Chapter 9: Criminal Law and Procedure

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A. RIGHT TO COUNSEL

§9.1. Introduction. Massachusetts law relating to the right to counsel in criminal proceedings has undergone considerable change since 1963. Much of the law in this area which, prior to 1963 had been well settled, has now been discarded. Moreover, change in this area is only part of a greater pattern of change in the area of criminal law enforcement. Many constitutional rights of accused criminals have now been extended into areas where such rights had never been applied. The violation of these rights results in the application of new exclusionary rules which operate to prohibit the admission of evidence obtained as a result of such violations. Thus, many heretofore acceptable law enforcement activities are now prohibited as a matter of constitutional law. The rapid extension of these constitutional rights is one of the factors in the concern of the general public with crime and effective law enforcement. These extensions leave many law enforcement officials uncertain as to the distinction between their duty to investigate and to prosecute crime expeditiously, extensively and thoroughly; and their duty to protect the rights of the individual.

The primary vehicle through which the courts have extended greater constitutional rights to persons accused of crime has been the Sixth Amendment.\(^1\) Under the expanding definition of these Sixth Amendment rights, the role of defense counsel has shifted from a courtroom advocate, pleading his client’s cause to court and jury, to that of a protector who interposes constitutional shields between his client and the prosecution at all stages of the proceeding. Thus, a great burden is placed on the bar to provide the number of informed lawyers who can ensure that the needs of all persons requiring such legal advice and services are satisfied.

This chapter will attempt to delineate the areas in criminal proceedings where the right to both the presence and advice of counsel is needed. Since the right now attaches to the various out-of-court con-

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frontations between police and the accused,² this stage will be discussed in detail. Attention will then be directed to judicial and quasi-judicial stages of the proceedings to show the nature, scope and application of the right in those areas. Finally, analysis of the current pending cases may indicate the future evolution or extension of these rights.

§9.2. Development of the right to counsel. The Constitution of Massachusetts¹ and the Constitution of the United States² both guarantee a right to the assistance of counsel to every criminal defendant at his trial. Although these constitutional provisions would appear to be strikingly clear, it has not been until this decade that the courts have used these mandates to create a revolutionary change in criminal law enforcement. Originally, the Sixth Amendment of the United States Constitution applied only in the federal cases. In *Powell v. Alabama*,³ however, the United States Supreme Court held that the due process clause of the Fourteenth Amendment incorporated the Sixth Amendment, and thus made the right to counsel applicable to the states. The Court, however, limited the right to the extent that a defendant was entitled to have counsel at his trial if he was able to provide counsel himself; and that, before trial, the defendant must be given an opportunity to secure counsel. In 1938, the Court held that the Sixth Amendment required that all criminal defendants in the federal courts have counsel for their defense, unless they expressly and intelligently waived that right.⁴ Later, in *Betts v. Brady*,⁵ the Court determined that the Fourteenth Amendment protection did not fully include the Sixth Amendment guarantee that was applicable to the federal courts. Rather, the Sixth Amendment right to counsel, applicable to the states through the Fourteenth Amendment, was defined by due process criteria. That standard required an examination of the totality of the circumstances in each individual case in order to determine whether the defendant, by incapacity, complication or unfairness was deprived of counsel and thereby failed to secure a fair trial. Thus, although the Sixth Amendment required counsel to be provided for defendants in all felony cases in federal courts, this right was not extended, in its fullest scope, to such cases in state courts. Rather, a state defendant was required to have counsel only in those cases where the absence of counsel made the proceedings so inherently unfair as to deny the defendant due process of law.


³ 1 Mass. Const., part I, art. XII, provides in part: “every subject shall have a right . . . to be fully heard in his defense by himself, or by his counsel, at his election.”

⁴ U.S. Const. amend. VI provides in part: “In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”


⁶ *316 U.S. 455 (1942).*
In *Gideon v. Wainwright*, the Supreme Court finally corrected this double standard. The Court, in overruling *Betts*, held that the Sixth Amendment guarantee was one of those rights so fundamental to the fair administration of criminal justice that this right was applicable in full to defendants in state court proceedings. Thus, the right to counsel as defined for federal courts was applicable to the states, without the limiting effects of the previous application of due process criteria.

The development of the right to counsel did not cease after the *Gideon* decision. In several subsequent cases, the United States Supreme Court indicated an apprehension that investigative procedures directly involving the accused might be so extensive, so thorough and so prejudicial as to relegate the trial, and the concomitant right to be represented by counsel at the trial, to the status of a meaningless gesture. The Court feared that the trial would descend to a mere declaration of guilt; that the police officer's recitation of prejudicial statements made by an accused, in the absence of counsel, at some time long prior to the trial, indeed, even prior to the indictment or complaint, would be virtually conclusive. The holding of *Gideon*, therefore, has been extended to include most state and federal pre-trial, out-of-court proceedings which involve dealings with an accused.

§9.3. Critical stage test. The Supreme Court, in determining whether the Sixth Amendment guarantee should apply to a particular phase of the entire criminal and law enforcement proceedings, has developed a "critical stage" test. If the phase of the proceedings is deemed "critical," the Sixth Amendment guarantee applies, and an accused must be accorded his right to counsel during that phase. If, on the other hand, the phase is found not to be critical, no right to counsel will be afforded to the accused during the conduct of those proceedings. A "critical stage" has been defined by the Court as "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."1

In order to determine whether a particular phase is "critical," all of the surrounding circumstances of the case, both as to fact and to law, must be analysed in the light of the entire proceeding. This determination is made on a case-by-case basis. Thus, in *Schmerber v. California*, the Court found that the stage involving the withdrawal and examination of the defendant's blood to determine its alcohol content, was not a critical stage. The Court found that the withdrawal of blood did not violate any of the defendant's Fourth or Fifth Amendment rights. They held that the absence of counsel would not derogate the basic rights of the defendant during the conduct of those proceedings. Thus, the Sixth Amendment did not apply. On the other hand, in

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Hamilton v. Alabama, the Court found the Alabama arraignment procedure was a critical stage, because it is at that point that some defenses must either be asserted or lost. Similarly, in White v. Maryland, the Court decided that a preliminary hearing, where the accused, without counsel, entered a guilty plea, became a critical stage because the guilty plea could be offered into evidence at a later trial even though it might have been previously withdrawn. Therefore, in considering the extent of the right to counsel at any point in a criminal proceeding, the "critical stage" test must be first applied. It is only in this manner that the Sixth Amendment guarantee can be understood and effectively applied.

B. PRE-INDICTMENT STAGE

§9.4 Out-of-court stages. The law of the Commonwealth, prior to this recent development of the right-to-counsel tests, had never required the assistance of counsel at any out-of-court stage of a criminal proceeding. In fact, it was considered good police practice to interview all suspects during the course of an investigation in the absence of counsel, regardless of whether a lawyer had been retained or not. Until recently, no warnings or other statements indicating the legal effect of any incriminating statements made at such interviews were either required or given. All such statements were admissible in the subsequent trial if they were material and relevant. Thus, all admissions made by a suspect to the police at this stage of the proceeding were competent evidence. Indeed, if the suspect was not formally under arrest, even his equivocal replies or his silence to accusations made to him could be used in evidence. If, however, the statements constituted a confession, the Fourteenth Amendment required specific findings as to whether it was voluntary or coerced. Gideon required representation by counsel at the trial only and did not affect any of these rules. The United States Supreme Court had never considered the general right of a suspect to the assistance of counsel at a state proceeding involving interrogation, prior to any formal in-court proceedings.

The first case in which the United States Supreme Court addressed itself to this question was Escobedo v. Illinois. Mr. Justice Goldberg,

2 An admission is a statement by the accused of facts tending to prove guilt when taken with other facts. A confession is an acknowledgment of guilt. See Commonwealth v. Gleason, 262 Mass. 185, 159 N.E. 518 (1928). See admissions, see §20.3 infra.
speaking for the majority, considered the denial by the police of Escobedo's repeated requests to see his retained attorney and the denial of his attorney's requests to see Escobedo, during a pre-indictment interrogation, in violation of the Sixth Amendment. The Court held that the statements made by Escobedo during the interrogation period were inadmissible in evidence at his trial. The Court applied the "critical stage" test of Sixth Amendment cases and not the usual standards for determining voluntariness of confessions,\(^6\) stating:

This [the pre-indictment interrogation] was the "stage when legal aid and advice" were most critical to petitioner. \(^7\) Massiah v. United States . . . [377 U.S. 201]. It was a stage surely as critical as was the arraignment in Hamilton v. Alabama, 368 U.S. 52, and the preliminary hearing in White v. Maryland, 373 U.S. 59. What happened at this interrogation could certainly "affect the whole trial."\(^7\)

In the following language the Court extended the right to counsel to pre-indictment proceedings:

It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.\(^8\)

The Court then held that the proceeding becomes a "critical stage" when an investigation no longer is a general inquiry into an unsolved crime, but has focused on a particular individual then being interrogated in police custody for the purpose of obtaining incriminating statements. If the individual during that interrogation requests the assistance of counsel and is denied it, then he has been denied his Sixth Amendment right to counsel. The result of such a denial is that no statements made by him during that interrogation may be used as evidence in his subsequent trial. The procedure to be used to protect this right is a warning that the subject has an absolute right to remain silent during the interrogation. The Court did not, however, go so far as to hold that all pre-indictment interrogations required counsel. The "sum total of the circumstances" test used in Crooker v. California\(^9\) was retained in order to determine which particular pre-indictment interrogations became a "critical stage." If on the basis of all of the facts of the case this investigation has focused on the accused and the interrogation was for the purpose of obtaining a confession, then the Court indicated that counsel is required. Thus, under the Escobedo case, all "accusatory" interrogations of an individual by the police became "crit-

\(^6\) A careful reading of the statements made by Escobedo shows that in fact no confession was involved so that the voluntariness test did not apply.

\(^7\) 378 U.S. 478, 486 (1964).

\(^8\) Id.

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atical stages” of the proceedings for the purposes of the Sixth Amend-
ment guarantee, and this right applied in both federal and state
proceedings.

Shortly after the Escobedo decision, the Supreme Judicial Court was
presented with a similar set of circumstances. In Commonwealth v. Guerro,10 the defendant was arrested near the scene of the crime and
taken to the police station after he had been identified by one of the
witnesses. A request to call his lawyer was repeated two or three times
and in each case it was refused. He was never warned of his right to
remain silent. Finally, about six and one-half hours after his arrest and
after he had made incriminating statements, he was allowed to see
counsel. The Court found that the Escobedo case applied and the
statements were inadmissible, stating:

We have examined with care the circumstances of the arrest and
interrogation of the defendant and conclude that he was uncon-
stitutionally deprived of his right to the “Assistance of Counsel”
as this right is formulated in Escobedo v. Illinois. . . . We cannot
conclude that when the defendant’s statements were uttered the
investigation was “investigatory” and had not “begun to focus on
a particular subject.”11

Despite its opinion in the Guerro case, the Supreme Judicial Court
has given a strict interpretation to the Escobedo decision.12 Thus, in
Commonwealth v. Young,13 where the defendant’s wife requested him
to make a confession after arrest and interrogation, the Court held
that Escobedo was inapplicable because the interrogation did not lend
itself to eliciting incriminating statements. The Court did not discuss
the focus of the police investigation, nor did it explain how it arrived
at its conclusion relating to the purpose of the interrogation. Ap-
parently it was found that the statements were volunteered.

Commonwealth v. Ladetto14 dealt with statements made by a de-
fendant after he was arrested by the F.B.I. in Maine. While being
driven to the local police station in Maine he was told that he was
wanted for a shooting in Massachusetts, at which time he replied that
he had shot two “cops.” Later, while in custody in Maine, he
made various incriminating statements. During the trip from Maine
to Massachusetts, and again at the Malden police station, he de-
scribed all of the facts surrounding the crime. He was neither advised

§§11.4, 11.11, 12.3.
11 Id. at 282, 207 N.E.2d at 890.
12 See Commonwealth v. Roy, 349 Mass. 224, 207 N.E.2d 284 (1965), noted in
1965 Ann. Surv. Mass. Law §§11.5, 12.2, 12.3, 12.6, 22.3; Commonwealth v. Fancy,
11.11, 12.3, 12.7.
§§11.5, 12.2, 12.3.
of his right to remain silent nor of his right to counsel during the interrogation. At the completion of the questioning he indicated that he would like to talk with an attorney. This request was granted. At his trial, all of these incriminating statements were admitted into evidence. On appeal, the Supreme Judicial Court held that the statements given shortly after his arrest were not coerced by the police and were spontaneously and freely given. The Court indicated that the statements were volunteered; thus no warning was required. As to the other statements made in Maine and during the ride to Massachusetts, the Court said that they were merely confirmatory of the statements made at the time of his arrest.

In Ladetto, the Court seemed to rely on the lack of coercion, the absence of false accusations or promises, and the failure of the defendant to request an attorney. However, there was no evidence that the first two of these factors have any relevance to Escobedo situations. The Supreme Judicial Court failed to distinguish between volunteered statements and voluntary statements. If the Court found that some of the statements were volunteered, then, under Sixth Amendment standards, the defendant would be deemed to have waived his right to counsel as to those statements. On the other hand, if the Court found that some of the statements were voluntary, then the defendant would not be deemed to have been deprived of his Fourteenth Amendment rights under the due process clause. Since Gideon, however, the Sixth Amendment right to counsel, as applied to the states, has not been defined by the old due process criteria. Under the new "critical stage" test, it could be possible that statements, although voluntary, are inadmissible where the suspect has not been warned of his right to silence.

The distinction between an investigative proceeding and an accusatory interrogation was raised in Commonwealth v. Kerrigan. There the defendant made several false exculpatory statements during a police interrogation. As a result of these statements he was released. About nine months later he was arrested and questioned, and again he made false, exculpatory statements. He was not given any warning of his rights prior to these interrogations. At the trial, while the defendant was being cross-examined, these statements were introduced. The Supreme Judicial Court held that both interrogations were investigatory in nature, rather than accusatory, and their purposes were not to elicit a confession. The Court also stated that the defendant's statements were made willingly in the hope that he could establish an alibi.

Similarly, in Commonwealth v. Tracy, the Court again applied

15 See Davis v. North Carolina, 384 U.S. 737 (1966), for a discussion of the distinction between application of Sixth Amendment and Fourteenth Amendment standards.
the standard applicable to voluntariness of confessions in order to resolve an Escobedo argument. The Tracy case involved a short interrogation with a murder suspect, in the hospital. No warnings were given and the defendant made no request for counsel. The Court indicated that the statements made during this interview were voluntary and thus admissible. The interesting aspect of the Tracy case, however, is the dissent by Justice Whittemore. Here, for the first time in a Massachusetts case, is a statement addressed to the full scope of Escobedo:

The right to the advice of counsel where the prime suspect does not know his other relevant rights and is about to be interrogated cannot depend, as I see it, upon whether the suspect happens to ask for counsel. The Escobedo opinion does not state such an arbitrary rule. "[T]he imposition of . . . [such a] requirement . . . would discriminate against the defendant who does not know his rights." People v. Dorado, 62 Cal. 2d 338, 351. "[T] is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." Carnley v. Cochran, Corrections Director, 369 U.S. 506, 513.

There was coercion of Escobedo. There was plainly no coercion of Tracy. But the Escobedo principle does not appear to be founded in coercion. Had that been determinative, the case, semble, would have been decided under the Fourteenth Amendment without reference to the Sixth Amendment. See, for example, Haynes v. Washington, 373 U.S. 503.18

It appears that the Court is reluctant to recognize the true impact of Escobedo, which deals with a wholly new constitutional principle, that is, the right to counsel at a pre-indictment stage. This right first accrues to an accused where an investigation has focused on him, and when he is being interrogated for the purpose of obtaining incriminating statements. In this area, the law relating to the voluntariness of confessions has no application. Escobedo and Miranda apply to statements made during accusatory interrogation, both exculpatory and incriminating. They do not apply solely to confessions:

No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.19

The old rules relating to coerced confessions still apply, however.20

18 Id. at 101, 207 N.E.2d at 24.
19 Miranda v. Arizona, 384 U.S. at 476.
Some of the standards to be used in determining the voluntariness of confessions have been affected by Escobedo. In Davis v. North Carolina, the United States Supreme Court stated that one of the factors which led them to decide that the defendant's confession was involuntary was the fact that the defendant was never advised of his right to counsel during sixteen days of incommunicado arrest, during which time a confession was made. Thus, the right to counsel was engrafted on the law of voluntariness of confessions. It is now an added factor in determining this issue. But the two considerations still remain distinct and separate constitutional issues.

Subsequently, in Commonwealth v. Femino, the Supreme Judicial Court rejected the voluntariness test applicable to confessions. There the Court decided the Escobedo issues on the basis of the Sixth Amendment as it did in the Guerro case, stating that the law relating to the voluntariness of confessions has no application to Escobedo situations.

Despite the Whittemore dissent in Tracy, the Court continued to apply the Escobedo case only in the event that an express request for counsel was made. Thus, in Commonwealth v. Sousa, the Court held that Escobedo did not apply since the accused made no request for counsel at the time of the interrogation. The Court reasoned that, therefore, he was not denied access to counsel by the police. The broad application of Escobedo urged upon the Court by Justice Whittemore was rejected, and the Court held that a "critical stage" arose only when a request for counsel, absent the required warning, was made during an accusatory interrogation. In Commonwealth v. Grant, the defendant was advised of his rights to remain silent and to have counsel. The defendant himself testified that he never requested counsel. In these circumstances, the Court held Escobedo to be wholly inapplicable. The warnings given in Grant were in compliance with Escobedo. Thus, under the Court's reasoning, both a request for counsel by the defendant and a denial of that request by the police would be essential for reversal on Escobedo grounds.

In Commonwealth v. Kleciak, the police not only failed to deny the defendant access to counsel, but assisted the accused in locating counsel who advised the defendant not to say a word. Counsel also arranged to see the defendant and the police at a specific time. At the appointed time, counsel failed to appear and the police commenced a three-hour interview. The Court said that it was the attorney's failure to arrive at the appointed time which prevented consultation. The police had agreed to postpone the interview until the appointed time. Nothing required the police to further suspend the interroga-

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tion. The Court held, therefore, that the accused was given the assistance of counsel and chose not to rely on his advice. In this situation, no warnings were necessary to protect the defendant’s right to counsel under the Escobedo doctrine.

Another Massachusetts case which applies Escobedo deserves some scrutiny. In Commonwealth v. LePage, the defendants’ attorney arrived at the police station shortly after they were arrested. He conferred with one defendant and was told that both defendants were merely suspects and would probably be released. The attorney then left. Later, he called and learned that because they had made conflicting statements, the police had decided to hold them. Thereafter, another attorney (an associate of the first) went to the police station where he was told that both defendants were in the back room. There was conflicting testimony as to whether he asked to see the defendants. The defendants were never informed of the presence of the attorney until after the interrogation was completed. The defendants, however, were warned of their right to silence at the interrogation. The Court held that Escobedo did not apply because the warnings were given to the defendants. The Court reasoned that the defendants’ failure specifically to request counsel, and the fact that counsel did not demand that the interrogation cease, were also factors which made Escobedo inapplicable. The Court also said that Escobedo did not apply because the police action occurred prior to the Escobedo decision. Nevertheless, disregarding the problem of retroactivity, it would seem from a close examination of the facts that the case was indeed an Escobedo situation. Not only were the defendants under arrest, but they were subjected to an accusatory interrogation. The investigation had focused on the defendants as a result of their conflicting statements. Although their attorney was present to advise them, the defendants were never told of his presence nor was he allowed to consult with them. The first consultation with counsel, by one defendant at least, could be sufficient evidence of a “request” so that the presence of counsel at the police station should have required the police to at least advise the defendant of this fact. Thus, it would seem that although the police permitted one defendant to have a conference with counsel, they denied that defendant the right to consult with an attorney by failing to disclose the fact of the attorney’s presence. It would be anomalous to hold that once a person consults an attorney, he waives further advice from him. No interpretation of the Sixth Amendment warrants restricting an accused to one interview with counsel. The LePage situation is surely much closer to a Sixth Amendment violation than other cases which merely involve a warning, no request and a statement.

§9.5 Effect of Miranda. In 1966 the United States Supreme Court

decided *Miranda v. Arizona*,\(^1\) which consisted of a series of cases which "go to the roots of our concepts of American criminal jurisprudence."\(^2\) In *Miranda*, the Court established the safeguards that must be used to assure compliance with the Fifth and Sixth Amendments guarantees in pre-indictment interrogations. *Miranda* clarified *Escobedo* and in fact went far beyond it. Whereas *Escobedo* declined to turn all police interrogations of suspects into "critical stages," all interrogations where the suspect is denied his freedom are made "critical" by *Miranda*:

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in the custody at the station or otherwise deprived of his freedom of action in any significant way. *It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries.*\(^3\) [Emphasis added.]

The term "custodial interrogation" used in *Miranda* is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."\(^4\) Whether the change in terminology from "accusatory" to "custodial" involves any real conceptual change remains to be seen. It would seem to be considerably more broad than the test used in *Escobedo*, however, because it refers to all interrogations where the individual has been deprived of his freedom. Thus, the test is not restricted to the focus of the investigation upon a suspect.

*Miranda* also states that constitutional rights guaranteed by the Fourteenth Amendment may be interdependent:

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.\(^5\)

The Court went on to say:

*The circumstances surrounding in-custody interrogation can*
operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires. 6

The safeguards announced by the Court in Miranda are twofold. First, a series of warnings is required to be given to the subject of a "custodial interrogation" prior to any questioning of him. They are:

1. that the suspect has a right to remain silent;
2. that any statements he makes may be used as evidence against him;
3. that he has the right to have counsel present during any questioning;
4. that, if he is unable to afford counsel, a lawyer will be appointed for him.

Secondly, the Court severely restricted the implication of waiver of any of these rights. A waiver will not be presumed from the suspect's silence following the warnings. Presumably, an express statement of waiver is needed. Reliance on the right to silence as a waiver during the course of an interrogation will also render any subsequent interrogation violative of the person's rights:

If the individual indicates in any manner, at any time prior to and during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. 7

Finally, the Court cast on the government a "heavy burden" of proving an effective waiver by the accused. Thus, no ritualistic intonation of rights by the government, followed by a statement by the defendant, will be sufficient to allow the statement into evidence at a subsequent trial.

One week after the Miranda decision, the Court addressed itself to the retrospective application of that case and of Escobedo. Johnson v. New Jersey 8 set out the guidelines to be used in deciding whether constitutional protections in criminal proceedings will be applied retroactively. These guidelines apply not only to Escobedo and

6 Id. at 469-470.
7 Id. at 473-474.
Miranda, but also to cases involving the possible retrospective application of new constitutional guarantees. Four basic guidelines are to be used: (1) the purpose of the new standards; (2) the reliance placed upon the old procedures by law enforcement agencies; (3) the effect upon the administration of justice of any retroactive application of the new principles; and (4) whether the new principles may enhance the factfinding process at the subsequent trial. The purpose of Miranda and Escobedo, the Court said, is to insure that persons who are questioned understand their Fifth and Sixth Amendment rights fully and intelligently. The Court also took note of the fact that the states, prior to Miranda and Escobedo, had relied on cases which held that admissible statements could be obtained under proceedings which were proscribed by Miranda and Escobedo. Retroactive application of these cases would require the wholesale release and retrial of persons convicted by use of trustworthy evidence obtained pursuant to the then existing constitutional standards. As a result, neither case was given retroactive application. The Court held that Escobedo was binding in all criminal trials commencing on or after June 22, 1964, and Miranda became effective as to all cases tried after June 13, 1966. Nevertheless, as a matter of discretion, each state could give retroactive application to either or both of these cases.

The Supreme Judicial Court had several occasions to decide cases in the light of Miranda during the 1967 Survey year. As a result of the fact that most of these cases were tried prior to June 13, 1966, the question of retroactive application of Miranda was of primary concern. The Court faced this question in four cases and decided not to give Miranda retroactive effect. In Commonwealth v. Morrissey, the first case where the Court declined to give Miranda retroactive effect, the Court reasoned that six other states had taken the same position. In Commonwealth v. Rogers, the Court reiterated its aversion to retroactive application of the Miranda rules, adding as reasons for its decision the lack of foreseeability of Miranda by law enforcement officials, the general public interest in effective law enforcement, and the gross impracticability of retroactivity.

It is interesting to note in the Morrissey case that all of the warnings required by Miranda were given, except the one relating to having counsel appointed for the suspect. Thus, four months after the Escobedo decision and more than eighteen months before Miranda

9 Id.
10 Id.
11 Id. at 731, citing Crooker v. California, 357 U.S. 433 (1958), and Cicenia v. Lagay, 357 U.S. 504 (1958).
15 Id. at 35-36, 222 N.E.2d at 772.
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those police officers had, for the most part, anticipated Miranda, and had taken steps to insure that suspects were aware of their rights. In fact, applying the Miranda standards, the interrogation itself discloses strong evidence of waiver. The defendant was asked if he desired to answer questions after having been "informed of [his] rights" and he answered "Yes." Since the omitted warning as to his right to counsel was so totally unanticipated by both the bar and law enforcement agencies, no machinery existed to implement that right. Any such warning by the officer, therefore, would have been an exercise in futility, had the accused chosen to take advantage of it. Under the circumstances, therefore, the police should be commended for their perception rather than criticized for their omission.

Commonwealth v. McGrath17 concerned a defendant who, while under "technical" arrest, gave equivocal statements to several accusations. Again, the Court relied on the non-retroactivity of Miranda, and held that the statements were admissible. In applying the Miranda standards, however, McGrath shows that the police warned the defendant of his right to remain silent and of his right to counsel. The defendant said he understood his rights, and an informal interrogation was begun by the police officer with a witness present. It appears, however, that an examination of the facts discloses that strong evidence of waiver was lacking. The defendant at various times during the interrogation said, "I got nothing to say"; "I ain't saying no more"; "I never say anything to cops." It seems apparent that these statements were indications, during the questioning, that he wished to remain silent. It would appear that in order to conform to the Miranda requirements, the interrogation should have ceased at the time that the defendant expressed hesitation in continuing.

In Commonwealth v. Rogers,19 the defendant was warned "that he didn't have to make any statements, and that he was entitled to counsel, and a telephone call, and that he could stand mute." At this point he tried to call a state legislator. Upon failing to contact him the defendant stated that he did not wish to call anyone else. Later, he was again warned that he did not have to answer questions, and that if he did so, the police officer would testify to his answers in court. Applying the Miranda requirements and disregarding the fact that no statement about appointed counsel was made, it would seem that the results of the interrogation were inadmissible. The call to the legislator could be construed as a request for counsel under Miranda and in that event any interrogation occurring thereafter would be in violation of the defendant's Sixth Amendment right to counsel.

18 Id. at 45, 222 N.E.2d at 776.
20 Id. at 31, 222 N.E.2d at 769.
In Commonwealth v. McCambridge, the police officers witnessed an automobile accident. Upon arriving at the accident the victim told the police officers three times, all in the defendant's hearing, that the defendant shot him. When the officer asked the defendant for the reason, he replied that the deceased had pulled a gun on him. In addition, the defendant was in a position to hear and did not reply to any one of the three statements by the deceased. At this point the defendant was arrested. Again the Court ruled that Miranda would only be given prospective application in this Commonwealth. An examination of the facts reveals no violation of the rules set down in Miranda. At the time of the questioning the defendant was not under arrest. The police officer not only had a right but a duty to make a brief “threshold inquiry” of the defendant. This is an instance which would require some inquiry of the defendant, and the “on-the-scene” questioning aspect of Miranda would apply:

General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

In Commonwealth v. Rawlins, the Supreme Judicial Court was presented with a purely volunteered statement, of the kind not proscribed by Miranda. There the defendant was under arrest and in his cell. The police officer checked all cells every half hour. On the first three of these checks the police officer and the defendant engaged in some minor small talk; on the fourth check, however, the defendant made some damaging admissions, prefacing his remarks with “Maybe I shouldn't be telling you this. . . .” Rawlins was not interrogated. His statement was volunteered with full knowledge of its damaging effect and under Miranda standards, was correctly admitted as evidence during the trial.

The Court summarily disposed of a claim of violation of the Miranda requirements in Commonwealth v. Geary. There the defendant, through his attorney, had requested a conference with the police. Present were the defendant and his attorney. The police warned the defendant of his constitutional rights. The attorney stated that the defendant was there to make a voluntary disclosure and surrender. On appeal, the somewhat remarkable claim was made to the Court that the statement was in fact made against the defendant's
will. Exercising admirable judicial restraint, the Court indicated, but refused to decide, that no Miranda violation occurred.

As in Morrissey, several decisions deal with the subject of what constitutes an in-custody interrogation. The Court rejected the Miranda claim in Commonwealth v. O’Toole. There, the defendant attended a conference with an assistant district attorney relating to a pending investigation. At the conference some damaging admissions were made. The Court held:

The defendant O’Toole was in no way physically detained or restricted. Calling a suspect’s attention to circumstances that appear to require an explanation does not deprive him of his freedom of action. There was no restraint of freedom in interviewing the defendant in the district attorney’s office. . . . It was not coercion or restraint to give the defendant full opportunity to decide whether, in the light of what was known, he cared to talk.

Another case dealing with the custodial aspect of Miranda is United States v. Spinney, where a doctor was asked to come to the Intelligence Division of the Internal Revenue Service for an interview by the chief of the division. The invitation also stated that he could have a lawyer, if he wished. He appeared without counsel. The Court held that the interview was not a custodial interrogation as defined in Miranda. A mere invitation to appear offered to a suspect, which he could have declined, is no deprivation of his freedom. Therefore, Miranda had no application.

§9.6. Statutory right to call counsel. A statutory right, possibly involving the right to counsel at out-of-court stages, was conferred by General Laws, Chapter 276, Section 33A. This statute provides that any person who is in custody in a police station or place of detention having a telephone shall have the right to use it to communicate with others or “to engage the services of an attorney.” This statute also provides that a person in custody shall be informed of this right upon his arrival at the station, and the call may be permitted within one hour thereafter. The statute, however, fails to provide a penalty for its noncompliance by the police. It also fails to state the legal effect of a failure to comply with its provisions. The Supreme Judicial Court, during this Survey year, interpreted the statute to mean that such a failure will not be grounds for dismissal of an indictment or complaint. Commonwealth v. Bouchard, however, indicates that any statements or evidence resulting from an undue delay in either notifying the person of this statutory right, or in allowing him to exercise

28 Id. at 152-153, 223 N.E.2d at 90.

the right, may, in the appropriate case, be suppressed.\(^2\) Thus, in Commonwealth v. Guerro,\(^3\) where the defendant was not permitted to call his attorney upon request to do so, his subsequent statements were suppressed on the basis that he was deprived of his right to counsel under the Sixth Amendment. If, however, no harm had resulted from the failure to comply with this statute then no suppression would have resulted.\(^4\)

This statute should also be analyzed from the point of view of Miranda. It obviously refers to custodial interrogations. If, however, a request was made to call any of the persons mentioned in the statute other than an attorney, any statements voluntarily given during an undue delay might still be admitted.\(^5\) As Guerro demonstrates, however, a request to call an attorney stands on a completely different footing. The standard of Escobedo and Miranda must be applied in that case, and the results of any subsequent interrogation in the absence of his counsel are inadmissible at a trial. No subsequent waiver would be effective under Miranda. Indeed, no statements would be admissible even in the presence of counsel, unless the client and counsel had an opportunity to confer prior to questioning.

In summary, it is evident that the right to counsel has been firmly entrenched into out-of-court proceedings. Pre-indictment custodial interrogations are “critical stages” of criminal proceedings for the purpose of deciding Sixth Amendment rights. Moreover, the interaction between the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination makes it hardly conceivable that these rights can be waived at critical stages. No case, however, has been decided by the Supreme Judicial Court along precise Miranda lines outside of a specific retroactivity question. The 1967-1968 term should remedy that situation. During the forthcoming year decisions can be expected which will clarify the application of Miranda in this Commonwealth. In the future, virtual torrents of judicial ink will flow as the courts of the Commonwealth seek to define and apply Miranda.

## C. POST-INDICTMENT STAGE

### §9.7. Effect of Massiah. The foregoing discussions of Escobedo and Miranda, and the various cases applying them, relate only to pre-indictment stages of the proceeding. Escobedo determined that pre-indictment accusatory interrogations were critical stages of criminal proceedings, and extended the Sixth Amendment protection to them in order to ensure a fair trial. Miranda supplemented Escobedo by requiring mandatory procedural safeguards to “custodial” interrogations occurring during the pre-trial stages of the proceeding. As a

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\(^2\) 347 Mass. at 421, 198 N.E.2d at 413 (dicta).

\(^3\) 349 Mass. 277, 207 N.E.2d 887 (1965).


\(^5\) Commonwealth v. Bouchard, 549 Mass. at 421, 198 N.E.2d at 413.
practical matter the greatest application of the rules of these two cases will be to interrogations held during the pre-indictment phases of the prosecution. Prior to the decisions in these cases, however, the United States Supreme Court had already considered the application of the Sixth Amendment guarantee to post-indictment interrogations of the accused.

In Massiah v. United States,1 two defendants were indicted and at their arraignment both pleaded not guilty. After arraignment, but before trial, one of the defendants decided to cooperate with the government. As a result, he was equipped with a small radio transmitter and was sent to meet his co-defendant to engage him in conversation and to attempt to get incriminating statements. This was done and the non-cooperating defendant's incriminating statements were secretly overheard by a police officer and later introduced in evidence at that defendant's trial. The Supreme Court held that the statements were inadmissible at the trial. The Court ruled that the secret and deliberate eliciting of statements from the defendant, in the absence of his retained counsel after he had been indicted, constituted a denial of his basic protections of the Sixth Amendment guarantee. In so ruling the Court relied on a New York rule, resulting from the United States Supreme Court's decision in Spano v. New York2 that a secret and prolonged post-indictment interrogation of the defendant, in the absence of his retained counsel, was a violation of his fundamental rights and contravened the basic dictates of fair play. In Massiah the Court found that such an interrogation constituted a critical stage of the entire proceeding:

This view [the New York rule] no more than reflects a constitutional principle established as long ago as Powell v. Alabama, 287 U.S. 45, where the Court noted that "... during perhaps the most critical period of the proceedings ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants ... [are] as much entitled to such aid [of counsel] during that period as at the trial itself." Id., at 57. And since the Spano decision the same basic constitutional principle has been broadly reaffirmed by this Court.3 [Emphasis added.]

Thus, post-indictment interrogations of the accused, conducted for the purpose of obtaining incriminating statements, are now cloaked with the protection of the Sixth Amendment guarantee to the assistance of counsel.

In Massiah, the Court stated that, since the case was a federal case, it was applying the specific Sixth Amendment guarantee which it

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3 377 U.S. at 205.
applied in *Johnson v. Zerbst*. Thus, there was a question as to whether the decision was binding on the states. Nevertheless, in *McLeod v. Ohio* the Court, in a per curiam decision, vacated a state court conviction on the basis of *Massiah*. Since the Court chose to discuss neither the reason for nor the scope of the application of the case to state court proceedings, it must be presumed that federal and state application of *Massiah* is coextensive.

The Supreme Judicial Court first applied *Massiah* in *Commonwealth v. McCarthy*. There, the defendant was arrested in Illinois about six months after he had been indicted. A voir dire examination during the trial showed that he had been interrogated by Boston police officers in Illinois in the absence of his counsel. Counsel had been previously retained for him at some point shortly after his indictment. Because the *Massiah* case had not then been decided, his statements were admitted into evidence. The Court reversed the defendant's conviction on the basis that the statements made in Illinois were improperly admitted into evidence, stating:

The case of *Massiah v. United States*, . . . decided after the trial of these defendants, establishes that it was error to admit [the defendant's] statement. . . .

The court in general terms stated a rule against interrogation after indictment in the absence of counsel. This is now a constitutional principle applicable to these cases.

In *Commonwealth v. Kleciak*, the Supreme Judicial Court distinguished the *Massiah* case on the ground that no indictment had been obtained prior to the interrogation. In addition, the Court stated that the defendant knew that he was being interrogated and that his counsel's advice not to talk was applicable. In *Massiah*, on the other hand, the defendant did not even known an interrogation was taking place. It should be noted that in *Spano v. New York*, the defendant had been advised by his attorney not to talk. He relied on that advice for about eight hours, and then confessed. In *Spano*, however, the United States Supreme Court held that the confession was coerced. Considering the near identity of facts between *Spano* and *Kleciak*, together with the fact that *Spano* was the basis of the decision in *Massiah*, it would appear that, except for the fact that the interrogation in *Kleciak* was before indictment, *Massiah* should be applicable.

§9.8. Identification process. Another out-of-court confrontation between the accused and the prosecution which constitutes a critical stage is the identification proceeding. There, the suspect is displayed

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4 304 U.S. 458 (1938).
5 378 U.S. 582 (1964).
7 Id. at 11-12, 200 N.E.2d at 266.
for the purpose of being identified by one or more witnesses to the crime. These cases are referred to as the “lineup” cases. This reference may tend to confuse rather than elucidate, since the principles are applicable to all identification proceedings and are not restricted to “lineups.” During its October, 1966 term the United States Supreme Court had occasion to examine three cases with reference to the application of the Sixth and Fourteenth Amendments to these identification proceedings. Two of the three cases dealt with post-indictment proceedings. The first case, *United States v. Wade,*1 concerned the post-indictment lineup of a bank robbery suspect for identification by two employees of the bank. Mr. Justice Brennan, speaking for a rather peculiarly divided Court, analogized the lineup procedure to the blood-test proceedings in *Schmerber v. California*2 and to other nontestimonial and noncommunicative proceedings and held that there was no violation of the Fifth Amendment privilege against self-incrimination. This was not dispositive, however, of the case. In discussing the need for counsel at such proceedings the Court distinguished the lineup from the *Schmerber* blood test, stating that

the confrontation compelled by a state between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.3

Many instances of such dangers were given by the Court. For example, where the accused is the only member of the line-up of his race; where the suspect is the only member with certain obvious physical characteristics; or where he is displayed in an otherwise prejudicial manner or a prejudicial atmosphere; or where the risks of subtle or not-so-subtle suggestion are present.4 The Court has also relied on the unlikelihood that an identifying witness will change his mind after making an identification of a particular suspect. After reciting the possible dangers attending lineups, the Court held that the doctrine of the protection of constitutional rights by the right to counsel, which was enunciated in the *Miranda* case, was applicable. The Court said that protection of the Sixth Amendment was not limited to the privilege against self-incrimination but rather, should be applicable to any case where the accused’s right to a fair trial might be affected by the absence of counsel, regardless of the stage of the proceeding. Thus the lineup became one of those “critical stages” of a criminal proceeding involving the basic fairness of a subsequent trial and the accused, absent an intelligent waiver, has the right to the presence and assistance of counsel.

3 388 U.S. at 228.
4 Id. at 229-235.
In *Gilbert v. California*, the second case in the "lineup" series of cases, the Court reversed another conviction involving an identification which occurred in the absence of counsel. In this case the accused was exhibited to about one hundred witnesses sixteen days after he was indicted and after counsel was appointed for him. In both *Wade* and *Gilbert* no evidence was introduced at the trial by the prosecution of the fact of the lineup or of anything occurring at it; rather, the prosecution merely asked witnesses who had participated in the earlier identification to identify the accused in the courtroom. The defense, on the other hand, sought to exclude the testimony of the fact and nature of the pre-trial lineup. Significantly, the Court refused to order new trials at which the identification testimony of the witness who had participated at the proscribed lineup was to be excluded. Such evidence was not held inadmissible per se. On the other hand, the Court also refused to apply the new rule solely to the exclusion of testimony concerning the lineup, thereby allowing courtroom identifications. The reason, as stated in *Wade*, is that

since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.\(^6\)

The precise holding was to cast the burden on the government "to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identifications." The Court, quoting the test set out in *Wong Sun v. United States*,\(^8\) stated:

"*W*hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Maguire, *Evidence of Guilt* 221 (1959)." See also *Hoffa v. United States*, 385 U.S. 293, 309. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts

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5 388 U.S. 263 (1967).
7 Id. at 240.
which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.9

The effect of the violation is somewhat more limited than is generally assumed. First, the cases were remanded for a determination as to whether the identification constituted prejudicial error in each of the two stages of the proceeding. If prejudicial error resulted in the guilt stage, a new trial was required. If prejudicial error resulted in the penalty stage that phase must be set aside. If, however, the error in both stages was considered by the California Supreme Court to have been "harmless beyond a reasonable doubt," then both stages would stand.

In *Stovall v. Denno*,10 the Court decided the retroactivity of *Wade* and *Gilbert*. There it was held that the rules set down in *Wade* and *Gilbert* were to be applied only to cases in which the identifications without counsel were conducted after June 12, 1967, the date of the decisions. As in *Johnson v. New Jersey*,11 *Stovall* contains a discussion dealing with retroactivity of those new constitutional rules as well as similar guidelines indicating how the United States Supreme Court intends to treat retroactivity questions in the future.12 In *Stovall*, the Court thought it significant that all fifty states and the federal law enforcement officials operated on the belief that counsel was not required at such identification confrontations. The Court also indicated that an illegal lineup did not necessarily result in an unfair trial, and that the effect of the lineup on the trial varied greatly from case to case. Therefore, the Court held that the new standards should not be applied retroactively.

The Supreme Judicial Court had occasion during this Survey year to decide two cases involving pre-trial identifications. *Commonwealth v. Rawlins*13 involved a hospital identification by the victim, under circumstances similar to those described in *Stovall*. The Court rejected the contention that such an identification proceeding was a "critical stage" of a criminal proceeding which required counsel under the Sixth Amendment. Since this case was decided prior to the decisions in *Wade*, *Gilbert* and *Stovall*, the constitutional doctrine set forth in those cases was not applicable. Nevertheless, those United States Supreme Court decisions holding that such proceedings are "critical stages" will require a change in Massachusetts law.

The accused in *Commonwealth v. Freeman*14 was requested to go to the police station for identification by the victims of the crime. At the station, the accused had an attorney with him, who objected to the use of a one-way mirror for the identification. The police officer

9 388 U.S. at 241.
10 388 U.S. 293 (1967).
12 See §§9.5 supra.
in charge replied that it could be done any way the attorney wanted. Thereafter, the accused was seated at a table in the room, with four police officers, the accused's fiancée and his attorney. The two victims were then brought to the doorway, one at a time, and each identified him as the criminal. On appeal the Supreme Judicial Court noted that the procedure employed in the identification was consented to by the accused and his counsel, thus distinguishing United States ex rel. Stovall v. Denno, on the obvious basis that Freeman's attorney was present during all stages of the identification proceeding.

D. Judicial Stage

§9.9. Rule 10. Shortly after the decision in Gideon v. Wainwright, and as a result of it, the Supreme Judicial Court ordered Rule 10 of the General Rules to be repealed and substituted the following:

If a defendant charged with a crime, for which a sentence of imprisonment may be imposed, appears in any court without counsel, the judge shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel. Before assigning counsel, the judge shall interrogate the defendant and shall satisfy himself that the defendant is unable to procure counsel. If the judge finds that the defendant is able to procure counsel, he shall make a finding to that effect which shall be filed with the papers in the case. If the defendant elects to proceed without counsel, a waiver and a certificate of the judge on a form herein established shall be signed, respectively, by the defendant and the judge and filed with the papers in the case. If the defendant elects to proceed without counsel and refuses to sign the waiver, the judge shall so certify on a form herein established, which shall be filed with the papers in the case.

It should be noted that the new rule requires the assignment of counsel to represent an accused "at every stage of the proceeding." It therefore applies not only to trials, but also to arraignments, motions, and all other pre-trial and post-trial proceedings. It would appear that the Court's intention in promulgating Rule 10 was to prevent attacks on criminal proceedings owing to lack of counsel, and that this rule will be enforced strictly. For example, in Williams v. Commonwealth, the Court stated that in cases where there is no evidence of compliance with the requirements of the rule, where the record of the case is silent as to whether the defendant was informed of his right to counsel, where no evidence exists to show that he waived counsel after

15 355 F.2d 731 (2d Cir. 1966). This case is the Court of Appeals decision in the United States Supreme Court case previously discussed.

warning, and where none of the required certificates are filed with the papers of the case, then the proceedings will be void, regardless of whether the defendant pleaded guilty or not.\(^8\)

Similarly, in *Mulcahy v. Commonwealth*,\(^4\) the Court vacated a conviction where the probation officer informed the defendant of his rights under Rule 10. When the probation officer was informed that the defendant had waived his right to counsel, he obtained the defendant's signature on the required waiver form. This was done in the absence of the judge. Thereafter, when the judge entered the courtroom, he verified that it was in fact the defendant's signature and made a short inquiry of the defendant with respect to his desire for counsel. The judge then signed the waiver certificate. This certificate provides that the defendant has executed the above waiver in the judge's presence.\(^5\) In reversing the conviction, the Chief Justice held that the advice must be given by the judge. He further stated that "in enacting the rule our purpose was to eliminate to the greatest possible extent all questions arising from lack of representation by counsel. . . ."\(^6\)

On the same day that the Court decided the *Mulcahy* case, it decided another Rule 10 case arising out of the same situation as that proscribed in *Mulcahy*. In *Baldassari v. Commonwealth*,\(^7\) the petitioner was brought before the court for violation of probation. He was committed to the House of Correction for two years. The Supreme Judicial Court vacated this commitment on the same basis as the *Mulcahy* conviction was vacated.

Both the *Williams* and *Baldassari* cases are examples of the application of Rule 10 to post-trial, post-conviction proceedings where petitioners' prior probations were revoked.\(^8\) Both Williams and Baldassari, while being represented by counsel, had been found guilty of particular crimes and placed on probation. Later, they appeared in court in proceedings which resulted in the revocation of their probation. In *Williams*, the Court held that the language of Rule 10 includes within its scope all judicial probation revocation hearings where the revocation might result in imprisonment. The Court distinguished *Martin v. State Board of Parole*,\(^9\) which held that, as a matter of due process under the Fourteenth Amendment, counsel was not required at state parole revocation proceedings. The distinguishing feature was that although probation revocation proceedings are judicial functions, revocation of parole proceedings are administrative and executive in nature. Court rules have no application to executive functions.

\(^3\) Id. at 734, 216 N.E.2d at 780-781.
\(^5\) 347 Mass. at 811.
\(^8\) See *Mempa v. Rhay*, — U.S. —, 88 Sup. Ct. 254 (1967), holding that the Sixth Amendment applies to probation revocation proceedings.
Thus, in the Commonwealth, the Sixth Amendment requirement of right to counsel poses few if any problems. General Court Rule 10 has both implemented and extended the Gideon requirements. Nevertheless, the constitutional question remains as to whether the Sixth Amendment requires counsel in misdemeanor cases. In applying state law to this question, the Supreme Judicial Court has stated:

We view Gideon v. Wainwright, 372 U.S. 335, as leaving unsettled whether, in all misdemeanor cases, advice concerning counsel and the appointment of counsel is constitutionally required. The Gideon case involved a non-capital felony, for which Gideon had been sentenced in a Florida court . . . to serve a prison term of five years. Although the language of the principal opinion is broad, at least one concurring opinion recognized . . . that the Supreme Court was not then called upon to decide whether the rule of the Gideon case “should extend to all criminal cases.” Subsequent action by the Supreme Court may suggest that in misdemeanor cases, not carrying the possibility of a substantial prison sentence, the Gideon principle need not be applied.

An examination of the law will reveal that most crimes in this Commonwealth, other than traffic violations, of any seriousness at all permit as a penalty some period of imprisonment. Thus, for all practical purposes, Rule 10 requires that counsel be made available to all persons charged with crimes in Massachusetts. In MacDonnell v. Commonwealth, the Supreme Judicial Court held that Rule 10 applied to drunkenness prosecutions, reasoning that there was a possibility that a jail sentence may be imposed upon a finding of guilt.

§9.10. Compensation for attorneys. In 1967 the Supreme Judicial Court ruled that counsel appointed for indigent defendants under Rule 10 were entitled to be paid by the county for their services. Prior to 1967, counsel appointed in non-capital cases were expected to contribute their services as officers of the court. In a landmark decision, the Supreme Judicial Court made provisions for the payment of fees to appointed counsel. In the case of Abodeely v. County of Worcester, Justice Reardon stated:

We believe that the provisions of G.L. c. 213, §8, should be extended to cover also the costs of defence counsel. In Attorney Gen. petitioner, 104 Mass. 537, at page 542, the court interpreted

10 In Subilosky v. Commonwealth, 349 Mass. 484, 209 N.E.2d 316 (1965), noted in 1965 Ann. Surv. Mass. Law §§11.11, 12.3, the Supreme Judicial Court held that as a matter of state law the Gideon case was to be given retroactive application.
12 Id. at 1439, 230 N.E.2d at 823.

2 Id.
the predecessor statute of G.L. c. 213, §8, not to authorize allowances for defendants’ counsel. We do not forget what we have said about the holdings in the great majority of other States based on the theory which we ourselves have expressed, that the bar has a duty to undertake the defence of indigents without compensation and that that obligation accompanies a license to practise at the bar. But times have changed. We do not now deal with a profession where it is commonplace for a lawyer to spend one day at his office and the next in court. Our bar and its practice have become fragmented and the all purpose attorney, the skilled advocate as well as the expert in trusts, corporations and business law, is no longer with us. Literally thousands of our lawyers, sad to relate, never see the inside of a court room at all. Not only has the bar itself been divided into specialties but of the very small percentage of lawyers who can be said to be trial lawyers an even smaller percentage of them has developed skills in the practice of criminal prosecution and defence. It is unjust that this comparative handful of individuals should alone bear the burdens which are rightly those of all of the bar and indeed of the community and the taxpayers. The regrettably small segment of the bar which has engaged in trial work has cheerfully borne the burden of representation of indigents over the years and these lawyers are frequently those who are less able to afford that burden than some of their brothers not in trial practice. This is inequitable.\(^3\)

The Court then went on to state that the Voluntary Defenders should be used as much as possible. In the event, however, a court should deem it appropriate to appoint other counsel, appointed counsel should be paid reasonable fees by the county, upon certification of his bill for services by the trial judge.

§9.11. **Arraignments.** In addition to the trial, other in-court stages of criminal proceedings have been held to be “critical stages” requiring the assistance of counsel as guaranteed by the Sixth Amendment. These are stages where specific rights are capable of being lost. Thus, in *Hamilton v. Alabama*,\(^1\) an arraignment was held to be critical under Alabama law, because it was at that point that the burden was on the defendant to assert some of his defenses, and if those defenses were not asserted at arraignment, they could be lost. In *Hamilton* the possibility that these defenses may be lost was paramount. Indeed, the United States Supreme Court refused to examine the record in that case in order to determine whether prejudice actually resulted. In *Macey v. Commonwealth*\(^2\) the defendant, in the absence of counsel, pleaded not guilty at his Superior Court arraign-

\(^3\) Id. at 1058-1059, 227 N.E.2d at 489.

\(^1\) 368 U.S. 52 (1961).

ment. Later, he changed his plea to guilty after conferring with counsel. The Supreme Judicial Court held that the arraignment was not, in that particular case, a critical stage. The Court said that the subsequent guilty pleas were sufficient to distinguish the case from Hamilton.\(^3\) The Macey case should be examined in the light of its discussion of the effects of an arraignment in Massachusetts. General Laws, Chapter 276, Section 47A, provides that motions to dismiss (formerly pleas in abatement, motions to quash, etc.) must be filed within ten days after arraignment. Thus, under Massachusetts law the arraignment starts a time period running, at the end of which many technical defenses are deemed waived if not made. It would seem, therefore, consistent with Hamilton, that a Massachusetts arraignment would constitute a critical in-court stage of criminal proceedings and require the attendance of the accused's counsel. Nevertheless, compliance with Rule 10 in any such case would cure constitutional defects arising under the Sixth Amendment.

White v. Maryland\(^4\) involved a preliminary hearing where the defendant, without counsel, pleaded guilty to the charges. Thereafter, at a subsequent arraignment with counsel, his plea was retracted. At his trial the first plea was introduced in evidence. The United States Supreme Court held that the first hearing became a critical stage of the proceeding since it was conducted in the absence of counsel and the prior plea was subsequently sought to be used against him.\(^5\) In Commonwealth v. O'Leary,\(^6\) however, the defendant requested counsel at a complaint hearing, but was not afforded such counsel. He was bound over to the grand jury, and at his subsequent arraignment he stood mute. The Court reasoned that since he never made any plea, none of his rights were lost. Indeed, none of the possible adverse effects which may have resulted from lack of counsel actually occurred. Thus, the Court held that the defendant was not prejudiced, and Gideon, Hamilton and White had no application.

\(\S 9.12\). Motion for continuance. It has been held in the Commonwealth that even a motion for continuance may be of such importance to the defendant to require counsel. Lindsey v. Commonwealth\(^1\) involved a defendant who was indicted and had consulted a lawyer three days after indictment and three days prior to the trial. The attorney told him that he would try to get a continuance of the trial. Thereafter, owing to an error on the trial list, counsel was informed that the case had been continued. Counsel then left an associate to inquire further about the case. Although the defendant had requested a continuance, the case had gone to trial with the defendant acting

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\(^4\) 373 U.S. 59 (1963).
pro se. The associate interrupted the trial and made another request for a continuance, which was denied. The trial continued, with the associate acting as counsel for the defendant, cross-examining witnesses and arguing to the court and jury in the defendant's behalf. The defendant was convicted. The defendant subsequently filed a petition for a writ of error. In its decision on the writ of error, the Supreme Judicial Court held that the defendant was deprived of counsel at the first request for continuance, stating:

The ground of this decision is that the petitioner was deprived of due process of law because an unfortunate combination of circumstances prevented him from having the benefit on an important occasion of the services of counsel whom he himself had secured within three days of his indictment to represent him on that occasion.2

§9.13. Appeal from conviction. Another in-court stage of a criminal proceeding where the assistance of counsel is guaranteed is the defendant's appeal from a conviction. The constitutional grounds are, however, based upon somewhat different principles than the Sixth Amendment guarantee. The right of an indigent to an appeal and appellate counsel is considered primarily as a matter concerning the equal protection clause of the Fourteenth Amendment. The first case that dealt with the right of an indigent to counsel on his appeal was Griffin v. Illinois.1 In Griffin the United States Supreme Court found that the Illinois procedure requiring indigents to pay for transcripts in order to obtain an adequate and effective review of their state court convictions was a violation of the equal protection clause of the Fourteenth Amendment. Thereafter, in Douglas v. California,2 the Court held that the states, by affording the right to an appeal accorded to an indigent as in Griffin, must provide the indigent with appointed counsel to assist him. Douglas reveals that the procedure of the California courts with respect to indigents was to have the appellate court conduct an independent investigation of the record to determine whether it would be either advantageous to the defendant or helpful to the court to have counsel appointed. The Supreme Court held that this procedure violated the Fourteenth Amendment, stating that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."3

In Ellis v. United States,4 a per curiam opinion, the Supreme Court held that appointed counsel must function in the role of an advocate, pleading his client's cause. The Court there rejected the argument

2 Id. at 5, 116 N.E.2d at 693.
3 Id. at 357.
that appointed appellate counsel was to act in the role of an amicus curiae whose function was to advise the court on questions of law. The Court held that counsel’s obligation is to conduct a conscientious investigation of all facts and law in the prosecution of the appeal. This role is best described in *Anders v. California*:

His role as advocate requires that he support his client’s appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

§9.14. **Juvenile proceedings.** In 1967, the United States Supreme Court had occasion to apply the Sixth Amendment guarantee of counsel to juvenile proceedings. In defining the due process rights of juveniles the Court held in *In re Gault*, that the due process clause of the Fourteenth Amendment requires that the juvenile and his parents be notified of their right to counsel in any delinquency proceeding where the juvenile may be committed to an institution where his freedom will be curtailed. The similarity of this holding to Rule 10 should be noted. Additionally, the Court instituted a rule requiring the appointment of counsel for the juvenile if the parents are unable to afford to employ counsel. This case was given retroactive application by the Supreme Judicial Court in *Marsden v. Commonwealth*. There a 1964 delinquency finding was reversed and the resultant commitment was invalidated on the grounds that the juvenile was not represented by counsel at the time of his hearing. Thus, in this Commonwealth all juveniles must be afforded counsel during all delinquency proceedings at which they may be confined.

§9.15. **Summary.** In contrast to the application of the right to counsel in out-of-court confrontations of a criminal defendant, the application of that right to in-court judicial proceedings is virtually complete in this Commonwealth. The Supreme Judicial Court has

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6 Id. at 744.

2 1967 Mass. Adv. Sh. 887, 227 N.E.2d 1, also discussed in §5.5 supra.
applied *Gideon* retroactively as a matter of state law. In addition, almost all in-court proceedings of any seriousness whatsoever are now covered by General Rule 10 of the Supreme Judicial Court which applies to all pre-trial, trial, and post-trial proceedings. Indeed, it is hard to conceive of any criminal prosecutions, other than traffic violations, which would not require the application of Rule 10. Also, the rationale of the *Marsden* case will probably be applied to all other quasi-criminal proceedings.1 If that be so, the result will be the completion of the application of the right to counsel as set forth in *Gideon v. Wainwright* and Rule 10 of the Supreme Judicial Court to all in-court stages of criminal and quasi-criminal proceedings, if the result can possibly be the loss of freedom of the respondent. Therefore, almost all of the requirements of the Sixth Amendment right will have been met. The only remaining area of such application in this Commonwealth will be to misdemeanor prosecutions where the crime does not contemplate the commitment of the defendant.

E. STUDENT COMMENT

§9.16. Criminal insanity: Commonwealth v. McHoul.1 The defendant was indicted for assault with intent to rape and breaking and entering a dwelling house with intent to commit rape. At trial, a psychiatrist for the Commonwealth testified "that according to the *M'Naghten* rule he [the defendant] was legally sane."2 Upon defendant's motion to strike the psychiatrist's statement, the trial judge refused to strike the whole statement but allowed the conclusion that "he was legally sane" to stand. The judge instructed the jury that an irresistible impulse to commit a crime is no defense unless accompanied by an inability on the part of the defendant to distinguish between right and wrong and a lack of awareness of the nature and quality of the acts committed.3 The jury found the defendant guilty of both crimes.

The defendant appealed, contending that the trial judge's charge to the jury was in error in that it required for findings of criminal insanity not only an inability to resist and control an impulse but also a lack of capacity to distinguish between right and wrong.4 The Supreme Judicial Court, in reversing, HELD: under the Massachusetts test for insanity, commonly known as the *Rogers* rule,5 the absence of cognizance of wrongdoing need not accompany "irresistible impulse."

§9.15. 1 For example, defective delinquency, alcoholism, and drug addiction and insanity proceedings under G.L., c. 123, and sexually dangerous persons proceedings under G.L., c. 123A.

2 Id. at 868, 226 N.E.2d at 557.
3 Id. at 870, 226 N.E.2d at 558.
4 Id. at 868-869, 226 N.E.2d at 557-558.
5 The rule is named for the case in which it was first announced, Commonwealth v. Rogers, 48 Mass. 500 (1844).
Therefore, the trial judge's charge to the jury was in error. The Court further held the Rogers rule, as applied, to be identical to the test suggested by the American Law Institute (hereinafter referred to as the Code), and as such, the language of the Code test should be used in place of the language of the Rogers rule.

The Rogers rule is generally stated as:

One whose mental condition is such that he cannot distinguish between right and wrong is not responsible for his conduct, and neither is one who has the capacity to discriminate between right and wrong but whose mind is in such a diseased condition that his reason, conscience and judgement are overwhelmed by the disease and render him incapable of resisting and controlling an impulse which leads to the commission of a homicide. [Emphasis added.]

The definition of insanity proposed in the Code is:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law. [Emphasis added.]

A reading of the two rules discloses substantial differences in language. The Rogers rule removes criminal responsibility from one who lacks the "capacity" to "discriminate" between right and wrong. On the other hand, the Code test removes criminal responsibility from one who lacks "substantial capacity" to "appreciate" the criminality of his acts. Moreover, where the Massachusetts test requires, for a finding of criminal insanity, that the defendant had acted on "impulse," the Code test requires only that the defendant be unable to "conform his conduct to the requirements of law."

Although the Supreme Judicial Court recognized these language differences between the two tests, it held that the Rogers rule, as applied was substantially the same as the Code test. It is submitted, however, that the application of the Rogers rule has not had the same effect as the Code would have had, and as such, the adoption of the Code test has significantly and substantially broadened the definition of criminal insanity in the Commonwealth.

The first instance in which the language of the Rogers rule and the

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6 The Court also ruled that the statement of the psychiatrist to the effect that the defendant was legally sane should not have been allowed to stand since he based his conclusion on the mistaken belief that the narrower M'Naghten rule was the test for insanity in Massachusetts. 1967 Mass. Adv. Sh. at 868, 226 N.E.2d at 557.
7 Id. at 873, 226 N.E.2d at 561.
11 Id.
§9.16 CRIMINAL LAW AND PROCEDURE

Code test vary concerns the meaning of the terms "capacity" as used in the Rogers rule, and "substantial capacity" as utilized by the Code. These terms describe the degree of capacity the defendant must possess to distinguish either the difference between right and wrong or to appreciate the criminality of his act in order to be judged insane. The language of the Massachusetts test, in demanding a lack of "capacity," would appear to require complete impairment of the cognitive ability to know the difference between right and wrong.\(^\text{12}\) The Code, however, by requiring only a lack of "substantial capacity," would appear to require something less than a complete impairment of the cognitive process. The critical determination, therefore, is whether, as the Supreme Judicial Court states in McHoul, the Rogers rule, "as applied has been in all likelihood, in most cases, a 'substantial capacity' test."\(^\text{13}\) An analysis of the Massachusetts decisions indicates that there has been little consistency in the degree of capacity the Supreme Judicial Court has demanded of defendants.

There is little indication that the courts have attempted to define that amount of capacity necessary to find a defendant criminally sane. In Commonwealth v. Sheppard\(^\text{14}\) the Supreme Judicial Court indicated that a jury could find a defendant criminally sane if it found that the defendant has "sufficient" capacity to appreciate the nature and conduct of his acts.\(^\text{15}\) The Court, however, did not define what it would consider "sufficient" capacity and, hence, effectively avoided determining the requisite capacity.

In other cases, the Court has either mechanically applied the Rogers rule, with no discussion as to the amount of capacity necessary for a finding of insanity,\(^\text{16}\) or has spoken in terms of "sufficient" capacity.\(^\text{17}\) Where the Court has mechanically applied the Rogers test, it would appear that the Court was requiring a total lack of capacity for a finding of criminal insanity. Yet, those cases in which the Court speaks in terms of "sufficient" capacity are of no value in defining the requisite amount of capacity, since the word "sufficient" is, of itself, patently ambiguous without an attempt to specify exactly what degree of capacity is required.

In Commonwealth v. McCann,\(^\text{18}\) the Court faced this issue of the


\(^{15}\) Id. at 594, 48 N.E.2d at 634.


requisite amount of capacity and appeared to require a total lack of capacity for a finding of criminal insanity. The defendant requested unsuccessfully that the trial judge charge the jury that in order to find that the defendant was capable of distinguishing between right and wrong, the jury must find that the defendant had "more than a superficial awareness of the wrongness of his deeds" or "a normal amount of judgmental sense." In affirming the conviction, the Supreme Judicial Court noted that the trial judge was not in error in refusing these requests, "as they did not state correct principles of law." Here, the requested instruction attempted to emphasize that total lack of capacity was not necessary for a finding of insanity but only a lack of that amount of capacity that would render the defendant unable to make "normal judgments."

In affirming the refusal of the requested instructions, the Court chose to require more than a lack of "normal judgmental sense" for a finding of criminal insanity. The Court appeared to indicate that a "superficial awareness" of the wrongfulness of his acts on the part of the defendant would require a finding of criminal responsibility. There could be no other conclusion but that the Court was requiring a total lack of capacity for a finding of criminal insanity. It seems evident that there has been little consistency in the Court's approach to the requisite degree of capacity needed to be found criminally sane.

It is submitted that to require the defendant to show a total lack of capacity, as McCann seems to do, places an unrealistic burden on the defendant. "Psychiatrists generally feel that total impairment of the cognitive and volitional faculties is rarely, if ever, reached." It is because of this that the Code speaks in terms of "a lack of substantial capacity." The entire effort in formulating the Code was to recognize that there are gradations of impairment of the capacity involved and to seek words that imply a greater depth in the mental capacity that is called for, for criminal responsibility to be established.

The second discrepancy between the Rogers rule and the Code test is the difference between the words "discriminate" and "distinguish" as used in the Rogers rule and "appreciate" as used in the Code test. The language in Rogers, in requiring an inability to "discriminate" or "distinguish" between right and wrong, indicates that all that is

19 Id. at 515, 91 N.E.2d at 217.
20 Id.
21 Confusion is also evident in Commonwealth v. Clark, 292 Mass. 409, 198 N.E. 641 (1935), where the Supreme Judicial Court refused to reverse a refusal by the trial judge to instruct the jury that "if the defendant . . . could distinguish between right and wrong only to a limited extent, then he cannot be found guilty . . ." 292 Mass. at 413, 198 N.E. at 644. Although the Court recognized that total incapacity was not necessary, it still refused to reverse the ruling of the trial judge.
22 Lindman and McIntyre, note 12 supra, at 354.
23 See United States v. Freeman, 357 F.2d 606, 622-623 (2d Cir. 1966).
necessary to prove criminal responsibility is that the defendant have
the capacity to simply perceive the differences between right and
wrong, even on a superficial level. Thus, if it can be shown that the
defendant was aware that the act he did was wrong, he will be found
sane. On the other hand, the word "appreciate" as used in the Code
illustrates a reluctance to allow mere intellectual awareness of right
and wrong to be a criterion of sanity. Instead, the Code requires that,
if a person is to be found sane, he must exhibit an understanding of
the moral or legal import of his behavior. The question which now
presents itself is whether, as the opinion in McHoul contends, the
words "discriminate" and "distinguish" as used in the Massachusetts
courts embrace the meaning of the word "appreciate" as used in the
Code. The decisions of the Supreme Judicial Court do not bear out
the contention of the opinion in McHoul.

In Commonwealth v. McCann, the defendant requested an instruc-
tion that in order to be found criminally responsible, he must have
"more than a superficial awareness" of the differences between right
and wrong. In affirming the trial judge's refusal to grant this instruc-
tion, the Supreme Judicial Court, in effect, held that mere intellectual
awareness on the part of the defendant that a difference between right
and wrong existed would be enough to find him legally sane. In this
case the Supreme Judicial Court did not apply the broad interpreta-
tion implicit in the Code test to "discriminate" or "distinguish" as used in the Rogers rule. On the other hand, in Sheppard and Com-
monwealth v. Zelenski, the Supreme Judicial Court used the word
"appreciate" rather than "distinguish" in its definition of insanity. In
subsequent cases, the Supreme Judicial Court has demanded some-
thing more than "normal emotional awareness" by describing the
knowledge required of the defendant as being "able to perceive [the
act's] true character and consequences to himself and to others." Although these interpretations fall short of the meaning intended by
the Code, they have gone beyond McCann in demanding more than
"normal emotional awareness" in order to find the defendant legally
sane.

As in the interpretation of "capacity," the interpretations given
"discriminate" and "distinguish," as used in the Rogers rule, have not
been entirely consistent. The trend of the Massachusetts decisions
prior to McCann seemed to indicate a willingness to incorporate the
meaning of the word "appreciate," as it is used in the Code, into the

25 It is interesting to note that the defendant in McHoul admitted that he "did
26 United States v. Freeman, 357 F.2d 606, 623 (2d Cir. 1966).
(1926); accord, Commonwealth v. Trippi, 268 Mass. 277, 280, 167 N.E. 354, 356
(1929).
Rogers rule. Yet McCann, being the latest case to discuss this issue, has chosen to discard the broad interpretation formulated in the previous decisions of the Supreme Judicial Court and, instead, has viewed "discriminate" and "distinguish" in a narrow sense. Thus, the situation in Massachusetts under the Rogers rule was confused in that it was extremely difficult to determine which interpretation to follow: that of the majority of the cases, or that of the most recent major case directly to discuss the issue.

There is no question that the adoption of the word "appreciation" as used in the Code definition will seriously affect the outcome of cases involving the defendant's understanding of the criminality of his acts. The Code is clear that a defendant will be judged legally insane unless he has a substantial capacity to understand the legal and moral import of his behavior. The Rogers rule would consider the defendant sane if he was "intellectually aware" of the difference between right and wrong. Here again, the difference between the Rogers rule and the Code test demands a greater exposition of the critical factors involved than that shown in the McHoul decision. It must be emphasized that:

in many cases of advanced psychosis, cases which everyone would deem appropriate for exculpation, the defendant may have a rudimentary . . . knowledge of right and wrong. What he lacks is understanding of the sort that involves the emotional or affective parts of his personality.

Thus, under Rogers, this "rudimentary knowledge" would be sufficient to consider the defendant legally sane even when he may exhibit all the signs of being unable to function successfully because of severe mental illness.

The third discrepancy between the Rogers rule and the Code test is the difference involved between the meanings attached to lack of capacity to resist an impulse (irresistible impulse) as used in the former, and lack of substantial capacity to conform his conduct to requirements of law (conform conduct) as used in the latter. Both phrases are obvious attempts to include within the definition of insanity those persons unable to stop certain patterns of behavior from happening in an unlawful manner. Again, however, on the basis of language alone, there is an apparent discrepancy between the two. The Rogers rule contemplates including only those crimes which are the result of a "sudden and explosive fit." On the other hand, the Code seeks to incorporate into this particular aspect of its definition "crimes committed after excessive brooding and melancholy by one who is unable to resist sustained psychic compulsion or to make any real attempt

32 United States v. Freeman, 357 F.2d 606, 623 (2d Cir. 1966).
33 See id.
35 See United States v. Freeman, 357 F.2d 606, 620 (2d Cir. 1966).
to control his conduct." The question remains whether there have been attempts in the Massachusetts courts to interpret "irresistible impulse" as the Code uses "conform conduct." An analysis of the cases indicates that both the Supreme Judicial Court and witnesses have not incorporated the broad interpretation given to "control his conduct" as used in the Code test into the Rogers rule.

In Commonwealth v. Cooper, the Supreme Judicial Court refused to reverse a conviction even though the defendant was "abnormally deficient in will power." In Cooper, the Court was faced with the very situation the Code seeks to remedy. Although not subject to any "sudden and explosive fit," the defendant was incapable of exerting any control over his behavior. The restrictive interpretation that had to be placed on "irresistible impulse," however, required that the defendant be found legally sane. In affirming the defendant's conviction, the Supreme Judicial Court effectively limited "irresistible impulse" to sudden and explosive fits. Although this was an early case, there is no indication of any change in the attitude of either the courts or expert witnesses.

There is little doubt that the substitution of "conform conduct" for "irresistible impulse" will be significant to the outcome of certain cases. The significance of this change is most dramatically demonstrated in the Kentucky case of Newsome v. Commonwealth. In Newsome, the psychiatric testimony offered at trial was that the defendant often had seizures during which time he became uncontrollable and generally suffered from a lowered control of his activities. At the time the case was decided, the Kentucky rule for criminal insanity was identical to the Rogers rule. The Kentucky court found that under the "irresistible impulse" test the defendant was legally sane, presumably because of the absence of any sudden and explosive fits. This same court, just twenty-eight days after its decision in Newsome, adopted the Code definition of insanity. Since the Code test demands that a defendant not be convicted of a crime if mental illness has deprived him of effective power to make the right choices in governing his behavior, it seems clear that the conviction in Newsome would have been reversed, since the defendant exhibited "mental blackouts" which gave rise to a loss of control over an extended period of time. The absence of a sudden and explosive fit, however, required a finding of sanity under the rule identical to Rogers.

Under the Rogers rule, the definition of "irresistible impulse" was

36 Id. at 620-621.
37 219 Mass. 1, 106 N.E. 545 (1914).
38 Id. at 5, 106 N.E. at 547.
39 366 S.W.2d 174 (Ky. 1963).
40 Id. at 175.
41 Terry v. Commonwealth, 371 S.W.2d 862 (Ky. 1963).
restricted to a sudden and explosive fit. It should be stressed that the substitution of the Code for the Rogers rule will allow a finding of criminal insanity where the evidence shows a loss of control, either spontaneous or extended.

It seems evident that, contrary to the Supreme Judicial Court in McHoul, the Rogers rule has not been interpreted by the Court to be substantially identical to the test set forth in the Code. It is true that in some cases the Supreme Judicial Court has interpreted sections of the Rogers rule in much the same way as it would if the Code test were in effect. However, even though there has been a tendency in some instances to interpret the Rogers rule broadly, the McCann case, being the most recent case directly to discuss these issues, served to confuse the situation by narrowly and restrictively defining the Rogers rule. Because of this lack of consistency in the definitions of "capacity," "distinguish" and "discriminate" and also because of the restrictive definition of "irresistible impulse" in the Rogers rule, the Code test brings substantial and significant changes to the definition of insanity in Massachusetts.

The change to "substantial capacity" no longer requires total incapacity of the defendant's volitional and cognitive functions. By now requiring an "appreciation" instead of "discrimination" or "distinguishing" on the part of the defendant, the test for insanity will include those unable to understand the significance and import of their behavior. There is no question but that this will provide a basis for a somewhat broader scope for expert testimony, by suggesting the relevance to the legal inquiry of disabilities in the emotional or affective aspects of the defendant's personality. The Code permits the examining physician to give evidence as to the extent of the impairment in a given case. This is particularly important in the light of the fact that the jury in Massachusetts may, if the defendant is found sane, recommend against the death penalty. By now using the "conform conduct" test, mental illness characterized by "brooding and reflection" is included in the definition of insanity, giving the defendant who is unable to "resist a sustained psychic compulsion" and yet who appears to have methodically committed a crime, the opportunity to be judged insane.

By far the most important characteristic of the Code test is its recognition of a greater spectrum of degree within each of the three aspects of the definition. The Code test is not the strict and narrow definition which the Rogers rule is; "it focuses on a defendant's ability not only to appreciate the wrongfulness of his conduct but also to conform it to the requirements of law, and it recognizes that both capacities involve matters of degree." (Emphasis added.) By allowing and encouraging testimony and evidence as to possible gradations within any

44 G.L., c. 265, §2.
45 United States v. Sheller, 369 F.2d 293, 295 (2d Cir. 1966).
of the three aspects of the definition of insanity, the result must be a clearer and more accurate presentation of the mental condition of the defendant. The jury will have a greater opportunity to examine this mental capacity and to arrive at a more meaningful judgment.

In not recognizing the changes which the Code test represents, the decision in McHoul will only serve to confuse lower courts in their attempts to interpret the Code test. In stating that the Code test simply represents the current interpretation of the Rogers rule, the Supreme Judicial Court has done the lower courts a disservice. The subtle yet significant differences between the two tests have not been elucidated to a sufficient degree to enable the lower courts to determine correctly the proper definition of insanity. It is not difficult to predict that because of the failure to distinguish properly between the two definitions in McHoul, the Supreme Judicial Court will be forced to reexamine the intent and meaning of the Code test in the future.

MICHAEL A. FEINBERG

§9.17. Grand jury procedure: Presence of assistants: Commonwealth v. Favulli. The defendants were indicted for conspiracy to solicit a bribe and for solicitation and acceptance of a bribe. Evidence was presented to a special grand jury at the direction of the Attorney General, aided by several special assistant attorneys general. At least three of these assistants were also staff attorneys for the Massachusetts Crime Commission. In their capacities as staff members of the Crime Commission two of the assistants did substantial work in the preparation of the case before and during the grand jury hearings. Although all five assistants were present, only one took active part in the proceedings on the day the indictments were handed down. The grand jurors were instructed that the assistants were available to give counsel and were present only with the panel's consent. Upon request of the grand jury the assistants left the room on two separate occasions the day indictments were issued.

The defendants were found guilty at trial. They contended on appeal that the inactive presence of assistant attorneys general violated the secrecy of the grand jury proceedings, as required by Article 12 of the Declaration of Rights. The Supreme Judicial Court, affirming,

2 See id. at 358-360, 224 N.E.2d at 436-438.
3 Resolves of 1962, c. 146: "Resolved, That an unpaid special commission . . . is hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the Commonwealth and corrupt practice in government at state and local levels. . . ." The indictments for the present case arose out of investigations conducted by the Commission and the Attorney General's office in their attempt to prosecute corruption in state government. See Commonwealth v. Favulli, 1967 Mass. Adv. Sh. at 341, 224 N.E.2d at 427.
4 Article 12 states, in pertinent part: "No subject shall be held to answer for any crimes or offenses, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against.
HELD: The standard for determining authorized presence of assistant prosecutors in grand jury proceedings is "effective presentation of evidence." The prosecutor has discretion to use a reasonable number of assistants. The Court will assume, unless the evidence indicates the contrary, that duly appointed assistants were in the grand jury room for the "effective presentation of evidence." The burden is therefore not on the state to show a "necessity, or indeed the reason" for the presence of assistants. This burden rests upon the defendant. Since the defendants in this case did not show that they were prejudiced, the trial judgment must be affirmed.

Justices Spiegel and Kirk dissented, arguing that the established standard in Massachusetts for the authorized presence of anyone other than grand jurors at indictment proceedings is that there must be an "inherent necessity" for their presence. The values of the grand jury process and a defendant's rights are best preserved by strict adherence to this standard. The standard for presence requires that the burden be on the state to prove necessity and not on the defense to show prejudice. Since there was no showing of necessity for the presence of assistants in this case, the secrecy of the grand jury proceedings was violated, and the conviction should have been reversed.

The standard in Massachusetts for determining the validity of presence at grand jury proceedings can best be understood by examining the constitutional basis of the institution itself. The Supreme Judicial Court held in Jones v. Robbins that Article 12 of the Declaration of Rights required a grand jury indictment before a defendant could be tried for an offense punishable by sentence to a state prison. Chief Justice Shaw stated in Robbins that an individual's right to be free from a public trial before probable cause is determined by a grand jury indictment "is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions. . . ." The Court in Commonwealth v. Harris interpreted Robbins as prohibiting practices which could "overawe" witnesses or grand jurors and as preventing the prosecution from being "too indulgently or too vindictively conducted." The Jones and Harris cases clearly established the grand jury indictment as mandatory in Massachusetts criminal procedure. They also provided a constitutional foundation for subsequent decisions concerning grand jury procedure. Both opinions unequivocally held, consistent with the history and essence of himself. . . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

9 Id. at 362-363, 224 N.E.2d at 439.
7 8 Gray 329 (Mass. 1857).
8 Id. at 344.
9 231 Mass. 584, 121 N.E. 409 (1919).
10 Id. at 586, 121 N.E. at 410.
the grand jury,\textsuperscript{11} that the essential and constitutional requirement of the procedure is secrecy.\textsuperscript{12} The grand jury's independence, which is the basis of defendants' rights in indictment proceedings, can be assured only when its secrecy is respected.

Historically, the requirement of secrecy has been carefully applied by the Supreme Judicial Court in determining the authority of persons to be present in the grand jury room. The general rule has been that apart from the testifying witness, grand jury investigations are to be "in private, except that the district attorney and his assistants are present."\textsuperscript{13} The grand jury process is most valuable because "its proceedings are secret and uninfluenced by the presence of those not officially and necessarily connected with it."\textsuperscript{14} The Court has specifically held that exceptions to the rule "rest upon inherent necessity and not upon convenience."\textsuperscript{15} While the Court has acknowledged the right of the prosecutor and his assistants to be present,\textsuperscript{16} the use of assistants, as it bears on the validity of indictment proceedings, has never before been directly confronted as an issue. Two important issues were raised by the Favulli decision: (1) whether the rule vesting discretion in the prosecutor to use a reasonable number of assistants, based on the standard "effective presentation of evidence," preserves the independence and secrecy of grand jury proceedings as demanded by Article 12 of the Declaration of Rights; and (2) whether placing the burden on defendants to prove prejudice ensures observance of the standard and effectively elicits proof of its breach. Resolution of the issues depends upon the legitimate needs of the prosecution, the inherent values of an independent grand jury system, and the protection the grand jury should afford defendants in Massachusetts criminal procedure.

The Favulli decision did not expressly adopt the "inherent necessity" test for the presence of assistants to the prosecutor.\textsuperscript{17} The question becomes whether the standard of "effective presentation of evidence" is a substantial departure from the "inherent necessity" test. It is submitted that a comparative analysis of the two tests shows that the Court in Favulli did not significantly depart from well-established constitutional safeguards accorded grand jury proceedings by prior decisions. The Favulli test may be interpreted as a definition of what constitutes "inherent necessity" as applied to the presence of prosecutors' assistants.

A forceful expression of "inherent necessity" was given in In Re Lebowitch:

\textsuperscript{11} See Burnstein, Grand Jury Secrecy, 22 Law in Transition 93, 94 (1962).
\textsuperscript{13} Opinion of the Justices, 232 Mass. 601, 603, 123 N.E. 100 (1919).
\textsuperscript{14} Id.
\textsuperscript{15} In re Lebowitch, 235 Mass. 357, 362, 126 N.E. 831, 832 (1920).
\textsuperscript{17} See 1967 Mass. Adv. Sh. at 345-346, 244 N.E.2d at 429.
It is only when some imperative compulsion requires it to prevent a miscarriage of justice or an utter failure of the investigation imposed by law upon the grand jury that more than one stranger at a time may be before the grand jury.18

The essential meaning of the test is that only those persons whose presence or function in the grand jury room is absolutely necessary in order to conduct the hearing are permitted to be present. This standard is best defined by its application.

In Commonwealth v. Harris,19 it was held that the mere presence of more than one witness violated the standard. The Court in Lebo-witch limited exceptions to the strict application of the test to interpreters and nurses for witnesses with appropriate disabilities, and guards for those whose custody must be assured.20 In an advisory opinion, the Supreme Judicial Court construed as unconstitutional a statute which would have permitted a policeman who had prepared the case to be present at the grand jury hearing.21 His presence was considered to be unnecessary, affording opportunities for intimidation, for prevention of full disclosure and for violation of grand jury secrecy.22 Clearly the prosecutor was given no discretion in meeting the standard in the situations presented by these cases. Inherent necessity was determined by a court applying an objective standard in deciding whether one's presence in the grand jury room was valid.

It is in giving the prosecutor discretion to use a reasonable number of assistants that the "effective presentation of evidence" standard departs from that of inherent necessity. While "discretion" connotes that the person exercising it has a range of choice, it is submitted that inherent in the new standard are limitations to the prosecutor's discretion. The discretion to use assistants is limited in each case to that number which would enable the state to present evidence effectively. The term "effectively," therefore, must be considered to be a limitation on prosecutors' discretion — as an objective standard to which the particular prosecutor's discretion can be compared. Interpreted in this manner, the "effective presentation of evidence" test is not a significant departure from "inherent necessity." That the Court did not intend to allow discretion without qualification is found in its re-affirmation of Jones v. Robbins and in the statement: "[P]rosecutors fully understand the advisibility [of] refraining from the use of an unusual number of assistants."23

Several factors warrant vesting discretion in the prosecutor. He makes the initial decision to seek an indictment. From his knowledge of the case, he alone is in the best position to judge whether assistants will be needed to present evidence effectively. The complexity and

19 231 Mass. 584, 121 N.E. 409 (1919).
22 Id. at 604, 123 N.E. at 101.
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volume of the evidence, and the care and organization of documents at the hearing, all demand that discretion be accorded the prosecution in the decision to use assistance. The development of testimony at the grand jury session may require immediate consultation between the prosecutor and his aides.

Recognition that the prosecutor must have discretion to determine the number of assistants present at grand jury hearings does not assure that such discretion will be exercised consistently within the standard set by the Favulli decision. As in every criminal process, there exists in grand jury proceedings an inherent potential for abuse which may compromise defendants' rights to an impartial and secret indictment hearing. The major issue raised by Favulli is whether allocating to the defendant the burden to prove prejudice ensures observance of the standard for presence and adequately preserves grand jury secrecy.

Prejudice may take several forms: (1) A witness before the grand jury may legitimately have decided to testify differently than when interviewed by the prosecution prior to the hearing. The presence of a number of assistants may induce the witness to retain his original testimony, for their presence would reinforce to him the importance of his evidence to the prosecution. Similarly, the prosecution could attempt to heighten the effect of a witness' testimony by having several attorneys examine him, creating an atmosphere of importance for the evidence. An essential purpose of grand jury hearings, to "ascertain truth," would be compromised. (2) The greater the number of prosecutors present, the greater the possibility of prejudice through speech or conduct, such as verbal reaction to testimony, or gestures and expressions that imply an opinion of the facts. (3) When a prosecutor appears frequently before a grand jury, his methods become familiar to them. If he normally presents the evidence alone, or with a limited number of assistants, a substantial increase in the number of assistants he uses could increase the importance of the case in the eyes of the grand jury, and possibly add inducement to indict. (4) Because the prosecutor and assistants are permitted to remain with the grand jury in its deliberations, the presence of several assistants may inhibit free discussion by the jurors of evidence presented by the prosecutors. It is submitted that in placing the burden of proof on the defendant, the Court inhibited the effective enforcement of the standard and allowed for the abuses noted above. Both logic and legal precedent demand that the prosecution bear the burden of proving adherence to a standard designed to assure grand jury independence and defendants' protection against undue influence at indictment proceedings.

Practical considerations support the position that the state should carry the burden of proof. The defendant who is neither present nor represented at an indictment hearing, may not call grand jurors

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as witnesses at trial to prove prejudice;\textsuperscript{27} the prosecution, however, may call attorneys to attest to their effectiveness at the grand jury hearing. Relative ease of proof should be an important factor in determining which side has the burden.\textsuperscript{28} Moreover, it would be extremely difficult, if not impossible, for a defendant to show an abuse of the standard when the initial determination of how many assistant prosecutors will be used is grounded on the personal judgment of the prosecutor. The defendant would have to elicit from the prosecutor the reasons why he felt he needed the number of assistants used; the defendant then would have to attack that judgment. It is manifestly more reasonable to require the prosecutor, who alone knows all the factors that went into the making of his decision, to come forward and explain why he used a particular number of prosecutors. Moreover, knowledge that proof of adherence to the standard is required would be the best method of assuring future compliance with the standard.

By placing the burden of proof on the defendant, the Court has essentially inhibited the effective enforcement of the standard and has increased the possibilities for abuse in grand jury proceedings and for prejudice to the defendant.

By placing the burden of proof on the defendant, moreover, the majority in the \textit{Favulli} case has departed from precedent in Massachusetts and has disregarded a strong trend in United States Supreme Court decisions. In \textit{Commonwealth v. Harris},\textsuperscript{29} where the presence of more than one witness before the grand jury was sufficient to invalidate the indictment, the Supreme Judicial Court held:

The contention of the Commonwealth that the burden is upon the defendant to show he was injured by action of the grand jury is unsound, because in the nature of things it would be impossible to prove the fact, if true, before the jury trial and because the wrong complained of is the violation of a substantial right. .\textsuperscript{30}

The \textit{Favulli} opinion did not expressly overrule \textit{Harris} on the question of proof. Mr. Justice Whittemore, rather, rested the Court's holding on the assumption that the prosecutor will use assistants according to the test of "effective presentation of evidence."\textsuperscript{31} It is submitted that, in light of the potential for abuse in grand jury hearings, the assumption of the majority opinion in \textit{Favulli} is incorrect. The attempt to distinguish \textit{Harris}, therefore, on the ground of the assumption, must

\begin{itemize}
  \item \textsuperscript{27} G.L., c. 277, §13 states: "Disclosure of proceedings. No grand juror shall be allowed to state or testify in any court in what manner he or any other member of the jury voted on any question before the grand jury, or what opinion was expressed by any juror relative thereto."
  \item \textsuperscript{29} 231 Mass. 584, 121 N.E. 409 (1919).
  \item \textsuperscript{30} Id. at 587, 121 N.E. at 410-411.
  \item \textsuperscript{31} 1967 Mass. Adv. Sh. at 347, 224 N.E.2d at 430.
\end{itemize}
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be considered inadequate. The holding of Harris on the burden of proof issue should have governed Favulli.

Recent decisions of the United States Supreme Court have sought to protect defendants' rights in criminal processes through the formulation of preventive rules. In each case in which the Court adopted a constitutional rule, its observance was assured by placing the burden of proving compliance with the rule on the prosecution. Miranda v. Arizona, which prescribed the conditions for valid interrogation by the police, dealt explicitly with the burden of proof:

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

In United States v. Wade, the Court, after establishing that a defendant has a right to counsel at a police lineup, placed the burden on the prosecution either to show that the courtroom identification of the defendant by the witness had an "independent source," distinct from the lineup, or that the lineup identification was harmless error. These decisions of the United States Supreme Court do not explicitly govern the Favulli decision and its burden of proof holding; it is submitted, however, that because the Supreme Judicial Court has hitherto regarded the grand jury as a protective, as well as an accusatory device, the rationale of the federal decisions offers strong support for requiring the state to prove compliance with the standard for presence at grand jury hearings. The federal decisions recognize that the criminal process is under the direction of the state, that often the defendant is at a disadvantage because he is unrepresented, and that the ease of proof should be a key factor in determining which party has the burden. All these elements are present in the grand jury issue raised by Favulli and are sound bases on which to require the

32 United States v. Wade, 388 U.S. 218 (1967), which held that a defendant is entitled to counsel at a police lineup; Miranda v. Arizona, 384 U.S. 436 (1966), which prescribed specific conditions for interrogation of suspects by local police; Gideon v. Wainwright, 372 U.S. 335 (1963), in which the Supreme Court applied the Sixth Amendment right to counsel to state criminal prosecutions; Mapp v. Ohio, 367 U.S. 643 (1961), in which the Court held that evidence seized in violation of the Fourth Amendment and Fourteenth Amendment must be excluded from state criminal proceedings.
34 Id. at 475.
36 Id. at 239-243.
state to come forward and justify its use of assistants at indictment hearings.

The standard of the majority opinion, "effective presentation of evidence," recognizes that a balance between the rights of defendants and the needs of the prosecution is essential in determining the validity of grand jury procedure. This is especially so since the purposes of the procedure are both protective and accusatory. While the standard serves these interests, the decision of the majority not to require proof of its observance by the prosecution may seriously affect its utility, to the detriment of grand jury procedure and to the prejudice of defendant. If the Court does not reconsider its position, a remedy may be found in a proposed bill providing for an independent observer to be present at grand jury hearings.\(^{37}\) Although the scope of the bill is very broad, it could be extended to permit the observer to testify, on a plea in abatement, concerning the prosecution's use of assistants.

The fact that an indictment is mandatory in serious cases renders it particularly important that the grand jury process in Massachusetts be preserved so as to function effectively and fairly. The Court should consider the standing of the grand jury in the public's mind, for while its prescribed independence is cause for respect, that respect can continue only if the public has confidence in the procedure. Confidence in the process stems from trust in the officials who direct it. The utility of the grand jury in Massachusetts will continue only if the standard of the Favulli decision, with its real limitations on the prosecution, is assured of enforcement by shifting the burden of proof to the state.

PETER W. THOMS

\(^{37}\) House No. 2295 (1966).