Chapter 12: Criminal Law and Procedure

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CHAPTER 12
Criminal Law and Procedure
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A. IDENTIFICATION

§12.1. Introduction. In recent years, the constitutional principles governing pretrial identification procedures have been the subject of significant new developments. As a result, the Supreme Judicial Court of the Commonwealth has considered a variety of identification issues in several of its recent decisions, among them three cases decided during the 1969 Survey year. To provide a sound basis for consideration of these Massachusetts decisions, the discussion which follows will be directed first toward description and analysis of four recent decisions of the United States Supreme Court which concerned this aspect of criminal procedure.

§12.2. Post-indictment lineup identifications. United States v. Wade1 and Gilbert v. California,2 two of three companion cases decided by the Supreme Court in June 1967, concerned post-indictment lineup identifications of criminal defendants. In Wade, the leading case, the defendant was arrested for an armed bank robbery. Fifteen days after counsel had been appointed to represent him, a lineup was held in the absence of and without notice to his appointed counsel. Two bank employees observed the lineup. Both identified Wade as the robber. At trial, they again identified Wade in the courtroom. The Gilbert case involved quite similar facts. Gilbert was charged with armed robbery of a savings and loan association and with the murder of a police officer in the course of the robbery. Various witnesses who identified Gilbert in the courtroom at trial had observed him earlier at a lineup conducted without notice to his appointed counsel, 16 days after his indictment.3

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§12.2. 1 388 U.S. 218 (1967).
3 The lineup was composed of Wade and five or six other prisoners. Each person wore strips of tape such as allegedly worn by the robber, and upon direction said words allegedly spoken by the robber.
4 The details of the lineup were as follows: "Some ten to thirteen prisoners were placed on a lighted stage. [More than one hundred] witnesses were assembled in a darkened portion of the room, facing the stage. . . . Each man in the lineup . . . was required to step forward into a marked circle, to turn, presenting both profiles as well as a face and back view, to walk, to put on or take off certain articles
Wade argued before the Supreme Court that the admission of the in-court identifications was constitutional error as a violation of his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to assistance of counsel. In its decision, the Court held that neither the lineup itself nor anything that Wade had been required to do in the lineup violated his Fifth Amendment privilege, relying upon the distinction drawn in Schmerber v. California between evidence of a "testimonial" nature and evidence of a "physical" nature. The Court reasoned as follows:

[T]he distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's communications in whatever form, vocal or physical, and compulsion which makes a suspect or accused the source of real or physical evidence. . . . We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. [C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. [The Fifth Amendment privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.6

In analyzing the Sixth Amendment ground, the Supreme Court defined the question presented to be whether a post-indictment lineup is a "critical stage of the prosecution" — a stage at which the presence of counsel is necessary to preserve the right of the accused to a fair

of clothing. [Each] was asked certain questions: where he was picked up, whether he owned a car, whether when arrested, he was armed, where he lived. Each was also asked to repeat certain phrases . . . that witnesses to the crimes had heard the robbers use: "Freeze, this is a stickup; this is a holdup; empty your cash drawer; this is a heist; don't anybody move."

"Either while the men were on stage, or after they were taken from it, . . . the assembled witnesses were asked if there were any that they would like to see again. . . . Several gave the numbers of men they wanted to see, including Gilbert's. While the other men were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify." Gilbert v. California, 388 U.S. at 270-271 n.2.


trial—placing particular emphasis upon effective cross-examination of prosecution witnesses as an essential element of fair trial. In addressing this question, the Court focused its analysis upon two issues: whether potential for substantial prejudice to the defendant’s right to fair trial inheres in lineup confrontations, and the likelihood that availability of counsel will help to avoid that prejudice.

With regard to the first issue, the Court concluded that pretrial confrontations compelled by the state between the accused and victims of witnesses to a crime for the purpose of eliciting identification evidence are “peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.” The Court noted the questionable character of eyewitness identification testimony generally, and gave particular emphasis to the great risk of misidentification which exists when the manner in which the suspect is presented intentionally or unintentionally contains improperly suggestive elements. The Court also pointed out that an initial identification usually fixes the testimony of the witness, and stressed the fact that it is generally very difficult to reconstruct the circumstances of a lineup at trial so that the judge or jury can weigh potentially suggestive factors against the credibility of the identification testimony. On the basis of these considerations, the Supreme Court concluded that grave potential for substantial prejudice to the defendant’s right to fair trial does inhere in pretrial lineups.

With respect to the second issue, the Court concluded that the presence of counsel would be likely to help to avert prejudice. The Court felt that misidentifications resulting from suggestive elements in lineup procedures might be prevented, and if not, the presence of counsel would in any case facilitate reconstruction at trial of the character of the unfairness, particularly through cross-examination.

Based upon this analysis, the Court held that post-indictment lineups are a “critical stage of the prosecution,” and consequently, that defendant and his counsel must be notified of an impending lineup and counsel must be present at the conduct of the lineup, absent an “intelligent waiver.” The failure to notify Wade’s counsel and his absence at the lineup thus constituted violations of the Sixth Amendment. The Court decided, however, that further inquiry at the trial court level was necessary before it could determine whether the courtroom identification evidence must be excluded. The Court

7 Id. at 228.
8 The court gave the following examples of suggestive procedures: having all participants in the lineup but the suspect be persons known to the witness; having as the other lineup participants persons grossly dissimilar in appearance from the suspect; requiring only the suspect to wear distinctive clothing allegedly worn by the criminal; presenting the suspect alone or in jail after indicating to the witness that the criminal has been caught; pointing out the suspect before or during the lineup; and having all lineup participants try on an article of clothing which fits only the suspect.
felt that the prosecution must have an opportunity to establish by clear and convincing evidence that the courtroom identifications had an "independent origin," that is, were based upon observations of the accused other than those which occurred at the lineup.

In establishing this independent origin test, the Court applied to the pretrial identification context the standard of *Wong Sun v. United States*: "Whether, 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." The Court stated that application of the *Wong Sun* test to this context requires consideration of the following factors:

- the prior opportunity to observe the alleged criminal act,
- the existence of any discrepancy between any prelineup 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, ... the lapse of time between the alleged act and the lineup identification [and] ... those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.\(^9\)

Where an independent origin cannot be established on the basis of an analysis of this kind, the in-court identification evidence must be excluded. Thus, the *Wade* case represents a marked departure from prior law, which regarded the circumstances of out-of-court identification as a matter affecting only the weight, not the admissibility, of identification testimony at trial.

The *Gilbert* case differed from *Wade* in the respect that the defendant sought to have excluded not only the courtroom identifications, but also the testimony of various witnesses that they had identified Gilbert at the pretrial lineup. The Supreme Court disposed of the courtroom identification question in the same manner as it had in *Wade*. The Court treated differently, however, the testimony regarding the pretrial lineup identifications, holding that because such testimony is "the direct result of the illegal lineup 'come at by exploitation of [the primary] illegality,'" the state is not entitled to an opportunity to demonstrate that there exists an independent origin. Such testimony is per se excluded.

In both *Wade* and *Gilbert*, the Court left open the door to legislative or administrative regulation of lineups which might eliminate the potential for suggestive practices leading to misidentification, thereby removing the basis for regarding these situations as a critical stage of the prosecution, and eliminating the need for the presence of counsel.

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\(^9\) *371 U.S. 471, 488 (1965).*

\(^10\) *United States v. Wade, 388 U.S. at 241.*

§12.3. Pre-indictment one-man identifications. The third case decided with Wade and Gilbert again involved a pretrial confrontation without counsel between a suspect and a witness. In Stovall v. Denno, however, the confrontation involved a single suspect, rather than a lineup, and took place before indictment and before appointment of counsel. The witness identified Stovall from her hospital bed as the murderer of her husband. Later, at trial, she again identified Stovall in the courtroom. On appeal to the Supreme Court, Stovall argued that the admission of the identification testimony was constitutional error under the Fifth, Sixth, and Fourteenth Amendments, because he had been without the assistance of counsel at the confrontation in the hospital room and because many circumstances of that confrontation unfairly suggested to the witness that Stovall was the man the police believed had committed the crime.

With respect to the Sixth Amendment claim, the Court held that the Wade and Gilbert decisions do not apply retroactively, and consequently, were not applicable to the Stovall case. The Court appears to have assumed implicitly that the form and timing of the confrontation—one man, rather than lineup, and before indictment, rather than after—were insufficient points of distinction from Wade to justify considering the Stovall confrontation not to have been a “critical stage of the prosecution.” These questions, however, were not explicitly considered.

In examining the Fourteenth Amendment claim, the Court stated that even though Wade and Gilbert were not applicable, Stovall would be entitled to relief if “in any event the confrontation ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.” Noting that validity of a claim that due process of law has been violated in the conduct of a pretrial confrontation depends upon the totality of the circumstances surrounding the confrontation, the Court denied Stovall relief, emphasizing that in the circumstances of the case, an immediate confrontation at the hospital was imperative.
§12.4. Identification by photograph. On March 8, 1968, the United States Supreme Court decided a fourth case, Simmons v. United States, concerning pretrial identification practices. In Simmons, unlike the three previous cases, it was photographic identification procedures which were challenged, not corporeal. Before the Supreme Court, Simmons argued that the pretrial photographic identification procedures employed in his case were “so unduly prejudicial as fatally to taint his conviction.” He did not contend that the procedures were constitutionally defective on the basis of his Sixth Amendment right to the assistance of counsel, that is, he did not argue that the photographic identifications were a “critical stage of the prosecution.”

The court stated, as it had in Stovall, that a constitutional argument of this kind must be evaluated in light of the totality of surrounding circumstances and held that convictions based upon courtroom identifications which follow pretrial identifications by photograph are to be set aside only if the photographic identification procedures employed were “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” The Court then applied this test to the facts of the Simmons case and concluded that the procedures there employed were not so defective as to constitute a denial of due process of law or to require reversal under the supervisory power of the Court.

§12.5. The central concern. In considering the constitutional standards established by the Wade, Gilbert, Stovall, and Simmons decisions, it is essential to ask what is the basic concern which has brought these cases before the Court and motivated the Court to establish such standards. In Wade, the Court elected to frame its analysis in Sixth Amendment terms. As a result, the Court’s discussion of the values to be preserved and dangers to be met in Wade reflects traditional statements of Sixth Amendment concerns. The emphasis is upon ensuring fair trial, through application of the traditional methods of right to assistance of counsel and, particularly, effective cross-examination of prosecution witnesses. Yet, it is difficult to identify any significant respect in which fair trial is endangered by pretrial identification procedures beyond the potential impact of such

§12.4. 1 590 U.S. 577 (1968).
2 The case involved a bank robbery by two unmasked men. The robbery was witnessed by five employees of the bank. These employees were shown photographs of Simmons the day after the robbery. Each was shown the photographs separately. There were apparently at least six pictures, most of them group photographs of an indeterminate number of people. Each of the employees identified Simmons from the photographs. Again at subsequent dates, some of the employees were shown various indeterminate numbers of photographs. Again all identified Simmons. At trial, the photographs were not introduced as evidence, but all five witnesses made in-court identification of Simmons.
3 Id. at 584.
4 The procedures were evaluated in the context of the circumstances of the case, which circumstances the Court felt contained elements of necessity supporting use of the procedures employed.
procedures upon the reliability of identification evidence. At no point does the Court identify any relationship between fair trial and pretrial identification practices independent of the reliability concern.

That concern about reliability is well-founded. Human capabilities to accurately observe, recall, and articulate recollection of occurrences are quite limited, particularly when an individual is subjected to the kind of conditions of excitement and emotional stress which frequently characterize criminal events. Moreover, as the Court emphasizes, pretrial identifications, which tend to fix courtroom identifications, may be obtained in circumstances containing suggestive elements which greatly increase the risk of misidentification. Concern about the reliability of identification evidence is further heightened by the fact that it is evidence of a kind that can have a critical impact upon the result of a trial. Thus, the central concern which the Court ought to have, and in most respects did focus upon, is preservation of the basic reliability of the dispositional process by ensuring the accuracy of identification evidence.

The possibility that identification testimony may of itself determine the result of trial is an indication of the importance of identification evidence to effective law enforcement, as well as to the defendant's right to fair trial. It is not uncommon for identification testimony to be the principal, or even sole, source of evidence of guilt available to the prosecution, however diligent and sophisticated was the investigation conducted. The character of constitutional constraints upon the use of identification evidence should reflect an awareness of the critical importance of such testimony in these circumstances.

§12.6. The presence of counsel requirement. In responding to the reliability concern, the Court has utilized two devices: the presence of counsel requirement and the exclusionary rule. The Court's constitutional prescriptions in the pretrial identification area can best be understood through an examination of these tools, the contexts in which they are applied, and various problems associated with their application.

Wade requires the presence of counsel, absent an intelligent waiver, at post-indictment lineups occurring after June 12, 1967. Stovall had determined that this requirement does not apply to pretrial identifications occurring prior to that date. It is not clear whether counsel

§12.5. 1 While the danger of suggestive identification procedures is a real concern, it is but one aspect of the problem of ensuring the reliability of identification evidence. The Court gives this aspect more emphasis than it deserves, particularly in the standards for application of the exclusionary rule established in Stovall and Simmons. This emphasis may derive from the choice of the Sixth Amendment in Wade, since suggestive procedures, unlike many factors threatening reliability, can arguably be effectively dealt with by providing assistance of counsel. This emphasis is then carried over from Wade into the decisions which are based upon the due process clause, rather than the Sixth Amendment.
is required at pre-indictment lineups, or at identification confrontations not in the form of a lineup, although there is some suggestion in *Stovall* that these are not crucial points of distinction from *Wade*. It would seem, however, that certain corporeal identifications ought to be valid despite the absence of counsel. An example is the unplanned confrontation which occurs at the scene of the crime or nearby, within a short time after the criminal event, when memory is fresh and the costs of an erroneous arrest most avoidable.

In requiring the presence of counsel at certain pretrial confrontations, the Court has not specified what the role of counsel is to be. It is not clear, for example, what "presence" means. Must counsel be in the room within which the confrontation is taking place? Or is it sufficient that counsel be in a position to observe the confrontation? Precisely what may counsel do if he identifies suggestive elements in the procedures being utilized? Is he simply to observe and record the proceedings in order to be able more effectively to discredit the identification testimony at trial? May he bring suggestive elements to the attention of those conducting the lineup? May he more actively intervene? The indication in *Wade* that presence of counsel is expected to prevent misidentification suggests that at the least, counsel is expected to bring such elements to the attention of those conducting the lineup. The Court might, on the other hand, be assuming that the mere presence of counsel will deter the use of suggestive procedures. In any case, it is clear that much uncertainty remains in this area.

It should also be noted that the presence of counsel requirement cannot prevent certain types of suggestive practices. The *Wade* case itself provides an example. The only suggestive element which the Court identified in the circumstances surrounding the *Wade* lineup occurred prior to the lineup. The courtroom in which the witnesses were seated prior to the lineup faced a hallway visible through an open door. Several of the witnesses who identified Wade at the lineup testified that they had seen him before the lineup in the hall in the custody of an FBI agent. If the presence of counsel requirement means presence at the lineup itself, this suggestive element would not have been identified or eliminated. Many such examples exist, e.g., statements to witnesses prior to the lineup that the police have evidence that one of the participants is the criminal, or statements giving information which will enable the witnesses to identify from among the participants the individual the police believe committed the crime.

In general, the presence of counsel requirement, the principal instrument of the Sixth Amendment, is a rather cumbersome and indirect method of ensuring reliability, and, as suggested above, is not necessarily an effective method. It should also be noted that in the pretrial identification area, unlike that of confessions, there exists little potential for the kind of directly abusive practices which might
provide a basis independent of the reliability concern for requiring the presence of an observer and source of expert advice.

§12.7. The exclusionary rule. The second tool utilized by the Court, the exclusionary rule, is to be applied in a variety of circumstances. _Wade_ requires that in the case of post-indictment lineups without counsel occurring after June 12, 1967, testimony about lineup identifications is to be excluded per se, and subsequent courtroom identifications are to be excluded unless the prosecution can establish by clear and convincing evidence that they had an "independent origin." _Stovall_ requires the exclusion of identification evidence where a pretrial confrontation has occurred prior to June 12, 1967, if the confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law."1 Similarly, _Simmons_ requires exclusion where photographic identification procedures have been employed which were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."2 The Court has not had occasion to decide whether there are certain pretrial confrontations occurring after June 12, 1967, which are not subject to the Sixth Amendment presence of counsel requirement, and if so, what standard applies to resulting identification evidence. A due process standard parallel to that of _Stovall_ and _Simmons_ would seem to be applicable. Since the Fifth Amendment approach was rejected in _Wade_, no appropriate alternative constitutional provision exists.

Various problems are associated with the Court's use of the exclusionary rule in the pretrial identification context. Many involve the standards which determine when the rule is to be applied. In examining these standards, it is important to recognize that different considerations support application of the rule to different constitutional and factual contexts. In some types of cases, the principal basis of application of the rule relates to its use as a sanction. The rule is applied either to deter an unconstitutional law enforcement practice, or to enforce a constitutional requirement that some affirmative action be taken. In other cases, it is concern about the reliability of the evidence excluded which provides the primary basis for application of the rule.

Most cases in which evidence is excluded as the product of an unlawful search and seizure are examples of use of the exclusionary rule solely as a sanction. The rule is applied in order to deter unconstitutional searches. The exclusion does not relate to any general concern about the reliability of evidence yielded by such searches. In those

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1 _Stovall_ v. _Denno_, 388 U.S. 293, 302 (1967).
2 _Simmons_ v. _United States_, 390 U.S. 377, 384 (1968). Although it seems clear that the Court intends that the exclusionary rule be utilized in the situations specified in _Stovall_ and _Simmons_, the Court does not so indicate specifically. Rather, it simply refers to "relief" (_Stovall_), "convictions . . . set aside" and "reversal" (_Simmons_).
cases in which evidence is excluded as the fruit of an unlawful arrest, deterrence of an unconstitutional law enforcement practice is again a purpose supporting application of the rule. However, concern about the trustworthiness of the evidence excluded is an additional consideration in certain unlawful arrest cases. An example is the case of inculpatory statements of the accused which immediately follow the arrest.

In the custodial interrogation cases, the full range of considerations is present — deterrence of the use of practices designed to coerce confessions, enforcement of affirmative requirements, including presence of counsel and concern about the reliability of confessions resulting from custodial interrogation. Wade reflects the same full range of concerns. The exclusionary rule is applied to deter the use of suggestive identification procedures, to enforce the affirmative presence of counsel requirement, and to exclude identification evidence of doubtful reliability. In Stovall and Simmons, no explicit affirmative requirements are involved, and consequently deterrence and concern about reliability provide the primary basis for application of the rule. It is important to emphasize that in all these pretrial identification cases, it is the reliability of the evidence excluded which is the core concern. Unlike the Fourth and Fifth Amendment cases, deterrence or enforcement of certain practices is not a sufficient independent basis for application of the rule. These practices are of concern almost solely because of their potential effect upon reliability.

Sensible use of the exclusionary rule requires proper standards for its application, and if the central concern is the reliability of evidence, then those standards should directly and explicitly be related to reliability. The standards established by the Supreme Court in its judicial decisions, and in the case of the “independent origin” rule, are not clearly related to the reliability concern.

In Wade, the Court made its first and perhaps least satisfactory statement of standards for application of the rule. The Wade test, composed of three elements, determines whether courtroom identifications are to be excluded when preceded by a post-indictment lineup identification without counsel. The first element of the test is suggested by the words with which the Court describes the determination to be made — whether the courtroom identification testimony had an “independent origin.” The second element is the Court’s reference to the standard established in the Wong Sun case. That standard requires a determination whether the courtroom identification evidence was acquired “by means sufficiently distinguishable to be purged of the primary taint.” Third, a list of factors are given which require consideration when the Wong Sun standard is applied to the identification testimony context.

In what sense might we look for an origin for the courtroom testimony which is “independent?” The identification at trial will never

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be truly independent of — i.e., wholly unaffected by — a prior identification. Even were this not so, how would one go about examining the question of independence, and why would one wish to do so? The Wong Sun standard presents parallel problems. How and why would one determine whether courtroom identification testimony has been acquired "by means sufficiently distinguishable to be purged of the primary taint?" The metaphorical language of Wong Sun further obscures the nature of the determination to be made.

These difficulties derive from the fact that the Wade analysis is based upon the Sixth Amendment. This leads the Court to think of the exclusionary rule in terms of its role as a sanction. The rule is thought of as a mechanism for enforcing the presence of counsel requirement. Thus, the determination to be made is said to be whether the evidence has been "tainted" by its relationship to a lineup conducted without compliance with the presence of counsel requirement — or, conversely, whether it is of an "independent," i.e., untainted, origin. But the presence of counsel requirement is itself principally a mechanism for ensuring the reliability of identification evidence. Reliability is the central concern, and this consideration — not some other — should be the basis of the standards established for application of the exclusionary rule.

An examination of the factors which the Court states require consideration when the Wong Sun standard is applied to the context of identification evidence suggests that the Court actually intends reliability to be the question addressed. Thus, the use of words like "independent," "purged," and "taint" is misleading. Moreover, a list of factors alone cannot provide a standard for decision. The Wade "independent origin test" is in fact no more than a requirement that case-by-case judgments be made, after examination of certain factors, whether to exclude courtroom identification testimony.

The standards for application of the exclusionary rule established in the Stovall and Simmons decisions, like those established in Wade, are not wholly satisfactory. In Stovall and Simmons, the constitutional analysis is based upon the due process clause of the Fourteenth Amendment rather than upon the Sixth Amendment. In Stovall, the Court recognized denial of due process of law as an appropriate basis for relief if a partial confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." In Simmons, the Court utilizes a

4 These factors are as follows: "... 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..." United States v. Wade, 388 U.S. 218, 241 (1967).

5 Citing a single decision of the Fourth Circuit Court of Appeals, Palmer v.
similar verbal formulation in establishing the standard for application of the exclusionary rule: "[c]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Court specifically notes that this standard "accords with our resolution of a similar issue in Stovall v. Denno."\(^7\)

The Stovall and Simmons standards differ in two respects. "Unnecessarily suggestive" in Stovall becomes "impermissibly suggestive" in Simmons, despite the fact that the Court specifically discusses elements of necessity in the circumstances of the Simmons case, as it did in Stovall. It is not clear in any case what "impermissibly" means in this context. The second difference between the Stovall and Simmons standards, unlike the first, improves somewhat the clarity of the standard. "So . . . conducive to irreparable mistaken identification that [the defendant] was denied due process of law" in Stovall, becomes "so . . . suggestive as to give rise to a very substantial likelihood of irreparable misidentification" in Simmons. "Very substantial likelihood" at least gives some measure of the degree of suggestiveness necessary to require application of the exclusionary rule.

The Stovall and Simmons standards are more satisfactory than the independent origin rule of the Wade case, because they speak directly in terms of the primary concern — reliability. Yet they focus upon just one element of reliability, the presence of suggestive procedures, and still provide little more than points of reference with respect to which one must consider the various factors discussed by the Court in reaching its decision. They are not adequate standards. Mr. Justice Black, dissenting in Stovall, commented upon this point as follows:

\[T\]he Court goes too far in holding that the courts can look at the particular circumstances of each identification lineup to determine at large whether they are too "suggestive and conducive to irreparable mistaken identification" to be constitutional. The result is to freeze as constitutional or as unconstitutional the circumstances of each case, giving the States and the Federal Government no permanent constitutional standards.\(^8\)

Peyton, 359 F.2d 199 (1966), the Court states that this is a "recognized ground of attack upon a conviction independent of any right to counsel claim." Although Palmer does rely upon the due process clause, the decision contains no verbal formulation comparable to the Stovall standard. The only related statements of the court of appeals were the following: "[The defendant] was deprived of the most elementary safeguards of the law"; "such a procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land"; "A state may not rely in a criminal prosecution upon . . . an identification secured by a process in which the search for truth is made secondary to the quest for a conviction"; and "We conclude that the entire atmosphere surrounding the identification was a violation of due process."

\(^6\) Simmons v. United States, 390 U.S. at 384.  
\(^7\) Ibid.  
Without proper standards for decision, there is no reason to expect various trial and appellate courts to reach consistent results in comparable cases.

Of greater concern than the difficulties associated with applying the several standards developed by the Court is the Court's failure to develop a single, systematic statement of standards, applicable to all pretrial identification contexts, and directly related to the principal concerns — reliability of evidence and effective law enforcement. Had the Court not chosen to rely upon the Sixth Amendment in *Wade*, standards for decision in this area could have been developed with a greater degree of consistency. Instead, two different constitutional provisions — the Sixth Amendment and the due process clause — and a range of different standards must now be applied to factual contexts which are basically the same, in order to preserve essentially the same values and to avoid the same dangers.

The constitutional aspects of corporeal confrontations are essentially identical to those of photographic identifications; the constitutional aspects of a post-indictment lineup are essentially the same as those of a street confrontation. In each case, the concern is reliability of subsequent identification testimony. In each case, that concern is based upon human limitations and the danger of suggestive practices. In each case, the principal counterbalancing concern — the importance of identification testimony to effective law enforcement — is identical.

The applicable constitutional analysis should be equally consistent. It is not, primarily, because the Sixth Amendment basis of *Wade* is obviously inapplicable to certain other pretrial identification contexts. If the identification technique utilized does not require the defendant's physical presence, e.g., photographic identification or identification by composite sketch, it is difficult to see how the defendant's right to counsel can provide an appropriate and effective method of ensuring reliability. In addition, there is clearly some point at which it is too early in the criminal process to require the presence of counsel. Yet an unplanned street confrontation immediately following the commission of a crime presents essentially the same issues and problems as does a post-indictment lineup.

Once the Court framed the *Wade* analysis in Sixth Amendment terms, it was necessary to draw artificial lines of distinction among the various identification cases, based upon the identification techniques utilized and the stage reached in the criminal process, then to declare the Sixth Amendment applicable to some, the due process clause to others. Thus emerges "critical stage of the prosecution" as an important, but essentially artificial and meaningless line of distinction. Unfortunately, the Court compounds these difficulties in *Stovall* and *Simmons* by phrasing its standards in somewhat different terms even where the same constitutional provision is applicable.

Despite these difficulties, it is possible to develop a reasonably systematic statement of the types of factors which ought to be con-
sidered in determining whether to apply the exclusionary rule, by collecting and categorizing the factors discussed by the Court in various decisions. The Court discusses two types of factors: those related to assessing the reliability of the identification testimony potentially subject to exclusion, and those related to the necessity of the law enforcement action taken.

The Court discusses three kinds of factors related to reliability. First, the circumstances or conditions of observation of the criminal event are considered, e.g., lighting conditions, the length of the period of observation, and the presence or absence of apparel which might obscure or distort appearance. Second, the Court discusses various circumstances of the challenged pretrial identification, e.g., the time lapse between the criminal event and the identification, and particularly, the degree to which the identification procedures employed were suggestive. Third, the Court considers various collateral indicators of the accuracy of the identification, e.g., the extent to which cross-examination revealed witness uncertainty, the speed and definiteness of the pretrial identification, and the degree to which various witness descriptions and identifications were consistent.

Unfortunately, the Supreme Court has not identified and drawn together at one point, as it should, all of these factors related to reliability, categorized them, and required that they be systematically reviewed when decisions are made regarding the admissibility of identification evidence. Nor has the Court provided a single statement of the degree to which assessment of these factors must substantiate the reliability of the identification testimony before it may be admitted. Such a statement should be applicable to identification evidence of all types, and should be directed toward all of the indicators of reliability—not toward a single indicator such as suggestiveness.

It is important to note that the existing standards for exclusion contain burdens of proof which differ in weight and direction. The Wade independent origin rule places the burden upon the prosecution to establish by clear and convincing evidence that the courtroom identification had an independent origin. Exclusion can be avoided only if this heavy burden is met. In contrast, the Simmons standard places an equally heavy burden upon the defense, which must prove that the identification procedures employed were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Stovall standard requires a similar showing.

Since the central question at issue in each case is reliability, it can be said that in a sense, the Wade standard—which requires exclusion unless a heavy burden is met—including a presumption against reliability, and the Stovall and Simmons standards—which impose a

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9 An important group of factors of this type not discussed by the Court are those related to the character or quality of the observer, i.e., the degree to which he appears to possess the physical requisites and skills of observation and memory as well as good judgment.
heavy burden to achieve exclusion — include a presumption toward reliability. The difference in this respect between the Wade case and the Stovall and Simmons cases results from the fact that the exclusionary rule is used in Wade, but not in Stovall or Simmons, to enforce the affirmative presence of counsel requirement, not simply to prevent admission of potentially unreliable evidence.

The result is that, as between Wade and Stovall, what amounts to contrary presumptions about the reliability of evidence potentially subject to exclusion may be applied to cases involving substantially identical factual circumstances. Perhaps worse, as between Wade and Simmons, the result may be that in cases where reliability is more suspect — photographic identification cases — the presumption is toward reliability; and in cases where the identification evidence is less suspect — corporeal identification cases — the presumption is against reliability. It is difficult to state with much confidence that corporeal identifications are in fact inherently more reliable, but it is interesting to note that the Court itself takes this position in the Simmons case, commenting as follows: “The reliability of the identification procedure could have been increased by . . . [displaying Simmons] to the other eyewitnesses in a lineup, thus permitting the photographic identification to be supplemented by a corporeal identification, which is normally more accurate.”

Ideally, standards for assessing reliability should be further refined, by identifying, for example, factors or types of factors which ought to be given greater or lesser weight. Unfortunately, there is not any firm basis upon which it might be said, for example, that collateral indicators of reliability ought to be given lesser, or greater, weight than circumstances of observation of the criminal event; or, e.g., that the presence of no other persons of the defendant’s age in a lineup ought to be given greater, or lesser, weight than the degree of certainty manifested by the witness in identifying the defendant.

The Court has done less to articulate standards related to the counterbalancing concern — the importance of identification testimony to effective law enforcement — than it has with reliability-related standards. Again, explicit standards are required, standards which directly relate to the relevant concern, and which are capable of consistent application to any identification evidence context. The only factor discussed by the Supreme Court which relates to the law enforcement concern is the necessity or imperativeness criterion which appears in Stovall and Simmons. This criterion seems to be reducible to an assessment of the importance to the investigation and reasonableness of utilizing the particular identification technique used, at the time and in the manner it was employed.

The types of considerations properly a part of this criterion are not particularly clear, however. Necessity was the sole factor emphasized in the Stovall case, and the elements of necessity present there are

10 Simmons v. United States, 390 U.S. at 386 n.6.
clear. There was only one eyewitness. She had been stabbed at about midnight on August 23. She had major surgery on August 24. It was not known on August 25, the day of the identification, whether or how long she might continue to live. In Simmons, the specific reference to necessity was eliminated from the Court's standard, and the elements of necessity in the circumstances of the case were much less apparent. Yet the Court again gave them emphasis. The principal elements of necessity identified by the Court in Simmons were the seriousness of the crime committed, the fact that the criminals were still at large, and the fact that the law enforcement officials had some clues, but no substantial evidence, indicating who had committed the crime.

The seriousness of the crime committed might be considered as an additional, separate standard for measuring the law enforcement concern. The difficulty with this potential criterion is that its use would require an explicit determination that courts are to be less concerned about the reliability of evidence in those cases which are of greatest importance, both to the defendant and to society.

Another possible direction for further refinement of standards related to the law enforcement concern is discrimination among individual cases or among types of crime on the basis of the degree to which alternative kinds of evidence are potentially available. Where the crime or category of crime is such that evidence other than identification evidence, e.g., physical evidence, confessions, or testimony of informants, is not available, constraints upon admission of identification evidence might be relaxed to some degree. The difficulty with this approach lies in the incentive it might provide to law enforcement officials not to pursue diligently alternative sources of evidence.

Another potential criterion, which would be applicable where suggestive elements were present in identification procedures employed, is the intent, or good faith, of the officials involved. Tighter constraints might be imposed where suggestive elements were deliberately introduced, greater tolerance given where no intent to influence the witness was present. One problem with this approach lies in the difficulty of proving intent. In addition, it should be noted that this criterion bears no relationship to reliability. If an assailant were Caucasian, and the lineup were composed entirely of Negroes, with the exception of the person identified, it should make no significant difference that no intent to influence the witness was present. Although unrelated to reliability, an intent criterion could, however, serve the purpose of deterring the use of suggestive procedures. This rationale would support its use only to create a presumption against admissibility when good faith was absent, however, not to create a presumption in favor of admissibility when good faith was present.

Many of the difficulties suggested throughout the discussion above derive from the decision in Wade, consistent with recent decisions in related areas of criminal procedure, to extend the application of the Sixth Amendment into a pretrial context. Many of these difficulties could be overcome if, instead, all pretrial identification cases were
analyzed within the framework of carefully developed standards tied to the due process clause. Yet it is clear that further refinement of standards for decision in this area is itself not a particularly promising approach. This may be an area of the law in which wholly satisfactory solutions cannot be achieved through judicial decision-making, but rather require legislative or administrative change. Clearly, many aspects of the problem, e.g., the dangers of suggestive procedures, could be approached in a much simpler and more straightforward manner through legislative or administrative regulation. In any case, until more satisfactory approaches—judicial or otherwise—are adopted, it is essential that existing legal standards be applied in a manner which is as responsive as possible to the true character of the matters at issue.

§12.8. Massachusetts case law. In 1968 the Supreme Judicial Court decided two cases analagous to *Stovall v. Denno*. Like *Stovall*, each involved a pretrial confrontation without counsel, not in the form of a lineup, occurring prior to June 12, 1967. As the result of the *Stovall* holding, the Sixth Amendment analysis and presence of counsel requirement of *Wade* are not applicable to these two Massachusetts cases. In each case, the defendant argued that a Fourteenth Amendment due process violation of the kind discussed in *Stovall* had occurred.

In the first case, *Commonwealth v. Blackburn*¹ the defendant was apprehended within an hour after an armed robbery. The same evening, the defendant was identified by two victims of the robbery at a police station, without use of a lineup and without counsel. The Supreme Judicial Court held that this did not constitute a violation of the defendant's Fourteenth Amendment rights, finding that there existed "no basis for concluding that the 'confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification' that the defendant was denied due process of law."²

In support of this conclusion, the Court cited two considerations, the fact that the two witnesses had full opportunity to view the three robbers during the robbery earlier that evening, and the fact that the "prompt capture in the carefully observed and described getaway car of three men (answering the general description given by the victims) makes it unlikely that those captured were other then the robbers. In the circumstances, identification was only a confirmation of strong evidence implicating these men."³ The latter consideration has little relevance to the *Stovall* standard; and unless all evidence of guilt is to be considered collateral indication of the reliability of identification evidence, this consideration would not appear to be among those considered relevant to the question of exclusion by the Supreme Court of the United States.

² Id. at 631, 237 N.E.2d at 37.
³ Ibid.
The second case of the Stovall variety decided by the Supreme Judicial Court in 1968, Commonwealth v. Sullivan, involved the identification testimony of two witnesses to an armed robbery and murder. The first witness, Coleman, was carrying a bag of money along a corridor when a man, later identified as the defendant Reissfelder, came out of a room with a gun, grabbed the bag, and demanded the money. Coleman struggled with the man, then released the bag. The robber called to a companion, later identified as the defendant Sullivan, in a room nearby. The companion came out into the hall with a gun and ordered Coleman into the room. The corridor was very dark. There was a light on in the room. Both robbers wore dark glasses; one wore a cap. Coleman observed the robber with whom he had struggled for up to thirty-five seconds. The second witness, LaRusso, observed the two robbers run past him after the robbery. One told him not to move. He observed both about five seconds.

On the day following the robbery, Coleman observed Reissfelder in a cell with several other men at a district courthouse, and "positively identified" him as the man with whom he had struggled. Coleman apparently identified Reissfelder again later that day at police headquarters. Reissfelder was apparently without counsel at the time of both identifications. No lineup was involved. Coleman's subsequent courtroom identification of Reissfelder was challenged on the basis of the Fourteenth Amendment. The Supreme Judicial Court denied relief, finding "no basis for concluding that 'the confrontation . . . was . . . unnecessarily suggestive or conducive to irreparable mistaken identification.'" In support of this conclusion, the Court noted the following factors. Coleman had been face to face with the robber on the day preceding the pretrial identification. The pretrial identification was "prompt and certain." After identifying Reissfelder, Coleman was shown many photographs by the police in an effort to find the other robber, but identified none of those pictured.

LaRusso identified both Reissfelder and Sullivan in the courtroom at trial. He had identified Reissfelder at police headquarters the day after the robbery. He saw eight or nine photographs of Reissfelder that day, either before or after the identification. The Supreme Judicial Court concluded that LaRusso's identification testimony involved no denial of due process, noting that there was "no basis for concluding that the police sought to influence the witness or wanted other than his best judgment as to whether Reissfelder was one of the men LaRusso had seen." This statement seems to imply that intentional police suggestion is required to show a denial of due process. It should be noted that the identification decisions of the United States Supreme Court focus upon suggestive elements in the circumstances of an.

5 Id. at 1085, 239 N.E.2d at 9.
6 Coleman also observed another man at police headquarters, and told the police that he was not the other robber.
identification, not upon intention; and there may have been a significant suggestive element present here, depending upon when and in what circumstances LaRusso viewed the photographs of Reissfelder.

A third case decided by the Supreme Judicial Court in 1968, Commonwealth v. Bumpus, involved a pretrial confrontation, not in the form of a lineup, occurring after June 12, 1967. The identifying witness, while in bed and feigning sleep, observed an intruder walk about his room for about 20 minutes. After the man left, the witness called the police, who arrived in ten minutes. A police officer obtained a description from the witness. He then went out and within half an hour arrested Bumpus, who fit the description and did not give responsive answers, near the scene of the crime. Bumpus was taken back to the scene, where he was observed by the witness. In the courtroom at trial, the witness identified Bumpus as the intruder. The trial judge refused to hold a voir dire to determine what part the pretrial confrontation played in the courtroom identification.

Before the Supreme Judicial Court, the defendant argued that it was error to admit the courtroom identification without a voir dire to establish an independent origin, relying upon the Wade case. The Supreme Judicial Court refused to apply the Wade holding to the facts of Bumpus, commenting that "reasonable confrontations of this type, in the course of (or immediately following) a criminal episode, seem to us to be wholly different from post-indictment confrontations (such as those in the Wade and Gilbert cases) in serious crimes, after a significant interval of time, and in the absence of already appointed counsel." The Court concluded that a voir dire was not required, noting that the trial judge had "allowed ample investigation of the basis of the in-court identification and full disclosure of all matters going to its weight."10

The Court also concluded, after examining the totality of the circumstances, that there had been "no violation, intentional or otherwise, of due process of law,"11 noting that although the confrontation in Bumpus was less immediately imperative than that in Stovall, it was "entirely reasonable" for the officer to return to the scene of the crime with Bumpus to seek assistance from fellow officers, to get transportation to the police station, and possibly to determine whether the witness thought Bumpus was the intruder. Again, as in Sullivan, the Court noted that there was "no indication in the record of any police desire or intention to deal with Bumpus unfairly."12

During the 1969 Survey year, the Supreme Judicial Court decided two cases involving application of the Wade decision. The first, Commonwealth v. Robinson, involved an assault and robbery. The in-
incident occurred at night, partly on a sidewalk and street lighted by mercury vapor lamps and partly in some bushes nearby. The witness "was clearly able to observe his [attacker's] features for a period of about a minute" at arm's length. About two weeks later, the defendant was apprehended with two other persons for an offense not related to the attack. One of the others apprehended was found to have articles taken from the witness. The witness identified the defendant in a group of about six people at the police station. Although he was told that the man he had identified was not the person upon whose person the articles had been found, he still identified him as the attacker. At the time of the identification, no formal charge had been lodged related to the attack. The defendant was without counsel.

The trial judge held that the police station identification was not admissible, but that the witness's courtroom identification had an independent origin, and was therefore admissible. The Supreme Judicial Court affirmed, noting the following factors:

[The witness] was patently of high intelligence. He faced his assailant at arm's length for a minute under circumstances which would tend to etch his impressions on observation on his memory. He gathered these impressions in an adequately lighted area. He described with some accuracy to the police thereafter the person of his attacker and the weapon he employed. That his view of the defendant two weeks later in the police station "enhanced" his ability to identify the defendant does not detract from the positive identification made in court. [He] made it most clear that his identification in court was based not on the confrontation in the police station but upon [the criminal event]. In fact, it would be difficult to conjure up circumstances where such an identification was more validly admitted. [The witness] had distinguished at the police station between the individual who had been taken with [his] articles in his possession and the defendant.14

The Supreme Judicial Court reached a similar result in the second case, Commonwealth v. Cooper.15 Cooper involved an armed robbery of a "reasonably well-lighted" store on March 4, 1968. Two witnesses observed the robbers at close range. The robber who was later identified as the defendant Cooper apparently had distinctive facial characteristics—"a pock-marked face and pulled-in cheeks." The following day, one witness looked at five or six boxes of police photographs without identifying anyone, then, with no hesitation, identified a single photograph of Cooper brought in separately. On March 20, Cooper was arrested for an unrelated crime. At the police station, Cooper was observed through a one-way glass window by first one, then the other witness to the robbery. He was among 12 to 20 men in all manner of dress, including police officers, milling around in a

14 Id. at 585, 246 N.E.2d at 670-671.
room. Both witnesses identified Cooper. Cooper was later observed alone by the two witnesses together. Cooper was indicted on April 5. At the time of the identification, he was without counsel. He had been advised of his rights under the *Miranda* decision, but not under *Wade*. At trial, both witnesses again identified Cooper.

Before the Supreme Judicial Court, the defendant argued that the identification testimony should have been excluded, relying upon *Wade*. The Court noted that *Cooper* was neither *Wade*, nor *Bumpus*, but rather a case falling between the two. *Wade* involved a lineup after indictment and appointment of counsel; *Bumpus*, a prompt field confrontation between a suspect and a witness; and *Cooper*, a pre-indictment station house confrontation between witnesses and a suspect in custody on an unrelated charge. Noting that *Wade* was not directly applicable to the facts of *Cooper*, the Court nevertheless concluded that the confrontation was a “critical stage,” because it determined whether there would be a prosecution. Consequently, Cooper was entitled to notice and presence of counsel as required by *Wade*.

The Court then applied the independent origin test to the courtroom identification evidence, and concluded that it was properly admitted, noting the following points: wide-ranging cross-examination of the witnesses was permitted at trial and actively participated in by the judge; both witnesses “had more than adequate opportunity to observe the criminals and had ample capacity to remember what they observed”; “one witness had made an unequivocal photographic identification, after failing to identify any photograph contained in five or six boxes of pictures”; there was “no confusion of identity prior to the observation at the station house”; and there was no failure to identify the defendant at any time.

In 1968 the Supreme Judicial Court decided *Commonwealth v. Nassar*, a case like *Simmons v. United States*, involving a photographic identification. On September 29, 1964, a Mrs. Buote and her daughter witnessed a murder. After committing the murder, the assailant walked up to the door of the automobile in which they were sitting, pointed a pistol at Mrs. Buote and pulled the trigger. The gun did not fire. He banged on the window, then stood for a moment. Mrs. Buote got down on the floor of the automobile; her daughter crouched on the seat. When they arose, the assailant had left.

On the night of the murder, each was shown a group of photographs, not including one of the defendant Nassar. Neither identified any of those pictured. The following day, Mrs. Buote assisted the police in preparing a composite sketch of the murderer. The sketch was later shown to her daughter, who had not been present when it was prepared, then published in the newspapers. On the night of September 30-October 1, a police officer from another department saw the sketch in the newspaper. Without informing anyone assigned to the case,
he selected a photograph of Nassar, took it to the Buote home on the morning of October 1 and showed it first to Mrs. Buote, then separately to her daughter. Both identified Nassar as the murderer. Later the same day, other police officers showed Mrs. Buote and her daughter, separately, a number of photographs, including one of Nassar. Both identified Nassar’s photograph. Both later identified Nassar in the courtroom at trial.

The Supreme Judicial Court concluded that “there was nothing in the process of identification adopted . . . which was unreasonable in the light of the whole situation or was conducive to irreparable mistaken identification,” and held that the courtroom identifications were properly received in evidence. The Court noted that the witnesses had a “good, recent, close look at the murderer, in circumstances which neither of them was likely to forget,” that Nassar’s photographs showed his face to be one likely to be remembered, that the “full facts concerning the identifications were before the jury for whatever bearing they might have upon the weight to be given to the Buotes’ testimony,” and that the “record does not indicate to us that there was any effort . . . to influence the Buotes improperly to make an identification.” The latter two considerations are not among those identified by the Supreme Court as relevant to the determination whether to admit identification evidence of this type. Again, presence of suggestion, not intention to influence, is the criterion. Here, a photograph of a single individual was presented to witnesses by two police officers at 7 a.m. This procedure contains suggestion to a significant degree.

During the 1969 Survey year, the Supreme Judicial Court decided a second case involving photographic identification procedures, Commonwealth v. Geraway. There the defendant was convicted of a murder committed April 24, 1966. Two witnesses identified him in the courtroom as the driver of an automobile seen leaving the scene of the crime. Both witnesses were driving automobiles moving toward the crime scene. When the assailant’s automobile approached that of one witness, Lashus, it was more than half on the wrong side of the road. The other witness, Raycraft, had slowed somewhat, thinking an occupant of the approaching car was a person she knew, and looked at the driver, who turned and smiled at her. She had only a few seconds to observe the driver.

In the winter of 1966-1967, Raycraft was shown about eight to ten photographs of young men about the same age. She was not told that a suspect was among those pictured. She selected three pictures, each one a photograph of the defendant. The same winter, Lashus was shown a number of pictures of individual young males, including two photographs of Geraway and two photographs of another person. Of

17 It is not clear whether this was the same photograph shown to the Buotes earlier, although that photograph had been given to the officers who later presented the group of pictures.
19 Id. at 692, 237 N.E.2d at 47.
perhaps 15 or 16 photographs, only seven were photographs of big men. Of these, only two had full heads of hair. The man Lashus had seen was big and heavy set, with dark, bushy hair. Lashus selected about five photographs, then identified one as looking like the man he had seen. Both witnesses identified Geraway in the courtroom at trial.

The Supreme Judicial Court held that the identification testimony was properly admitted, finding "no sufficient reason" for regarding the photographic identification procedures employed as "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Court noted that Raycraft was a "precise, conscientious witness," that both witnesses were subjected to "searching cross-examination," that the witnesses’ prior statements were scrutinized by the trial judge for inconsistencies, and that there was "no unreasonable selection of pictures for Lashus to examine." The Court again stated, as it had in Nassar, that "to the extent that the testimony may have had infirmities, that was a matter of the weight to be given to the testimony by the jury." It should be noted that in this case, as in Nassar, the identification procedures employed contained suggestive elements. At least three of the eight or ten photographs shown to Raycraft were pictures of Geraway. Many of the photographs shown to Lashus were pictures of individuals not resembling the man he had seen. In only two cases were more than one photograph of an individual included in the group. One was Geraway. Lashus only identified one of the two pictures of Geraway. Finally, it should be noted that in the case of both witnesses, a very substantial period of time passed — about eight months — between observation at the crime scene and examination of the photographs.

Examination of the Massachusetts decisions discussed above suggests the following general comments. In setting out the basis for these decisions, the Supreme Judicial Court for the most part has focused upon considerations directly related to the concerns central to this area of the law. In deciding whether identification evidence had been properly admitted or excluded, the Supreme Judicial Court discussed in each case a range of factors related to the reliability of the evidence in question; conditions of observation, circumstances of the pretrial confrontation, and various collateral indicators of reliability.

It should be noted, however, that the Court did not systematically explore the full range of factors bearing upon reliability. Rather, the Court tended to focus upon a relatively small number of such factors, and the kinds emphasized varied from case to case. In addition, the Court often did not take note of suggestive aspects of law enforce-

21 Id. at 379, 245 N.E.2d at 428.
22 Id. at 377-379, 245 N.E.2d at 427-428.
23 Id. at 379, 245 N.E.2d at 428.
24 The Court states that the two photographs differed substantially.
25 The record before the Court on review may not have contained the facts required for more extensive and systematic discussion of considerations related to reliability.
ment procedures utilized. For example, the presence of suggestive factors in the Nassar and Geraway cases must be drawn out of the Court's discussion of the facts. In its analysis, the Court did not, as it might have, first note those factors as considerations weighing against admission of the evidence, then discuss counterbalancing considerations, then conclude that on balance the heavy burden of the Simmons standard had not been met. This is in contrast to the Simmons opinion itself, which carefully noted various potential sources of suggestion, even though none were present which were as significant as those in Nassar and Geraway. Finally, in addition to not systematically examining factors related to reliability, the Supreme Judicial Court did not consider in any respect the necessity criterion in its decisions applying the Stovall or Simmons due process standards, and despite its evident awareness of the law enforcement concern, did not utilize any other explicit criteria of that kind.

While omitting discussion of certain factors, the Court also at times discussed considerations which have not been identified as relevant by the Supreme Court. In particular, in the Nassar, Sullivan, and Bumpus decisions, the Court discussed law enforcement intent. The Court noted in each of these cases that the motives of the police officers involved were good. As was suggested earlier, this is not a workable or relevant criterion. Intent, particularly wrongful intent of a law enforcement officer, is extremely difficult to prove; and in any case, good intentions per se do not contribute to reliability and ought not to be given positive weight in admissibility determinations. The best-intentioned official can employ procedures which may lead to mistaken identification. The cost of admitting erroneous identification evidence far outweighs the potential benefit to be derived from endorsing good intentions. Finally, as noted above, in some cases, particularly Blackburn and Geraway, the Supreme Judicial Court seems to look toward the weight of the evidence as a whole, rather than solely toward examination of the factors relevant to the question of exclusion.

These decisions of the Supreme Judicial Court provide examples of the difficulties associated with attempting to apply the standards presently established in this area. Significant suggestive elements were present in a number of these cases, for example Geraway. It is not clear how the Supreme Judicial Court determined that these factors were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"; or how the Court might have reached the contrary conclusion. Simply comparing the facts of the various decided cases cannot provide an adequate substitute for general standards for decision.

B. SEARCH AND SEIZURE

§12.9. Introduction. The 1968 Survey article on criminal law and procedure discussed extensively the law of search and seizure.
During the 1969 Survey year, the Supreme Judicial Court again considered a significant number of cases in this area, and the Supreme Court of the United States decided a case of unusual importance. These new developments are summarized below.

§12.10. Scope of search incident to lawful arrest. The principal exception to the requirement that a search be authorized by a warrant is the contemporaneous search incident to a valid arrest. *Chimel v. California*, decided by the United States Supreme Court in June 1969 established a new definition of the permissible scope of such searches. The defendant Chimel was arrested pursuant to an arrest warrant at his home. Following the arrest, over his objection and without authority of a search warrant, the entire three-bedroom house, including the attic and garage, was searched by the police. In the master bedroom and sewing room, the contents of drawers were examined. Numerous items of evidence were seized. The search continued 45 minutes to an hour.

The Supreme Court reversed the resulting conviction, finding this warrantless search "unreasonable" under the Fourth and Fourteenth Amendments because of its extent. The Court reasoned that the proper extent of a search must be defined by the circumstances which render it permissible. Since the justification for a search incident to arrest lies in the need to remove weapons which might be used to resist arrest or to attempt escape, and to seize any evidence that might be concealed or destroyed, the scope of such searches is properly limited to the arrestee's person and the area within his immediate control, i.e., that area from within he might gain possession of a weapon or destructible evidence. The Court replaced with this clear and quite restrictive standard the rather erratic history of decisions in this area. The Court explicitly overruled *Harris v. United States* and *United States v. Rabinowitz* insofar as they were inconsistent with this new standard.

§12.11. Massachusetts case law: Warrantless searches and seizures. During the 1969 Survey year, prior to the *Chimel* decision, the Supreme Judicial Court decided two cases involving searches said to be incident to valid arrests. One of these decisions, *Commonwealth v. Jones*, would have been altered in result by *Chimel*. In *Jones*, the defendants were arrested near the scene of a burglary. A few minutes after the arrests, while the defendants were being held in a Boston police car about five feet away, their automobile was searched without a warrant. A pair of gloves and a screwdriver were found on the front floor, and a revolver was found in a paper bag inside a suitcase in the trunk, which had been locked. The Supreme Judicial Court held that these items were properly admitted in evidence, because

§12.10  1 *395 U.S. 752 (1969).*  
2 *331 U.S. 145 (1947).*  
3 *339 U.S. 56 (1950).*

the search was "reasonable in the circumstance"—directly related to the crime for which the lawful arrest was made, and not remote in time or place from the arrest. This result is not consistent with the Chimel holding, which limits the scope of such a warrantless search incident to arrest to the arrestee's person and "the area from within which he might gain possession of a weapon or destructible evidence." Clearly, no part of the search of the defendants' automobile falls within this definition of permissible scope.

Commonwealth v. Togo, decided by the Supreme Judicial Court several months after Jones, also involved the search of an automobile. The defendant was arrested at a shopping center about 11:15 A.M. for forgery and receiving stolen goods. His automobile was towed to the police station and subsequently searched about 12:45 P.M. No attempt was made to secure a search warrant. Marijuana was found in the automobile, leading to the defendant's conviction for possession of marijuana, and this appeal. The Supreme Judicial Court held that the warrantless search was too remote in time and place from the valid arrest to be considered incident to that arrest, relying upon Preston v. United States. Had Chimel been decided at this time, this result, which is clear under Preston, would have been even more apparent.

The Supreme Judicial Court decided one case during the 1969 Survey year involving a threshold police inquiry and search, Commonwealth v. Matthews. The Court described the facts of that case as follows:

A police officer observed the defendant walking at 2:50 A.M. in a Brookline neighborhood in which there had been several burglaries. None had been reported that night. The officer stopped the defendant and inquired about his identity and purpose for being abroad. The defendant identified himself and stated that he was walking from Boston to visit a friend who lived on Commonwealth Avenue in Brookline. When questioned as to the route he was taking, the defendant replied that "he had felt like taking a walk." Observing that the defendant was carrying a paper bag with the name of "Mal's Department Store" on the outside, the officer asked if he might examine its contents, and the defendant readily assented. The bag contained new articles of clothing, consisting of underwear and socks, and a sales slip bearing the date of June 28. The defendant informed the officer that he had purchased the articles on the preceding day, July 1. Because the items of clothing were apparently not of defendant's size, the officer became suspicious and frisked him to determine if he was carrying any weapons. The frisk consisted

\[ \text{2 Commonwealth v. Jones, 395 U.S. 752, 763 (1969).} \]
\[ \text{4 376 U.S. 564 (1964).} \]
\[ \text{5 1969 Mass. Adv. Sh. 311, 244 N.E.2d 908.} \]
of the officer quickly running his hands over the defendant's clothing. He discovered, in the small of the defendant's back and tucked under his shirt and belt, a screwdriver, the shaft of which was seven inches long; it was not new and had paint marks on both the shaft and handle. The defendant said he had bought the screwdriver along with the clothing at Mal's Department Store. The defendant was thereupon arrested and taken to the police station where a thorough search was made. He was charged with possession of burglarious instruments. 8

Before the Supreme Judicial Court, the defendant contended that these events constituted an unreasonable search and seizure in violation of his Fourth Amendment rights. The Court assumed, arguendo, that the events described constituted a search and seizure, and that there was no probable cause to arrest prior to the search, and consequently no search incident to a valid arrest. The Court concluded, however, that there had been no Fourth Amendment violation, because both the threshold inquiry and the search were reasonable.

With respect to the inquiry, the Court noted that G.L., c. 41, §98, authorizes the police to "examine all persons abroad whom they have reason to suspect of unlawful design," and that Commonwealth v. Lehan 7 had held that this provision constitutionally permits a brief threshold inquiry where suspicious conduct gives the officer "reason to suspect" that the person has committed, is committing, or is about to commit a crime. The Court found the stopping and questioning of Matthews reasonable in the circumstances, noting that he was walking at 2:50 A.M. in an area where there had been several burglaries, while carrying a bag with a department store label.

In considering the frisk, which the Court characterized as a search for weapons, the Court relied upon Terry v. Ohio, 8 where the United States Supreme Court authorized a search for weapons when "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger [because he was] dealing with an armed and dangerous individual." 9 Applying this standard, the Court concluded that the search of Matthews was reasonable. Surprisingly, however, the Court did not identify in support of this conclusion any element of the circumstances which might warrant the belief that the defendant was armed or that anyone's safety was in danger. The Court instead relied upon the generally suspicious character of the circumstances, commenting as follows:

The officer, after having his suspicions aroused by the defendant's actions and his answers to the officer's questions, could reasonably believe that his safety was in danger. That there were reasonable grounds for the officer to become suspicious is abun-

6 Id. at 511-512, 244 N.E.2d at 909.
8 392 U.S. 1 (1968).
9 Id. at 27.
dantly warranted by the evidence. In arriving at this conclusion he could consider: the presence of the defendant (carrying a paper bag) at an unusual hour of the morning in a vicinity where breaks had occurred; his unlikely story that he was walking from Boston to Brookline to visit a friend; the statement that he chose the route taken because he wanted to walk; the articles contained in the bag (revealed voluntarily) that apparently were not the defendant’s size; and the date on the sales slip which was three days prior to the time when the defendant said he made the purchase. 10

Commonwealth v. Garreff,11 a fourth Supreme Judicial Court decision of the 1969 Survey year involving a warrantless search and seizure, principally concerned the issue of consent. There the defendant was convicted of possession of burglarious tools. She was approached by a police officer as she sat in an automobile, apparently acting as a lookout during an attempted burglary. When questioned about suspicious circumstances related to the automobile and its contents, she asserted that she was not the owner of the automobile, although she was in fact. The police officer warned the defendant that if she were not more responsive to his questions, he was going to arrest her. He then asked if he could conduct a search of the automobile and look for the registration. The defendant said she would not mind if he looked into the automobile, and unlocked the door on the righthand side. The officer examined the contents of the car, including the glove compartment, and found various suspicious items. After further investigation, arrangements were made for the defendant to go home in a taxi. She left behind the ignition keys to her automobile. Later, a thorough search was made, including a search of the trunk, to which access was gained by removing the back seat. A registration certificate in the defendant’s name and incriminating evidence were found. At no time was a search warrant obtained.

The Supreme Judicial Court concluded that the defendant’s Fourth Amendment rights had not been violated, reasoning as follows. The defendant consented to the initial search. She had a legal obligation to produce the registration certificate. Her compliance with the officer’s request to look for it was not coerced. It was reasonable to enter the automobile to conduct that search. Various items were then in plain view. The consent of the defendant was not “so limited as to prevent the police officers from making an additional search after the defendant had apparently abandoned the automobile. 12

§12.12. Massachusetts case law: Search warrants. During the 1969 Survey year, the Supreme Judicial Court decided four cases involving challenges to the validity of search warrants. These challenges were

12 Id. at 370, 245 N.E.2d at 445.
based upon either the provisions of G.L., c. 276, §§1, 2, 2A, 2B, and 2C, which establish Massachusetts statutory standards for search warrants, or upon Article 14 of the Massachusetts Declaration of Rights and the Fourth and Fourteenth Amendments to the United States Constitution. 1

In the first such case, Commonwealth v. Pope, 2 the validity of the warrant was challenged on two grounds. First, it was argued that the affidavit on which the warrant was based failed to show probable cause, as required by the Fourth Amendment and G.L., c. 276, §2B. 3 The principal issue in this regard related to whether the affidavit set out sufficient “underlying circumstances” to demonstrate the credibility of an informant whose statements were relied upon, or the reliability of the information he provided. 4 That information indicated that the defendant was accepting and communicating by telephone, numbers wagers at the premises searched. The Court found in the affidavit a sufficient statement of “underlying circumstances” in the following description of police observations of the premises:

The above premises have been under investigation and surveillance by myself and Off. D. Tighe, for a period of about four months. It has a constant flow of traffic (foot) in and out during the period between 10:00 A.M. and 3:00 P.M. Many of the men entering are known to us as book-makers and other gamblers. Lewis Pope (reported to be the top man in the numbers racket in the hill section of the city) is there daily and stays most of the day. 5

The second ground upon which the warrant was challenged related to the sufficiency of the description of the place to be searched. 6 The warrant referred only to “the rooms mentioned in the above

§12.12 1 Article 14 provides: “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with formalities prescribed by the laws.”

The Fourth Amendment provides that “no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.”


3 G.L., c. 276, §2B, requires that the affidavit contain “the facts, information, and circumstances upon which such person relies to establish sufficient grounds for the issuance of the warrant.” The affidavit must describe the “source, facts indicating reliability of source and nature of information.”


6 The claim was based upon G.L., c. 276, §2, Article 14 of the Declaration of Rights, and the Fourth Amendment.
complaint." The complaint, which was "physically attached to the warrant and a part thereof," contained a detailed description of the premises. The Court held that this description in the complaint could be relied upon to support the validity of the warrant.

The second case involving a search warrant, Commonwealth v. Von Utter,7 again concerned the question whether probable cause had been established, as required by G.L., c. 276, §2B, and the Fourth and Fourteenth Amendments. Again, statements of an unnamed informant were relied upon in the affidavit. The defendant's principal allegation related to lack of a statement of "underlying circumstances" sufficient to demonstrate the credibility of the informant and the reliability of his information, and to validate the warrant generally.

The informant had predicted the defendant's arrival in town in possession of drugs. The affidavit did not state that this prediction was based upon the informant's personal knowledge. The Court found the following circumstances, set out in the affidavit, to be sufficient to support the validity of the warrant: the informant admitted to the use of drugs, had a "user's knowledge of narcotics," and was known to the affiant to associate "with convicted narcotic users"; the applicant had received information from a named police officer who had information regarding dates of parties and names of persons in attendance, consistent with the informant's information; the information given was specific (describing the drugs, date of arrival, and automobile); and the connection of the defendant with convicted drug users and the description of the automobile was confirmed by named Connecticut State Police narcotics agents, as well as unnamed Massachusetts State Police narcotics agents.

In Commonwealth v. Causey,8 the third search warrant case decided during the 1969 Survey year, the defendant contended that the affidavit supporting the warrant did not contain sufficient information to permit a finding of probable cause. At that point in the affidavit where G.L., c. 276, §2B, requires the affiant to "describe source, facts indicating reliability of source and nature of information," the affidavit read as follows: "I have information based upon statements made to me by eye-witnesses to a robbery and also by my own observations." The Supreme Judicial Court considered this to be inadequate, finding the affidavit "plainly deficient" in the following respects:

[It] does not tell what information was communicated to the affiant by the eyewitness; how either the eyewitness or the affiant had any reason to know where the items sought were likely to be found; what investigations had been made and by whom; what opportunity informants, eyewitnesses, and the affiant had to observe or ascertain incidents or facts relevant to probable cause for issuing a search warrant; what relation the items sought


http://lawdigitalcommons.bc.edu/asml/vol1969/iss1/15
While the Court found the affidavit bad on its face, the evidence in question was nevertheless held to have been properly admitted. Although the return on the warrant stated that the evidence had been seized pursuant to the warrant, the Court found that in fact the search warrant was not used, no search was conducted, and the property introduced in evidence was relinquished voluntarily. Consequently, the warrant was unnecessary and the inadequacy of the affidavit immaterial.

The final search warrant decision, Commonwealth v. Ness, involved a question of interpretation of G.L., c. 276, §3A. Each of two warrants involved was served and returned by an officer other than the officer who applied for it. The defendants contended that Section 3A requires that a search warrant be served and returned by the applying officer. The Supreme Judicial Court did not agree. Based upon the language of Chapter 276, Sections 2, 2A, and 2B, and upon a consideration of the rights and interests involved, the Court concluded that for the purposes of Section 3A, a warrant is issued to the officer who serves it, and it is he — not the applying officer — who is required to make the return.

C. STUDENT COMMENT: DISCOVERY OF GRAND JURY MINUTES

§12.13. Introduction. For many years grand jury proceedings were clothed in such secrecy that even courts had no access to the evidence upon which an indictment was based. The policy which maintained this principle of secrecy is still in effect in the proceedings of federal grand juries. The extent to which secrecy applies in federal grand jury proceedings is visible in Rule 6(e) of the Federal Rules of Criminal Procedure. Although this rule permits disclosure to

9 Id. at 917, 248 N.E.2d at 251.
11 That provision reads, in relevant part, as follows: “Every officer to whom a warrant to search is issued shall return the same to the court by which it was issued as soon as it has been served and in any event not later than seven days from the date of issuance. . . .”

§12.13. 1 Greenberg v. Superior Court of the City and County of San Francisco, 19 Cal. 2d 319, 322, 121 P.2d 713, 715 (1942).
3 Fed. R. Crim. P. 6(e) reads: “Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted
government attorneys for use in the performance of their duties as prosecutors, there is no rule requiring pretrial disclosure of any grand jury testimony to defense counsel.\(^4\) Courts have, however, been prone to lift what is often called "the veil of secrecy" in limited circumstances where counsel has made an adequate showing of need for certain portions of the grand jury transcript. Because of a frequently cited public policy favoring grand jury secrecy, disclosure, if permitted, must be discreet and under close supervision of the trial judge.\(^5\)

The rules of procedure in Massachusetts and in the federal courts seem to be almost identical in their treatment of disclosure of evidence, or testimony, taken before the grand jury. There is no Massachusetts statute requiring courts or prosecutors to provide the defense with either a copy of, or an opportunity to view, the testimony given before the grand jury. Indeed, the trend in the case law of this jurisdiction seems to favor the preservation of secrecy\(^6\) except in very limited circumstances where the defendant has established a "particularized need" for the testimony of one or more witnesses who had testified before the grand jury.\(^7\) In Massachusetts, inspection of the transcript of grand jury testimony, either before, during, or after trial, is not a right, but a privilege, to be granted at the discretion of the trial judge.\(^8\) This Comment will consider the validity of this policy to determine whether or not its continuance is in the best interests of full and complete justice.

\(^{12.14}\) History and development. The grand jury concept originated in England in 1166 with the Grand Assize. Initially the proceedings of this body were not afforded the protection of secrecy. Its proceedings were open to the public, and its functions directed solely in the interest of the crown. In 1368 an entirely different body evolved from the Grand Assize. This body, known as "le grandue inquest," became responsible for initiating all criminal charges. As its importance grew, the body adopted the custom of privately interviewing witnesses, thus establishing a degree of insulation from pressures or interference by the crown. It was not until 1681 and the trial of the


\(^{5}\) United States v. Proctor & Gamble Co., 356 U.S. at 683.


Earl of Shaftesbury\textsuperscript{1} that the legal concept of grand jury received its first vital recognition. Counsel for the crown demanded that the proceedings take place in public. After hearing testimony in public, the jury demanded and received from the crown the right to examine the witnesses privately. Upon conclusion of the private examination the jurors refused to indict, thus ignoring the pressure by the crown and successfully avoiding its interference.\textsuperscript{2} The case was thereafter noted as a bulwark against oppression by the state.\textsuperscript{3}

For many years it was common practice in the United States to receive witness's testimony without the presence of either prosecution or defense.\textsuperscript{4} As fear of undue pressure or influence from the state lessened, a prosecutor for the state was admitted to the proceedings in order to enable him to draw the form of the indictment desired by the jury, a function now performed by the district attorney or an assistant. Gradually, during the late 19th and early 20th centuries, the prosecution was granted greater freedom in the use of grand jury proceedings. Today full use of the grand jury minutes by the prosecution is a commonly accepted state right.

In examining the evolution of the grand jury and the principle of secrecy which surrounds its proceedings, it must be noted that the principle was primarily formulated to insulate jurors, witnesses and citizens from pressure by the crown. Another important basic aim of the principle was the protection of the jurors and witnesses against intimidation or threats of reprisal by the person under investigation. An attempt to aid the prosecution in obtaining evidence for preparation of its case or for use at trial does not appear to have been a motivating force in the evolution of the principle.

During the 19th century, grand jury proceedings in many jurisdictions became "judicialized," the district attorney or prosecuting officer controlling the hearing.\textsuperscript{5} Although the body may serve as initiator of investigation and accusation, the accused is often already in custody when testimony and evidence relating to the crime is presented. The primary function of the grand jury is, after hearing evidence and testimony, to make an adjudication of probable guilt; to determine if the prosecuting officer has produced sufficient evidence to warrant a more complete hearing or a trial. If such a determination is made, the accused, if not already in custody, will be apprehended and charged with the crime. In making this determination the grand jury is permitted to be its own judge of the kind of evidence it will require before issuing an indictment.\textsuperscript{6} The district attorney or prosecuting officer may be very influential in obtaining the indictment,

\textsuperscript{1} The Earl of Shaftesbury, 8 How. St. Tr. 759 (1681).
\textsuperscript{2} Id. at 771-774.
\textsuperscript{3} Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 457 (1965).
\textsuperscript{6} Costello v. United States, 350 U.S. 359 (1956).
since it is he who is largely in control of the proceeding. Indeed, the
grand jury has been termed an "inefficient 'rubber stamp' for the
prosecutor who conceived its investigation, directed its secret pro-
ceedings, and drafted its indictment."7

§12.15. Massachusetts and federal proceedings. Chapter 277 of
the Massachusetts General Laws provides the statutory basis for the
functions of the grand jury in the Commonwealth. Twenty-three
persons are chosen by the clerk of courts to serve as grand jurors.1
They are chosen 28 days before the first sitting of the superior court
for criminal business in each year and serve at that court until the
grand jury for the next year has been impanelled.2 Section 5 of this
Chapter provides that the first two persons named on the alphabetical
list of the jurors shall take the following oath administered by the
clerk of the court:

You, as grand jurors of this inquest for the body of this county
of . . . , do solemnly swear that you will diligently inquire, and
true presentment make, of all such matters and things as shall
be given you in charge; the commonwealth's counsel, your fel-
lovs' and your own, you shall keep secret; you shall present no
man for envy, hatred or malice; neither shall you leave any man
unpresented for love, fear, favor, affection or hope of reward;
but you shall present things truly, as they come to your knowl-
dge, according to the best of your understanding; so help you
God.8

There is no Massachusetts statute defining the duties of grand jurors
except as stated in the oath and Sections 6 through 14 which relate
to administrative matters.4 In accord with these sections, the grand
jurors elect one from among their number to serve as foreman for the
entire period which they may be required to serve. It is the foreman's
duty to present the court with a list of the names of witnesses sworn
before the grand jury.5 Either the foreman or the prosecuting attor-
ney, who is present and controls the proceedings, administers oaths
to witnesses. A clerk is appointed from the numbers of the grand
jury to keep records of the proceedings and, if directed by the jury,
deliver them to either the attorney general or district attorney.6 Dur-

7 Goldstein, The State and the Accused: Balance of Advantage in Criminal
Procedure, 69 Yale L.J. at 1171.

§12.15. 1 G.L., c. 277, §3A. In Suffolk County the clerk of the superior court for
criminal business makes the selection.
2 G.L. c. 277, §1.
3 Section 6 provides for an affirmation to be taken by grand jurors who are con-
scientiously scrupulous against taking an oath.
5 Section 9, which defines the duties of the foreman, is merely directory, and a
non-compliance is not grounds for quashing an indictment. Commonwealth v.
Edwards, 70 Mass. 1, 5 (1855).
6 It is Section 10 of this Chapter which gives the attorney general the right to
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ing its session the grand jury makes daily returns to the court of all cases in which it is finally determined not to present an indictment against the accused. The individual, if in custody, is then released.

In the trial of one indicted by a Massachusetts grand jury, the prosecution, having been present to direct the proceedings and thereby acquiring knowledge of the testimony and evidence presented before the grand jury, is free to use the transcript of that testimony in the preparation of its case. In federal proceedings disclosure of all but the deliberations and votes of jurors may be made to Government attorneys for use in the performance of their duties. During the trial the prosecutor will often call many of the witnesses who provided testimony upon which the indictment was based. When the Government, in a federal case, calls a witness who has previously testified before the grand jury, it is under a duty to have the transcript of such testimony available in court at trial. This does not seem to be a practice required in Massachusetts. The witness in most cases will merely repeat the testimony which he has given before the grand jury. In order that the trial judge might, if called upon to do so, compare the testimony given before the trial court and the grand jury, it seems necessary to have the transcript available, and such should be the Massachusetts rule.

In Dennis v. United States, the Supreme Court of the United States held that free or automatic disclosure of grand jury testimony to the defense is not permissible. In so holding, the Court said that it is the function of the trial judge to decide whether the defense had made adequate argument in support of his motion for disclosure and to supervise the process should disclosure be granted. The Court noted that in making this determination an in camera inspection by the trial judge of the relevant portions of the transcript is considered extremely useful. In United States v. National Dairy Products Corp., it was held that the defendant is entitled to use grand jury testimony for impeachment "if and when, but only if and when, the trial judge determines as a result of his in camera inspection that inconsistencies in fact exist between trial and grand jury testimony that could be used for impeachment of the particular witness involved." Such inconsistencies between trial and grand jury testimony are not limited to flat contradictions of the fact. They may consist of omissions of facts in the trial testimony, or a difference in the emphasis, or treatment, of the same facts. Any of these, if discovered by the federal trial judge, would show a "particularized need" and entitle the defense to dis-


10 Id. at 875.


12 Id. at 466.

closure of the relevant grand jury testimony of that witness. The burden, however, is upon the defendant to establish the "particularized need" which would merit an in camera inspection of the grand jury transcript by the trial judge. Certain exceptions to this rule of "particularized need" have been created. Where the defendant is on trial for perjury he is entitled, as of right, to a copy of his own grand jury testimony in order to prepare his defense. Also, where the prosecution uses the transcript at trial to refresh the memory of, or to impeach, a witness, the defense is then entitled to that portion of the transcript so used.

The similarity between federal policy concerning the defendant's rights to disclosure of grand jury minutes and that of Massachusetts is apparent. As noted, the words of the oath or affirmation taken by grand jurors in Massachusetts indicate the extent to which disclosure may be made by the grand jurors. The degree of secrecy imposed upon grand jurors by statute is clearly expressed in G.L., c. 277, §§12 and 13. Section 12 provides:

No grand juror or officer of the court shall disclose the fact that an indictment has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on the indictment.

Section 13 provides:

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. In charging the grand jury, the court shall remind them of the provisions of this and the preceding sections.

These sections deal merely with the secrecy concerning votes and deliberations of jurors and the fact that an indictment has been found. They do not forbid disclosure of the minutes to the defense after the accused is in custody. The statutes would seem to be a significant indication of the extent to which public policy, upon which the rule of secrecy rests, requires it to be carried.

In this jurisdiction, as in the federal system, the government or prosecution, by being present at and controlling the grand jury hearing, has full access to testimony given before that body. This testimony, although freely given to the prosecution, is denied to the defense. Although there is no statutory provision expressly denying this testimony to defense counsel once the accused is in custody, it has been repeatedly held by the Supreme Judicial Court that the defendant

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is not entitled, as of right, to obtain a copy of, or to examine the transcript of, testimony taken before the grand jury.17 The defendant has no statutory or common law right to require that the prosecution provide him with a copy of, or opportunity to inspect, the minutes of the grand jury, either before the trial,18 or after the verdict and sentence.19 However, the Commonwealth has long recognized that the rights of the accused may be greatly injured and his peril increased if he can be denied the opportunity of showing that an important witness against him is either unworthy of belief or that the testimony of such witness ought to be taken with a great deal of caution.20 It is because of this realization that the defendant, upon a showing of "particularized need," is entitled to inspect relevant testimony given before the grand jury.21 The determination as to the validity of the motion for production and degree of need is, however, a matter of judicial discretion.

Although the common law rules of secrecy have been relaxed, thereby permitting the prosecution admittance to, and control of, the grand jury proceedings, there is still a reluctance on the part of the judiciary to allow the "veil of secrecy" to be lifted for the defendant after the issuance of the indictments.22 Even where disclosure is made to the defendant in circumstances of "particularized need," it is done limitedly, discreetly, and under close judicial supervision.23 That only these instances of limited and discreet disclosure to the defendant are allowed shows the extent to which public policy is said to favor secrecy and weigh against disclosure. Five reasons are most commonly pronounced by courts as the basis of the secrecy requirement of grand jury proceedings.

... (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he had been under in-


21 Commonwealth v. Doherty, 353 Mass. 197, 229 N.E.2d 267 (1967). This inspection, subject to reasonable judicial supervision, is in camera. The trial judge may disclose only those portions of the transcript which are relevant and material to the specific point at issue.

22 Welch v. United States, 371 F.2d 287 (10th Cir. 1966).

vestigation, and from the expense of standing trial where there was no probability of guilt. 24

These reasons for the principle of secrecy in grand jury proceedings seem designed to afford protection to all but the individual who is indicted. Indeed, the courts recognize that these reasons for secrecy, with the exception of the last, are for the protection of the grand jury itself, and are not based on any inherent right of the accused who is under investigation. 25 It is believed that the juror is protected against fear of reprisal, and that his participation is made more diligent by the policy of secrecy. The principle is also purportedly designed to afford protection, to the witness, against intimidation by the person under investigation or his friends. Underlying the belief in protecting the witness by imposing the seal of secrecy upon the proceedings are two basic presumptions. First, the testimony would be parsimonious if each witness knew that the accused would immediately be furnished with a copy. Second, by enforcing the principle of secrecy the state will be assured that the witness will freely and truthfully give all facts within his knowledge. By providing the protection of anonymity to the jurors and witnesses, the government hopes to insure full and accurate testimony and a fair decision as to whether or not just cause for indictment exists. Some courts feel that the policy of secrecy is indispensable to the pursuit of the guilty; that disclosure to the defense would subvert the functions of the grand jury and detract from its efficacy. 26

The government and the individual who is exonerated are protected, but the individual who is indicted has no definite means of adequately preparing a defense to meet this testimony until it is presented by the prosecution at the trial, unless, prior to the trial, he is able to interview witnesses upon whose testimony the indictment was based and to get from such witnesses their exact statements made before the grand jury. In Massachusetts the General Laws provide that only in capital cases will the defendant be given, as of right, a list of all jurors and witnesses sworn before the grand jury. 27 In the absence of interviewing witnesses, the only practical source of knowledge concerning the crime, and evidence which the prosecution possesses, would be the indictment and the bill of particulars. The General Laws provide that the indictment shall contain "(a) plain and concise description of the act which constitutes the crime, or the appropriate legal term descriptive of such act, without a detailed description thereof." 28 If the indictment fails to adequately describe the manner in which, and

25 United States v. Amazon Industrial Chemical Corp., 55 F.2d at 261.
27 G.L., c. 277, §66.
28 G.L., c. 277, §17.
the means by which, the crime was committed, the defendant has an absolute right to such particulars as may be necessary to prepare his defense. The bill of particulars, as provided under G.L., c. 277, §40, however, does not include grand jury testimony or evidence upon which the indictment was based. A refusal to disclose in detail the means employed in committing the crime has been held not to be a denial of due process. Unable to have a grand jury transcript included in a bill of particulars and with no right to obtain the names of grand jury witnesses except in capital cases, counsel may seek permission by means of a pretrial motion to view the testimony upon which the indictment was based. However, with the exception of one on trial for perjury, a defendant is not entitled, as of right, to obtain a copy of the transcript, nor is he entitled to view the minutes of the grand jury. In the usual case the defendant's privilege to examine the transcript or portions thereof rests within the discretion of the trial judge. In order to obtain favorable action on this motion, counsel must demonstrate to the satisfaction of the trial judge that a "particularized need" for access to this transcript outweighs the policy of secrecy. The trial judge, not the defendant or his counsel, must examine the transcript to determine if in fact there are any inconsistencies. If the trial judge decides that the defendant's counsel is entitled to inspect relevant testimony, counsel must inspect it under reasonable judicial supervision.

§12.16. Commonwealth v. Carita: In camera inspection to discover particularized need. The principle of grand jury secrecy and the common Massachusetts practice of disclosure was exhibited in the 1969 survey year in Commonwealth v. Carita. In this case, four defendants were indicted, tried and convicted of murder in the first degree and armed robbery. On assignments of error, two of the defendants alleged that the trial judge's denial of their pretrial motion for disclosure of the grand jury testimony was an abuse of his discretion. The Supreme Judicial Court held that as the motion for pretrial disclosure failed to meet the test of "particularized need" as established in Massachusetts, there was no such abuse. On cross-examination, however, one witness testified that she had not disclosed to the grand jury the fact that she had seen a gun in the hand of one of the defendants. Upon this admission the defense again moved for permission to view the minutes of the grand jury. The motion was again denied. This second denial

31 Id. at 267-68, 93 N.E. at 812.
33 See note 21 supra.
the Carita Court held to be reversible error. The expansion of the testimony and an apparent inconsistency in important details were held to constitute a "particularized need" sufficient to warrant disclosure of the grand jury testimony of this witness. In reversing the trial court's decision the Supreme Judicial Court expressed its approval of the disclosure practice applied in Commonwealth v. Kiernan, wherein the trial judge, during trial, read the minutes of the grand jury to determine if there were any inconsistencies. In Carita the expansion of testimony "set up a 'particularized need' and constituted a possible contradiction of important fact of sufficient moment to show prejudicial error in the denial of their several motions."

The decision in Carita, although permitting disclosure of the witness' grand jury testimony, gives rise to several interesting and important problems in Massachusetts practice and procedure regarding secrecy and disclosure of grand jury testimony. While defense counsel did discover discrepancies on cross-examination, the chance of such a discovery being made would have been greatly increased had the pretrial motion for disclosure been granted. It is quite likely that during a trial many witnesses expand or deviate in some way from the testimony which they have given before the grand jury. It is just as likely that such inconsistencies have gone unnoticed by counsel, simply because they have not been afforded the opportunity to view that previous grand jury testimony.

The in camera inspection of sometimes voluminous transcripts by the trial judge, which, as noted, the Supreme Judicial Court considers a commendable and useful practice, demands that the trial be delayed and time be consumed by the trial judge while he examines the grand jury minutes. This delay impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. There is also the possibility that, under the pressures of conducting a trial, the trial judge may overlook important inconsistencies. This situation occurred in United States v. Spangelet. In that case the trial judge examined the grand jury testimony during trial and denied the defense counsel's motion for disclosure. The Court of Appeals, however, discovered inconsistencies between trial and grand jury testimony which warranted disclosure, and, on that ground, reversed the decision of the trial court. Because of the failure of the trial judge to discover the inconsistencies and to permit defense counsel to view the transcript, there was a considerable expenditure of time and money which need never have occurred had the defense been afforded the opportunity to view the witness' grand jury testimony.

8 Id. at 990, 249 N.E.2d at 10.
7 258 F.2d 958 (2d Cir. 1958).
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§12.17. The arguments for disclosure: Judicial reasoning and conclusions as controverted by modern legal development and thought. The primary function of criminal proceedings is not to convict the accused, but to see that justice is administered.\(^1\) There is a growing realization on the part of many courts that disclosure rather than suppression of relevant materials better promotes the proper administration of justice.\(^2\)

Since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake the prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. [Emphasis added.]\(^3\)

Although the principle of grand jury secrecy may not be strictly considered a governmental privilege, the same reasoning seems to apply. Rule 6(e) of the Federal Rules of Criminal Procedure permits full disclosure to government attorneys, and in Massachusetts the same is true for attorneys of the Commonwealth engaged in criminal proceedings. The prosecution is permitted access to this testimony, yet it may then invoke the veil of secrecy which the defendant may pierce only by showing a "particularized need" which moves the judge to employ his discretion favorably. If the object of a trial is to administer justice by finding the facts, it seems appropriate that there be full disclosure to the defense prior to trial to better enable adequate preparation. The instruments of discovery "together with the pretrial procedures make a trial less of a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."\(^4\) However, it seems that many criminal proceedings are in fact mere games of blind man's bluff, the prosecution holding the names of grand jury witnesses and their testimony and not being required to disclose evidence concerning details of the crime.

Judge Learned Hand, writing in opposition to pretrial disclosure to the defense, set forth his reasons for its denial:

... I am no more disposed to grant it than I was in 1909 ... It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is rigidly held to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against

§12.17. \(^1\) A.B.A. Canons of Professional Ethics (No. 5, 1965).
\(^3\) United States v. Reynolds, 345 U.S. 1, 12 (1953).
him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. [Citations omitted.]

Legal developments in recent years have caused much of this reasoning to be outdated. It seems highly unlikely that an indigent and/or ignorant defendant, which seems to describe the majority of defendants in criminal cases, would have an advantage over the Commonwealth with its mass of investigators, laboratories, criminal experts, and other investigative machinery. Indeed, in the context of criminal proceedings the state's advantage over the defendant at trial seems almost repugnant to our system of justice. "Any suggestion that the state must have at least as good a chance to prevail as the defendant would seem to violate the traditional policy of favoring the defendant in order to avoid conviction of the innocent." On Hand's notion of the defendant's immunity from question or comment on his silence, it is true in theory. However, being immune from comment on his silence does not necessarily make silence a favorable practice for the defendant. The failure of the accused to testify is so conspicuous that he is under the utmost pressure to take the stand to rebut the inference of guilt which, as a practical matter, is likely to be drawn by the jury from his silence. The rigidity with which the prosecution is held to its charge also does not seem to be as great as Judge Hand's statement might lead one to believe. General Laws, c. 277, §35A, permits the court, upon motion of the district attorney or prosecuting officer, to order the complaint or indictment amended to conform with the evidence, as long as the defendant will not be prejudiced in his defense. "A defendant shall not be acquitted on the ground of variance between the allegations and proof if the essential elements of the crime are correctly stated, unless he is thereby prejudiced in his defense."

Courts in Massachusetts and in the federal system realize the necessity of adequate pretrial preparation by the defense for cross-examination. "The essential thing is that the defendant should have full and adequate opportunity to prepare his defense and to meet all evidence against him." It seems that "full and adequate opportunity" would best be provided prior to, rather than during, the pressure of trial. If the opportunity is to "meet all evidence against him," it must include that which was first offered before the grand jury and later at the trial. Pretrial disclosure of grand jury testimony of all witnesses who had appeared before that body would seem best suited in affording the defendant the best opportunity to prepare his defense. The possible lack of time and the necessity of in camera inspection by the trial judge must be seen to favor disclosure to the defendant.

7 Id. at 468.
9 G.L., c. 277, §35.
prior to the trial. The United States Supreme Court realized that the burden and responsibility of examining testimony given before the grand jury ought not to be cast upon the trial judge, and that it would be extremely difficult for even the most able and experienced judge to examine the transcript under the pressures of conducting a trial and to determine that which would be useful in impeaching a witness. It is unrealistic to assume that even the most capable trial judge would be able to exhaust all possible uses for the transcript of testimony or to evaluate properly each statement. Many decisions have expressed the opinion that only the defense is capable of adequately performing this task. Yet, under the procedures of the federal and Massachusetts judicial systems, the defendant is required to show "particularized need" and to await the trial judge's determination as to the existence of the inconsistencies and their relative importance, a determination which only the defendant's counsel is fully equipped to make.

In Jencks v. United States, the United States Supreme Court, discussing Government and F.B.I. reports, stated:

Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise, until after the witness has testified and unless he admits conflict, as in Gordon [Gordon v. United States, 344 U.S. 414], the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. Arguably, the standard for permitting disclosure set forth in Dennis does not require a showing of actual conflict, merely that the defense make a satisfactory demonstration of a need for production which outweighs the policy of secrecy. The procedure in Massachusetts requiring in camera inspection by the trial judge in essence requires a showing of deviation from, or expansion of, grand jury testimony. Only if the trial judge finds substantial inconsistency between trial and grand jury testimony will he permit disclosure. The Court in Jencks reaffirmed and reemphasized the essentials for production: that the demand be for specific documents possessed by the government and not a blind fishing expedition. "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination are established when the reports are shown to relate to the testimony of the witness." Thus the requirement for viewing the reports or previous statements of agents or informers is simply that

13 Dennis v. United States, 384 U.S. at 874.
15 Id. at 667-668.
16 Id. at 669.
they be relevant and material to the defense. This is considerably less than the requirement for viewing grand jury testimony.

Congress realized the need for pretrial disclosure to the defendant after the Jencks decision. To fulfill this need the Jencks Act was passed, making available to the defense the pretrial statements of a witness in so far as they relate to his trial testimony. These pretrial reports, however, are not made available to the defense until after the witness has first testified on direct examination. Court interpretations of both Jencks and the subsequent statute have held that neither the decision nor the statute may be applied to grand jury testimony. If Jencks may be considered an expression of the rule of fairness in the administration of criminal justice, and, as stated in Dennis, a realization of the awareness that disclosure rather than suppression promotes the proper administration of justice, it would appear inconsistent for the government to make one rule for prior statements made to government agents and another for prior grand jury testimony. When viewed from the aspect of trustworthiness, the inconsistency is more apparent. Prior oral statements of agents or informers are presented to the defense, while inspection of sworn testimony given before the grand jury is not. It would seem that the sworn testimony should be at least on equal footing if not in a preferred position. If they are on equal footing, grand jury testimony should automatically be disclosed to the defendant after the witness has testified on direct examination. If, as seems more reasonable, grand jury testimony is to be in a preferred position, the testimony of each witness to be called by the prosecution should be disclosed to the defense prior to trial.

As in the case of many privileges, courts are prone to invoke the rule of grand jury secrecy unquestioningly, even when reasons for protecting the secrecy have ceased to exist. Much of the reasoning used by the courts to refuse disclosure does not directly support that conclusion. The judiciary realizes that burdens of added responsibility, delay and expense are imposed upon the trial court. They also recognize the possibility of oversight in the examination by the trial judge, the delay and possible expense to the defendant, and that disclosure would aid the proper administration of justice. In spite of these realizations, courts continue to deny disclosure to the defense upon demand, even after the accused is in custody. The attitudes of the courts have been increasingly toward favoring the facilitation of disclosure of grand jury testimony, yet, especially in Massachusetts, realizing the many problems involved in the present practice of disclosure, the courts persist in requiring the discretionary procedure of in camera inspection and determination of inconsistencies after a showing of "particularized need." It is mainly public policy which weighs against

19 Pittsburgh Plate Glass Co. v. United States, 360 U.S. at 398.
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disclosure. The courts of Massachusetts and the federal system have frequently mentioned public policy as the basis for their denial of disclosure but they fail to accurately describe its limits. The Supreme Judicial Court has expressed the opinion that refusing disclosure solely on the ground that it is against public policy and the fundamental principles upon which the grand jury was founded is stating the rule of secrecy "much too broadly." This seems to be the extent to which the limits of the policy have been defined in Massachusetts.

There are those who feel that the disclosure of grand jury testimony would subvert the function of the grand jury, detract from its efficiency, or cause it to be less effective. The reasoning upon which the principle of grand jury secrecy is founded reinforces the functions and purposes of that body, allowing it to act freely and effectively. But when these purposes are accomplished, the necessity and expediency of retaining the "veil of secrecy ceases" to exist. Once the necessity of secrecy no longer exists, no harm can come to the public interest by disclosing relevant and material facts to the defendant. On the contrary, great hardship and injustice might often be occasioned by depriving him of important information essential to his defense by enforcing a rule of exclusion after the reasons supporting this rule cease to exist. As has been noted, Massachusetts statutes require secrecy as to votes of the grand jurors, as to opinions which they express, and as to the fact that one not in custody is under investigation or has been indicted. The statutes would seem to be significant indication of the extent to which the rule requires secrecy to be carried. The judiciary in the federal courts also acknowledges the principle that disclosure, where justice requires, is wholly proper after the grand jury's functions are ended. Upon this reasoning it seems clear that the principle of secrecy should apply only to pre-indictment procedures, and that, upon arrest of the accused and formally charging him with the crime, the "veil of secrecy" should be lifted. Prior to indictment and arrest, the fact that an individual is under investigation ought well be kept secret in order to avoid the escape of the individual, should he be ultimately indicted. Pre-indictment secrecy would also protect one who is exonerated from the stigma and suspicion which might well have been cast upon him by public opinion had the public learned that he was under investigation. However, once the accused is in custody the need for secrecy ceases to exist and his attorney should then be permitted to view the transcript of grand jury testimony.

Statutes of the Commonwealth protect the secrecy of the procedural aspects of the grand jury in order to insure fair and honest consideration. Testimony of jurors as to the consistency or accuracy

22 Ibid.
of trial testimony by witnesses who have previously appeared before the grand jury is, however, permitted. The calling of grand jurors to testify at trial was held not to impair the principle of secrecy. It would seem much better from the viewpoint of accuracy and reliability to introduce a transcript of grand jury testimony rather than call a grand juror and rely upon his recollections of detailed testimony which he has heard some time before. Probably the main reason behind permitting a grand juror to testify was that the minutes of the grand jury at the time of these decisions were taken by laymen rather than professional stenographers and were not signed. Since the minutes of these proceedings are now taken by stenographers, the necessity of calling a grand juror to testify is thereby obviated. Thus, the function of the grand juror relative to a particular case could cease entirely at the moment the indictment is issued or denied.

Some courts, as noted previously, have hypothesized that free disclosure of testimony given before the grand jury would endanger the proper function of that body and that testimony would be parsimonious if each witness called before it knew that his testimony would be immediately available to the accused. This fear, however, seems to be one which the principle of secrecy would foster rather than combat. It seems more logical to reason that secrecy would tend to endanger the proper function of the grand jury and be a source of encouragement to exaggerated or inaccurate testimony. Each witness called to testify before the grand jury must be aware that if an indictment is issued he is subject to being subpoenaed to testify, either by the prosecution or the defense. Any motive which might induce a witness to conceal facts, be it fear, embarrassment, or anything else, will not be removed by the application of the principle of secrecy. The evidence or testimony presented before the grand jury will later be presented at the trial. If a witness testifies truthfully before both the grand jury and at trial, disclosure of the former testimony would not be likely to bring any harm which his testimony at trial would not equally tend to produce.

The grand jury does not need the same amount or quality of evidence to indict an individual as is required at trial to convict him. In cases where the prosecution has completed its investigation, it might neither desire nor need to present its entire case to the grand jury in order to obtain an indictment. It is also likely that the prosecution may not present all of these witnesses at trial. Even where a witness who appeared before the grand jury is not called by the prosecution at trial, it would be advantageous to permit the defense to view his testimony. In such cases counsel might compare the testimony of such a witness with the account given at trial by another witness. This comparison of different accounts of the same event or situation would be in the best interest of justice, enabling the attorneys to present the most accurate disclosure of facts.

28 State v. Thomas, 99 Mo. 235, 261, 12 S.W. 643, 651 (1889).
Another argument supporting the principle of secrecy is that the accused may, upon reading the transcript, create false testimony or cause the witness to give false testimony in order to escape the damaging evidence within the possession of the prosecution. This seems to be a very weak argument for continuing to impose secrecy upon grand jury testimony. A guilty defendant is well aware of the facts and circumstances surrounding the crime and could easily devise an alibi without reference to the testimony. Likewise, any unscrupulous party wishing to tamper with the testimony will do so, whether or not he has had access to a grand jury transcript. The guilty defendant can usually guess what the testimony of the witnesses will be. In order to prepare an honest and adequate defense, he should not be forced to hypothesize as to what they will say. A basic presumption upon which our system of criminal justice rests is that the accused is innocent until found guilty at trial. Under the system of grand jury secrecy the accused who is totally innocent may very well be in serious difficulty, since he will be unable to refute what he does not know.

It would appear more probable that disclosure of grand jury testimony would lessen rather than increase the possibility of perjury. If a witness realizes that at trial the defendant has a copy of his statement made before the grand jury, he will, in all probability, be more aware of the necessity that he repeat those statements, unaltered in substance, at trial. In Missouri, disclosure of relevant grand jury testimony to the defense is permitted by statute. The legislative intent behind this statute is “to remove, as far as was consistent with public policy, the temptation to false swearing before the grand jury.” Where conviction or acquittal depends upon the reliability of a witness, his testimony must be subject to close scrutiny. This will be accomplished most effectively when the defense has a copy of the witness’s grand jury testimony prior to trial.

§12.18. Disclosure permitted in other states: Possible application to Massachusetts. The functions of the grand jury are substantially completed with the issuing of the indictment and the arrest of the individual. Beyond this point there is little validity to arguments supporting the retention of secrecy as to grand jury testimony. This is supported by statistical results from a survey of California’s procedure of making grand jury testimony available to the defense upon request. Rather than showing a decrease in the effectiveness of the grand jury, those statistics reflect an increase in the number of indictments issued. It thus seems that greater justice would be done and expense and time saved if Massachusetts would follow the lead of California, as well as Minnesota, Kentucky, and Iowa, which have

30 State v. Thomas, 99 Mo. at 259, 12 S.W. at 650.

statutes\(^8\) entitling the defendant, upon demand, to a copy of the grand jury transcript prior to trial. By making full pretrial disclosure to the defendant the rule, there would be little or no harm to the prosecution or the state. There would be great benefit to the defendant and to the state's interest in justice, for "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."\(^4\) The innocent accused would be in a better position to escape conviction by being adequately prepared to establish the fact of his innocence, and the conviction of the guilty would be obtained more justly. The principles regarding pre-indictment secrecy are valid and, therefore, ought to be retained. Lacking this validity and possessing a great potential for injustice, the rules concerning post-indictment secrecy should be modified so as to permit pretrial disclosure. "Where dangers do exist and abuses are threatened, not denial of discovery, but appropriate safeguards to prevent such dangers and abuses should, I think, be our effort."\(^5\) The present safeguards which the principle of secrecy maintains are ineffective and are outweighed by the detrimental effect which they have upon the defendant and the interests of justice.

The inclination of the courts of Massachusetts in criminal cases ought well to be toward disclosure of grand jury testimony to the defense upon request. Reasonable judicial supervision would seem better directed to the area of inspecting testimony which might endanger national security or prejudice the Commonwealth in its investigation of related matters. If testimony is relevant and material to the preparation of the defense it ought to be disclosed, and, as previously noted, this determination can best be made by defense counsel. If the proper administration of justice rests upon a full and accurate presentation of all relevant and material facts, it would seem more reasonable for the trial judge to disclose all matters which would not be detrimental to the public interest. Withholding the names of grand jurors asking questions, testimony which might endanger national security or domestic or foreign policy, and information which might prejudice the investigation of related matters should be considered before a decision to grant full disclosure is made. In determining the latter two matters, the advice of concerned officials would be appropriate, but the determination should be made prior to the trial in order to avoid delay in the proceedings.

A legislative enactment denying admittance of the prosecution to grand jury proceedings and access to the testimony given would place each side on equal ground prior to trial. However, this would be a step backward, impeding the disclosure of facts and hindering the proper administration of justice. Any change in procedure concern-


ing the minutes of the grand jury ought to be made with the idea of facilitating the gathering of relevant facts. A change which would equalize the adversaries by denying facts to both sides would be based on the notion that "winning" a case, rather than administering justice, is the proper end of a criminal proceeding, thus making surprise and cunning of prime importance. A criminal trial cannot be made a game of chance when the stakes may be valuable years of the player's life, or even that life itself. It must be a fair and open process by which his guilt or innocence is determined. This end can best be achieved by permitting pretrial disclosure in order that the outcome depend not upon surprise or cunning but upon a true evaluation of all of the facts.

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