Chapter 12: Criminal Law and Procedure

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Criminal Law and Procedure

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§12.1. The Constitutionality of the Trial de Novo System. The legal challenge to the constitutionality of the Massachusetts trial de novo system was settled by the Supreme Court of the United States during the Survey year in Ludwig v. Massachusetts. The Court upheld the Commonwealth's practice of trial de novo finding that the system does not constitute an impermissible burden upon a defendant's right to a trial by jury and that the requirement that a defendant undergo two trials in order to obtain a jury trial is not a violation of the right against double jeopardy.

In holding that the de novo system in Massachusetts does not deprive a defendant of the right to a trial by jury, the Supreme Court considered the 88 year old case of Callan v. Wilson in which the Court had struck down the trial de novo system in the District of Columbia. Faced with this precedent squarely condemning trial de novo at the federal level, the Court confined Callan to that level, thus continuing the trend of applying different standards for the state and federal systems. The Court also distinguished Callan and Ludwig on

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2 The trial de novo system is governed by G.L. c. 218, §§ 1 et seq. and G.L. c. 278, §§ 1 et seq. For a description of this system, see Ludwig v. Massachusetts, 427 U.S. at 620-22; 30 K. SMITH, MASSACHUSETTS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE §§ 741-766 (1970).

3 The Court noted that "[i]t is indisputable that the Massachusetts two-tier system does afford an accused charged with a serious offense the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution." 427 U.S. at 625. The Court also dismissed the plaintiff's contentions that the trial de novo system unconstitutionally interferes with the exercise of the right to a trial by jury, since (1) there is no undue financial burden placed upon the accused, (2) there is no inherent possibility of the vindictive imposition of an increased sentence upon appeal, and (3) the accused is not subjected to adverse psychological or physical hardship because of the two trial system. Id. at 626-29.

4 Id. at 630-32.

5 127 U.S. 540 (1888).

6 Id. at 557.

7 427 U.S. at 629-30. This reasoning was first expounded by Justice Powell in Apodaca v. Oregon, 406 U.S. 404, 369-80 (1972) (Justice Powell's concurrence in
The basis that the Massachusetts trial de novo system poses only a minor inconvenience to the accused as opposed to the District of Columbia procedure in Callan.\(^8\) Under the Massachusetts system, a defendant in the district court can “admit to a finding”\(^9\) and thus avoid actually having to try his entire case at the district court level before presenting it to a jury. The Supreme Court found that this procedure did not create a significant burden on the accused in contrast to the trial de novo system in Callan “which apparently required that an accused be ‘fully tried’ in the first tier . . .”\(^10\)

The petitioner in Ludwig also claimed that the two-tier de novo system violated the double jeopardy provision of the fifth amendment.\(^11\) The Supreme Court, however, dismissed this contention, viewing the retrial of a defendant in the de novo context as no different from the situation of someone who appeals on the basis of the trial record, gains reversal of his conviction, and has the case remanded for a new trial.\(^12\) Since a state may re-prosecute a defendant who has obtained a reversal of a prior conviction,\(^13\) the Commonwealth may re-try a defendant who appeals a conviction from the district court. As the Ludwig Court noted, “[n]othing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal.”\(^14\)

\(\text{§12.2. Double Jeopardy: The Attachment of Jeopardy.}\) The United States Supreme Court’s discussion of double jeopardy in Ludwig v. Massachusetts\(^1\) centered on the defendant’s right to be free

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\(\text{Apodaca}\) is contained in his concurrence in the accompanying case of Johnson v. Louisiana, 406 U.S. 356 (1972).

\(^8\) 427 U.S. at 630.


\(^10\) 427 U.S. at 630. See Callan, 127 U.S. at 557. The dissent in Ludwig could find no rational basis for this distinction. 427 U.S. at 633-35 (Stevens, J., dissenting). Justice Stevens also noted:

If [the proceeding before the district court] is meaningless for the defendant, it must be equally meaningless for the Commonwealth. But if so, why does the Commonwealth insist on the requirement that the defendant must submit to the first trial? Only, I suggest, because it believes the number of jury trials that would be avoided by the required practice exceeds the number that would take place in an optional system. In short the very purpose of the requirement is to discourage jury trials by placing a burden on the exercise of the constitutional right. Id. at 635 (Stevens, J., dissenting). The dissent was more willing to take seriously the collateral consequences of a district court conviction, including the harm to a defendant’s reputation and the possibility that jurors in the de novo trial will be sufficiently aware of the Commonwealth’s criminal justice system to realize the defendant has already lost one trial on the same issue. Id. at 637 (Stevens, J., dissenting).

\(^11\) U.S. Const. amend. V. The double jeopardy provision of the fifth amendment was applied to the states in Benton v. Maryland, 395 U.S. 784, 794 (1969).

\(^12\) 427 U.S. at 631.

\(^13\) See United States v. Ball, 163 U.S. 662, 672 (1896).

\(^14\) 427 U.S. at 632.

\(\text{§12.2.}^{1} 427\text{ U.S. 618 (1976). See \(\text{§12.1 supra.}\)}\)

http://lawdigitalcommons.bc.edu/asml/vol1976/iss1/16
from prosecution for the same offense after conviction. The Court did not dwell on the other major protection offered by the double jeopardy clause: the restriction against a second prosecution for the same offense after acquittal. It is clear under this aspect of the double jeopardy clause that once a defendant is held to be innocent by a district court judge there can be no appeal by the Commonwealth to the superior courts. The defendant’s ability to invoke the protection from double jeopardy is not as clear, however, when the trial judge makes a legal ruling which is short of an actual verdict.

In the Survey year case of Commonwealth v. Clemmons, the Supreme Judicial Court applied the rules of double jeopardy to a case in which a district court judge terminated a trial prior to a verdict in order to permit the prosecution to bring a more serious charge. Clemmons made clear that once testimony begins in the district court jeopardy attaches and that thereafter any termination of the proceeding short of a verdict may be a bar to re-trying the defendant in either the district or superior court.

In Clemmons, the defendant was originally before the municipal court on a complaint charging him with possession of heroin. Although the arresting officer had indicated on his application for the complaint that the charge should be possession of heroin with intent to distribute, the clerk prepared a complaint for simple possession. Under section 26 of chapter 218 of the General Laws, the court could only take jurisdiction of a complaint for simple possession. On a charge of possession with intent to distribute, the court may only conduct a probable cause hearing and, if it is apparent that the defendant is guilty, bind him over to the superior court. When the case was called for trial, the police assumed that a probable cause hearing was being held, while the defendant and his attorney believed that they were engaged in the trial of a charge within the court’s jurisdiction. The first police witness was sworn and testified as to the circumstances of the arrest. Prior to the cross examination, the trial judge asked why the charge was simple possession and not the more serious crime of possession with intent to distribute. When the mix-up was discovered,
the judge — over the defendant's objection — allowed the complaint to be amended to make it reflect the officer's original intention to charge the defendant with possession with intent to distribute. A probable cause hearing was then held, and the defendant bound over to the grand jury.\textsuperscript{11} The defendant unsuccessfully moved to dismiss the indictment in superior court on the grounds of double jeopardy. The defendant was eventually convicted on so much of the indictment as charged him with simple possession.\textsuperscript{12} On appeal, the Supreme Judicial Court reversed the conviction on double jeopardy grounds.\textsuperscript{13}

The Supreme Judicial Court first addressed the issue of whether the initial proceeding was a trial on the merits causing jeopardy to attach.\textsuperscript{14} The Court applied the standard "that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'"\textsuperscript{15} If the initial proceeding before the municipal court was within the jurisdiction of the court, the defendant would have been placed on trial, and jeopardy would have attached.\textsuperscript{16} On the other hand, if the proceeding was merely a probable cause hearing, the defendant would not have been "put to trial before the trier of facts," and jeopardy would not have attached. To resolve the issue of the nature of the initial proceeding, the Court referred to the case of Corey v. Commonwealth\textsuperscript{17} in which the Court had stated in dicta that "a District Court judge should announce, before the hearing commences, whether he is conducting a probable cause hearing or a full trial on the merits."\textsuperscript{18} In Clemmons, the judge had failed to give such notice.\textsuperscript{19} Since the judge had before him a charge of simple possession which was within the lower court's jurisdiction and the judge had not stated prior to the proceeding that he was declining jurisdiction, the Supreme Judicial Court inferred "that the judge intended to exercise jurisdiction and that a trial on the charge of possession of heroin was being held."\textsuperscript{20} Since a trial had been initiated with the start of testimony by the first witness, jeopardy had attached.

\textsuperscript{11} Id. at 1266, 346 N.E.2d at 866.  
\textsuperscript{12} Id.  
\textsuperscript{13} Id. at 1274, 346 N.E.2d at 869.  
\textsuperscript{14} To constitute a violation of the double jeopardy clause, the defendant must twice be placed in jeopardy of being tried for the same offense. Hence, the defendant must show two proceedings at which jeopardy must "attach" to come under the protection of the fifth amendment. Serfass v. United States, 420 U.S. 377, 388 (1975).  
\textsuperscript{15} Id.  
\textsuperscript{18} 364 Mass. at 141-42 n.7, 301 N.E.2d at 454 n.7.  
\textsuperscript{19} 1976 Mass. Adv. Sh. at 1266-67, 346 N.E.2d at 866-67. In his dissent, Justice Quirico argued that Corey did not impose a requirement that the district court judge disclose before the hearing what type of proceeding would be conducted. While Justice Quirico found such disclosure desirable, he contended that it should not be mandatory. Id. at 1283-84, 346 N.E.2d at 872 (Quirico, J., dissenting).  
\textsuperscript{20} Id. at 1267, 346 N.E.2d at 866.
The Court next considered whether the discontinuance of the initial proceeding raised a double jeopardy bar to retrial under the "manifest necessity" rule. Under this rule, jeopardy will bar a retrial unless the interests of the public in reprosecuting the case outweigh the interest of fairness to the defendant. However, requiring a defendant to go through a second trial solely for the purpose of subjecting him to a more severe punishment runs afoul of the interests double jeopardy is designed to protect. As the Court stated: "it cannot reasonably be argued that a trial may be terminated in order to provide the State with a more favorable opportunity to convict on a more serious charge . . . ."

Having found that jeopardy did attach at the first trial, the Supreme Judicial Court finally considered whether the superior court trial put the defendant in jeopardy a second time for the same offense as in the municipal court. The Court concluded that there was double jeopardy since the defendant was convicted twice for the same offense. Accordingly, the Court rejected the prosecution's argument that because the original charge in the subsequent trial differed from that in the previous trial, double jeopardy did not apply.

The immediate significance of Clemmons is to make clear that a district court trial aborted before a verdict will bar any further prosecution on the same charge either in the district or superior courts, unless the case falls within one of the limited exceptions embodied in the manifest necessity rule. A more wide-ranging effect will be to add teeth to the procedural requirement first enunciated in Corey that the district court judge should announce prior to the commencement of the proceeding whether a probable cause hearing or a trial on the merits is being held. In his dissent in Clemmons, Justice Quirico argued that the Court's reliance on Corey was unfounded because nothing in the Corey opinion created an obligation to make an announce-

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23 Id. at 1270, 346 N.E.2d at 868.
24 Id. at 1270, 346 N.E.2d at 868. The Commonwealth purported to find support for this argument in Commonwealth v. Mahoney, 331 Mass. 510, 120 N.E.2d 645 (1954). In Mahoney, the defendant was found guilty of assault and battery and larceny and was acquitted of a charge of robbery by the district court, id. at 510-11, 120 N.E.2d at 646. The district court had no jurisdiction over the robbery charge. Later the defendant was indicted and convicted of robbery in the superior court. Id. The Supreme Judicial Court held that double jeopardy did not apply, since the district court had no jurisdiction over the original case; id. at 514, 120 N.E.2d at 648.
In Clemmons, however, the district court did have final jurisdiction over the charge for which the superior court convicted the defendant, and therefore, contrary to the Commonwealth's contentions, Mahoney did not control. Hence, the Court found that double jeopardy applied. 1976 Mass. Adv. Sh. at 1272, 346 N.E.2d at 869.
26 See text at note 21 supra.
ment prior to the initiation of proceedings. He concluded that this requirement would add a burdensome and time-consuming "step in the already seemingly endless proceedings for the dispositions of criminal cases." The majority attempted to refute this criticism stating: "While we adhere to the position announced in Corey . . . the implications of [our prior statement in that action] are not before us in this case." However, the Clemmons Court's inference that the judge in the trial court intended to exercise jurisdiction is based upon the reasoning that the judge did not make a preliminary statement "as required by Corey." Despite the earnest protest of the majority, Clemmons most likely stands as a precedent which will enable defense attorneys to bar superior court action in cases where district court judges have declined jurisdiction after conducting a hearing without making an appropriate announcement prior to the beginning of testimony.

§12.3. The Right to a Speedy Trial. Under the principles that protect the accused from double jeopardy, a "dismissal of a complaint without a trial on the merits is ordinarily not a bar to a trial for the same offense" in a later action. As noted in the previous section, the basis for this reasoning is that jeopardy cannot attach until the defendant is "put to trial before the trier of facts . . ." There are, however, principles other than jeopardy which may bar retrials. In the Survey year case of Commonwealth v. Ludwig, the Supreme Judicial Court held that, even if jeopardy had not attached:

[T]he dismissal of a complaint in the District Court on the ground that the defendant has been denied his right to a speedy trial is a bar to any subsequent prosecution for the same offense whether by later complaint in the District Court or by an indictment in the Superior Court.

As an exception to the basic rule that the dismissal of a complaint without trial does not bar a subsequent trial for the same offense, Commonwealth v. Ludwig provides a significant degree of protection to defendants who have been denied speedy trials over their objections.

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28 Id. at 1285, 346 N.E.2d at 873 (Quirico, J., dissenting).
29 Id. at 1267 n.2, 346 N.E.2d at 866-67 n.2.
30 Id. at 1267, 346 N.E.2d at 866.

2 See § 12.2 supra at note 18.
3 1976 Mass. Adv. Sh. 857, 345 N.E.2d 386. While the defendants in Commonwealth v. Ludwig and Ludwik v. Massachusetts, see §12.1 supra, were the same, the two cases are separate actions, the former involving a claim of larceny and the latter negligent operation of a motor vehicle.
§12.3 CRIMINAL LAW AND PROCEDURE

On November 28, 1973, the Commonwealth and the defendant announced themselves ready for trial on charges of larceny and conspiracy to commit larceny. Upon the defendant's motion for a trial by jury, the prosecution moved for a continuance. The district court granted the motion for a continuance over the defendant's objection. The case was scheduled for trial nine weeks later on February 19, 1974, at which time the defendant moved for dismissal on the grounds of denial of a speedy trial. The motion was granted and the case dismissed. The defendant was later indicted in the superior court on the same charges as in the first action. The defendant again moved for a dismissal because of a denial of his right to a speedy trial based on the delay in the district court, but the motion was not granted. The second action proceeded in the superior court, and the defendant was found guilty of larceny. On appeal to the Supreme Judicial Court, the defendant's position was upheld and the conviction reversed.

In its decision in Commonwealth v. Ludwig, the Court centered its attention on the provisions of section 35 of chapter 276 of the General Laws. Under that section, a judge may grant a continuance of not more than ten days if the defendant objects to the continuance. In the present action the defendant met the criteria of section 35 since he had objected to the continuance and the delay exceeded ten days. Having found that the district court judge's dismissal of the action on speedy trial grounds was justified under section 35, the Court next considered whether the dismissal for denial of a speedy trial barred any further action. In United States v. Marion, the United States Supreme Court had noted that the denial of a speedy trial seriously interfered with the defendant's liberty. In accepting the reasoning in Marion, the Supreme Judicial Court reasoned that the speedy trial guarantee should be accorded great weight by the courts. Accordingly,

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5 Id. at 857-58, 345 N.E.2d at 387.
6 Id. at 858, 345 N.E.2d at 387. The defendant also included a claim of double jeopardy. In granting the defendant's motion the trial judge did not indicate whether the motion was granted on double jeopardy or speedy trial grounds. Id. at 860, 345 N.E.2d at 388. On appeal to the Supreme Judicial Court, it was held that the judge could not have sustained the motion on double jeopardy grounds, because the trial had not begun. Id. at 859-60, 345 N.E.2d at 387. However, the Court did find that the motion for dismissal on the basis of denial of a speedy trial was properly granted. Id. at 860-61, 345 N.E.2d at 387-88.
7 For a discussion of the right to a speedy trial see United States v. Marion, 404 U.S. 307, 313-20 (1971). See also G.L. c. 276, § 35, which provides that "the court or justice may adjourn an examination or trial from time to time, not exceeding ten days at any one time against the objection of the defendant ...."
9 Id. at 858-59, 345 N.E.2d at 387.
10 Id. at 863, 345 N.E.2d at 389.
11 G.L. c. 276, § 35 is quoted at note 6 supra.
13 Id. at 320.
the Court stated that:

While the dismissal of the complaint without a trial on the merits is ordinarily not a bar to a trial for the same offense charged in the complaint dismissed . . ., we are of the opinion that the interests [incumbent in the need for a speedy trial] are best served by a rule which treats a dismissal based on the denial of that right as an absolute discharge with prejudice against the Commonwealth.13

Hence the Court was willing to carve out an exception to the rule concerning the effect of pre-trial dismissals because of the need to protect the right to a speedy trial. The holding in Commonwealth v. Ludwig also indicates a new view by the Supreme Judicial Court on the application of the speedy trial guarantee especially in terms of the factors necessary to establish a denial of the guarantee.

The right to a speedy trial under the sixth amendment to the federal Constitution has been frequently applied in the district as well as the superior courts of the Commonwealth.14 Commonwealth v. Ludwig may indicate, however, that under certain circumstances, the length of the delay which courts consider sufficient to constitute a denial of this right has been appreciably shortened. In its decision in Ludwig, the Court centered its attention on the provisions of section 35 of chapter 276 of the General Laws. Under that section, a judge may grant a continuance of not more than ten days if the defendant objects to the continuance. Ludwig's case in the district court was dismissed because of a violation of this provision. The Supreme Judicial Court found the speedy trial dismissal in Commonwealth v. Ludwig — given the nine-week delay — a permissible ruling by the trial judge. This nine-week period is substantially shorter than the type of delay, sometimes as long as three years, which is routinely excused by the Supreme Judicial Court in speedy trial claims arising out of superior court criminal appeals.15 Although in Commonwealth v. Ludwig, the Supreme Judicial Court approved the granting of a speedy trial dismissal rather than disapproved the denial of a speedy trial claim,16 deference to the trial judge does not explain the tremendous difference that Commonwealth v. Ludwig presents in terms of time span.

The key difference in the case was that the defendant's claim was bolstered by the fact that the delay was granted over his objection in violation of the ten-day limit in section 35 of chapter 276 of the General Laws.17 The Court's treatment of Ludwig's assertion showed that

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16 A speedy trial ruling by a trial judge will be upheld on appeal if the judge's findings are supported by the evidence. See Commonwealth v. Burhoe, 1975 Mass. App. Ct. Adv. Sh. 1343, 1345, 337 N.E.2d 913, 915.
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with claims under section 35, the Court is willing to relax the factors necessary for a finding of denial of a speedy trial. Speedy trial claims are analyzed in terms of four factors: the length of delay, the defendant's assertion of his right to a speedy trial, the reasons for the delay, and any resulting prejudice to the defendant. The length of the delay usually acts as a triggering mechanism for an examination of the other factors in speedy trial claims. However, unless the length of delay is long enough to be presumptively prejudicial, the court will not conduct a searching inquiry into the other factors. In the past, a much longer delay than the nine weeks present in Commonwealth v. Ludwig has been required in order for Massachusetts courts to hold a delay presumptively prejudicial. Ten days was the benchmark for presuming prejudice set out in Commonwealth v. Ludwig because the Court ruled that section 35 of chapter 276 of the General Laws expressed "a legislative judgment that continuances in excess of the statutory period of ten days do presumptively prejudice the defendant, satisfy the length of delay criterion and trigger an examination of the other speedy trial factors." Thus, the statute's existence and the fact of the defendant's objection to the continuance satisfied the first two of the speedy trial criteria. The Commonwealth v. Ludwig Court failed, however, to consider the two remaining factors: the reasons for the delay and prejudice to the defendant.

If the period of delay is long enough to trigger a speedy trial analysis, the Court normally examines all the other factors. While not every factor must be present to find denial of a speedy trial, the Court in Commonwealth v. Ludwig did not even undertake a discussion of the reasons for the delay or prejudice to the defendant. The Court was willing to presume that the necessary facts existed to support a dismissal based on the reasoning that the district court's "dismissal with prejudice implied the findings of fact necessary to support his action on speedy trial grounds ...." In making this assertion, the

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21 In Commonwealth v. Gove, 1974 Mass. Adv. Sh. 2083, 2101 n.13, 320 N.E.2d 900, 909-10 n.13, the Court stated: "We have discovered no cases in which a six months' delay caused dismissal. A nine months' period seems to mark the minimum delay for which an appellate court has failed to affirm criminal convictions."
23 See note 20 supra.
Court cited a prior case, *Commonwealth v. Thomas*, where a trial judge's ruling dismissing a case on speedy trial grounds was also upheld. *Thomas*, like *Commonwealth v. Ludwig*, involved a situation where the state insisted in the district court on a continuance in excess of ten days. Similarly, there was no discussion by the Court of actual prejudice to the defendant aside from the prejudice that is inherent in any delay. Thus, it seems that *Commonwealth v. Ludwig* will require speedy trial dismissals of cases continued in violation of section 35 of chapter 276 of the General Laws, even absent a demonstration by the defendant of actual prejudice.

Conceptually more startling than the speedy trial implications of *Commonwealth v. Ludwig*, is the Court’s decision to give final effect to a pre-trial ruling by a district court judge. In the past the Supreme Judicial Court has permitted superior court judges to relitigate points of law which were the basis for a dismissal at the district court level. For example, in *Commonwealth v. Ballou* the district court judge, prior to trial, granted the defendant’s motion to suppress and dismissed the action. The defendant was later indicted on the same charge and brought before the superior court. The defendant again moved to suppress. However, the superior court denied the motion, and the Supreme Judicial Court affirmed. By implication, the Court acquiesced in the ability of the superior court to decide a matter previously disposed of in the district court. In *Commonwealth v. Ludwig*, however, the Court held that the superior court could not consider the speedy trial dismissal which was decided in the related district court case. Initially, it would appear that the Court has reached inconsistent results in *Ballou* and *Commonwealth v. Ludwig* in its treatment of the superior court judge’s power to relitigate issues previously decided in the district court. The Court in *Commonwealth v. Ludwig* implied, however, that the considerations involved in the denial of a speedy trial were more important than the considerations involved in the suppression of illegally obtained evidence. As noted by the Court:

"The major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense... Arrest is a public act that may seriously interfere with a defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety..."

27 Id. at 431-32, 233 N.E.2d at 26-27.
29 Id. at 752, 217 N.E.2d at 188.
30 Id. at 757, 217 N.E.2d at 191.
in him, his family and his friends.\textsuperscript{32}

Because of these considerations, the Supreme Judicial Court was willing to carve out an exception to its approach in cases such as Ballou.\textsuperscript{33} The Court arrived at this exception, however, without referring to any general principles of law beyond those relevant to the speedy trial guarantee. Therefore, it is unclear whether in the future the Court will expand the exception to give final effect to other types of pre-trial rulings in a district court.\textsuperscript{34}

\textbf{§12.4. Jurisdiction and Scope of Review in Bail Determinations.} The Supreme Judicial Court in the Survey year case of Commesso v. Commonwealth\textsuperscript{1} dealt with the question of bail and how bail decisions will be reviewed under the Bail Reform Act.\textsuperscript{2} The Court clarified the scope of review and jurisdiction of bail appeals from the district court to the superior court and the role of the Supreme Judicial Court in reviewing these decisions. The actual decision in Commesso, however, implies that the Supreme Judicial Court does not intend to take an active role in insuring that a defendant's rights under the Bail Reform Act are fully protected in the lower courts.

Commesso was charged with burglary and armed assault in a dwelling and was held in lieu of $2,000 bail by the district court.\textsuperscript{3} The defendant remained in custody until the Commonwealth requested a continuance of the action. At that time, the defendant's bail was reduced to personal recognizance, and the continuance was granted. After two more continuances, a probable cause hearing was finally held, and the defendant was bound over to the Grand Jury. In addition to finding probable cause, the judge also increased the bail from personal recognizance to $15,000.\textsuperscript{4} The defendant appealed the bail increase, claiming that the action was contrary to the Bail Reform Act. Under the Act an order of personal recognizance may not be revoked after a finding of probable cause unless there exist "changed circumstances or other factors not previously known or considered . . . ."\textsuperscript{5} The defendant contended that such circumstances did not exist and therefore the increase in bail was not permissible. On appeal to the Supreme Judicial Court, the Court affirmed the bail decision of the district court judge.\textsuperscript{6}

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\item \textsuperscript{33} 1976 Mass. Adv. Sh. at 862-63, 345 N.E.2d at 388-89.
\item \textsuperscript{34} If a defendant asserts his right to a trial \textit{de novo} in Superior Court, however, then \textit{all} rulings of the District Court judge—on law as well as fact—are wiped out, just as in the case of granting a motion for a new trial. \textit{See} United States v. Dovico, 261 F. Supp. 862 (S.D.N.Y. 1966), 24 CJS Crim. Law § 1426, 1511.
\end{itemize}
The Supreme Judicial Court was called upon to review the district court judge’s action by way of a petition, filed initially before a single Justice of the Supreme Judicial Court and then reviewed by the full Court, to reduce bail after the defendant took an unsuccessful bail appeal to the superior court. As a preliminary matter, the Court reaffirmed its jurisdiction to entertain questions of bail that remain after a superior court bail petition has been decided. The Bail Reform Act does not specifically provide for review by a single Justice of the Court. The Court reasoned, however, that since a single Justice may still make bail determinations under other statutes and excessive bail would violate the state and federal constitutions, the determination of bail by a single Justice was authorized by the Bail Reform Act.

Before dealing with the facts of the appeal, the Court next explained the scope of review of bail appeals before the superior court and before the Supreme Judicial Court. When a defendant brings a bail petition before the superior court, the judge under the Bail Reform Act must consider the question of bail anew, rather than make a judgment as a matter of law of whether the district court judge’s bail decision was within the range of permissible discretion. Hence, the superior court judge is not limited in his inquiry and may conduct a complete review of the facts and exercise his own discretion without remanding the case to the district court. However, if a defendant wishes to appeal this decision to a single Justice of the Supreme Judicial Court, there are no specific guidelines in the Act as to the scope of the Justice’s review. The Court reasoned in Commesso that since bail determinations are usually conducted in haste, a single Justice should have the power to consider the matter anew. Nonetheless, the Court noted that the single Justice should ordinarily confine himself to a review of the matters of law, because the issues of fact have already been considered in two independent proceedings. If the defendant wishes a further appeal to the entire bench, the Commesso Court stated that the review of the Court would be limited to a review of errors of law.

Having set out the limits for its scope of review, the Supreme Judicial Court proceeded to examine whether the district court judge had increased the bail in keeping with the Bail Reform Act. Under the Act:

Except where the defendant has defaulted on his recognizance or

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7 Id. at 3688-89, 339 N.E.2d at 919.
8 Id. at 3691-92, 339 N.E.2d at 920-21.
9 See statutes cited id. at 3691, 339 N.E.2d at 920.
10 U.S. CONST. amend VIII; MASS. CONST. Declaration of Rights, art. 26.
12 Id. at 3693, 339 N.E.2d at 921.
13 Id. at 3694, 339 N.E.2d at 921.
14 Id.
has been surrendered by a probation officer, an order of bail or recognition shall not be revoked, revised or amended by the district court, either because the defendant has appealed or has been bound over to the superior court, provided, however, that if any court, in its discretion, finds that changed circumstances or other factors not previously known or considered, make the order of bail or recognition ineffective to reasonably assure the appearance of said defendant before the court, the court may make a further order of bail, either by increasing the amount of the recognition or requiring sufficient surety or both, which order will not revoke the order of bail or recognition previously in force and effect.\(^\text{15}\)

As noted previously, the defendant had been released on his own recognizance by the district court.\(^\text{16}\) After a probable cause hearing, the bail was increased to $15,000. Under the Act, a district court judge for appeal purposes must give a summary of the court's reasons for denying personal recognizance.\(^\text{17}\) Accordingly, the district court judge in Commesso gave his reasons for the increase by filling out a special form provided for such purposes. The judge checked the item "[n]ature of the offense charged, such as its seriousness" and added the comment, "[t]he defendant has a long serious record of criminal activity. The co-defendant failed to show at the continued hearing on probable cause."\(^\text{18}\)

Based upon these facts, the Supreme Judicial Court could find no specific reason mentioned on the form which met the criteria of the Bail Reform Act.\(^\text{19}\) The Court pointed out that the factors of the defendant's previous record and the nature of the offense should have been known and considered when bail was first set.\(^\text{20}\) Hence, these elements were not "factors not previously known or considered."\(^\text{21}\) The only other factor mentioned by the district court judge — the co-defendant's flight in the middle of the probable cause hearing — was not discussed by the Supreme Judicial Court, and rightly so. The risk of a co-defendant's nonappearance should not be a legitimate factor in considering the bail necessary to insure that the defendant will not flee.

The Court was left with a situation where no specific reason appeared on the face of the record to warrant the district court judge's changing the defendant's bail status. Moreover, none of the reasons given by the district court judge to justify what he had done were valid under the statute.\(^\text{22}\) Nonetheless, the Court, given its role of

15 G.L. c. 276, § 58 (emphasis added).
16 See text at notes 3-4 supra.
17 G.L. c. 276, § 58.
19 Id. at 3696-97, 339 N.E.2d at 922.
20 Id. at 3696, 339 N.E.2d at 922.
21 G.L. c. 276, § 58.
22 See notes 20-21 supra and accompanying text.
stepping in only where errors of law exist, refused to overturn the increase in bail. Relief was denied because the Court speculated that "it may have been shown that the circumstances of the offense charged looked quite different after the probable cause hearing . . . ."23 The Court, therefore, was willing to find the necessary factors by implication and not by direct evidence.

While it is conceivable that the circumstances surrounding the offense which first came to light at the probable cause hearing were of sufficient gravity to constitute justification under the statute for increasing bail, it is also possible that the district court judge raised the bail for an impermissible reason — such as the mere finding of probable cause. Hence, the implication drawn by the Court is subject to question as a reliable supposition. The only way to tell why bail was raised is to ask the district court judge or to look at the statement of reasons he filled out at the time. Where the reasons given do not justify the action taken, one accepted method of insuring an orderly appellate process is to remand to the district court an order to supplement the statement of reasons.24 But to uphold a decision where the lower court judge's own reasons do not support his actions, and where appropriate reasons are not otherwise obvious, abdicates the function of appellate review. It substitutes speculation for examination.

The ultimate effect of Commesso is to de-emphasize, if not eliminate, the need for a statement by the district court judge to justify an increase in bail. This stands in marked contrast to the procedure in the federal courts. Initially, the scope of review in federal circuit courts of bail determinations made in district courts is similar to the one announced by the Supreme Judicial Court, since bail orders in federal district courts "shall be affirmed if . . . supported by the proceedings below."25 Yet federal appellate courts consistently require as a condition of review, a statement of reasons from the district court judge who set bail in accordance with Rule 9(a) of the Federal Rules of Appellate Procedure. As one court has stated, "judicial review is effectively thwarted if the appellate court cannot determine the factors relied upon by the district court in reaching its decision."26 Contrary to this approach, the Supreme Judicial Court is not only willing to exercise its function of judicial review without a statement of reasons from the district court judge, but also is willing to speculate that valid reasons existed, even where they do not appear on the record.

§12.5. Burden of Proof in Insanity Defenses. The Massachusetts courts have long recognized an insanity defense in criminal cases.1 In terms of procedure in the Massachusetts courts, once evidence of in-


§12.5. 1 J. NOLAN, MASSACHUSETTS PRACTICE, CRIMINAL LAW § 644, at 455 (1976).
sanity has been introduced at trial, the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time the crime was committed. To sustain this burden the prosecution may rely exclusively on the presumption of sanity: "[T]he law presumes that every one charged with a crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime." For example, in Commonwealth v. Smith, the defendant provided two psychiatrists at trial who testified that the defendant was insane at the time the crime was committed. Even though the prosecution presented no direct evidence to rebut this testimony, the defendant was found guilty. On appeal the Supreme Judicial Court affirmed the holding of the trial court, reasoning that the prosecution sustained its burden of proving sanity beyond a reasonable doubt by merely relying on the presumption of sanity. During the previous Survey year, the Supreme Judicial Court in Commonwealth v. Mutina7 raised a question as to the continued validity of allowing the prosecution to rely exclusively on the presumption of sanity. While not answering the question, the Court did note that if the presumption of sanity "can be sufficient in and of itself to carry the prosecution’s burden of proving sanity beyond a reasonable doubt where the defendant introduces overwhelming evidence of lack of criminal responsibility," there is a "danger of shifting the burden to the defendant." Such a result would be contrary to the United States Supreme Court’s decision In re Winship, in which the Court explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The question posed in Mutina was answered during the Survey year in Commonwealth v. Kostka, where the Supreme Judicial Court found that the presumption of sanity does not violate the due process clause.

Kostka was tried and convicted of first degree murder, armed robbery, and assault with a dangerous weapon in the robbery of a variety store. In relying upon a defense of insanity, the defendant presented evidence that he had an eight year history of hospitalization

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5 Id. at 176-77, 258 N.E.2d at 19.
6 Id. at 176-81, 258 N.E.2d at 18-21.
10 Id. at 364.
12 Id. at 1639, 350 N.E.2d at 458.
13 Id. at 1608, 350 N.E.2d at 446.
for psychiatric problems. The defendant also placed two expert witnesses on the stand to testify as to his insanity. While one expert did state that the defendant was not criminally responsible at the time of the crime, the other expert had no opinion as to Kostka's sanity when the robbery occurred. In rebuttal, the prosecution presented a witness who identified the defendant as being in the store the night before the crime. The prosecution argued that by inference this evidence showed that the defendant had planned the robbery and, hence, possessed the necessary criminal intent for conviction. The defendant was found guilty.

On appeal to the Supreme Judicial Court, the defendant claimed that the trial judge erred in denying his motion for a directed verdict of not guilty by reason of insanity, because the Commonwealth failed as a matter of law to prove him sane beyond a reasonable doubt. In relying on Mutina, the defendant argued that:

[T]he Commonwealth may not constitutionally satisfy [the burden of proving sanity beyond a reasonable doubt] by reliance—in whole or in part—on the so called “presumption of sanity,” in a case where there has been uncontradicted expert testimony that the defendant was insane at the time the crimes were committed.

In rejecting this argument, the Court first provided an analysis of the general purpose and nature of the presumption of sanity. The presumption of sanity in Massachusetts serves two different procedural functions. The first function allocates the burden of going forward with evidence on the question of insanity. If the issue of sanity is not raised at trial, then the prosecution may rely on the presumption and need not present any evidence on the matter. Therefore, the defendant has an initial burden of going forward by raising the issue of insanity. Once the burden of going forward is

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14 Id. at 1612-14, 350 N.E.2d at 448.
15 Id. at 1614-15, 350 N.E.2d at 448. It is important to note that unlike Commonwealth v. Smith, 357 Mass. 168, 258 N.E.2d 13 (1970), the evidence of the defendant's insanity in Kostka was not overly convincing and the prosecution did attempt to refute the testimony of the defendant's expert witnesses. Therefore, Kostka is not a case where the prosecution relied exclusively on the presumption of sanity.
17 Id. at 1620, 350 N.E.2d at 451.
18 See notes 7-10 supra and accompanying text.
20 Id. at 1623-27, 350 N.E.2d at 452-54.
21 Id. at 1628-29, 350 N.E.2d at 454.
22 Id. at 1623, 1628, 350 N.E.2d at 452, 454.
23 The burden of going forward does not have to be satisfied exclusively by evidence produced by the defendant. The only requirement that the Kostka Court imposed is that the question must be “raised.” Id. at 1628, 350 N.E.2d at 454. Hence, in the course of the prosecution's evidence facts may be produced which raise the question of insanity and in effect satisfy the defendant's burden. See id. at 1623 n.7, 350 N.E.2d at 452 n.7.
24 In placing the burden of going forward on the defendant, Massachusetts is in accord with every other state. Id. at 1623, 350 N.E.2d at 452. See H. Weihofen, Mental Disorder as a Criminal Defense 214-15 (1954).
met, the second function of the presumption of sanity comes into play. Specifically, the presumption at that point allows the prosecution to meet its burden of proving beyond a reasonable doubt that the defendant was sane.\(^{24}\) As the Court in \textit{Kostka} made clear, however, the presumption of sanity at this point does not resemble a true presumption.\(^{25}\) Hence, the jury is not to weigh the presumption itself as evidence, but must instead consider its underlying basis: the fact that the great majority of people are sane, and the resulting probability that any one person is also sane.\(^{26}\)

Having defined the scope of the presumption, the Supreme Judicial Court next determined the applicable standard for measuring whether the presumption of sanity meets due process standards. The Court turned for guidance to the United States Supreme Court case of \textit{Leland v. Oregon},\(^{27}\) in which an Oregon practice of requiring the defendant to prove his insanity beyond a reasonable doubt was upheld as not violating due process.\(^{28}\) The Supreme Judicial Court viewed \textit{Leland} as enunciating a due process standard of review based on a determination of whether the "policy with respect to the burden of proof on the issue of sanity ... violates generally accepted concepts of basic standards of justice."\(^{29}\) The Court then examined the reasons for the presumption of sanity in Massachusetts to determine if they met the \textit{Leland} standard. In this context, the \textit{Kostka} Court noted that a jury could be justified in rejecting uncontradicted evidence as to the defendant's insanity, since this testimony might not be worthy of belief.\(^{30}\) Second, "the facts underlying the presumption are within the jury's common sense and knowledge and ... it would be inappropriate and artificial to forbid jurors to rely, at least in part, on their common experience."\(^{31}\) Finally, the Court noted that since the prosecution must still prove sanity beyond a reasonable doubt, there is a safeguard against erroneous convictions.\(^{32}\) When viewed as a whole, the Court found that the Massachusetts practice was based on fundamentally sound reasons and that it met the \textit{Leland} standard of "generally accepted concepts of basic standards of justice."\(^{33}\)
The Court's analysis, however, did not closely examine the shortcomings of the presumption of sanity. These shortcomings are best viewed in terms of the two functions it performs within the context of the burden of persuasion: (1) as an instruction to the jury; and (2) as an element to be weighed in deciding a motion for a directed verdict of not guilty by reason of insanity either by the trial judge or on appeal. As an instruction to the jury, the presumption of sanity is merely a statement of the obvious. If juries were not told that they could view the evidence on the defendant's sanity against the background of their common experience that most men are sane, would they decide the issue any differently? Instructions such as the presumption of sanity are not thought necessary in any other area where juries also have common sense knowledge of what exists among the population in general. For example, courts feel no need to tell a jury in a murder case where self-defense is at issue: "In considering all the evidence, you may bear in mind the fact that most men do not commit a murder in self-defense, and the probability that any one man would not commit a murder in self-defense." Placed in this context, the concept of carefully instructing the jury as to the presumption of sanity is of dubious value. It makes no sense to talk about a generality that is sound for society as a whole when the jury has to make a decision about someone with respect to whom it possesses a great deal of specific information on the issue.

Furthermore, the possibility must be considered that the real effect of including this concept in jury instructions is to convey to them the impression that insanity is a suspect defense, regardless of how often the reasonable doubt standard is repeated. In no other instance where a jury must decide an issue beyond a reasonable doubt does the judge tell them they should consider the generality that most people would not be in the same position in which the defendant claims to be. The fact that the proposed self-defense instruction sounds as odd as it does demonstrates this assertion.

The Court in Kostka justified instructing the jury on the generality concept embodied in the presumption of sanity by reasoning that since the notion is a common sense one, it would be artificial to forbid the jury to rely upon it. However, failing to mention explicitly the concept to the jury does not mean that they are precluded from considering it. No jury would leave its common sense behind merely because a judge did not remind them to use it. Thus, the generality about the odds against anyone person's being insane is not only misleading and an invitation to apply a standard less rigorous than proof beyond a reasonable doubt; it is also unnecessary. It should not be mentioned to the jury at all.

In addition to the instruction on the presumption of sanity being of questionable merit when given to the jury, the role of the presumption in a motion for a directed verdict or an appeal based on insufficient evidence of sanity is equally suspect. Kostka makes clear that in any criminal trial where the defendant's sanity is an issue, the pros-
execution in meeting its burden of proof will be able to rely upon a generalization whose application to the particular defendant may not bear a statistically valid relationship. Of course in many cases, there will be some evidence in addition to the presumption—the nature of the crime, for instance—which may decrease the importance of the presumption. The Court made it clear in Kostka, however, that it is the presumption that carries the case to the jury and justifies upholding a guilty verdict even when there exists uncontroverted, strong evidence to the contrary.34 As a result, an appellate court, rather than determining whether there was sufficient evidence presented by the Commonwealth to show the defendant was sane beyond a reasonable doubt, will rely on the automatic operation of the presumption of sanity. This mode of reviewing a conviction in an insanity case, in effect, abdicates a court's obligation to evaluate the evidence to insure that the trial presented sufficient information to the jury to authorize it to return a guilty verdict consistent with due process. A guilty verdict is not ordinarily permitted to stand if the evidence at the trial is not sufficient. It must at least meet the test that a reasonable person could—reviewing the testimony in a light most favorable to the prosecution—find proof beyond a reasonable doubt on every essential point. Using a legal device like a presumption removes some part of the prosecution's case from this type of scrutiny of the sufficiency of the evidence. Since the beyond a reasonable doubt standard is designed to insure that no one is convicted without due process, using a presumption in a criminal case may be unconstitutional to the extent that it dilutes that standard. As one commentator has put it:

Purporting to give weight to the presumption or inference of sanity is merely an obfuscating way of increasing the burden placed upon the defendant. In effect, it means that evidence which merely raises a reasonable doubt if sanity may not be sufficient to shift the burden to the prosecution (because it may be "outweighed" by the presumption).35

Thus, the presumption of sanity does not preserve a reasonable doubt standard since the prosecution's burden actually rests somewhere short of beyond a reasonable doubt, and the defendant must overcome more than just the burden of going forward.

The Kostka Court, however, reached an opposite result because it rejected the application of a recent line of United States Supreme Court cases.36 These cases have dealt with traditional statutory presumptions—such as presuming knowledge of illegal importation

34 See, e.g., Commonwealth v. Cox, 327 Mass. 609 (1951). There, the Court conceded the validity of the defendant's claim of insanity, yet found no reversible error in the prosecution's use of the presumption of sanity.


from unlicensed possession of a narcotic—and common law inferences—such as an inference from the defendant's possession of recently stolen goods that the defendant knew of their illegal origin. What is clear from these opinions is that the key factor in testing these devices against the demands of due process is the strength of the connection between the fact that the prosecution must prove by evidence (the predicate fact) and the fact that is supplied by the operation of the presumption or inference (the operative fact). The Supreme Court has not definitively answered this question. The Court has merely indicated that if, on the one hand, the relationship is so strong that it exists in every case beyond a reasonable doubt, then the device meets the requirements of the Constitution, but if, on the other hand, in any one case the relationship's existence is less likely than not, using it to help the prosecution is a violation of due process.

If the framework developed in the United States Supreme Court cases had been used in Kostka, there would have been a serious doubt about the constitutionality of the manner in which the Commonwealth used the presumption of sanity. In Massachusetts, the prosecution has an easier time in making use of the device than in the traditional framework, since it has no predicate fact that must be established by evidence. The "presumption" of sanity exists in every case. The prosecution is relieved of offering any evidence on the question whatsoever, yet no matter what testimony may be offered to show that the defendant was insane, the Commonwealth is deemed to have done enough to prove beyond a reasonable doubt that the defendant is sane. The Massachusetts presumption of sanity allows the prosecution to meet its burden not only when no evidence is offered to show that the defendant is insane, but also operates in the face of overwhelming, uncontradicted evidence to the contrary. The strength of the relationship supplied by the presumption is surely far less strong in this latter situation than in the former. Yet the Supreme Judicial Court allows this particular legal device to supply the operative fact of the defendant's sanity in both instances.

The Court in Kostka reasoned that the principles enunciated in the recent United States Supreme Court cases were inapplicable to the case at hand, because insanity was not an element of the offense of murder, but rather a fact necessary for conviction after the issue is properly raised. This distinction between an "element" and a "fact" is just another way of saying who has the burden of going forward. The prosecution has the burden of going forward with evidence on each element. Although the defendant has the burden of going for-

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39 Id. at 842.
40 Id. at 843.
ward on any non-element "fact", the prosecution still has the burden of persuasion on the "fact" once raised.

Using the distinction between elements and facts as a method for applying due process standards is particularly suspect in light of the recent United States Supreme Court case of Mullaney v. Wilbur. Mullaney involved the Maine doctrine of "implied malice" in its homicide statute. Maine law required the prosecution to prove beyond a reasonable doubt an unlawful, intentional homicide. Thereafter, the defendant is required to show lack of malice (by evidence that he acted in the heat of passion, for example) by a preponderance of the evidence in order to reduce the penalty from that of murder to manslaughter. Under Maine law, malice was not an element of a distinct crime of murder, but merely a factor that brought to bear a less severe punishment category. The United States Supreme Court accepted Maine's classification of malice as something other than an element of the crime, but nonetheless held that the Constitution required the prosecution to bear the burden on this question beyond a reasonable doubt. The basis for this holding was that the principles of burden of proof stated in In re Winship were concerned with the substance of the burden and not formal differences between elements and facts.

When viewed in the light of Mullaney, it would appear that the Court in Kostka placed too much emphasis on the form of the evidence problems involved in the presumption of sanity, while neglecting the underlying substance. On the one hand, the Court reiterated that it is a basic law of the Commonwealth that once the issue of sanity is raised the prosecution must prove insanity beyond a reasonable doubt. Yet, because the issue of sanity is a "fact" and not an "element" the prosecution does not need to present any evidence of sanity. This questionable reasoning permitted the Court to disregard the recent United States Supreme Court cases and to dilute the "beyond a reasonable doubt" standard.

45 421 U.S. at 704.
46 Id. at 699. The Kostka Court did note that "all of the elements necessary to prove commission of the offense charged are 'facts' within the meaning of Winship ... . But the term 'fact' is more inclusive than the term 'element.' Winship is not 'limited to a State's definition of the elements of a crime.'" 1976 Mass. Adv. Sh. at 1631 n.16, 350 N.E.2d 455 n.16, citing Mullaney, 421 U.S. at 699 n.24.
48 Id.
49 Leland has been criticized by two commentators as poorly reasoned. See Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 202-03 (1969). Even if it stands as good precedent, Leland is not a guideline for how to apply the reasonable doubt standard. The case sets out what may
While the Court's opinion in *Kostka* indicated that its view of due process would permit continued use of the presumption of sanity, there was an indication that some Justices at least were unhappy with the practice. In the final section of its opinion, the Court considered the issue of whether the verdict in the case was against the weight of the evidence. Under section 33E of chapter 278 of the General Laws, a person convicted of first or second degree murder may appeal to the Supreme Judicial Court. Under this section the Court will consider both matters of law and evidence. If it is found that the "verdict was against the law on the weight of the evidence," the verdict may be set aside or the case remanded for a new trial. In reviewing the testimony in *Kostka*, the Court noted that the evidence that the defendant had visited the variety store the night before the robbery tended to prove that he had planned the crime and, therefore, a conclusion that the defendant acted with *mens rea* was permissible. In addition, the Court viewed the inability of one of the defendant's expert witnesses to testify that he was insane at the time of the crime as severely weakening the defendant's case. As a result, the failure of the prosecution to produce medical testimony to refute the defendant's experts was not fatal, and the verdict was not against the weight of the evidence under section 33E.

In his dissent, Chief Justice Hennessey argued that section 33E should have been applied because of the substantial evidence of the defendant's insanity. The Chief Justice was also willing to infer that the prosecution's failure to present rebutting expert testimony meant that no expert could be found who would support the Commonwealth's position or that no such expert had been sought. Significantly, Chief Justice Hennessey then gave the following warning:

Although the presumption plays a role in a case such as this, I suggest that the Commonwealth runs the very real risk of reversal and the granting of a new trial if it chooses to rely on the pre-
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sumption and the circumstantial evidence of sanity such as that adduced at this trial, rather than to introduce medical evidence of sanity.\(^{58}\)

It would appear that while at law the prosecution may rely exclusively on the presumption of sanity and not violate the due process clause, the weight of the defendant's evidence may still require the Commonwealth to present rebutting medical evidence to avoid a reversal or remand of the case under section 33E.

§12.6. Burden of Proof: Self-Defense: \textit{Miranda} Warnings: Sus­pect Identification. During the Survey year, the Supreme Judicial Court dealt with several areas of criminal procedure: self-defense,\(^1\) proper \textit{Miranda} warnings,\(^2\) and the constitutionality of identification procedures.\(^3\) These issues have a profound effect on the way trials are conducted and convictions reviewed on appeal.

I. SELF-DEFENSE

In \textit{Commonwealth v. Rodriguez},\(^4\) the Supreme Judicial Court dealt with the question of whether the prosecution should bear the burden of proof when the issue of self-defense is raised at trial. The defendant, Rodriguez, claimed that he had acted in self-defense when he killed the victim during a fight. After a conviction for manslaughter, the defendant appealed on the issue of the trial judge's refusal to instruct the jury that the Commonwealth bore the burden of showing beyond a reasonable doubt that the defendant did not act in self-defense.\(^5\) Once a defendant presents sufficient evidence on the question of self-defense, he is entitled to have the jury instructed on that issue.\(^6\) The trial judge in \textit{Rodriquez} did instruct the jury on self-defense, but declined to tell them that the Commonwealth had the burden of showing beyond a reasonable doubt that the defendant did not act to protect himself.\(^7\)

The Supreme Judicial Court first noted that the issue of which party bore the burden of proof in self-defense claims presented a case of first impression.\(^8\) For guidance the Court turned to the United

\(^{58}\) Id.


\(^5\) \textit{Id.} at 1864-65, 352 N.E.2d at 204.


\(^7\) 1976 Mass. Adv. Sh. at 1864-65, 352 N.E.2d at 204.

\(^8\) \textit{Id.} at 1868, 352 N.E.2d at 205.
States Supreme Court cases of In re Winship\(^9\) and Mullaney v. Wilbur.\(^{10}\) Winship held that the “Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”\(^{11}\) In terms of what constitutes a “fact” under Winship, the Supreme Judicial Court noted that under Mullaney “all of the elements necessary to prove commission of the offense charged are ‘facts’ within the meaning of Winship.”\(^{12}\) Hence, irrespective of whether self-defense is classified as an element or a fact in a particular case, Winship requires that “the Commonwealth must show the absence of self-defense (lawfulness) beyond a reasonable doubt.”\(^{13}\) Since the trial judge had failed to instruct the jury upon the request of the defendant that the prosecution bore the burden of proof on the self-defense issue, the Supreme Judicial Court set the verdict aside and remanded for a new trial.\(^{14}\) The Court concluded that:

Because we have determined that the Commonwealth must bear the burden on the self-defense issue, we think it required that, when a timely request is made in any trial or retrial after the date of this decision, an instruction to that effect be given, provided that sufficient evidence has been presented to raise the issue.\(^{15}\)

II. **MIRANDA WARNING**

In two cases decided during the Survey year, both the Supreme Judicial Court and the Appeals Court dealt with the question of the burden that the Commonwealth must bear on the issue of whether a defendant’s waiver of his right to an attorney under Miranda\(^{16}\) was valid. In Commonwealth v. Hosey,\(^{17}\) the Supreme Judicial Court was faced with a defendant’s claim that there had been no valid Miranda warning. At trial, the Commonwealth in attempting to prove statutory rape introduced a statement the defendant had made to police officers after he had been arrested in the early morning hours for drunkenness.\(^{18}\) At a voir dire on the issue of waiver of the defendant’s Miranda rights, the police stated that the defendant appeared extremely emotional and was not making much sense.\(^{19}\) The trial judge
made no findings of fact, but concluded that there had been an intelligent waiver.\textsuperscript{20} After a conviction for statutory rape, the defendant appealed.\textsuperscript{21}

The Supreme Judicial Court reversed, holding that as a matter of law the trial judge was not warranted in reaching his conclusion that there was a valid waiver.\textsuperscript{22} The Court did not, however, take the step of remanding the case to the trial judge so that he could make findings of fact concerning the waiver. Instead, the Court concluded that it had enough evidence to make the determination that even in a light most favorable to the Commonwealth there was not sufficient support for a conclusion that there had been a valid waiver.\textsuperscript{23}

Despite the conclusion of the Court concerning the waiver of \textit{Miranda} rights, \textit{Hosey} does not establish any firm precedent beyond its facts. The Court did note that the Commonwealth had a "heavy burden" of demonstrating a valid waiver.\textsuperscript{24} The Court refused, however, to state whether this burden could be satisfied by a preponderance of the evidence as contended by the Commonwealth or by "a more exacting standard" as claimed by the defendant.\textsuperscript{25} Instead, the Court noted that under either standard the Commonwealth had failed to sustain its burden.\textsuperscript{26} As a result, \textit{Hosey} does not provide any general standard for examining whether the state has adequately shown that the defendant "voluntarily, knowingly and intelligently"\textsuperscript{27} waived his right to counsel.

In a related \textit{Survey} year case decided after \textit{Hosey}, the Appeals Court dealt with the propriety of remanding a case for a second hearing to determine if there was a valid waiver of \textit{Miranda} rights. The defendant in \textit{Commonwealth v. Howard}\textsuperscript{28} was convicted of several charges after the admission of a statement he had made to the police.\textsuperscript{29} The trial judge in \textit{Howard} held a pretrial hearing on the defendant's motion to suppress evidence allegedly obtained after an invalid waiver of \textit{Miranda} rights.\textsuperscript{30} On the basis of very sparse testimony by the arresting officer as to the defendant's waiver, the court denied the motion. The judge did make findings of fact which simply incorporated the substance of the arresting officer's testimony.\textsuperscript{31} On appeal, the Appeals Court ordered a second evidentiary hearing on the defendant's motion to suppress, because of the lack of adequate testimony.\textsuperscript{32} At

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at 2735-36, 334 N.E.2d at 46.
\item \textsuperscript{21} \textit{Id.} at 2732, 334 N.E.2d at 45.
\item \textsuperscript{22} \textit{Id.} at 2744, 334 N.E.2d at 49.
\item \textsuperscript{23} \textit{Id.} at 2736-37 n.1, 334 N.E.2d at 46-47 n.1.
\item \textsuperscript{24} \textit{Id.} at 2739-40, 334 N.E.2d at 48.
\item \textsuperscript{25} \textit{Id.} at 2740 n.2, 334 N.E.2d at 48 n.2.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Miranda}, 384 U.S. 436, 444 (1966).
\item \textsuperscript{29} \textit{Id.} at 868, 350 N.E.2d at 723.
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.} at 869, 350 N.E.2d at 723.
\item \textsuperscript{32} \textit{Id.} at 869-70, 350 N.E.2d at 723.
\end{itemize}
the second evidentiary hearing, ample testimony was elicited by the
prosecution to support a finding that there had been a valid waiver of
the defendant’s *Miranda* rights, which finding the Appeals Court af-

tirmed.\textsuperscript{33}

The issue on the second appeal was whether it was proper to allow
the prosecution to again attempt to meet its burden of proof of show-
ing a valid waiver after the trial had been concluded. The defendant
contended that *Hosey* foreclosed this opportunity in cases where the
trial judge makes initial findings of fact. The Supreme Judicial Court
in *Hosey* had stated that a waiver determination should be remanded if
there were no express findings of fact or a change in the law.\textsuperscript{34} The
defendant argued that since the lower court had made findings of
fact, it did not meet the exceptions stated in *Hosey*.\textsuperscript{35} The Appeals
Court rejected the argument, reasoning that *Hosey* was not intended to
establish binding criteria for remands.\textsuperscript{36} The Appeals Court did rec-
ognize that restrictions against remands of evidentiary hearings had
value both in terms of judicial economy and in terms of avoiding the
hardships to a defendant which may arise from a piecemeal prosecu-
tion.\textsuperscript{37} However, the court affirmed the conviction holding that there
are appropriate cases for allowing the prosecution to satisfy its burden
of proof even in a post-trial hearing. The court viewed the case as
presenting an exception to the rule against remanding evidentiary
hearings, since it was clear at the first hearing that the prosecuting at-
torney had additional evidence which if introduced could have met
the burden, the additional evidence was not purposely withheld, and
the defendant during the first hearing failed to make a valid objection
to the testimony concerning his waiver.\textsuperscript{38}

### III. IDENTIFICATION

In *Commonwealth v. Botelho*,\textsuperscript{39} the Supreme Judicial Court dealt with
the question of the burden of proof in determining the validity of a
witness’s identification of the accused. Botelho was charged with mur-
der, and the primary evidence against him was testimony by an
eyewitness to the crime. The crime took place in a cocktail lounge,
and the witness had approximately one minute to observe the incident
from a distance of twenty-five to thirty feet under subdued lighting
conditions.\textsuperscript{40} Shortly after the crime, the witness viewed an array of
photographs including one of the defendant, but could not identify

\textsuperscript{33} Id. at 870-71, 350 N.E.2d at 724.  
\textsuperscript{36} Id.  
\textsuperscript{37} Id. at 873, 350 N.E.2d at 725.  
\textsuperscript{38} Id. at 874, 350 N.E.2d at 725.  
\textsuperscript{40} Id. at 653-54, 343 N.E.2d at 878.
him. Subsequently, the witness was taken to the parking lot of a district court where she was given an opportunity to view the defendant as he left the court between two court officers both dissimilar in appearance to him. At that time the witness again could not identify the defendant as the killer. Several days later, however, the witness saw the defendant inside the same cocktail lounge and at that point made a positive identification.

At a hearing prior to trial, the defendant moved to suppress the identification on the basis that since the parking lot confrontation was suggestive and impermissible, the subsequent identification in the cocktail lounge was invalid and tainted by the earlier confrontation. The prosecution admitted that the parking lot confrontation was suggestive, but attempted to show that the identification at the bar was independent and, hence, not tainted. The judge found that the identification was directly related to the suggestive confrontation and granted the motion to suppress. On an interlocutory appeal to the Supreme Judicial Court, the finding was affirmed.

The procedure for determining whether an identification can be admitted at trial in accordance with due process is set out in the Wade-Gilbert-Stovall trilogy. Under these three cases a defendant has the right to challenge an identification which resulted from a confrontation which was suggestive and impermissible. If the defendant is able to carry his burden on this issue, the prosecution is barred from placing into evidence facts concerning the confrontation or any information that was derived from it. If the prosecution wishes to present other identification as evidence it must give "clear and convincing" proof that the identification was obtained independently of the suppressed evidence. A court's inquiry is thus set up in two stages. The defendant must first show that the pretrial identification was suggestive. The prosecution must then show clear and convincing evidence that the totality of circumstances surrounding the witness and his opportunity to observe, remember, and accurately identify the defendant had not been tainted by the suggestive incident.

41 Id. at 654, 343 N.E.2d at 878.
42 Id. at 655-56, 343 N.E.2d at 878-79.
43 Id. at 656-57, 343 N.E.2d at 879.
46 Id. at 657-58, 343 N.E.2d at 879.
47 Id.
48 See G.L. c. 278, § 28E.
51 Wade, 388 U.S. at 239-41.
52 The Court in Botelho viewed the burden as "apparently by a preponderance" of the evidence. 1976 Mass. Adv. Sh. at 661, 343 N.E.2d at 881 (emphasis added).
53 Wade, 388 U.S. at 241.
54 Id. at 240.
The significant element in *Botelho* is not the result that the Court reached in affirming the trial judge's action. Rather, it is a suggestion contained at the end of the opinion that the Court would be willing to entertain a request by the Commonwealth in the future that the *Wade-Gilbert-Stovall* line of analysis be dropped. While the prosecution in *Botelho* did not suggest that the Court should deviate from the *Wade-Gilbert-Stovall* cases, the Court raised the possibility that the two-stage analysis of the admissibility of identification testimony developed in the cases might no longer be appropriate. The Court found a possible alternative to the two-stage analysis of the trilogy cases suggested in *Neil v. Biggers*, a United States Supreme Court case decided after the three principal cases.

In *Biggers*, the Supreme Court analyzed the effect of a suggestive pretrial identification. The discussion in the case was not directed to a two-stage analysis with the defendant bearing the burden in the first stage and the prosecution bearing the burden in the second. Rather, it looked at the totality of the circumstances to determine whether the identification was reliable even though the confrontation procedure was suggestive. Under this type of approach, suggestiveness and reliability apparently would be interwoven and the defendant's burden would persist throughout.

*Biggers* was a case involving an identification procedure which took place prior to the *Stovall* opinion. The Supreme Judicial Court admitted that there is serious doubt about whether the approach which was followed in *Biggers* was intended to apply at all to post-*Stovall* confrontations. However, the fact that the Court chose to end its opinion in *Botelho* with a spontaneous discussion of a radical departure from the settled law indicates that the approach outlined in *Biggers* may be adopted in this Commonwealth at some point in the future.

56 Id. at 666, 343 N.E.2d at 882-83.
57 409 U.S. 188 (1972).
58 Id. at 199.