Chapter 3: Criminal Law and Procedure

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§ 3.1. Involuntary Guilty Pleas—Omission of Reference to Internal Rights.* A guilty plea offered by a defendant in a criminal prosecution represents the defendant's consent that a judgment of conviction may be entered without a trial.1 By entering a guilty plea in a state criminal trial, a defendant waives three rights guaranteed by the federal Constitution.2 These rights are the right against self-incrimination,3 the right to trial by jury4 and the right to confront one's accusers.5 Because these three rights are guaranteed by the Constitution, the United States Supreme Court has ruled in Boykin v. Alabama6 and Brady v. United States7 that the record must show that the defendant offered the guilty plea voluntarily and knowingly, fully aware of the circumstances and consequences of the action.8

Following these Supreme Court decisions, Massachusetts courts have adhered to the view that a defendant's guilty plea may be withdrawn, or may be set aside by the court at any time if the record does not affirmatively show that the defendant offered the plea both knowingly and voluntarily.9 The Supreme Judicial Court of Massachusetts has interpreted the United States Supreme Court's decision in Boykin v. Alabama to mean that a guilty plea must be set aside unless the record discloses that

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the defendant entered the guilty plea freely and intelligently.\textsuperscript{10} The Supreme Judicial Court has suggested that trial judges should question the defendant comprehensively to determine whether the defendant, with the guidance of counsel, has thought about the ramifications of the plea and whether the defendant is offering the plea freely and voluntarily without any undue pressure.\textsuperscript{11}

Yet, although the Massachusetts Rules of Criminal Procedure formulate a procedure to discuss guilty pleas,\textsuperscript{12} the Supreme Judicial Court has stated that \textit{Boykin} does not require that the trial judge expressly delineate the three rights waived by the guilty plea.\textsuperscript{13} Guilty pleas will not be invalidated just because the defendant may not have been advised of all possible contingent effects of the plea.\textsuperscript{14} Thus, although the Court has indicated that the trial court must demonstrate by dialogue that the guilty pleas were entered intelligently and voluntarily, the Court has not established a level of detail to which the three intra-trial rights\textsuperscript{15} must be discussed during this colloquy.

In an attempt to insure that a guilty plea has been entered knowingly and voluntarily, the Massachusetts legislature has formulated several rules which embody the individual’s constitutional rights.\textsuperscript{16} Rule 12 of the Massachusetts Rules of Criminal Procedure establishes a procedure by which the judge and the defendant discuss the plea in the form of a

\begin{itemize}
  \item \textsuperscript{10} \textit{Foster}, 368 Mass. at 102, 330 N.E.2d at 157; \textit{See also Morrow}, 363 Mass. at 603, 296 N.E.2d at 472.
  \item \textsuperscript{11} \textit{Foster}, 368 Mass. at 107, 330 N.E.2d at 160. It is preferred practice that the judge and not the defense counsel should ask the defendant questions so that the judge can be assured that the guilty plea is voluntary and that the defendant understands the consequences. \textit{Smith, Criminal Practice and Procedure, vol. 30 Mass. Practice Series § 1237} (2d ed. 1983).
  \item \textsuperscript{12} Mass. R. Crim. P. 12.
  \item \textsuperscript{13} \textit{Morrow}, 363 Mass. at 604–05, 296 N.E.2d at 473. Following this reasoning, the Appeals Court of Massachusetts has stated that although compliance with the procedures set out in Rule 12(c) is mandatory, departure from them is only one factor to be considered in deciding whether a guilty plea was offered knowingly and voluntarily. Commonwealth v. Nolan, 16 Mass. App. Ct. 994, 995, 454 N.E.2d 1280, 1281 (1983) (quoting Commonwealth v. Johnson, 16 Mass. App. Ct. 835, 841, 420 N.E.2d 34, 38 (1981)).
  \item \textsuperscript{14} \textit{Smith, Criminal Practice and Procedure, vol. 30 Mass. Practice Series § 1241} (2d ed. 1983).
  \item \textsuperscript{15} The \textit{Nolan} court in the instant case has used the term “intra-trial rights” to refer to the individual’s right to confront witnesses and the right against self-incrimination. \textit{See} Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 499, 475 N.E.2d 763, 769 (1985). Both of these rights are subsumed under the right to trial. \textit{See generally id.} at 498, 475 N.E.2d at 769. Thus, when a defendant waives the right to trial by pleading guilty, he or she essentially waives these other two rights as well.
  \item \textsuperscript{16} \textit{See, e.g.}, Mass. R. Crim. P. 12; Mass. R. Crim. P. 30(b).
\end{itemize}
§ 3.1 CRIMINAL LAW AND PROCEDURE

colloquy. Pursuant to Rule 12(c)(3), the judge shall inform the defendant that by his guilty plea, he waives his right to trial, his right to confront witnesses and his right against self-incrimination. Under Rule 12(d), a defendant may withdraw a guilty plea prior to sentencing and the case will be advanced for trial. In addition, if the defendant attempts to overturn a conviction based upon a guilty plea, under Rule 30(b) of the Massachusetts Rules of Criminal Procedure, the defendant's motion is treated as a motion for a new trial and may be granted "if it appears that justice may not have been done." The procedures and standards differ because once a guilty plea has been accepted, it is considered the same as a conviction and the policy of finality then becomes an issue. If a guilty plea could be withdrawn with ease after sentencing, the result would undermine respect for the courts and the process of sentencing the defendant would have been a waste of time and effort.

17 Mass. R. Crim. P. 12. Rule 12 reads in pertinent part:
(c) Guilty Plea Procedure

Notice of Consequences of Plea. The judge shall inform the defendant, or permit defense counsel under the direction of the judge to inform the defendant, on the record, in open court:

(A) that by his plea of guilty or nolo contendere he waives his right to trial with or without a jury, his right to confrontation of witnesses, and his privilege against self-incrimination.


18 Id. Mass. R. Crim. P. 12(c)(3) is patterned after Fed. R. Crim. P. 11(c)-(d), but the Massachusetts rule sets forth with greater specificity the nature of the information the court must make available to the defendant. Reporter's Notes, Mass. R. Crim. P. 12(c)(3).


20 Mass. R. Crim. P. 30(b). Rule 30(b) provides that: "The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law." Mass. R. Crim. P. 30(b).

In Commonwealth v. DeMarco, the Supreme Judicial Court stated that a post-conviction motion to withdraw a plea is treated as a motion for a new trial. 387 Mass. 481, 482, 440 N.E.2d 1282, 1283 (1982). Because of this principle, the Court reasoned that a judge must apply the standard articulated in Mass. R. Crim. P. 30(b) and grant the defendant's motion "if it appears that justice may not have been done." Id.

21 See DeMarco, 387 Mass. at 481, 440 N.E.2d at 1283.

22 See generally DeMarco, 387 Mass. at 484-86, 440 N.E.2d at 1285-86 (discussing policy of finality).

23 DeMarco, 387 Mass. at 484-85, 440 N.E.2d at 1285 (citing Kadwall v. United States, 315 F.2d 667, 670 (9th Cir. 1963)). The Court feared that if a guilty plea could be withdrawn easily after sentencing, possible results would include a defendant pleading guilty to test the weight of the punishment or unfair prejudice to the prosecution because witnesses may become unavailable and evidence may be destroyed. Id. at 485-86, 440 N.E.2d at 1285. In addition, the Court stated that the defendant might receive a harsher sentence if the guilty
During the Survey year, in Commonwealth v. Nolan, the Appeals Court of Massachusetts clarified the issue whether the omission of reference to the right to confront witnesses and the right against self-incrimination in the colloquy between trial judge and defendant constitutes a fatal defect in the voluntariness of the defendant's plea. The court held unanimously that while a defendant was aware that by pleading guilty he would waive his right to trial by jury, the guilty plea was voluntary even though the defendant was not told expressly that by pleading guilty he would also waive his rights to confront witnesses and his right against self-incrimination. In deciding this case, the court ruled that there is no per se rule governing the issue. For a defendant to withdraw a guilty plea after conviction, according to the court, the defendant must demonstrate that the omission of information in the court's colloquy caused direct harm to the defendant.

In Nolan, the defendant had been indicted for armed assault with intent to commit a felony, and assault and battery with a dangerous weapon. The defendant, Robert Nolan, admitted that he had committed these acts and stated that he wanted to plead guilty. In response, the trial judge told Nolan that he had a right to trial, either with or without a jury. The judge then explained to the defendant that by pleading guilty he was admitting the acts and allowing the judge to impose the sentence. The defendant then acknowledged that he understood what had been said and that the plea had not been induced by promises or threats. In addition, Nolan admitted that he had discussed the matter fully with his counsel, was not confused, had no questions and he "willingly, freely, and voluntarily" pleaded guilty. Then, the trial judge sentenced the defendant.

plea were withdrawn, which might appear to the defendant as an unjust penalty, and thus undermine any possible effectiveness the criminal justice system may have on the defendant. Id. at 486-87, 440 N.E.2d at 1286.

25 Id. at 497, 475 N.E.2d at 768.
26 See id.
27 Id.
28 Id.
29 Id. at 491, 475 N.E.2d at 765. The defendant telephoned his girlfriend and threatened her. Id. at 493, 475 N.E.2d at 766. She called the police and they responded. Id. After the police left, the defendant broke into the apartment and stabbed his girlfriend. Id. When the police returned shortly thereafter, they found the defendant in the kitchen. Id. The victim identified a knife, also found in the kitchen, as the weapon. Id.
30 Id. at 493, 475 N.E.2d at 765.
31 Id.
32 Id. The trial judge, however, indicated that the sentence would not exceed the prosecutor's recommendations. Id.
33 Id.
34 Id.
to ten to fifteen years imprisonment on the armed assault charge and eight to ten years concurrently on the assault and battery charge. The defendant moved for a "new trial" under rule 30(b) of the Massachusetts Rules of Criminal Procedure on the ground that he had not offered the plea voluntarily or knowingly, because the colloquy did not conform to Rule 12 of the Massachusetts Rules of Criminal Procedure which governs the withdrawal of guilty pleas. The trial court, however, denied this motion and the defendant appealed.

In deciding this case, the Appeals Court of Massachusetts acknowledged the constitutional proposition that a guilty plea may be withdrawn when it does not appear affirmatively that the defendant offered the plea voluntarily and knowingly. The court then discussed the procedure under Rule 12 of the Massachusetts Rules of Criminal Procedure which was enacted to safeguard the defendant's constitutional rights. Pursuant to Rule 12, the defendant submits a guilty plea, the defendant and the judge discuss the guilty plea in the form of a colloquy and the judge then rules on the plea. The court remarked that although Rule 12 should be faithfully followed, not every omission entitles a defendant to negate his plea. According to the court, a post-conviction attack will fail if the deviation from Rule 12 did not significantly affect the substance of the constitutional standard.

Applying the principle that a guilty plea must be made voluntarily and

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35 Id. at 492, 475 N.E.2d at 765.
36 Id. The defendant initially brought a pro se motion for new trial alleging only that neither the trial judge, nor his defense counsel had advised him of his parole eligibility on any sentence that might be imposed. Commonwealth v. Nolan, 16 Mass. App. Ct. 994, 994, 454 N.E.2d 1280, 1280-81 (1983). In this motion, Nolan also requested the appointment of new counsel. Id. at 994, 454 N.E.2d at 1281. The same trial judge denied the motion without a hearing. Id. On appeal, Nolan abandoned the issue of the omission of parole eligibility advice and with the representation of new counsel, argued instead that the trial judge failed to comply with Mass. R. Crim. P. 12(c)(3)(A). Id. The court affirmed the trial court's decision denying Nolan's first claim, but granted the defendant leave to file a new motion. Id. at 495, 454 N.E.2d at 1281. See also Nolan, 19 Mass. App. Ct. at 494 n.4, 475 N.E.2d at 766 n.4.
38 Id. at 494, 475 N.E.2d at 767.
39 Id. at 494-95, 475 N.E.2d at 767.
40 Id.
41 Id. at 495, 475 N.E.2d at 767. The court also discussed the distinction between a withdrawal before conviction and one attempted thereafter. Id. According to the court, if there is such an omission before the sentence has been imposed, and the defendant wishes to withdraw the plea on that account, although the defendant must provide a reason, generally the judge will be lenient toward that request. Id. In contrast, the court stated that after a judgment has been entered on a guilty plea, it will be more difficult for the defendant to overturn the conviction because of the concept of finality. Id.
42 Id. at 496, 475 N.E.2d at 768.
intelligently, the Nolan court determined that the issue in the instant case was whether a substantial deviation from the standard occurred when a defendant who was informed that he was waiving his right to trial was not told expressly that interrelated rights would also be waived.\textsuperscript{43} The court then stated that there is no per se rule governing the omission of these intra-trial rights.\textsuperscript{44} Instead, the court ruled, in order for a defendant to overturn a conviction based upon a guilty plea, the defendant must have incurred some harm.\textsuperscript{45} The court reasoned that this ruling was justified because the defendant had been informed that the guilty plea entailed the waiver of his right to trial.\textsuperscript{46} Following logically from this, the court continued, the defendant would also surrender rights internal to the trial.\textsuperscript{47}

After deciding that the omission of reference to intra-trial rights did not justify overturning the defendant's conviction, the court examined whether the colloquy and acceptance of the guilty plea satisfied the criterion for a new trial enunciated in rule 30(b) of the Massachusetts Rules of Criminal Procedure—whether "justice may not have been done."\textsuperscript{48} The court began this discussion by defining what is required by rule 30(b). According to the court, the colloquy must assure that the defendant is represented by and has consulted with counsel, is free from coercion, understands the nature and elements of the criminal charges, knows the extent of his guilt, recognizes the penal consequences of the crime and is aware of the right to trial.\textsuperscript{49} In light of these elements the court determined that the omission of reference to intra-trial rights—the right to confront witnesses and the right against self-incrimination—does not affect any of the delineated assurances.\textsuperscript{50}

In its decision that omission of reference to intra-trial rights did not violate the standard set out in rule 30(b), the court looked to parallel federal court cases decided under Rule 11 of the Federal Rules of Criminal Procedure.\textsuperscript{51} The court interpreted these cases as standing for the prop-

\textsuperscript{43} Id. at 497, 475 N.E.2d at 768.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 498, 475 N.E.2d at 769.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 498-99, 475 N.E.2d at 769.
\textsuperscript{50} Id. at 499, 475 N.E.2d at 769.
\textsuperscript{51} FED. R. CRIM. P. 11(c)(3) provides that: 
\textit{Advice to Defendant.} Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(3) that he has the right to plead not guilty or to persist in that plea if it has already
osition that omission of reference to intra-trial rights in the colloquy mandated by Rule 11 will not support a motion to vacate the conviction unless it can be demonstrated that a reference to these rights would have changed the defendant's decision to plead guilty. Although the court recognized a difference in the standard of "manifest injustice" used to attack convictions in federal courts, and the Massachusetts standard under rule 30(b) that "justice may not have been done," the court determined that the difference was not crucial. Thus, after deciding that the

been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself... FED. R. CRIM. P. 11(c)(3).

The Nolan court cited several federal cases for the proposition that a collateral attack will be ineffectual as grounds for vacating a conviction unless the defendant can demonstrate that it would have made a difference in the decision-making process. See Nolan, 19 Mass. App. Ct. at 499, 475 N.E.2d at 769–70 (citing United States v. Hobson, 686 F.2d 628, 630 (8th Cir. 1982); United States v. Nuckols, 606 F.2d 566, 568 (5th Cir. 1979); United States v. Tursi, 576 F.2d 396, 399 (1st Cir. 1978); United States v. Webb, 433 F.2d 400, 403 (1st Cir. 1970), cert. denied, 401 U.S. 958 (1971)).

In addition, the court cited several cases which adopted the same position that although the judge did not inform the defendant of intra-trial rights, the defendant was not entitled to negate this plea on direct appeal because the defendant did not claim a lack of understanding. See Nolan, 19 Mass. App. Ct. at 499–500, 475 N.E.2d at 770 (citing United States v. Burnett, 671 F.2d 709, 711–13 (2d Cir. 1982); United States v. Caston, 615 F.2d 1111, 1113–15 (5th Cir. 1980), cert. denied, 449 U.S. 831 (1980); United States v. Saft, 558 F.2d 1073, 1080–81 (2d Cir. 1977); and United States v. Michaelson, 552 F.2d 472, 477 (2d Cir. 1977)). But see United States v. Carter, 619 F.2d 293, 295 (3d Cir. 1980) (court held that from the record indicating that defendant, who was represented by a public defender and was not informed of the right to continued assistance of counsel, and the right to confront and cross examine witnesses against him, it could not be assumed that defendant was aware of his rights and thus offered a guilty plea knowingly and intelligently).

52 Nolan, 19 Mass. App. Ct. at 499, 475 N.E.2d at 769. In analyzing the federal decisions, the Appeals Court distinguished the procedures of vacating a conviction by direct appeal and by collateral attack utilized by the defendant Nolan. See id. at 499, 475 N.E.2d at 769–70. See also supra note 51.

53 Nolan, 19 Mass. App. Ct. at 500, 475 N.E.2d at 770. FED. R. CRIM. P. 32(d) in effect at the time of the decisions cited by the court stated that: "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." Nolan, 19 Mass. App. Ct. at 500 n.16, 475 N.E.2d at 770 n.16.

Subsequently the rule was amended to provide that "a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255." Id. The Nolan court noted that the 28 U.S.C. § 2255 standard has been applied in a variety of ways which may or may not be equivalent to "manifest injustice." Id. at 500, 475 N.E.2d at 770.

54 Nolan, 19 Mass. App. Ct. at 500, 475 N.E.2d at 770. The court recognized that "manifest injustice" as provided for in the federal court system is a rigorous standard, but cited DeMarco, 387 Mass. at 487, 440 N.E.2d at 1282, for the proposition that rule 30(b) "is to be applied 'rigorously.'" Nolan, 19 Mass. App. Ct. at 500, 475 N.E.2d at 770. The
Massachusetts standard was a rigorous one, the court concluded that the defendant in *Nolan* had not attempted to show any material harm arising from the omission of reference to the intra-trial rights.\(^{55}\)

Although the court determined that a defendant must show actual harm under rule 30(b), the court also noted that regardless of a specific injury the trial judge still has discretion to rule in favor of the defendant.\(^{56}\) In order to exercise this discretion, the court continued, the trial judge should reexamine the record and conclude that the plea defect warrants relief.\(^{57}\) The court observed that in the instant case, the trial judge was not moved to rule in favor of Nolan after reflection on the prior proceedings.\(^{58}\) Thus, by dismissing Nolan’s motion, the court followed Massachusetts precedent in ruling that an omission of reference to intra-trial

\(\text{DeMarco}\) Court noted, however, that the federal standard is more stringent than the Massachusetts rule provides. *DeMarco*, 387 Mass. at 485 n.9, 440 N.E.2d at 1285 n.9.\(^{55}\) *Nolan*, 19 Mass. App. Ct. at 500, 475 N.E.2d at 770.\(^{56}\) *Id.* at 501, 475 N.E.2d at 770.\(^{57}\) *Id.*

\(^{58}\) *Id.* at 501, 475 N.E.2d at 771. In concluding, the court discussed in dicta the policy implications surrounding the attempted withdrawal of guilty pleas after conviction. The court noted that most appeals involve a waste of time and effort by lawyers and judges and result in disappointing the prisoners. *Id.* The court expressed the idea that both the prosecuting and defense attorneys may have a duty to insure that the trial judge inadvertently does not omit the full requirements of the procedure stated in Rule 12. *Id.* at 502, 475 N.E.2d at 771. In addition, the court also suggested that many problems could be avoided if judges drafted model questionnaires to serve as a checklist for colloquies involving a discussion of rights forfeited by defendants who offer guilty pleas. *Id.* at 501-02, 475 N.E.2d at 771. For example, the court cited a questionnaire allegedly used by superior court judges. See *id.* at 501 n.20, 475 N.E.2d at 771 n.20 (citing SMITH, CRIMINAL PRACTICE AND PROCEDURE, vol. 30, MASS. PRACTICE SERIES § 1238 (2d ed. 1983)). In pertinent part, this questionnaire reads:

I. My name is . I am an Associate Justice of the Superior Court. Before I can accept your plea, I must ask you some questions. The reason that I am asking you these questions is to make sure that your plea of guilty is voluntary and that you understand the consequences of your guilty plea. If at any time you do not understand a question, I want you to tell me. If I do not understand your answer, I will tell you.

    

IV. Waiver of Rights

    (8) Do you know that by pleading guilty you give up your absolute right:

    (a) to have a fair and impartial trial to determine your guilt or innocence with or without a jury?

    (b) to face your accusers and question them and other witnesses that appear against you, and to present evidence in your own defense?

    (c) to exercise your privilege against self-incrimination?

    (d) to appeal any motions to suppress?

rights is a slight defect unless the individual can demonstrate actual harm.\footnote{See Commonwealth v. Morrow, 363 Mass. 601, 604-05, 296 N.E.2d 468, 472-73 (1973).}

The \textit{Nolan} decision follows the settled approach that a guilty plea must be entered knowingly and voluntarily.\footnote{See supra text accompanying notes 9-11.} \textit{Nolan} reflects the principle that a defendant who pleads guilty need not be told expressly what tangential rights are waived along with the right to trial.\footnote{See supra text accompanying notes 12-15.} This decision seems logical because if an individual waives the right to trial it follows that any rights which the individual would encounter within a trial setting would also be waived. Yet, \textit{Nolan} does not formulate a rule under which omissions of reference to rights in the colloquy between judge and defendant would always be considered negligible defects.\footnote{See supra text accompanying notes 44-45.} Rather, if the individual can demonstrate a specific harm the conviction resulting from the guilty plea may be overturned.\footnote{See \textit{id.}}

Specific harm to the defendant would occur if the defendant would not have admitted guilt if he were aware that he was waiving other constitutional rights as well. A plea defect would warrant relief if an integral assurance as to understanding and voluntariness has been omitted from the colloquy.\footnote{Nolan, 19 Mass. App. Ct. at 497, 475 N.E.2d at 768.} The absence of an inquiry concerning consultation with counsel or about coercion or other wrongful inducement of the guilty plea demonstrates a failure of affirmative assurance as to understanding and voluntariness.\footnote{See \textit{id.}}

Although \textit{Nolan} concerns the waiver of a defendant’s constitutional rights, the implications of this decision will not threaten the right to confront witnesses and the right against self-incrimination because these rights are subsumed by the right to trial. The danger inherent in guilty pleas involves the existence of ignorance, incomprehension and coercion in regard to whether a defendant offers such a plea freely and voluntarily.\footnote{See supra note 8 and accompanying text.} Informing a defendant that a guilty plea results in a waiver of the right to trial as well as insuring that the pleas are offered voluntarily and intelligently should safeguard against the evils of ignorance and coercion.\footnote{See \textit{id.}} A technical defect concerning what words are uttered should be negligible as long as the defendant is fully aware of the right to trial and waives this right freely and knowingly.

In conclusion, \textit{Nolan} adheres to the doctrine that a guilty plea must
be made knowingly and voluntarily. Nolan does not represent an erosion of constitutional principles involving the criminal defendant's right to trial. Instead Nolan signifies that a failure to discuss the right to confront witnesses and the right against self-incrimination in the colloquy between judge and defendant will not invalidate the guilty plea. Notwithstanding this, the decision does not formulate a per se rule that all defects in the colloquy are negligible. If the defendant can show a specific harm deriving from the flaw, then the guilty plea will be withdrawn or the conviction will be overturned, and the defendant will be entitled to the right to trial as guaranteed by the federal Constitution.

§ 3.2. The Right to Proceed Pro Se.* The sixth and fourteenth amendments to the United States Constitution guarantee a criminal defendant's right to assistance of counsel. This right stands as an element critical to the preservation of due process in our criminal justice system. In the landmark case of Faretta v. California, however, the United States Supreme Court explicitly recognized a correlative constitutional right of a criminal defendant to dispense with assistance of counsel, and to proceed pro se. The Supreme Court emphasized that because assistance of counsel represents a fundamental constitutional right, a criminal defendant who wishes to proceed pro se must first waive the right to counsel in a knowing and intelligent manner. Under Massachusetts law, although knowing and intelligent waiver must be unequivocal, the Massachusetts Supreme Judicial Court has held in Commonwealth v. Appleby that a defendant's refusal, without good cause, to proceed with able, court-appointed counsel effects a valid waiver of the right to counsel. During

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1 The sixth amendment of the United States Constitution provides in part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2 The sixth amendment applies to the states through the fourteenth amendment of the United States Constitution. See Faretta v. California, 422 U.S. 806, 819 (1975) (holding that the Constitution prohibits a state from forcing counsel upon a criminal defendant who knowingly and intelligently elects to defend himself).

3 See id. at 819 (citing Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972)).

4 Id.

5 422 U.S. 806 (1975).

6 Id. at 815 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279–80 (1942)).

7 Id. at 836 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).


10 Id. at 366–67, 450 N.E.2d at 1076.
the Survey year, in Commonwealth v. Tuitt, the Court qualified this standard, holding that a defendant’s explicit refusal to waive the right to counsel could negate the waiver that refusal to proceed with appointed counsel would ordinarily effect under Appleby. The decision in Tuitt is thus likely to have limited impact on the right to proceed pro se, constrained as it is to the unusual instances where a defendant refuses to proceed with able, appointed counsel, but also explicitly refuses to waive the right to counsel.

The defendant in Tuitt was convicted of armed robbery while masked and carrying a firearm without a permit. On the day that the trial was scheduled to begin, the defendant filed a motion to dismiss his court-appointed attorney, and to hire substitute counsel on the grounds that counsel was unprepared and had failed to interview important witnesses. Despite the defendant’s contentions, the trial judge denied the motion, concluding that the defendant’s counsel had performed in a highly professional and impressive manner. The trial court also found that the defendant’s assertions were “dilatory” and “without substance.” The defendant nonetheless renewed the motion the following day, only to meet with identical results. The defendant then made an oral motion to proceed pro se. When the trial judge indicated to the defendant that he must waive his right to counsel if he desired to proceed pro se, the defendant replied that although he did not want counsel to

12 Id. at 808, 473 N.E.2d at 1109. The Court in Tuitt also decided that the defendant’s motions to discharge counsel, id. at 803–07, 473 N.E.2d at 1106–08, and for a mistrial, id. at 808–09, 473 N.E.2d at 1109, had been properly denied below. The Court further rejected the defendant’s claims that the evidence sustaining the firearms conviction was insufficient, id. at 809–10, 473 N.E.2d at 1109–10, that some of the prosecutor’s remarks at trial had been prejudicial, id. at 810–12, 473 N.E.2d at 1110–11, and that the application of the habitual offender statute, and the imposition of a life sentence thereunder, violated the eighth amendment’s prohibition against cruel and unusual punishment, id. at 812–14, 473 N.E.2d at 1111–12.
13 See id. at 808, 473 N.E.2d at 1109. The Court clearly distinguished Tuitt from other cases where a defendant had refused to sign a waiver card, an action which the Court indicated was not wholly inconsistent with a desire to waive counsel and to proceed pro se. The Court, however, found that Tuitt had “emphatically” and “expressly” refused to waive his right to counsel. Id. at 808, n.4, 473 N.E.2d at 1109, n.4.
14 Id. at 802, 473 N.E.2d at 1105. Armed robbery while masked is a violation of G.L. c. 265, § 17.
15 Id. Carrying a firearm without a permit is a violation of G.L. c. 269, § 10(a).
16 Id. at 803, 473 N.E.2d at 1106.
17 Id. at 803–04, 473 N.E.2d at 1106. There was no evidence that the defendant had arranged for representation by another attorney. Id. at 803, 473 N.E.2d at 1106.
18 Id. at 805, 473 N.E.2d at 1107 (quoting the trial judge).
19 Id. at 803, 473 N.E.2d at 1106.
20 Id. at 807, 473 N.E.2d at 1108.
defend him, and he did want to represent himself, he would not waive the right to counsel of his choice.\footnote{Id. at 807, n.3, 473 N.E.2d at 1108, n.3.} Based on this and other similar exchanges,\footnote{Id. at 816-17, 473 N.E.2d at 1113–14, n.1 (O‘Connor, J., dissenting).} the trial judge denied the motion, concluding that the defendant refused to waive his right to counsel.\footnote{Id. at 807, 473 N.E.2d at 1108.} The defendant pled guilty to the firearms charge,\footnote{Id. at 812, 473 N.E.2d at 1111, n.10.} was ultimately convicted on both charges, and sentenced as a habitual offender to life imprisonment.\footnote{Id. at 812, 473 N.E.2d at 1111.} The defendant appealed, and the Supreme Judicial Court ordered direct appellate review on its own initiative.\footnote{Id. at 802, 473 N.E.2d at 1104.} The Court affirmed the convictions and the sentence.\footnote{Id. at 804–06, 473 N.E.2d at 1106–07.}

In upholding the lower court’s denial of the defendant’s motion to proceed pro se, the Supreme Judicial Court, Hennessey, C.J., reasoned that the defendant’s motion to discharge court-appointed counsel had been properly denied\footnote{Id. at 804, 473 N.E.2d at 1106. In upholding the lower court’s denial of the defendant’s motion to discharge his court-appointed attorney, the Supreme Judicial Court reasoned that a trial judge remains bound only to make a sufficient inquiry into the reasons for the motion, and retains the freedom, in the exercise of sound judicial discretion, to deny the motion. Id. at 804–06, 473 N.E.2d at 1106–07. The Court observed that a trial court judge exercising this discretion may determine that the right to employ one’s choice of counsel may be subordinated to the proper administration of justice, id. at 804, 473 N.E.2d at 1107, especially when the defendant requests the discharge of counsel on the “eve of trial.” Id. at 804, 473 N.E.2d at 1106. The Court concluded that the trial judge had made the necessary inquiry, and did not abuse his discretion in denying the motion to discharge counsel. Id. at 804–06, 473 N.E.2d at 1106–07.} because defense counsel had performed adequately,\footnote{Id. at 804–06, 473 N.E.2d at 1106–07.} and the defendant had explicitly refused to waive the right to counsel — despite his clearly voiced desire to proceed pro se.\footnote{Id. at 803–04, 473 N.E.2d at 1106.} The Court interpreted the defendant’s desire to proceed pro se without waiving his right to counsel as an attempt to retain both rights simultaneously.\footnote{Id. at 807, n.3, 473 N.E.2d at 1108, n.3.} The right to represent oneself, and the right to counsel, however, are available in the disjunctive only, the Court concluded.\footnote{Id. at 807, 473 N.E.2d at 1108.}
Observance of this principle, the Court noted, would prevent a defendant who effectively elects to proceed pro se from assuming the opposite position on appeal, and claiming that he was improperly denied counsel.33 The Court did indicate, however, that defendant’s refusal to go forward with appointed counsel would have been interpreted as a waiver of the right to counsel had the defendant not also voiced a desire to preserve that right.34

Justice O’Connor, the sole dissenter, disagreed with the majority’s conclusion that the defendant had attempted to enjoy simultaneously the right to counsel, and the right to proceed pro se.35 The defendant, given the choice of continuing with court-appointed counsel, or representing himself, clearly wished to represent himself, Justice O’Connor concluded.36 The dissent reasoned that the defendant’s refusal to waive counsel, despite his desire to proceed pro se, resulted from his misapprehension that waiver of counsel would cause the forfeiture of the opportunity to appeal the trial judge’s denial of the motion for representation by counsel of the defendant’s choice.37 Under such circumstances, Justice O’Connor opined, requiring a defendant expressly to waive his right to counsel in order to proceed pro se was inconsistent with the Court’s previous holding in Commonwealth v. Appleby, where refusal to proceed with able, appointed counsel was found to constitute valid waiver of the right to counsel.38 This inconsistency represented for Justice O’Connor the placement of an impermissible burden on the defendant’s constitutionally guaranteed right to self-representation.39

The Court’s decision in Tuitt is not inconsistent with the prior precedent of Commonwealth v. Appleby. Appleby held that a refusal to proceed with competent, court-appointed counsel constitutes valid waiver of the right to counsel for the purposes of proceeding pro se.40 There is nothing in the Tuitt decision which indicates that it will interfere with the reasoning or application of Appleby. The Tuitt decision merely adds to this standard the qualifier that in cases where the defendant explicitly refuses to waive his right to counsel, in addition to refusing to proceed with able, appointed counsel, the court may deny the defendant’s request to proceed

33 Id. at 807–08, 473 N.E.2d at 1108.
34 Id. at 808, 473 N.E.2d at 1108–09.
35 See id. at 816, 473 N.E.2d at 1113 (O’Connor, J., dissenting).
36 Id. (O’Connor, J., dissenting).
37 Id. at 815, 473 N.E.2d at 1113 (O’Connor, J., dissenting).
pro se.\textsuperscript{41} Despite the dissent's contention that such refusal will impermissibly burden the defendant's right to self-representation,\textsuperscript{42} prior precedent indicates that the right to proceed pro se is conditioned upon unequivocal waiver of the right to counsel.\textsuperscript{43} While the refusal to proceed with court-appointed counsel may provide the necessary unequivocal waiver,\textsuperscript{44} \textit{Commonwealth v. Appleby}, upon which the dissent relies so heavily, does not indicate that the defendant's refusal alone absolutely compels the court to grant the motion to proceed pro se.\textsuperscript{45} Indeed, it appears logical that a defendant who clearly vocalizes a desire to proceed pro se, while simultaneously refusing to surrender the right to counsel, expresses a patently equivocal desire insufficient to effect a valid waiver. Although the trial court perhaps should have explained more thoroughly to the defendant the meaning of waiver,\textsuperscript{46} the mere possibility that the defendant refused to surrender the right to counsel because he misconstrued the effects of waiver should not bar the court from refusing a motion to proceed pro se.

In summary, the sixth amendment to the United States Constitution guarantees the right to counsel to a defendant in a criminal proceeding. The sixth amendment also guarantees the right of self-representation. It is well settled law that the right of self-representation may be exercised only after a defendant has knowingly and intelligently waived the right to counsel. The Massachusetts Supreme Judicial Court held in \textit{Commonwealth v. Appleby} that a defendant's refusal to proceed with able, appointed counsel constitutes valid waiver of the right to counsel. The Court's holding in \textit{Commonwealth v. Tuitt}, however, indicates that the waiver that \textit{Appleby} would ordinarily effect will not be found when a defendant desiring to proceed pro se also asserts a desire to preserve the right to counsel — even where that desire may simply result from confusion on the defendant's part. Despite the possibility that the defendant's confusion regarding the effects of waiver alone may have accounted for the apparent ambiguity of the defendant's desires, as the dissent asserted,

\textsuperscript{41}See \textit{Tuitt}, 393 Mass. at 808, 473 N.E.2d at 1109.
\textsuperscript{42} \textit{Id.} at 815, 473 N.E.2d at 1113 (O'Connor, J., dissenting). \textit{See supra} note 35, and accompanying text.
\textsuperscript{43} See, e.g., \textit{Commonwealth v. Chapman}, 8 Mass. App. Ct. 260, 392 N.E.2d 1213 (1979), where the court made clear that the assertion of the right to proceed pro se must be unequivocal.
\textsuperscript{44} See \textit{Appleby}, 389 Mass. at 366–67, 450 N.E.2d at 1076.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} See \textit{Faretta}, 422 U.S. at 836, where the United States Supreme Court stated that a defendant desiring to proceed pro se "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with open eyes'" (quoting \textit{Adams v. United States ex. rel. McCann}, 317 U.S. 269, 279 (1942)).
the Tuitt court implicitly, and appropriately, acknowledged that the importance of the right to counsel dictates caution in granting a motion to proceed pro se. Indeed, if error is to be made in this area of the law, it should be made on the side of caution, and the right to proceed pro se should be granted only when the waiver of the right to counsel is truly unequivocal.

§ 3.3. The Exclusionary Rule — Facially Defective Search Warrants.*
The fourth amendment to the United States Constitution guarantees the right of individuals to be free from unreasonable searches and seizures of their person or property.1 This right is protected by the further provisions of the fourth amendment that searches be conducted pursuant to a warrant which describes with particularity the scope of the search and the place to be searched and is supported by a showing of probable cause.2 Traditionally, evidence obtained during a search conducted in violation of the fourth amendment protections was held to be admissible despite the illegality.3 This changed with the adoption by the United States Supreme Court of the exclusionary rule which precluded admissibility of evidence obtained in violation of the fourth amendment in order to further the effective enforcement of the constitutional protections therein.4

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§ 3.3. 1 The fourth amendment provides that:

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

U.S. CONST. amend. IV.

2 See supra note 1 for text of the fourth amendment. See also W. Leach & P. Liacos, HANDBOOK OF MASSACHUSETTS EVIDENCE 170–71 (1967).

3 W. Leach & P. Liacos, HANDBOOK OF MASSACHUSETTS EVIDENCE 166 (1967).

4 Id. The exclusionary rule was established by the United States Supreme Court as a "judicially created means of effectuating the rights secured by the fourth amendment" to the United States Constitution. Stone v. Powell, 428 U.S. 465, 482 (1976). The exclusionary rule, it has been argued, is not a right arising directly from the Constitution, as evidenced by the absence of textual support in the fourth amendment or elsewhere. Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 COLUM. L. REV. 1365, 1381 (1983). In addition, as United States Supreme Court Justice Stewart stated: "there is nothing in the events giving rise to the adoption of the fourth or fifth amendments that supports the view that the provisions were intended to require exclusion since . . . common law courts did not exclude evidence simply because it was obtained by unlawful means." Id. Rather, there is support for the argument that the exclusion of evidence obtained in an unconstitutional search is a constitutional remedy implied from the need to enforce the constitutional limitations on government. Id. at 1384. The rule is "designed to safeguard fourth amendment rights generally through its deterrent effect" on the exercise of police power. United States v. Calandra, 414 U.S. 338, 348 (1974).
In 1984, the United States Supreme Court in *United States v. Leon*,\(^5\) created a good faith exception to the exclusionary rule.\(^6\) In *Leon*, the Court held that evidence obtained pursuant to a search warrant that violated the fourth amendment’s requirements of particularity need not be excluded when the officers conducting the search acted in “objectively reasonable reliance” on the issuance of the warrant by a neutral and detached magistrate.\(^7\) The Court found that the primary objective of the exclusionary rule to deter police misconduct would not be served where the police officers acted in good faith.\(^8\)

Massachusetts courts have adopted the exclusionary rule to remedy violations of state statutory laws governing probable cause requirements,\(^9\) but they have not adopted the rule so as to exclude evidence obtained by law enforcement officials in violation of state constitutional protections against unreasonable searches and seizures.\(^10\) During the Survey year, in *Commonwealth v. Sheppard*,\(^11\) (*Sheppard II*), the Massachusetts Supreme Judicial Court considered whether it would recognize, under state law, a rule of exclusion requiring suppression of evidence obtained during a search which was based on a facially defective warrant.\(^12\) In *Sheppard II*, a search of the defendant’s residence was conducted pursuant to a warrant which was defective because it failed to list the items to be seized or to incorporate by reference a list of those items.\(^13\) The warrant violated the requirements of the fourth amendment to the United States Constitution,\(^14\) Article 14 of the Massachusetts Constitution\(^15\) and

\(^6\) Id. at 921.
\(^7\) Id.
\(^8\) Id. at 919.
\(^12\) Id. at 382, 476 N.E.2d at 541.
\(^13\) Id. at 385–87, 476 N.E.2d at 543–45.
\(^14\) See supra note 1.
\(^15\) Article 14 of the Declaration of Rights of the Constitution of the Commonwealth provides:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, 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 person or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

The Supreme Judicial Court has interpreted article 14 as requiring that the “special designation” of the “objects of search” be incorporated in the warrant itself, or that a writing
General Laws chapter 276\textsuperscript{16} that search warrants state with particularity the nature and scope of the search to be conducted.\textsuperscript{17}

In \textit{Sheppard II}, the Supreme Judicial Court adopted a narrower exception to the exclusionary rule under state statutory law than the Supreme Court applied under the fourth amendment.\textsuperscript{18} The Court found that Massachusetts constitutional and statutory law do not require exclusion of evidence obtained during a search conducted pursuant to a warrant defective for its lack of particularity where the search was performed "as if the warrant had met statutory and constitutional requirements of particularity,"\textsuperscript{19} independent of the police officers' good faith belief in the warrant's validity.\textsuperscript{20} The Supreme Judicial Court thus implicitly acknowledged that state law provides a greater degree of protection to the criminal defendant than does the United States Constitution.\textsuperscript{21}

The defendant in \textit{Sheppard II} was convicted of first-degree murder on the basis, in part, of evidence obtained during a search of his residence.\textsuperscript{22} After a preliminary investigation to establish probable cause, the search was conducted pursuant to a search warrant authorized by a magistrate.\textsuperscript{23} Since the investigating police officers were unable to locate the proper form for the type of search being requested,\textsuperscript{24} they adapted a warrant form used for searches for controlled substances.\textsuperscript{25} A reference to "controlled substance" was deleted on one part of the form, but other such references were not deleted.\textsuperscript{26} In addition, the officers prepared a typed

\begin{itemize}
\item containing the designation be attached to the warrant and incorporated in the warrant by reference. \textit{Sheppard II}, 394 Mass. at 390–91, 476 N.E.2d at 546. "The purpose of these limitations is to forbid general warrants ... and in doing so to circumscribe the discretion of the executing officer and to inform the person or persons subject to the seizure what the officer is entitled to take . . . ." Commonwealth v. Sheppard, 387 Mass. 488, 500 n.10, 441 N.E.2d 725, 731 n.10 (1982) [hereinafter \textit{Sheppard I}].
\item G.L. c. 276, § 2 provides that "[s]earch warrants shall designate and describe the building, house, place, vessel or vehicle to be searched and shall particularly describe the property or articles to be searched for. They shall be substantially in the form prescribed in section two A of this chapter . . . ." Section 2A provides a prototype form for use in preparing a valid search warrant.
\end{itemize}

\textsuperscript{16} Sheppard II, 394 Mass. at 382, 476 N.E.2d at 542.
\textsuperscript{17} Sheppard II, 394 Mass. at 382, 476 N.E.2d at 542.
\textsuperscript{18} See infra notes 55–76 and accompanying text.
\textsuperscript{19} Sheppard II, 394 Mass. at 382, 476 N.E.2d at 542.
\textsuperscript{20} See id. at 391–92 & n.9, 476 N.E.2d at 547 & n.9.
\textsuperscript{21} See infra notes 83–91 and accompanying text.
\textsuperscript{22} Sheppard II, 394 Mass. at 382, 476 N.E.2d at 542.
\textsuperscript{23} Id. at 384, 476 N.E.2d at 543.
\textsuperscript{24} Id. at 383, 476 N.E.2d at 542.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 383–84, 476 N.E.2d at 542. Additionally, since the modified form was intended for use in the Municipal Court of the Dorchester District rather than the Roxbury Division of the District Court Department, the word "Dorchester" was replaced by the word "Roxbury." Id. at 383, 476 N.E.2d at 542.
affidavit in support of the application for a search warrant, including a detailed description of the premises to be searched, and a list of the items to be searched for.

When the search warrant application was presented for the judge's approval, he made only minor changes to the actual warrant portion of the form which, therefore, continued to authorize a search for controlled substances. The warrant did not reference either the affidavit in support of the application or the items to be seized listed therein. In addition, the affidavit was not physically attached to the warrant, although the police officers had a copy of the affidavit with them throughout the search. Moreover, the police limited the scope of their search to those items listed in the affidavit and to those areas of the house identified on the warrant. During the search, the police obtained a great deal of incriminating evidence.

The defendant moved to suppress the evidence on the grounds that the warrant was facially defective because it failed to list the items to be seized. The superior court judge agreed that it was defective and therefore in violation of the fourth amendment. He questioned, though, whether the exclusionary rule as applied to fourth amendment violations required suppression of the evidence under the circumstances presented. The judge allowed admission of the evidence because the police

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27 Id. at 383, 476 N.E.2d at 542.
28 See Sheppard I, 387 Mass. at 492–93 n.7, 441 N.E.2d at 727–28 n.7. As the Court recounted:

"[t]he affidavit described the premises to be searched as the second floor at 42 Deckard Street, Roxbury, and "that part of the cellar controlled by Osborne [Jimmy] Sheppard." It described 42 Deckard Street as a "three story red brick apartment building with a basement."

The affidavit listed the property for which the search was intended as follows: "A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim." (Corrected for punctuation).

Id.
29 Sheppard II, 394 Mass. at 384, 476 N.E.2d at 542–43.
30 Id. at 384, 476 N.E.2d at 543.
31 Id.
32 Id. at 385, 476 N.E.2d at 543.
33 Id. at 384, 476 N.E.2d at 543.
34 Id. at 385, 476 N.E.2d at 543.
35 Id. The Supreme Judicial Court stated that "[t]he fourth amendment requires that a search warrant describe the "things to be seized."" Sheppard I, 387 Mass. at 500 n.10, 441 N.E.2d at 731 n.10.
36 See Sheppard II, 394 Mass. at 385, 476 N.E.2d at 543.
conducted the search with a "reasonable and good faith belief in the validity of the warrant." The superior court judge found that the judge who issued the warrant told the police officers that the necessary changes would be made to the warrant to provide the authority for the search as requested. Further, the superior court judge found that the police officers conducted the search with the affidavit and warrant in hand, and within the limits of the warrant as understood by them.

On appeal, the Supreme Judicial Court, in *Commonwealth v. Sheppard (Sheppard I)*, agreed that the search warrant was defective because it violated the particularity requirements of the fourth amendment to the United States Constitution, article 14 of the Massachusetts Constitution, and General Laws chapter 276. The Court proceeded to consider whether, under the circumstances, the exclusionary rule required suppression of the evidence obtained during the search. The Supreme Judicial Court, like the United States Supreme Court, noted that deterrence of unconstitutional conduct by law enforcement officials is the primary justification for the exclusionary rule. The Court found that the officers' conduct in the instant case was proper, and questioned whether the exclusionary rule was likely to be an effective deterrent to judicial misconduct. Nevertheless, the Court concluded that previous decisions

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37 *Id.*
38 *Id.*
39 *Id.*
41 See *id.* at 501, 441 N.E.2d at 732.
43 *Sheppard I*, 387 Mass. at 502, 441 N.E.2d at 733.
44 *Id.* at 506, 441 N.E.2d at 735 (emphasis added). The Supreme Judicial Court stated that:
The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether the suppression of evidence is necessary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

*Id.*
of the United States Supreme Court compelled suppression of the evidence in furtherance of fourth amendment protections. 46 Finding that the Federal Constitution required suppression of the evidence, the Supreme Judicial Court declined to consider whether Massachusetts law would compel the same result. 47

The United States Supreme Court granted certiorari 48 and heard the case in conjunction with United States v. Leon. 49 Having established in Leon a good faith exception to the prohibitions of the fourth amendment, 50 the Court in Massachusetts v. Sheppard 51 considered only the factual issue of whether the officers had reason to believe that the search conducted was authorized by a valid warrant. 52 The Court found that the police conduct was objectively reasonable and for the most part error-free, unlike the conduct of the judge who issued the warrant. 53 Noting again that the exclusionary rule would not serve its deterrent purpose in these circumstances, the Court reversed the judgment of the Supreme Judicial Court and remanded the case for further proceedings. 54

On remand, the Supreme Judicial Court considered whether it would recognize, under the circumstances, the applicability of a rule of exclusion under either General Laws chapter 276 or article 14 of the Massachusetts Constitution. 55 The Court acknowledged that because the search warrant did not include on its face a list of the items to be searched for and did not incorporate by reference the accompanying affidavit, the warrant violated state statutory and constitutional law. 56 The Court also noted that the language of General Laws chapter 276 did not provide guidance as to when, if ever, evidence obtained during a search based on probable cause but performed pursuant to a defective warrant must be excluded. 57 According to the Court, no definitive guidance was available from article 14 either because the Court had not previously accepted the concept of an exclusionary rule under the state constitution. 58 The

46 Id. at 507-08, 441 N.E.2d at 735-36.
47 Id. at 508, 441 N.E.2d at 736. The Supreme Judicial Court acknowledged that the Court had not adopted an exclusionary rule under the constitutional law of the Commonwealth. Id.
50 Id. at 920-21.
52 Id. at 987-88.
53 Id. at 990-91.
54 Id. at 991.
55 Sheppard II, 394 Mass. at 382, 476 N.E.2d at 541.
56 Id. at 387, 476 N.E.2d at 545.
57 Id. at 388, 476 N.E.2d at 545.
58 Id. at 391, 476 N.E.2d at 547.
Court viewed the problem as one of identifying not a right, but a remedy for a violation of the particularity requirements, because neither the statute nor the state constitution include a specific exclusion requirement.\(^{59}\)

In order to infer such a remedy, the Court looked first to the statutory requirements, and sought guidance based on consideration of the intent of the legislature, the evils sought to be remedied, and the objectives to be accomplished.\(^{60}\) The Court concluded that the particularity requirements of General Laws chapter 276 mirrored those of article 14\(^{61}\) and therefore looked to the intent of the framers of article 14.\(^{62}\) The Court inferred two legislative objectives behind the particularity requirements.\(^{63}\) According to the Court, the requirement that a search warrant describe the items to be searched for and the place to be searched serves to protect individuals against general, limitless searches.\(^{64}\) The Court noted, as well, that these requirements serve an evidentiary function, by ensuring that the Commonwealth is able to establish, with a writing, that a proper limit on the scope of the authorized search existed, should the

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\(^{59}\) See id. at 388, 391, 476 N.E.2d at 545, 547.

\(^{60}\) See id. at 388, 476 N.E.2d at 545.

\(^{61}\) Id. at 389, 476 N.E.2d at 546. The Court noted that in contrast to the particularity requirements of G.L. c. 276, the statute has more stringent requirements for a showing of probable cause than the state constitution. In reaching this conclusion, the Court distinguished earlier decisions which address the requirements in G.L. c. 276 that a warrant not issue absent a showing of probable cause presented in an affidavit to a court or magistrate. Id. at 388–89, 476 N.E.2d at 545–46. In those cases, the Court applied a rule of exclusion to violations of the statutory requirements which it determined were prejudicial to the interests of the defendant because of their substantiality. The violations were held to compel exclusion because of the prejudice brought on by invasion of the individual’s right to be free from unreasonable searches and seizures, see Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985), or because of the prejudice caused by the Commonwealth’s failure to preserve in an affidavit the grounds for the search thereby preventing the defendant from challenging the search, see Commonwealth v. Monosson, 351 Mass. 327, 221 N.E.2d 220 (1966). The Court stated that: “[i]n light of the Legislature’s heightened solicitude for probable cause requirements, both . . . [Upton and Monosson] suggest that all violations of the statutory probable cause requirements are substantial,” Sheppard II, 394 Mass. at 389, 476 N.E.2d at 546. The Court determined that the particularity requirements of G.L. c. 276, unlike the probable cause provisions of that chapter, tracked the requirements of article 14 of the Massachusetts Declaration of Rights, and the fourth amendment to the United States Constitution. Id.

\(^{62}\) Sheppard II, 394 Mass. at 389, 476 N.E.2d at 546.

\(^{63}\) See id.

\(^{64}\) Id. As the Court previously stated: Such particularity is necessary in order to identify . . . the things to be seized; it both defines and limits the scope of the search and seizure, thereby protecting individuals from general searches, which was the vice of the pre-Revolution writs of assistance. Commonwealth v. Pope, 354 Mass. 625, 629, 241 N.E.2d 848, 851 (1968).
defendant choose to challenge at trial the scope of the officers' authority.65

In view of these objectives, the Court, in Sheppard II, concluded that the defect in the search warrant was not substantial because it did not prejudice the interests of the defendant under the circumstances of the search as actually conducted, and therefore General Laws chapter 276 did not require exclusion of the evidence.66 The Court noted that the failure of the warrant to include a detailed itemization of articles to be searched for and to incorporate the affidavit by reference, did not lead to a general search because the police officers believed that their authority was, in fact, limited by the affidavit to those items listed therein, and conducted the search accordingly.67 Therefore, the search was conducted as it would have been if the warrant had not been defective.68 Additionally, the Court noted that the affidavit used during the search provided the writing necessary to satisfy the legislative objective and therefore the defendant's opportunity to challenge the scope of the search was not impaired.69 The Court concluded that under the circumstances the evidence did not need to be excluded because the search was conducted as if the warrant had complied with the constitutional and statutory requirements.70

The Court then proceeded to consider whether article 14 of the Massachusetts Declaration of Rights compelled exclusion of the evidence obtained during the illegal search.71 The Court recognized that the objectives of the particularity requirements of article 14 are identical to those of General Laws chapter 276, and thus were also satisfied under the circumstances.72 The Court then noted that it had not previously created an exclusionary rule under the state constitution for violations of article 14, and declined to do so here because the search as conducted met constitutional requirements and thus was not unreasonable within the meaning of the state constitution.73

The Court concluded by noting that other circumstances than those present in the instant case might justify exclusion of illegally obtained evidence.74 Specifically, the Court suggested that exclusion might be appropriate where the defect in the warrant causes prejudice to the

65 Sheppard II, 394 Mass. at 389, 476 N.E.2d at 546.
66 Id. at 390, 476 N.E.2d at 546.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id. at 390–92, 476 N.E.2d at 546–47.
72 Id. at 391, 476 N.E.2d at 547.
73 Id.
74 Id. at 391–92, 476 N.E.2d at 547.
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defendant. The Court also recognized that in other circumstances the rationale of the good faith exception might be relevant, and thus left open the possibility of its adoption in the future.76

Two justices of the Supreme Judicial Court, in concurring opinions, noted their agreement with the results but expressed their contrasting views on the status of the exclusionary rule, and exceptions to it under Massachusetts law.77 Justice Liacos supported the approach taken by the Court, which focused on the actual conduct of the search rather than on the supposed good faith of the magistrate and law enforcement officials.78 According to Justice Liacos, if a search is conducted as if the warrant had complied with the particularity requirements, suppression of evidence obtained during the search is not required and is not dependent on a test for good faith reliance.79

In contrast, Justice Lynch believed that if an exclusionary rule is recognized in article 14,80 it should be applied in the Commonwealth as it is applied by the United States Supreme Court.81 Justice Lynch saw no reason to formulate a different rule than that of Leon, which would compel exclusion of evidence obtained pursuant to a defective warrant except where it is shown that the officer acted in "objectively reasonable reliance" on a warrant issued by a magistrate.82

The opinion shows clearly that while the Supreme Judicial Court agreed with the results commanded by the United States Supreme Court, it chose to adopt a narrower exception to the exclusionary rule than did the Supreme Court.83 The decisions by the United States Supreme Court in Massachusetts v. Sheppard84 and United States v. Leon85 indicate that court's willingness to allow the admissibility of evidence obtained pursuant to a facially defective search warrant where it is shown that the law enforcement officials acted in good faith and reasonable reliance on the validity of the warrant.86 The Supreme Court's approach, then, places

75 Id.
76 Id. at 392 & n.9, 476 N.E.2d at 547 & n.9.
77 Id. at 392–93, 476 N.E.2d at 547–48 (Liacos, J., & Lynch, J., concurring).
78 See id. at 392, 476 N.E.2d at 547–48 (Liacos, J., concurring).
79 Id.
80 It should be noted that in this decision the Supreme Judicial Court has refrained from recognizing under the Constitution of the Commonwealth the existence of an exclusionary rule.
81 Sheppard II, 394 Mass. at 393, 476 N.E.2d at 548 (Lynch, J., concurring).
82 Id. Presumably Justice Lynch would look to the good faith reliance by the police officers, independent of whether the search as conducted actually conformed with statutory and constitutional requirements. See id.
83 See id. at 392 & n.9, 476 N.E.2d at 547 & n.9.
greater emphasis on the good faith conduct of the police officers and the magistrate who issued the search warrant, than on the issue of whether the search as actually conducted, albeit in good faith, violated the defendant's rights.\textsuperscript{87}

In contrast, the approach adopted by the Supreme Judicial Court attaches greater importance to the nature of the actual search, and specifically to the prejudice to the defendant which might result.\textsuperscript{88} Though the Court found no prejudice to the defendant on the facts of \textit{Sheppard II}, the exception to the exclusionary rule the Court carved out would compel suppression of evidence obtained during a search conducted pursuant to a defective warrant when the deficiency in particularity leads to a general and unlimited search, in spite of the good faith reliance of the police officers.\textsuperscript{89} Similarly, the good faith of the officers would not negate the defectiveness of the warrant if the defendant's ability to challenge in court the scope of the search is defeated by the lack of particularity.\textsuperscript{90} Though the result in \textit{Sheppard II} was the same as in \textit{Massachusetts v. Sheppard},\textsuperscript{91} application of the exception to the exclusionary rule under state law as adopted in \textit{Sheppard II} will provide greater protection to the rights of the criminal defendant under state law than is provided by the fourth amendment.

\section*{Double Jeopardy—Retrial After Hung Jury Mistrial.\textsuperscript{*} The fifth amendment double jeopardy clause,\textsuperscript{1} as applied to the states through the fourteenth amendment due process clause,\textsuperscript{2} prohibits the states from subjecting criminal defendants to more than one prosecution for the same offense.\textsuperscript{3} Thus, the double jeopardy clause prevents the government from

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having a second opportunity to prosecute a defendant after a jury verdict of acquittal in the first trial. In *Burks v. United States*, the Supreme Court ruled that the double jeopardy clause also prevents reprosecution after a jury verdict of guilty has been overturned on appeal due to a lack of legally sufficient evidence to support the conviction. The Court found that since such an appellate reversal means that the evidence was so lacking that the trial judge should not have submitted the case to the jury and should have directed a verdict of acquittal, the government should not have a second chance to obtain a conviction.

The Supreme Court has held, however, in *Richardson v. United States*, that the double jeopardy clause does not prevent a retrial after a mistrial has been declared as a result of a hung jury. In these situations, the Supreme Court ruled that the double jeopardy clause does not prevent a retrial even if the evidence presented in the first trial was legally insufficient to support a guilty verdict. During the Survey year, in *Berry v. Commonwealth*, the Supreme Judicial Court expanded the protection afforded to criminal defendants in Massachusetts beyond that provided by the double jeopardy clause of the fifth amendment as interpreted by the Supreme Court in *Richardson*. Based on common-law double jeop-

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4 Benton, 395 U.S. at 797.
6 Id. at 18. The *Burks* case involved a prosecution by the federal government. Id. at 3.
In Green v. Massey, 437 U.S. 19 (1978), decided the same day as *Burks*, the Court held that the *Burks* principle was equally applicable to state criminal proceedings. Id. at 24.
7 *Burks*, 437 U.S. at 16. Appellate reversal due to trial error, as distinguished from evidentiary insufficiency, however, does not prevent a retrial of the defendant due to double jeopardy concerns. Id. at 15. See United States v. Tanto, 377 U.S. 463, 465 (1964). The *Burks* Court found that reversal for trial error, unlike reversal due to insufficiency of the evidence, "does not constitute a decision to the effect that the government has failed to prove its case." *Burks*, 437 U.S. at 15. Rather, such a reversal means that the defendant was convicted in a trial which was defective in some fundamental respect, such as "incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct." Id.
In this situation, the Court found that a defendant has a strong interest in obtaining a fair readjudication, just as society maintains a strong interest in seeing that the guilty are punished. Id. Thus, the double jeopardy clause does not prevent retrial when a conviction has been overturned due to trial error in the first prosecution. Id.
9 Id. at 325–26. A “hung jury” means that the jury was unable to agree on a verdict. See id. at 323.
10 Id. at 326.
12 Id. at 799, 473 N.E.2d at 1119.
ardy principles, the Berry Court held that reprosecuting a defendant after a hung-jury-mistrial has been declared in the first trial is prohibited if the government failed to present evidence legally sufficient to warrant a conviction in the first trial.\textsuperscript{13}

In \textit{Berry v. Commonwealth}, the defendant was indicted for the murder of his twenty-month old daughter.\textsuperscript{14} Following the indictment, the defendant, Berry, was brought to trial in the superior court.\textsuperscript{15} At the conclusion of the prosecution's case, Berry made a motion for a required finding of not guilty.\textsuperscript{16} The motion was granted as to the charge of murder in the first degree, but denied as to the charges of second degree murder and manslaughter.\textsuperscript{17} The case was submitted to the jury after the defense presented its case.\textsuperscript{18} The jury deliberated for four days without reaching a verdict, and, thereafter, the judge declared a mistrial.\textsuperscript{19} As the Commonwealth prepared to retry Berry, he filed a motion in the trial court to dismiss the indictment on the ground that a retrial would subject him to double jeopardy.\textsuperscript{20} The motion was denied, and Berry then sought relief from a single justice of the Supreme Judicial Court under that Court's general superintendence powers.\textsuperscript{21} The single justice stayed the proceedings in the trial court, and the case was reported to the full bench of the Supreme Judicial Court.\textsuperscript{22} Berry argued that the Commonwealth did not present evidence legally sufficient to sustain a conviction in the first trial, and that double jeopardy principles therefore did not allow the Commonwealth a second chance to prosecute him.\textsuperscript{23}

\textsuperscript{13} \textit{Id.} at 798, 473 N.E.2d at 1119.
\textsuperscript{14} \textit{Id.} at 793, 473 N.E.2d at 1116.
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.} A motion for a required finding of not guilty may be made by the defendant after the conclusion of the presentation of the prosecution's or the defendant's evidence. See Mass. R. Crim. P. Rule 25 provides that the judge shall enter a finding of not guilty if the evidence is insufficient as a matter of law to sustain a conviction on the offense charged. \textit{Id.}
\textsuperscript{17} \textit{Berry}, 393 Mass. at 793, 473 N.E.2d at 1116.
\textsuperscript{18} \textit{Id.} at 794, 473 N.E.2d at 1116.
\textsuperscript{19} \textit{Id.} The defendant did not object to the grant of a mistrial. \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} The Supreme Judicial Court's general superintendence power is provided for by G.L. c. 211 § 3, which reads in part:

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

\textit{Id.}
\textsuperscript{22} \textit{Berry}, 393 Mass. at 794, 473 N.E.2d at 1116.
\textsuperscript{23} \textit{Id.} at 794, 473 N.E.2d at 1117. Berry conceded that if the Commonwealth had presented legally sufficient evidence to support a conviction, double jeopardy principles would not
In analyzing Berry’s double jeopardy claim, the Supreme Judicial Court first addressed the issue whether the evidence presented by the Commonwealth at the first trial was legally sufficient to warrant a guilty finding. The Court stated that the standard for determining the legal sufficiency of the evidence is whether, in viewing the evidence in the light most favorable to the prosecution, any rational juror could have found beyond a reasonable doubt that the essential elements of the crime were present. After reviewing the evidence in the light most favorable to the Commonwealth, the Court found that the evidence was not legally sufficient to convict Berry of murder or manslaughter in connection with the death of his daughter. According to the Court, evidence indicating that Berry had an opportunity to kill his daughter, that he had struck her on two previous occasions, and that he was capable of inflicting the injuries that killed her, was not sufficient to warrant a finding beyond a reasonable doubt that he had in fact killed the child.

The evidence, the Court stated, also indicated that the child’s mother had an equal opportunity to kill her daughter, that she was capable of inflicting the injuries that caused the child’s death, and that she was as disposed as Berry was to prevent his retrial after a mistrial declared due to a hung jury. Id. at 794, 473 N.E.2d at 1116–17.

24 Id. at 794, 473 N.E.2d at 1117.
26 Berry, 393 Mass. at 794–96, 473 N.E.2d at 1117–18.
27 Id. at 796, 473 N.E.2d at 1118. The Court found that the evidence, viewed most favorably to the prosecution, established that twenty-month old Shurasha Campbell, Berry’s daughter, suffered many injuries throughout her life before she died. Id. at 794, 473 N.E.2d at 1117. The child had lived with her mother, Dorothy Campbell, Campbell’s other daughter Natasha, and Berry. Id. On June 5, 1982, Berry remained in the family apartment with Shurasha and Dorothy Campbell until 11:00 A.M. Id. at 795, 473 N.E.2d at 1117. At approximately 1:00 P.M., Campbell carried Shurasha, who was unconscious, out of the apartment. Id. The child was pronounced dead later that evening. Id.
28 Id. at 796, 473 N.E.2d at 1118. On one occasion late in the spring or early in the summer of 1981, a visitor to the second floor of a home in which the Campbell’s occupied the first floor heard Shurasha crying for 30 to 45 minutes. Id. at 795, 473 N.E.2d at 1117. The visitor heard Berry yell “Shut up. Shut up. Shut up.,” and then heard a loud thud. Id. Afterward, Shurasha cried loudly as though she were in pain. Id. On June 4, 1982, Berry entered a room in the family apartment where Shurasha was crying. Id. Natasha heard a noise that sounded like “somebody hitting” and the child stopped crying. Id.
29 Id. at 796, 473 N.E.2d at 1118. The physician who performed an autopsy testified that Shurasha died from injuries caused by blows of great force which were “consistent with karate or martial-art-type blows.” Id. at 795, 473 N.E.2d at 1117. Berry is six feet, two inches tall, weighs one hundred and sixty pounds, and knows martial arts. Id. at 794, 473 N.E.2d at 1117. Dorothy Campbell stands five feet, two inches tall and weighs one hundred pounds. Id.
30 Id. at 796, 473 N.E.2d at 1118.
to kill the child.\(^{31}\) Therefore, the Court concluded that the evidence presented by the prosecution at Berry’s first trial was legally insufficient to warrant a finding beyond a reasonable doubt that Berry, and not the child’s mother, was guilty of murder or manslaughter.\(^{32}\)

After finding the evidence legally insufficient to warrant a guilty verdict, the Court next addressed the question whether double jeopardy principles barred Berry’s retrial.\(^{33}\) The Court stated that in order for a defendant to receive protection from double jeopardy, the defendant’s original jeopardy must have terminated.\(^{34}\) If the retrial is part of the defendant’s original jeopardy, then double jeopardy protections do not prohibit the retrial.\(^{35}\) According to the Court, whether the defendant’s original jeopardy has terminated depends upon whether, in view of the policies and principles behind the protection from double jeopardy, the proceedings against the defendant have reached a point at which they should cease.\(^{36}\)

In discussing the reasons for providing protection from double jeopardy, the Court stated that a second prosecution may be grossly unfair to the defendant, even if the first trial is not completed due to the jury’s inability to agree upon a verdict.\(^{37}\) According to the Court, a second prosecution increases the financial and emotional burden on the accused.\(^{38}\) In addition, the Court pointed out that the period in which the accused is stigmatized by an unresolved accusation of criminal activity is prolonged by a second prosecution.\(^{39}\) Furthermore, the Court noted

\(^{31}\) Id.

\(^{32}\) Id. The Court recognized that in order to obtain a conviction on circumstantial evidence the prosecution is not required to show that no person other than the defendant had the power to commit the crime. *Id.* at 795, 473 N.E.2d at 1117 (quoting Commonwealth v. Fancy, 349 Mass. 196, 200, 207 N.E.2d 276, 280 (1965), quoting from Commonwealth v. Leach, 156 Mass. 99, 101-02, 30 N.E. 163 (1892)). The Court stated, however, that “‘if, upon all the evidence, the question of the guilt of the defendant is left to conjecture or surmise and has no solid foundation in established facts, a verdict of guilty cannot stand.’” *Berry*, 393 Mass. at 795–96, 473 N.E.2d at 1117–18 (quoting *Fancy*, 349 Mass. at 200, 207 N.E.2d at 280, quoting from Commonwealth v. O’Brien, 305 Mass. 393, 401, 26 N.E.2d 235, 240 (1940)). When the evidence, the Court stated, equally supports either of two inconsistent propositions, neither proposition is established by sufficient proof. *Berry*, 393 Mass. at 796, 473 N.E.2d at 1117–18 (quoting *Fancy*, 349 Mass. at 200, 207 N.E.2d at 280, quoting from Commonwealth v. Carter, 306 Mass. 141, 147, 27 N.E.2d 690, 694 (1940); Commonwealth v. Smith, 342 Mass. 180, 183, 172 N.E.2d 597, 599–600 (1961)).

\(^{33}\) Id. at 796–800, 473 N.E.2d at 1118–20.

\(^{34}\) Id. at 796, 473 N.E.2d at 1118.

\(^{35}\) See Richardson, 468 U.S. at 325.

\(^{36}\) *Berry*, 393 Mass. at 796, 473 N.E.2d at 1118.

\(^{37}\) Id. at 796–97, 473 N.E.2d at 1118 (quoting Arizona v. Washington, 434 U.S. 497, 503–05 (1978)).

\(^{38}\) *Berry*, 393 Mass. at 796–97, 473 N.E.2d at 1118.

\(^{39}\) Id.
that a second prosecution may increase the risk that an innocent defendant will be found guilty.\textsuperscript{40} Therefore, the Court stated, a prosecutor is generally entitled to only one opportunity to require an accused to stand trial.\textsuperscript{41} The Court recognized, however, that a defendant’s right not to be reprosecuted must yield to the interests of society in giving the prosecution one “complete” opportunity to convict those who violate the law.\textsuperscript{42}

In this case, the Court stated, the Commonwealth had had one complete opportunity to convict Berry.\textsuperscript{43} According to the Court, the Commonwealth presented all of the evidence it chose to present at Berry’s first trial, and that evidence was not legally sufficient to warrant a conviction.\textsuperscript{44} The Court stated that the judge’s declaration of a mistrial when the jury could not agree on a verdict did not deprive the Commonwealth of its opportunity to convict Berry, since, on the basis of the evidence presented, the jury could not have legally returned any verdict other than not guilty.\textsuperscript{45} Furthermore, the Court stated that if the jury had found Berry guilty, rather than failing to reach a verdict, Berry could have appealed and obtained an appellate determination that the evidence presented at trial was legally insufficient to support the conviction.\textsuperscript{46} In that situation, the Court stated, the Commonwealth could not have reprosecuted Berry, as the Supreme Court’s decision in \textit{Burks v. United States}\textsuperscript{47} establishes that the fifth amendment double jeopardy clause prohibits a second trial after an appellate reversal of a conviction based on legally insufficient evidence.\textsuperscript{48} The Commonwealth, the Supreme Judicial Court reasoned, should not be placed in a better position by being allowed to retryBerry simply because the jury could not agree on a verdict.\textsuperscript{49} Therefore, the Court held that jeopardy terminates when a hung-jury mistrial is declared if the Commonwealth failed to present legally sufficient evidence to support a conviction.\textsuperscript{50} Based on the finding that jeop-

\textsuperscript{40} \textit{Id.} See Carsey v. United States, 392 F.2d 810, 813–14 (D.C. Cir. 1967) for a discussion of how subtle changes in the evidence presented by the prosecution, initially favorable to the defendant, may occur during the course of successive prosecutions.

\textsuperscript{41} \textit{Id.} at 796–97, 473 N.E.2d at 1118 (quoting \textit{Arizona}, 434 U.S. at 503–05).

\textsuperscript{42} \textit{Id.} at 797, 473 N.E.2d at 1118 (quoting \textit{Arizona}, 434 U.S. at 509).

\textsuperscript{43} \textit{Berry}, 393 Mass. at 797, 473 N.E.2d at 1118.

\textsuperscript{44} \textit{Id.} See supra notes 26–32 and accompanying text for a discussion of the legal sufficiency of the evidence presented against Berry at his first trial.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Burks v. United States}, 437 U.S. 1 (1978).

\textsuperscript{48} \textit{Id.} at 797–98, 473 N.E.2d at 1118–19 (citing \textit{Burks v. United States}, 437 U.S. 1, 18 (1978)).

\textsuperscript{49} \textit{Berry}, 393 Mass. at 798, 473 N.E.2d at 1119.

\textsuperscript{50} \textit{Id.} The defendant must also raise the issue of the legal sufficiency of the evidence at the first trial by moving for a required verdict of not guilty. See \textit{id.}
In determining that a second prosecution is barred after a hung-jury-mistrial if the evidence presented at the first trial is thereafter determined to have been legally insufficient, the Berry Court expressly refused to follow the Supreme Court's reasoning in Richardson v. United States. In Richardson, the Supreme Court held that, regardless of the sufficiency of the evidence presented at the first trial, the double jeopardy clause of the fifth amendment does not prevent a defendant from being reprosecuted after a hung-jury-mistrial. The Supreme Court stated that it had been established for 160 years that a failure of the jury to agree on a verdict permitted the trial judge to terminate the first trial and retry the defendant. The Supreme Court noted that it has consistently adhered to the rule that a retrial in such circumstances does not violate the double jeopardy clause, and the Court exhibited an unwillingness to disturb this settled line of cases. The protections of the double jeopardy clause, according to the Supreme Court, only apply if there has been some event, such as an acquittal or its equivalent, which terminates the original jeopardy. The Richardson Court stated that its decision in Burks, which held that the double jeopardy clause bars retrial following appellate reversal of a conviction based on insufficient evidence, established only that a finding of insufficient evidence, on appeal from a jury verdict of guilty, was the equivalent of an acquittal for double jeopardy purposes. The Burks case, the Richardson Court stated, did not establish that a hung jury was the equivalent of an acquittal, and the Court refused to so extend the Burks decision. The Supreme Court thus held that original jeopardy does not terminate following a hung-jury-mistrial even if the evidence at the first trial was legally insufficient. In such circumstances, therefore, the Richardson Court indicated that the double jeopardy clause would not prohibit a retrial.

51 Id.
52 Id. at 799, 473 N.E.2d at 1119.
54 Id. at 325–26.
55 Id. at 323–24 (citing United States v. Perez, 9 Wheat. 579 (1824)).
56 Richardson, 468 U.S. at 324 (citing Logan v. United States, 144 U.S. 263, 297–98 (1892)).
57 Richardson, 468 U.S. at 324.
58 Id. at 325.
59 Burks, 437 U.S. at 18.
60 Richardson, 468 U.S. at 325.
61 Id. at 325, 326.
62 Id. at 326.
63 Id.
The Berry Court, however, refused to limit the protection from double jeopardy to that afforded by the fifth amendment as interpreted by the Supreme Court in Richardson. The Supreme Judicial Court stated that Berry's claim was not based on the fifth amendment double jeopardy clause, but was instead based on common-law principles. The Supreme Judicial Court noted that protection from double jeopardy had long been a part of the common law of Massachusetts. Principles of common law, the Court emphasized, may provide greater protections to criminal defendants than either the State or the Federal Constitution. The Berry Court stated that the concerns that underlie double jeopardy principles justify more protection to criminal defendants than that afforded by the fifth amendment under Richardson. The Supreme Judicial Court indicated that this added protection required that retrial be barred following a hung-jury-mistrial if the evidence presented at the first trial is determined to have been legally insufficient. Therefore, because the evidence presented at Berry's first trial was legally insufficient to support a conviction, and because Berry preserved the issue by moving for a required not guilty verdict at the first trial, the Court found that common-law double jeopardy principles barred his retrial.

Before concluding its analysis, the Berry Court stated that its decision had no effect on the operation of the two-tier trial system in effect in the district and municipal courts of Massachusetts. Under this system, criminal defendants who are brought to trial in district or municipal courts may elect to have either a bench trial or a jury trial. A defendant who elects a jury trial may appeal directly to the Massachusetts Appeals Court if convicted. A defendant's only avenue of recourse from a bench trial conviction, however, is a trial by jury, again at the trial court level.

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64 Berry, 393 Mass. at 799, 473 N.E.2d at 1119.
65 Id. at 798, 473 N.E.2d at 1119.
67 Berry, 393 Mass. at 798, 473 N.E.2d at 1119.
68 See supra notes 29–33 and accompanying text.
69 Berry, 393 Mass. at 799, 473 N.E.2d at 1119.
70 Id.
71 See supra notes 26–32 and accompanying text.
72 Berry, 393 Mass. at 793, 473 N.E.2d at 1116.
73 Id. at 800, 473 N.E.2d at 1120.
74 Id. at 799, 473 N.E.2d at 1119–20.
75 G.L. c. 218 § 26A.
76 G.L. c. 218 § 27A(g).
77 G.L. c. 218 § 27A(c).
Supreme Judicial Court, in *Lydon v. Commonwealth*,\(^78\) held that a defendant is not placed in double jeopardy merely because the only recourse from a bench trial conviction based on evidence later found legally insufficient is a trial de novo by jury.\(^79\) The *Berry* Court maintained the *Lydon* Court's view that a defendant’s voluntary choice of a bench trial and subsequent voluntary choice of a trial de novo by jury does not implicate double jeopardy concerns.\(^80\)

The decision in *Berry v. Commonwealth* is significant in that it demonstrates the willingness of the Supreme Judicial Court to depart from decisions of the United States Supreme Court in the area of protections afforded to criminal defendants. In several recent cases, the Supreme Court has acted to narrow the federal constitutional rights of criminal defendants.\(^81\) For example, in *United States v. Leon*,\(^82\) the Supreme Court created a “good-faith” exception to the exclusionary rule,\(^83\) which prohibits the use in a criminal trial of evidence seized in violation of the fourth amendment.\(^84\) In *Leon*, the Supreme Court held that evidence seized pursuant to a warrant which was not supported by probable cause nevertheless could be admitted into evidence against the defendant based on the objective good-faith belief of the police that the warrant was valid.\(^85\) In another case, *New York v. Quarles*,\(^86\) the Supreme Court limited the application of the *Miranda* doctrine,\(^87\) in which evidence obtained as a result of police interrogation cannot be admitted into evidence at trial unless the police have complied with the dictates of *Miranda*.\(^88\) In *Quarles*, the Court created a “public safety” exception to the requirements of *Miranda*, holding that the police need not comply with *Miranda* when doing so would endanger the public.\(^89\) As the Supreme Court continues to limit the protections afforded to criminal defendants by the United States Constitution,\(^90\) defendants will be forced to rely on


\(^{80}\) See *Berry*, 393 Mass. at 799, 473 N.E.2d at 1120 (quoting *Lydon*, 381 Mass. at 359–60, 409 N.E.2d at 748).

\(^{81}\) See infra notes 82–90 and accompanying text.


\(^{83}\) Id. at 922.


\(^{85}\) *Leon*, 468 U.S. at 922.


\(^{87}\) Id. at 655–56.


\(^{89}\) *Quarles*, 467 U.S. at 655–56.

\(^{90}\) For other instances in which the Supreme Court has limited the protections afforded to criminal defendants by the federal constitution, see *Oregon v. Elstad*, 105 S. Ct. 1285, 1298 (1985) (statement obtained in violation of *Miranda* requirements does not “taint”...
state law interpretations by state courts to obtain these protections.\textsuperscript{91} The decision in \textit{Berry} clearly establishes that the Supreme Judicial Court of Massachusetts is willing to provide more protections to criminal defendants based on interpretations of state law than those afforded by the federal constitution as interpreted by the Supreme Court.\textsuperscript{92}

The Supreme Judicial Court’s decision in \textit{Berry} is more responsive than the Supreme Court’s decision in \textit{Richardson} to the principles that underlie protecting criminal defendants from double jeopardy.\textsuperscript{93} Because of the danger that a second prosecution may be grossly unfair to a defendant, the state is entitled to but one complete opportunity to subject a defendant to trial for an alleged offense.\textsuperscript{94} The potential dangers presented by allowing the prosecution more than one opportunity to obtain a conviction dictate that the government be prohibited from re prosecuting a defendant after it has failed in the first trial to present legally sufficient evidence to warrant a conviction.\textsuperscript{95} Thus, as the Supreme Court held in

\begin{footnotesize}

\textsuperscript{92} Subsequent to the \textit{Berry} decision, the Supreme Judicial Court again addressed the issue whether Massachusetts state law provided more protection to criminal defendants than the federal constitution as interpreted by the Supreme Court. In Commonwealth v. Upton, 394 Mass. 363, 373, 476 N.E.2d 548, 556 (1985), the Supreme Judicial Court concluded that Article 14 of the Declaration of Rights of the Massachusetts Constitution provides more substantive protections to criminal defendants in the determination of probable cause than provided by the fourth amendment as interpreted by the Supreme Court in Illinois v. Gates, 462 U.S. 213 (1983). The \textit{Upton} Court rejected the “totality of circumstances” test adopted by the Supreme Court in \textit{Gates}. \textit{Upton}, 394 Mass. at 373, 476 N.E.2d at 556. The \textit{Upton} Court found that Article 14 of the Massachusetts Constitution required that determinations of probable cause be made according to the more demanding \textit{Aguilar}/\textit{Spinelli} test. \textit{Id.} at 374, 476 N.E.2d at 556–57. Other state courts have also rejected the totality of the circumstances test and concluded that state law required that determinations of probable cause be made according to the \textit{Aguilar}/\textit{Spinelli} test. See State v. Jackson, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984); State v. Ross, 194 Conn. 447, 463, 481 A.2d 730, 738 (1984); \textit{People} v. Kershaw, 147 Cal. App. 3d 750, 754 n.2, 195 Cal. Rptr. 311, 313 n.2. (1983).

\textsuperscript{93} See \textit{infra} notes 94–100 and accompanying text.

\textsuperscript{94} Arizona v. Washington, 434 U.S. 497, 503–05 (1978). See \textit{supra} notes 29–33 and accompanying text for a discussion of the dangers presented by allowing the state more than one opportunity to obtain a conviction.

\textsuperscript{95} See \textit{Burks} v. United States, 437 U.S. 1, 18 (1978).
\end{footnotesize}
Burks, the fifth amendment double jeopardy clause prohibits retrial after appellate reversal of a conviction due to the legal insufficiency of the evidence. Under the Supreme Court's decision in Richardson, however, the double jeopardy clause does not prevent retrial after a mistrial because of the jury's inability to agree on a verdict, even if the evidence presented at the first trial is thereafter determined to have been legally insufficient. Whether the first trial results in the return of a guilty verdict by the jury or in a mistrial due to the jury's inability to agree on a verdict should have no consequences for double jeopardy purposes. The fact remains that if the government failed to present legally sufficient evidence in the first trial, allowing the government a second opportunity to obtain a conviction would unfairly subject the defendant to the hazards accompanying a second trial. Furthermore, the Supreme Court's decision in Richardson will lead to the illogical result of actually placing the government in a better position if it fails in the first trial to convince the jury of the defendant's guilt. If the evidence is determined to have been insufficient by an appellate court after the jury returns a guilty verdict, the double jeopardy clause bars retrial. If the jury cannot agree on a verdict and a mistrial is granted, however, the double jeopardy clause does not bar retrial. Logic would dictate that the government should not be placed in a better position and allowed to reprosecute a defendant simply because it failed in the first trial to convince the jury of the defendant's guilt. Therefore, the Berry Court's decision to expand the protections available to criminal defendants beyond that afforded by the double jeopardy clause as interpreted in Richardson is consistent with the principles that underlie double jeopardy prohibitions.

Although the Berry decision is consistent with double jeopardy principles, the decision will result in an increased burden on the Massachusetts court system. Under Berry, a criminal defendant, who had raised the issue of the legal sufficiency of the evidence at his first trial by moving for a required verdict of not guilty, will be entitled to a review of the legal sufficiency of that evidence prior to a second prosecution taking place if the first trial ends in a hung-jury-mistrial. The defendant may

96 Id.
97 Richardson, 468 U.S. at 326.
98 Because the evidence presented by the prosecution was legally insufficient to warrant a conviction, the jury should not be given the case and a not guilty verdict should be directed. See, e.g., Burks, 437 U.S. at 16. Therefore, in such instances, the jury's decision would be irrelevant for double jeopardy purposes.
99 Burks, 437 U.S. at 18.
100 Richardson, 468 U.S. at 326.
101 See supra notes 94–100 and accompanying text.
102 Berry, 393 Mass. at 799, 473 N.E.2d at 1119.
103 Id. at 798, 473 N.E.2d at 1119.
obtain this review by making a motion to the trial court judge presiding at the second trial, asserting that the second prosecution should be prohibited based on double jeopardy grounds. If the reviewing judge determines that the evidence presented at the first trial was legally sufficient, and that retrial is therefore not barred by double jeopardy, such an interlocutory decision would not be immediately appealable to the Massachusetts Court of Appeals. The defendant would, however, have other means of possible recourse from such a determination. For example, if the reviewing trial court judge determines that the evidence at the first trial was legally sufficient and that retrial is thus permitted, the defendant would probably be entitled to immediate review of that decision under the general superintendence power of the Supreme Judicial Court. In addition, a defendant whose double jeopardy claim is denied by the reviewing trial court judge may bring a civil action in the Supreme Judicial Court, in the nature of a writ of prohibition, to obtain interlocutory relief. Therefore, because a defendant whose first trial ends in a hung-jury-mistrial will be entitled to a review of the legal sufficiency of the evidence presented at the first trial before a second trial may take place, the Berry decision will place additional burdens on the Massachusetts court system.

The Berry Court recognized that its decision might impose additional burdens on the Massachusetts courts. The Court found, however, that such additional burdens were justified by the need to provide criminal defendants with the important protections required by double jeopardy principles. The Supreme Judicial Court stated that such a result must

104 Id. at 794, 473 N.E.2d at 1116.
105 See G.L. c. 278 § 28E, which allows an interlocutory appeal by a defendant of an adverse decision by a trial judge on a motion to suppress evidence. The statute, however, does not provide for interlocutory appeal by defendants of any other adverse pre-trial orders. Id. See also Mass. R. Crim. P., Rule 15, 43 M.G.L.A.
106 See G.L. c. 211 § 3 and supra note 16. In Costarelli v. Commonwealth, 374 Mass. 677, 373 N.E.2d 1183 (1977), the Supreme Judicial Court held that a defendant who presents a substantial double jeopardy claim is entitled to a review of that claim under the Court’s general superintendence powers prior to the second trial. Id. at 680, 373 N.E.2d at 1186. In Fadden v. Commonwealth, 376 Mass. 604, 382 N.E.2d 1054 (1978), the Supreme Judicial Court held that a single justice of the Court may, in a proper case, exercise powers of general superintendence under G.L. c. 211 § 3 by allowing interlocutory review of the double jeopardy claim and transfer the decision on the merits of the claim to the Massachusetts Court of Appeals. Id. at 608, 382 N.E.2d at 1057.
107 Id. at 607, 608, 382 N.E.2d at 1056, 1057. In Fadden, the Court found that such a civil action seeking relief from a trial court proceeding could be transferred to the appeals court for a decision on the merits. Id. at 608, 382 N.E.2d at 1057. See also G.L. c. 211 § 4A.
108 See Berry, 393 Mass. at 799, 473 N.E.2d at 1119.
109 Id.
110 Id.
be accepted as courts cannot withhold important protections from criminal defendants simply because granting them would impose additional burdens on the courts.\textsuperscript{111}

In conclusion, the Supreme Judicial Court acted in \textit{Berry} to expand the protections available to criminal defendants in Massachusetts beyond those afforded by the fifth amendment double jeopardy clause as interpreted by the Supreme Court in \textit{Richardson}. In \textit{Berry}, the Supreme Judicial Court held that common-law double jeopardy principles prohibit the Commonwealth from reprosecuting a defendant following a hung-jury-mistrial, if, thereafter, the evidence presented at the first trial is determined to have been legally insufficient to warrant a conviction. Because the \textit{Berry} decision allows criminal defendants to obtain review of the legal sufficiency of the evidence presented in the first trial prior to a second trial taking place, additional burdens will be placed on the Massachusetts court system. These additional burdens, however, are justified, as the \textit{Berry} decision is consistent with the concerns which underlie protection from double jeopardy. Due to the risk of unfairness to the defendant, the state should not be allowed a second chance to prosecute a defendant after failing in its first opportunity to produce legally sufficient evidence to warrant a conviction.

\textbf{§ 3.5. Warrantless Automobile Searches & The Exclusionary Rule.}\textsuperscript{*}

Over the past thirty years, defendants in the Commonwealth rested search and seizure claims on federal constitutional grounds\textsuperscript{1} to the substantial exclusion of arguments based on the state constitution.\textsuperscript{2} Individual rights over this period became associated almost entirely with federal law, even though the Massachusetts Constitution also often guaranteed these rights, because the United States Supreme Court had expanded the measure of federal protection of individual rights under the United State Constitution's Bill of Rights.\textsuperscript{3} Thus the Massachusetts Supreme Judicial

\textsuperscript{111} Id. (citing Abney v. United States, 431 U.S. 651, 662 n.8 (1977)).
\textsuperscript{*} Anne E. Craige, staff member, \textit{ANNUAL SURVEY OF MASSACHUSETTS LAW}.
\textsuperscript{3} See Brennan, \textit{State Constitutions and the Protection of Individual Rights}, 90 HARV. L. REV. 489, 493 (1977). As Justice Brennan points out, the Supreme Court, in the years 1962–1969, extended to the states nine specific guarantees of the Bill of Rights. \textit{Id.} Justice Brennan posits that because rights and liberties were becoming increasingly federalized in the 1960's, "state courts saw no reason to consider what protections, if any, were secured by state constitutions." \textit{Id.} at 495.

As Justice Linde of the Oregon Supreme Court notes, state courts routinely apply state
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Court never had afforded more substantive protection to criminal defendants under article fourteen of the Declaration of Rights of the Massachusetts Constitution, prohibiting unreasonable searches and seizures,\(^4\) than prevailed under the fourth amendment, the parallel provision of the United States Constitution.\(^5\)

The United States Supreme Court’s expansion of federal rights during this period included the application of the federal “exclusionary rule” to the states.\(^6\) Under the federal exclusionary rule, if law enforcement of-

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statutes or state constitutional provisions that have no federal parallel before reaching a federal question. Linde, supra note 1, at 176.

But when the Supreme Court has decided a point, many state courts take the decision as a kind of benchmark, presumptively correct also for state law. When they depart from federal decisions, state courts often begin by explaining that the Supreme Court permits them to interpret their state’s law in their own way — a sign of how far we have lost sight of basic federalism.

Id.

\(^4\) Article 14 provides in pertinent part:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, 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 . . . .


\(^5\) Upton III, 394 Mass. at 373, 476 N.E.2d at 555. The fourth amendment to the United States Constitution provides in part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. CONST. amend. IV.

In 1949, the fourth amendment became applicable to the states through Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). United States Supreme Court Justice Brennan has noted that the extension to the states “was made virtually meaningless because the states were left free to decide for themselves whether any effective means of enforcing the guarantee was to be made available.” Brennan, supra note 3, at 493. In 1961, however, the Supreme Court provided for the exclusion from a state criminal prosecution of evidence obtained in violation of the United States Constitution. Id. (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)). A state can diverge from the constitutional minimum set forth in the United States Supreme Court’s fourth amendment standards if the state affords greater protection under state law than under federal law. Brennan, supra note 3, at 500 (quoting State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974)). As Justice Linde of the Oregon Supreme Court has noted, the people of any state are not bound to the minimum standard allowed to all states by the federal constitution. Linde, First Things First: Rediscovering the States’ Bills of Rights, 9 U. BALTIMORE L. REV. 379, 395 (1980).

\(^6\) In 1961, the United States Supreme Court provided for the exclusion from a state criminal prosecution of evidence obtained in violation of the United States Constitution. Brennan, supra note 3, at 493 (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)). The United States Supreme Court first adopted this “exclusionary rule,” as it has come to be known, in federal prosecutions in 1914. Weeks v. United States, 232 U.S. 383, 398 (1914). The United States Supreme Court adopted the rule as a principal method of ensuring that constitutional limitations upon criminal investigations would be enforced. F. MILLER, R. DAWSON, G. DIX, & R. PARNAS, THE POLICE FUNCTION 35 (3d ed. 1982). Specifically, the Supreme Court sought to deter unreasonable search and seizure, United States v. Calandra,
officers obtain evidence in an illegal search and seizure, then the government is barred under the fourth amendment from using that evidence in a criminal prosecution. Nevertheless, the Massachusetts Supreme Judicial Court never had held that article fourteen of the Massachusetts Constitution required exclusion of evidence seized during an illegal search.

In the 1983 decision of Commonwealth v. Upton, the Massachusetts Supreme Judicial Court passed up the opportunity to define the protection against unreasonable search and seizure guaranteed by article fourteen of the Massachusetts Constitution. Instead, the Upton Court held a search and seizure unconstitutional, basing its decision on the fourth amendment. The United States Supreme Court, however, rejected the Supreme Judicial Court's construction of the fourth amendment standard and remanded the decision. In a concurring opinion, Justice Stevens commented that the Supreme Judicial Court had ignored its primary function of defining article fourteen, the Massachusetts guarantee against unreasonable search and seizure, by applying article fourteen principles to the case.

On remand of Upton, the Supreme Judicial Court followed Justice Steven's directive to give new substance to the state's constitutional protection against unreasonable searches and seizures. The Supreme Judicial Court concluded for the first time in Upton that article fourteen of the Massachusetts Constitution provides more protection to criminal

414 U.S. 338, 348 (1974), ensure judicial integrity by preventing judges from becoming accomplices in the disobedience of the Constitution, Mapp, 367 U.S. at 659, and minimize the risk of undermining citizens' trust in government by permitting the government to profit from its own misconduct. Id. The Supreme Court has stated that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Id.


10 Upton I, 390 Mass. at 573, 458 N.E.2d at 723–24. In Upton I, the Supreme Judicial Court stated:

[B]ecause we conclude that the evidence seized pursuant to the search warrant should have been suppressed by application of Fourth Amendment principles expressed by the Supreme Court of the United States, ... we need not consider whether the search violated the cognate provisions of art. 14 of the Massachusetts Declaration of Rights . . . .

Id.

11 Upton II, 104 S. Ct. at 2089.

12 Id. (Stevens, J., dissenting) (quoting Linde, supra note 1, at 179); id. at 2089, 2091 (Stevens, J., dissenting).
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During the Survey year, in Commonwealth v. Ford, the Supreme Judicial Court established two significant, additional search and seizure protections based explicitly on state constitutional grounds. In Ford, the Court held that a warrantless storage search of a locked trunk of a vehicle at a minimum must be conducted in accordance with standard police procedures established by the police department in order to be lawful under article fourteen of the Massachusetts Constitution. In addition, the Court held that evidence obtained in a storage search not conducted pursuant to standard police procedures must be excluded from a criminal proceeding under article fourteen.

In Ford, a Watertown police officer saw the defendant operating a motor vehicle. Because the officer was aware of an outstanding warrant for the defendant's arrest, he stopped the defendant's vehicle. The defendant produced a driver's license but told the officer that he was waiting for title on the vehicle before registering it and thus had no registration. The officer arrested the defendant, took him to the police station, and subsequently confirmed that the vehicle was unregistered.

Because the defendant had parked his unregistered car in a restricted area upon being stopped, the officer decided to call a private towing company to remove the car from the street. Knowing that the towing company had had incidents with items stolen from vehicles stored by the company, the officer reached into the vehicle to gather up some eight-

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13 Upton III, 394 Mass. at 373, 476 N.E.2d at 556.
14 394 Mass. at 421, 476 N.E.2d at 560 (1985). In fact, the Court decided Ford three days after its decision in Upton III.
15 The definition of a storage search is perhaps best understood by comparing the search in Ford to an inventory search. In an inventory search, the police follow a routine procedure of securing and inventorying the contents of an impounded vehicle. See South Dakota v. Opperman, 428 U.S. 364, 369 (1976). The Supreme Court in Opperman stated three purposes for an inventory search: to protect the owner's property while the vehicle is in police custody, the police department from claims of loss and theft, and themselves from potential danger. Id. In addition, the Opperman Court stated that police perform inventory searches to attempt to determine whether a vehicle has been stolen. Id. at 369. In contrast, in the storage search in Ford, the officer did not search and make a record of the contents of Ford's trunk. Rather, the officer viewed valuables in plain view on the car seat and floor, and he opened the trunk to store those items. Ford, 394 Mass. at 423, 476 N.E.2d at 562.
16 Ford, 394 Mass. at 426, 476 N.E.2d at 563.
17 Id. at 426, 476 N.E.2d at 563-64.
18 Id. at 422, 476 N.E.2d at 561.
20 Ford, 394 Mass. at 422, 476 N.E.2d at 561.
21 Id. at 422-23, 476 N.E.2d at 561.
22 Id. at 423, 476 N.E.2d at 561.
track tapes located on the seat and floor of the vehicle.\textsuperscript{23} The officer opened the locked trunk to place the tapes therein for safekeeping, whereupon he found a firearm in plain view.\textsuperscript{24} The defendant was charged with unlawfully carrying a firearm without a license\textsuperscript{25} and was convicted at a bench trial in the district court.\textsuperscript{26} After appealing to the district court jury session, the defendant moved to suppress the rifle, contending that the intrusion into the trunk violated his rights to be free from unreasonable search and seizure under the fourth amendment of the United States Constitution and article fourteen of the Declaration of Rights of the Massachusetts Constitution.\textsuperscript{27} The motion judge denied the motion, concluding that the officer did not intend to search when he opened the trunk and had no expectation of finding contraband.\textsuperscript{28} The rifle was admitted into evidence, and a jury subsequently found the defendant guilty.\textsuperscript{29}

The defendant then appealed to the Massachusetts Appeals Court, which reversed the conviction, holding that the intrusion into the trunk was a storage search\textsuperscript{30} which was unreasonable under both the federal and state constitutions because the search was not made pursuant to standard police procedures.\textsuperscript{31} After granting the Commonwealth’s motion for further appellate review, the Supreme Judicial Court affirmed the Appeals Court’s ruling.\textsuperscript{32} While agreeing with the Appeals Court’s conclusion, the Supreme Judicial Court’s decision was based explicitly on state constitutional grounds.\textsuperscript{33} The Supreme Judicial Court held that the warrantless search of the locked automobile trunk in the absence of standard police procedures violated article fourteen.\textsuperscript{34} The Court further

\textsuperscript{23} Id. at 423, 476 N.E.2d at 561–62.
\textsuperscript{24} Id. at 423, 476 N.E.2d at 562.
\textsuperscript{25} Id. at 421–22, 476 N.E.2d at 561. The defendant was charged with violation of G.L. c. 269, § 10(a). \textit{Ford I}, 17 Mass. App. Ct. at 505, 459 N.E.2d at 1243.
\textsuperscript{26} \textit{Ford}, 394 Mass. at 422, 476 N.E.2d at 561.
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 423, 476 N.E.2d at 562. In addition, the motion judge concluded that the officer had a legitimate reason for opening the trunk and that the rifle was in plain view. \textit{Id}.
\textsuperscript{29} Id. at 422, 476 N.E.2d at 561.
\textsuperscript{30} For a description of storage searches, see \textit{supra} note 15.
\textsuperscript{32} \textit{Ford}, 394 Mass. at 422, 476 N.E.2d at 561. The Supreme Judicial Court affirmed the Appeals Court in a four to one decision.
\textsuperscript{33} \textit{Id}. In accordance with the United States Supreme Court’s directive in Michigan v. Long, 103 S. Ct. 3469 (1983), discussed \textit{infra} note 92, the Supreme Judicial Court stated that the state grounds were “separate, adequate, and independent . . . .” \textit{Ford}, 394 Mass. at 426, 476 N.E.2d at 563.
\textsuperscript{34} \textit{Ford}, 394 Mass. at 426, 476 N.E.2d at 563.
held that the unlawful search required exclusion of the evidence under article fourteen.\textsuperscript{35}

In Ford, the Supreme Judicial Court established first that the intrusion into the locked trunk to store the defendant's valuables was a search for purposes of article fourteen of the Massachusetts Constitution.\textsuperscript{36} The Court rejected the Commonwealth's argument that because the officer was not looking for anything when he opened the trunk, there was no search of the defendant's vehicle in the constitutional sense.\textsuperscript{37} The Court noted that the absence of investigative intent was not significant in determining whether an intrusion constituted a search, although it might be significant in determining whether the search was reasonable or unreasonable.\textsuperscript{38} Instead, according to the Court, the controlling question was whether the officer intruded into an area in which the defendant had a reasonable expectation of privacy.\textsuperscript{39} After noting that the intrusion appeared to be a search for the purposes of the fourth amendment, the Court held it to be a search for purposes of article fourteen of the Massachusetts Constitution,\textsuperscript{40} thus impliedly concluding that an individual has a legitimate and reasonable expectation of privacy in his or her locked vehicle trunk.

After establishing that the trunk intrusion constituted a search, the Court inquired into the reasonableness of that search\textsuperscript{41} and concluded that a storage search of a locked vehicle trunk conducted in the absence of standard procedures established by the police department is always unreasonable.\textsuperscript{42} In reaching this conclusion, the Court looked primarily to the United States Supreme Court's discussion of inventory searches in a 1976 decision, South Dakota v. Opperman.\textsuperscript{43} In Opperman, the Supreme Court upheld as reasonable an inventory search of an unlocked

\textsuperscript{35} Id. at 426, 476 N.E.2d at 563–64.
\textsuperscript{36} Id. at 424, 476 N.E.2d at 562.
\textsuperscript{37} Id. at 423, 476 N.E.2d at 562.
\textsuperscript{38} Id. at 423–24, 476 N.E.2d at 562.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 424, 476 N.E.2d at 562. Although the Court did not provide any analysis of why an individual has a legitimate expectation of privacy in her or his trunk, it relied on the Appeals Court's reasoning that an expectation of privacy exists in the interior of a motor vehicle in areas, including the trunk, that would be free from observation except by physical intrusion. Id. (citing Ford I, 17 Mass. App. Ct. at 507, 459 N.E.2d at 1244 (quoting Commonwealth v. Podgurski, 386 Mass. 385, 389, 436 N.E.2d 150, 153 (1982), cert. denied, 103 S. Ct. 1167 (1983))).
\textsuperscript{41} Ford, 394 Mass. at 424–26, 476 N.E.2d at 562–63.
\textsuperscript{42} Id. at 426, 476 N.E.2d at 563.
\textsuperscript{43} For a description of inventory and storage searches, see supra note 16.
\textsuperscript{44} Ford, 394 Mass. at 424–25, 476 N.E.2d at 562–63.
\textsuperscript{45} 428 U.S. 364 (1976).
glove compartment and, as the Ford Court noted, stated generally that "inventories pursuant to standard police procedures are reasonable." Quoting the majority and concurring Justices' rationales in Opperman, the Ford Court stated that standard procedures would limit the scope of the intrusion to the necessities of the caretaking function, limit the discretion to search, and eliminate the danger that a search would be justified on hindsight. In addition, the Ford Court relied on past Massachusetts cases which had noted the importance of standard police procedures when an inventory search is conducted, including one 1982

46 Id. at 376. In Opperman, the police impounded a car in the absence of the owner for parking violations. Id. at 365–66. A police officer viewed from the outside of the impounded vehicle valuable personal property located on the car seat and floor. Id. at 366. Pursuant to standard police procedures and following a standard inventory form, the officer performed an inventory search which included the unlocked glove compartment of the vehicle. Id. In the compartment he found marijuana. Id. In upholding the search as reasonable, the Supreme Court in Opperman looked to the fact that the car had been impounded, the owner was not present to make safekeeping arrangements, the inventory was prompted by valuables in plain view within the car, and the standard procedure did not conceal an investigatory motive. Id. at 375–76.

47 Ford, 394 Mass. at 424, 476 N.E.2d at 562–63 (quoting Opperman, 428 U.S. at 372). The Supreme Court in Opperman relied in part on Cady v. Dombrowski, 413 U.S. 433 (1973), wherein

[T]he Court carefully noted that the protective search was carried out in accordance with standard procedures in the local police department, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function.

Opperman, 428 U.S. at 374–75 (discussing Cady, 413 U.S. at 436–37) (emphasis original).


49 Id. at 425, 476 N.E.2d at 563 (quoting Opperman, 428 U.S. at 383 (Powell, J., concurring)).

50 Id.

51 Id. (citing Commonwealth v. Wilson, 389 Mass. 115, 117, 448 N.E.2d 1130, 1131 (1983); Commonwealth v. Matchett, 386 Mass. 492, 510, 436 N.E.2d 400, 411 (1982); Commonwealth v. Hason, 387 Mass. 169, 178, 439 N.E.2d 251, 257 (1982)). In Wilson, the police conducted an inventory search of the person of a person who had been arrested and placed in police custody. 389 Mass. at 116, 448 N.E.2d at 1131. The police found drugs in defendant's wallet. Id. The Court upheld the search of defendant's wallet and commented that "[s]uch searches have been upheld as reasonable, where they are conducted in accord with standard procedures and are not a pretext . . . ." Id. at 117, 448 N.E.2d at 1131. According to the Wilson Court, the showing that the search was made pursuant to standard procedures "could have been more detailed, . . . ." but the routine nature of the search was supported by the judge's finding that the sheriff and assistants were under the statutory duty to "keep a record of all money or property found in the possession of prisoners." Id., 448 N.E.2d at 1132 (citing G.L. c. 127, § 3, as amended by st. 1962, c. 569).

In Matchett, after the defendant was arrested for murder, the station wagon he had been driving was towed to the police garage. 386 Mass. at 509, 436 N.E.2d at 411. During an inventory search of the car, the police found contraband. Id. The Court upheld the search as reasonable, commenting that an inventory search of an impounded vehicle is not unrea-
case in which the Supreme Judicial Court had suggested that a particular inventory search of a car trunk conducted according to standard police procedures may have been reasonable. In sum, the Court reasoned by analogy to inventory searches to conclude that the threshold inquiry in determining the reasonableness of a storage search would be whether the search was conducted pursuant to standard police procedures.

Significantly, the Ford Court expressly refused to decide whether article fourteen prohibits all inventory or storage searches of locked trunks and whether inventory and storage search reasonableness requirements would be the same under article fourteen. The Court stated that because any search must be conducted pursuant to standard procedures and because there was no basis in the record for finding that the search was conducted accordingly, it could conclude that the search was unreasonable without reaching either of these questions. The Court did note, however, that there are differences between storage and inventory searches. The Court noted that while a trunk has to be opened in an inventory search, there is no such necessity in a storage search.

The reasonable under the fourth amendment "if carried out in accordance with standard procedures and if there is no suggestion that the procedure was a pretext concealing an investigatory police motive." Id. at 510, 436 N.E.2d at 411. The Court noted that the trial judge had specifically found that the search "was conducted as a matter of routine, standard police procedure . . . ." Id.

In Hasan, the Court addressed the constitutionality of an inventory search of a vehicle's trunk under the fourth amendment. 387 Mass. at 177-78, 439 N.E.2d at 256-57. The reportedly stolen car that defendant had been driving was towed to the Commonwealth Armory and during an inventory search the auto theft unit found a small computer, later identified as stolen, in the trunk of the vehicle. Id. at 171-72, 439 N.E.2d at 253. The Hasan Court noted first that individuals have diminished fourth amendment interests in contraband or stolen goods. Id. at 177, 439 N.E.2d at 256 (citing Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971)). The Court then emphasized that standard procedures are required to conduct a reasonable inventory search. Id. at 177-78, 439 N.E.2d 257 (citing Matchett, 386 Mass. at 509-10, 436 N.E.2d at 411-12). Because the judge had not produced findings on whether the computer was the product of a lawful inventory search, the Court remanded the case to the Superior Court. Id. at 178, 439 N.E.2d at 257.

53 Ford, 394 Mass. at 424, 476 N.E.2d at 562.
54 Id. at 426, 476 N.E.2d at 563.
55 Id. at 425 n.2, 476 N.E.2d at 563 n.2. The Court noted that the United States Supreme Court had not yet answered this question and that other courts had not answered this question consistently. Id. at 425 n.2, 476 N.E.2d at 563 n.2.
56 Id. at 425, 476 N.E.2d at 563. The Court, however, noted that the searches do involve different procedures and hence, suggested that the principles might not be equivalent. Id. at 425 & n.3, 476 N.E.2d at 563 & n.3.
57 Id. at 425 & n.2, 476 N.E.2d at 563 & n.2.
58 Id. at 425 & n.3, 476 N.E.2d at 563 & n.3.
59 Id. at 425 n.3, 476 N.E.2d at 563 n.3; id. at 427 n.4, 476 N.E.2d at 564 n.4.
Court found that because the officer in *Ford* had to take the defendant's key ring to the police station, the Court could find no reason why the officer could not have delivered the tapes to the station. Nevertheless, the Court left open the question of whether it would uphold storage searches which are conducted pursuant to standard procedures. The Court noted that the storage search of Ford's locked trunk was warrantless and con-

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60 Id. at 425 n.3, 476 N.E.2d at 563 n.3.
61 Id. at 427 n.4, 476 N.E.2d at 564 n.4. The Court stated that it saw "no reason to 'decide' a case not before us, and thus we leave open the question of the constitutionality of a storage search conducted pursuant to established police procedures." Id.
62 Id. at 426–27, 476 N.E.2d at 563–64. The Court also added that it suspected "the Supreme Court of the United States would reach the same conclusion under the Fourth Amendment." Id. at 427, 476 N.E.2d at 564. For a discussion of the exclusionary rule, see *supra* note 6 and accompanying text. As both the majority and the dissent in *Ford* pointed out, the Supreme Judicial Court had in the past considered claims of exclusion based on article fourteen of the Massachusetts Constitution. Id. at 426, 476 N.E.2d at 564 (citing *Upton III*, 394 Mass. at 364–66, 476 N.E.2d at 550–51 (1985)); id. at 431–32, 476 N.E.2d at 566–67 (Lynch, J., dissenting) (citing Commonwealth v. Sheppard, 394 Mass. 381, 391, 476 N.E.2d 541, 547 (1985); *Upton III*, 394 Mass. at 365, 476 N.E.2d at 550; Commonwealth v. Wilkins, 243 Mass. 356, 359, 138 N.E. 11, 12 (1923); Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 334 (1841)). The *Ford* majority stated, however, that in recent cases in which the defendant raised this claim, it had not been necessary to reach the question of whether article fourteen required exclusion. 394 Mass. at 426, 476 N.E.2d at 564. For example, in *Upton III*, the Supreme Judicial Court applied an exclusionary remedy based upon a Massachusetts statute governing the content of search warrant affidavits to evidence seized pursuant to a search warrant not based on probable cause. 394 Mass. at 366, 476 N.E.2d at 551. The Court in *Upton III* held that exclusion was required under G.L. c. 276, § 2B, as amended by st. 1965, c. 384, which provides in relevant part that a person seeking a search warrant shall give an affidavit which contains "the facts, information, and circumstances upon which such person relies to establish sufficient grounds for the issuance of the warrant." Id. at 366 n.2, 476 N.E.2d at 551 n.2 (quoting G.L. c. 276, § 2B).

In *Sheppard*, the Court again examined a claim that article fourteen required exclusion of evidence obtained pursuant to a search warrant that was defective because it failed to list the items to be seized. 394 Mass. at 385, 476 N.E.2d at 543. In *Sheppard*, the district attorney and two police officers went to the home of a judge on a Sunday morning to apply for a warrant to search the home of a murder suspect. Id. at 384, 476 N.E.2d at 542. Although one officer had prepared an affidavit in support of the warrant application, he could not find an appropriate warrant form and instead, used an outdated form authorizing search for controlled substances. Id. at 383, 476 N.E.2d at 542. The judge made changes on the form, but issued the warrant with no reference to the items listed by the officer in his affidavit and without attaching the affidavit to the warrant. Id. at 384, 476 N.E.2d at 542–43. The Court held that neither statutory nor constitutional exclusion was required because the search had been conducted as if the warrant had complied with constitutional and statutory requirements and the police had acted on a warrant issued on probable cause. Id. at 382, 476 N.E.2d at 541. The *Sheppard* Court termed the violation of article fourteen "technical" and found that the search was not unreasonable. Id. at 391, 476 N.E.2d at 547.
ducted without probable cause, consent, or any exigent circumstances justifying the intrusion.\(^63\) Again, the Court noted that the search was conducted in the absence of standard police procedures.\(^64\) Furthermore, the Court reiterated its major distinction between storage and inventory searches,\(^65\) commenting that in a storage search the trunk did not have to be opened.\(^66\) In conclusion, the Court expressed two concerns with standardless storage or inventory searches in general and with the *Ford* search in particular.\(^67\) First, the Court commented that a search pursuant to standard procedures would eliminate the element of discretion in the police officer’s decision to conduct a storage or inventory search.\(^68\) Second, the Court termed the *Ford* search an “ad hoc practice,”\(^69\) which denotes a search conducted without guiding principles.\(^70\) Given these concerns and the circumstances surrounding the search, the Court excluded the evidence, expressly leaving open the question of whether a storage search of a locked trunk could ever be constitutional.\(^71\)

Justice Lynch dissented from the majority’s conclusions, contending that the Court should have resolved the case solely under the fourth amendment.\(^72\) The dissent concluded that the search was reasonable under the fourth amendment\(^73\) based in part on the fact that valuables in plain view prompted the search.\(^74\) In addition, the dissent criticized the majority’s refusal to state that a storage search conducted pursuant to written procedures would be upheld under article fourteen.\(^75\)

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\(^{63}\) *Ford*, 394 Mass. at 427 & n.4, 476 N.E.2d at 564 & n.4. The Court noted that circumstances justifying intrusion would include potential danger or emergency.

\(^{64}\) *Id.*

\(^{65}\) See *supra* notes 58–61 and accompanying text.

\(^{66}\) *Ford*, 394 Mass. at 427 n.4, 476 N.E.2d at 564 n.4.

\(^{67}\) *Id.* at 427, 476 N.E.2d at 564.

\(^{68}\) *Id.*

\(^{69}\) *Id.*

\(^{70}\) The Merriam-Webster publishing company defines “ad hoc” as follows: “for the particular end or purpose at hand and without reference to wider application or employment.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 26 (P. Gove ed. 1981).

\(^{71}\) *Id.* at 427 & n.4, 476 N.E.2d at 564 & n.4.

\(^{72}\) *Id.* at 436, 476 N.E.2d at 569 (Lynch, J., dissenting).

\(^{73}\) *Id.* at 431, 476 N.E.2d at 566 (Lynch, J., dissenting).

\(^{74}\) *Id.* at 428, 476 N.E.2d at 565 (Lynch, J., dissenting).

\(^{75}\) *Id.* at 435, 476 N.E.2d at 568 (Lynch, J., dissenting). The dissent stated that “[p]resumably, the court’s implicit admonition to police departments requiring such procedures is intended to be more than an academic exercise.” *Id.* (Lynch, J., dissenting). The dissent questioned at length the majority’s focus on police procedures as determinative of the reasonableness of storage searches and contended instead that reasonableness must be determined on a case by case basis under all of the circumstances. *Id.* at 428–30, 476 N.E.2d at 564–66 (Lynch, J., dissenting). Justice Lynch looked to *Opperman*, as had the majority, contending that *Opperman* and prior precedent rejected the creation of “per se rules” to decide these cases. *Id.* at 428–29, 476 N.E.2d at 564–65 (Lynch, J., dissenting).
In addition, the dissent contended that the majority’s implication that a storage search is more intrusive than an inventory search and thus requires greater justification was based on irrelevant distinctions between the two types of search.\(^7\) Justice Lynch commented that police would conduct either search for the same purposes.\(^7\) The dissent further noted that this storage search was less intrusive in some respects than inventory searches because the officer did not open the glove compartment, look under the seats, or open the trunk looking for anything.\(^7\) Furthermore, the dissent stated that although the majority’s rationale for preventing standardless searches was apparently based on the fear of a discretionary determination to search and of pretextual searches, these purposes were not served in the case before the Court because there was no evidence that the officer’s determination to search was discretionary or that the search was conducted as pretext.\(^8\) In sum, under an individualized analysis of the circumstances, Justice Lynch would not have found the storage search of Ford’s vehicle more intrusive than an inventory search.\(^9\)

Turning to the exclusionary rule issue, the dissent contended that exclusion of the evidence was not called for under article fourteen of the Massachusetts Constitution.\(^10\) The dissent believed that the creation of

\(_{\text{76}}\) Id. at 430, 476 N.E.2d at 565 (Lynch, J., dissenting). For a discussion of the majority’s distinction between storage and inventory searches, see supra notes 58–61 and accompanying text.
\(_{\text{77}}\) Id. at 430, 476 N.E.2d at 564–65, (Lynch, J., dissenting) (citing Opperman, 428 U.S. at 369) (police search to protect the owner’s property and to protect the department from claims of loss or theft).
\(_{\text{78}}\) Id. at 430, 476 N.E.2d at 565 (Lynch, J., dissenting).
\(_{\text{79}}\) Id. at 430, 476 N.E.2d at 566 (Lynch, J., dissenting) (citing Opperman, 428 U.S. at 383 (Powell, J., concurring)). For a discussion of the majority’s rationale for inventory search protections, see supra notes 48–50 and accompanying text.
\(_{\text{80}}\) Ford, 394 Mass. at 430, 476 N.E.2d at 566 (Lynch, J., dissenting).
\(_{\text{81}}\) Id. (Lynch, J., dissenting).
\(_{\text{82}}\) Id. at 428, 476 N.E.2d at 564 (Lynch, J., dissenting). The dissent also stated that the fourth amendment did not require exclusion. Id. (Lynch, J., dissenting). Under the fourth amendment, the dissent concluded that the principles that justify the application of the federal exclusionary rule would not be furthered in the instant case. Id. at 430–31, 476 N.E.2d at 566 (Lynch, J., dissenting). Specifically, the dissent cited the intended goals to be served by the exclusionary rule of deterrence of police misconduct and protection of
such a rule would be unwise under article fourteen and, in any event, should not go beyond the reach of protection already afforded by the fourth amendment. Furthermore, Justice Lynch criticized the majority for creating what it viewed as a shapeless standard for determining when article fourteen requires exclusion. Justice Lynch similarly found the majority’s decision lacking in policy justification for the new rule and, moreover, seriously questioned the efficacy of an exclusionary rule at either the federal or state level. The dissent stated that little or no evidence existed to show that the rule served its primary purpose as a "judicial integrity." Id. at 430, 476 N.E.2d at 566 (Lynch, J., dissenting) (citing 1 W. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 1.1, at 17 (1978)). For a discussion of the aims of the exclusionary rule, see supra note 6. The dissent contended that because the majority had addressed only the lack of standardized procedures and not the reasonableness of the officer’s actions, its application of the exclusionary rule here could serve no substantial deterrent function. Ford, 394 Mass. at 430, 476 N.E.2d at 566 (Lynch, J., dissenting). Justice Lynch also viewed the officer’s good faith as dispositive of the deterrence issue, stating that exclusion can have no deterrent effect when officers act in good faith. Id. at 430–31, 476 N.E.2d at 566 (Lynch, J., dissenting). In support of this proposition, the dissent cited a 1984 United States Supreme Court decision in which evidence obtained by officers acting in reasonable and good faith reliance on a search warrant issued by a neutral and detached magistrate was admissible even though the warrant was ultimately found to be unsupported by probable cause. Id. at 430, 476 N.E.2d at 566 (Lynch, J., dissenting) (citing United States v. Leon, 104 S. Ct. 3405, 3419 (1985)). The dissent concluded that the majority’s desire to deter future police misconduct that might potentially result from a lack of standardized police procedures had no application to the facts of the instant case. Id. at 431, 476 N.E.2d at 566 (Lynch, J., dissenting).

Justice Lynch similarly found that the goal of protecting judicial integrity was not served by exclusion. Id. (Lynch, J., dissenting). The dissent contended that judicial integrity would be implicated only when evidence showed that a wilful constitutional violation had occurred. Id. (Lynch, J., dissenting). The dissent concluded that because no evidence of a wilful violation existed, judicial integrity would not be advanced. Id. (Lynch, J., dissenting).

83 Id. at 433, 476 N.E.2d at 567. Under article fourteen, the dissent contended that an exclusionary rule had been expressly rejected by the Court when asserted. Id. at 431, 476 N.E.2d at 566 (Lynch, J., dissenting) (citing Sheppard, 394 Mass. at 388, 476 N.E.2d at 545; Wilkins, 243 Mass. at 359, 138 N.E.2d at 12; Dana, 43 Mass. (2 Met.) at 334). The dissent stated that in recent cases the Court had declined to create such a rule and reiterated that it had never accepted such a concept under article fourteen. Id. at 431–32, 476 N.E.2d at 566–67 (Lynch, J., dissenting) (citing Upton III, 394 Mass. at 365, 476 N.E.2d at 550; Sheppard, 394 Mass. at 388, 476 N.E.2d at 545).

84 Ford, 394 Mass. at 433, 476 N.E.2d at 567 (Lynch, J., dissenting).

85 Id. at 432, 476 N.E.2d at 567 (Lynch, J., dissenting).

86 Id. at 431, 476 N.E.2d at 566 (Lynch, J., dissenting). In addition, the dissent contended that the majority had failed to apply standards it had adopted in a prior decision in which it had held that exclusion was not required. Id. at 432–33, 476 N.E.2d at 567 (Lynch, J., dissenting) (citing Sheppard, 394 Mass. at 391 & n.8, 476 N.E.2d at 547 & n.8).

87 Id. at 433–35, 476 N.E.2d at 568 (Lynch, J., dissenting). The dissent stated that the rule had become increasingly confusing to administer on both the law enforcement and judicial levels. Id. at 433–34, 476 N.E.2d at 568 (Lynch, J., dissenting).
deterrent to police misconduct. Justice Lynch found the exclusionary rule most efficient in keeping highly probative evidence from the trier of fact. In addition, the dissent commented that violations of article fourteen probably could be remedied more effectively than by the creation of an exclusionary rule.

The significance of the *Ford* decision lies in its departure from the United States Supreme Court's standards for defining search and seizure protections in the automobile search context. Furthermore, the *Ford* decision is particularly noteworthy for its creation of an exclusionary rule under article fourteen of the Massachusetts Constitution. Because the decision was based on state constitutional law and affords as much, if not more, substantive protection as the fourth amendment, it cannot be overturned and is not even reviewable by the United States Supreme Court.

The implications of the Court's independent course under the state constitution are especially significant because an increasingly divided United States Supreme Court has developed guidelines in the

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90 *Id.* (Lynch, J., dissenting). The dissent also commented that judicial integrity could be preserved in less "doctrinaire" ways. *Id.* (Lynch, J., dissenting). The dissent suggested that the Court could use its general supervisory power under G.L. c. 211, § 3. *Id.* (Lynch, J., dissenting).

91 According to the dissent, the Court's holding went beyond the reach of the fourth amendment. *Id.* at 435, 476 N.E.2d at 569 (Lynch, J., dissenting). A state court can only diverge from the constitutional minimum set forth in the United State Supreme Court's fourth amendment standards if it affords greater protection under state law than under federal law. Brennan, *supra* note 3, at 500 (quoting *State v. Kaluna*, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974)).

92 Brennan, *supra* note 3, at 501. If the Supreme Judicial Court in *Ford* had cited the federal Constitution and the Massachusetts Constitution to conclude that the action violated both constitutions, the United States Supreme Court would have disregarded the state cites and reviewed the case under federal law. Michigan v. Long, 463 U.S. 1032 (1983). The Court in *Long* told state courts that when a state's decision is interwoven with federal law it "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. The Supreme Court in *Long* indicated that it would not review the decision if the "state decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent ground . . . ." *Id.* Thus, the Supreme Court will no longer look beyond the opinion under review or require state courts to reconsider cases to clarify the grounds of their decisions. *Id.* at 1039-41. Oregon Justice Linde discusses the Supreme Court's rejection of federal constitutional claims coupled with the parallel clause of the state constitution. Linde, *supra* note 1, at 176. He goes on to discuss how several state courts have handled overlapping state and federal claims. *Id.* at 176-79.
automobile search area which are themselves problematic. In addition, the United States Supreme Court has moved, some would argue, towards abandoning the exclusionary rule in search and seizure cases in both state and federal courts. Thus, the Supreme Judicial Court impliedly has suggested that it will develop an independent state constitutional jurisprudence to protect civil liberties, "however the philosophy of the United States Supreme Court may ebb and flow."

The independent course chosen by the Supreme Judicial Court in the vehicle search context appears to be premised on two concerns expressed consistently by the courts in addressing the lawful limits of vehicle inventory searches. First, the inventorial process in general carries with it potential for abuse. Police may search beyond the extent required by legitimate police needs and may conduct an inventory search which in actuality masks an otherwise unlawful search. Second, a locked trunk implicates privacy interests greater than those that obtain in an inventory search of a car interior and glove compartment.

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93 See Note, Warrantless Automobile Searches, 1982 ANN. SURV. MASS. LAW, § 3.11 at 136 ("One of the most difficult problems associated with the fourth amendment is its application to searches involving automobiles"). The United States Supreme Court has not ruled on whether an inventory search of a locked trunk is constitutionally permissible. See Ford, 394 Mass. at 425 n.2, 476 N.E.2d at 563 n.2. For an annotation of the split of authority in both federal and state courts on the constitutionality of inventory trunk searches, see Annot., 48 A.L.R.3d 537, 577-80 (1973 & Supp. 1985) [hereinafter Annot.].


95 State v. Jewett, No. 83-478, slip op. at 3-4 (Vt. 1985). The Supreme Judicial Court in Upton III, rejected "the 'totality of the circumstances' test [to determine probable cause] now espoused by a majority of the United States Supreme Court." 394 Mass. at 373, 476 N.E.2d at 556. The Court stated "[t]he test we adopt has been followed successfully by the police in this Commonwealth for approximately 20 years." Id. at 376, 476 N.E.2d at 557. The Court in Upton III retained the previous probable cause principles developed under Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). See Ford, 394 Mass. at 374, 476 N.E.2d at 556.

96 United States v. Edwards, 577 F.2d 883, 893 (5th Cir. 1978).

97 Edwards, 577 F.2d at 893. See also South Dakota v. Opperman, 428 U.S. 364, 374-75 (United States Supreme Court concerned with ensuring search limited in scope to extent necessary to carry out caretaking function).

98 United States v. Martin, 566 F.2d 1143, 1145 (10th Cir. 1977) (inventory search can be one in name only and actually only a "subterfuge to cover an otherwise unlawful search").

99 See Ford, 394 Mass. at 424 n.1, 476 N.E.2d at 562 n.1. The Court commented that if the officer had entered the vehicle to secure property in plain view and subsequently had discovered property in plain view in the glove compartment, that the officer could seize property reasonably. Id.
Standard procedures may prove satisfactory in addressing abuse of discretion concerns for the reasons articulated by the majority and the concurrence in *Opperman* and cited by the *Ford* Court. Procedures setting forth neutral criteria for initiating and conducting searches necessarily impose controls on the discretionary power of police officers to search. In addition, procedures provide a measurable standard against which to measure individual searches, and therefore, the danger of hindsight justification is lessened. Thus, standard procedures would impose controls which could enhance the reasonableness of the search.

Yet, however satisfactory standard procedures may be in addressing abuse of discretion problems, they may be insufficient to justify the routine search of a locked vehicle trunk given the invasion of privacy interests that such a search entails. As the dissent in *Opperman* recognized, not everyone whose car is impounded would want the locked trunk to be opened, regardless of whether the trunk held contraband. Citizens place objects in their trunks and lock the trunks expressly because they wish to prevent the public from casually observing those items. Although the courts are split on this question, some courts have recognized a substantial expectation of privacy in a locked vehicle trunk and accordingly have held locked trunk inventory searches unreasonable. Moreover, some courts have held trunk inventory searches unlawful expressly under state constitutions.

Thus the basic question that remains unanswered is whether any storage or inventory search of a locked vehicle trunk conducted pursuant to

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100 *See supra* notes 48–50 and accompanying text.
101 *Id.*
103 *Id.* at 419. Professor Amsterdam states “[c]ourts would no longer have to speculate . . . whether the claim of necessity advanced by the state’s lawyers . . . is in fact the claim of necessity upon which the police acted . . . .” *Id.*
104 *See supra* note 50 and accompanying text.
105 *See generally* Amsterdam, *supra* note 102, at 416–39 (search in absence of police department rules is unreasonable).
106 *See infra* notes 107–11 and accompanying text.
109 *See supra* note 93.
111 *See, e.g.*, State v. Sawyer, 174 Mont. 512, 518, 571 P.2d 1131, 1134 (1977) (search limited to articles in plain view from outside vehicle). *See also* State v. Goff, 272 S.E.2d 457, 460, 462 n.7 (W. Va. 1980).
standard procedures established by the police department will pass constitutional muster. The Court’s comments that opening a trunk is necessary to conduct an inventory search provide some support for the argument that a reasonable inventory search conducted pursuant to standards could be upheld. In addition, the Court in Ford noted that previously it had suggested that a particular inventory search might have been reasonable. Thus, inventory searches of locked trunks appear not to be prohibited generally by article fourteen.

In contrast, however, the Ford decision certainly suggests that the Court will evaluate an officer’s intrusion into a locked trunk to safeguard valuables with stricter scrutiny than the officer’s intrusion to inventory the trunk’s contents. The majority distinguished the two types of search, noting that in a storage search an officer does not need to open a locked trunk. Although the dissent properly notes that inventory searches are very intrusive due to their thoroughness, the majority’s focus on the need to search is more directly related to a basic fourth amendment balancing test which balances the need to search against the intrusion involved. Where no need to search exists, arguably no invasion should be tolerated, however consistent with established procedures that search may be.

If the Court were to uphold a storage or inventory search based upon standard procedures, then an examination of the United States Supreme Court’s opinion in South Dakota v. Opperman upon which both the Ford majority and dissent relied, provides some indications as to what those standard procedures might entail. In Opperman, the Court upheld the inventory search of the defendant’s unlocked glove compartment as reasonable based in part on the fact that valuables in plain view prompted the initial decision to search. In addition, the majority in Ford stressed that the police officer easily could have transported the eight-track tapes to the police station with the defendant’s key ring. Although there

112 See supra note 55 and accompanying text.
113 See Ford, 394 Mass. at 425 n.3, 427 n.4, 476 N.E.2d at 563 n.3, 564 n.4; id. at 427 n.4, 476 N.E.2d at 564 n.4.
114 Id. at 425, 476 N.E.2d at 563 (citing Hason, 387 Mass. at 178, 439 N.E.2d at 257). For a discussion of Hason, see supra note 51.
115 See supra notes 58–61 and accompanying text.
116 See supra notes 59–61 and accompanying text.
117 See supra notes 76–78 and accompanying text.
118 See Terry v. Ohio, 392 U.S. 1, 21 (1968).
120 See supra notes 45–50 and accompanying text.
121 See supra note 46.
122 See supra note 60 and accompanying text.
arguably would be few items that could not be transported to the station, the majority's concern suggests that the procedures set forth standards that tailor the intrusion to the size and value of the items to be stored. Thus, it would appear that, at a minimum, procedures should require that the officer specify what valuables in plain view prompted the need to open the locked trunk and why the particular item had to be stored in the trunk.\textsuperscript{123}

Turning to the question of when exclusion of evidence will be applied under article fourteen, the majority does not state a general exclusionary rule but rather limits the application of the exclusionary rule to the circumstances in the case before the Court.\textsuperscript{124} In carving out this exclusionary rule, the Court did not rely solely upon the policy underpinnings of the federal exclusionary rule of deterring police misconduct and preserving judicial and governmental integrity.\textsuperscript{125} Rather, the Court went further to target ad hoc practices and searches which include an element of discretion in the decision to conduct an inventory or storage search.\textsuperscript{126} Thus, the Court suggests a concern with whom is accorded discretion over and above a concern with abuse of discretion. The dissent faults the majority for not furthering the federal rule's goal of deterrence to police misconduct.\textsuperscript{127} Yet it overlooks the Court's primary focus on encouraging the exercise of discretion at a level higher on the chain of command than the searching officer, in other words, by the decision makers in the police department.\textsuperscript{128} The goal of the Massachusetts exclusionary rule under the Massachusetts Constitution is more encompassing because it guards against not only misconduct, but also unbridled discretion which may lead to misconduct. Thus, the exclusionary rule under article fourteen in the area of warrantless searches would appear to afford greater protection than that of the federal exclusionary rule under the fourth amendment.\textsuperscript{129}

One of the most important practical points to be gleaned from the \textit{Ford} decision is the necessity for defendants to raise state law issues. In fact, a lawyer who fails to raise the possible state issues leaves open a later

\textsuperscript{123} \textit{See Goff}, 272 S.E.2d at 460. Based on \textit{Opperman}, the \textit{Goff} court would uphold an inventory search if the search was prompted by valuables in plain view, there was no suggestion of pretext, the vehicle driver was not present to make arrangements, and the impoundment was lawful. \textit{Id.} (citing \textit{Opperman}, 428 U.S. at 375–76).

\textsuperscript{124} \textit{Ford}, 394 Mass. at 426–27, 476 N.E.2d at 564.

\textsuperscript{125} \textit{See supra} note 6 for a discussion of the purposes of the federal exclusionary rule.

\textsuperscript{126} \textit{See supra} notes 67–70 and accompanying text.

\textsuperscript{127} \textit{See supra} note 88 and accompanying text.

\textsuperscript{128} Accord \textit{see} Amsterdam, \textit{supra} note 102, at 423 (fact that daily police work raises issues which require determination at the level of policy is commonly ignored).

\textsuperscript{129} For a discussion of the federal exclusionary rule, see \textit{supra} note 6.
§ 3.6 CRIMINAL LAW AND PROCEDURE

The commission of a crime involves the performance of a forbidden act and an accompanying criminal state of mind or intent. The mental state required by most crimes is only a general intent to do the act prohibited. A number of crimes, however, require an additional specific criminal intent. While general intent involves only the purpose to carry out the criminal act, specific intent requires an intent to achieve additional consequences. For example, robbery is a specific intent crime because it involves both the general intent of carrying away another's property, which intent is presumed from the doing of the act, and the specific intent to deprive the

133 See Jewett, No. 83-478, slip op. at 4.
* William A. Hazel, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.
§ 3.6. Voluntary Intoxication — Specific Intent.* The commission of a crime involves the performance of a forbidden act and an accompanying criminal state of mind or intent. The mental state required by most crimes is only a general intent to do the act prohibited. A number of crimes, however, require an additional specific criminal intent. While general intent involves only the purpose to carry out the criminal act, specific intent requires an intent to achieve additional consequences. For example, robbery is a specific intent crime because it involves both the general intent of carrying away another's property, which intent is presumed from the doing of the act, and the specific intent to deprive the

133 See Jewett, No. 83-478, slip op. at 4.
* William A. Hazel, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.
§ 3.6. Voluntary Intoxication — Specific Intent.* The commission of a crime involves the performance of a forbidden act and an accompanying criminal state of mind or intent. The mental state required by most crimes is only a general intent to do the act prohibited. A number of crimes, however, require an additional specific criminal intent. While general intent involves only the purpose to carry out the criminal act, specific intent requires an intent to achieve additional consequences. For example, robbery is a specific intent crime because it involves both the general intent of carrying away another's property, which intent is presumed from the doing of the act, and the specific intent to deprive the

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owner of the property permanently — the intent to steal.\textsuperscript{4} Unlike general intent, specific intent will not be presumed from the doing of the act.\textsuperscript{5}

The Massachusetts courts traditionally have refused to instruct juries that a defendant’s intoxication\textsuperscript{6} may be considered\textsuperscript{7} in determining if he or she acted with a requisite specific intent.\textsuperscript{8} This rule reflects the underlying policy determination that intoxication should not excuse or justify the commission of a crime.\textsuperscript{9} In the past, however, the Supreme Judicial Court allowed trial courts to instruct the jury to consider whether intoxication prevented the accused from acting with the deliberate premeditation\textsuperscript{10} necessary to sustain a conviction of first degree murder.\textsuperscript{11}

\footnotesize

\textsuperscript{4} See Perkins, supra note 1, at 852. As a second example, common-law burglary requires the general intentional breaking and entering of a home at night with the additional specific intent to commit a felony while therein. See id. at 852. For a full discussion of general and specific intent see 22 C.J.S. Criminal Law §§ 29–34 (1961). For a discussion of general and specific intent in the context of intoxication, see Note, Intoxication as a Criminal Defense, 55 Colum. L. Rev. 1210, 1211–18 (1955).

\textsuperscript{5} 22 C.J.S. Criminal Law § 32 (1961).

\textsuperscript{6} The term intoxication is used in this article to refer to voluntary intoxication unless otherwise indicated. Massachusetts, as well as most other jurisdictions, treats involuntary intoxication as a complete defense to a charged crime. See Commonwealth v. McAlister, 365 Mass. 454, 463–64, 313 N.E.2d 113, 119 (1974); see also Annot., When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge, 73 A.L.R. 3d 195 (1976) (citing cases).

\textsuperscript{7} The Massachusetts rule does not operate to exclude otherwise admissible evidence concerning the defendant’s intoxication. The rule does, however, result in the courts instructing juries that they cannot find that a defendant lacked a specific intent due to voluntary intoxication.

\textsuperscript{8} Cf. Commonwealth v. Sheehan, 376 Mass. 765, 774, 383 N.E.2d 1115, 1121 (1978) (citing cases). The Supreme Judicial Court has often ruled that intoxication cannot warrant a finding of no specific intent. E.g., id.


\textsuperscript{10} Deliberate premeditation is a stricter standard of intent than specific intent. That is, not only must there be specific intent, there also must be prior reflection on such specific intent. For example, to convict a defendant of first degree murder, absent other grounds such as the felony murder rule, the prosecution must show that the defendant acted with deliberate premeditation which “means that the plan to kill was formed after deliberation and reflection.” Commonwealth v. Caine, 366 Mass. 366, 374, 318 N.E.2d 901, 907–08 (1974). Thus the element of deliberate premeditation involves acting with a specific intent to kill which was formed as the result of prior reflection. Commonwealth v. McInerney, 373 Mass. 136, 153–54, 365 N.E.2d 815, 825 (1977) (quoting Commonwealth v. Tucker, 189 Mass. 457, 494–95, 76 N.E. 127, 141 (1905)). The sequence of deliberation, resolving to kill and performing the act may, however, occur in a matter of seconds. McInerney, 373 Mass. at 153–54, 365 N.E.2d at 825.

This "exception" reflected a willingness on the Court's part, not present when it dealt with the less stringent mens rea standard of specific intent, to concede that a defendant may have been so inebriated that he or she lacked the ability to deliberately premeditate.

During the Survey year in Commonwealth v. Henson, the Court abandoned its position that trial courts are not to instruct juries to consider a defendant's intoxication in determining if he or she acted with specific intent. The Court ruled that juries may consider the accused's voluntary intoxication "where proof of a crime requires proof of a specific criminal intent." The Court noted that this decision brings the Massachusetts rule in line with the majority view that evidence of voluntary intoxication may be considered by the jury when the defendant is charged with a crime involving specific intent. Henson involved the crime of assault with intent to murder while armed with a dangerous weapon which requires the specific intent to kill. In deciding that the jury could consider the defendant's intoxication in determining if he acted with this intent, the Court relied, in part, on the close relationship between the concepts of specific intent to kill and deliberate premeditation. Thus, despite the Court's ostensibly clear statement that its ruling applies to all specific intent crimes, Chief Justice Hennessey wrote separately to emphasize that he understood the opinion to apply only to specific intent to kill in murder cases. Accordingly, the Court still must address questions such as the applicability of the Henson rule to other specific intent crimes and, presumably, in future cases, to crimes requiring only general intent.

In Henson the defendant was charged with assault with intent to murder while armed with a dangerous weapon and assault and battery by means of a dangerous weapon. The charges stemmed from a sequence...
of events occurring in the early morning hours of July 21, 1981. Henson was riding in the front seat of a car driven by his girl friend, Regina DiBlasio. At one point the vehicle passed the victim, Ernest Hill, who was walking in the opposite direction, and DiBlasio stated that Hill had “jumped” her a year or two earlier. Henson indicated “that no one was going to get away with hurting his girl friend” and directed DiBlasio to turn the vehicle around.

Later, the vehicle came to be parked outside of a lounge which the victim had entered. Henson was sitting in the front passenger seat adjacent to the curb with the window rolled down and a gun in his hand. At this point Hill exited from the lounge and had a conversation with a friend out front. Upon the friend’s departure Henson called to Hill asking to talk to him for a minute. As Hill approached the car Henson shot him in the face. DiBlasio then drove off, but both she and Henson were arrested a short time later. Henson had been drinking at his apartment prior to entering the vehicle that night, and at trial DiBlasio testified that he was drunk when he entered the car.

At trial the judge refused to give the defendant’s requested jury instruction that the jury may consider his intoxication when determining if he acted with the requisite specific intent to kill. Upon conviction, defense counsel appealed, seeking a retrial on other grounds. On appeal, the

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22 Id. at 585, 476 N.E.2d at 949. The Court recited the facts as the jury could have found them. Id.
23 Id. Henson and DiBlasio were tried together but took separate appeals. Id. at 585 n.1, 476 N.E.2d at 949 n.1.
24 Id. at 585, 476 N.E.2d at 949.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id. at 585–86, 476 N.E.2d at 949. The wound was not fatal.
31 Id. at 586, 476 N.E.2d at 949.
32 Id.
33 Id. at 592, 476 N.E.2d at 953.
34 Henson’s attorney sought to impeach the testimony of the prosecution’s two main witnesses for bias by questioning them about pending criminal charges which each faced. Id. at 585, 476 N.E.2d at 949. The trial judge, however, foreclosed all questioning on the subject. Id. at 586, 476 N.E.2d at 950. Upon conviction the defendant appealed, alleging error in the trial judge’s denial of his proposed line of questioning. Id. at 585, 476 N.E.2d at 949.

The Supreme Judicial Court took direct review of Henson’s case. The Court held that the trial judge erred in totally foreclosing defense counsel’s attempted cross-examination. Id. at 586, 476 N.E.2d at 950. The Court noted that it was dealing with a total denial of cross-examination on the question of bias and not with a case where the trial court used its discretion to limit cross-examination on a subject. Id. (citing Commonwealth v. Dougan, http://lawdigitalcommons.bc.edu/asml/vol1985/iss1/7
Supreme Judicial Court granted the defendant a new trial on these other grounds, and went on to address the trial judge's denial of the defendant's jury instructions pertaining to intoxication and intent.

The Court first turned to the question of the intent that the Commonwealth must prove to gain a conviction on the charge of assault with intent to murder while armed with a dangerous weapon. The Court began by stating that its prior opinions had not "expressly defined what 'intent to murder' means in terms of the defendant's state of mind." After noting that assault with intent to kill is a lesser included crime of assault with intent to murder, the Court concluded that to be convicted of the latter crime, an accused must act with both malice — that is without justification or excuse — and with the specific intent to kill. Thus, the Court stated, in order to be convicted upon retrial, it must be proven that Henson acted with malice and with the specific intent to kill Hill when he shot at him.

Having concluded that conviction of assault with intent to murder while armed with a dangerous weapon requires a showing that the accused had a specific intent to kill, the Court went on to consider what effect should be given to the evidence that Henson was intoxicated on the night in question. The trial judge had refused defense counsel's requested instruction which would have allowed the jury to consider Henson's intoxication in determining if he had formed the required specific intent to kill Hill. Instead the trial court charged the jury that voluntary intoxication is no excuse or justification for the crimes charged against Henson. The Supreme Judicial Court concluded that this instruction was correct for the count that charged Henson with assault and battery with a dangerous weapon because that crime does not require proof of specific intent.

For the crime of assault with intent to murder with a dangerous weapon, however, the Court abandoned its prior precedent and concluded that

377 Mass. 303, 310, 386 N.E.2d 1, 5 (1979). The Court concluded that where even a remote possibility of bias exists the jury should hear and evaluate the evidence. Id. at 587, 476 N.E.2d at 950. Because the trial judge abused his discretion in not allowing this line of questioning and prejudicial harm resulted, the Court ruled that Henson was entitled to a new trial. Id. at 590, 476 N.E.2d at 951.

35 See supra note 34.

36 Henson, 394 Mass. at 591, 476 N.E.2d at 952.

37 See G.L. c. 265, § 29.

38 G.L. c. 265, § 15.

39 Henson, 394 Mass. at 591, 476 N.E.2d at 952.

40 Id.

41 Id. at 592, 476 N.E.2d at 953.

42 Id.

43 Id.

44 As was noted in Sheehan, 376 Mass. at 774, 383 N.E.2d at 1121, the rule that voluntary
the jury should be allowed to consider the defendant's intoxication in determining if he had the necessary specific intent to kill.45

The Court began its analysis of the assault with intent to murder charge by observing that evidence of voluntary intoxication long had been considered by juries in determining if one charged with first degree murder was capable of the requisite deliberate premeditation.46 The Court then noted that earlier opinions had viewed this practice as being an ordinary application of the law regarding the necessity for the presence of the requisite mental state for the conviction of a crime charged.47 Because the concepts of deliberate premeditation and specific intent to kill are closely related,48 the Court felt that it could not logically justify allowing juries to receive evidence on voluntary intoxication when considering the former issue but not the latter.49

In addition to concluding that deliberate premeditation is not sufficiently distinct from specific intent to warrant different rules as to the relevance of intoxication, the Court noted that this distinction generally had been rejected elsewhere as well.50 Moreover, the Court pointed out that its own abandonment of this distinction had been foreshadowed in cases such as Commonwealth v. Lorretta51 and Commonwealth v. Sheehan.52 In Lorretta the defendant was convicted of assault with intent to murder.53 He appealed, alleging error in the judge's refusal to instruct the jury to consider his intoxication in determining if he acted with the requisite intent to kill.54 The defendant argued that intoxication is as relevant to one's ability to form a specific intent as it is to one's ability to premeditate deliberately.55 The Court noted the logical force of this argument, but refused to abandon its longstanding rule against the requested instruction due to the presence of conflicting evidence on whether the defendant was intoxicated.56

In Sheehan the defendant was convicted of robbery, which requires

intoxication cannot of itself warrant a finding of the absence of a specific intent was of long standing.

45 Henson, 394 Mass. at 592–93, 476 N.E.2d at 953–54.
46 Id. at 592, 476 N.E.2d at 953.
47 Id. See also supra note 12.
48 Henson, 394 Mass. at 592, 476 N.E.2d at 953. See also supra note 10.
49 Henson, 394 Mass. at 592–93, 476 N.E.2d at 953.
50 Id. at 593, 476 N.E.2d at 953–54.
53 The defendant was also convicted of kidnapping and assault by means of a dangerous weapon. Lorettia, 386 Mass. at 795, 438 N.E.2d at 57.
54 Id. at 799, 438 N.E.2d at 60.
55 Id. at 799–800, 438 N.E.2d at 60.
56 Id.
proof that the accused acted with the specific intent to steal.\textsuperscript{57} On appeal, the defendant argued that since Massachusetts law allowed the jury to consider intoxication when determining if the defendant acted with deliberate premeditation, it was unfair not to instruct the jury likewise to consider intoxication when determining if he acted with the requisite specific intent.\textsuperscript{58} In affirming the defendant's conviction, the Court indicated that the record was not developed sufficiently for it to consider this contention.\textsuperscript{59} The Court also noted, however, "that the two circumstances are not identical because deliberate premeditation involves more than simply an intent to kill."\textsuperscript{60}

After noting that its ruling was foreshadowed by the above cases, the \textit{Henson} Court also reasoned that its traditional rule "might permit a defendant to be convicted who, because of intoxication, totally lacked a specific criminal intent, thus raising a constitutional due process issue."\textsuperscript{61} At the very least, the Court noted, a rule which bars consideration of relevant evidence on a defendant's capacity to act with a specific intent is arbitrary.\textsuperscript{62} Thus, the Court reiterated, where a crime requires proof of a specific intent and there is evidence that the defendant was intoxicated at the time of the act, that defendant is entitled to jury instructions which allow the fact-finders to consider the intoxication in determining if the defendant possessed the requisite intent.\textsuperscript{63}

Chief Justice Hennessey joined the opinion of the Court but wrote separately to explain his understanding of the impact of the opinion.\textsuperscript{64} The Chief Justice stated that he read the opinion as making intoxication relevant to the specific intent involved in assault with intent to murder just as it is relevant to deliberate premeditation in first degree murder cases.\textsuperscript{65} He then stated, however, that the Court's language should not be applied to the great majority of violent crimes.\textsuperscript{66} The Chief Justice stated that as a policy matter "[it] is not in the public interest to conclude that a defendant's voluntary intoxication is relevant to most crimes of violence. We turn our backs on the realities of today's society if we move in that direction."\textsuperscript{67}

\textsuperscript{57} Sheehan, 376 Mass. at 766, 775, 383 N.E.2d at 1117, 1122.
\textsuperscript{58} Id. at 775, 383 N.E.2d at 1122.
\textsuperscript{59} Id. at 775–76, 383 N.E.2d at 1122.
\textsuperscript{60} Id. at 776, 383 N.E.2d at 1122.
\textsuperscript{61} Henson, 394 Mass. at 593, 476 N.E.2d at 954.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 593–94, 476 N.E.2d at 954.
\textsuperscript{64} Id. at 594, 476 N.E.2d at 954 (Hennessey, C.J., concurring).
\textsuperscript{65} Id.
\textsuperscript{66} Id. As examples of crimes which the ruling should not affect, the Chief Justice mentioned assault by means of a dangerous weapon and armed robbery. \textit{Id}. The former crime requires only a showing of general intent, while the latter involves specific intent.
\textsuperscript{67} Id. There is a tension underlying Chief Justice Hennessey's opinion. In concurring, he
The narrowest reading of *Henson* assures that when one is charged with a crime involving a specific intent to kill, and there is evidence that the accused was intoxicated, the jury may consider the intoxication in determining if the act was done with the necessary specific intent. In adopting this rule, the Supreme Judicial Court felt it was ending an illogical distinction which had allowed the jury to consider intoxication when determining the presence of deliberate premeditation, but not when determining the presence of intent to kill. By the Court's own admission, however, the concepts of specific intent to kill and deliberate premeditation are not identical.

In *Henson* the Court justified its decision by pointing to the similarity of the two concepts of intent to kill and deliberate premeditation and stating that as a matter of logic they should be treated alike. In doing this, the Court neatly sidestepped the underlying policy question implicated by its decision. The traditional rule of not allowing the jury to consider the defendant's intoxication in determining if he acts with a given specific intent stemmed from the maxim that "as a man . . . brings [voluntary intoxication] upon himself, he can not use it as an excuse, or

indicates that he is willing to allow intoxication evidence to negate the specific intent to kill necessary for conviction of the heinous crime of assault with intent to murder. Like the majority, he logically cannot justify the continued inconsistent treatment of the related *mens rea* of deliberate premeditation and specific intent to kill. He also writes, however that it is unwise to allow intoxication evidence in the context of lesser violent crimes. Drawing the line in this manner creates an arguably greater inconsistency whereby intoxication evidence will be admissible to disprove only one type of specific intent. Logically, redress of this inconsistency would lead the Court to allow intoxication evidence in all cases where specific intent is at issue.

The tension in the Chief Justice's opinion is dissipated, however, by a reading which realizes that he is simply unwilling to be held hostage by a Descartian extension of logic to its outer limits without regard to the real world impact. By his approach, the inconsistency which works the most severe harm to the defendant is eliminated, but the legal fiction that intoxication cannot negate specific intent is retained in the vast majority of cases for the protection of society. It is worth noting in this context that the defendant who successfully escapes conviction for assault with intent to murder by showing intoxication negating the requisite specific intent, will still likely face imprisonment on the lesser included general intent charge of assault with intent to kill. *See infra* note 68.

68 The crimes of assault with intent to murder and assault with intent to murder while armed with a dangerous weapon require a specific intent to kill the person attacked, i.e. the defendant actually must intend to kill the victim. The crime of assault with intent to kill, however, requires only the general intent to do an act. If death resulted, the actor would be responsible for manslaughter. Assault with intent to kill is a lesser included offense of assault with intent to murder. *Henson*, 394 Mass. at 591, 476 N.E.2d at 952.

69 *Id.* at 592-93, 476 N.E.2d at 953.

70 *See supra* note 68 for a discussion of the concept of specific intent to kill.

71 *See supra* note 10 for a discussion of the concept of deliberate premeditation.

72 *Henson*, 394 Mass. at 592, 476 N.E.2d at 953.
justification or extenuation of crime."

Of course, it can be argued that a finding that intoxication prevented a defendant from possessing a specific intent does not excuse a crime but merely proves that no crime was committed. Nonetheless, while as a logical matter intoxication may prevent one from acting with a requisite intent, the underlying policy question of whether it is in the public interest to make such intoxication relevant at trial remains. In view of the violent propensities of far too many of our society is it wise to allow those accused of inflicting injury upon innocents to simply retort, "I was drunk?"

Because the Court avoided answering this question in Henson, the full scope of the ruling remains to be developed.

The most significant question concerning the scope of the Henson rule is whether it will be limited to crimes involving the specific intent to kill or will be extended to other specific intent crimes. The language of the Henson opinion is very broad, stating that the rule "applies where proof of a crime requires proof of a specific criminal intent." This language indicates that the rule applies to all specific intent crimes. The Court's reliance on the close relationship between the deliberate premeditation element of first degree murder and the specific intent to kill element of the crime before it, however, leaves room for limiting the new rule to these classes of cases, as Chief Justice Hennessey did in his concurrence. Many jurisdictions which allow evidence of intoxication on specific intent do so for all crimes requiring this element. While this is the logically sound approach, the policy considerations implicated by Chief Justice

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73 Commonwealth v. Hawkins, 69 Mass. (3 Gray) 463, 466 (1855). See also Commonwealth v. Taylor, 263 Mass. 356, 362–64, 161 N.E. 245, 247 (1928) where the Court approved jury instructions which stated that "[i]t would be subversive of all law and morality if the commission of one vice like drunkenness . . . should be allowed to excuse another crime."

74 See W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 45, at 342 & n.7 (1982).

75 Henson, 394 Mass. at 594, 476 N.E.2d at 954 (Hennessey, C.J., concurring).

76 See supra note 67.

77 Among the crimes which require a specific intent under Massachusetts law are robbery (G.L. c. 265, § 17), assault with intent to rape (G.L. c. 265, § 24), burglary (G.L. c. 266 §§ 14, 15), and larceny (G.L. c. 266, § 34).

78 Henson, 394 Mass. at 593–94, 476 N.E.2d at 954.

79 See Modern Status, supra note 16. For example, Florida has allowed evidence of voluntary intoxication in the specific intent crimes of robbery, battery, burglary, escape and others. See Note, The Voluntary Intoxication Defense in Florida: A Question of Intent, 13 STETSON L. REV. 649, 654 (1984). Other jurisdictions limit the intoxication defense to instances where the defendant is charged with a crime which incorporates a lesser included general intent offense upon which the defendant will be convicted upon a finding of no specific intent. See Comment, Criminal Law — Diminished Capacity Defense Limited to Specific Intent Crimes Having Lesser Included Offenses — State v. Doyon, 15 SUFFOLK U.L. REV. 639, 645 (1981).
Hennessey may yet result in the Court limiting the rule to crimes involving the specific intent to kill. Perhaps the best solution is to allow intoxication evidence on specific intent only where the end result will be a possible conviction on a lesser included offense which does not require specific intent. In this way the defendant’s intoxication will not constitute a complete shield from all criminal responsibility.

If the Court should extend the Henson rule to other specific intent crimes, it might then be asked to further extend it by allowing evidence of intoxication to negate a general intent to commit a crime as well. A number of commentators have criticized severely the approach of most jurisdictions which allows the intoxication evidence only when a specific intent crime is at issue. As a logical matter there seems to be no reason to hold that a general intent cannot be lacking due to intoxication while ruling that a specific intent can be. The great majority of jurisdictions, however, have refused to allow evidence of intoxication to negate a general criminal intent. The Supreme Judicial Court in Henson acknowledged this dichotomy by ruling that the trial court’s instruction, which indicated that intoxication is no excuse, was correct in so far as it applied to the “crime of assault and battery by means of a dangerous weapon, because no specific intent is involved in the proof of that crime.” Thus, it is doubtful that the Court will be willing to extend the Henson rule to crimes of general intent.

As a result of the Henson decision, defendants accused of crimes requiring a specific intent to kill are entitled to jury instructions which allow consideration of the defendants’ intoxication in determining if they acted with the requisite intent. Because the Court did not address the underlying policy question at issue before it in Henson, however, the full impact of the case is uncertain. This rule appears applicable to other crimes involving specific intent, though not to those requiring only a general intent. The full scope that eventually is given this new rule will depend largely on the Supreme Judicial Court’s balancing of the interest of society in being protected from violent crime on one side, and, on the

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81 Among the many crimes which require only a general intent under Massachusetts law are assault and battery by means of a dangerous weapon (G.L. c. 265, § 15A) and arson (G.L. c. 266, §§ 1, 2).

82 See, e.g., W. LaFave & A. Scott, Jr., Handbook on Criminal Law § 45, at 343–44; Alcohol Abuse, supra note 3, at 1683–87.

83 See Modern Status, supra note 16.

84 Henson, 394 Mass. at 592, 476 N.E.2d at 953. The Court cites to broad language in LaFave & Scott’s Handbook on Criminal Law and the Model Penal Code, id. at 593, 476 N.E.2d at 953–54, which, however, support an extension of the rule to crimes of general intent. See W. LaFave & A. Scott, Jr., Handbook on Criminal Law § 45 at 344.
other side, the force of the logical conclusion that the specific intent to kill is not the only intent which can be negated by the consumption of alcohol.

§ 3.7. Grand Juries—Preindictment Publicity—Prejudice.* The fifth amendment to the United States Constitution requires that no person be held for a capital or infamous crime unless indicted by a grand jury.1 According to the United States Supreme Court, in order to comply with the fifth amendment, the grand jury returning an indictment must be unbiased.2 The Supreme Court, however, explicitly has declined to decide whether the fourteenth amendment requires a state to provide an unbiased grand jury.3

Most federal courts state that the fifth amendment guarantees the right to indictment in federal court by an impartial, unprejudiced grand jury.4 Federal courts have nonetheless realized that "a grand jury need not deliberate in a sterile chamber, completely immunized from reports of those events transpiring about it."5 As explained in United States v. Mandel,6 there are three reasons why federal courts require a defendant challenging a grand jury indictment to show that she has suffered "actual prejudice" as a result of the publicity. First, a presumption of regularity surrounds grand jury proceedings.7 Second, if preindictment publicity were sufficient to overturn indictments then defendants involved in newsworthy cases could avoid indictment—a clearly undesirable result.8 Finally, the historical role of the grand jury has not required the same freedom from outside influences required of a petit jury.9 Therefore, while prejudice may be assumed when a petit jury has been exposed to inherently prejudicial publicity,10 a federal grand jury indictment generally may be overturned only if the defendant can demonstrate that the grand

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§ 3.7. 1 U.S. CONST. amend. V.
6 415 F. Supp. 1033, 1063 (D. Md. 1976), aff’d, 602 F.2d 653 (4th Cir. 1979) (en banc).
7 Id.
8 Id.
9 Id.
10 United States v. Brien, 617 F.2d 299, 313 (1st Cir. 1980).
jury has abdicated its sworn duty to act with impartiality. Yet because judges need not voir dire grand jurors to ascertain whether they have been prejudiced, such actual prejudice to date has been impossible for defendants to prove.

In contrast to the federal approach, the Supreme Judicial Court, like the courts in most other states, long has held that criminal defendants in Massachusetts courts have no right under the fifth and fourteenth amendments to the United States Constitution to be indicted by unbiased and unprejudiced grand juries. The Court has stated that the grand jury is an accusatory body only, not a judicial tribunal. As such, the grand jury does not determine guilt but merely decides whether there is probable cause to indict the accused. In returning indictments, Massachusetts grand juries have not been limited to the evidence presented to them, but have been free to act upon knowledge gained from outside sources, including preindictment publicity disseminated by the media. As long as a grand jury has not indicted a defendant on the basis of hatred or malice, the fact that a grand jury has been exposed to preindictment publicity has never been deemed cause to question the validity of the indictment.

During the Survey year, in Commonwealth v. McLeod, the Supreme Judicial Court reexamined and unanimously reaffirmed the Massachusetts rule that grand jury indictments may not be attacked on grounds that the grand jury was prejudiced by adverse preindictment publicity. The

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11 Id.
12 In Re Balistrieri, 503 F. Supp. 1112, 1114 (E.D. Wis. 1980).
13 See Myers, 510 F. Supp. at 325 (collecting cases).
18 G.L. c. 277, § 5 (1984), the grand jurors' oath, sets forth the duties of the grand juror: 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 fellows' and your own, you shall keep secret; you shall present no man for envy, hatred or malice, neither shall you leave any man unrepresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God. The terms "envy, hatred or malice" as used in this oath have not been interpreted.
Court also discussed and rejected six other grounds for reversal pro-
pounded by the defendants. In McLeod two Everett police officers were
convicted of second degree murder, and one was convicted of manslaugh-
ter, for the killing of Vincent Bordonaro. At approximately 1:45 a.m.
on July 23, 1982, McLeod, an off duty police officer, arrived at the bar
of King Arthur’s Motel in Chelsea. Between 3 a.m. and 4 a.m. a fight
broke out between McLeod and several other patrons. Although
McLeod was badly beaten and was thrown out of the motel, he was able
to instruct a guard to call the Everett police.

Officers Aiello and Macauda picked McLeod up and drove to King
Arthur’s, where they were joined by approximately ten other officers. The
police entered the motel through a fire escape, informed the bar
patrons hidden in room 209 that they were under arrest, and demanded
that the door be opened. When the door was not opened the officers
broke it down and several officers, including Aiello and Macauda, en-
tered. In the ensuing melee, Aiello and Macauda struck several persons,
including Bordonaro, with an assortment of heavy blunt instruments. When
the police eventually left the room Bordonaro was unconscious.

Aiello along with McLeod, who had not taken part in the first entry,
then returned to the room with a baseball bat. McLeod took the bat
and struck both Bordonaro and Mattuchio, yelling “My name is John

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20 See infra note 56 for the Court’s treatment of the six other grounds.
21 Id. at 728–29, 477 N.E.2d at 976. All three defendants also were convicted of other
charges, including assault and battery and civil rights violations. Id. at 729 & n.2, 477
N.E.2d at 976 & n.2.
22 Id. at 730, 477 N.E.2d at 976. McLeod previously had consumed four alcoholic beve-
erages, and he drank two or three more drinks while at the motel. Id.
23 Id. at 730, 477 N.E.2d at 976.
24 Id. at 730, 477 N.E.2d at 976–77.
25 Id. at 730, 477 N.E.2d at 977. Upon seeing Mattuchio in the doorway the officers
announced that Mattuchio was under arrest. Id. Mattuchio went inside the building and
locked the door. Id. Dimino then directed all those in the bar to go to room 209, where
they joined Vincent Bordonaro who was lying on the bed. Id. at 730–31, 477 N.E.2d at
977. Bordonaro, who was drunk, had been helped to room 209 some time earlier. Id. at
730, 477 N.E.2d at 977.
26 Id. at 731, 477 N.E.2d at 977.
27 Id.
28 Id. For these acts Aiello was subsequently convicted of three counts of assault and
battery by means of a dangerous weapon and two counts of violating the victim’s civil
rights. Macauda was convicted of one count of assault and battery by means of a dangerous
weapon and of violating the victim’s civil rights. Id. at 731 n.6, 477 N.E.2d at 977 n.6.
There was testimony that Macauda struck Bordonaro with a tire iron, a nunchaku, and
three times to the head with a nightstick. Id. at 731, 477 N.E.2d at 977. Aiello too was
accused of hitting Bordonaro at least twice. Id.
29 Id. at 732, 477 N.E.2d at 977.
30 Id.
McLeod and don't you forget it.'"31 Bordonaro rolled off the bed onto the floor.32 After briefly regaining consciousness, Bordonaro died one week later.33

Aiello, Macauda and McLeod were tried for first degree murder.34 Aiello and McLeod were subsequently convicted of second degree murder, while Macauda was found guilty of manslaughter.35 On direct appeal to the Supreme Judicial Court the defendants argued, inter alia, that the fifth and fourteenth amendments to the United States Constitution require that indictments be returned by unprejudiced grand juries.36 The defendants relied on three factors to show that the grand jury which indicted them in fact had been biased. First, they introduced copies of newspaper articles and recordings of television and radio coverage of the incident to show the extensive attention payed to the event by the media.37 Next, the defendants argued that the prejudicial impact of such publicity had already been found by the trial judge since he allowed a change of venue before trial based on the pretrial publicity.38 Finally, the defendants contended that this publicity led to hostility by the grand jury towards at least Macauda.39 To support this contention the defendants alleged that while Macauda was testifying one grand juror referred to the incident as a "massacre,"40 and the judge found that one grand juror said to Macauda, "[Y]ou think we are idiots, we don't understand."41 The McLeod Court rejected, inter alia, the defendants' arguments that the indictments should have been dismissed because the trial judge failed to ascertain whether the grand jurors had been prejudiced by the substantial preindictment publicity engendered by the case42 and affirmed all three convictions.43

31 Id. McLeod was convicted of assault and battery by means of a dangerous weapon on Mattuchio. Id. at 732 n.9, 477 N.E.2d at 977 n.9.
32 Id. at 732, 477 N.E.2d at 977.
33 Id. at 732, 477 N.E.2d at 977–78.
34 Id. at 728, 477 N.E.2d at 976. G.L. c. 265, § 1 (1984) states that Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree.
35 McLeod, 394 Mass. at 728–29, 477 N.E.2d at 976.
36 Id. at 732, 477 N.E.2d at 978.
37 Id. at 734, 477 N.E.2d at 979.
38 Id.
39 Id.
40 Id. at 735, 477 N.E.2d at 979.
41 Id. at 734, 477 N.E.2d at 979.
42 Id. at 729, 732, 477 N.E.2d at 976, 978. The defendants also collectively brought six other grounds upon which they believed the convictions should be overturned. All of these arguments were rejected by the Supreme Judicial Court. See infra note 56.
43 Id. at 729, 477 N.E.2d at 976.
The Court first rejected the defendants' argument that the fifth and fourteenth amendments require unprejudiced grand jury indictments. While acknowledging such a requirement in federal proceedings, the Court stated that unprejudiced grand juries are not required in state courts by either the United States Constitution or by Massachusetts law. Furthermore, the Court found no value in establishing such a requirement. The Court explained that the purpose of the grand jury is not to decide guilt, but to investigate and determine whether there is probable cause to indict an accused. The Court stated that because the petit jury which determines guilt must be impartial, such a safeguard is not necessary at the grand jury stage, and grand jurors may act upon knowledge gained outside the grand jury proceedings. The Court acknowledged that a grand jury indictment may be dismissed if there is a serious flaw in the grand jury process itself, such as if knowingly false testimony has been used or evidence has been presented in a misleading manner. Furthermore, the Court stated that further inquiry might be warranted if the grand jury has shown such prejudice that the indictment was based on hatred or malice.

The Court then examined four factors which, according to the defendants, showed prejudice on the part of the grand jury and held that none of the elements, either individually or taken together, were sufficient to meet the defendants' burden of proving malice. First, the Court reasoned that knowledge gained by the grand jury in no way evidenced that the grand jury had exhibited animosity towards the defendants. Similarly, the Court found that the fact that the trial judge allowed a change of venue before trial was irrelevant to the question of grand jury malice. Finally, the Court reasoned that the trial judge was warranted in concluding that the negative statements by grand jurors could well have resulted from the evidence presented before the grand jury rather than from adverse publicity. The Court also found that the trial judge was warranted in concluding that the grand jury had shown a lack of bias by indicting each defendant for a different series of offenses.

44 id. at 732, 477 N.E.2d at 978.
45 id. at 732-33, 477 N.E.2d at 978.
46 id. at 733, 477 N.E.2d at 978.
47 id.
48 id.
51 id. at 734, 477 N.E.2d at 979. See supra note 18.
52 394 Mass. at 734, 477 N.E.2d at 979.
53 id.
54 id.
55 id. at 734–35, 477 N.E.2d at 979.
56 id. The defendants also presented six other reasons why they believed their convictions
Following McLeod there is little doubt that in Massachusetts grand jury indictments may not be overturned simply because the grand jurors have been influenced by negative preindictment publicity. The McLeod Court made clear that a defendant seeking to overturn a grand jury indictment must carry the heavy burden of showing not only that the grand jurors acted out of prejudice, as federal courts require, but that this prejudice is "so egregious as to result in an indictment based on 'hatred or malice'" within the meaning of the grand juror's oath. This position is both pragmatic and consistent with the functions served by

should not stand, all of which were rejected by the Court. The Court held that the trial court did not confuse proximate cause with actual cause and was correct in defining proximate cause as ""a cause, which, in the natural and continuous sequence, produces the death, and without which the death would not have occurred."" Id. at 735–36, 477 N.E.2d at 979–80 (quoting Commonwealth v. Rhodes, 379 Mass. 810, 825, 401 N.E.2d 342, 351 (1980)). The Court also rejected the defendants' contention that statements made during the prosecution's closing argument were without evidentiary basis. Id. at 736–37, 477 N.E.2d at 980–81.

Concerning the manslaughter instruction given to the jury, Aiello and McLeod contended that the burden of proof was impermissibly shifted from the Commonwealth to the defendants by the judge's failure to restate the Commonwealth's burden during his discussion of the elements of manslaughter. Id. at 737–38, 477 N.E.2d at 981. In response, the Commonwealth argued that too lengthy a cooling off period had taken place between the provocation and the killing for the homicide to be considered manslaughter. Id. at 738–39, 477 N.E.2d at 981. The Court assumed, without deciding, that a manslaughter instruction was required and held that by repeating immediately following the manslaughter instruction that the burden of proof was on the Commonwealth, the judge's charge was sufficient. Id. at 739–40, 477 N.E.2d at 982.

Next, Macauda contended that when the prosecution's witnesses changed their testimony Macauda should have been permitted to voir dire the witnesses or his motion for a mistrial should have been granted. Id. at 740, 477 N.E.2d at 982. However, the Court held that any purpose served by a voir dire was accomplished by the extended and searching cross examination carried out by the defense. Id. at 742, 447 N.E.2d at 983–84. The Court stated that there was nothing to suggest that the judge was required to deal with the changed testimony in another way. Id. at 743, 477 N.E.2d at 984.

Macauda then argued that the judge should have given to the jury his proposed instruction on independent, intervening cause. Id. at 744 & n.20, 477 N.E.2d at 984 & n.20. The Court disagreed, holding that the judge's instruction was adequate and that Macauda's proposed instruction misstated the law. Id. at 745, 477 N.E.2d at 985. Finally, Macauda contended that his motion for a required finding of not guilty should have been granted. Id. at 746, 477 N.E.2d at 985–86. The Court explained that Macauda could be convicted of homicide if his acts contributed to Bordonaro's death even if they alone would not have caused the death. Id. at 747, 477 N.E.2d at 986. The Court concluded that the jury was warranted in finding that Macauda's acts were a proximate cause of Bordonaro's death. Id. at 748, 477 N.E.2d at 987. Therefore, since the Court rejected all of the defendants' arguments, the convictions entered on the jury verdicts were affirmed. Id.

58 McLeod, 394 Mass. at 734, 477 N.E.2d at 979.
grand juries. Furthermore, even had the Supreme Judicial Court adopted the federal standard, it is unlikely that the Court would have reached a different result in this case.

The McLeod defendants argued that their indictments should be overturned, in part, because extensive media coverage of the crime suggested that the grand jurors must have been familiar with the case prior to their investigation and because in allowing a change of venue, the trial judge found the pretrial publicity inherently prejudicial. While petit jurors must be impartial at the beginning of a trial, the cost of adopting such a standard for the grand jury would outweigh any benefits which might be expected in terms of fairer grand jury decisions.

As the McLeod Court explained, the purpose of a grand jury is to determine whether probable cause exists to indict an accused, and in this way to screen out those prosecutions which are wholly unfounded. This purpose differs from that of the petit jury, which determines guilt. Consequently the significant procedural safeguards which protect a defendant at trial have never been applied to grand jury proceedings. A grand jury hears evidence only from the prosecution, and the prosecution need not present any exculpatory evidence. Furthermore, the rules of evidence which apply during a trial are not applied during grand jury proceedings. An indictment may be based wholly or in part on inadmissible hearsay, including tips, rumors, and the grand jurors’ personal knowledge. Since a grand jury is required to hear sufficient testimony to establish the identity of the accused and probable cause to arrest him, rather than to make a balanced determination of guilt, it is unlikely that allowing grand juries to be composed of persons with prior knowledge of the case gained through publicity will substantially affect the fairness of the grand jury proceeding.

Moreover, adopting a system of unprejudiced grand juries would be costly. Unlike a petit jury a grand jury is not chosen anew for each individual case, but sits for a number of months. If an indictment may be dismissed because some of the grand jurors had been influenced by publicity, new impartial grand juries might have to be convened before each sensational case. Yet even such a safeguard might prove insufficient.

59 Id.
61 McLeod, 394 Mass. at 733, 477 N.E.2d at 978.
63 See id. § 732.
64 Id.
if grand jurors are prejudiced by publicity during the course of their investigation. It is unlikely that the costs in terms of delay and expense of providing impartial grand juries would be counterbalanced by the achievement of fairer outcomes since an impartial petit jury stands ready to rectify any unreasonable indictments by the grand jury.

Furthermore, although the federal courts acknowledge that the fifth amendment requires unbiased federal grand juries, even these courts require a defendant to show that the grand jury acted with actual prejudice, not merely that the grand jurors were exposed to inherently prejudicial publicity. Thus, even if the Supreme Judicial Court adopted the federal standard, it is unlikely that the McLeod defendants would have prevailed. While the McLeod defendants were able to point to two instances where grand jurors made negative comments, the Court ruled that these comments were not necessarily the result of media publicity.

Were the Supreme Judicial Court to adopt the federal standard, most other defendants likely would face similar evidentiary hurdles to proving that actual grand jury prejudice occurred. This is especially so since a federal defendant has no right to voir dire grand jurors to determine whether actual prejudice was present. While proving that the grand jury acted out of prejudice is theoretically a lesser burden than proving that it acted based on "hatred or malice," in fact, no federal plaintiff has ever successfully shown that the grand jury which indicted him or her was biased.

The McLeod Court was reasonable and pragmatic in reaffirming that defendants may not question grand jury indictments on the basis that the grand jurors had been prejudiced by preindictment publicity. Were judges required to conduct inquiries into grand jury prejudice in each publicized case the cost of providing new, unprejudiced grand juries would likely outweigh any benefit which might be expected in the way of fairer out-

67 See, e.g., United States v. Hyder, 732 F.2d 841, 842 (11th Cir. 1984); United States v. Burke, 700 F.2d 70, 82 (2d Cir.) cert. denied, 464 U.S. 816 (1983); Myers, 510 F. Supp. at 324.
68 See, e.g., United States v. Brien, 617 F.2d 299, 313 (1st Cir. 1980).
69 McLeod, 394 Mass. at 734-35, 477 N.E.2d at 979.
70 Id.
71 In Re Balistrieri, 503 F. Supp. 1112, 1114 (E.D. Wis. 1980).
72 See, e.g., United States v. Burke, 700 F.2d 70 (2d Cir.) (appellants unable to show actual grand jury prejudice following adverse publicity and had no right to preindictment hearing to determine whether grand jury prejudiced) cert. denied, 464 U.S. 816 (1983); United States v. Brien, 617 F.2d 299 (1st Cir. 1980) (defendant unable to show that grand jury failed to act impartially following adverse publicity); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), (grand jury indictment following media publicity not overturned), cert. denied, 400 U.S. 1022 (1971); United States v. Myers, 510 F. Supp. 323 (E.D.N.Y. 1980) (although the public was deluged with hostile media reports, defendants unable to prove actual grand jury prejudice).
comes. Furthermore, had the Court embraced the rule followed in federal courts—which acknowledges a right to unbiased grand juries but requires those challenging indictments to show that they suffered actual prejudice—it is unlikely that outcomes would differ significantly from those under current Massachusetts law. The evidentiary barriers to proving that grand jurors actually acted out of prejudice are so great that in practice federal defendants have proven no more able to overturn indictments from prejudiced grand juries than have state defendants. The Supreme Judicial Court was correct in McLeod to reject this federal system and to acknowledge that the costs of providing unprejudiced grand juries are not justified by the limited accusatory role they play.