The commitment process under chapter 123A may be initiated prior to sentencing against a defendant who is convicted of one of the crimes enumerated in section 4 of the statute,[13] or against any prisoner currently under sentence or in the custody of the department of youth services who appears to be sexually dangerous.[14] Upon the appropriate

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[4] G.L. c. 123A, § 2.

[5] G.L. c. 123A, § 5.

[6] Commonwealth v. Barboza, 387 Mass. 105, 109, 438 N.E.2d 1064, 1068 (1982); Andrews, petitioner, 368 Mass. 468, 487, 334 N.E.2d 15, 25-28 (1975).

[7] Commonwealth v. Barboza, 387 Mass. 105, 111, 438 N.E.2d 1064, 1069 (1982) (quoting Commonwealth v. Travis, 372 Mass. 238, 246, 361 N.E.2d 394, 401 (1977)). The Court also recognized the stigma involved in being determined to be sexually dangerous. *Id.* at 111, 112; *see* Vitek v. Jones, 445 U.S. 480, 488, 492 (1980).

[8] *See, e.g.*, Andrews, petitioner, 368 Mass. 468, 488-91, 334 N.E.2d 15, 25-28 (1975) (Commonwealth must prove its case beyond a reasonable doubt); Commonwealth v. Lamb, 365 Mass. 265, 270, 311 N.E.2d 47, 51 (1974) (right to a warning that disclosures made to psychiatrist will not be privileged); Commonwealth v. Blasda, 362 Mass. 539, 541-42, 288 N.E.2d 813, 814-15 (1972) (right to exclude certain hearsay from final hearing). *See generally* Sarzen v. Gaughan, 489 F.2d 1076, 1080-85 (1st Cir. 1973); Gomes v. Gaughan, 471 F.2d 794, 795-801 (1st Cir. 1973).

[9] *See* G.L. c. 123A, §§ 4-6 (notice, use of compulsory process, right to counsel at critical stages).

[10] *See* Sarzen v. Gaughan, 489 F.2d 1076, 1085 n.15 (1st Cir. 1973); Commonwealth v. Barboza, 387 Mass. 105, 112, 438 N.E.2d 1064, 1069 (1982).

[11] 387 Mass. 105, 438 N.E.2d 1064 (1982).

[12] *Id.* at 110-11, 438 N.E.2d at 1068 (1982). Specifically, the respondent in *Barboza* relied on the criminal due process rights of trial by jury, Miranda warnings, and protection from double jeopardy. *Id.*

[13] G.L. c. 123A, § 4. The crimes listed in section 4 are essentially violent and sexually motivated offenses.

[14] G.L. c. 123A, § 6.

motion,[15] and notice to the respondent from the court that it is considering his commitment to a treatment center, the court may commit the respondent to such a center for a period not more than sixty days for examination and diagnosis by not less than two psychiatrists.[16] The psychiatrists must then file a written report with the court, including their recommendations in proceeding with the respondent.[17] If the report clearly indicates[18] that the respondent is a sexually dangerous person, then appropriate notice of a commitment hearing shall be given to the respondent, and the hearing shall be held pursuant to the provisions of chapter 123A, section 5.[19]

In *Barboza*,[20] the Commonwealth invoked this commitment process against a criminal defendant shortly after his conviction for a crime within the ambit of section 4.[21] Stanley Barboza had pleaded guilty to a charge of assault with intent to rape, and on January 23, 1979, the court had sentenced him to a one year term in the Plymouth house of correction.[22] On April 12, 1979, upon the motion of the Commonwealth, Barboza was committed pursuant to chapter 123A to the treatment center at the Massachusetts Correctional Institution, Bridgewater, for examination and diagnosis for a period not to exceed sixty days to determine whether he was a "sexually dangerous person."[23] Based on that examination, and a second psychiatric report which was filed after Barboza requested an independent psychiatric examination, the Commonwealth moved for commitment pursuant to chapter 123A, section 6.[24] A hearing was held and the judge

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[15] Under section 4, the court may act upon its own motion, or upon the motion of the district attorney. G.L. c. 123A, § 4. Under section 6, the person in charge of the custody of the prisoner may have the prisoner examined by a psychiatrist if the prisoner appears to be a sexually dangerous person. The results of this examination are to be reported to the person supervising the prisoner's detention or to the district attorney, whereupon, if the report indicates that the prisoner may be sexually dangerous, the prisoner shall be notified of his possible commitment. The report shall be submitted by the supervisor or the district attorney to the clerk of the courts in the appropriate county, together with a motion for commitment for examination and diagnosis for not more than sixty days. G.L. c. 123A, § 6.

[16] G.L. c. 123A, §§ 4, 6.

[17] G.L. c. 123A, § 4.

[18] G.L. c. 123A, §§ 5, 6. *See* Commonwealth v. Lamb, 372 Mass. 17, 23-25, 360 N.E.2d 307, 311-12 (1977). If there is a difference of opinion between the psychiatrists on whether a person is sexually dangerous, the commitment proceedings may not continue. *See* Commonwealth v. Hall, 6 Mass. App. Ct. 918, 918, 379 N.E.2d 1126, 1127 (1978).

[19] G.L. c. 123A, §§ 5, 6. Under the statute, the respondent has the right to appointed counsel and the use of compulsory process for the final hearing. G.L. c. 123A, § 5.

[20] 387 Mass. 105, 438 N.E.2d 1064 (1982).

[21] *Id.* at 106, 438 N.E.2d at 1066.

[22] *Id.*

[23] *Id.*

[24] *Id.*

found, beyond a reasonable doubt, that Barboza was a sexually dangerous person.[25] At an additional hearing, the judge ordered that Barboza be committed to the treatment center at Bridgewater for a minimum of one day and a maximum of life.[26] Barboza appealed and the appeal was tranferred directly to the Supreme Judicial Court on the Court's own motion.[27]

In his appeal Barboza contended that the order of commitment was invalid, arguing that: privileged statements made by him during his psychiatric examination were erroneously admitted into evidence; his commitment was supported by insufficient evidence; and finally, he was denied the fundamental constitutional protections of trial by jury, Miranda warnings, protection against double jeopardy, and due process of law.[28] The Court first addressed the evidentiary issues raised by Barboza.[29] Barboza asserted that statements made by him during the court ordered psychiatric examination which were admitted as evidence at the hearing should have been excluded under the patient psychotherapist privilege.[30] The Court noted, however, that chapter 233, section 20B of the General Laws makes such evidence admissible on the issue of a patient's mental or emotional condition if the patient has been informed in advance that the communication will not be privileged.[31] Therefore, the Court stated, because Barboza had been informed prior to his disclosures that they would not be privileged, and because the statements were admitted only for purposes related to the respondent's mental or emotional health,[32] the evidence was properly admitted.[33]

The Court then addressed Barboza's claim that the evidence presented was insufficient to support his commitment.[34] The Court noted that because of the weighty interests at stake,[35] the same rigorous standard of proof which is used in criminal cases is appropriate for chapter 123A

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 107-08, 438 N.E.2d at 1067.

[29] *Id.* at 109-10, 438 N.E.2d at 1067-68.

[30] *Id.* at 108, 438 N.E.2d at 1067.

[31] *Id.* at 108 & n.2, 109, 438 N.E.2d at 1067 & n.2. The Court expressly states that section 20B is applicable to court-ordered psychiatric examinations pursuant to chapter 123A. *Id.* at 108 n.2, 438 N.E.2d at 1067 n.2 (citing Commonwealth v. Lamb, 365 Mass. 265, 266-69, 311 N.E.2d 47, 49-50 (1974)).

[32] Section 20B expressly forbids the admission of such psychiatric communications as a confession or admission of guilt. *Id.*

[33] *Id.* at 108-09, 438 N.E.2d at 1067.

[34] *Id.* at 109-10, 438 N.E.2d at 1068.

[35] *See supra* note 7 and accompanying text.

proceedings.[36] The Court stated that the proper appellate function in a case such as this is to determine whether the record reasonably supports the conclusion beyond a reasonable doubt that the respondent is a sexually dangerous person.[37] The Court had no difficulty in finding that the record could reasonably support such a finding beyond a reasonable doubt.[38]

The Court then turned to Barboza's constitutional claims. Barboza contended that he was entitled under federal and state constitutional principles to a trial by jury, Miranda warnings, and protection against double jeopardy, safeguards which are applicable to criminal prosecutions.[39] The Commonwealth asserted that chapter 123A proceedings were civil, and thus the rights guaranteed to criminal defendants were not necessarily applicable.[40] The Court stated that a label of civil or criminal would not be dispositive of what procedural rights would be required in chapter 123A proceedings.[41] The Court indicated that only by assessing the gravity of the rights at stake for the respondent in a proceeding could the proper amount of procedural protection be determined.[42]

Barboza based his argument for the right to a trial by jury on the contention that chapter 123A is punitive in nature, and the proceedings under that law are therefore actually criminal.[43] The Court stated, however, that the aims of the statute were to both protect the public and *rehabilitate* the sexually dangerous person.[44] Chapter 123A, according to the Court, is to help persons found to be sexually dangerous, not to punish them for any particular crime they may have committed.[45] Noting that the United States Supreme Court had not yet determined the applicability of the various sixth amendment rights to proceedings such as those under chapter 123A,[46] the Court refused to extend the right to a jury trial to proceedings which it considered to be civil, not criminal.[47]

Barboza also contended that he was entitled to a trial by jury under

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[36] 387 Mass. at 109, 438 N.E.2d at 1068 (citing Andrews, petitioner, 368 Mass. 468, 488, 334 N.E.2d 15, 25 (1975)); *compare* Addington v. Texas, 441 U.S. 418, 427-31 (1979).

[37] *Id.* at 110, 438 N.E.2d at 1068.

[38] *Id.* (citing Commonwealth v. Lamb, 372 Mass. 17, 24, 360 N.E.2d 307, 311-12 (1977)); *compare* Commonwealth v. Jarvis, 2 Mass. App. Ct. 8, 11-12, 307 N.E.2d 844, 846-47 (1974).

[39] 387 Mass. at 110-11, 438 N.E.2d at 1068.

[40] *Id.* at 111, 438 N.E.2d at 1068.

[41] *Id.*

[42] *Id.* at 111, 438 N.E.2d at 1069.

[43] *Id.*

[44] *Id.* at 111-12, 438 N.E.2d at 1069.

[45] *Id.* (citing Commonwealth v. Major, 354 Mass. 666, 668, 241 N.E.2d 822, 823-34 (1968)).

[46] *Id.* at 112, 438 N.E.2d at 1069.

[47] *Id.*

article 12 of the Massachusetts Constitution.[48] The Court noted that article 12 governed principles of due process in noncriminal matters, and required a balancing test to determine whether the respondent was due a trial by jury in chapter 123A proceedings.[49] To be balanced, the Court stated, were the interests of the respondent at stake, and the chance that those interests might be wrongly deprived, against the interest of the Commonwealth in the efficient and economic administration of its affairs.[50] While noting the substantiality of the rights at stake for the respondent, the Court stated that no significant additional protection would be afforded to him by a trial by jury.[51] The Court indicated that it found the procedural protection already provided to respondents in chapter 123A proceedings to be sufficient under article 12.[52] The Court stated that hearings on sexual dangerousness were concerned largely with expert testimony, and therefore, the need for a jury to ensure accurate fact finding was greatly diminished.[53] Finally, the Court stated that, in its opinion, the potential value of community involvement in chapter 123A proceedings was outweighed by the Commonwealth's interest in prompt hearings and the individual's right to privacy.[54]

Next, the Court considered Barboza's claim that the fifth amendment privilege against self-incrimination and Miranda warnings were applicable to chapter 123A proceedings.[55] Barboza relied primarily on the Supreme Court case of *Estelle v. Smith*[56] in support of this contention.[57] In *Estelle*, the Supreme Court had found the use of psychiatric testimony at the sentencing stage of a criminal trial to violate the defendant's fifth amendment rights when the defendant did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and that his statements could later be used against him.[58] The *Barboza* Court noted, however, that, unlike the *Estelle* situation, the respondent's statements were being used in a noncriminal, non punitive proceeding.[59] The Court stated that although the privilege against self-incrimination can be claimed in any proceeding, it protects only against the use of statements which might be used in criminal prosecution.[60] Thus, the Court

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 112-13, 438 N.E.2d at 1070.

[52] *Id.* at 113, 438 N.E.2d at 1070 (citing Andrews, petitioner, 368 Mass. 468, 481-90, 334 N.E.2d 15, 21-28 (1975)).

[53] *Id.*

[54] *Id.*

[55] *Id.* at 113-15, 438 N.E.2d at 1070-71.

[56] 451 U.S. 454 (1981).

[57] 387 Mass. at 114, 438 N.E.2d at 1070.

[58] 451 U.S. 454, 461-62 (1981).

[59] 387 Mass. at 109, 111-12, 114, 115, 438 N.E.2d at 1068, 1069, 1071.

[60] *Id.* at 114, 438 N.E.2d at 1071.

concluded, the use at the respondent's chapter 123A hearing of his statements made to the psychiatrists did not violate Barboza's fifth amendment right against self-incrimination.[61] The Court stated that the warning given to the respondent that those statements would not be privileged[62] was sufficient to preserve his due process rights in this case.[63]

The respondent also asserted that he was placed twice in jeopardy because he was sentenced twice for the same crime.[64] The Court found no merit in this contention, stating that the respondent's prison sentence and his subsequent commitment to a treatment center were imposed for sufficiently distinguishable reasons.[65] The Court stated that the issues and the evidence presented in the criminal trial were entirely different from those of the commitment proceedings.[66]

The respondent's final contention was that he was denied due process of law in these proceedings in violation of the fourteenth amendment.[67] The Court disagreed, finding that the proceeding pursuant to chapter 123A was conducted so as to preserve the respondent's due process rights.[68] The Court noted that respondent received adequate and timely notice throughout the proceeding and was effectively represented by counsel.[69] Thus, the Court concluded, the respondent was deprived of no constitutional protection to which he was entitled, and there was no error in the Superior Court.[70]

The *Barboza* Court indicated that the respondent's procedural rights in chapter 123A proceedings would not be determined by attaching a label of civil or criminal to those proceedings.[71] In actuality, however, the civil/criminal distinction was a key factor in the *Barboza* decision.[72] By adhering to its view that chapter 123A proceedings are civil,[73] the Court was able to determine the rights of the respondent through a due process

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[61] *Id.*

[62] *See supra* notes 30-33 and accompanying text.

[63] 387 Mass. at 113-14, 438 N.E.2d at 1070.

[64] *Id.* at 115, 438 N.E.2d at 1071.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 115-16, 438 N.E.2d at 1071.

[69] *Id.* at 116, 438 N.E.2d at 1071.

[70] *Id.*

[71] *Id.* at 111, 438 N.E.2d at 1068.

[72] *See, e.g., id.* at 112, 438 N.E.2d at 1069 ("Not all the due process procedures applicable to a *criminal* prosecution for Federal constitutional purposes apply to a [chapter] 123A proceeding." (emphasis added)); *id.* at 114, 438 N.E.2d at 1070 ("[W]e do not view c. 123A proceedings as *criminal* prosecutions, and thus the Fifth Amendment is not violated by the use of respondent's statements to his psychiatrists at his c. 123A hearing." (emphasis added)). *See infra* notes 94-96 and accompanying text.

[73] *See* 387 Mass. at 109, 111-12, 114, 438 N.E.2d at 1068, 1069, 1071.

balancing test,[74] and avoid the automatic applicability of certain constitutional safeguards which would presumably be required in a criminal prosecution.[75] An examination of the basis for the determination that chapter 123A proceedings are civil would therefore seem appropriate in assessing the correctness of the *Barboza* Court's decision that the respondent was not entitled to certain constitutional protections from the criminal area in those proceedings.

The Court has stressed the point that chapter 123A is not motivated by any punitive intent.[76] Instead, the Court has indicated, commitment under chapter 123A is premised on the dual goals of protecting the public and *rehabilitating* the person found to be sexually dangerous.[77] The Commonwealth has provided treatment centers[78] in order to facilitate a cure of the dangerous condition, and chapter 123A cannot be used to justify the imposition of prision-like conditions, except as is necessary for security reasons.[79] The statute provides for an annual opportunity for committed persons to petition for their release,[80] with the burden on the Commonwealth to establish the need to continue the commitment.[81] These attributes all support the Court's assertion that chapter 123A proceedings are civil, and in no way a criminal prosecution seeking to impose punishment upon the respondent.[82]

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[74] *Id.* at 111, 438 N.E.2d at 1068-69; *see* Gomes v. Gaughan, 471 F.2d 794, 799-800 (1st Cir. 1973).

[75] 387 Mass. at 112, 438 N.E.2d at 1069. "Not all the due process procedures applicable to a criminal prosecution for Federal Constitutional purposes apply to a [chapter] 123A proceeding." *Id.*: *see* Sarzen v. Gaughan, 489 F.2d 1076, 1085 n.15 (1st Cir. 1973); Gomes v. Gaughan, 471 F.2d 794, 799 (1st Cir. 1973).

[76] *See* Commonwealth v. Lamb, 365 Mass. 265, 269, 311 N.E.2d 47, 51 (1974); Commonwealth v. Major, 354 Mass. 666, 668, 241 N.E.2d 822, 823-24 (1968).

[77] "General Laws c. 123A . . . was enacted 'with the dual aims of protecting against future antisocial behavior by the offender, and of doing all that can be done to rehabilitate him.' Commonwealth v. Rodriguez, [376 Mass. 632, 646, 382 N.E.2d 725, 734 (1978)]." Commonwealth v. Barboza, 387 Mass. 105, 111, 438 N.E.2d 1064, 1069 (1982) (quoting Commonwealth v. Knowlton, 378 Mass. 479, 483, 392 N.E.2d 1021, 1024 (1979)).

[78] G.L. c. 123A, § 2.

[79] *See* Commonwealth v. Barboza, 387 Mass. 105, 111-12, 438 N.E.2d 1064, 1069 (1982) (quoting Commonwealth v. Major, 354 Mass. 666, 668, 241 N.E.2d 822, 823-24 (1968)); Commonwealth v. Hogan, 341 Mass. 372, 375, 170 N.E.2d 327, 330 (1960); Commonwealth v. Page, 339 Mass. 313, 313-18, 159 N.E.2d 82, 85 (1959).

[80] G.L. c. 123A, § 9. *See* Trimmer, petitioner, 375 Mass. 588, 590-92, 378 N.E.2d 59, 60 (1978).

[81] *See* Andrews, petitioner, 368 Mass. 468, 485, 334 N.E.2d 15, 24 (1975).

[82] *See* Commonwealth v. Barboza, 387 Mass. 105, 111-12, 438 N.E.2d 1064, 1068-69 (1982). "Both the Massachusetts court and legislature have made considerable effort to differentiate between the treatment of the sexually dangerous, on the one hand, and the penalizing of criminals, on the other." *Id.* at 112, 438 N.E.2d at 1069 (quoting Gomes v. Gaughan, 471 F.2d 794, 800 (1st Cir. 1973)).

This position, however, is not unassailable. In *Specht v. Patterson,*[83] the Supreme Court examined a Colorado statute similar to chapter 123A[84] and found it to be criminal in nature.[85] As a result of this finding the *Specht* Court stated that a person subjected to proceedings under the Colorado law should be provided with the same constitutional rights available to a defendant in state criminal proceedings.[86] The Supreme Court cited with approval *United States ex rel. Gerchman v. Maroney,*[87] in which the Third Circuit came to the same conclusion about a Pennsylvania statute.[88] The *Maroney* court stated that a rehabilitative intent could not alter the punitive character of extended confinement, and when the equivalent of criminal punishment was a potential consequence, the procedural protections guaranteed to criminal defendants by due process could not be denied.[89]

Despite the authority of *Specht,* however, which might have been read to require the full spectrum of constitutional protections from the criminal context in chapter 123A proceedings, the reasoning of the Supreme Judicial Court in characterizing the proceedings under chapter 123A as civil seems to be sound. The First Circuit, while calling the chapter 123A proceedings a "hybrid,"[90] has accepted the interpretation of chapter 123A as non-punitive, and stated that the full range of criminal due process protections would not necessarily be required.[91] While chapter

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[83] 386 U.S. 605 (1967).

[84] *Id.* at 608. "The (Colorado) Sex Offenders Act . . . makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill." *Id.* If this determination is in the affirmative, the person may be "sentenced" for a term of one day to life. *Id.* at 607.

[85] *Id.* at 608-09. "The punishment under the second act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." *Id.*

[86] *Id.* at 609-10.

[87] 355 F.2d 302 (3d Cir. 1966).

[88] *Id.* at 309-12.

[89] *Id.* at 309-10. The Court stated:

> This criminal punishment does not lose its characteristic because the Act goes beyond simple retribution. . . . Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventive. . . . The effort of enlightened penology to alleviate the condition of a convicted defendant by providing some elements of advanced, modern methods of cure and rehabilitation and possible ultimate release on parole cannot be turned about so as to deprive a defendant of the procedures which the due process clause guarantees in a criminal proceeding.

Id.; cf. In re Gault, 387 U.S. 1, 50 (1967).

[90] Gomes v. Gaughan, 471 F.2d 794, 799 (1st Cir. 1973).

[91] *Id.* at 799-800; Sarzen v. Gaughan, 489 F.2d 1076, 1085 n.15 (1st Cir. 1973). The First Circuit did state that "realistically we realize that all too often confinement of the emotionally disturbed has been little better than imprisonment. . . . " Gomes v. Gaughan, 471 F.2d

123A does present the possibility of a lifetime commitment,[92] it also has characteristics which can distinguish it from the statutes involved in *Specht* and *Maroney*. For instance, while chapter 123A provides for annual petitions for release from commitment with the burden placed on the Commonwealth to show why commitment should continue,[93] the Pennsylvania statute involved in *Maroney* contained no affirmative provision for release, leaving the length of the "sentence" totally in the hands of the parole board.[94] Decisions of the Supreme Court subsequent to *Specht* also indicate that involuntary commitment proceedings such as those under chapter 123A, while certainly involving substantial individual interests, are not the equivalent of a criminal prosecution.[95]

The determination that chapter 123A proceedings are indeed civil and not punitive in nature significantly impairs any claim of the right to a jury trial, Miranda warnings, and protection against double jeopardy.[96] If the proceedings were to be viewed as criminal, the respondent in *Barboza* would have been entitled to trial by jury[97] and Miranda warnings[98] as a matter of right. Also, the respondent's double jeopardy claim may have fared better if he could have shown a second *punishment* in relation to the same criminal offense.[99]

Under the Supreme Judicial Court's characterization of the chapter 123A proceedings as civil, however, the rights of the respondent are essentially determined under a due process balancing test.[100] This balanc-

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794, 800 (1st Cir. 1973). The court continued by admitting, however, that "we cannot say that this must be so. Both the Massachusetts court and legislature have made considerable effort to differentiate between the treatment of the sexually dangerous, on the one hand, and the penalizing of criminals on the other." *Id.*

[92] *See* Commonwealth v. Travis, 372 Mass. 238, 246, 361 N.E.2d 394, 400 (1977). "[T]hose persons are subject to a one day to life commitment as sexually dangerous persons which may have far more serious consequences for the individual than criminal punishment." *Id.*

[93] *See supra* note 81 and accompanying text.

[94] 355 F.2d 302, 309 (3d Cir. 1966); *see* Specht v. Patterson, 386 U.S. 605, 609 n.2 (1967).

[95] *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 494-96 (1979); Addington v. Texas, 441 U.S. 418, 425-33 (1979). "(A) civil commitment proceeding can in no sense be equated to criminal prosecution." Addington v. Texas, 441 U.S. 418, 428 (1979).

[96] *See supra* note 72 and accompanying text.

[97] *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

[98] *See* Estelle v. Smith, 451 U.S. 454, 461-62 (1981); Malloy v. Hogan, 378 U.S. 1, 3 (1964).

[99] *See* Gomes v. Gaughan, 471 F.2d 794, 797 (1st Cir. 1973); Commonwealth v. Dias, 385 Mass. 455, 458, 432 N.E.2d 506, 509 (1982) (if the statute is "essentially remedial and not punitive" double jeopardy is inapplicable).

[100] *See* Gomes v. Gaughan, 471 F.2d 794, 799-800 (1st Cir. 1973); Commonwealth v. Barboza, 387 Mass. 105, 111-12, 438 N.E.2d 1064, 1068-69 (1982). The Supreme Court uses such a balancing approach for analogous involuntary commitment procedures. *See* Addington v. Texas, 441 U.S. 418, 425 (1979).

ing consists of weighing the interests at stake for the respondent[101] against the interests of the Commonwealth[102] in efficiently dealing with sexually dangerous persons.[103] The rights already secured for respondents in chapter 123A proceedings through this balancing have been significant, including the requirement that the Commonwealth prove its case beyond a reasonable doubt,[104] important notice requirements and the right to counsel at key stages of the process.[105] These right, however, will apparently not include trial by jury, Miranda warnings during the psychiatric examination, or any claim under double jeopardy.[106] The Court has found the interest of the Commonwealth to be superior to any additional protection these rights could offer to a respondent in chapter 123A proceedings.[107]

The Court reached this result through a reasonable balancing of the factors involved. The difficulty involved in assessing psychiatric testimony and the likely future conduct of the respondent would seem to make the value of a jury as a factfinder very limited.[108] The interest of the Commonwealth in "efficiently and economically" dealing with emotionally disturbed persons outweighs whatever value there would be.[109] A requirement for Miranda warnings would unnecessarily hinder the effectiveness of the psychiatric examination.[110] The statements made by the respondent during the sixty day commitment examination are not going to be used against him in any criminal proceeding, and the examining psychiatrist is not an adverse party involved in a prosecutorial role.[111] The

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[101] *See supra* note 7 and accompanying text.

[102] *See* Commonwealth v. Barboza, 387 Mass. 105, 112, 438 N.E.2d 1064, 1069 (1982); Thompson v. Commonwealth, 386 Mass. 811, 817, 438 N.E.2d 33, 37 (1982); *cf.* Addington v. Texas, 441 U.S. 418, 426 (1979).

[103] The due process balancing used by the Court actually considers a third factor as well, the likely benefit to be derived from additional procedural protection. *See* Commonwealth v. Barboza, 387 Mass. 105, 113, 438 N.E.2d 1064, 1070 (1982) (trial by jury unlikely to add significantly to respondent's protection from unfair process). This third component of the due process balancing test has been explicitly recognized by the Supreme Court. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[104] Andrews, petitioner, 368 Mass. 468, 488-91, 334 N.E.2d 15, 25-28 (1975); *compare* Addington v. Texas, 441 U.S. 418, 425-33 (1979) (standard of proof for involuntary commitment proceedings required to be greater than preponderance of the evidence, but may be less than beyond a reasonable doubt).

[105] *See* Sarzen v. Gaughan, 489 F.2d 1076, 1080-84 (1st Cir. 1973); *see* G.L. c. 123A, §§ 4-6.

[106] Commonwealth v. Barboza, 387 Mass. 105, 110-16, 438 N.E.2d 1064, 1069-71 (1982).

[107] *See id.* at 111, 113, 438 N.E.2d at 1068-69, 1070.

[108] *See* Addington v. Texas, 441 U.S. 418, 429-31 (1979).

[109] *See* Commonwealth v. Barboza, 387 Mass. 105, 113, 438 N.E.2d 1064, 1070 (1982).

[110] *See id.* at 113-15, 438 N.E.2d at 1070-71.

[111] *See* Sarzen v. Gaughan, 489 F.2d 1076, 1085-86 (1st Cir. 1973); *compare* Estelle v. Smith, 451 U.S. 454, 461-62 (1981) (statements made to psychiatrist used as part of criminal prosecution); Commonwealth v. Cain, 361 Mass. 224, 226-28, 279 N.E.2d 706, 709-10 (1972) (statements made to police used in chapter 123A proceedings).

warning given to the respondent that his communications will not be privileged is a more suitable compromise in protecting the respondent's interests.[112] Finally, the interest of the Commonwealth in helping sexually dangerous persons and protecting its citizens from them would seem to clearly outweigh any claim that a double punishment was actually being imposed upon respondents committed under chapter 123A.[113]

In summary, the approach taken by the Supreme Judicial Court in *Commonwealth v. Barboza*[114] seems to be a desirable one. While the potential deprivation facing a person subject to proceedings under chapter 123A may seem grave,[115] the Court's distinction between these proceedings and criminal prosectution seems to be valid.[116] The civil label, however, has not prevented the Court from providing ample procedural protection to respondents in chapter 123A proceedings.[117] Of greatest importance, however, is the fact that the rights which are afforded to respondents in chapter 123A proceedings are the result of a careful and intelligent balancing process rather than the obligatory trappings of a "criminal" label.[118] In this way the basic components of due process may be preserved while the Commonwealth is allowed to effectively perform a task which may not be at all adverse to the respondent's interests.

§ 3.6. Felony-Murder Rule.* The common law felony-murder rule provides that a homicide committed in the commission of a felony is murder.[1] This rule as formulated in Enlish law is based on the doctrine of constructive malice.[2] Under this doctrine, to prove malice aforethought, the essential element of common law murder, the prosecutor needs only to establish that the defendant committed a homicide while committing a

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[112] *See* Sarzen v. Gaughan, 489 F.2d 1076, 1084 (1st Cir. 1973); Commonwealth v. Barboza, 387 Mass. 105, 113-14, 438 N.E.2d 1064, 1070 (1982).

[113] Gomes v. Gaughan, 471 F.2d 794, 797-98 (1st Cir. 1973); Commonwealth v. Barboza, 387 Mass. 105, 115, 438 N.E.2d 1064, 1071 (1982).

[114] 387 Mass. 105, 438 N.E.2d 1064 (1982).

[115] *See supra* notes 7, 92 and accompanying text.

[116] *See supra* notes 76-95 and accompanying text.

[117] *See* Sarzen v. Gaughan, 489 F.2d F.2d 1076, 1080-84 (1st Cir. 1973); Andrews, petitioner, 368 Mass. 468, 334 N.E.2d 15 (1975). *See supra* notes 8-9. For the view that the rights afforded respondents in chapter 123A proceedings are in fact constitutionally inadequate, *see* Note. *Out of Tune with the Times: The Massachusetts SDP Statute,* 45 B.U. L. REV. 391, 407-10 (1965); Comment, *Sarzen v. Gaughan: The Right to Counsel and Notice in the Commitment of Sexually Dangerous Persons,* 9 SUFF. L. REV. 602, 610-13 (1974).

[118] *See* Addington v. Texas, 441 U.S. 418, 431 (1979) ("procedures must be allowed to vary [from state to state] so long as they meet the constitutional minimum").

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§ 3.6. [1] Commonwealth v. Ambers, 370 Mass. 835, 839, 352 N.E.2d 922, 926 (1976).

[2] Commonwealth v. Balliro, 349 Mass. 505, 512, 209 N.E.2d 308, 312 (1965).

felony.[3] The effect of the felony-murder rule, therefore, is to substitute the intent to commit the underlying felony for the requisite malice aforethought.[4] Under the Massachusetts murder statute, chapter 265, section 1 of the General Laws, which incorporates the felony-murder doctrine,[5] a felony-murder may be either first degree or second degree murder.[6] A felony-murder perpetrated in the commission of a felony punishable by death or life imprisonment is first degree murder, while a felony-murder perpetrated during the commission of a felony punishable other than by death or life imprisonment is second degree murder.[7]

Historically, the vast majority of felony-murder convictions in Massachusetts have rested on felonies which are inherently dangerous to human life.[8] Nevertheless, the Supreme Judicial Court and other state courts and legislatures have severely limited the application of the felony-murder rule.[9] These courts and legislatures have limited the application of the rule because of the injustice of substituting the intent to commit any underlying felony for the malice aforethought required for murder.[10] In three cases decided during the *Survey* year,[11] the Supreme Judicial Court further narrowed the application of the felony-murder rule by requiring that the nature of the underlying felony triggering the rule be such that the

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[3] *Id.* The felony-murder rule applies to accomplices as well. Commonwealth v. Ambers, 370 Mass. 835, 839, 352 N.E.2d 922, 925 (1976). Thus, if an accomplice intentionally encourages or assists in the commission of the underlying felony and has the requisite intent, his complicity in that underlying felony will establish his guilt of first or second degree murder if a homicide occurs during the commission of the felony. *Id.*

[4] Commonwealth v. Matchett, 386 Mass. 492, 502, 436 N.E.2d 400, 407 (1982).

[5] Commonwealth v. Matchett, 386 Mass. 505, 512, 209 N.E.2d 308, 312 (1965).

[6] *See* Commonwealth v. Matchett, 386 Mass. 492, 502, 436 N.E.2d 400, 407 (1982).

[7] *See* G.L. c. 265, § 1. See also Commonwealth v. Ambers, 370 Mass. 835, 839-40, 352 N.E.2d 922, 926 (1976).

[8] Commonwealth v. Matchett, 386 Mass. 492, 505 n.15, 436 N.E.2d 400, 408 n.15 (1982). *See, e.g.*, Commonwealth v. Walden, 380 Mass. 724, 405 N.E.2d 939 (1980) (breaking and entering with intent to commit larceny *and* to put a person therein in fear); Commonwealth v. Hicks, 377 Mass. 1, 384 N.E.2d 1206 (1979) (robbery); Commonwealth v. Watkins, 375 Mass. 472, 379 N.E.2d 1040 (1978) (robbery and kidnapping).

[9] *See, e.g.*, Commonwealth v. Devlin, 335 Mass. 555, 566-67, 141 N.E.2d 269, 275 (1957) (homicide must be probable consequence of underlying felony); People v. Aaron, 409 Mich. 672, 733, 299 N.W.2d 304, 328-29 (1980) (common law felony-murder rule abrogated); Burton v. State, 122 Tex. Crim. 363, 366-67, 55 S.W.2d 813, 816 (1932) (death must be caused by voluntary act). *See also* DEL. CODE ANN. tit. 11, §§ 635-636 (1979) (*mens rea* of recklessness or criminal negligence required); HAWAII REV. STAT. tit. 37, § 707-701 (1976) (common law felony-murder rule abolished); KY. REV. STAT. § 507-020 (Supp. 1980) (no felony-murder rule).

[10] *See* Commonwealth v. Matchett, 386 Mass. 492, 503 n.12, 506-07, 436 N.E.2d 400, 407 n.12, 409-10 (1982).

[11] Commonwealth v. Licciardi, 387 Mass. 670, 443 N.E.2d 386 (1982); Commonwealth v. Moran, 387 Mass. 644, 442 N.E.2d 399 (1982); Commonwealth v. Matchett, 386 Mass. 492, 436 N.E.2d 400 (1982).

intent to commit that felony demonstrates a conscious disregard for human life.[12]

In *Commonwealth v. Matchett,*[13] the defendant, a veteran and a martial arts expert,[14] was hired by Samson to help him collect a gambling debt from Colvin.[15] On February 12, 1979, Matchett and Samson drove to Pittsfield where Colvin lived with his father, telephoned the Colvin house twice, and visited it once, with all contacts taking place between one a.m. and four-thirty a.m.[16] Colvin's father answered each time and told the men that Colvin was not at home.[17] The next morning, when his father told him of the phone calls, Colvin looked "nervous" according to his father's testimony.[18] Shortly after seven a.m., the defendant and Samson were successful in making contact with Colvin by telephone and arranged a meeting.[19] Approximately one hour later, Colvin met a neighbor outside his home and asked him to keep "his eyes and ears open."[20] Shortly thereafter, the neighbor saw the defendant and Samson arrive at the Colvin home; Samson and Colvin went inside, followed less than a minute later by Matchett.[21] According to Matchett's testimony, a struggle ensued between Samson and Colvin, and Colvin was shot twice, once in the shoulder and once in the abdomen.[22] He died two days later.[23]

Matchett was indicted on a charge of murder in the first degree.[24] The trial judge instructed the jury that they could find the defendant guilty of murder in either the first or second degree.[25] He further instructed them that a verdict of second degree murder should be returned if the defendant "acted with express malice aforethought, i.e. an intention to kill without excuse or mitigation, or with implied malice aforethought, the implication

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[12] Commonwealth v. Matchett, 386 Mass. 492, 507, 436 N.E.2d 400, 410 (1982). *See also* Commonwealth v. Licciardi, 387 Mass. 670, 673-74 & n.2, 443 N.E.2d 386, 389 & n.2 (1982); Commonwealth v. Moran, 387 Mass. 644, 651, 442 N.E.2d 399, 403 (1982).

[13] 386 Mass. 492, 436 N.E.2d 400 (1982).

[14] *Id.* at 493, 436 N.E.2d at 402.

[15] *Id.* at 494, 436 N.E.2d at 402.

[16] *Id.* at 494, 436 N.E.2d at 402-03.

[17] *Id.* at 494-95, 436 N.E.2d at 403.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 496, 436 N.E.2d at 403.

[22] *Id.* at 496-97 & n.6, 436 N.E.2d at 404 & n.6. *See supra* note 3 and accompanying text.

[23] Commonwealth v. Matchett, 386 Mass. 492, 497, 435 N.E.2d 400, 404 (1982).

[24] *Id.* at 493, 436 N.E.2d at 402.

[25] *Id.* at 497, 436 N.E.2d at 404. The judge instructed the jury that first degree murder could be found "based on deliberately premeditated malice aforethought or the felony-murder rule, with the underlying felony being an armed assault in a dwelling house with intent to commit a felony." *Id. See* G.L. c. 265, §§ 1, 18A.

arising from the underlying felony of extortion.[26] The jury returned a verdict of guilty on the second degree murder charge, and the defendant appealed, claiming in part that the trial judge had erred in instructing the jury that a second degree murder verdict was permissible using the felony-murder rule.[27] The defendant contended that the judge's instructions regarding the felony-murder doctrine were erroneous for three reasons: the record in the case was devoid of evidence of extortion; the felony-murder rule does not apply to the statutory crime of extortion; and the felony murder rule is unconstitutional.[28] On its own motion, the Supreme Judicial Court accepted the case for direct appellate review.[29]

The Court dismissed the defendant's first claim of error, that the record contained no evidence of extortion. The Court found that on the evidence presented, the jury reasonably could have inferred that the defendant had threatened Colvin with physical harm if Colvin refused to pay Samson the gambling debt.[30] The Court then addressed the question of whether a felony murder charge can be predicated on the felony of extortion.[31] The Court stated that it had never specified precisely which felonies warranted application of the felony murder rule nor had it expressly limited the rule's application to common law felonies.[32] The Court noted that courts generally apply the felony-murder rule grudgingly and narrowly.[33] The reason for this reluctant application, the Court continued, is that a felony-murder rule that treats all homicides resulting from the perpetration of a felony as

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[26] Commonwealth v. Matchett, 386 Mass. 492, 498, N.E.2d 400, 404 (1982). *See* G.L. c. 265, § 25.

[27] Commonwealth v. Matchett, 386 Mass. 492, 492-93, 436 N.E.2d 400, 402 (1982).

[28] *Id.* at 498-99, 436 N.E.2d at 404-05.

[29] *Id.* at 493, 436 N.E.2d at 402.

[30] *Id.* at 501, 436 N.E.2d at 406. The Court reached this conclusion based on the following facts. Colvin owed Samson $1,500 for more than one year and the trip to Pittsfield was for the sole purpose of collecting that debt. Samson, who was perfectly capable of driving himself to Pittsfield, hired Matchett, who Samson knew carried guns and was a martial arts expert, as a "driver." Matchett brought with him a veritable arsenal of weapons, consisting of a loaded pistol and revolver, ammunition, a sawed-off shotgun, a large dog, a pair of handcuffs and a knife. The pair set out at 1:30 a.m. and stayed out until approximately 4 a.m. looking for the Colvin house. Based on this activity, the jury could reasonably infer that upon finding David Colvin, or in the telephone conversation preceding their meeting, one or both of the defendants maliciously threatened Colvin in order to collect the money, again, the sole purpose of the trip. *Id.*

[31] *Id.* at 502, 436 N.E.2d at 406. The Court pointed out that it had never before applied the felony-murder rule when the underlying felony was extortion. *Id.* at 504, 436 N.E.2d at 408.

[32] *Id.* at 505, 436 N.E.2d at 408. Extortion is a statutory felony in Massachusetts. *See* G.L. c. 265, § 25.

[33] Commonwealth v. Matchett, 386 Mass. 492, 505, 436 N.E.2d 400, 409 (1982).

a murder regardless of the perpetrator's intent in committing the underlying felony violates the "most fundamental principle of the criminal law."[34] That principle, the Court stated, is that a person cannot be held criminally liable for causing a particular result unless he had a culpable mental state regarding that result.[35] Because the felony-murder rule is based on the theory "that the intent to commit the felony is equivalent to the malice aforethought required for murder,[36] the Court noted, the theory can be viable only if the nature of the felony is such that intent to commit that crime demonstrates a "conscious disregard of the risk to human life."[37] The Court pointed out that many statutory felonies, such as receiving stolen goods or possessing buglarious instruments, involve little danger to human life.[38] The felony-murder rule could not apply to such felonies, the Court concluded, since the requisite intent to commit these felonies involves no intent equivalent to the malice aforethought required for murder.[39]

Accordingly, the Court held that when death results from the perpetration of the statutory felony of extortion, a defendant cannot be convicted of felony-murder unless the jury finds that the extortion involved circumstances showing the defendant's conscious disregard of the risk to human life.[40] The trial judge's charge was erroneous, the Court found, because it did not include this limiting instruction on the application of the felony-murder rule.[41] Rather than speculating on whether the jury verdict of second degree murder was based on a finding of express malice aforethought or the felony-murder rule, the Court reversed the judgement, set aside the verdict and remanded the case to the superior court for a new trial.[42]

In the second felony-murder case decided during the *Survey* year, *Commonwealth v. Moran,*[43] the Supreme Judicial Court considered whether, in light of *Matchett,*[44] the felony-murder rule could be applied to the underlying felony of unarmed robbery.[45] In *Moran,* the defendants, Moran and Chenail, and the victim, Wronski, met outside a bar in Adams

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[34] *Id.* at 506–07, 436 N.E.2d at 409.

[35] *Id.* at 507, 436 N.E.2d at 409.

[36] *Id.* at 507, 436 N.E.2d at 409-10.

[37] *Id.* at 507, 436 N.E.2d at 410.

[38] *Id.*

[39] *See id.*

[40] *Id.* at 508, 436 N.E.2d at 410.

[41] *Id.* The Court noted that its conclusion vitiated the need to reach the constitutionality of the felony-murder rule in this case. *Id.* at 508 n.17, 436 N.E.2d at 410 n.17.

[42] *Id.* at 511, 436 N.E.2d at 412.

[43] 387 Mass. 644, 442 N.E.2d 399 (1982).

[44] Commonwealth v. Matchett, 386 Mass. 492, 436 N.E.2d 400 (1982).

[45] Commonwealth v. Moran, 387 Mass. 644, 645, 442 N.E.2d 399, 402 (1982).

and entered the bar together.[46] Wronski bought Moran and Chenail one or more drinks,[47] then left the bar and began walking towards his truck.[48] The other two emerged from the bar and Moran told Chenail to go after Wronski because he owed them another drink.[49] Moran and Chenial pursued Wronski and confronted him at his truck.[50] Witnesses at the scene saw a person dressed like Moran punching another person inside the truck.[51] Wronski's body was discovered in his truck the next morning; his empty wallet was found in a nearby river a day later.[52]

Moran and Chenail were convicted by a jury in superior court of both unarmed robbery and first degree murder based on the felony-murder rule.[53] The defendants appealed the murder conviction, arguing that the felony murder rule is unconstitutional.[54] They contended that the felony-murder rule violates the Fourteenth Amendment's requirement that the State prove every element of a crime beyond a reasonable doubt because the rule presumes the mental state required for murder from the mental state required for the underlying felony.[55] The Court dismissed this argument, stating that the felony-murder rule does not presume the malice aforethought required for murder,[56] but rather the intent to commit the underlying felony is the required malice aforethought within the meaning of the law.[57] This occurs, according to the Court, because the effect of the felony-murder rule is to substitute the intent to commit the underlying felony for the requisite malice aforethought of murder.[58] The Court therefore upheld the constitutionality of the felony-murder rule.[59]

The jury had convicted the defendants in *Moran,* however, before the *Matchett* Court issued its holding that a defendant cannot be convicted of murder based on the felony-murder rule where the underlying felony was extortion unless the facts of the extortion showed the defendant's "con-

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[46] *Id.* at 645, 442 N.E.2d at 400.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 646, 442 N.E.2d 401.

[50] *Id.* at 645, 442 N.E.2d at 400.

[51] *Id.* at 647, 442 N.E.2d at 401.

[52] *Id.* at 646, 442 N.E.2d at 401.

[53] *Id.* at 645, 442 N.E.2d at 400.

[54] *Id.* Defendant Moran also moved for required findings of not guilty on the charges of unarmed robbery and murder. *Id.* at 646, 442 N.E.2d at 401. The Court, however, held that the evidence was sufficient to allow a reasonable jury to find each element of the crime of robbery beyond a reasonable doubt. *Id.* at 647, 442 N.E.2d at 401. The Court accordingly denied the motion. *Id.*

[55] *Id.* at 648, 442 N.E.2d at 402.

[56] *Id.* at 650, 442 N.E.2d at 403.

[57] *Id.* at 649, 442 N.E.2d at 403.

[58] *Id.* at 649, 442 N.E.2d at 402.

[59] *Id.* at 650, 442 N.E.2d at 403.

scious disregard of the risk to human life."[60] The *Moran* Court therefore reviewed the judge's jury instruction on felony-murder to determine whether the instructions complied with *Matchett* despite the defendant's failure to object to the rule's application to this case.[61] The judge had instructed the jury that the element of malice aforethought, a necessary component for a murder conviction, is supplied by participation in a felony punishable by life imprisonment.[62] The *Moran* Court, however, referred to its decision in *Matchett* as establishing the principle that criminal liability for murder is not justified absent proof of the defendant's culpable mental state regarding that result.[63] As the *Matchett* Court stated, the defendant will be held to have had the requisite mental state for the killing if the intent to commit the underlying felony demonstrates a conscious disregard for human life.[64] Applying this holding to the *Moran* case, the Court concluded that homicides resulting from unarmed robbery may not be treated as murder without proof of a culpable mental state regarding the killing, since unarmed robbery is not inherently dangerous to human life.[65] The Court therefore held that where the underlying felony is unarmed robbery, the felony-murder rule will apply only where the jury finds from the facts of the unarmed robbery that the defendant "consciously disregarded the risk to human life."[66] Because the judge did not instruct the jury that it must find such "conscious disregard for human life" to convict the defendant of felony-murder, the Court reversed the murder convictions.[67]

In the final felony-murder rule case decided during the *Survey* year, *Commonwealth v. Licciardi*,[68] the Supreme Judicial Court in dicta implied that the felony of statutory rape will not trigger the felony-murder rule unless the defendant's intent showed a conscious disregard for the risk to human life.[69] In *Licciardi*, the defendant was convicted of the kidnapping, non-consensual rape and first degree murder of the victim, a fifteen-year old girl.[70] The trial judge instructed the jury that it could find first degree murder based on malice aforethought, felony-murder or extreme atrocity.[71] On the rape indictments, the judge initially gave the

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[60] Commonwealth v. Matchett, 386 Mass. 492, 508, 436 N.E.2d 400, 410 (1982).
[61] Commonwealth v. Moran, 387 Mass. 644, 650, 442 N.E.2d 399, 403 (1982).
[62] *Id.* at 651, 442 N.E.2d at 403.
[63] *See id.* at 650, 442 N.E.2d at 403.
[64] *See id.* at 651, 442 N.E.2d at 403.
[65] *Id.* at 651, 442 N.E.2d at 403.
[66] *Id.*
[67] *Id.*
[68] 387 Mass. 670, 443 N.E.2d 386 (1982).
[69] *Id.* at 674 n.2, 443 N.E.2d at 389 n.2.
[70] *Id.* at 670, 443 N.E.2d at 387.
[71] *Id.* at 673, 443 N.E.2d at 388.

jury the option of returning verdicts of guilty or not guilty.[72]

Upon deliberation, the jury returned to the judge and asked if "rape" included consensual intercourse with a child under the age of sixteen.[73] The judge concluded that it did, but that the distinction between non-consensual or forcible rape and consensual or statutory rape presented a problem regarding felony-murder.[74] The judge noted that strict construction of chapter 265, section 1 of the General Laws[75] would allow a felony-murder conviction based on statutory rape since a life sentence can be imposed for a statutory rape conviction.[76] The judge added, however, that no case authorized a first degree felony-murder conviction based on statutory rape,[77] and that it seemed unlikely that death would occur during consensual intercourse, thus making a felony-murder conviction unwarranted.[78]

The judge changed the verdict slips on the rape indictments to require the jury, in the event it found the defendant guilty, to indicate whether the rape was forcible or consensual.[79] The judge further instructed the jury to state whether it relied on felony-murder if it found the defendant guilty of first degree murder, because a general verdict would not reveal the theory on which the verdict was based.[80] The jury found the defendant guilty of forcible rape and of first degree murder based on both felony-murder and extreme atrocity, but not on malice aforethought.[81]

The defendant appealed to the Supreme Judicial Court and argued that the questions posed by the verdict called for an impermissible "special verdict."[82] He argued alternatively that asking the jury "special ques-

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[72] *Id.* at 673, 443 N.E.2d at 389.

[73] *Id.*

[74] *Id.*

[75] *See supra* note 1 and accompanying text.

[76] *See* G.L. c. 265, § 23. *See supra* note 1 and accompanying text.

[77] Commonwealth v. Licciardi, 387 Mass. 670, 674, 443 N.E.2d 836, 389 (1982).

[78] *Id.* The Supreme Judicial Court noted that the judge's concern about using the felony of statutory rape as a basis for felony-murder conviction was well justified in light of subsequent decisions by the Court in *Moran* and *Matchett*. *Id.* at 674 n.2., 443 N.E.2d at 389 n.2. Since *Licciardi* was decided on December 3, 1982, after both *Moran* and *Matchett*, it must have been argued before either of those cases were decided. Although this comment by the Supreme Judicial Court about using statutory rape as a basis for felony-murder is only dictum, it appears after *Moran* and *Matchett* that a conviction for murder based on the felony-murder rule with the underlying felony being statutory rape will be upheld only where the jury finds that the defendant acted with "conscious disregard for human life." *See* Commonwealth v. Matchett, 386 Mass. 492, 507, 436 N.E.2d 400, 410 (1982).

[79] Commonwealth v. Licciardi, 387 Mass. 670, 674, 443 N.E.2d 386, 389 (1982).

[80] *Id.*

[81] *Id.* at 675, 443 N.E.2d at 389-90.

[82] *Id.* A "special verdict" is a statement of facts as found by the jury involving no ultimate verdict, from which the judge determines judgment; it is impermissible in Massachusetts. *Id.*

tions'' was unconstitutional.[83] The Court held first that no special verdict was involved, since the jury reached a general verdict on the charge of first degree murder.[84] Second, the Court held that the special questions had no tendency to lead the jury to a guilty verdict and were proper in that they made it possible to determine whether the defendant's conviction of first degree murder was based solely on felony-murder with the underlying felony being statutory rape.[85] The significance of the *Licciardi* decision, however, is the apparent approval by the Supreme Judicial Court of the trial judge's distinction between forcible rape and statutory rape for purposes of the felony-murder rule.[86] In a footnote that was unrelated to the holding and therefore dictum, the Court commented briefly that the judge's concern whether statutory rape could be the basis for felony-murder was well justified in light of *Matchett* and *Moran*.[87]

The decisions in *Matchett, Moran* and *Licciardi* by the Supreme Judicial Court reflect a growing international and national trend.[88] England abolished the felony-murder rule in 1957, and reinstated an absolute requirement of malice aforethought for murder.[89] In the United States, many state legislatures have either abandoned or limited the application of the rule.[90] State courts have followed suit,[91] indicating their dissatisfaction with the notion of substituting the intent to commit an underlying felony for the malice aforethought required for murder, regardless of the felony's nature and the danger it poses to the individual.[92] The basic flaw in the felony-murder doctrine is that it runs contrary to a fundamental principle of criminal law that criminal liability for causing a particular result, in this case murder, can not be justified absent culpable intent with respect to that result.[93] Under this fundamental principle, if a defendant has committed a statutory felony which poses no inherent danger to human life and if he intends no such harm, yet death results, the death cannot be deemed murder. By requiring that the intent needed for the

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[83] *Id.* ''Special questions'' involve a general verdict by the jury coupled with answers to written questions on essential issues of fact and are allowed in Massachusetts. *Id.*

[84] *Id.* at 676, 443 N.E.2d at 390.

[85] *Id.* at 676-77, 443 N.E.2d at 390-91.

[86] *See id.* at 673-74 and n.2, 443 N.E.2d at 289 and n.2.

[87] *Id.* at 674 n.2, 443 N.E.2d at 389 n.2. *See supra* note 78 and accompanying text.

[88] *See* Commonwealth v. Matchett, 386 Mass. 492, 503 n.12, 436 N.E.2d 400, 407 n.12 (1982) (trends in limitation of felony-murder rule). *See infra* notes 90-92 and accompanying text.

[89] Commonwealth v. Matchett, 386 Mass. 492, 503 n.12, 436 N.E.2d 400, 407 n.12 (1982) (citing Homicide Act, 1957, 5 & 6 Eliz. c. 11, § 1).

[90] *See id. See supra* note 9 and accompanying text.

[91] *See supra* note 9 and accompanying text.

[92] *See, e.g.,* People v. Aaron, 409 Mich. 672, 708, 299 N.W.2d 304, 334 (1980).

[93] *Id.* at 709-11, 299 N.W.2d at 334.

underlying felony must demonstrate the defendant's conscious disregard for the risk to human life, the Supreme Judicial Court was merely following this long-established criminal law principle.

The *Matchett* decision appears to provide a two-part test for discerning which felonies will trigger the application of the felony-murder rule in the future. Under the first part of the test, the felony-murder rule will apply when the underlying felony is inherently dangerous to human life and the requisite intent for that felony is present.[94] When a death results from the perpetration of a felony that is not inherently dangerous, the second part of the test dictates that the felony-murder rule will apply only when the defendant displays a conscious disregard for the risk to human life in committing that felony.[95] The latter application of the felony-murder rule will require courts to examine closely the defendant's intent in committing felonies which are not inherently dangerous to see if the circumstances surrounding the commission of the felony show the requisite "conscious disregard" for human life.

The effect of *Matchett, Moran* and *Licciardi* is to remove the felonies of extortion, unarmed robbery and, arguably, statutory rape[96] from the felony-murder rule unless the conscious disregard for the risk to human life is present in a particular case. These decisions do not appear to overturn any past decisions of the Supreme Judicial Court.[97] For example, the Court has long required that a homicide resulting from the commission of a felony be the natural and probable consequence of the act.[98] Further, the Court had never delineated precisely which underlying felonies give rise to the rule's application.[99] Finally, the great majority of felony-murder convictions in Massachusetts for both statutory and common-law felonies have rested on inherently dangerous felonies.[100]

In conclusion, during the *Survey* year the Supreme Judicial Court narrowed the future application of the felony-murder rule by delimiting which underlying felonies will trigger the rule's application. In so doing, the Court relied on the fundamental criminal law principle that criminal liability for murder cannot be justified absent culpable intent regarding that result. In the future, if a defendant commits a felony inherently dangerous to human life, and death results, the felony-murder rule will apply. In addition, if death results from the commission of a felony not

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[94] Commonwealth v. Matchett, 386 Mass. 492, 507, 436 N.E.2d 400, 410 (1982).

[95] *Id.* at 508, 436 N.E.2d at 410.

[96] *See supra* note 78 and accompanying text.

[97] *See* Commonwealth v. Matchett, 386 Mass. 492, 504 & n.14, 505 & n.15, 436 N.E.2d 400, 408 & nn.14, 15 (1982).

[98] Commonwealth v. Devlin, 335 Mass. 555, 567, 141 N.E.2d 269, 275 (1957).

[99] Commonwealth v. Matchett, 386 Mass. 492, 505, 436 N.E.2d 400, 408 (1982).

[100] *See supra* note 8 and accompanying text.

normally dangerous to human life, but the circumstances surrounding the felony's commission indicate the defendant's conscious disregard for the risk to human life, the felony-murder rule will also apply.

§ 3.7. Speedy Trial.* The sixth amendment to the United States Constitution provides a criminal defendant with the right to a speedy trial in federal court.[1] This right is extended to criminal defendants in state courts through the due process clause of the fourteenth amendment.[2] A state criminal defendant in Massachusetts has a co-extensive right to a speedy trial under article eleven of the Massachusetts Declaration of Rights.[3] Although neither the federal nor the state constitution expressly defines "speedy trial," the United States Supreme Court, in *Barker v. Wingo*,[4] determined that proper resolution of speedy trial claims under the federal constitution depended upon an *ad hoc* judicial balancing of certain factors relating to the conduct of the prosecutor and the defendant in criminal proceedings.[5] The *Barker* Court identified four factors which courts must assess in determining whether a defendant's constitutional right to a speedy trial has been violated: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[6] The Court in *Barker* cautioned, however, that no one of the four factors is dispositive to a finding of a deprivation of the speedy trial right.[7] Instead, the Court stated that the factors were related and all four should be considered, together with any other relevant circumstances, in determining whether the defendant has received a speedy trial.[8]

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§ 3.7. [1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.

[2] *See* Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1976). The Supreme Court has noted that the right to a speedy trial is one of the most basic rights preserved by the Constitution. *Id.* at 226; Moore v. Arizona, 414 U.S. 25, 27-28 (1973); Dickey v. Arizona, 398 U.S. 30, 37 (1970).

[3] "Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws. . . . He ought to obtain right and justice freely . . . promptly, and without delay; conformably to the laws." MASS. CONST. art. XI. *See* Commonwealth v. Gove, 366 Mass. 351, 356 n.6, 320 N.E.2d 900, 905 n.6 (1974); Commonwealth v. Hanley, 337 Mass. 384, 387, 149 N.E.2d 608, 610, *cert. den.*, 358 U.S. 850 (1958).

[4] 407 U.S. 514 (1972).

[5] *Id.* at 530.

[6] *Id.*

[7] *Id.* at 533.

[8] *Id.* For example, in *Barker*, there was a five year delay between the defendant's arrest and his subsequent trial for murder. *Id.* In the interim, the prosecution obtained numerous continuances, primarily for the purpose of first trying the defendant's alleged accomplice so that, if convicted, his testimony would be available at the defendant's trial. *Id.* at 534. The Supreme Court nevertheless held that the defendant's right to a speedy trial had not been violated even though more than four years of the delay was attributed to the prosecutor's

In contrast to the *ad hoc* nature of the *Barker* analysis is the strict remedy which is imposed when a court determines that a defendant's sixth amendment rights have been infringed. Once a court has properly determined that a criminal defendant's constitutional speedy trial right has been violated, the *only* permissible remedy is dismissal of the charges with prejudice to the state.[9] The rationale behind this severe sanction is that any failure to afford the defendant a speedy trial, unlike other guarantees of the sixth amendment, cannot be cured by a new trial.[10]

In *Barker*, the Supreme Court envisioned a flexible constitutional test based on practical considerations for determining when a speedy trial has not been provided.[11] Accordingly, the Court refused to set a particular time period beyond which any delay would presumptively infringe upon the defendant's speedy trial rights.[12] The *Barker* Court did not, however, forbid the states from prescribing such periods so long as they were consistent with constitutional standards.[13] Following the directive of *Barker*, Massachusetts has promulgated both procedural rules by the Supreme Judicial Court and statutory provisions[14] which attempt to more specifically define the Commonwealth's obligation to secure a prompt trial for criminal defendants. For instance, in 1979, the Massachusetts Supreme Judicial Court promulgated a new rule of criminal procedure which sets forth specific speedy trial standards.[15] Rule 36, entitled "Case Management," essentially provides time limits for trial beyond which a criminal defendant's right to speedy adjudication is presumptively violated.[16] Additionally, under Rule 36, the defendant may be entitled to relief even before the specified time periods elapse if he or she can show prejudice

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failure or inability to try the co-defendant. *Id.* at 533-36. Applying its newly enunciated balancing test, the Court found that both the excessive length of delay and the state's clear fault in causing much of that delay were outweighed by the minimal resulting prejudice to the defendant and, most importantly, the fact that the evidence showed that the defendant definitely did not want to be promptly tried. *Id.* at 534. The Court noted that the defendant failed to assert his speedy trial right for over three years, apparently preferring to gamble on his co-defendant's chances of acquittal. *Id.* at 534-35.

[9] *See* Strunk v. United States, 412 U.S. 434, 437-40 (1973); United States v. Novelli, 544 F.2d 800 (5th Cir. 1977); Mann v. United States, 304 F.2d 394, 397 (U.S. App. D.C.), *cert. den.*, 371 U.S. 896 (1962). *See also* Commonwealth v. Ludwig, 370 Mass. 31, 35, 345 N.E.2d 386, 389 (1976).

[10] Strunk v. United States, 412 U.S. 434, 440 (1973). *See* C. WHITEBREAD, CRIMINAL PROCEDURE § 23.01, at 475-76 (1980).

[11] Strunk v. United States, 412 U.S. 434, 438 (1973).

[12] Barker v. Wingo, 407 U.S. 514, 523 (1972). The Barker Court noted that it could find "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Id.*

[13] *Id.*

[14] *See generally* MASS. R. CRIM. P. 36. *See infra* notes 90-96 and accompanying text.

[15] MASS. R. CRIM. P. 36(b).

[16] MASS. R. CRIM. P. 36(c).

caused by the prosecution's lack of diligence.[17] During the *Survey* year, Massachusetts courts had several opportunities to examine and clarify the scope as well as the functional interrelationships of the various constitutional, court rule and statutory speedy trial rights and remedies available to state criminal defendants.

A. CONSTITUTIONAL SPEEDY TRIAL RIGHTS AND REMEDIES

In *Commonwealth v. Lutoff*,[18] Lutoff was indicted on charges of burning a building and other insured property.[19] Two different judges of the superior court each denied separate motions filed by the defendant to dismiss the indictments for lack of a speedy trial and he was subsequently convicted.[20] On appeal, Lutoff renewed his argument that he had been deprived of his federal and state constitutional rights to a speedy trial.[21]

The indictments against Lutoff were originally returned by the grand jury on September 15 and 16, 1976.[22] On February 4, 1977, counsel for Lutoff requested that the indictments be placed on the trial list for mid-March, 1977.[23] The assistant district attorney assigned to prosecute the case replied that, due to Lutoff's apparent readiness for trial, his office would place the case on the earliest trial list possible, although there would be no trial sitting in March or perhaps even in April.[24] On March 4, 1977 Lutoff filed a motion for speedy trial on the ground that delay would cause undue hardship and violate his constitutional rights.[25] The motion was never marked for hearing.[26] On June 23, 1977, Lutoff secured new counsel[27] who, on that same day, advised the prosecutor that the case could not be plea bargained, but would have to be tried.[28] It was apparently agreed, however, that, due to a crowded docket in July and the lack of sessions in August, the case would not appear on a trial list until September or October, 1977.[29] The case was not set for trial until March

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[17] *See generally* G.L. c. 276, § 35. *See infra* notes 162-165 and accompanying text. For a brief discussion of G.L. c. 277, § 72A, which was repealed by the Acts of 1981, c. 795, § 16, *see infra* notes 171-73 and accompanying text.

[18] 14 Mass. App. Ct. 434, 440 N.E.2d 52 (1982).

[19] *Id.* at 434, 440 N.E.2d at 53.

[20] *Id.* at 435, 440 N.E.2d at 53.

[21] *Id.* at 434, 440 N.E.2d at 53.

[22] *Id.* at 435, 440 N.E.2d at 54.

[23] *Id.*

[24] *Id.* at 435-36, 440 N.E.2d at 54.

[25] *Id.* at 436, 440 N.E.2d at 54.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

14, 1978.[30] On that date, the Commonwealth did not move for trial because the assigned prosecutor was engaged in another criminal trial.[31] On March 17, 1978, the court appointed new counsel for Lutoff.[32] A superior court judge then scheduled July 17, 1978 for trial.[33] On this new trial date, however, the case was not on the trial list, and it did not appear on any such list thereafter.[34] On April 2, 1979, approximately two and one-half years after the grand jury returned the original indictments, Lutoff again moved to dismiss the indictments for denial of his federal and state constitutional rights to a speedy trial.[35]

In considering Lutoff's motion, a superior court judge determined that, although the passage of thirty-two months since the return of the indictments was enough to trigger a speedy trial inquiry and Lutoff's actions had not caused the delay, Lutoff had nevertheless failed to show that the delay had resulted in prejudice.[36] Accordingly, the judge denied the motion.[37] Lutoff seasonably objected to the order and, on May 9, 1980, again moved to dismiss the indictments on speedy trial grounds.[38] A different superior court judge heard the second motion on July 30, 1980,[39] but the court again concluded that Lutoff had not established prejudice as a result of the delay.[40] Consequently, Lutoff's motion was denied.[41] Trial

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 437, 440 N.E.2d at 54.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 437, 440 N.E.2d at 55. The defendant alleged that he had been prejudiced because the lack of trial prevented him from obtaining employment as well as prevented the appearance of two key defense witnesses. *Id.* at 437 n.4, 440 N.E.2d at 55 n.4.

[37] *Id.* at 437, 440 N.E.2d at 55. The judge concluded that the lack of demonstrated prejudice outweighed the remaining three factors in the *Barker* test. *Id. See supra* notes 6-8 and accompanying text.

[38] 14 Mass. App. Ct. at 437, 440 N.E.2d at 55. More than one year had passed since denial of the first motion and the case had yet to be assigned to trial. *Id.* The defendant argued that the case was forty-four months old, a material witness had died and another witness had subsequently moved out of state and lacked the means to return to testify. *Id.* at 437-38, 440 N.E.2d at 55.

[39] *Id.* at 438, 440 N.E.2d at 55. At the hearing, a new prosecutor for the Commonwealth indicated that she had been unable to try the case since it had been assigned to her in January, 1980 because of commitments to defendants who were already incarcerated. *Id.*

[40] *Id.* Upon considering affidavits of cousel, the findings made by the judge on the April 2, 1979 motion and the defendant's testimony, the judge found that other available witnesses could testify to the facts which would have been testified to by a key, deceased defense witness. *Id.* The judge further found that the defendant had failed to establish the relevance of the testimony of an unavailable out-of-state witness. *Id.* Finally, the judge opined that, other than the passage of one year, there had been no substantial changes in the defendant's circumstances since denial of his April 2, 1979 motion. *Id.*

[41] *Id.*

subsequently began on September 15, 1980 and Lutoff was convicted 11 days later.[42]

Lutoff appealed his conviction, alleging that he had been deprived of his right to a speedy trial under the sixth and fourteenth amendments to the United States Constitution and article eleven of the Massachusetts Declaration of Rights.[43] In reviewing Lutoff's claim, the Massachusetts Appeals Court examined each of the four factors enunciated by the United States Supreme Court in *Barker v. Wingo:* the length of delay, the reason for delay, the defendant's assertion of his or her right, and prejudice to the defendant as a result of the delay.[44] With regard to the first factor, the length of delay, the court held that the four year delay of the commencement of the trial,[45] while not dispositive, was unquestionably sufficient to justify further inquiry into whether Lutoff's constitutional right to a speedy trial had in fact been violated.[46] The Appeals Court stated that, unless the prosecution could adequately explain the length of the delay, this factor clearly weighed against the Commonwealth.[47]

The Appeals Court next examined the second factor of the Barker test, the reason for the delay. The court noted that the superior court judges who had denied Lutoff's motions below each attributed the delay to congestion in the criminal docket and the district attorney's heavy

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[42] *Id.*

[43] *Id.* at 434, 440 N.E.2d at 53.

[44] *Id.* at 438-39, 440 N.E.2d at 55. The court noted that these factors must be carefully considered and balanced incident to a proper constitutional speedy trial analysis. *Id.* at 439, 440 N.E.2d at 56. *See Barker v. Wingo,* 407 U.S. 514, 530-33 (1972), and *supra* notes 6-8 and accompanying text.

[45] The Court found that since the defendant was not in custody prior to the return of the indictments, his right to a speedy trial did not attach until the date of the return, September 15, 1976. 14 Mass. App. Ct. at 439, 440 N.E.2d at 56. *See, e.g.,* United States v. Marion, 404 U.S. 307, 320 (1971) ("[I]t is either a formal indictment or else the actual restraints imposed by arrest and holding to answer a charge that engage the right."); C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 813, at 203 (2d ed. 1982) ("The sixth amendment right does not attach at all to those not yet accused, nor does it require the government to discover, investigate, or accuse any person within any particular time.").

[46] 14 Mass. App. Ct. at 439, 440 N.E.2d at 56. The court subsequently noted delays in other cases which by comparison suggested that the four year delay in this case warranted further investigation (citing Commonwealth v. Look, 379 Mass. 893, 402 N.E.2d 470, *cert. denied,* 449 U.S. 827 (1980) (fifty-two month delay); Commonwealth v. Beckett, 373 Mass. 329, 366 N.E.2d 1252 (1977) (fifty-five month delay); Commonwealth v. Boyd, 367 Mass. 169, 326 N.E.2d 320 (1975) (fourteen month delay); Commonwealth v. Gilbert, 366 Mass. 18, 314 N.E.2d 111 (1974) (thirty-one month delay); Commonwealth v. Horne, 326 Mass. 738, 291 N.E.2d 629 (1973) (forty-eight month delay)).

[47] 14 Mass. App. Ct. at 439, 440 N.E.2d at 56 (quoting Commonwealth v. Look, 379 Mass. 893, 898, 402 N.E.2d 470, 475, *cert. denied,* 449 U.S. 827 (1980)).

caseload.[48] Although there was no suggestion of any purposeful delay of trial by the prosecution,[49] the Appeals Court nevertheless emphasized that neither "court congestion" nor "deficiencies in the system" could be a defense to the defendant's speedy trial claim.[50] Additionally, the court found that the record before it left little doubt that the greater part of the delay was caused by the prosecutor's preoccupation with other cases,[51] and, correspondingly, showed that none of the delay could be attributed to Lutoff.[52] Noting that prosecutors have the primary right to control trial lists under Massachusetts law as well as the concomitant obligation to maintain current lists of cases for trial, the Appeals Court stated that "prosecutors must take affirmative action to bring cases to trial, particularly where, as here, the accused has pressed for an early confrontation with his accusers."[53] The Appeals Court concluded, therefore, that the reason for the delay also weighed heavily against the Commonwealth.[54]

In addressing the third factor of the *Barker* test, the defendant's assertion of his or her right, the Appeals Court quickly concluded that there could be little question that Lutoff had diligently attempted to obtain a prompt trial.[55] As evidence of Lutoff's diligence, the court pointed to

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[48] 14 Mass. App. Ct. at 440, 440 N.E.2d at 56.

[49] *Id.* The sixth amendment does not permit purposeful or oppressive delays and an action must be dismissed if it is shown that such a delay was deliberately caused by the prosecutor. *See* C. WRIGHT, *supra* note 45, at § 813, at 216-19 and cases cited therein.

[50] 14 Mass. App. Ct. at 440, 441, 440 N.E.2d at 56, 57. The court also noted, however, that it might have been helpful if the Commonwealth's explanation for the delay, i.e. court congestion or heavy caseloads, was supported by subsidiary findings of fact more adequately depicting the prevailing problems. *Id.* at 440 n.6, 440 N.E.2d at 56 n.6. Such a comment by the court suggests that administrative excuses offered by the government may be entitled to some favorable weight in the balancing process if the reasons for and scope of the administrative problems are properly presented to the court. *See, e.g.*, Dickey v. Florida, 398 U.S. 30, 38 (1970) ("Crowded dockets, the lack of judges or lawyers, and other factors no doubt make some delays inevitable.").

[51] 14 Mass. App. Ct. at 440, 440 N.E.2d at 56. The court pointed out that the prosecutor first assigned to the case, although having promised the defendant a prompt trial, repeatedly delayed placing the case on trial lists and was subsequently unavailable to prosecute when the case finally did come up for trial. *Id.* Likewise, the court noted that the second prosecutor conceded that she could not have tried the case earlier due to prior commitments. *Id.* at 440-41, 440 N.E.2d at 56-57. Finally, the court reasoned that the case was not unusually complex, and that basic investigation and preparation should have been completed when the Commonwealth complied with discovery orders on June 10, 1977. *Id.* at 441, 440 N.E.2d at 57.

[52] *Id.* The court noted that the first superior court judge's findings obviated any argument that the defendant had engaged in delaying tactics by changing counsel. *Id.* at 441 & n.7, 440 N.E.2d at 57 & n.7. The defendant's several counsel were apparently always prepared to proceed promptly to trial as they had requested. *Id.* at 441 & n.7, 440 N.E.2d at 57 & n.7.

[53] *Id.* at 441, 440 N.E.2d at 57.

[54] *Id.* at 442, 440 N.E.2d at 57 (citation omitted).

[55] *Id.*

Lutoff's letter to the superior court and informal request to the prosecutor, seeking a prompt trial, the later formal, although unmarked, motion to dismiss, and Lutoff's two subsequent motions to dismiss on speedy trial grounds argued before the superior court and supported by affidavits specifying prejudice.[56]

In examining the fourth and final factor of the *Barker* test, the prejudice to the defendant caused by the delay, the Appeals Court reiterated a principle previously articulated by the Massachusetts Supreme Judicial Court in *Commonwealth v. Beckett*[57] regarding the burden of proving prejudice in a constitutional speedy trial case.[58] The Appeals Court noted that under *Beckett* if the delay is deemed substantial and if the defendant has pressed diligently for a trial during at least a substantial portion of that period, then the burden falls on the Commonwealth to establish the absence of prejudice to the defendant.[59] The *Lutoff* court pointed out that in the case before it Lutoff's persistent efforts over a four-year period to obtain trial were sufficient to create a presumption of prejudice.[60] After establishing that the burden of proof on the issue of Lutoff's claim of prejudice[61] was shifted to the Commonwealth under the *Beckett* rule,[62]

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[56] *Id.* The United States Supreme Court's decision in *Barker* dispelled a previous view held by some courts that the defendant's failure to raise his or her speedy trial right forever waived that right. *Barker v. Wingo*, 407 U.S. 514, 531-32 (1972). *See* C. WRIGHT, *supra* note 45, at § 813, at 204. Nevertheless, whether the defendant has asserted the right in a timely manner has still been given strong evidentiary weight in determining the existence of a constitutional violation. *See, e.g.*, 407 U.S. at 531-32, 536 ("[W]e would be reluctant . . . to rule that a defendant was denied . . . [a constitutional right to a speedy trial] . . . on a record that strongly indicates . . . that the defendant did not want a speedy trial."); Commonwealth v. Look, 379 Mass. 893, 900-01, 402 N.E.2d 470-77, *cert. denied*, 449 U.S. 827 (1980) ("The speedy trial is not one which may be kept in reserve in the event that one's belief that the prosecution has overlooked or decided not to pursue his case proves to be erroneous."). *See generally* Gelhaar, *Criminal Practice and Procedure*, 1980 ANN. SURV. MASS. LAW § 4.10, at 183-84.

[57] 373 Mass. 329, 366 N.E.2d 1252 (1977).

[58] 14 Mass. App. Ct. at 442, 440 N.E.2d at 57-58.

[59] *Id.* (quoting *Beckett*, 373 Mass. at 334, 366 N.E.2d at 1256).

[60] *Id.* at 442-43, 440 N.E.2d at 58. The court subsequently gave the basis for such a presumption:

> Prejudice to . . . defendants because of . . . [a] long unjustified delay in bringing . . . [a] case to trial "may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years." *United States v. Blaustein*, 325 F. Supp. 233, 238 (S.D.N.Y. 1971), quoting from *United States v. Mann*, 291 F. Supp. 268, 271 (S.D.N.Y. 1968).

Id. at 443 n.9, 440 N.E.2d at 58 n.9. *See also* United States v. Dowl, 394 F. Supp. 1250 (D. Minn. 1975); United States v. Blanca Perez, 310 F. Supp. 550 (S.D.N.Y. 1970); United States v. Skinner, 308 F. Supp. 1221 (S.D.N.Y. 1969).

[61] In the *Barker* analysis, a defendant's claim of prejudice must be assessed in light of the interests protected by the speedy trial guarantee. *See* C. WRIGHT, *supra*, note 45, at § 813, at 205. The Appeals Court in *Lutoff* pointed out that of the several interests of the accused as

the court proceeded to examine the trial record to determine the presence or absence of prejudicial impairment of Lutoff's right to present an adequate defense at trial.[63]

Upon review of the record, the court found that the lapse of time had impaired Lutoff's strategy in several respects. First, key witnesses had suffered unrefreshable failures of memory which tended to weaken the defense.[64] Second, a fire investigator, whose existence the defense had not been aware of until one week before trial, offered testimony which suggested that one of the fires in question had been intentionally set.[65] The investigator was, however, unable to locate a report or notes made at the scene which would have corroborated his testimony because the incident had occurred "quite a while ago."[66] Finally, the details surrounding the issuance of an important insurance binder could not be clearly ascertained because the issuing agent had moved to Florida and was therefore beyond the court's jurisdiction.[67] Such evidence, the Appeals Court reasoned, would have helped Lutoff to rebut the prosecution's claim that Lutoff had fraudulently obtained insurance prior to the fire.[68] The court, applying the *Beckett* rule, determined that the Commonwealth had not met its burden of showing lack of prejudice to the defendant.[69] According to the court, the trial record revealed that the delay had in fact prejudicially interfered with Lutoff's ability to present evidence on material issues at trial.[70]

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articulated in *Barker* — prevention of oppressive pretrial incarceration, minimization of the defendant's pretrial anxiety and limitation of the possibility that the delay will impair the ability of a defendant to prepare a defense — the latter interest is of fundamental importance. 14 Mass. App. Ct. at 443, 440 N.E.2d at 58. *See* Barker v. Wingo, 407 U.S. 514, 532-33 (1972). *See also* Dickey v. Florida, 398 U.S. 30, 38 (1970); United States v. Graham, 538 F.2d 261, 265 (9th Cir. 1975), *cert. denied,* 429 U.S. 925 (1976).

[62] 14 Mass. App. Ct. at 443, 440 N.E.2d at 58.

[63] *Id.* at 443-45, 440 N.E.2d at 58-59. In view of the defendant's claim of prejudice at trial, the Appeals Court reasoned that this element of prejudice could be adequately analyzed only by an examination of the facts manifested at trial. *Id.* at 443-44 n.12, 440 N.E.2d at 58 n.12. Indeed, prior to trial, any inquiry as to the degree to which delay has impaired the defense tends to be speculative. *See* C. WRIGHT, *supra* note 45, at § 813, at 205. The United States Supreme Court, therefore, has held that a denial of a motion to dismiss on speedy trial grounds is not an appealable order and may be raised on appeal only after conviction. United States v. MacDonald, 435 U.S. 850, 853-63 (1978).

[64] 14 Mass. App. Ct. at 444-45, 440 N.E.2d at 58-59.

[65] *Id.* at 444, 440 N.E.2d at 59.

[66] *Id.* at 445, 440 N.E.2d at 59.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 443, 440 N.E.2d at 58.

[70] *Id.* at 445, 440 N.E.2d at 59. The Court also noted that there was some indication that the delay caused the defendant prejudicial anxiety above that reasonably associated with

In balancing all four factors of the *Barker* test, the Appeals Court concluded that, although Lutoff might be entitled to relief even *apart* from the question of prejudice,[71] the unrebutted evidence of prejudice in the trial record eliminated any doubt that the charges should be dismissed.[72] In a final comment, the court reemphasized that institutional failures would not be an acceptable basis for denying a reasonably prompt trial to a defendant who has diligently pursued his constitutional right to such a trial.[73] The appropriate remedy, the court added, "lies in correcting the failures of the system, rather than in abridging a defendant's constitutional right."[74]

In Massachusetts, as underscored by the *Lutoff* decision, an unjustified and substantial delay in bringing the defendant to trial, where the defendant has diligently asserted his or her rights and the Commonwealth cannot show a *lack* of prejudice to the defendant, will result in a violation of the speedy trial provisions of both the federal and state constitutions.[75] Despite this position, commentators are in general agreement that courts often remain reluctant to find a violation of a criminal defendant's constitutional right to a speedy trial except in the most extreme circumstances.[76] This reluctance apparently stems from judicial dislike of the uncompromising severity of the dismissal with prejudice sanction imposed for a speedy trial violation as well as fear of freeing potentially dangerous criminals on technical, albeit constitutional, grounds.[77] The facts in *Lutoff,* however, are an example of the type of extreme circumstances under which a court is clearly justified in finding a constitutional

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normal pressures of trial. *Id.* at 445-46 n.15, 440 N.E.2d at 59 n.15 (quoting United States v. Shepherd, 511 F.2d 119, 123 (5th Cir. 1975)).

[71] *Id.* at 446, 440 N.E.2d at 59. *See, e.g.,* Moore v. Arizona, 414 U.S. 25, 26 (1973) ("Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial. . . ."); Commonwealth v. Green, 353 Mass. 687, 690, 234 N.E.2d 534, 536 (1968) ("[Under the sixth amendment] prejudice need not be affirmatively shown."); Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 530, 335 N.E.2d 915, 922 (1975) ("[L]ack of a showing of prejudice to a defendant is not in itself sufficient to deny a speedy trial claim. . . .").

[72] 14 Mass. App. Ct. at 446, 440 N.E.2d at 59.

[73] *Id.* at 446, 440 N.E.2d at 59-60 (quoting Commonwealth v. Beckett, 373 Mass. 329, 335, 366 N.E.2d 1252, 1256 (1977)).

[74] *Id.* at 446, 440 N.E.2d at 60. The court pointed out that some repair of the system was accomplished by the adoption of MASS. R. CRIM. P. 36. *Id.* at 446 n.16, 440 N.E.2d at 60 n.16. For a detailed discussion of Rule 36, *see infra* notes 90-96 and accompanying text.

[75] *See id.* at 438-47, 440 N.E.2d at 55-60. *Cf.* Commonwealth v. Beckett, 373 Mass. 329, 366 N.E.2d 1252 (1977).

[76] *See* Amsterdam, *Speedy Criminal Trial: Rights and Remedies,* 27 STAN L. REV. 525 (1975); C. WHITEBREAD, *supra* note 10, at § 23.01, at 476.

[77] C. WHITEBREAD, *supra* note 10, at § 23.01, at 476. *See also supra* notes 9-10 and accompanying text.

speedy trial violation under the *ad hoc* standard enunciated by the United States Supreme Court in *Barker*.[78] Indeed, no delicate balancing of the four *Barker* factors was actually necessary in *Lutoff*, because the Appeals Court properly found that each element unquestionably weighed in favor of the defendant.[79] In effect, the fact situation lent itself to no result other than a finding that the defendant's constitutional speedy trial rights were violated and a dismissal of charges with prejudice to the Commonwealth.

Beyond merely identifying a clear-cut constitutional violation, the *Lutoff* decision is important because it serves to highlight the availability and potential value of a judicial presumption of prejudice to state criminal defendants in constitutional speedy trial cases. As the Appeals Court correctly implied, the defendant in *Lutoff* might still have prevailed even absent a showing of prejudice, provided the other factors in the *Barker* test weighed heavily in his favor.[80] Nevertheless, while proof of prejudice is not itself determinative under *Barker*,[81] the presence or lack of prejudice remains a crucial, and often pivotal, factor which must be affirmatively proven by the defendant in the absence of a judicial presumption,[82] and carefully considered by the court.[83]

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[78] 407 U.S. 514 (1972). *See supra* notes 4-10 and accompanying text.

[79] *See supra* notes 43-74 and accompanying text. Thus, in *Lutoff*, it was beyond dispute that the four year delay between the grand jury's return of indictments and the defendant's trial was substantial enough to trigger further judicial inquiry into whether the defendant's speedy trial rights had been denied. 14 Mass. App. Ct. 434, 439, 440 N.E.2d 52, 56 (1982). Also the evidence in *Lutoff* clearly indicated that virtually all of the delay was attributable solely to administrative failures by the Commonwealth and none of the delay was attributable to the defendant. *Id.* at 440-42, 440 N.E.2d at 56-57. Additionally, it was undisputed that the defendant had on several occasions attempted to obtain a prompt trial and thereafter had diligently asserted that the Commonwealth's failure to act violated his constitutional rights. *Id.* at 442, 440 N.E.2d at 57. Perhaps the only point of factual dispute in *Lutoff* was the extent of prejudice to the defendant caused by the delay. Nevertheless, although prior to trial two separate superior court judges denied the defendant's speedy trial motions on the ground that he had failed to show prejudice, the actual trial record indicated that, as a result of the delay, several key witnesses suffered unrefreshable lapses of memory on important issues and various notes and reports tending to support the defendant's claim of innocence had since been lost. *Id.* at 442-45, 440 N.E.2d at 57-59.

[80] *Id.* at 446, 440 N.E.2d at 59. *See supra* note 71.

[81] Barker v. Wingo, 407 U.S. 514, 533 (1972).

[82] *See, e.g.*, C. WRIGHT, *supra* note 45, § 814, at 225-26 (defendant must affirmatively show at least possible prejudice). The Massachusetts Supreme Judicial Court has held generally that a defendant has the burden of showing prejudice caused by the delay. *See* Commonwealth v. Beckett, 373 Mass. 329, 334, 366 N.E.2d 1252, 1256 (1977); Commonwealth v. Gilbert, 366 Mass. 18, 22, 314 N.E.2d 111, 114 (1974); Commonwealth v. Gove, 366 Mass. 351, 361, 320 N.E.2d 900, 909-10 (1974)

[83] Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 335 N.E.2d 915, 922 (1975). *See, e.g.*, Commonwealth v. Look, 379 Mass. 893, 402 N.E.2d 470, 478, *cert. denied*, 499 U.S. 827 (1980) (defendant's failure to prove prejudice an important consideration in denying speedy trial claim); Commonwealth v. Beckett, 373 Mass. 329, 334, 366 N.E.2d 1252, 1256 (1977) (same).

In *Lutoff,* the Commonwealth offered two arguments in an attempt to rebut the presumed prejudicial effect of the delay. The prosecution argued first, that any lost testimony would simply have corroborated other defense evidence; and second, that the gaps in testimony might have damaged the prosecution as much as the defense.[84] The Appeals Court rejected these arguments, stating that, while they might be persuasive in an appropriate case, in the case before the court "the defendant was convicted; his conviction rest[ed] in part on memories which failed on issues important to his defense; and the effect of the loss of exculpatory evidence in a case can seldom be determined with precision."[85] Furthermore, it seems likely that the defendant in *Lutoff* would have successfully carried the issue of prejudice even absent the presumption because the trial record revealed convincing evidence of prejudice to the defendant's presentation of his case caused by the delay.[86] It should be noted that although the judicial presumption of prejudice was perhaps not vital to the defendant's victory in *Lutoff,* its availability may nevertheless be of great importance to state criminal defendants under certain circumstances. For example, assuming a "substantial" delay and at least timely, if not diligent, assertion of the speedy trial right by the defendant, the presumption might well prove decisive where 1) prejudice at trial remains a pivotal issue after the court examines the other relevant factors and the trial record is unclear as to the actual effects of the delay; or 2) the defendant's crucial claim of prejudice revolves not around an impairment of his or her defense, but rather the more speculative prejudicial effects of lengthy pretrial incarceration or pretrial anxiety caused by the delay.

This judicial presumption of prejudice in speedy trial cases is not unique to Massachusetts courts. Federal courts have also recognized that substantial delays in bringing a defendant to trial may create a rebuttable presumption of prejudice.[87] The reason for presuming prejudice in a particular instance is a judicial recognition that as delay continues, memories inevitably will begin to fade, important evidence will potentially be lost and the defendant's anxiety over the proceedings will likely become unreasonably exacerbated.[88] In a constitutional speedy trial analy-

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[84] Commonwealth v. Lutoff, 14 Mass. App. Ct. 434, 445, 440 N.E.2d 52, 59 (1982).

[85] *Id.* As an example of a case where the Commonwealth's argument might succeed, the *Lutoff* court cites Commonwealth v. Beckett, 373 Mass. 329, 366 N.E.2d 1252 (1977). In *Beckett,* the defendant could not convince the Supreme Judicial Court the memory lapses on the part of *prosecution* witnesses were prejudicial to the defendant. 373 Mass. at 334, 366 N.E.2d at 1256. Unlike the *Lutoff* court, the Court in *Beckett* concluded that such failures of memory as could be gleaned from the trial record weakened only the Commonwealth's case. *Id.; see also* Commonwealth v. Gove, 366 Mass. 351, 364, 320 N.E.2d 900, 909 (1974).

[86] *See* C. WRIGHT, *supra* note 45, at § 814, at 226-28 n.43 and cases cited therein.

[87] United States v. Mann, 291 F. Supp. 268, 271 (S.D.N.Y. 1968).

[88] *Id.*

sis, the discretion of a court to determine when a delay is so substantial as to not only trigger further speedy trial inquiry, but also to combine with other relevant circumstances to create a presumption of prejudice, seems consistent with the flexibility notions underlying the *Barker* decision. One inevitable result of such discretion is unpredictability as to when the presumption will be utilized by a court. The United States Supreme Court in *Barker* indicated, however, that, while it had no constitutional basis for establishing quantitative speedy trial rules for the States, the States might themselves adopt presumptive rules which more explicitly define fixed time periods within which cases must generally be brought.[89] After the superior court had ruled on the motions in the *Lutoff* case, the Massachusetts Supreme Judicial Court responded with Rule 36 of the Massachusetts Rules of Criminal Procedure.[90] As the *Lutoff* court posited at the end of its opinion, the specificity with which Rule 36 was drawn is likely to go far towards obviating future "substantial" trial delays in the Commonwealth.[91]

B. NON-CONSTITUTIONAL MASSACHUSETTS SPEEDY TRIAL RIGHTS AND REMEDIES

It is probable that the recently promulgated Rule 36 will become the primary judicial vehicle for enforcement of the speedy trial right in Massachusetts in the future.[92] The rule, entitled "Case Management," provides standards for a speedy trial including specific time limits between indictment and trial.[93] Subdivision (b) of Rule 36, which includes prescribed time limitations, also provides for exclusions for delays attributable to the normal maintenance of orderly criminal proceedings as well as delays attributable to actions by the defendant.[94] Once a defendant has established a prima facie violation under subdivision (b), he or she is

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[89] Barker v. Wingo, 407 U.S. 514, 522-23, 530 n.29 (1972).

[90] MASS. R. CRIM. P. 26. For a detailed discussion of the rule and its ramifications, *see, infra* notes 91-97 and accompanying text.

[91] Commonwealth v. Lutoff, 14 Mass. App. Ct. 434, 445-46 nn.15 & 16, 440 N.E.2d 52, 59-60 nn.15 & 16 (1982).

[92] Commonwealth v. Look, 379 Mass. 893, 898 n.2, 402 N.E.2d 470, 476 n.2, *cert, den.*, 449 U.S. 827 (1980). *See* MASS. R. CRIM. P. 36. *See also* Gelhaar, *supra* note 56, at § 4.10, at 184-85.

[93] From July 1, 1979 to July 1, 1980, a defendant must be tried within twenty-four months after the defendant's return day — the day on which a defendant is ordered by summons to first appear or does appear to answer the charges. From July 1, 1980 to July 1, 1981, the defendant must be tried within eighteen months after the return day. Finally, after July 1, 1981, a defendant must be tried within one year after the return day absent any applicable exceptions provided for in the rule. MASS. R. CRIM. P. 36(b)(1)(A)-(C).

[94] MASS. R. CRIM. P. 36(b)(2)(A)-(H).

entitled to dismissal without any showing of prejudice.[95] Additionally, under Rule 36 a defendant may be entitled to a dismissal even before the time specified for bringing the defendant to trial has elapsed. Subdivision (c) of the rule requires dismissal of charges, notwithstanding the fact that the defendant is not yet entitled to dismissal under subdivision (b), if: 1) the prosecutor's conduct is unreasonably lacking in diligence; and 2) such conduct has resulted in prejudice to the defendant.[96] A defendant arguing for dismissal under subdivision (c), unlike (b), must therefore affirmatively demonstrate not only unreasonable prosecutorial delay, but also prejudice caused by that delay.[97] Finally, any dismissal of charges under Rule 36 operates to bar future prosecution for the particular offense charged as well as all related offenses.[98]

During the *Survey* year, in *Commonwealth v. Balliro,*[99] the Massachusetts Supreme Judicial Court examined the discretionary authority of a district court to dismiss applications for complaints pursuant to Rule 36(c), the "speedy trial" provision requiring dismissal for prejudicial delay.[100] In *Balliro,* process was issued on July 22, 1980 on two complaints charging Balliro with homicide by a motor vehicle and operating a motor vehicle under the influence of intoxicating liquor.[101] Prior to the

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[95] Mass. R. Crim. P. 36(b)(1)(D). *See* Commonwealth v. Look, 379 Mass. 893, 898 n.2, 402 N.E.2d 470, 476 n.2, *cert, denied,* 449 U.S. 827 (1980). Once the prescribed time limits under subdivision (b) have elapsed, the defendant no longer has the burden of proving that the Commonwealth unjustifiably caused prejudicial delay as under the *ad hoc* balancing standard of Barker v. Wingo, 407 U.S. 514 (1972).

[96] Specifically, Rule 36(c) provides:

> *Dismissal for Prejudicial Delay.* Notwithstanding the fact that a defendant is not entitled to a dismissal under subdivision (b) of this rule, a defendant shall upon motion be entitled to a dismissal where the judge after an examination and consideration of all attendant circumstances, determines that: 1) the conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence; and 2) this conduct on the part of the prosecuting attorney has resulted in prejudice to the defendant.

Mass. R. Crim. P. 36(c).

[97] *See* Commonwealth v. Balliro, 385 Mass. 618, 433 N.E.2d 434 (1982). For a detailed discussion and analysis of *Balliro, see infra* notes 99-145 and accompanying text. *See also* Commonwealth v. Marchionda, 385 Mass. 238, 431 N.E.2d 177 (1982).

[98] Mass. R. Crim. P. 36(e). Rule 36(e) provides that "[a] dismissal of any charge ordered pursuant to any provision of this rule shall apply to all related offenses." *Id.* The Massachusetts Supreme Judicial Court, in *Commonwealth v. Ludwig,* has held that a dismissal of a complaint on speedy trial grounds is a bar to any later prosecution for the same offense. 370 Mass. 31, 35, 345 N.E.2d 386, 388-89 (1976). In conjunction with subdivision (e), the *Ludwig* decision requires that any dismissal of a complaint or indictment under Rule 36 result in *prejudicial* dismissal of the particular charge as well as all related charges.

[99] 385 Mass. 618, 433 N.E.2d 434 (1982).

[100] Mass. R. Crim. P. 36(c). *See supra* notes 96-97 and accompanying text.

[101] 385 Mass. at 619, 433 N.E.2d at 435.

pretrial conference on August 6, 1980, however, the district attorney's office was informed that blood test results showed that Balliro's blood contained a hypnotic drug and not alcohol at the relevant time.[102] Nevertheless, due to the negligence of the assistant district attorney assigned to prosecute the case, the prosecution took no action to amend the complaints until September 25, 1980, the date of the trial.[103] At this time, the prosecution moved to amend the complaints by deleting the reference to "intoxicating liquor" in both complaints and inserting in each a reference to "narcotics, or depressants."[104] A district court judge denied the prosecution's motion to amend and its subsequent motion to dismiss.[105] In response to this adverse ruling, the assistant district attorney entered a *nolle prosequi*[106] of the charges because a material difference existed between the allegations of the complaints and the proof which the Commonwealth could have presented.[107] On the same day, at the district attorney's request, the arresting officer filed an application for a new series of complaints against Balliro.[108] The new complaints again alleged motor vehicle homicide, but, reflecting the blood test evidence, now charged Balliro with operating under the influence of narcotics.[109] Subsequently, Balliro moved to dismiss the applications alleging, *inter alia,* a violation of his speedy trial rights.[110] In October, 1980, a district court judge, without opinion, granted Balliro's motion to dismiss the application for complaints.[111]

The prosecution pressed on, however, and in November, 1980, a grand jury returned indictments charging Balliro with the same crimes as those for which complaints had been sought on September 25 and denied in October, 1980.[112] Balliro moved in superior court to dismiss these new indictments on March 9, 1981.[113] The superior court judge granted this motion after concluding that the district court had denied the September

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[102] *Id.* There was no evidence whether the assistant district attorney disclosed the results of the blood tests at the August 6 pretrial conference. *Id.*

[103] *Id.* at 619, 433 N.E.2d at 435-36.

[104] *Id.* at 619, 433 N.E.2d at 436.

[105] *Id.*

[106] A *nolle prosequi* is defined as "the formal expression of the determination of the . . . [prosecuting attorney] . . . that he will not further prosecute the whole or separate part of a criminal prosecution." K. B. SMITH, CRIMINAL PRACTICE AND PROCEDURE, 30 MASS. PRACTICE SERIES § 852, at 399-400 (1970). *See* Commonwealth v. Daskalakis, 246 Mass. 12, 140 N.E. 470 (1923); Commonwealth v. Meyers, 356 Mass. 343, 252 N.E.2d 350 (1969).

[107] 385 Mass. at 619-20, 433 N.E.2d at 436.

[108] *Id.* at 620, 433 N.E.2d at 436.

[109] *Id.* The new complaints also charged the defendant with driving so as to endanger. *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

25, 1980 application for complaints on speedy trial grounds.[114] The judge held that the indictments had to be dismissed with prejudice to the Commonwealth.[115]

Viewing the propriety of the dismissal of the indictments on the same record as was before the superior court judge, the Supreme Judicial Court determined that the issue before it was whether, on the basis of such a record, the district court judge exceeded his authority in dismissing the September 25, 1980 application for complaints.[116] The Court held that the district court judge had acted within his discretion because the facts on the record were sufficient to have permitted a determination by the judge pursuant to Rule 36(c) that the prosecuting attorney's conduct in bringing Balliro to trial had been unreasonably lacking in diligence and that such conduct resulted in prejudice to Balliro.[117] The Court noted that the Commonwealth had conceded that the actions of the assistant district attorney were unreasonably lacking in diligence.[118] Then, because there was no other showing of prejudice to Bailliro, the Court inferred that the district court judge had relied upon the assumed anxiety and concern of Balliro resulting from the delay as sufficient to fulfill the Rule 36(c) prejudice requirement.[119] The Court refused, however, to delineate the circumstances where, in a case of unreasonable prosecutorial delay, assumed anxiety and concern alone would as a matter of law constitute prejudice mandating dismissal under Rule 36(c).[120] Instead the Court held that, while subdivision (c) does concern mandatory dismissal of charges, it does not deny a judge who is considering the prejudicial effects of an unreasonable prosecutorial delay, at least under circumstances such as those presented in the case before the Court, "the inherent right in his discretion to determine that an application for a complaint should be dismissed . . . ."[121] Thus, although suggesting that it would not have reached the same decision, the Supreme Judicial Court declined, given the record in this case,[122] to substitute its judgment on the issue of

[114] *Id.*

[115] *Id.* (citing Commonwealth v. Ludwig, 370 Mass. 31, 35, 345 N.E.2d 386, 388-89 (1976), and MASS. R. CRIM. P. 36(e). *See supra* note 98 and accompanying text.

[116] 385 Mass. at 622, 433 N.E.2d at 437. The Court previously assumed that the Commonwealth could appeal from the dismissal of the indictment pursuant to MASS. R. CRIM. P. 15(b)(1). *Id.* at 621 n.4, 433 N.E.2d at 437 n.4.

[117] *Id.* at 623-24, 433 N.E.2d at 437-38. *See* MASS. R. CRIM. P. 36(c). *See also supra* notes 96-98 and accompanying text.

[118] 385 Mass. at 623, 433 N.E.2d at 437-38.

[119] *Id.* at 623, 433 N.E.2d at 438. The United States Supreme Court has identified minimization of the defendant's pretrial anxiety and concern as one of the interests to be protected by the speedy trial right. United States v. Ewell, 383 U.S. 116, 120 (1966); Barker v. Wingo, 407 U.S. 514, 532 (1971).

[120] 385 Mass. at 623, 43 N.E.2d at 438.

[121] *Id.*

[122] *Compare* Commonwealth v. Marchionda, 385 Mass. 238, 242, 431 N.E.2d 177, 179

prejudice for the discretion of the district court judge.[123] Accordingly, the Court concluded that it was not an abuse of discretion for the district court judge to dismiss the applications once he determined that Balliro had been denied a speedy trial.[124] Because any subsequent prosecution for the same or related offense is barred when the original complaint has been dismissed on "speedy trial" grounds under Rule 36,[125] the Supreme Judicial Court affirmed the superior court's dismissal of the indictments.[126]

The *Balliro* decision is important in two respects. First, it was the Massachusetts Supreme Judicial Court's first significant discussion of the discretion to be afforded lower court speedy trial determinations under Rule 36(c). The *Balliro* Court held that while Rule 36(c) concerns the mandatory dismissal of charges, it nevertheless does not deny judicial discretion to determine that the defendant has been sufficiently prejudiced by prosecutorial delay to justify the required remedy under the rule.[127] The abuse of discretion standard announced by the Court may take on a double edged quality for state criminal defendants, however, in light of the shorter delays necessarily associated with 36(c) motions[128] and the strict dismissal remedy associated with any violation of Rule 36.[129] Thus, in factual situations different from those in *Balliro*, it is easy to speculate that, more often than not, lower court judges will use their discretion to *deny* speedy trial motions to dismiss. In reviewing future district court denials of Rule 36(c) motions, the Court will almost certainly point to the *Balliro* decision as a basis for deferring to these discretionary denials absent clear facts which reveal a misapplication of the two pronged requirement of Rule 36(c)[130] or where judicial discretion serves to deny the defendant's sixth amendment rights under *Barker*.[131]

Second, the result in *Balliro* is significant because it serves to illustrate the functional importance of the new rule in relation to the *Barker* constitutional standard as utilized by the criminal defendant in *Lutoff*.[132] As the *Balliro* decision demonstrates, it is possible, although unusual, that a trial

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(1982) (Record which shows trial delay caused by defendant does not justify a dismissal for prejudicial delay pursuant to Rule 36(c)).

[123] 385 Mass. at 623, 433 N.E.2d at 438.

[124] *Id.*

[125] *See supra* note 98 and accompanying text.

[126] 385 Mass. at 623-24, 433 N.E.2d at 438.

[127] *Id.* at 623, 433 N.E.2d at 438.

[128] *See supra* notes 96-98 and accompanying text.

[129] *See supra* note 98.

[130] *See supra* note 96.

[131] *See infra* note 140 and accompanying text.

[132] 14 Mass. App. Ct. 434, 440 N.E.2d 52 (1982). For a detailed discussion and analysis of *Lutoff, see supra* notes 18-91 and accompanying text.

delay of less than 12 months caused by the prosecution could be deemed prejudicial and therefore violative of a criminal defendant's right to a speedy trial.[133] The purpose of Rule 36(c) is to protect a defendant's right in such an instance.[134] Thus, while subdivision (b) of Rule 36 ultimately sets a definitive standard of 12 months after which time the defendant's speedy trial rights have presumptively been violated,[135] subdivision (c) undertakes a more qualitative approach which is applicable only to defendants not yet qualified to make a motion under subdivision (b).[136] As written, Rule 36(c) appears to impose a constitutional standard which is comparable, although perhaps not coextensive, with the *ad hoc* balancing test mandated by *Barker* as a prerequisite to a finding of a constitutional speedy trial violation.[137] Indeed, Rule 36(c) has been read as simply putting the *Barker* constitutional standard for judicial decision-making into functional terms for speedy trial motions brought within one year.[138] Arguably, however, there is at least one important difference in the judicial analysis required under Rule 36(c) and the analysis mandated by the *Barker* standard — the importance of the length of the delay. This difference may determine the efficacy of each approach for Massachusetts criminal defendants depending on the given factual circumstances. Of course, once the time limit for trial mandated by Rule 36(b) has expired, the defendant has established a prima facie violation and the court is required to dismiss the charges regardless of whether the defendant was prejudiced, unless the Commonwealth can satisfactorily excuse the delay.[139]

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[133] 385 Mass. at 623, 433 N.E.2d at 438.

[134] *See* MASS. R. CRIM. P. 36(c), and *supra* notes 96-98 and accompanying text.

[135] *See* MASS. R. CRIM. P. 36(b)(1), and *supra* notes 93-95 and accompanying text.

[136] Thus, Rule 36(c) applies "notwithstanding the fact that a defendant is not entitled to a dismissal under subdivision (b). . . ." MASS. R. CRIM. P. 36(c).

[137] In comparison with a defendant's burden of proving and a court's duty to balance the four factors enunciated in *Barker* — delay, reason for delay, diligent assertion and prejudice — in a speedy trial claim under the federal and state constitutions, Rule 36(c) simply requires a defendant to prove, and *Balliro* gives a court broad discretion to determine, that there has been sufficient prejudice caused by unreasonable prosecutorial delay to warrant dismissal of the charges. *Compare* Barker v. Wingo, 407 U.S. 514, 530-33 (1972) (*ad hoc* balancing of four factors) *with* Commonwealth v. Balliro, 385 Mass. 618, 433 N.E.2d 434, 437-38 (1982) (Rule 36(c)).

[138] A one year time limit assumes that the defendant's return day is after July 1, 1981. *See* MASS. R. CRIM. P. 36(b)(1)(C), and *supra* note 93.

[139] *See* MASS. R. CRIM. P. 36(b). Rule 36(b) apparently expresses the Supreme Judicial Court's belief that delays in excess of the twelve month prescribed period for trial are presumptively caused by the prosecution and prejudicial to the defendant. This is clearly a more liberal, and therefore constitutionally permissible, formulation of the speedy trial right. Indeed, once subdivision (b) is applicable, the *Barker* standard would seem to hold little value for a criminal defendant alleging a speedy trial violation since the rule automatically provides the defendant with a prima facie case for dismissal. *See* Commonwealth v. Look, 379 Mass. 893, 898 n.2, 402 N.E.2d 470, 476 n.2, *cert. denied*, 449 U.S. 827 (1980).

Under the *Barker* test, the length of delay is a triggering device.[140] Unless there is sufficient delay to be presumptively prejudicial as a threshold matter, a court need not inquire further into either the remaining factors — reason for delay, diligent assertion and prejudice — or other relevant circumstances, but instead may deny the defendant's motion.[141] Conversely, under the plain language of Rule 36(c), the length of the delay is an appropriate factor to consider in a 36(c) motion only insofar as it relates to the time limits imposed by subdivision (b) of the rule.[142] As a result of this difference, it is probable that the defendant's motion in *Balliro,* while granted under Rule 36(c), would have been properly denied if grounded solely on a *Barker* constitutional claim. The *Balliro* Court would clearly have been hard-pressed to find a *Barker*-type violation based upon a three month trial delay, because the threshold requirement of a presumptively prejudicial delay, which the defendant must overcome to justify further constitutional inquiry under *Barker,* was arguably absent under the facts of the case.[143] The *Balliro* Court more easily found a possible violation of Rule 36(c), however, because the facts clearly showed that the trial delay, regardless of its length, was caused by an unreasonable lack of diligence on the part of the prosecutor and at least supported an inference that such a delay prejudiced the defendant.[144] Given the fact, therefore, that Rule 36(c) will only apply to short-delay motions and thereafter a speedy trial violation will be presumed under Rule 36(b), the aggregate

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[140] Barker v. Wingo, 407 U.S. 514, 530-31 (1972).

[141] *Id.*

[142] Rule 36(c) states in part that "Notwithstanding the fact that a defendant is not entitled to a dismissal under subdivision (b) . . . a defendant shall be entitled to a dismissal where the judge . . . determines that: 1) the conduct of the prosecuting attorney . . . has been unreasonably lacking in diligence. . . ." MASS. R. CRIM. P. 36(c). The Reporters' Notes state that the (c)(1) subsection actually imposes two requirements on the defendant comporting with the length of delay and reason for delay criteria enunciated in *Barker. See Barker v. Wingo,* 407 U.S. 514, 530-31 (1972). According to the Reporters' Notes, to satisfy (c)(1), the defendant must establish first that the challenged delay was unreasonable and secondly that this delay was caused by the prosecutor. This interpretation, however, does not necessarily fit the plain language of the rule. A more consistent reading of (c)(1) would interpret the requirement as expressing the Court's belief that *any* delay which has been caused by unreasonable lack of prosecutorial diligence is itself presumptively unreasonable. The Supreme Judicial Court's discussion of Rule 36(c) in *Balliro* seems consistent with the latter view; once the defendant demonstrated that the delay was caused by lack of prosecutorial diligence, the length of the delay was irrelevant to the Court's analysis. Commonwealth v. Balliro, 385 Mass. 618, 623, 433 N.E.2d 434, 437-38 (1982).

[143] In *Balliro,* only three months had passed since the issuance of process on the two original complaints when the district court allowed the defendant's motion to dismiss the Commonwealth's application for new complaints. *Id.* at 619-20, 433 N.E.2d at 435-36. For a comparison with the delays which the *Lutoff* court believed warranted further investigation under the *Barker* test, *see supra* note 46.

[144] 385 Mass. at 623, 433 N.E.2d at 437-38. *See supra* note 141.

effect of the two provisions would seem to limit the future practical utility of a *Barker* argument in Massachusetts. It should be clear, however, that the *Barker* standard, while necessarily imposing a heavier burden on the moving defendant, remains the starting point for state criminal defendants alleging speedy trial violations under Rule 36(b) and (c).[145] Although a defendant might premise a speedy trial claim on the more lenient standards permitted by the Massachusetts procedural rules, there is no assurance that the court will apply such standards in a manner consistent with constitutional requirements. Indeed, the *Barker* criteria must always act to limit the judicial discretion authorized under Rule 36 by the *Balliro* decision. For example, the guidelines of 36(c) are applied by a court so as to impose a stricter standard on the defendant than *Barker* permits. The court has undeniably exceeded its discretionary authority.

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[145] It is constitutionally impermissible for the states to impose more burdensome speedy trial standards upon criminal defendants than does the sixth amendment as interpreted by the United States Supreme Court in *Barker v. Wingo*. 407 U.S. 514, 523 (1972). In this context, however, it is interesting to note a second apparent distinction between the Rule 36(c) and the *Barker* approaches — the criminal defendant's obligation to affirmatively show prejudice caused by the delay. Rule 36(c) apparently establishes actual prejudice as a *necessary* element of the defendant's burden of proof in support of a successful motion under the subdivision. *See* MASS. R. CRIM. P. 36(c)(2). Although the *Balliro* Court held that it is within a judge's discretion to determine whether a defendant has proved sufficient prejudice to require dismissal under 36(c), a showing of prejudice by the defendant is nevertheless a dispositive burden of proof under the rule. Commonwealth v. Balliro, 385 Mass. 618, 623, 433 N.E.2d 434, 438 (1982); Commonwealth v. Atkinson, 15 Mass. App. Ct. 200, 443 N.E.2d 1371 (1983) (rescript opinion). Conversely, while prejudice is an essential factor to be considered and weighed in a *Barker* analysis, and it is generally incumbent upon the defendant to show at least a potential for prejudice arising out of any challenged delay, a defendant's constitutional right to a speedy trial nevertheless cannot be wholly dependent on a showing of prejudice. 407 U.S. at 533. *See supra* note 71 and accompanying text. A literal reading of Rule 36(c) thus suggests a more rigorous burden on the moving defendant than under *Barker* and, therefore, may call into question the constitutionality of the prejudice requirement.

Alternatively, however, the requirement might be viewed as the Supreme Judicial Court's belief that, as a matter of law, the prejudice inherent in any unjustified delay, absent an affirmative showing of particular prejudice, is insufficient to justify dismissal of speedy trial claims based on delays of less than one year under Rule 36(c). Under such an interpretation, the prejudice requirement of Rule 36(c)(2) would simply encompass the *Barker* requirement that, as a threshold matter, there be presumptively prejudicial delay before further constitutional speedy trial inquiry is justified. 407 U.S. at 530. *But see supra* note 142. Assuming that the one year time limit imposed by Rule 36(b) is a "reasonable period consistent with constitutional standards," the prejudice requirement of subdivision (c)(2) would thus appear to be constitutionally sound. *See* 402 U.S. at 523. Between the effective date of Rule 36 on July 1, 1979 and July 1, 1981, however, Rule 36(c) also applies to trial delays ranging from twenty-four to eighteen months. MASS. R. CRIM. P. 36(b)(1)(A)(B). *See supra* note 92 and accompanying text. In the face of such a lengthy delay, the constitutional validity of the Rule 36(c) prejudice requirement under *Barker* seems somewhat more tenuous.

C. A NEW AND FLEXIBLE REMEDY FOR PROSECUTORIAL DELAY

If a criminal defendant, as was the case in *Balliro,* can ultimately demonstrate sufficient prejudice caused by an unreasonable lack of prosecutorial diligence under Rule 36(c), the required remedy is dismissal of all charges.[146] Similar to a dismissal for a *Barker* constitutional speedy trial violation, a dismissal under 36(c) also acts as a bar to any later prosecution for the same or related offense.[147] As a consequence of this strict sanction, it is easy to speculate that Massachusetts courts will generally be reluctant to find Rule 36 speedy trial violations absent compelling circumstances.[148] Aside from implicitly foregoing any remedy for the defendant in cases involving less serious prosecutorial delay, however, a viable alternative might be the recognition of a court's discretion to dismiss a criminal case without prejudice to the state when the prosecution causes an unnecessary, but not unconstitutional, trial delay. The Federal courts currently enjoy such an option under both Rule 48(b) of the Federal Rules of Criminal Procedure[149] and the Federal Speedy Trial Act of 1974.[150] During the *Survey* year, in *Commonwealth v. Pomerleau*,[151] the Massachusetts Appeals Court approved a district court's decision to exercise similar remedial discretion in a purported speedy trial case.

In *Pomerleau,* two complaints were issued on December 26, 1980, and one was issued on January 13, 1981, charging Pomerleau with receiving stolen goods.[152] Pomerleau pleaded not guilty on the day the last complaint was issued.[153] The cases were set for pretrial conference on February 27, 1981, but three continuances were granted which ultimately extended the hearing date to May 26, 1981.[154] when Pomerleau's cases were called on May 26, together with those of two co-defendants, the

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[146] *See* MASS. R. CRIM. P. 36(c).

[147] *See* MASS. R. CRIM. P. 36(e) and *supra* note 97 and accompanying text.

[148] *See supra* notes 76-77 and accompanying text.

[149] *See* FED. R. CRIM. P. 48(b). Under Rule 48(b), a federal court can choose to dismiss without prejudice for unnecessary delays not amounting to a constitutional violation. *See* C. WRIGHT, *supra* note 45, § 814, at 229 and cases cited therein.

[150] 18 U.S.C. §§ 3161-74 (1974). A dismissal for violation of the Act may be with or without prejudice to the government. 18 U.S.C. § 3162(c)(1). In determining which sanction to apply, however, the court must consider such factors as the seriousness of the offense, the facts and circumstances of the case which led to the dismissal and the impact of reprosecution on the administration of the chapter and justice. *Id.*

[151] 13 Mass. App. Ct. 530, 434 N.E.2d 1288 (1982).

[152] *Id.* at 531, 434 N.E.2d at 1289.

[153] *Id.*

[154] *Id.* The record did not disclose who sought the continuances and the defendant made no claim that they had been granted over his objection or that the continuances violated G.L. c. 276, § 35 (continuance over objection of defendant not to exceed ten days). *Id.*

assistant district attorney requested another continuance to keep the cases of all three co-defendants together, as counsel for one of the co-defendants was not then present in court.[155] In response to the Commonwealth's request, counsel for the second co-defendant moved to dismiss for lack of a speedy trial.[156] Pomerleau's counsel also expressed a desire to move for dismissal on speedy trial grounds, but stated "[i]f they want to indict [Pomerleau] and go the the Grand Jury, go ahead and do that."[157] The judge subsequently dismissed the cases without prejudice to the Commonwealth's rights to seek these indictments.[158] Pomerleau's counsel made no objection to this disposition.[159] Pomerleau was indicted for the same offenses as charged in the original complaints within two weeks of the dismissal.[160] Pomerleau then moved for dismissal in the superior court, asserting that despite the May 26 dismissal "without prejudice," all subsequent prosecution for the same offense was barred.[161] The superior court judge denied the motion and Pomerleau was convicted on August 4, 1981.[162]

On appeal, the Appeals Court held that the district court judge had not exceeded his authority in dismissing the complaints without prejudice on purported speedy trial grounds.[163] In so holding, the court distinguished four recent Massachusetts speedy trial cases in which the appropriate remedy was dismissal *with* prejudice. First, the court examined two cases where a trial continuance had been granted over the defendant's objections in violation of chapter 276, section 35 of the General Laws.[164] The Appeals Court pointed out that in both *Commonwealth v. Ludwig*[165] and

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[155] *Id.* at 531, 434 N.E.2d at 1289-90.

[156] *Id.* at 531, 434 N.E.2d at 1290.

[157] *Id.* at 532, 434 N.E.2d at 1290.

[158] *Id.* Prior to this disposition, the judge was apparently annoyed with the assistant district attorney. *Id.* She seemingly was not ready for trial since neither the defendant nor one of the codefendants was present in the courtroom. *Id.* The prosecutor claimed, however, that she was ready, her witnesses were present and the defendants were close at hand in the house of corrections. *Id.* at 532 n.3, 434 N.E.2d at 1290 n.3.

[159] *Id.* at 532, 434 N.E.2d at 1290.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 536, 434 N.E.2d at 1292.

[164] *Id.* at 533-34, 434 N.E.2d at 1290-91. Section 35 provides in pertinent part: "[T]he court or justice may adjourn an examination or trial from time to time, *not exceeding ten days at any one time against the objection of the defendant . . .*" G.L. c. 276, § 35 (emphasis added).

[165] 370 Mass. 31, 345 N.E.2d 386 (1976). In *Ludwig*, the defendant was charged with larceny and conspiracy. *Id.* at 32, 345 N.E.2d at 387. At trial, a continuance was granted to the Commonwealth over the defendant's objection which delayed the trial for approximately twenty days. *Id.* The district court subsequently allowed the defendant's motion for dismissal with prejudice for a denial of a speedy trial. *Id.* The defendant, however, was later

Commonwealth v. Silva,[166] the reviewing court was able to conclude that the lower court's dismissal of the complaints against the defendant with prejudice, on purported speedy trial grounds, was permissible based on the evidence.[167] The *Pomerleau* court emphasized that the dismissals in *Ludwig* and *Silva* were required to be with prejudice because each determination had been on constitutional speedy trial grounds.[168] Next, the Appeals Court considered the Supreme Judicial Court's decision in *Commonwealth v. Fields,*[169] where a statutory, and not a constitutional viola-

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indicted and convicted for identical crimes. *Id.* The Supreme Judicial Court reversed the convictions and held that, given a clear violation of G.L. c. 276, § 35 (continuance over defendant's objection not to exceed ten days), the dismissal of the complaints in the district court could properly have been treated as a dismissal based upon the constitutional speedy trial right and, as such, was "an absolute discharge with prejudice against the Commonwealth." *Id.* at 34-35, 345 N.E.2d at 388-89. *See infra* notes 166.

[166] 1980 Mass. App. Ct. Adv. Sh. 2103, 413 N.E.2d 349. In *Silva,* the defendant was indicted for armed robbery. *Id.* at 2103, 413 N.E.2d at 350. Prior to trial, he moved in superior court to dismiss the indictment for lack of a speedy trial. *Id.* The motion was based on a prior dismissal in district court of a complaint which had charged the defendant with the same crime. *Id.* The superior court judge denied the motion and the defendant was subsequently convicted on the indictment. *Id.* The Appeals Court reversed the conviction holding that the district court's dismissal of the complaint, together with a clear violation of G.L. c. 276, § 35, implied findings of fact sufficient to establish a violation of the defendant's constitutional right to a speedy trial. *Id.* at 2108-09, 413 N.E.2d at 352-53. As such, dismissal with prejudice to the Commonwealth was the appropriate remedy. *Id.* at 2108, 413 N.E.2d at 352.

[167] 13 Mass. App. Ct. at 533, 434 N.E.2d at 1290-91.

[168] *Id.* at 533, 434 N.E.2d at 1291. In each case, violation of the ten day time limit prescribed by G.L. c. 276, § 35, while not requiring automatic dismissal, served to trigger a constitutional speedy trial inquiry under the *Barker* standard. The Ludwig Court thus explained that the statutory violation indicated a delay which was presumptively prejudicial to the defendant, satisfied the *Barker* length of delay criterion, and therefore justified further examination into the other speedy trial factors enunciated by the *Barker* decision. Commonwealth v. Ludwig, 370 Mass. 31, 34 n.1, 345 N.E.2d 386, 388 n.1 (1976). *See* Commonwealth v. Silva, 1980 Mass. App. Ct. Adv. Sh. 2103, 2107-10, 413 N.E.2d 349, 351-53. *See also* Barker v. Wingo, 407 U.S. 514, 530-33 (1972).

[169] 371 Mass. 274, 356 N.E.2d 1211 (1976). In *Fields,* the defendant, who was already incarcerated on unrelated charges, was charged with armed robbery and larceny. *Id.* at 275, 356 N.E.2d at 1212. He subsequently made an application to the district court under G.L. c. 277, § 72A (repealed, Acts of 1981, c. 795, § 16.), which provided that any prisoner serving a term of imprisonment, upon application to the court for a prompt trial or other disposition of any pending, untried indictment, information or complaint, was entitled to a trial or other disposition within six months after the court received the application unless the court orders otherwise. *Id.* at 275-76, 356 N.E.2d at 1212. *See* G.L. c. 277, § 72A (repealed, Acts of 1981, c. 795, § 16). No action was taken on the defendant's application, however, for almost eight months. *Id.* at 276, 434 N.E.2d at 1213. A district court judge, pursuant to the provisions of section 72A, dismissed the complaints. *Id.* Four months later, the defendant was indicted, and ultimately convicted at trial, for the same offense. *Id.* In reversing the defendant's conviction, the Supreme Judicial Court found that the decision of the district court judge to dismiss the original complaints under section 72A was proper under the circumstances. *Id.*

tion was at issue.[170] The court explained that in *Fields* the Supreme Judicial Court had held that prejudicial dismissal for a non-constitutional violation of chapter 277, section 72A of the General Laws was an appropriate remedy.[171] Finally, the *Pomerleau* court examined the recent case of *Commonwealth v. Balliro,*[172] where the Supreme Judicial Court discussed an alleged violation of Rule 36(c) of the new Massachusetts Rules of Criminal Procedure.[173] The court noted that, as in the *Ludwig, Silva,* and *Fields* cases, the *Balliro* Court was able to conclude that the lower court judge had impliedly found that facts necessary to permit a determination that the defendant had been denied a speedy trial; in this instance, however, within the guidelines of Rule 36(c).[174] The Appeals Court em-

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at 282, 434 N.E.2d at 1216. According to the Court, the appropriate consequence of such a dismissal was a bar of any subsequent prosecution for the same offense. *Id.* at 282, 434 N.E.2d at 1217 (quoting Commonwealth v. Ludwig, 371 Mass. 31, 33, 345 N.E.2d 386, 389 (1976)).

[170] 13 Mass. App. Ct. at 533-34, 434 N.E.2d at 1291.

[171] *Id.* at 534, 434 N.E.2d at 1291. During the *Survey* year, in *Commonwealth v. Jones,* the Supreme Judicial Court had another opportunity to review an incarcerated defendant's claim for dismissal under the now-repealed G.L. c. 277, § 72A. 385 Mass. 12, 429 N.E.2d 1136 (1982). In *Jones,* the defendant, who was serving a sentence on unrelated charges, filed an application pursuant to section 72A for a prompt trial or other disposition of outstanding complaints charging him with intent to murder. *Id.* at 12-13, 429 N.E.2d at 1136-37. The defendant was nevertheless tried and convicted on the charges seven and one-half months after the superior court received his statutory application, a delay of one and one-half months over the maximum allowed under section 72A (assuming the receiving court has not properly ordered otherwise). *Id.* at 13, 429 N.E.2d at 1137.

On appeal, the Supreme Judicial Court held that the judgments of the superior court had to be reversed, and the indictments dismissed. *Id.* at 12-13, 429 N.E.2d at 1136. The Court noted that while expiration of the section 72A statutory period did not require dismissal, especially in cases where the defendant required or caused the delay, where the delay is not attributable to the defendant, then "the Commonwealth must at the very least explain why such delay is 'reasonably necessary and justifiable.' " *Id.* at 14, 429 N.E.2d at 1137 (quoting Commonwealth v. Alexander, 371 Mass. 726, 730, 359 N.E.2d 306, 309 (1977)). The Court, in examining the record, found that the defendant had not consented to the delays and that the Commonwealth had failed to follow the correct procedures to apply for an extension of the section 72A statutory period. *Id.* at 14-15, 429 N.E.2d at 1137-38. Accordingly, the Court held that the indictments had to be dismissed. *Id.* at 15-16, 429 N.E.2d at 1138.

There was no language in the *Jones* opinion concerning whether the dismissal was with prejudice. The question, however, was not in issue. Although G.L. c. 277, § 72A was repealed by the Acts of 1981, c. 795, § 16, all existing case law under section 72A is now encompassed under MASS. R. CRIM. P. 36. Commonwealth v. Look, 379 Mass. 893, 898 n.2, 402 N.E.2d 470, 476 n.2, *cert. denied,* 449 U.S. 827 (1980). *See* MASS. R. CRIM. P. 36(a)(1), (d).

[172] 385 Mass. 618, 433 N.E.2d 434 (1982). For a detailed discussion and analysis of *Balliro, see supra* notes 99-145 and accompanying text.

[173] 13 Mass. App. Ct. at 534-35, 434 N.E.2d at 1291-92. *See* MASS. R. CRIM. P. 36, and *supra* notes 92-98 and accompanying text.

[174] Mass. App. Ct. at 535, 434 N.E.2d at 1292.

phasized that, because the Supreme Judicial Court determined that the defendant in *Balliro* was denied a speedy trial, the appropriate remedy was dismissal with prejudice.[175]

Unlike the four cases it discussed, however, the Appeals Court found that the facts in *Pomerleau* did not permit the inference that the defendant had been denied a speedy trial.[176] The court first noted that there was clearly no constitutional or statutory violation.[177] Secondly, the court could find no indication or suggestion in the record that the prosecution was unreasonably lacking in diligence in bringing Pomerleau to trial or that the district court judge had made any finding that Pomerleau was prejudiced by any delay so as to infer a violation of Rule 36(c).[178] To the contrary, the Appeals Court pointed out that the judge's action in dismissing without prejudice indicated his belief that the delay had not been unfair to Pomerleau.[179] Accordingly, the Appeals Court held that the dismissal had not been on true speedy trial grounds and, consequently, the district court judge had not exceeded his discretion in dismissing the complaints without prejudice.[180]

The court in *Pomerleau* concluded its discussion by suggesting that the term "speedy trial" only be applied to situations where a judge determines that the defendant was denied a speedy trial under constitutional, statutory or Rule 36 criteria which permit or require dismissal with prejudice.[181] Where a judge finds the prosecutor's delay less grievous, the court reasoned, the Commonwealth can avoid subsequent difficulty by requesting that the judge indicate that the defendant's speedy trial rights have not been found to have been violated.[182] If it is so determined, the Appeals Court concluded, then the judge, acting under his inherent powers to take corrective action, may impose an appropriate sanction, including dismissal without prejudice.[183]

The *Pomerleau* decision is significant because the Appeals Court clearly articulated the scope of the common law power of Massachusetts courts to fashion dismissal remedies for trial delay caused by the Com-

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[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at 535-36, 434 N.E.2d at 1292. *See* MASS. R. CRIM. P. 36.

[179] 13 Mass. App. Ct. at 536, 434 N.E.2d at 1292. The court further reasoned that prejudice could not be implied in light of the defense counsel's apparent acquiescence to the possibility of future indictments as well as his failure to object to the form of the dismissal. *Id.*

[180] *Id.*

[181] *Id.* at 537, 434 N.E.2d at 1293.

[182] *Id.*

[183] *Id.*

monwealth.[184] Although the court's suggestion of limiting the use of the term "speedy trial" to constitutional, statutory or court rule violations was dicta, such reasoning is justified in light of the court's holding that judges may fashion any appropriate remedy in unnecessary delay or non-speedy trial cases.[185] Quite conceivably, the result of such a practice would be less confusion for both reviewing courts and litigants as to the determinative facts found and the standards applied to those facts by the dismissing court. Thus, recognizing that a court may dismiss *with* prejudice if it finds a "speedy trial" violation and assuming, after *Pomerleau*, that the court has an "inherent" right to dismiss without prejudice for less serious delay, it would seem to be in the best interests of all concerned to consistently elicit a specific basis on the record for any dismissal on purported speedy trial grounds. Given the ramifications of a dismissal with prejudice to the Commonwealth, such a remedy should only be granted by a court after a warning is given to the prosecution that the severest sanction will result from a failure to proceed to trial.[186] Similarly, it is reasonable to expect a court to specify clearly whether the dismissal is compelled by the constitution, state statute or Rule 36 so the defendant will know with certainty whether he or she may again be prosecuted for the same or a related offense.[187]

As both the *Pomerleau* and *Balliro* decisions demonstrate, the outcome, as well as the remedy, associated with a "speedy trial" motion on appeal may often turn upon speculative interpretation of a barren court record. A possible result of this interpretation, of course, is the defendant's freedom from prosecution. While the importance of this issue would seem to call for a clear standard in order to insure predictable results, the uncertainty of outcome and remedy is in fact further exacerbated by the *ad hoc*, discretionary nature of most, if not all, of the available constitutional, statutory and court rule standards designed to guarantee prompt trials for Massachusetts criminal defendants. Consequently, the ultimate decision by a reviewing court will very likely be dependent on the extent to which the practitioner, keeping in mind the

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[184] By comparison, it is generally agreed that Rule 48(b) of the Federal Rules of Criminal Procedure, which authorizes dismissal with or without prejudice for unnecessary delay, is also a "restatement of the inherent power of the court to dismiss a case for want of prosecution." C. WRIGHT, *supra* note 45, at § 814, at 209.

[185] 13 Mass. App. Ct. at 537, 434 N.E.2d at 1293.

[186] Such a requirement would be consistent with the general belief by federal courts that under FED. R. CRIM. P. 48(b) the power to dismiss with prejudice under the Rule should be utilized with caution and only after a forewarning to the prosecution. *See* C. WRIGHT, *supra* note 45, at § 814, at 229-30

[187] *Id.; see generally* Commonwealth v. Silva, 1980 Mass. Adv. Sh. 2103, 2110 n.9, 413 N.E.2d 349, 353 n.9. ("[I]t would have been a better practice for the District Court judge to have clearly identified the basis for his action and to have stated whether the dismissal was with prejudice.").

functional relationship and important criteria of Rule 36, the *Barker* test and statutory provisions such as chapter 276, section 35, develops a favorable record for appeal.

In conclusion, the Commonwealth's obligation to provide, and a state criminal defendant's corresponding right to receive, a prompt trial can be found in both the federal and state constitutions, the Massachusetts Rules of Criminal Procedure and state statutory provisions. The rather elusive Constitutional definition of the term "speedy trial" has effectively required judicial interpretation of virtually every guarantee of the rights associated with the term. As a result, there appear to be a number of interrelated speedy trial standards whose application, in large part, depends on judicial discretion. Nevertheless, it remains clear that the foundation upon which such discretion is built and against which all state-promulgated speedy trial standards must ultimately be measured is the flexible constitutional standard enunciated by the United States Supreme Court in *Barker v. Wingo* and recently applied by the Massachusetts Appeals Court in *Commonwealth v. Lutoff*. Consistent with the *Barker* decision and its own rule making authority, however, the Massachusetts Supreme Judicial Court has promulgated Rule 36 of the new Rules of Criminal Procedure in an attempt to both quantify and clarify, within constitutional parameters, a criminal defendant's right to a prompt trial in state courts. In accordance with Rule 36(b), the Commonwealth will generally be obligated to try a defendant within 12 months or risk a prejudicial dismissal of its case. Moreover, a shorter delay may also require prejudicial dismissal under Rule 36(c) if a defendant can demonstrate prejudice caused by an unreasonable lack of prosecutorial diligence. As the *Balliro* decision indicates, however, it remains within a court's discretion to determine when prosecutorial delay has caused sufficient prejudice to require dismissal. Nevertheless, this discretion must always by tempered by the constitutional constraints of *Barker*. In comparison with *Barker*, therefore, Rule 36(c) must be interpreted as allowing for a more lenient, or perhaps even a coextensive constitutional burden on a defendant to prove a speedy trial violation. It should not be interpreted or applied so as to impose a heavier burden; to do so would be an abuse of the discretion granted in *Balliro*. Thus, if a defendant's claim for speedy trial relief is denied under Rule 36, he or she may still claim a constitutional violation under the *Barker* balancing test.

Assuming the defendant does prevail, the remedy for a constitutional or Rule 36 speedy trial violation is mandatory dismissal of charges with prejudice to the Commonwealth. Given this uncompromising remedy, it seems likely that violations will be found only in the most egregious circumstances. Rather than foregoing any remedy in less serious cases, however, the Massachusetts Appeals Court decision in *Pomerleau* indicates that state courts have inherent discretion to fashion appropriate

remedies for unnecessary delays not rising to true speedy trial violations, including dismissal *without* prejudice. Although potentially beneficial to criminal defendants seeking some type of relief from want of prosecution, the result in *Pomerleau* may well add simply another element of unpredictability to the "speedy trial" formula unless the court exercising this remedial discretion makes both the basis of its decision and the extent of any sanction clearly known to the litigants and the reviewing courts. The responsibility of ensuring such clarity, however, cannot be left entirely to the courts. Given the discretionary nature of the standards and remedies associated with trial delays, it would seem equally incumbent upon the participating attorneys, for the sake of greater certainty in subsequent legal proceedings as well as greater clarity and consistency in their own arguments at those proceedings, to request that an explicit judicial determination concerning the speedy trial questions at issue be made on the record.

§ 3.8. Duress as a Defense.* Massachusetts has long recognized duress as a defense in criminal actions.[1] The essence of this defense is that a person will not be held responsible for criminal conduct which he was forced to commit. The defense of duress is based on the theory that a person should not be convicted of an offense when he lacks the required criminal intent.[2] Although Massachusetts, unlike some states, has no statute defining duress in this context, the Supreme Judicial Court has clearly stated the factors which must be present in order for a defendant to be acquitted under this defense. According to the Court, the defendant must establish that there was a present, immediate and impending threat sufficient to induce a well-founded fear of death or serious bodily injury if he did not commit the criminal act.[3] That is, the person must have been put in a position where neither he nor a person of reasonable firmness could have avoided committing the criminal offense under the circumstances.[4] The person also must not have had a reasonable chance to escape.[5]

Although the Court has articulated the necessary elements of the defense of duress, it has not clearly defined the outer parameters of the defense's applicability.[6] During the *Survey* year, the Massachusetts Court

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§ 3.8. [1] Commonwealth v. Elwell, 43 Mass. (2 Met.) 190, 192 (1840).

[2] Commonwealth v. Melzer, 14 Mass. App. Ct. 174, 180 n.3, 437 N.E.2d 549, 552 n.3 (1982) (jury instructions); Note, *Criminal Law — Duress*, 9 SETON HALL L. REV. 556, 559 (1978).

[3] Commonwealth v. Robinson, 1981 Mass. Adv. Sh. 4, 15, 415 N.E.2d 805, 812.

[4] *Id.*

[5] *Id.*

[6] For example, the Court has not firmly decided whether the prosecution or the defense

of Appeals considered whether duress was available as a defense to a criminal defendant claiming that he was in fear for the life of a third person. In *Commonwealth v. Melzer*,[7] the Appeals Court stated that it was likely that the defense of duress would be available when it is a third person who is in an immediate danger of death or serious injury.[8] The court held, however, that it did not have to consider whether the trial judge erred by not instructing the jury that the defense was available when a third person was in danger, because the defendant had not established the elements required to raise the defense of duress successfully.[9]

In *Melzer*, it was established at trial[10] that in February of 1978, the defendant Jeffrey Melzer met Robert Gear in Florida, where Melzer helped to maintain Gear's boat.[11] During that month, Gear arranged for Melzer to come to Massachusetts to help repair Gear's home, which had been damaged in a storm.[12] After a month in Massachusetts, Melzer returned to Florida, where he met Dwight Harrison.[13] According to Melzer's testimony at trial, in June 1978 he accepted an offer from Harrison and Harrison's friend, Robert Gaita, to drive him up to Virginia.[14] During the trip, Melzer spoke about his work for Gear, whom he described as having a lot of money.[15] Gaita and Harrison refused to let Melzer off when the group arrived in Virginia. Instead, they asked him to direct them to Gear's house in Massachusetts.[16] When Melzer declined to direct them, Harrison drew a gun and pointed it at the defendant.[17] Melzer

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has the burden of proof when the defendant claims duress. *See* Commonwealth v. Robinson, 1981 Mass. Adv. Sh. 4, 18-22, 415 N.E.2d 805, 814-16. In addition, the Court had not decided whether the defense of duress is available to a person who commits a criminal offense because of a threat of serious bodily injury to a third person. Commonwealth v. Melzer, 14 Mass. App. Ct. 174, 180-81, 437 N.E.2d 549, 553 (1982); *but see* Commonwealth v. Robinson, 1981 Mass. Adv. Sh. 4, 15, 415 N.E.2d 805, 812 (citing Rhode Island Recreation Center, Inc. v. Aetna Casualty & Surety Co., 177 F.2d 603, 606 (1st Cir. 1949), a case in which the First Circuit Court of Appeals stated that perhaps "a well-grounded apprehension of death or serious bodily injury to another, particularly a close relative, may constitute coercion." 177 F.2d at 606).

[7] 14 Mass. App. Ct. 174, 437 N.E.2d 549 (1982).

[8] *Id.* at 182, 437 N.E.2d at 554.

[9] *Id.*

[10] It should be noted that much of the testimony adduced at trial was conflicting. *Id.* at 175, 437 N.E.2d at 550.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 178, 437 N.E.2d at 551.

[14] *Id.* Melzer's ultimate destination was Ohio. *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* Melzer claimed that during the remainder of the trip Gaita and Harrison forced him to submit to sodomy, commit fellatio and swallow pills of unknown origin. *Id.* at 178, 437 N.E.2d at 551-52.

testified that he could not have escaped from Harrison and Gaita without getting shot.[18] Shortly before they reached Gear's house, Harrison told Melzer that if he did as he was told, nobody would get hurt.[19]

When the group arrived at the house, Gear, his friend Robert Tracey and Gear's plumber Dennis Haggett were all present in the house.[20] After entering the house, Gaita pulled out a gun and announced, "This is a robbery."[21] Harrison then began searching the house for a safe.[22] Gear, fearing for his life, offered to take Harrison and Gaita to a bank to get some money.[23] When Gaita and Harrison accepted Gear's offer, Melzer was left alone to guard Tracey and Haggett.[24] A struggle arose when Gear, Harrison and Gaita returned from the bank.[25] As a result of this confrontation, Gear, Tracey and Haggett were able to escape from the house.[26] Tracey and Haggett testified that Melzer shot Tracey in the leg while Tracey was attempting to escape.[27] Melzer testified that Harrison and Gaita dragged Melzer to their car and the three fled.[28] According to Melzer, Gaita and Harrison continued to abuse him the entire time they were fleeing.[29]

Melzer was charged with several crimes, including armed robbery and armed assault in a dwelling. At the trial, the defense counsel requested the trial judge to instruct the jury that the defense of duress should apply if there had been a present, immediate and impending threat at the time of the crime of such a nature as to induce a well-founded fear of death or serious injury either to Melzer *or to another person* if the criminal act was not done.[30] The trial judge expressly declined to include the phrase "or to another person" in his instructions to the jury.[31] Melzer was convicted of armed robbery and armed assault in a dwelling.[32] Melzer appealed, argu-

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[18] *Id.* at 178, 437 N.E.2d at 552.

[19] *Id.* at 178-79, 437 N.E.2d at 552. Melzer was also forced to take a pill of unknown origin. *Id.*

[20] *Id.* at 175, 437 N.E.2d at 550. The group entered the house and Melzer asked Gear if he could show Harrison and Gaita the repair work he had done on the house. *Id.*

[21] *Id.* All the cash and valuables of Gear, Tracey and Haggett were taken from them. *Id.*

[22] *Id.* There was no safe in Gear's house. *Id.*

[23] *Id.* at 176, 437 N.E.2d at 550.

[24] *Id.* Harrison told Melzer, "[i]f we're not back in forty-five minutes, dust them . . . ." *Id.*

[25] *Id.* at 177, 437 N.E.2d at 551.

[26] *Id.*

[27] *Id.* at 177-78, 437 N.E.2d at 551. Melzer, in his testimony, denied shooting Tracey. *Id.* at 179, 437 N.E.2d at 552.

[28] *Id.*

[29] *Id.* at 180, 437 N.E.2d at 552.

[30] *Id.* at 175, 437 N.E.2d at 530.

[31] *Id.*

[32] *Id.* at 174, 437 N.E.2d at 549.

ing that the trial judge erred by refusing to give instructions to the jury that fear of death or serious bodily injury to another could constitute duress.[33]

The Appeals Court affirmed the judgment of the trial court, holding that even if the judge erred by refusing to give the requested jury instructions, it was harmless error.[34] The court stated that there was no Massachusetts authority directly controlling on the issue of whether a serious risk to another person was sufficient to raise the defense of duress.[35] The court noted that a federal appeals court case, which the Massachusetts Supreme Judicial Court had cited with approval, strongly indicated that a serious risk of injury to another person may constitute duress.[36] The court concluded that although the authorities outside the Commonwealth were not uniform on the issue, it was likely that Massachusetts would recognize that duress can arise through fear of serious bodily injury to a third person.[37] Accordingly, the court stated that it would have been "appropriate and wise" for the trial judge to give the jury the instructions that had been requested by the defendant.[38]

In upholding Melzer's convictions, the Appeals Court explained why it was harmless error for the trial court not to instruct the jury that duress can arise through fear of serious bodily injury to another. The court began its analysis by focusing on the requirement that the actor must have been positioned so as to have no reasonable opportunity to escape in order for the defense of duress to be applicable.[39] According to the court, Melzer

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[33] *Id.* at 174-75, 437 N.E.2d at 550.

[34] *Id.* at 182, 437 N.E.2d at 554.

[35] *Id.* at 181, 437 N.E.2d at 553.

[36] *Id.* at 181-82, 437 N.E.2d at 553. The court discussed Rhode Island Recreation Center, Inc. v. Aetna Casualty & Surety Co., 177 F.2d 603 (1st Cir. 1949), which was cited with approval in Commonwealth v. Robinson, 1981 Mass. Adv. Sh. 4, 15, 415 N.E.2d 805, 812. In *R.I. Recreation Center* the court stated that perhaps a "well-grounded apprehension of death or serious bodily injury to another, particularly a close relative, may constitute coercion." 177 F.2d at 606.

[37] 14 Mass. App. Ct. at 182, 437 N.E.2d at 554. The court thought it likely that Massachusetts would adopt the approach of the MODEL PENAL CODE § 2.09 (Proposed Official Draft 1962), which states:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

Id.

[38] 14 Mass. App. Ct. at 182, 437 N.E.2d at 554. The court also noted that the trial judge probably should have charged the jury that they could take into account the proximity and relationship between the defendant and the third person who was subject to the risk of serious harm. *Id.* at 182 n.5, 437 N.E.2d at 554 n.5.

[39] *Id.* at 182-83, 437 N.E.2d at 554 (quoting Commonwealth v. Robinson, 1981 Mass. Adv. Sh. 4, 15, 415 N.E.2d 805, 812).

had to show that he had no reasonable opportunity to escape.[40] The court concluded that the defendant made no such showing. The court stated that uncontested evidence revealed that for a period of time during the robbery Melzer was left alone with the victims Tracey and Haggett and yet made no attempt to escape.[41] Because Melzer continued to hold the victims while Gaita and Harrison took Gear to his bank, the court reasoned that Melzer could not raise the defense of duress because of a fear of serious injury to himself.[42]

After determining that Melzer had not been in fear for his own safety, the court then examined the possibility of Melzer's fear of serious injury to other people. Melzer indicated in his testimony that he had feared Gear would be seriously injured if Melzer released Tracey and Haggett when Harrison and Gaita went to the bank.[43] The court was not persuaded by this testimony, reasoning that if Melzer's story was believed, Melzer and Gear were in equal danger. According to the court, "Nothing suggested that Gear's risk would be lessened if Melzer failed to take the opportunity to escape."[44] The court stated that because the jury rejected the defense as applied to Melzer alone, the result would have been the same if the trial judge had mentioned Melzer's possible concern over the risk to Gear.[45] The court concluded, therefore, that even if the trial judge's failure to mention the risk to Gear was error, it was harmless error.[46]

The Appeals Court's opinion in *Melzer* is significant because it indicates that Massachusetts courts will recognize the defense of duress when there is a threat of serious bodily injury or death to a third person, as well as when that threat is directed at the defendant himself.[47] The policies

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[40] 14 Mass. App. Ct. at 184, 437 N.E.2d at 554. The court recognized the principle that even if a criminal defendant gives incredible testimony, he is entitled to jury instructions on the hypothesis that the testimony is true. *Id.; see* Commonwealth v. Campbell, 352 Mass. 387, 398, 226 N.E.2d 211, 219 (1967) (quoting People v. Carmen, 36 Cal. 2d 768, 773, 228 P.2d 281, 285 (1951)).

[41] 14 Mass. App. Ct. at 183, 437 N.E.2d at 554-55. *See supra* notes 21-25 and accompanying text.

[42] *Id.* at 183, 437 N.E.2d at 555.

[43] *Id.* at 184-85, 437 N.E.2d at 555. "When asked why (in the face of Harrison's and Gaita's alleged sexual abuse of him) he did not 'take off when . . . [he] had . . . [a] chance,' he [Melzer] replied, 'Because they told me they were going to kill . . . Gear.' " *Id.* at 184 n.7, 437 N.E.2d at 555 n.7. The court termed this evidence "meager, if not trivial." *Id.* at 184-85, 437 N.E.2d at 555. Melzer also suggested that he feared for the safety of his mother, but because she was far from Massachusetts at the time, she was in no *immediate* danger. *Id.* at 184, 437 N.E.2d at 555.

[44] *Id.* at 185, 437 N.E.2d at 555.

[45] *Id.*

[46] *Id.* The court noted that Melzer's failure to report to the proper authorities after his ultimate escape from Harrison and Gaita "gave color" to his failure to escape during Gear's trip to the bank. *Id.* at 186, 437 N.E.2d at 556.

[47] *See supra* notes 34-38 and accompanying text.

underlying the defense of duress support this extension. First, the defense is based on the idea that it is better for the defendant, when faced with the option of either suffering bodily injury or committing a criminal offense, to violate the law rather than to suffer the physical harm.[48] Under this theory, the defendant's criminal conduct is justified because he avoided a harm that was more significant.[49] This reasoning applies with equal weight when the threatened harm is directed to a person other than the defendant.[50] In both instances, violating the penal code is a lesser evil than permitting the infliction of serious bodily injury or death.

The second policy reason for applying the defense of duress when a third person is threatened involves the relationship between the defendant and the person threatened. Because the person threatened is often either a relative or friend of the defendant, the defendant's impulse to protect that person may be as strong, if not stronger, as the desire to protect his own life.[51] It would be improper to allow a defendant to commit a crime to prevent serious injury to himself, but not to prevent an injury to another.

Although the *Melzer* court reached the proper result when it concluded that Massachusetts probably would apply the defense of duress when injury is threatened to a third person, the court's decision not to allow the defense in the matter before it seems incorrect. Assuming that the defense of duress is available when a third person is threatened with bodily harm, the elements necessary to invoke the defense are a present, immediate and impending threat of such a nature as to induce a well-founded fear of death or serious bodily injury to the defendant *or another* if the act is not done.[52] The defendant also must not have a reasonable opportunity to escape.[53] According to Melzer's testimony, Melzer was in a position to escape when Gaita and Harrison left him at Gear's home to watch Tracey and Haggett.[54] Melzer testified, however, that he did not escape at that time because he feared for Gear's safety.[55] The court recognized that Melzer had a reasonable opportunity to escape but ignored the possible

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[48] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 49, at 374 (1972).

[49] *Id.; see also* Note, *Criminal Law — Duress, supra* note 2, at 559; Hersey & Avins, *Compulsion as a Defense to Criminal Prosecution*, 11 OKLA. L. REV. 283, 291 (1958).

[50] W. LAFAVE & A. SCOTT, *supra* note 48, at 378. These commentators conclude it should be sufficient if the harm is aimed at "a member of his [defendant's] family or friend (or it would seem, even a stranger)." *Id.*

[51] Hersey & Avins, *supra* note 49 at 286.

[52] *See* Commonwealth v. Robinson, 1981 Mass. Adv. Sh. 4, 15, 415 N.E.2d 805, 812.

[53] *Id.*

[54] *See supra* notes 16-29 and accompanying text.

[55] *See supra* notes 18-25, and 43 and accompanying text. According to his testimony, Melzer was (1) forced by Harrison and Gaita to participate, (2) told that if he did as he was told no one would get hurt, and (3) told that Gear would be killed if Melzer escaped when Harrison and Gaita went to the bank. *Id.*

concern which Melzer had for Gear. While it is clear Melzer could have escaped from Gear's house without the threat of death or serious bodily injury to himself, it is not at all certain that Gear would not have been put in greater danger if Melzer had escaped.[56] The court's statement that "nothing suggested that Gear's risks would be lessened if Melzer failed to take the opportunity to escape,"[57] disregards the important consideration of increased danger to a third person in applying the defense of duress when the threatened injury is to the third person. While there was no evidence that Gear's risk would be *lessened* if Melzer did not escape, there was testimony which indicated that the risk to Gear would be *increased* if Melzer did escape.[58]

The standard on appeal for determining whether a trial court's error is so prejudicial as to warrant a new trial is whether the claimed defect influenced the jury and tainted its verdict.[59] Assuming, as the Appeals Court apparently did, that the defense of duress is available when a third person is threatened, the *Melzer* court's conclusion that the trial court's failure to give this instruction was harmless error seems incorrect. There was evidence in this case which, if believed by the jury, would indicate that Melzer did not have a reasonable opportunity to escape, if the fear of possible injury to third persons is considered.[60] It seems clear, therefore, that under the standard appropriate for appellate review, the trial judge's refusal to give the requested instructions was more than harmless error.

In conclusion, the Massachusetts Appeals Court in *Melzer* clearly indicated that Massachusetts courts will recognize the defense of duress when a person other than the defendant is in immediate danger of serious bodily injury or death. This position is correct when the underlying purposes of the defense are considered. The court's opinion, however, loses some of its effectiveness because the court did not correctly analyze the applicability of the defense of duress to the particular facts before it. Hopefully, the defense will be more properly applied in future cases involving threats of death or serious injury directed at persons other than the defendant himself.

§ 3.9. Armed Robbery — Armed with a Dangerous Weapon — Apparent Ability Doctrine.* During the Survey year, in *Commonwealth v. Howard*,[1]

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[56] There was testimony which, if believed, indicated that Gear would be killed if Melzer escaped. *See supra* note 45.

[57] 14 Mass. App. Ct. at 185, 437 N.E.2d at 555.

[58] *Id.* at 184 n.7, 437 N.E.2d at 555 n.7.

[59] Commonwealth v. Smith, 342 Mass. 180, 189, 172 N.E.2d 597, 602 (1961) (quoting People v. Kingston, 8 N.Y.2d 384, 387, 208 N.Y.S.2d 956, 959, 171 N.E.2d 306, 308 (1960)).

[60] *See supra* note 43 and accompanying text.

* LAUREN C. WEILBURG, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW. § 3.9. [1] 386 Mass. 607, 436 N.E.2d 1211 (1982).

the Supreme Judicial Court clarified the scope of chapter 265, section 17 of the General Laws, the statute proscribing armed robbery in Massachusetts.[2] In *Howard*, the Court held that this law does not apply to the situation where a defendant *appears* to be armed with a dangerous weapon during the course of a robbery.[3] According to the Court, section 17 will be violated only when it is proved, beyond a reasonable doubt, that a defendant actually had a dangerous weapon in his possession when the robbery was committed.[4]

The Supreme Judicial Court first defined "the gist of the crime of armed robbery" in 1865.[5] In *Commonwealth v. Mowry,* the Court rejected the contention that actual use of a dangerous weapon is a prerequisite to a conviction for this crime.[6] Rather, the Court ruled that under the predecessor of chapter 265, section 17, armed robbery is committed when a person in possession of a dangerous weapon robs another, whether or not that weapon is used to inflict harm.[7] The Court based its holding on a finding that the mere presence of the weapon increases the danger of resistance and conflict. The presence of a weapon, the Court concluded, is a substantial aggravation of the crime of robbery and warrants a conviction for armed robbery.[8] In 1872, in *Commonwealth v. White,*[9] the Supreme Judicial Court further ruled that assault with an unloaded gun constitutes a violation of the statute proscribing assault while armed with a dangerous weapon.[10] The *White* Court held that the secret intent of the defendant and his inability to actually shoot the victim are immaterial.[11] The Court found the defendant's outward demonstration of the ability to

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[2] G.L. c. 265, § 17 provides:

> Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years; provided, however, that any person who commits any offense described herein while masked or disguised or while having his features artificially distorted shall, for the first offense be sentenced to imprisonment for not less than five years and for any subsequent offense for not less than ten years.

Because *Howard* essentially deals with the concept of being "armed with a dangerous weapon," it will also have application to G.L. c. 265, § 15A (assault and battery with a dangerous weapon) and G.L. c. 265, § 15B (assault with a dangerous weapon).

[3] 386 Mass. at 608, 436 N.E.2d at 1212.

[4] *Id.* at 611, 436 N.E.2d at 1213.

[5] Commonwealth v. Mowry, 93 Mass. (11 Allen) 20, 22 (1865).

[6] *Id.* at 21-22.

[7] *Id.* at 22-23.

[8] *Id.* at 23.

[9] 110 Mass. 407 (1872).

[10] *Id.* at 409.

[11] *Id.*

commit a battery to constitute the mischief which is punishable as a breach of the peace.[12]

These two nineteenth century cases led to the development by the Supreme Judicial Court of the "apparent ability" doctrine.[13] Under this doctrine, a defendant's objectively menacing conduct or use of an instrumentality which appears to a reasonable individual to have the potential to inflict harm will satisfy the "dangerous weapon" requirement[14] of the armed robbery and armed assault statutes.[15] In *Commonwealth v. Henson*,[16] for example, the defendant was convicted of assault with a dangerous weapon for firing two blanks from a fake gun at an off-duty police officer.[17] The *Henson* Court found that the objectively menacing conduct of the defendant produced fear of harm and, consequently, had a tendency to produce a breach of the peace.[18] According to the *Henson* Court, even an apparent ability to accomplish a battery with a weapon constitutes an aggravated form of assault; the presence of a weapon causes a greater threat to the public peace and order because the natural reaction of the victim may be more sudden and violent than in cases where no weapon is involved.[19]

In *Commonwealth v. Tarrant*,[20] the Supreme Judicial Court refined the apparent ability doctrine by clarifying the meaning of the term "dangerous weapon" as used in the armed robbery and armed assault statutes.[21] Specifically, the *Tarrant* Court held that for the purpose of determining whether an instrumentality is a "dangerous weapon," the proper inquiry is whether the instrumentality is one that presents an objective threat of danger to a person of reasonable and average sensibility.[22] Where a neutral object is used to help perpetrate a robbery, the Court's determination turns on whether the instrumentality has the apparent ability to inflict harm, whether the victim reasonably so perceived it, and whether the defendant used the instrumentality to further the robbery.[23] In *Tarrant*, the Court concluded that a defendant who had robbed his victim while

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[12] *Id.*

[13] *See* R. PERKINS, CRIMINAL LAW 91-93 (1957).

[14] *Id.; see also,* Commonwealth v. Henson, 357 Mass. 686, 693, 259 N.E.2d 769, 774 (1970); Commonwealth v. Tarrant, 367 Mass. 411, 417, 326 N.E.2d 710, 715 (1975).

[15] *See supra* note 2.

[16] 357 Mass. 686, 259 N.E.2d 769 (1970).

[17] *Id.* at 689-90, 693, 259 N.E.2d at 771-72, 774.

[18] *Id.* at 689, 259 N.E.2d at 771.

[19] *Id.* at 693, 259 N.E.2d at 774; *see also* Commonwealth v. Perry, 6 Mass. App. Ct. 531, 378 N.E.2d 1384 (1978) (assault and robbery while armed with a toy gun violates G.L. c. 265 §§ 15A, 15B and 17).

[20] 367 Mass. 411, 326 N.E.2d 710 (1975).

[21] *See supra* note 2.

[22] 367 Mass. at 416, 326 N.E.2d at 714.

[23] *Id.* at 417, 326 N.E.2d at 715.

accompanied by a German shepherd dog was guilty of armed robbery.[24] In reaching this result, the *Tarrant* Court relied on the menacing appearance of the dog to the victim, and the defendant's use of the dog to prevent the victim from resisting.[25]

The Supreme Judicial Court further extended the scope of the apparent ability doctrine in *Commonwealth v. Novicki*[26] and *Commonwealth v. Richards*.[27] In these two cases, the Court established that armed robbery is committed when a robber exerts "constructive force" upon his victim.[28] "Constructive force" includes the use of threatening words or gestures or the display of a deadly weapon which causes fear in the mind of the victim.[29] According to the Court, an essential element of the crime of armed robbery is that force and violence must be exerted on the victim *or* that the victim be put in a state of fear or apprehension by the perpetrator.[30]

The most recent decision of the Supreme Judicial Court applying the apparent ability doctrine to an armed robbery conviction was handed down in 1975. In *Commonwealth v. Delgado*,[31] three men entered a grocery store and robbed the manager at knife point.[32] During the course of the robbery the defendant Delgado said to his accomplices, "Hold [the manager] or I'm going to shoot him."[33] No gun was seen by the victim and later, when Delgado was apprehended, no gun was found on his person or in the area where he was arrested.[34] The Court upheld the defendant's conviction for robbery while "armed with a dangerous weapon, to wit: a gun."[35] The Court found that the defendant's statement, uttered during an ongoing robbery, was sufficient to cause the victim reasonably apprehension with respect to his physical well-being.[36] The Court observed that "the jury could reasonably conclude that the defendant should be taken at his word."[37]

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[24] *Id.* at 412, 326 N.E.2d at 712; *see also*, Commonwealth v. Farrell, 322 Mass. 606, 78 N.E.2d 697 (1948) (a lighted cigarette is a dangerous weapon under G.L. c. 265 § 15A when it is used to inflict serious bodily injury).

[25] 367 Mass. at 412, 326 N.E.2d at 712.

[26] 324 Mass. 461, 465, 87 N.E.2d 1, 3-4 (1949).

[27] 363 Mass. 299, 303-04, 293 N.E.2d 854, 858 (1973).

[28] *Id.* at 304, 293 N.E.2d at 858.

[29] *Id.*

[30] 324 Mass. 461, 465, 87 N.E.2d 1, 3-4 (1949).

[31] 367 Mass. 432, 326 N.E.2d 716 (1975).

[32] *Id.* at 433-34, 326 N.E.2d at 717.

[33] *Id.* at 434, 326 N.E.2d at 717.

[34] *Id.* at 436, 326 N.E.2d at 718.

[35] *Id.* at 434, 326 N.E.2d at 717.

[36] *Id.* at 437, 326 N.E.2d at 718-19.

[37] *Id.* The Court in *Delgado* based its holding on three lines of reasoning. First, the Court noted that the "apparent ability" standard governed the definition of a "dangerous weapon"

Commonwealth v. Howard,[38] decided during the *Survey* year, represents a narrowing of the apparent ability doctrine. In *Howard*, the Court reviewed, on direct appeal, the superior court's denial of the defendant's motion for a directed verdict on the charge of robbery while armed with a dangerous weapon.[39] The case arose when the defendant approached the victim with his right hand in his jacket and said, "Walk straight, look down, and don't try anything foolish or I'll pull the trigger."[40] The defendant then directed the victim into an apartment building where he demanded, and was given, the victim's wallet.[41] After an occupant of the apartment building opened her door and saw the victim and the defendant, the defendant directed the victim out of the building and into an alley.[42] The defendant then demanded that the victim empty her pockets and she complied.[43] At this point, a police cruiser arrived at one end of the alley, and a second cruiser arrived shortly thereafter at the other end of the alley.[44] The defendant was arrested at the scene.[45] No gun was found on the defendant or in the vicinity of the arrest.[46] The victim testified that she never saw a gun.[47] The trial court judge charged the jury, over the defendant's objection, that the Commonwealth need not prove the existence of a weapon to establish the offense of armed robbery.[48] The judge stated that if the defendant had indicated and declared that he had a gun,

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for the purposes of armed robbery; the jury must decide "whether the instrumentality under the control of the perpetrator has the apparent ability to inflict harm, whether the victim reasonably so perceived it, and whether the perpetrator by use of the instrumentality intended to elicit fear in order to further the robbery." *Id.* at 435-36, 326 N.E.2d at 718-20 (quoting Commonwealth v. Tarrant, 367 Mass. 411, 417, 326 N.E.2d 710, 715 (1975)). Second, the Court found that, although words are generally not sufficient to constitute an assault, a distinction is to be drawn between words that are merely threatening and those that are informational. Informational words, according to the Court can take the place of a threatening movement or gesture and complete the assault by causing a reasonable apprehension of immediate physical harm. *Id.* at 436-37, 326 N.E.2d at 718-19. Third, the Court found that it is well-established that an act of putting another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault. *Id.* at 437, 326 N.E.2d at 718-19 (citing Commonwealth v. Henson, 357 Mass. 686, 259 N.E.2d 769 (1970); Commonwealth v. Richards, 363 Mass. 299, 293 N.E.2d 854 (1973)).

[38] 386 Mass. 607, 436 N.E.2d 1211 (1982).

[39] *Id.* at 607, 608 n.1, 436 N.E.2d 1211, 1211 n.1 (1982). The Court noted that the motion should have been expressed in terms of a required finding of not guilty. *Id.; see* MASS. R. CRIM. P. 25.

[40] *Id.* at 607, 609, 436 N.E.2d at 1211.

[41] *Id.* at 609, 436 N.E.2d at 1211.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 608, 436 N.E.2d at 1212-13.

"the law will take him at his word that he did have a gun."[49] The jury found the defendant guilty of armed robbery.[50]

Upon direct appeal the Supreme Judicial Court reversed the conviction of armed robbery.[51] Specifically, the Court found that the trial judge misconstrued the holding of *Commonwealth v. Delgado*[52] when he formulated the charge to the jury.[53] According to the Court, *Delgado* did not mandate that a jury must presume the existence of a gun from the robber's assertions.[54] Rather, the *Delgado* Court permitted the jury to infer the existence of a gun.[55] In *Delgado*, according to the *Howard* Court, it was possible that the defendant had a gun and disposed of it.[56] The jury would therefore have been warranted in finding beyond a reasonable doubt that the defendant had a gun during the commission of the crime.[57] In the instant case, however, the Court found that there was no evidence to warrant the jury finding, on the basis of a reasonable inference and beyond a reasonable doubt, that the defendant Howard had a gun at the time of the robbery.[58] The Court noted that no gun had been seen by the victim nor found by the police.[59] Moreover, the Court found that the defendant had neither an opportunity nor a reason to dispose of a gun before the police suddenly arrived and arrested him.[60]

The *Howard* majority concluded that the *Delgado* case did not eliminate the statutory requirement that a defendant actually have a dangerous weapon in his possession to commit armed robbery.[61] Rather, *Delgado*, according to the Court, stood for the proposition that in certain circumstances the jury was warranted in inferring, beyond a reasonable doubt, that a defendant did, in fact, have a gun at the time of the robbery.[62] In the *Howard* case, the Court defined the limits of those "certain circumstances" as follows: a defendant's statement alone, implying that he had a gun, where no gun was seen or found and where he had no opportunity or

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[49] *Id.* The trial judge relied on language from *Commonwealth v. Delgado* in framing the charge to the jury. *Id.*

[50] *Id.* at 609, 436 N.E.2d at 1212.

[51] *Id.* at 608, 436 N.E.2d at 1212. The majority opinion was written by Justice Wilkins. *Id.*

[52] *See supra* notes 31-37 and accompanying text.

[53] 386 Mass. at 608, 436 N.E.2d at 1212.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 610, 436 N.E.2d at 1212-13; *see* Commonwealth v. Delgado, 367 Mass. 432, 437, 326 N.E.2d 716, 719.

[57] 386 Mass. at 610, 436 N.E.2d at 1212-13.

[58] *Id.* at 609, 436 N.E.2d at 1212.

[59] *Id.*

[60] *Id.* at 609-10, 436 N.E.2d at 1212-13.

[61] *Id.*

[62] *Id.*

reason to dispose of it, cannot be sufficient to warrant a conviction of robbery while "armed with a dangerous weapon."[63]

The *Howard* Court stated that if robbery while *apparently* armed is to be proscribed by chapter 265, section 17 of the General Laws, legislative amendment would be required.[64] The Court refused to construe section 17 so loosely as to eliminate the requirement that there be some instrumentality which presents "an objective threat of danger to a person of reasonable and average sensibility."[65] The Court explained that the crime of armed robbery is based in part on the potential for injury that arises from the possession of a dangerous weapon.[66] Without a finding of the actual existence of such a weapon, this potential for injury is absent.[67] The Court therefore concluded that while verbal threats and the victim's resulting apprehension are relevant to the offense of unarmed robbery, they do not warrant a conviction under section 17.[68]

In a lengthy concurring opinion Justice O'Connor agreed that a conviction of armed robbery was not warranted in the instant case.[69] Specifically, he found that the evidence presented did not prove, beyond a reasonable doubt, that the defendant in fact possessed a dangerous weapon at the time of the robbery.[70] Justice O'Connor went further than the majority in *Howard,* however, by arguing that the Court should overrule the apparent ability doctrine espoused in the *Tarrant* and *Delgado* decisions.[71]

Justice O'Connor first criticized the Court's method of distinguishing *Delgado* from the case before it.[72] *Delgado,* according to Justice O'Connor, stood for the proposition that a defendant's words can be the legal equivalent of possession of a dangerous weapon.[73] After all, Justice O'Connor observed, the *Delgado* Court had found its decision to be controlled by the "apparent ability" doctrine enunciated in *Common-*

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[63] *Id.*

[64] *Id.* at 610-11, 436 N.E.2d at 1213.

[65] *Id.* at 611, 436 N.E.2d at 1213 (quoting from Commonwealth v. Tarrant, 367 Mass. 411, 416, 326 N.E.2d 710, 715 (1975)).

[66] *Id.; see* Commonwealth v. Mowry, 93 Mass. (11 Allen) 20, 22 (1865) (*see supra* notes 5-8 and accompanying text); *see also* Commonwealth v. Henson, 357 Mass. 686, 693, 259 N.E.2d 769, 774 (1970) (*see supra* notes 16-19 and accompanying text).

[67] 386 Mass. at 611, 426 N.E.2d at 1213.

[68] *Id.* at 611, 436 N.E.2d at 1213; *cf.* Commonwealth v. Delgado, 367 Mass. 432, 436, 326 N.E.2d 716, 718-19 (1975) (distinction between words that are merely threatening and those that are also informational); *see* R. PERKINS, *supra* note 13, at 132.

[69] 386 Mass. at 611, 436 N.E.2d at 1213 (O'Connor, J., concurring).

[70] *Id.* at 611, 436 N.E.2d at 1213.

[71] *Id.,* at 611-18, 436 N.E.2d at 1213-17. *See supra* notes 13-38 and accompanying text.

[72] *Id.* at 611, 436 N.E.2d at 1213.

[73] *Id.*

wealth v. Tarrant.[74] Justice O'Connor concluded, therefore, that the apparent ability doctrine, as established by the *Tarrant* and *Delgado* decisions, could justify a finding of armed robbery both when a defendant is armed with an apparently dangerous weapon and when a defendant is apparently armed with a dangerous weapon.[75]

Justice O'Connor then criticized the use of the "apparent ability" doctrine to determine what is armed robbery within the meaning of chapter 265, section 17.[76] He concurred in the majority's holding that section 17 should not be construed so loosely as to eliminate the requirement that there actually be some instrumentality in the possession of the defendant which presents an objective threat of danger to a person of reasonable and average sensibilities.[77] Unlike the majority, however, Justice O'Connor further determined that the Court should not dispense with the requirement under section 17 that the instrumentality possessed by the defendant be actually dangerous.[78] He concluded that the rule of strict construction applied to criminal statutes[79] does not permit a reading of the language of section 17, "armed with a dangerous weapon," to include either a robber armed with an "apparently dangerous" weapon or a robber "apparently armed."[80] Justice O'Connor advocated overruling both the *Tarrant* and *Delgado* decisions, and thereby essentially recommended a complete abandonment of the apparent ability doctrine in the Commonwealth.[81] He proposed that the Court announce that, unless the Legislature amends section 17, a conviction for armed robbery is improper unless the defendant actually possesses an inherently dangerous instrumentality or an instrumentality that was used to produce serious bodily harm.[82]

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[74] *Id.* at 611, 436 N.E.2d at 1215.

[75] *Id.* at 615, 436 N.E.2d at 1215.

[76] *Id.* at 616-18, 436 N.E.2d at 1215-17.

[77] *Id.* at 616, 436 N.E.2d at 1215-16.

[78] *Id.* at 616-17, 436 N.E.2d at 1215-16.

[79] *See* Commonwealth v. Devlin, 366 Mass. 132, 137, 314 N.E.2d 897 (1974); Commonwealth v. Federico, 354 Mass. 206, 207, 326 N.E.2d 646 (1968).

[80] 386 Mass. at 616-17, 436 N.E.2d at 1216 (1982).

[81] *Id.* at 617-18, 436 N.E.2d at 1216-17. Justice O'Connor stated, "In my opinion, neither mere words nor an instrument incapable of inflicting serious harm, used to threaten a robbery victim, is sufficient under section 17 to elevate unarmed robbery to armed robbery. I fail to see a good reason to distinguish between a statement plus a finger in a pocket and a statement plus a pocket comb or pen. Yet, as the law is set out today, a robber who effectively simulates a gun by means of a comb is 'armed with a dangerous weapon' whereas one who uses his finger with the same result is not." *Id.* at 617, 436 N.E.2d at 1216.

[82] *Id.* at 618, 436 N.E.2d at 1217. In addition, Justice O'Connor urged that an analogous construction be given to G.L. c. 265 § 15B, which proscribes assault with a dangerous weapon. *Id.*

Justice Nolan dissented from the Court's opinion.[83] He found the issue presented in the case to be a narrow one: the legal sufficiency of evidence tending to prove that the defendant had a gun when he robbed the victim.[84] Justice Nolan found that the defendant's statement to the victim[85] was "an evidentiary admission from which the jury may infer that he was then carrying a gun."[86] Moreover, given that the jury believed he made the statement, Justice Nolan concluded that the defendant's statement satisfied the standard of evidence necessary for the Court to affirm the superior court's denial of the defendant's motion for a directed verdict.[87] Finally, Justice Nolan disputed the Court's conclusion that the instant case was distinguishable from the *Delgado* decision.[88] In both *Delgado* and the instant case, according to Justice Nolan, there was no direct evidence of a gun.[89] The only evidence of the presence of the gun in each case was the defendant's statements.[90] In *Howard,* Justice Nolan observed, the defendant could have disposed of the gun between the apartment building and the alley.[91] Justice Nolan concluded, therefore, that as in *Delgado,* the jury should be permitted to take the defendant at his word.[92]

In *Commonwealth v. Howard,* the Supreme Judicial Court delineated a new construction of chapter 265, section 17 and thereby clarified the scope of the offense of armed robbery. The armed robbery statute, the Court decided, does not apply to robberies committed by a defendant "apparently armed" with a dangerous weapon. Rather, to obtain a conviction under section 17 the prosecution must prove, beyond a reasonable doubt, that the defendant was in fact armed with a dangerous weapon during the commission of the crime.[93] An oral assertion by the defendant alone is not sufficient evidence to prove possession of a weapon, although it constitutes evidence from which the jury may infer the presence of a weapon.[94]

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[83] *Id.* (Nolan, J., dissenting).

[84] *Id.* at 619, 436 N.E.2d at 1217.

[85] *See supra* text accompanying note 40.

[86] 386 Mass. at 619, 436 N.E.2d at 1217; *see* P.J. LIACOS, HANDBOOK ON MASSACHUSETTS EVIDENCE 275-81 (5th ed. 1981).

[87] 386 Mass. at 619, 436 N.E.2d at 1217; *see also* Commonwealth v. Latimore, 378 Mass. 671, 393 N.E.2d 370 (1979).

[88] 386 Mass. at 618-19, 436 N.E.2d at 1217.

[89] *Id.* at 619, 436 N.E.2d at 1217.

[90] *Id.*

[91] *Id.* at 618, 436 N.E.2d at 1217.

[92] *Id.*

[93] *Id.* at 608, 436 N.E.2d at 1211.

[94] *Id.* at 609-11, 436 N.E.2d at 1213.

The Court did not expressly disturb the doctrine, enunciated in the *Tarrant* decision, that a weapon need not be dangerous *per se* in order to qualify as a dangerous weapon for the purposes of section 17.[95] Nevertheless, the *Howard* decision, by implication, calls into question the vitality of the "apparent ability" doctrine. Traditionally, the mere presence of a weapon, though not used to inflict harm nor capable of actually inflicting injury, has been held to aggravate the crimes of robbery and assault.[96] This doctrine is based on the notion that the mere existence of a weapon places the victim in a state of fear and raises the potential for resistance, conflict and injury.[97] It is difficult to imagine that a verbal assertion by a robber that he is armed and will use the weapon will cause any less fear or potential for conflict than the actual presentation of a weapon. Whether a robber displays a real gun, a toy gun or represents to the victim that he is armed, the victim will usually be placed in a reasonable apprehension of harm. "Constructive force" will apparently have been exercised by the defendant, and the crime of armed robbery will apparently have been committed.[98] Because this same reasoning justifies a finding of armed robbery when the defendant was apparently armed as well as when the defendant was armed with only apparent ability to inflict harm, it is difficult to reconcile the Court's past "apparent ability" cases with the *Howard* decision.

Moreover, the Court's refusal to construe the statute to include robbery by a defendant "apparently armed" with a dangerous weapon, coupled with its acceptance of reading the statute to include robberies committed while armed with an "apparently" dangerous weapon, raises questions about the Court's adherence to the rule that criminal statutes should be strictly construed.[99] Numerous other jurisdictions reject the "apparent ability" doctrine. In those jurisdictions, the defendant must possess the actual ability to harm the victim when threats are made by means of weapons which are not inherently dangerous if convictions under similar statutes are to be upheld.[100] The Court should either follow these other jurisdictions and read the words "armed with a dangerous weapon"

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[95] *Id. See supra* notes 20-25 and accompanying text.

[96] *See supra* notes 6-29 and accompanying text.

[97] *See supra* notes 8-19 and accompanying text.

[98] *See supra* notes 26-28 and accompanying text.

[99] *See supra* note 79.

[100] *See, e.g.*, People v. Arando, 63 Cal.2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965); Hutton v. People, 156 Colo. 334, 398 P.2d 973 (1965); People v. Ratliff, 22 Ill. App. 3d 106, 317 N.E.2d 63 (1974); People v. Trice, 127 Ill. App. 2d 310, 262 N.E.2d 276 (1970); Decker v. State, 179 Ind. App. 472, 386 N.E.2d 192 (1979); State v. Matthews, 67 Ohio Ops. 2d 190, 322 N.E.2d 289 (1974); *see also*, State v. Keller, 214 N.C. 447, 199 S.E. 620 (1938); Cooper v. State, 201 Tenn. 149, 297 S.W.2d 75 (1956).

literally, or infer apparently armed as well as apparently dangerous from the statutory language of section 17.

In summary, *Commonwealth v. Howard* raises more questions than it offers solutions. Although the decision offers a seemingly clear cut rule for the application of section 17, the Court's partial retreat from *Delgado* and its implicit questioning of the doctrine of "apparent ability" are likely to require clarification in the near future.

§ 3.10. District Court Practice — Admission to Sufficient Facts — Continuance Without a Finding — Waiver of Trial on the Merits.* A criminal defendant in the District Court Department of the Trial Court of Massachusetts (the "district court") presently has a right to two completely independent trials for the same charge.[1] Under the usual procedure in the district courts, the defendant will have a bench trial in the primary session, and if he is unhappy with the result, he may then elect to have a trial *de novo* in the jury session, either before a jury or a judge alone.[2] The availability of the trial *de novo* expands the defendant's options at the first trial in several important ways.[3]

One strategy which may appear more attractive to a defendant in the first tier of this two-tier court system is an admission to sufficient facts.[4] In Massachusetts, a criminal defendant may plead not guilty, yet admit to facts sufficient for a finding of guilty on the charged offense.[5] In this way the defendant can decrease greatly the time and expense involved in defending his case and avoid the stigma of a plea of guilty or *nolo contendere*. Furthermore, an admission will be attractive to the prosecution, and may help a defendant secure a lesser charge or a recommenda-

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§ 3.10. [1] *See* G.L. c. 218, §§ 26A, 27A; G.L. c. 278, § 18.

[2] Actually, the defendant must waive his right to a jury trial in the first instance, *see* DIST. CT. DEPT. SUPP. R. CRIM. P. 2, if he is to obtain two trials. After such waiver the defendant gets a bench trial in the primary session, the first tier of the district court system. *See* G.L. c. 218, § 26A. After the trial in the primary session, the defendant has a right to a completely new trial in the second tier of the district court, the jury session. *Id.* While the second tier is called the "jury" session, a defendant can opt for a bench trial in the second tier by waiving his right to a jury. *See* MASS. R. CRIM. P. 19(a). If the defendant does not waive his right to a jury trial in the first instance, his first and only trial will be in the jury session. G.L. c. 218, §§ 26A, 27A.

[3] Because the defendant is guaranteed a new trial if he wants one, he can use the initial bench trial to explore strategies, discover the prosecution's case, ascertain the likely penalty, and generally pursue other avenues he might not if he was limited to a single trial on the merits.

[4] *See* K.B. SMITH, CRIMINAL PRACTICE AND PROCEDURE, 30 MASS. PRACTICE SERIES § 1202 (1983).

[5] MASS. R. CRIM. P. 12(a)(3); *see* K.B. SMITH, *supra* note 4, at § 1202.

tion of a lighter penalty.[6] It is then up to the judge to decide upon a disposition for the case.[7] The availability of the *de novo* trial takes much of the risk out of the defendant's admission because if the disposition is perceived as too harsh, the defendant can get a whole new trial.[8]

Where the defendant uses an admission in an attempt to secure a more lenient disposition, he is often seeking a continuance without a finding.[9] A continuance without a finding allows the judge to put the matter over until some future date without making a finding as to guilt or innocence.[10] During the continuance period, the defendant may be released with or without probationary supervision, and the trial judge may impose conditions with which the defendant must comply.[11] A defendant who complies with these conditions may sometimes have the charges against him dismissed.[12] Thus, the continuance may provide a defendant with an opportunity to earn a dismissal, and to thereby escape the possibility of trial, conviction, sentencing, and a criminal record.[13] If, however, the defendant violates the conditions of the continuance, a guilty finding may be entered by the district court without a trial on the merits because the defendant has already admitted to sufficient facts.[14]

A defendant can seek a continuance without a finding from the court after a plea of guilty as well as after an admission to sufficient facts. The advantage of the admission route, however, is fairly obvious. If the defendant does not obtain a continuance, or if he does but is subsequently found guilty because he violates the terms of his continuance, he may simply exercise his right to a *de novo* trial in the jury session.[15] The defendant has no *de novo* appeal right after he makes a guilty plea.[16] In other words, a defendant could plead guilty, receive a continuance without a finding, and then be found guilty before the continuance period ended. This defendant would have no right to any trial on the merits at this

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[6] *See* K.B. SMITH, *supra* note 4, at § 1202, at 676. The prosecutor might make concessions because it is in his interest to avoid the time-consuming process of trial where it is reasonably possible to do so.

[7] MASS. R. CRIM. P. 28.

[8] *See supra* notes 1 and 2 and accompanying text.

[9] *See* K.B. SMITH, *supra* note 4, at § 1202, at 676.

[10] *See* G.L. c. 276, § 87; K.B. SMITH, *supra* note 4, at §§ 1522-23.

[11] *See* Commonwealth v. Brandano, 359 Mass. 332, 269 N.E.2d 84 (1971) (interpreting G.L. c. 276, § 87).

[12] *See id.*; Rosenberg v. Commonwealth, 372 Mass. 59, 360 N.E.2d 333 (1977); Commonwealth v. Eaton, 11 Mass. App. Ct. 732, 419 N.E.2d 849 (1981). The procedure is complicated if the prosecution objects to the continuance and ultimate dismissal of the case. *See* K.B. SMITH, *supra* note 4, at §§ 1522-26.

[13] *See* K.B. SMITH, *supra* note 4, at § 1522.

[14] *See id.* at § 1202.

[15] *See id.*

[16] *See id.* at § 1199.

point.[17] Accordingly, because of the potential denial of constitutional rights where a plea of guilty is used to obtain a continuance without a finding, substantial procedural safeguards must be observed before the guilty plea may be accepted to ensure a knowing and voluntary waiver of those rights.[18]

Under district court practice, no analogous protection has been available to defendants who, rather than pleading guilty, admit to sufficient facts.[19] Admittedly, where the trial *de novo* is available, such procedural safeguards are not necessary.[20] The trial *de novo* will be available, however, only where the admission is made in the primary session and the right to proceed to the jury session is not waived.[21] It is possible for a defendant to admit to sufficient facts in the jury session, or in the primary session after he waives his right to proceed to the jury session.[22] An admission made in either of those situations is procedurally indistinguishable from a guilty plea because the judge can subsequently enter a finding of guilty and the defendant will have given up his right to a trial on the merits.[23] In summary, while a guilty plea and an admission to sufficient facts have been treated differently in terms of the procedural protection given to the defendant, the potential for a denial of fundamental constitutional rights can be the same in both situations.

During the *Survey* year, in *Commonwealth v. Duquette*,[24] the Supreme Judicial Court considered the use of an admission to sufficient facts in conjunction with the continuance without a finding in instances where the defendant, if eventually found guilty, will have no right to a trial *de novo*.[25] The Court held that such a guilty finding deprives the defendant of his right to a jury trial, his right to confront and cross-examine his accusers, and his right to call witnesses on his own behalf, unless the defendant has know-

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[17] *See id.*

[18] *See* MASS. R. CRIM. P. 12(c).

[19] *See* Rule 4, Initial Rules of Criminal Procedure for the District Courts (as amended through 1980). Rule 4 states that the protective procedure required before a plea of guilty may be accepted is "not . . . applicable to a defendant who has pleaded not guilty and at the trial admits to a finding of facts sufficient to warrant a finding of guilty." Rule 4 was repealed, effective February 1, 1981, and the district court practice is now governed by MASS. R. CRIM. P. 12(c).

[20] Because the defendant still has a right to a trial on the merits, *see supra* notes 1 and 2 and accompanying text, there is no waiver of constitutional rights, and therefore no need to ensure that the waiver be knowing and voluntary. The defendant need only waive his right to a jury trial in the first instance. *See supra* note 2.

[21] *See* G.L. c. 218, §§ 26A, 27A.

[22] *See* K.B. SMITH, *supra* note 4, at § 1202.

[23] As with a guilty plea, the defendant no longer has the option of a *de novo* trial. *See* Commonwealth v. Duquette, 386 Mass. 834, 844-47, 438 N.E.2d 334, 341-43 (1982).

[24] 386 Mass. 834, 438 N.E.2d 334 (1982).

[25] *Id.* at 835, 438 N.E.2d at 336.

ingly and voluntarily waived these rights.[26] In addition, the Court outlined the proper procedures to be followed whenever an admission is used in the jury session or the primary session where the right to proceed to the jury session has been waived so that the defendant's constitutional rights will be protected.[27]

The defendant Charles Duquette was charged with wilfull and malicious destruction of property.[28] In a hearing before a district court judge,[29] Duquette pleaded not guilty, but admitted to sufficient facts.[30] His case was continued without a finding for one year on the condition that he make restitution to the owner of the damaged property.[31] When Duquette failed to comply with this condition, a guilty finding was entered against him.[32] Duquette appealed this finding, seeking a *de novo* trial in the jury session of the district court.[33]

In a preliminary hearing before a second-tier district court judge, the charge was reduced to wanton injury to property.[34] Duquette, without waiving his right to a jury trial, again pleaded not guilty, yet admitted to sufficient facts.[35] The judge accepted the admission notwithstanding Massachusetts Rule of Criminal Procedure 12(a)(3) which provides that such an admission may only be accepted if the defendant has waived his right to a jury trial.[36] The judge then continued the case without a finding for one year on the condition that Duquette make restitution.[37] Duquette again defaulted and a default warrant was issued.[38] At a hearing before yet another judge in the jury session, Duquette requested that his case be restored to the jury session docket for trial.[39] The judge denied this motion,

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[26] *Id.* at 839, 438 N.E.2d at 339.

[27] *Id.* at 845-46, 438 N.E.2d at 341-42.

[28] *Id.* at 835, 438 N.E.2d at 336.

[29] The date of this appearance was October 17, 1978. *Id.* This was prior to the effective date of the Court Reorganization Act, Acts of 1978, c. 478, § 343, and the defendant was therefore not entitled to first instance jury trial. *Id.* at 837, 438 N.E.2d at 337. *See supra* note 2.

[30] 386 Mass. at 835, 438 N.E.2d at 336.

[31] *Id.*

[32] *Id.*

[33] *Id.* This appeal occurred after the effective date of the Court Reorganization Act, Acts of 1978, c. 478, § 343, and the defendant was therefore entitled to a trial *de novo* in the district court jury session. *Id. See supra* notes 1 and 2 and accompanying text.

[34] 386 Mass. at 835, 438 N.E.2d at 337.

[35] *Id.* at 835-36, 438 N.E.2d at 337.

[36] *Id.*

[37] *Id.* at 836, 438 N.E.2d at 337.

[38] *Id.*

[39] *Id.*

entering a guilty finding pursuant to the modified complaint, and imposed sentence.[40] The defendant then appealed the guilty finding.[41]

Before the Supreme Judicial Court, Duquette argued that the guilty finding was erroneous because either he had been deprived of his statutory right to a jury trial or an involuntary guilty plea had been imposed upon him.[42] Under Massachusetts law, Duquette asserted, a defendant who has appealed to the jury session of the district court cannot be tried by a judge unless he has waived his right to be tried by a jury.[43] Moreover, Duquette maintained, it was error for the judge to accept his admission in a non-jury-waived session.[44] Because he had not waived his right to be tried by a jury, Duquette argued, the guilty finding of the jury session district judge could not be considered the result of a valid bench trial or a valid admission.[45] As such, Duquette asserted, it amounted to the imposition of an involuntary[46] guilty plea.[47]

In response to Duquette's argument, the Commonwealth asserted the defendant's admission to sufficient facts eliminated all factual issues, and therefore left nothing for a jury to try.[48] The defendant had waived his right to a jury trial, argued the Commonwealth, when he admitted to sufficient facts before a jury session district court judge.[49] Moreover, the

[40] *Id.* "The third judge found that (1) the defendant had made no waiver, oral or written, of his right to trial by jury, (2) the defendant had not offered to change his plea of not guilty, and (3) it could not be determined whether a statement of facts as to the allegations of the complaint was made to the [second] justice. . . ." *Id.* (footnote omitted).

[41] *Id.*

[42] *Id.* at 839, 438 N.E.2d at 339.

[43] *Id.* at 839-40, 438 N.E.2d at 339 (citing G.L. c. 218, § 27A). In order to waive his right to a jury trial, defendant must sign a written waiver and file it with the clerk of the court. G.L. c. 263, § 6; MASS. R. CRIM. P. 19(a). In addition, the judge must be satisfied that the waiver is knowingly and voluntarily made, and to this end, must conduct a colloquy with the defendant. Ciummei v. Commonwealth, 378 Mass. 504, 509-10, 392 N.E.2d 1186, 1189 (1979); DIST. CT. DEPT. SUPP. R. CRIM. P. 2.

[44] 386 Mass. at 838-39, 438 N.E.2d at 338.

[45] *Id.* at 839, 438 N.E.2d at 338.

[46] A guilty plea is assumed to be involuntary absent an affirmative showing by the state that it was knowingly and voluntarily made. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Commonwealth v. Morrow, 363 Mass. 601, 604, 296 N.E.2d 468, 472 (1973); Huot v. Commonwealth, 363 Mass. 91, 99-100, 292 N.E.2d 700, 706 (1973). Moreover, the judge must insure, on the record, that the defendant is aware of the constitutional rights he is waiving by pleading guilty. MASS. R. CRIM. P. 12(c)(3). Neither of these requirements was met in *Duquette*. 386 Mass. at 841, 438 N.E.2d at 339. The *Duquette* Court noted: "There has been no showing that the defendant was questioned . . . concerning the voluntariness of his 'plea.' Indeed, there is no evidence that the defendant was informed at the hearing that his admission to sufficient facts would be treated as a plea of guilty." *Id.* at 841-42, 438 N.E.2d at 340. The Court also acknowledged the lower court judge's finding that "[t]he defendant did not offer to change his plea of 'not guilty.' " *Id.* at 841, 438 N.E.2d at 339.

[47] *Id.* at 841, 438 N.E.2d at 339.

[48] *Id.*

[49] *Id.* at 840, 438 N.E.2d at 339.

Commonwealth asserted, even if the admission did not amount to a waiver by the defendant of his right to a jury trial, it did amount to a change of plea from not guilty to guilty and therefore eliminated the need for a trial.[50]

The Supreme Judicial Court agreed with the defendant Duquette's contentions and overturned the guilty finding.[51] The Court explained that once defendant had appealed to the jury session of the district court, he had a right to a trial by jury.[52] In order to waive this right, the Court noted, defendant would have to file a signed, written waiver with the court clerk.[53] Because Duquette made no such waiver, the Court stated, he had to be tried before a jury rather than a judge.[54] The Commonwealth's assertion that the admission provided a factual basis for the guilty finding by the jury session district court judge was irrelevant, the Court noted, since Duquette had a right to be tried by a jury rather than a judge.[55] Accordingly, the Court held, the judge's guilty finding, absent a signed waiver of the jury trial right, cannot be considered the result of a valid bench trial.[56]

Without a valid bench trial, the Court continued, Duquette could not have been found guilty unless he pleaded guilty.[57] Duquette, the Court noted, did not offer to change his plea of not guilty to a plea of guilty.[58] Even if the jury session district court judge had chosen to treat defendant's admission as equivalent to a guilty plea, the Court added, no guilty plea may be accepted without an affirmative showing that the defendant

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[50] *Id.* at 841, 438 N.E.2d at 339. The Commonwealth also argued that, pursuant to DIST./MUN. CTS. SUPP. R. CIV. P. 114(a)(2)-(7), applicable to criminal proceedings under former Rule 11 of the Initial Rules of Criminal Procedure for the District Courts, defendant lost his right to question the constitutionality of the process by which he was convicted because he didn't preserve the record of the hearing. *Id.* at 842, 438 N.E.2d at 340. The Court rejected this argument. *Id.* The Court reasoned that under Boykin v. Alabama, 395 U.S. 238 (1969), the Commonwealth has a constitutionally imposed burden to prove the voluntariness of every guilty plea. 386 Mass. at 842, 438 N.E.2d at 340. Defendant's failure to preserve a record, although a violation of Rule 11, does not remove this burden. *Id.* Accordingly, the Court stated, the Commonwealth in such a case must "take proof from witnesses to reconstruct what occurred in the court when the plea was made." *Id.* (quoting Commonwealth v. Foster, 368 Mass. 100, 108 n.6, 330 N.E.2d 155, 160 n.6. (1975)). In *Duquette,* the Court noted, the Commonwealth did not even claim to be able to do this. *Id.*

[51] *Id.* at 839, 438 N.E.2d at 339.

[52] *Id.* at 839-40, 438 N.E.2d at 340.

[53] *Id.* at 840, 438 N.E.2d at 340. *See supra* note 2.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 841, 438 N.E.2d at 340.

[58] *Id.*

acted voluntarily and understood the consequences of his plea.[59] With no such showing in the case before it, the Court stated, Duquette's admission could not be treated as a valid guilty plea.[60] The Court concluded that the defendant was entitled to a full jury trial and remanded the case to the jury session of the district court for trial before a jury of six.[61]

The Court went on to specify the proper procedures for the use of an admission in the jury session of the district court.[62] The Court noted that the jury session represents a defendant's last opportunity for a trial.[63] Moreover, the Court stated, under current district court procedures, where a defendant receives a continuance judges are required to enter a guilty finding if the defendant violates a condition of that continuance.[64] Consequently, the Court noted, a defendant who admits to sufficient facts in order to obtain a continuance in the jury session waives significant constitutional rights, including the right to a jury trial, the right to confront and cross-examine one's accuser, and the right to call witnesses on one's own behalf.[65] It is imperative, the Court stated, that the defendant know and understand that he is waiving these rights.[66]

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[59] *Id.* (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969) and Commonwealth v. Morrow, 363 Mass. 601, 604, 296 N.E.2d 468, 472 (1973)).

[60] *Id.*

[61] *Id.* at 847, 438 N.E.2d at 343.

[62] *Id.* at 845, 438 N.E.2d at 342. The procedures outlined by the Court need not be followed when an admission is used in the primary session of the district court, because the defendant, if convicted, still has a right to a trial *de novo* in the jury session. *Id.* at 846, 438 N.E.2d at 342. Nevertheless, even in the primary session, defendant must validly waive his right to an immediate jury trial. *Id.* In addition, if a defendant in the primary session, as a condition of obtaining his continuance, waives his right to a trial *de novo,* the admission should be treated as if it occurred in the jury session, and the procedures outlined by the *Duquette* Court should be followed. *Id.* at 847, 438 N.E.2d at 343. This is because the finding of the first tier court "would then have the finality normally associated with second tier proceedings." *Id.*

[63] *Id.* at 844, 438 N.E.2d at 341.

[64] *Id.* at 839 & n.5, 438 N.E.2d 338-39 & n.5. This procedure is required by a memorandum of the Chief Justice for the District Courts, dated October 15, 1979. The memorandum, as quoted by the *Duquette* Court, reads, in relevant part:

> 2. *Action in Cases Returned After a Continuance Without a Finding in the Jury Session.* If a case is continued without a finding and returned to the primary court, the primary court should . . . if it finds that the terms have been violated, proceed to enter the guilty finding . . . .
>
> Judges sitting in the jury session should inform defendants whose cases they may be inclined to continue without a finding that, should they violate the conditions of the continuance, . . . *there is no right to de novo appeal thereafter.*

Id. at 839 n.5, 438 N.E.2d 338-39 n.5 (emphasis in original).

[65] *Id.* at 839-41, 438 N.E.2d 339-40.

[66] *Id.*

To insure that the defendant knows and understands the rights he is waiving, the Court outlined a six step procedure to be followed whenever an admission is used at the second tier of the district court.[67] First, as required by Massachusetts Rule of Criminal Procedure 12(a)(3), the defendant must validly waive his right to a jury trial.[68] Second, the facts which the defendant is admitting should be formalized in a written document and filed with the papers of the case.[69] Third, the judge should satisfy himself that there is a factual basis for a guilty finding, so that he can make such a finding if defendant fails to comply with the conditions of the continuance.[70] Fourth, the judge must inform the defendant that he is waiving his rights to confront and cross-examine his accusers, and to call witnesses on his own behalf, and question the defendant to make sure he understands these rights.[71] Informing and questioning the defendant in this regard, the judge should treat the admission as if it were a guilty plea, and follow the procedures outlined in Massachusetts Rule of Criminal Procedure 12 for the acceptance of guilty pleas.[72] Fifth, after the judge complies with these requirements, he may enter the admission in the record and continue the case or treat the admission as a guilty plea, and impose a guilty finding.[73] Sixth, if the judge continues the case and if the conditions of the continuance are violated, the judge may enter a finding of guilty provided he is satisfied of the defendant's guilt beyond a reasonable doubt.[74]

The most significant aspect of the *Duquette* decision is the Court's holding that in instances where an admission to sufficient facts will or may have the same procedural effect as a guilty plea, the judge must follow similar procedures prior to accepting the admission as would be followed prior to the acceptance of a guilty plea.[75] This ruling applies where an admission is used in instances when the defendant will have no right to a trial *de novo* if found guilty.[76] Thus, a defendant in the primary session who has waived his right to a trial *de novo,* as well as a defendant in the jury session, who has no right to a trial *de novo,* may admit to sufficient facts only after the judge has explained to these defendants that by admitting to sufficient facts they are waiving their right to confront and cross-examine

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[67] *Id.* at 845-46, 438 N.E.2d at 342.

[68] *Id.* at 845, 438 N.E.2d at 342.

[69] *Id.*

[70] *Id.* This procedure is required by DIST. CT. DEPT. SUPP. R. CRIM. P. 3, which reads:
The court shall not enter a judgment upon a plea of guilty nor make a finding of guilty upon the defendant admitting to a finding of facts sufficient to warrant the same, unless it is satisfied that there is a factual basis for such plea or finding.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 945-46, 438 N.E.2d at 342.

[74] *Id.*

[75] *See supra* text accompanying notes 81-83. *Compare supra* note 22.

[76] 386 Mass. at 845, 847, 438 N.E.2d at 342, 343.

accusers and to call witnesses on their own behalf.[77] Thereafter, the judge must question these defendants to insure that they understand these rights, and are waiving them knowingly and voluntarily.[78]

The *Duquette* Court did not hold, however, that other procedural safeguards required by Massachusetts Rule of Criminal Procedure 12 for the acceptance of guilty pleas must also be employed for admissions which have or may have the same procedural effect as guilty pleas. Accordingly, a defendant who admits to sufficient facts with no right to a trial *de novo,* unlike a defendant who pleads guilty, has no right to have the judge informed that his plea was made as part of a plea bargaining agreement.[79] Similarly, the admitting defendant, unlike the defendant who pleads guilty, has no right to be informed prior to his admission of the maximum possible sentence he could receive, or of the judge's intention to follow or not follow the prosecutor's sentencing recommendations.[80] Finally, the admitting defendant, unlike the defendant who pleads guilty, has no right to withdraw his admission if the judge, after accepting the admission, decides to exceed the prosecutor's sentencing recommendation.[81] Thus, even after the *Duquette* decision, greater procedural safeguards surround guilty pleas than admissions, even where the latter may have an identical procedural effect.

The *Duquette* Court's procedural requirements with regard to admissions will not substantially alter district court procedure. Massachusetts Rule of Criminal Procedure 12(a)(3) already requires that a defendant waive his right to a jury trial prior to admitting to sufficient facts. The *Duquette* Court, however, made it clear that if, by some error, the defendant does not validly waive this right prior to his admission, he will be entitled to a jury trial notwithstanding that admission.[82] Similarly, District Court Department Supplemental Rule of Criminal Procedure 3 already requires that the judge satisfy himself that there is a factual basis for a finding of guilty before imposing such a finding based on an admission. The *Duquette* Court simply made this inquiry by the judge a precondition to the acceptance of the admission,[83] thereby formalizing what had already been the prevailing district court practice. Finally, the *Duquette* Court's suggestion that the defendant's admission be formalized in written stipulations[84] simply affirms the prevailing district court practice, at

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[77] *Id.*
[78] *Id.*
[79] *See* MASS. R. CRIM. P. 12(c).
[80] *Id.*
[81] *Id.*
[82] 386 Mass. at 840-41, 438 N.E.2d at 339 (1982).
[83] *Id.* at 845-46, 438 N.E.2d at 342.
[84] *Id.* at 845, 438 N.E.2d at 342.

least in cases where an admission is used in conjunction with a continuance without a finding.[85]

With regard to the continuance without a finding, several aspects of the *Duquette* decision are significant. First, the *Duquette* Court made clear that a defendant's violation of the conditions of his continuance will not affect that defendant's right to either a jury or non-jury trial.[86] Accordingly, a defendant, such as Mr. Duquette, who has not validly waived these rights, is entitled to receive either a jury or non-jury trial notwithstanding his violation of the conditions of his continuance.[87] Second, the *Duquette* Court expressed approval of the use of the continuance without a finding, citing the substantial benefits derived from the practice by the prosecutor, the defendant, and the community.[88] According to the *Duquette* Court, the prosecutor benefits because he avoids the great time and expense involved in trial and sentencing.[89] The defendant benefits, the Court noted, by obtaining an opportunity to avoid the consequences of a criminal conviction.[90] Finally, the Court stated, the community benefits because the risk of recidivism is reduced and court dockets are lightened.[91] The *Duquette* Court specifically stated that its decision did not preclude the use of the continuance at either tier of the district court.[92]

The *Duquette* decision, however, was silent with regard to the administration of the continuance program. Consequently, the selection of defendants who are eligible for the program will continue to be informal, guided only by unwritten custom. Similarly, the extent to which a defendant may appeal the decision not to grant a continuance, the decision to revoke the continuance, or the decision not to dismiss the case at the conclusion of the continuance remains uncertain. The field remains open for a defendant to appeal any of these decisions, as well as to challenge the validity of this disposition as a whole or the manner in which it is administered on constitutional grounds.[93]

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[85] M. L. GREENBERG, *Criminal Bench Trials in the District Court: A View from the Bench*, in MONOGRAPH THREE: BENCH TRIALS 93-94 (M.C.L.E. 1981).

[86] 386 Mass. at 843-44, 438 N.E.2d at 341.

[87] *Id.*

[88] *Id.* at 843, 438 N.E.2d at 341.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, People v. Superior Court of San Mateo County, 11 Cal. 3d 59, 113 Cal. Rptr. 21, 520 P.2d 465 (1974) (requirement that district attorney concur with judge's decision to divert trial held unconstitutional); State v. Nolfi, 141 N.J. Super. 528, 358 A.2d 853 (1976) (automatic exclusion of nonresidents from trial diversion program held unconstitutional).

§ 3.11. Warrantless Automobile Searches.* One of the most difficult problems associated with the fourth amendment is its application to searches involving automobiles. As a general rule, the fourth amendment requires that law enforcement officials obtain a warrant before making a search.[1] In *Carroll v. United States,*[2] however, the United States Supreme Court held that automobiles, due to their inherent mobility, may be searched without a warrant if both probable cause for the search and exigent circumstances are present.[3] In the years since *Carroll,* the Supreme Court has on a number of occasions addressed the question of when and to what extent a warrantless search of an automobile is constitutionally permissible.[4] Recent decisions reflect an ongoing transition in this area of the law[5] manifested by the Court's adoption of several overlapping exceptions to the general warrant requirement applicable to automobile searches.[6]

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§ 3.11. [1] Warrantless searches "are *per se* unreasonable under the fourth amendment subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

[2] 267 U.S. 132 (1925).

[3] *Id.* at 149-53.

[4] *See, e.g.,* United States v. Ross, 102 S. Ct. 2157, 2159 (1982) (vehicle legitimately stopped may be searched as thoroughly as a magistrate could authorize by warrant, if there is probable cause to believe that contraband is concealed in the vehicle); Robbins v. California, 453 U.S. 420, 428 (1981) (containers found in vehicle during a lawful warrantless search may not themselves be opened without a warrant) (overruled by *Ross,* 102 S. Ct. at 2172); New York v. Belton, 453 U.S. 454, 460-61 (1981) (passenger compartment of automobile, including containers found therein, may be searched incident to the lawful arrest of the occupant of the vehicle without a warrant); Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971) (no exigent circumstances justifying warrantless search of automobile parked in the driveway of the defendant's home, after the defendant was arrested there under an arrest warrant); Chambers v. Maroney, 399 U.S. 42, 52 (1970) (where police have probable cause to search a vehicle on a public roadway, they may seize the vehicle and later conduct a warrantless search at the station house, despite the fact that exigent circumstances are no longer present); Dyke v. Taylor Co., 391 U.S. 216, 221 (1968) (probable cause to believe that an instrumentality or evidence of a crime is concealed in an automobile must be present in order for officers to conduct a warrantless search).

[5] *See* United States v. Ross, 102 S. Ct. 2157 (1982), overruling Robbins v. California, 453 U.S. 420 (1981).

[6] *See, e.g.,* United States v. Ross, 102 S. Ct. 2157, 2164 (1982) (applying *Carroll* automobile exception to allow the warrantless search of a vehicle and any containers found therein where there was probable cause to believe the vehicle contained contraband as well as exigent circumstances); New York v. Belton, 453 U.S. 454, 460 (1981) (applying the search incident to a lawful arrest exception to permit a limited warrantless search of the arrestee's vehicle even where there is no probable cause to search the vehicle); Adams v. Williams, 407 U.S. 143, 145-49 (1972) (applying stop and frisk exception to permit a warrantless "frisk" to extend into the interior of a car where officer had a reasonable, "articulable suspicion" that his safety might be threatened by the occupant of the vehicle, despite the absence of probable cause).

Three cases decided in Massachusetts during the *Survey* year illustrate the variety of situations encompassed by present constitutional doctrines permitting warrantless automobile searches. In *Commonwealth v. Minh Ngo,*[7] *Commonwealth v. Beasley,*[8] and *Commonwealth v. Loughlin,*[9] the Massachusetts Supreme Judicial Court and the Appeals Court further delineated the circumstances under which a warrantless search of an automobile will be upheld as well as the permissible scope of such a search in view of the circumstances presented. Each of these decisions presents an automobile search which the Commonwealth attempted to justify under a distinct, judicially recognized exception to the general warrant requirement.[10] Specifically, the exceptions raised in support of the automobile searches undertaken in these cases were the automobile exception established in *Carroll,*[11] the search incident to a lawful arrest exception,[12] and the stop and frisk exception.[13]

The automobile exception received treatment from the Appeals Court

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[7] 14 Mass. App. Ct. 339, 439 N.E.2d 839 (1982).

[8] 13 Mass. App. Ct. 62, 430 N.E.2d 437 (1982).

[9] 385 Mass. 60, 430 N.E.2d 823 (1982).

[10] *See, e.g.*, Commonwealth v. Minh Ngo, 14 Mass. App. Ct. 339, 340 & n.l, 439 N.E.2d 839, 840 & n.l (1982) (Commonwealth relying on automobile exception to justify search); Commonwealth v. Beasley, 13 Mass. App. Ct. 62, 64, 430 N.E.2d 437, 438 (1982) (Court relying on search incident to lawful arrest exception in partially upholding search of defendant's vehicle after he was arrested); Commonwealth v. Loughlin, 385 Mass. 60, 62, 430 N.E.2d 823, 824 (1982) (Commonwealth relying on stop and frisk doctrine to justify protective search for weapons; alternatively relying on "consent" exception to support search of the automobile).

[11] *See* Commonwealth v. Minh Ngo, 14 Mass. App. Ct. 339, 340 & n.1, 439 N.E.2d 839, 840 & n.1. The automobile exception was established in Carroll v. United States, 267 U.S. 132 (1925). *See supra* notes 2, 3 and accompanying text, *infra* notes 43-46, 76 and accompanying text.

[12] *See* Commonwealth v. Beasley, 13 Mass. App. Ct. 62, 64, 430 N.E.2d 437, 438. For cases developing the search incident to arrest exception, see Chimel v. California, 395 U.S. 752 (1969) and New York v. Belton, 453 U.S. 454 (1981). *See infra* notes 34-42, 64-69, 72-76 and accompanying text.

[13] *See* Commonwealth v. Loughlin, 385 Mass. 60, 62, 430 N.E.2d 823, 824. The stop and frisk exception was first recognized by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968). The Court in *Terry* held:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

in the decision of *Commonwealth v. Minh Ngo.*[14] In *Minh Ngo,* the Chelsea police arrested a person who was a major buyer of drugs from the defendant.[15] The buyer agreed to cooperate with the authorities and, at the request of a federal agent, telephoned the defendant and arranged a drug deal to take place later that same day.[16] The buyer telephoned the defendant to arrange the purchase at approximately 1:00 p.m.; the meeting was to take place at 3:00 p.m.[17] During the two hour interim period between the phone call and the proposed meeting, the federal agent assembled a surveillance team comprised of both federal and local police officers.[18] The buyer agreed with the police that he would meet with the defendant and give a signal to the police if the defendant had heroin with him.[19] Although the defendant failed to appear at the appointed time and location, a phone call from the buyer resulted in another proposed meeting at a new location.[20] The defendant was sitting in his parked automobile when the buyer and surveillance team arrived.[21] The buyer entered the defendant's vehicle and shortly thereafter signalled the police that the defendant had heroin with him.[22] The police then arrested the defendant, conducted a warrantless search of his automobile, and seized the drugs.[23]

At trial the defendant moved to suppress the drugs seized from his automobile, contending that no exigent circumstances justified the warrantless search.[24] The trial judge ruled that the prosecution had met its burden of justifying the warrantless search under the automobile exception and denied the motion.[25] The defendant then petitioned for review of the denial in the Appeals Court.[26]

The Appeals Court affirmed the trial court's denial of the defendant's motion.[27] The Appeals Court agreed that the warrantless search of the vehicle was proper under the automobile exception because there was probable cause to believe the vehicle contained contraband,[28] and exigent

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[14] 14 Mass. App. Ct. 339, 439 N.E.2d 839 (1982).
[15] *Id.* at 339, 439 N.E.2d at 839.
[16] *Id.* at 339-40, 439 N.E.2d at 839.
[17] *Id.* at 341, 439 N.E.2d at 839.
[18] *Id.* at 340, 439 N.E.2d at 839.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 340, 439 N.E.2d at 840.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 340-41, 439 N.E.2d at 840.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 340, 439 N.E.2d at 840. The defendant conceded that probable cause was present. *Id.* at 341, 439 N.E.2d at 840.

circumstances surrounded the search.[29] According to the court, probable cause arose at the time of the 1:00 p.m. phone call made by the buyer to the defendant.[30] The court relied primarily on two factors in reaching the conclusion that exigent circumstances prevented the police from obtaining a warrant.[31] First, a considerable amount of time was necessary to assemble and position a surveillance team.[32] Second, the two hour period was not a sufficient amount of time to collect the information concerning the defendant, reduce it to affidavit form, and go before a magistrate to obtain a search warrant.[33]

It is interesting to note that although the trial judge specifically found that the search of the defendant's vehicle took place after he was arrested,[34] the Appeals Court did not consider the United States Supreme Court's decision in *New York v. Belton*[35] to be controlling.[36] In *Belton,* the United States Supreme Court held that police may conduct a warrantless search of the passenger compartment of a vehicle after they have lawfully arrested the occupant of the vehicle.[37] The *Belton* decision rested upon the search incident to lawful arrest exception, rather than the automobile exception, to the general warrant requirement.[38] The Commonwealth, at the suppression hearing in *Minh Ngo,* specifically disavowed

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[29] *Id.* at 340, 439 N.E.2d at 840.

[30] *Id.* at 341, 439 N.E.2d at 840.

[31] *Id.* The defendant contended that, although the police did not know what vehicle the defendant would be driving prior to the arrest and search, they nonetheless had time to obtain an "anticipatory warrant," leaving certain information to be filled in at the time of the search. *Id.* at 342, 439 N.E.2d at 840-41; Commonwealth v. Soares, 1981 Mass. Adv. Sh. 1696, 424 N.E.2d 221. The court determined that considering all the circumstances, two hours was too short a time for the police to obtain *any* warrant. 14 Mass. App. Ct. at 341, 439 N.E.2d at 840.

[32] *Id.*

[33] *Id.* The court noted that the defendant had been the subject of a police investigation for a long period of time and that a large amount of information and material had been collected by the police concerning the defendant. *Id.*

[34] *Id.* at 340 n.1, 439 N.E.2d at 840 n.1.

[35] 453 U.S. 454 (1981).

[36] 14 Mass. App. Ct. at 340-41 n.1, 439 N.E.2d at 840 n.1.

[37] 453 U.S. at 460-61. The Court in *Belton* further stated:

> [P]olice may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach . . . such a container may, of course, be searched whether it is opened or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

Id.

[38] *Compare* New York v. Belton, 453 U.S. 454 (1981) (search incident to arrest exception) *with* Robbins v. California, 453 U.S. 420 (1981) (overruled by United States v. Ross, 102 S. Ct. 2157 (1982)) (automobile exception).

justifying the search of the defendant's vehicle as a search incident to a lawful arrest.[39] Instead, the Commonwealth stated that it was relying on the automobile exception to support the warrantless search.[40] The Commonwealth's choice of the automobile exception rather than the search incident to lawful arrest exception can likely be attributed to the uncertainty surrounding the application of the latter exception in the context of post-arrest automobile searches prior to the *Belton* decision.[41] More significant than the underlying reasons for the Commonwealth's choice, however, is the fact that the Appeals Court confined its analysis to the particular exception chosen by the Commonwealth.[42]

In addition to not applying the Supreme Court's holding in *Belton,* the Appeals Court in *Minh Ngo* further stated that it was not relying on the United States Supreme Court's most recent pronouncement regarding the automobile exception, *United States v. Ross,*[43] to uphold the trial court's decision.[44] The *Ross* Court held that where police have probable cause to search a legitimately stopped automobile, a search as thorough as that which could be authorized in a magistrate's warrant may be conducted without a warrant.[45] The Appeals Court in *Minh Ngo* expressed its uncertainty concerning whether the *Ross* holding could be applied in the present case, because the car searched was parked rather than stopped by the police.[46]

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[39] 14 Mass. App. Ct. at 340-41 n.l, 439 N.E.2d at 840 n.l.

[40] *Id.*

[41] *Belton* was decided after the *Minh Ngo* suppression hearing. *Id.* Prior to *Belton* no Supreme Court decision had been rendered applying the search incident to a lawful arrest exception to a post-arrest automobile search. Thus, the limits on the exception as posited in Chimel v. California, 395 U.S. 752, 763 (1969), would have been controlling. In *Chimel,* the Court held that the area within the immediate reach of an arrestee, at the time he is arrested, may be searched without a warrant. 395 U.S. at 763.

Although the Court in *Belton* held that despite the arrestee no longer being in the automobile, it could be searched incident to a lawful arrest, 453 U.S. 454, 460 (1981), it would not have been unreasonable for a court, relying on *Chimel* alone, to have concluded that no search incident to a lawful arrest could extend into the interior of an automobile when its occupant was placed under arrest outside of the vehicle.

[42] 14 Mass. App. Ct. at 340-41 n.1, 439 N.E.2d at 840 n.1. The Court stated that because the defendant's evidence at the suppression hearing was "pitched toward the automobile exception," as a result of the Commonwealth's statement, it did not consider *Belton,* 453 U.S. 454 (1981), to be dispositive. 14 Mass. App. Ct. at 340-41 n.1, 439 N.E.2d at 840 n.1.

[43] 102 S. Ct. 2157 (1982).

[44] 14 Mass. App. Ct. at 341 n.2, 439 N.E.2d at 840 n.2.

[45] 102 S. Ct. 2157, 2159 (1982).

[46] 14 Mass. App. Ct. at 341 n.2, 439 N.E.2d at 840 n.2. The Appeals Court cited Justice Marshall's dissent in *Ross,* 102 S. Ct. 2157, 2174 (1982). In his dissenting opinion, Justice Marshall stated: "The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not under-

The *Minh Ngo* decision apparently stands for the proposition that a *planned* search of a vehicle, based on probable cause arising several hours prior to the search, does not *per se* preclude a finding of exigent circumstances. Specifically, where probable cause arises at a time prior to the intended search and it is administratively impracticable to take the time to complete the procedures necessary to obtain a search warrant, exigent circumstances may be found which alleviate the search warrant requirement. Whether the two hour lapse of time presented in the *Minh Ngo* case will rise to the level of a "safe haven" period on which officers may rely in deciding not to obtain a warrant cannot be posited with absolute certainty. Because the Appeals Court cited more than one factor in support of its finding of exigent circumstances, the time element may not in itself have been the controlling factor on which the appeals court predicated its holding.[47]

While the Commonwealth relied on the automobile exception to justify the warrantless automobile search in *Minh Ngo,* in *Commonwealth v. Beasley*[48] the government resorted to another exception, the search incident to a lawful arrest exception, to support the warrantless search of the defendant's automobile.[49] In *Beasley,* the defendant pulled off to the side of a deserted section of the roadway in Milton at approximately 1:30 a.m. in response to the flashing of a police cruiser spotlight.[50] The police cruiser was sitting alongside another cruiser on the side of the road.[51] The trooper who flashed his spotlight stated that he did not intend to stop the defendant, but rather he flashed the light to warn the defendant to slow down.[52] Nevertheless, when the defendant pulled over and stopped, both the troopers and the defendant alighted from their vehicles.[53] After briefly conversing, the troopers walked the defendant back to his automobile and one of the troopers looked into the vehicle with his flashlight and spotted marijuana.[54] The trooper entered the car and removed both the marijuana and some fireworks which he observed on the front seat floor.[55] After arresting the defendant,[56] one of the troopers searched the glove com-

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stand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971)." 102 S. Ct. at 2174.

[47] *See* 14 Mass. App. Ct. at 341, 439 N.E.2d at 840. *See also supra* notes 31-33 and accompanying text.

[48] 13 Mass. App. Ct. 62, 430 N.E.2d 437 (1982).

[49] *Id.* at 64-65, 430 N.E.2d at 438.

[50] *Id.* at 63, 430 N.E.2d at 437-38.

[51] *Id.* at 63, 430 N.E.2d at 437.

[52] *Id.* at 63, 430 N.E.2d at 437-38.

[53] *Id.* at 63, 430 N.E.2d at 438.

[54] *Id.*

[55] *Id.*

[56] *Id.* Defendant was arrested for possession of fireworks. *Id.*

partment and removed an envelope, which he opened and found to contain money.[57] The troopers then asked the defendant if they could search the trunk.[58] The defendant apparently indicated in some way that they could.[59] The troopers found revolvers and ammunition in the trunk which they seized.[60]

At trial, the defendant moved to suppress both the envelope contained in the glove compartment and the revolvers and ammunition found in the trunk of the defendant's automobile.[61] The trial judge granted the motion as to all of those items.[62] The Appeals Court reversed the trial court's decision to suppress the envelope, but upheld its decision to suppress the revolvers and ammunition.[63]

In overruling the suppression of the envelope found in the glove compartment, the Appeals Court relied on the United States Supreme Court's holding in *New York v. Belton,*[64] decided after the lower court's ruling.[65] The *Belton* decision, which upheld a post-arrest search of the passenger compartment of an arrestee's vehicle,[66] specifically included a closed glove compartment in its definition of "containers" that may be searched within a vehicle under the search incident to lawful arrest exception.[67] The *Beasley* court held, therefore, that a warrantless search of a glove compartment is permissible if made incident to a lawful arrest.[68]

With respect to the search of the trunk of the defendant's car, however, the Appeals Court noted that the *Belton* decision limits the scope of a warrantless search incident to a lawful arrest to the interior of the automobile and does not extend to the trunk.[69] Accordingly, the court concluded, the warrantless search of the defendant's trunk in *Beasley* could not be justified as incident to a lawful arrest.[70] The Appeals Court rejected the Commonwealth's contention that the defendant consented to the trunk search, abiding by the lower court's finding that the burden of

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[57] *Id.* at 64, 430 N.E.2d at 438.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 63, 430 N.E.2d at 437.

[62] *Id.*

[63] *Id.*

[64] 453 U.S. 454 (1981).

[65] 13 Mass. App. Ct. at 64, 430 N.E.2d at 438.

[66] *See supra* notes 35-41 and accompanying text.

[67] 453 U.S. 454, 460-61 n.4 (1981). The Court included within its definition of "container" luggage, boxes, bags, clothing or any other opened or closed receptacle found within the interior of the automobile. *Id.*

[68] 13 Mass. App. Ct. at 64, 430 N.E.2d at 438.

[69] *Id.* at 64 n.1, 430 N.E.2d at 438 n.1. *See* New York v. Belton, 453 U.S. 454, 460-61 n.4 (1981).

[70] 13 Mass. App. Ct. at 64-65, 430 N.E.2d at 438.

establishing "free, voluntary" consent, "unfettered by coercion," had not been met by the Commonwealth.[71]

It should be noted that the Appeals Court decided *Beasley* before the United States Supreme Court's recent decision in *United States v. Ross*.[72] In *Ross*, the Court held that where there is probable cause to believe that contraband may be found somewhere in a vehicle that has been lawfully stopped, the officers may conduct a search, without a warrant, "as thorough as a magistrate could authorize in a warrant" under the circumstances.[73] The Supreme Court did not expressly mention the effect of its holding in *Ross* on the prior limitations on a search incident to a lawful arrest which were established in *Belton*.[74] It would be reasonable to infer, however, that once a search incident to a lawful arrest has led to a discovery of contraband in the passenger compartment of an automobile, the probable cause necessary to justify a warrantless search of the trunk of the vehicle arises. The Supreme Court's decision in *Ross* lends support to this inference by expressly rejecting its prior decision in *Robbins v. California*,[75] a case whose facts are substantially similar to those in *Beasley*.[76] Consequently, the *Beasley* decision, insofar as it upholds the suppression of evidence found as a result of the search of the defendant's trunk, is of questionable validity in light of *Ross*.

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[71] *Id.* The court noted that the defendant was under arrest and guarded by at least two officers when he allegedly consented to the trunk search. *Id.* at 65, 430 N.E.2d at 438. In addition, the keys to the vehicle had been taken from the defendant without his permission and he was not informed of his right to refuse consent. *Id.*

[72] 102 S. Ct. 2157 (1982).

[73] 102 S. Ct. 2157, 2159.

[74] 453 U.S. 454, 460 (1981). In *Ross*, the government did not argue before the Supreme Court that the warrantless search of a container found in the defendant's vehicle was justified as incident to a lawful arrest. *See* 102 S. Ct. 2157, 2161 n.2 (1982).

[75] 453 U.S. 420 (1981).

[76] In *Robbins*, the defendant was stopped early in the morning by officers because he had been driving erratically. 453 U.S. 420, 422 (1981). The defendant alighted from his vehicle and approached the patrol car. *Id.* When asked for his license and registration, he returned to his car accompanied by the officers, opened the car door, and the officers smelled marijuana smoke. *Id.* One of the officers patted down the petitioner and found a vial of liquid. *Id.* The officer then searched the passenger compartment of the vehicle and discovered marijuana. *Id.* The police officers then opened the tailgate of the defendant's station wagon and raised the cover of a recessed luggage compartment. *Id.* In the compartment they found two packages wrapped in green plastic which they opened, finding more marijuana contained in each. *Id.*

The *Robbins* Court, while considering the search of the luggage compartment permissible under the automobile exception, held that the green plastic containers could not be opened without a warrant. *Id.* at 428-29. The Court in *Ross*, 102 S. Ct. 2157 (1982), overturned *Robbins*, holding that containers found during a legitimate automobile exception search may be themselves opened and searched if there is probable cause to believe they contain contraband. 102 S. Ct. at 2172.

In *Commonwealth v. Loughlin*,[77] the Supreme Judicial Court considered the application of yet another exception to the general rule requiring a search warrant, the stop and frisk exception, in the context of a warrantless automobile search.[78] Defendants Loughlin and Searles were the occupants of a Chevrolet El Camino that a state police trooper observed parked in the breakdown lane on a deserted, poorly lit portion of a highway at 1:00 a.m.[79] The trooper pulled up behind the vehicle, whose distress signals were flashing, and observed the defendant Loughlin standing at the right rear of the vehicle.[80] When the police cruiser stopped, Loughlin walked quickly to the open passenger door and entered the vehicle. The defendant Searles, sitting in the driver's seat, ducked out of sight.[81] Searles then jumped from the vehicle and approached the trooper.[82] Searles immediately produced both his license and the vehicle registration and then returned to his seat, at the trooper's request.[83] The trooper then asked the passenger Loughlin for identification.[84] Loughlin responded by giving his name and address, but produced no other identification.[85] The trooper then ordered Loughlin from the vehicle, "pat-frisked" him and removed wads of money from his pockets, which Loughlin, in response to questioning, had informed the trooper were "cigarettes."[86] Subsequently, the trooper ordered Searles from the vehicle and commanded both of the defendants to lean "spread eagle" over the front of the vehicle.[87] The trooper asked if there were any weapons in the vehicle and Searles responded, "No weapons. You can check."[88] The trooper searched the interior of the vehicle and found no weapons.[89] He then asked if there were weapons in the back of the vehicle and Searles again responded, "No, you can check."[90] The flatbed of the vehicle was covered by a canvas, which the officer pulled aside.[91] He found marijuana in the course of the search, and arrested the defendants.[92]

Both defendants moved to suppress the marijuana seized from the rear

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[77] 385 Mass. 60, 430 N.E.2d 823 (1982).
[78] *Id.* at 62, 430 N.E.2d at 824.
[79] *Id.* at 61, 430 N.E.2d at 824.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 61-62, 430 N.E.2d at 824.
[84] *Id.* at 62, 430 N.E.2d at 824.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

of the vehicle. The trial judge denied the motion, ruling that the search of the flatbed was consensual.[93] The defendants subsequently were convicted of possession of marijuana with intent to distribute, and sought appellate review of the trial court proceedings.[94] The Appeals Court overturned the convictions on the grounds that the defendants' motions to suppress were improperly denied.[95] The Supreme Judicial Court granted the Commonwealth's motion for further appellate review and, in a four to two decision, affirmed the ruling of the Appeals Court.[96]

The majority of the Court agreed with the reasoning of the Appeals Court, ruling that once the defendant Searles had produced a valid license and registration and the defendant Loughlin had identified himself, any justifiable investigation was complete and the defendants should have been permitted to continue on their way.[97] The Court concluded that the trooper acted illegally in ordering the defendants from the vehicle and conducting a pat-frisk of Loughlin.[98] With respect to the warrantless automobile search, which the Commonwealth contended was consensual, the Court determined that the consent was traceable to the illegal "stop and frisk" search and was not an intervening act of free will sufficient to dissipate the taint of illegality.[99] In reaching this conclusion, the Court relied on the principles set forth in *Brown v. Illinois*,[100] governing the admissibility of a confession given after an illegal arrest.[101] The Court noted that Searles was not advised of his right to refuse to consent to the search and, that no significant time elapsed between the illegal exit orders and pat-frisk and the "consent" to the vehicle search.[102] The Court therefore considered the marijuana seized in the course of the automobile search to be subject to the exclusionary rule as applied under the "fruits of the poisonous tree" doctrine.[103]

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[93] *Id.* at 61, 430 N.E.2d at 823.

[94] *Id.* at 60-61, 430 N.E.2d at 823.

[95] *Id.* at 61, 430 N.E.2d at 823.

[96] *Id.* at 61 and n.2, 430 N.E.2d at 824 and n.2.

[97] *Id.* at 62, 430 N.E.2d at 824.

[98] *Id.* at 63-64, 430 N.E.2d at 824-25.

[99] *Id.* at 63-64, 430 N.E.2d at 825.

[100] 422 U.S. 590 (1975).

[101] *Id.* at 603-04. The Court in *Brown* stated:

> The question whether a confession is the product of a free will under *Wong Sun* [, 371 U.S. 471, 485-86 (1963),] must be answered on the facts of each case. No single fact is dispositive. . . . The temporal proximity of the arrest and confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. . . . The voluntariness of the statement is a threshold requirement. . . . And the burden of showing admissibility rests, of course, on the prosecution.

Id.

[102] 385 Mass. at 63-64, 430 N.E.2d at 825.

[103] *Id.* at 63, 430 N.E.2d at 825. The "fruits of the poisonous tree" doctrine requires that

In a concurring opinion, Chief Justice Hennessey emphasized the strictly limited, single justification supporting a stop and frisk search.[104] The Chief Justice observed that from its origins in *Terry v. Ohio*,[105] the stop and frisk search has consistently been held permissible only when the search is directed toward concealed weapons and is based upon an officer's "articulable suspicion" that his life might be in danger.[106] Without discussing the issue of whether the search of the vehicle was supported by Searles' consent, the Chief Justice concluded that the search was illegal because the impetus for the search was not self-protection but rather "a search for evidence."[107]

Justice Nolan, joined by Justice Lynch, dissented, arguing that the majority opinion unnecessarily expanded the protection of individual rights under the fourth amendment.[108] The dissenters determined there was sufficient cause for the trooper to reasonably believe that his safety was threatened, given the suspicious actions of the defendants upon the approach of the officer and the fact that the incident took place late at night in a deserted area.[109] Further, the dissenters rejected the majority's holding that the gesture of identification is sufficient to obviate the need for any further investigation.[110] In the dissenters' view, the need for protective precaution was not removed by the simple identification procedure.[111] The trooper was justified in ordering the defendants from the vehicle[112] and conducting a pat-frisk of Loughlin to determine whether he was armed.[113] In addition to finding the stop and frisk search justified and nonviolative of the defendants' fourth amendment rights, the dissenters agreed with the trial judge's finding that the defendant Searles validly consented to the search of the vehicle.[114]

The majority and dissenting opinions in *Loughlin* rely on different authorities in support of their conclusions. The majority turned to *Com-*

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any product of an illegal search or seizure, be it direct or indirect, must be excluded as evidence unless the prosecution can show that indirect evidence was arrived at through independent sources, or that the taint of the illegal act has been dissipated by intervening circumstances or an extended period of time between the act and the later discovery of the indirect evidence. *See* Wong Sun v. United States, 371 U.S. 471, 484-86 (1963).

[104] 385 Mass. at 64-66, 430 N.E.2d at 825-26 (Hennessey, C.J., concurring).

[105] 392 U.S. 1 (1968).

[106] *See, e.g.*, Commonwealth v. Almeida, 373 Mass. 266, 270-71, 366 N.E.2d 756, 759 (1977); Commonwealth v. Silva, 366 Mass. 402, 405-06, 318 N.E.2d 895, 898 (1974).

[107] 385 Mass. at 65, 430 N.E.2d at 826.

[108] *Id.* at 66-69, 430 N.E.2d at 826-28 (Nolan, J., joined by Lynch, J., dissenting).

[109] *Id.* at 68-69, 430 N.E.2d at 827-28.

[110] *Id.* at 67, 430 N.E.2d at 827.

[111] *Id.*

[112] *Id.* at 67-68, 430 N.E.2d at 827.

[113] *Id.* at 68, 430 N.E.2d at 827 (Nolan, J., joined by Lynch, J., dissenting).

[114] *Id.*

monwealth v. Ferrara,[115] a 1978 Supreme Judicial Court decision, to support its position that the search of both Loughlin's person and the vehicle were illegal.[116] In *Ferrara,* the Court held that once officers have legitimately stopped an automobile, in the absence of probable cause to believe criminal activity is afoot, the officers are initially limited to making a "threshold inquiry" consisting of a request that the driver of the vehicle produce a valid license and registration.[117] Any further inquiry, according to the *Ferrara* Court, must be based on either probable cause or a reasonable suspicion, supported by the facts, that the officer's safety might be threatened by the occupant(s) of the vehicle.[118] The Court in *Loughlin* did not view the actions of Searles and Loughlin subsequent to the threshold inquiry and prior to the trooper ordering them from the car as sufficient to "warrant a reasonable person to believe that the defendants were armed and presently dangerous."[119] In summary, the *Loughlin* majority considered the limited "threshold inquiry" posited in *Ferrara*[120] to operate in the *Loughlin* case as a restriction on the troopers' investigative actions with respect to the defendants and their vehicle.[121]

The dissenters in *Loughlin,* on the other hand, thought the actions of the defendants in *Ferrara*[122] were considerably less suspicious than the actions and circumstances leading to the stop and frisk search in *Loughlin.*[123] They considered the case of *Commonwealth v. Almeida,*[124]

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[115] 376 Mass. 502, 381 N.E.2d 141 (1978).

[116] 385 Mass. at 62, 430 N.E.2d at 824. The court stated that it agreed with the appeals court's holding that the principles expressed in *Ferrara,* 386 Mass. 502, 505, 381 N.E.2d 141, 144 (1978), were controlling.

[117] 376 Mass. 502, 505, 381 N.E.2d 141, 144 (1978).

[118] *Id.* In *Ferrara,* officers posted on surveillance duty outside a cleaning establishment observed an automobile, occupied by the defendants, stop in front of the cleaners. *Id.* at 503, 381 N.E.2d at 143. The driver of the automobile, within a short time period, went in to the cleaners and back out to the automobile three times and then drove off. *Id.* The officers followed the vehicle after observing one of the passengers look back at the police vehicle and say something to the driver. *Id.* The vehicle drove several miles, the driver committing no violations, but after the driver made a sharp turn, the officers stopped the vehicle. *Id.* The driver upon request produced a valid license and registration and the two passengers verbally identified themselves. *Id.* The officer addressing the passengers ordered them from the vehicle. *Id.* He then spotted a gun, previously obstructed from view, on the rear seat of the vehicle. *Id.* The officer seized the gun, frisked the occupants of the vehicle and placed them under arrest for illegal possession of firearms. *Id.*

The *Ferrara* court made no finding on the issue of whether the stop of the defendants' vehicle was proper. *Id.* at 505, 381 N.E.2d at 144. Instead, the court focused on the post-stop investigatory actions of the officers and considered the exit order leading to the discovery of the gun unjustified after the threshold inquiry had been made. *Id.*

[119] 385 Mass. at 62, 430 N.E.2d at 824.

[120] 376 Mass. 502, 505, 381 N.E.2d 141, 144 (1978).

[121] 385 Mass. at 62, 430 N.E.2d at 824.

[122] 376 Mass. 502, 503, 381 N.E.2d 141, 143 (1978). *See supra* note 118.

[123] 385 Mass. at 66, 430 N.E.2d at 826 (Nolan, J., joined by Lynch, J., dissenting).

decided by the Court in 1977, to be controlling.[125] In *Almeida,* the Court upheld a warrantless stop and frisk search of both an automobile and its occupant, finding that the search was justified by the officers' reasonable suspicion that their safety was threatened.[126] The *Almeida* Court applied a "totality of circumstances" test in reaching its conclusion that the facts supported a reasonable suspicion that the officers' safety might be threatened by the defendant.[127] The Court took into account the high crime area in which the officers discovered the defendant, late hour of the night, and the defendant's inability to produce the vehicle's registration upon request.[128] The Court found the search conducted by the officers in *Almeida* to be within the limits of what was "minimally necessary" for their protection, under the circumstances presented.[129] The dissenters in *Loughlin,* in comparing *Ferrara* and *Almeida,* considered the distinguishing factor to be the degree of suspicion aroused by the defendant's actions and surrounding circumstances in these cases.[130]

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[124] 373 Mass. 266, 366 N.E.2d 756 (1977).

[125] 385 Mass. at 67, 430 N.E.2d at 827 (Nolan, J., joined by Lynch, J., dissenting).

[126] 373 Mass. 266, 272-73, 366 N.E.2d 756, 760 (1977).

[127] *Id.* at 271-72, 366 N.E.2d at 760. The facts in *Almeida* were as follows. Two officers patrolling late at night in a high crime area of Boston, discovered the defendant sitting in a vehicle with the lights off and the engine running in a private parking lot. *Id.* at 268, 366 N.E.2d at 758. The officers pulled alongside the defendant's vehicle and asked him several questions. *Id.* In response to the questions, the defendant informed the officers that he was not from the area and that the car he was driving was borrowed. *Id.* When one of the officers alighted from the police cruiser and asked the defendant for his license and registration, the defendant produced a license, but failed after approximately fifteen seconds to produce a registration. *Id.* at 269, 366 N.E.2d at 758. The officer then ordered the defendant from the automobile. *Id.* The other officer took the defendant to the front of the vehicle while the officer giving the exit order walked around to the passenger side of the automobile, opened the door and looked into the vehicle. *Id.* The interior light came on when the officer opened the door and, leaning into the vehicle, he spotted what appeared to be a gun holster jutting out from under the front seat. *Id.* Reaching under the seat, the officer removed the holster, which he found to contain ammunition. *Id.* He subsequently opened the console compartment and found a revolver. *Id.* at 269, 366 N.E.2d at 759. The defendant was then placed under arrest. *Id.*

[128] *Id.* at 272, 366 N.E.2d at 760.

[129] *Id.* The court considered the cursory search of the defendant's vehicle justified, since at the inception of the auto search the defendant had not been placed under arrest and, thus, "there was no assurance that he would not be returning promptly to his seat behind the wheel of the automobile." *Id.* The search of the automobile was therefore deemed by the court to be protective in nature, limited to the area from which the suspect might gain access to a weapon. *Id. Cf.* Commonwealth v. Silva, 366 Mass. 402, 405-408, 318 N.E.2d 895, 898-900 (1974) (court holding "stop and frisk" search of defendant and his automobile unjustified in its initiation, but recognizing that if there had been cause to conduct the search, the search could have extended into the interior of the defendant's vehicle since he was not under arrest at the time the search was initiated).

[130] 385 Mass. at 66-67, 430 N.E.2d at 826-27 (Nolan, J., joined by Lynch, J., dissenting).

In response to the rationale of the dissenters, the majority in *Loughlin* expressed the view that the propriety of the officers' actions in *Ferrara* and *Almeida* did not hinge on the level of suspiciousness of the defendants' actions, but rather the relevant distinction between these cases was in the "order of events."[131] The majority elaborated on this "order of events" analysis by stating that a command to exit the vehicle, if it *follows* the "threshold inquiry" of requiring the driver to produce a license and registration, is only justified if supported by probable cause to believe that the defendant "has committed, is committing, or is about to commit a crime."[132] If, however, the exit order *precedes* the threshold inquiry, then the question is whether the officer reasonably believes that his safety is threatened.[133]

It is unclear how this curious "order of events" test which the majority posits in *Loughlin* distinguishes the *Ferrara* and *Almeida* cases. In neither of these prior cases did the officer order a defendant to exit the vehicle prior to a threshold inquiry. In order to justify the *Almeida* decision under this "order of events" test it is necessary to make the dubious presumption that the defendant's failure to produce a registration within fifteen seconds in that case gave rise to probable cause justifying the subsequent order to exit his car.

The rule laid down by the majority in *Loughlin* could give rise to a trap for the unwary officer. While the majority treats the "order of events" test as one established in prior cases, the technical application prescribed by the Court fails to take into account any evaluation of the "totality of circumstances" which might support a reasonable suspicion, short of probable cause, that precautions need be taken by the officer after a threshold inquiry pertaining to license and registration has been completed. The *Loughlin* Court departs in its analysis from *Ferrara* by establishing what appears to be a *per se* rule that no further inquiry *or precautions* may be taken without probable cause, once a threshold inquiry has been made pursuant to a legitimate "stop."[134] On the other hand, reasonable suspicion short of probable cause may justify a precautionary exit order *prior* to the threshold inquiry.[135] Finally, it is important to recognize that the *Loughlin* decision, in addition to the "order of events" test it announces, may be relied on in the future for the principle that a strong presumption militates against finding a valid consent to an auto search if

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[131] *Id.* at 62-63 n.3, 430 N.E.2d at 824-25 n.3.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*

an officer persists in taking precautionary or investigatory measures, absent probable cause, after a threshold inquiry has been made.[136]

Juxtaposition of the three principle Massachusetts cases discussed herein demonstrates the complexity encountered by courts attempting to provide guidelines for determining when an automobile search is permissible without a warrant. This complexity can be attributed in part to the current recognition in the area of automobile searches of several overlapping exceptions to the warrant requirement under the fourth amendment. The principal cases decided during the *Survey* year, *Minh Ngo, Beasley* and *Loughlin,* illustrate the variety of approaches under which warrantless automobile searches may be analyzed and, further, the potentially differing results which these approaches may yield depending upon the exception adopted to justify the warrantless search. For example, the *Minh Ngo* decision demonstrates that where the automobile exception is used to justify the search, the inquiry is limited to whether there is probable cause for the search and whether exigent circumstances are present. Further, in *Minh Ngo,* the Appeals Court gave liberal scope to the term "exigent circumstances," permitting a warrantless search planned two hours prior to its execution under this exception. This approach compares favorably from the State's perspective with the search incident to a lawful arrest exception as applied by the Appeals Court in the *Beasley* case. Where the prosecution justified the warrantless search under this latter theory, the Appeals Court, relying on *New York v. Belton,* imposed additional restrictions on the scope of the search within the contours of the vehicle. The question remains unresolved whether a court will hold the State to the exception pleaded or allow the search if facts are presented that bring the search within any recognized exception. In both *Minh Ngo* and *Beasley* the court limited its analysis to the exception asserted by the State.

While both *Minh Ngo* and *Beasley* concerned warrantless searches clearly founded on probable cause, the *Loughlin* case involved a "stop and frisk" search based on suspicion rather than probable cause. The Supreme Judicial Court in this case took a restrictive approach to permitting auto searches under the "stop and frisk" exception to the warrant requirement. Specifically, the court adopted a *per se* rule that once the occupants of a vehicle produce valid identification no further inquiry may be conducted in the course of an investigative auto stop. It remains uncertain after *Loughlin* whether any search for weapons extending into a vehicle may be conducted *prior to* the "initial" inquiry and, further, whether any set of circumstances short of overt and express threats will justify a precautionary vehicle search after an initial inquiry has yielded valid identification.

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[136] *See id.* at 63-64, 430 N.E.2d at 824-25.

§ 3.12. Grand Jury Indictment — Probable Cause to Bind-Over for Trial — Sufficiency of Evidence.* Under the United States Constitution,[1] a warrant to arrest[2] a criminal suspect cannot be issued without an initial finding of probable cause to arrest.[3] Massachusetts law provides that probable cause to arrest exists if, at the time the arrest warrant is requested, the facts and circumstances would justify a prudent man in believing that the suspect had committed or was committing an offense.[4] In making this determination, the judge may consider all the evidence he deems to be reasonably trustworthy, including evidence that would be inadmissible at trial.[5] If the judge finds the evidence sufficient to meet the probable cause standard, an arrest warrant may then be issued.[6]

After arrest, the defendant is arraigned,[7] and pretrial discovery begins.[8] The suspect may not be tried, however, absent a finding of probable cause to bind-over for trial.[9] Probable cause to bind-over is a determination that there is sufficient likelihood of the suspect's guilt to justify subjecting him to a public trial.[10] Under Massachusetts law, this determination may be made through a preliminary hearing or a grand jury indictment.[11] The

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§ 3.12. [1] U.S. CONST. amend. XIV, as interpreted in Marron v. United States, 275 U.S. 192, 195 (1927).

[2] In Massachusetts, an arrest can sometimes be made without a warrant. *See, e.g.*, G.L. c. 276, § 28; G.L. c. 766, §§ 37B, 37C. Nevertheless, in all instances where a warrant is required, the warrant cannot be issued without a finding of probable cause to arrest. Commonwealth v. Stevens, 362 Mass. 24, 26, 283 N.E.2d 637, 675 (1972).

[3] Marron v. United States, 275 U.S. 192, 195 (1927); Commonwealth v. Stevens, 362 Mass. 24, 26, 283 N.E.2d 673, 675 (1972).

[4] Commonwealth v. Stevens, 362 Mass. 24, 26, 283 N.E.2d 673, 675 (1972).

[5] Commonwealth v. St. Pierre, 377 Mass. 650, 656, 387 N.E.2d 1135, 1140 (1979).

[6] Commonwealth v. Stevens, 362 Mass. 24, 26, 283 N.E.2d 673, 675 (1972).

[7] An arraignment is a proceeding before a judge wherein the charges against the suspect are read to him and his plea is entered. MASS. R. CRIM. P. 7(d). The arraignment must take place as soon after the arrest as is reasonably possible. Commonwealth v. Dubois, 353 Mass. 223, 226, 230 N.E.2d 906, 907-08 (1967). The reasonableness of the delay is determined on a case by case basis. Commonwealth v. Banuchi, 335 Mass. 649, 656-57, 141 N.E.2d 835, 840 (1957). Generally, arraignment takes place the day of the arrest, or the first business day following the arrest. Commonwealth v. Dubois, 353 Mass. 223, 226, 230 N.E.2d 906, 908 (1967); MASS. R. CRIM. P. 3(a), Reporters Notes, 43C Mass. Gen. Laws Ann. 19 (West 1980); District Court Standards of Judicial Practice, The Complaint Procedure, Standard 2100, Commentary, at 5 (1975).

[8] *See* MASS. R. CRIM. P. 14.

[9] Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 531, 320 N.E.2d 876, 881 (1974). *See* G.L. c. 263, § 4; G.L. c. 276 § 38.

[10] Myers v. Commonwealth, 363 Mass. 843, 849, 298 N.E.2d 819, 824 (1974).

[11] Lataille v. District Court of East Hampden, 366 Mass. 525, 530-31, 320 N.E.2d 876, 881 (1974). Criminal proceedings may be initiated in the superior court or in the district court. MASS. R. CRIM. P. 3(a). If proceedings are initiated in the superior court, they are initiated by an indictment. *Id.* In such a case, the indictment serves as a finding of probable cause to

quantum of evidence required for the determination of probable cause to bind-over depends upon which of the two procedures is used.[12]

In order to find probable cause to bind-over for trial through a preliminary hearing,[13] a judge must find that the evidence introduced, if uncontroverted at trial, would be sufficient as a matter of law to support a guilty finding.[14] Prior to the *Survey* year, however, the Supreme Judicial Court had never specified the quantum of evidence necessary to support a finding of probable cause to bind-over for trial through a grand jury indictment.[15] During the *Survey* year, in *Commonwealth v. McCarthy*,[16]

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arrest, MASS. R. CRIM. P. 6(a)(2), and probable cause to bind-over. Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 530-31, 320 N.E.2d 876, 881 (1974). Once the defendant has been indicted, he may be arrested, arraigned, and held for trial, and he is not entitled to a preliminary hearing. *Id.* at 531, 320 N.E.2d at 881.

If proceedings are initiated in the district court, they are initiated by a complaint. MASS. R. CRIM. P. 3(a). If an arrest warrant is required, *see supra* note 2, a justice must find probable cause to arrest. *See supra* notes 4-6 and accompanying text. After the defendant is arrested and arraigned, the district court will determine whether it has concurrent jurisdiction with the superior court over the offenses charged. *See* G.L. c. 218, § 26. If the district court does not have jurisdiction, or if it chooses not to exercise its jurisdiction, a preliminary hearing will be held to determine whether there is probable cause to bind-over the defendant for trial in the superior court. G.L. c. 218, § 30; Myers v. Commonwealth, 363 Mass. 843, 845-46, 298 N.E.2d 819, 822 (1973). If probable cause to bind-over is found at the preliminary hearing, the defendant will be bound-over for trial in the superior court. G.L. c. 218, § 30. If the offense charged is punishable by imprisonment in state prison, however, the defendant must be indicted prior to being tried in superior court, even if he has already received a preliminary bind-over hearing. MASS. R. CRIM. P. 3(b)(1). Thus, in some cases, probable cause to bind-over must be found through both a preliminary hearing and an indictment.

If the district court does have jurisdiction over the offense charged, *see* G.L. c. 218, § 26, and it chooses to exercise that jurisdiction, the defendant is entitled to a preliminary hearing to determine if he should be held for trial in the district court. G.L. c. 276, § 38; Myers v. Commonwealth, 363 Mass. 843, 845-46, 298 N.E.2d 819, 822 (1974). In such cases, the defendant will not be entitled to an indictment in addition to a preliminary hearing. MASS. R. CRIM. P. 3(b)(1), Reporters Notes, 43C Mass. Gen. Laws Ann. 20 (West 1980).

[12] *See infra* notes 13-17 and accompanying text.

[13] The preliminary hearing is a full adversarial proceeding. Myers v. Commonwealth, 363 Mass. 843, 845-46, 298 N.E.2d 819, 822 (1974). The defendant has a right to be present, *id.*, and to be represented by counsel. *Id.* Both the defendant and the prosecutor may present admissible evidence, *id.* at 849 n.6, 298 N.E.2d at 824 n.6, including testimony, and may cross-examine each other's witnesses. *Id.* at 846, 298 N.E.2d at 822. The purpose of the preliminary hearing is to prevent individuals from being held unjustifiably and prosecuted. *Id.* at 849, 298 N.E.2d at 825. This purpose is effectuated by screening out cases which, because of insufficient evidence of the suspect's guilt, should not go to trial. *Id.* Accordingly, the preliminary hearing judge makes two determinations: first, whether a crime in fact has been committed, and second, whether there is probable cause to believe that the suspect is guilty of that crime. *Id.* at 847, 298 N.E.2d at 822. *See* G.L. c. 276, § 42.

[14] *Id.* at 849, 298 N.E.2d at 824.

[15] A grand jury consists of between sixteen and twenty-three jurors convened periodically to act as an accusatory body. S. KADISH AND M. PAULSEN, CRIMINAL LAW AND ITS

the Court finally addressed the question of what must be shown to establish probable cause to bind-over through a grand jury indictment. The *McCarthy* Court held that a grand jury may not find probable cause to bind-over a criminal defendant for trial unless it has heard evidence sufficient to establish the identity of the defendant and to find probable cause to arrest him.[17]

The defendant in *McCarthy* was charged with assault with intent to rape.[18] The only evidence presented to the grand jury was the hearsay testimony of the investigating officer relaying information given to him by the victim and the victim's sister.[19] The officer testified that the defendant was one of those present at a party at which William Maloney attempted to rape the victim.[20] The grand jury heard no evidence of any activity by the defendant except his presence at the party where the attempt took place.[21] Nevertheless, the grand jury returned an indictment against the defendant for assault with intent to rape.[22] The defendant subsequently was convicted and sentenced at trial.[23]

PROCESSES 1140 (3d ed. 1975); *see generally* Trichter & Lewis, *The Grand Jury, Putative Grand Jury Witnesses, and the Right to Limited Counsel — A Historic Overview and Modest Proposal,* 20 S. TEX. L.J. 81 (1979); Lewis, *The Grand Jury: A Critical Evaluation,* 13 AKRON L. REV. 33 (1979); Murov, *An Examination of the Grand Jury: Inquest and Quest,* 51 N.Y. ST. B.J. 17 (1979); Morse, *A Survey of the Grand Jury System,* 10 OR. L. REV. 101 (1972); Schwartz, *Demythologizing the Historic Role of the Grand Jury,* 10 AM. CRIM. L. REV. 701 (1972).

A grand jury hears evidence on numerous criminal matters and attempts to determine in each case whether there is sufficient evidence to justify holding and prosecuting the suspect. S. KADISH AND M. PAULSEN, *supra,* at 1140. The proceedings are secret, and are held without a judge. *Id.* at 1140-41. If the grand jury returns an indictment, this is considered a finding of probable cause to bind-over, and the defendant can be held for trial. Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 531, 320 N.E.2d 876, 881 (1974). During the grand jury proceedings, the prosecutor simply appears before the grand jury and presents evidence of the defendant's guilt. S. KADISH AND M. PAULSEN, *supra,* at 1140. Unlike the evidence presented at a preliminary hearing, the evidence presented before a grand jury need not be admissible at trial. Commonwealth v. St. Pierre, 377 Mass. 650, 655, 387 N.E.2d 1135, 1139 (1979); Commonwealth v. Robinson, 373 Mass. 591, 594, 368 N.E.2d 1210, 1211 (1977); Commonwealth v. Hare, 361 Mass. 263, 267, 280 N.E.2d 138, 141 (1972); *cf.* Myers v. Commonwealth, 373 Mass. 843, 849 n.6, 298 N.E.2d 819, 824 n.6 (1973). Moreover, unlike a preliminary hearing, the defendant has no right to be present during grand jury proceedings. S. KADISH AND M. PAULSEN, *supra,* at 1141; *cf.* G.L. c. 276, § 38.

[16] 385 Mass. 160, 430 N.E.2d 1195 (1982).

[17] *Id.* at 163, 430 N.E.2d at 1197.

[18] *Id.* at 161, 430 N.E.2d at 1195.

[19] *Id.* at 162 n.4, 430 N.E.2d at 1196 n.4.

[20] *Id.* at 161, 430 N.E.2d at 1196. Maloney was a codefendant who pleaded guilty. *Id.* at 161 n.3, 430 N.E.2d at 1196 n.3.

[21] *Id.* at 161, 163-64, 430 N.E.2d at 1196-97.

[22] *Id.* at 160, 430 N.E.2d at 1195.

[23] *Id.* at 161, 430 N.E.2d at 1196. The execution of the sentence was stayed by a single

The Supreme Judicial Court reversed the conviction,[24] holding that the indictments against McCarthy should have been dismissed because of the insufficiency of the evidence heard by the grand jury.[25] The evidence heard by the grand jury was insufficient, the Court held, in that, although the grand jury heard evidence that a rape had been attempted by someone, they heard no evidence that any criminal acts were actually performed by the defendant.[26] At most, the Court observed, the grand jury heard evidence only of the defendant's presence while a rape was being attempted.[27] The Court noted that mere presence during a crime or even failure to act to prevent the crime does not, standing alone, render a person guilty either as an actor or an accomplice.[28] Accordingly, the Court stated, the grand jury heard no evidence of defendant's criminality.[29]

The Court acknowledged the well-settled principle that the competency and sufficiency of the evidence underlying a facially valid indictment would not ordinarily be reviewed.[30] Nevertheless, the Court noted, the grand jury must hear some evidence that the accused himself committed the crimes charged, and must identify the accused in the indictment.[31] In addition, the Court held, the evidence heard by the grand jury must be sufficient to support a finding of probable cause to arrest.[32] To meet this standard, the Court held, the evidence heard by the grand jury must include "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense."[33] The Court held that unless the evidence heard in

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justice of the Appeals Court pending appellate review of the trial judge's denial of defendant's pretrial motion to dismiss the indictments. *Id.* The Supreme Judicial Court then allowed defendant's application for direct appellate review. *Id.*

[24] *Id.* at 164, 430 N.E.2d at 1197.

[25] *Id.*

[26] *Id.* at 163, 164, 430 N.E.2d at 1197.

[27] *Id.* at 163-64, 430 N.E.2d at 1197.

[28] *Id.*

[29] *Id.* at 164, 430 N.E.2d at 1197.

[30] *Id.* at 161-62, 430 N.E.2d at 1196.

[31] *Id.* at 163, 430 N.E.2d at 1197. *See* Connor v. Commonwealth, 363 Mass. 572, 576, 296 N.E.2d 172, 176 (1973).

[32] 385 Mass. at 163, 430 N.E.2d at 1197.

[33] *Id.* (quoting Commonwealth v. Stevens, 362 Mass. 24, 26, 283 N.E.2d 673, 675 (1972), quoting Beck v. Ohio, 379 U.S. 89, 91 (1972)). In *Stevens*, the Court further stated:

> Where hearsay is the basis [there must be] a substantial basis for crediting the hearsay, Jones v. United States, 362 U.S. 257, 269 (1960); United States v. Harris, 403 U.S. 573, 581 (1971); Commonwealth v. Rossetti, 349 Mass. 626, 631-32 (1954). Credibility is established by meeting two requirements, . . . 1) there should be underlying facts and circumstances indicating the informant's reliability, and 2) there should be underlying facts and circumstances on which the informant bases his

the grand jury is at least sufficient to establish the identity of the accused and probable cause to arrest him, the indictment returned by the grand jury is invalid and all subsequent proceedings taken in reliance upon the indictment are void.[34]

Addressing the case before it, the Court explained that because the grand jury that indicted the defendant McCarthy heard no evidence that he performed any criminal act, they did not hear sufficient evidence to warrant a prudent man in believing that McCarthy had committed an offense.[35] Accordingly, the Court continued, the grand jury heard insufficient evidence to establish probable cause to arrest.[36] The Court concluded that because the grand jury must hear sufficient evidence to establish probable cause to arrest in order to return a valid indictment, the indictment returned against McCarthy was invalid and his conviction had to be reversed.[37]

The *McCarthy* decision is significant because the Supreme Judicial Court has long been reluctant to specify a minimal evidentiary standard for grand jury indictments. The question was first addressed by the Court in the 1893 decision of *Commonwealth v. Woodward,*[38] which held that if the indictment was valid on its face,[39] the Court would not inquire into the competency or sufficiency of the underlying evidence.[40] This principle remained intact for 80 years,[41] until it was qualified by the Court's decision in *Connor v. Commonwealth.*[42] In that case, the Court held that the grand jury must hear some evidence that the accused committed the crime

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information that the defendant is engaged in criminal activity. Aguilar v. Texas, 378 U.S. 108, 112-16 (1963). *See* McCray v. United States, 386 U.S. 300, 324 (1967); United States v. Cobb, 432 F.2d 716, 719 (4th Cir. 1970); United States v. Mendoza, 433 F.2d 891, 894 (5th Cir. 1970), *cert. denied,* 401 U.S. 943 (1971); Williams v. Adams, 441 F.2d 394 (2d Cir. 1971); United States v. Fuller, 441 F.2d 755, 759 (4th Cir. 1971); United States v. Buonomo, 441 F.2d 922, 929 (7th Cir. 1971).

362 Mass. 24, 27, 283 N.E.2d 673, 675 (1972).

[34] 385 Mass. at 163, 430 N.E.2d at 1197.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 164, 430 N.E.2d at 1197.

[38] 157 Mass. 516, 32 N.E. 939 (1893).

[39] For an indictment to be valid on its face, it need only state the elements of the crime alleged in statutory form, and "enable the defendant to plead the conviction or acquittal in bar to another prosecution for the same offense." Commonwealth v. Hare, 361 Mass. 263, 267, 280 N.E.2d 138, 141 (1972).

[40] Commonwealth v. Woodward, 157 Mass. 516, 518, 32 N.E. 939, 940 (1893).

[41] *See, e.g.,* Commonwealth v. Walsh, 255 Mass. 317, 319, 151 N.E.2d 300, 301 (1926); Commonwealth v. Galvin, 323 Mass. 205, 211-12, 80 N.E.2d 825, 830 (1948); Commonwealth v. Hare, 361 Mass. 263, 267, 280 N.E.2d 138, 141 (1972).

[42] 363 Mass. 572, 296 N.E.2d 172 (1973).

charged.[43] The *Connor* Court also held that the indictment must contain a description of the accused sufficient to identify him as the specific individual that the grand jury intended to indict.[44] The next qualifications of the *Woodward* principle came in *Commonwealth v. St. Pierre*.[45] In that decision, the Court stated that although a valid indictment could be based entirely on hearsay,[46] the credibility of the hearsay evidence may fall so low as to invalidate an otherwise valid indictment.[47] The *St. Pierre* Court suggested that an indictment might be found invalid for this reason when the evidence would be insufficient to support a finding of probable cause to arrest or search.[48] In *Commonwealth v. McCarthy*,[49] the Supreme

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[43] *Id.* at 576, 296 N.E.2d at 175. *Connor* involved a challenge to an indictment that identified the accused as "John Doe," and contained no other words describing him. *Id.* at 575, 296 N.E.2d at 174. After the indictment was returned, but before trial, the prosecutor moved to amend the indictment by substituting petitioner's name for "John Doe." *Id.* at 573, 296 N.E.2d at 173. The motion was allowed, and petitioner was subsequently convicted of first degree murder. *Id.* The Supreme Judicial Court reversed. *Id.* at 578, 296 N.E.2d at 176. The Court reasoned that an indictment of "John Doe" containing no further words of description is actually an indictment of anyone whose name the judge allows to be substituted for "John Doe." *Id.* Consequently, the Court noted, the grand jury's power to accuse becomes vested in the judge who rules on the motion to substitute the names on the indictment. *Id.* Moreover, the ultimate defendant is subjected to a public trial without any evidence that the grand jury had found probable cause to believe that *he* committed the crime charged. *Id.* Accordingly, the Court held that the grand jury must hear some evidence that the accused committed the crime charged, and "it must appear that there is a warrantable inference, from a consideration of the indictment's description of the accused, together with proof concerning the proceedings before the grand jury, that the grand jury indicted the defendant." *Id.*

[44] *Id.* at 577, 296 N.E.2d at 176.

[45] 377 Mass. 650, 387 N.E.2d 1135 (1979).

[46] Hearsay is an out-of-court statement introduced in court to prove the truth of the matter asserted therein. Commonwealth v. Leaster, 362 Mass. 407, 412, 287 N.E.2d 122, 125 (1972).

[47] Commonwealth v. St. Pierre, 377 Mass. 650, 656, 387 N.E.2d 1135, 1140 (1979). *St. Pierre* involved, *inter alia*, a challenge to an indictment based entirely on the the testimony of a State Trooper who had no personal knowledge of the case. *Id.* at 653, 387 N.E.2d at 1138. The testifying trooper was substituting for the trooper who had investigated the case but could not be present during the grand jury proceedings. *Id.* The grand jury returned an indictment based entirely on the substituting trooper's testimony, and the accused was subsequently convicted of mayhem and assault and battery. *Id.* The Supreme Judicial Court affirmed. *Id.* at 665, 387 N.E.2d at 1145. The Court noted that it is well settled in the Commonwealth that an indictment is not invalid merely because it is based entirely on hearsay. *Id.* at 655, 387 N.E.2d at 1139. The Court questioned, however, whether in "extraordinary circumstances," the credibility of the hearsay testimony heard by the grand jury might be so low as to justify the dismissal of the indictment. *Id.* at 656, 387 N.E.2d at 1139 (quoting Commonwealth v. Commins, 371 Mass. 222, 224, 356 N.E.2d 241, 243 (1972)).

[48] *Id.* *See supra* notes 4-6 and accompanying text. The Court noted that this standard, if adopted, would be lower than that required for a finding of probable cause to bind-over at a

Judicial Court has explicitly adopted the standard suggested in *St. Pierre*.[50]

Because the evidence underlying the *McCarthy* indictment was insufficient to establish the identity of the accused and probable cause to arrest him, the Court found it unnecessary to decide whether evidence that did meet these requirements might nevertheless be insufficient to support an indictment.[51] In fact, the *McCarthy* Court explicitly left open the question of whether evidence that met the requirements set forth in *McCarthy*, but failed to reach the level of sufficiency required to support a finding of probable cause to bind-over at a preliminary hearing,[52] might be insufficient to support a finding of probable cause to bind-over by a grand jury.[53] In others words, the Court did not decide whether the quantum of evidence sufficient to support a finding of probable cause to bind-over is the same regardless of whether probable cause to bind-over is found by a grand jury or through a preliminary hearing.[54]

The quantum of evidence sufficient to support a finding at a preliminary hearing of probable cause to bind-over for trial was first determined in *Myers v. Commonwealth*,[55] decided in 1973. The *Myers* Court adopted a directed verdict standard in defining the level of evidence sufficient to support a determination to bind-over at a preliminary hearing.[56] Under the directed verdict standard, the Court noted, the credible admissible evidence presented at the preliminary hearing must be sufficient at law to overcome a motion for a directed verdict at trial.[57] To meet this requirement, the Court stated, the evidence must be such that, if it were admitted and believed at trial, a jury could reasonably conclude that the prosecution had proven every element of the crime charged beyond a reasonable

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preliminary hearing. *Id.* at 656 n.6, 356 N.E.2d 1140 n.6. (For a discussion of the amount of evidence required for a finding of probable cause to bind-over at a preliminary hearing, *see infra* notes 55-62 and accompanying text.) The Court, however, did not find it necessary to resolve this issue because the hearsay testimony would have been sufficient to support an arrest or search warrant. Commonwealth v. St. Pierre, 375 Mass. 650, 656-57, 387 N.E.2d 1135, 1140 (1979). Accordingly, the Court held that the hearsay evidence underlying the indictment in *St. Pierre* was sufficient to support the indictment. *Id.* The Court also considered other issues which were unrelated to the indictment but found no error. *Id.* at 657-65, 387 N.E.2d at 1140-45.

[49] 385 Mass. 160, 430 N.E.2d 1195 (1982).

[50] *See supra* text accompanying notes 16-37.

[51] 385 Mass. at 162 n.5, 430 N.E.2d at 1196.

[52] *See supra* notes 55-62 and accompanying text.

[53] 385 Mass. at 162 n.5, 430 N.E.2d at 1196 (1982).

[54] *Id.*

[55] 363 Mass. 843, 298 N.E.2d 819 (1973).

[56] *Id.* at 850, 298 N.E.2d at 824.

[57] *Id.*

doubt.[58] The Court noted that this quantum of evidence is greater than that required to find probable cause to arrest, and less than that required to find a defendant guilty at trial.[59] In arriving at this standard, the Court reasoned that the decision to hold the defendant for trial has more serious and far-reaching implications both for the defendant and for the state than the initial decision to arrest.[60] Accordingly, the Court explained, more evidence should be required to justify the decision to hold for trial than to justify the decision to arrest.[61] Therefore, the Court held, a finding at a preliminary hearing of probable cause to bind-over requires "a greater quantum of legally competent evidence" than a finding of probable cause to arrest.[62]

The Court's reasoning in *Myers* would seem to support a future holding by the Court that a finding by a grand jury of probable cause to bind-over, like a finding at a preliminary hearing of probable cause to bind-over, requires "a greater quantum of legally competent evidence" than a finding of probable cause to arrest. This conclusion follows from the fact that a finding of probable cause to bind-over, whether it is made by a grand jury or at a preliminary hearing, has the same practical effect; in both cases, the defendant is held for trial.[63] As noted by the *Myers* Court, holding the defendant for trial has more serious implications than arresting the defendant, and therefore should require more evidence.[64] Consequently, more evidence should be required for a grand jury indictment which allows the defendant to be held for trial than for an arrest warrant. Moreover, the Court's holding in *McCarthy,* that a grand jury indictment requires *at least as much* evidence as an arrest warrant,[65] does not preclude a future holding that a grand jury indictment in fact requires *more* evidence than an arrest warrant.[66] It is therefore open to argument in future cases that a finding by a grand jury of probable cause to bind-over, like a finding at a preliminary hearing of probable cause to bind-over, requires more evidence against the defendant than a finding of probable cause to arrest.[67]

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[58] *Id.*

[59] *Id.*

[60] *Id.* at 849, 298 N.E.2d at 824.

[61] *Id.*

[62] *Id.*

[63] *See supra* notes 9-11 and accompanying text.

[64] Myers v. Commonwealth, 363 Mass. 843, 849, 298 N.E.2d 819, 824 (1973).

[65] 385 Mass. at 163, 430 N.E.2d at 1197.

[66] *Id.* at 162 n.5, 430 N.E.2d at 1196 n.5.

[67] *Id.* Many states have statutorily imposed the same standards of evidentiary sufficiency to both indictments and preliminary hearings. *See, e.g.,* IDAHO CODE § 19-1107 (1948); IOWA R. CRIM. P. 4(3) (1978); MONT. REV. CODE § 95-1408(3) (Crim. Supp. 1977); N.D. CENT. CODE § 29-10, 1-33 (1974); *see also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE

§§ 340.5, 330.5 (1975). It must be noted, however, that even if the Court adopted the same ("directed verdict") standard for grand jury indictments as it has adopted for preliminary hearings, *see supra* text accompanying notes 55-62, the essential character of the grand jury proceeding, as well as the types of evidence admissible therein, would remain quite different than that of the preliminary hearing. For a discussion of the differences, see *supra* note 15. *See* Commonwealth v. St. Pierre, 371 Mass. 650, 656 n.6, 386 N.E.2d 1135, 1140 n.6 (1979) ("[The preliminary hearing] does not partake of the history of the grand jury with its ex parte character merging investigatory and accusatory role."); *see generally* Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 531-2, 320 N.E.2d 877, 881-2 (1974); Note, *The Improbability of Probable Cause — The Inequity of the Grand Jury Indictment Versus the Preliminary Hearing in the Illinois Criminal Process,* 1981 SOUTHERN ILL. L.J. 281. The differences in the two alternative modes of ascertaining probable cause to bind-over raise significant questions about whether defendants who are indicted receive the same protection from unwarranted prosecution as defendants who receive a preliminary hearing. *See* Note, *The Improbability of Probable Cause, supra,* at 286-98. At least two states have concluded, based on this argument, that a defendant is entitled to a probable cause hearing even when he has been indicted. *See* Hawkins v. Superior Court, 22 Cal. 3d 584, 150 Cal. Rptr. 435, 586 P.2d 916 (1978) (reaching this result under the California State Constitution's Equal Protection Clause); People v. Duncan, 388 Mich. 489, 201 N.W.2d 629 (1972) (reaching this result under supervisory power).