CHAPTER 34

FEBRUARY, 2012

Trial Motions

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§ 34.1 WAIVER OF JURY TRIAL

§ 34.1A. SUPERIOR COURT

The defendant has a right to a trial by jury, guaranteed by the federal and state constitutions and by state statutes.[1] The defendant may ordinarily waive this right in writing prior to empanelment, provided all other codefendants do as well or the court

[1] U.S. Const. amend. 6; Mass. Const. Declaration of Rights art. 12. *See also* Duncan v. Louisiana, 391 U.S. 145 (1968) (federal right applies to states in all charges punishable by more than six months incarceration); G.L. c. 278, § 2 (right to jury in superior court); G.L. c. 218, § 26A (district court right); G.L. c. 119, § 55A (juvenile right to jury).

chooses to sever the cases.[2] A jury waiver, however, may be rejected in the court's discretion[3] and is not allowed in capital cases.[4]

Like the waiver of any constitutional right, waiver of the right to a jury trial must be voluntary and intelligent.[5] A bench-trial conviction may not stand absent such a fully valid waiver.[6] However, unlike a guilty plea, a jury-trial waiver is followed by another form of fact finding, a bench trial. For that reason, a court is permitted greater flexibility in conducting a jury-waiver colloquy than a guilty-plea colloquy.[7]

Although there is no constitutionally required formula for waiving the right to a jury trial, the Supreme Judicial Court in *Ciummei v. Commonwealth*[8] held that in addition to requiring a waiver in writing, the court must conduct a colloquy to ensure that the waiver is voluntarily and knowingly made. *Ciummei* establishes a "bright line" rule: even if the defendant signed a written waiver, and independent evidence proves that his waiver was voluntary and intelligent, the court's failure to conduct a colloquy leads to automatic reversal.[9] The same "bright line" rule requires reversal in the

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[2] Mass. R. Crim. P. 19(a); G.L. c. 263, § 6. The statute limits "codefendants" to those joined for related offenses, but the trial court's judgment as to whether the offenses are related is conclusive unless erroneous as a matter of law. Commonwealth v. Boris, 317 Mass. 309, 311-12 (1944). A judge's unintentional violation of the rule and statute will not result in reversal unless defendant can show a substantial risk of miscarriage of justice. Commonwealth v. Collado, 426 Mass. 675, 678 (1998) (judge erroneously allowed waiver after empanelment, and conducted bench trial of jury-waiving defendant simultaneously with jury trial of codefendant, but no substantial risk of miscarriage of justice). *See generally supra* § 22.8.

[3] Mass. R. Crim. P. 19(a) allows the court to refuse a waiver "for good and sufficient reason . . . given in open court and on the record." *See also* G.L. c. 263, § 6, requiring court consent to waiver; Commonwealth v. Collins, 11 Mass. App. Ct. 126, 141 (1981) (judge could deny waiver on grounds that he was aware of inadmissible or prejudicial evidence); Singer v. United States, 380 U.S. 24 (1965) (waiver is not constitutional right); Commonwealth v. Francis, 450 Mass. 132, 134 (2007) (neither State nor Federal Constitution provides right to waive jury trial). However, unless there is more than one defendant, a jury waiver filed in district court or in the Boston municipal court prior to the transfer of the case to the jury session must be permitted. G.L. c. 263, § 6. *See* § 34.1B, *infra*.

[4] G.L. c. 263, § 6. *See also* Commonwealth v. Greene, 400 Mass. 144 (1987).

[5] Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938). *See also* Commonwealth v. Brito, 390 Mass. 112, 117-18 (1983); Commonwealth v. Connor, 14 Mass. App. Ct. 488, 491 (1982); Commonwealth v. Duquette, 386 Mass. 834, 843-44 (1982); Gallo v. Commonwealth, 343 Mass. 397, 399–401 (1961); Commonwealth v. Dussault, 71 Mass. App. Ct. 542, 547 (2008).

[6] Ciummei v. Commonwealth, 378 Mass. 504, 507 (1979). *See, e.g.*, Commonwealth v. Nydam, 21 Mass. App. Ct. 66, 68-69 (1985) (reversed for invalid jury waiver and guilty plea); Commonwealth v. Abreu, 391 Mass. 777, 779-80 (1984) (reversal because conclusory colloquy did not demonstrate defendant's state of mind and violated *Ciummei)*; Commonwealth v. Dussault, 71 Mass. App. Ct. 542, 547-48 (vacating third-offense part of OUI conviction because there was neither a written jury waiver nor a colloquy to assure purported waiver was voluntary, knowing, and intelligent).

[7] Commonwealth v. Hardy, 427 Mass. 379, 383 (1998).

[8] 378 Mass. 504, 507-09 (1979).

[9] Commonwealth v. Pavao, 423 Mass. 798, 801–02 (1996) (where defendant signed written jury waiver form, consulted with experienced counsel who stated on the record that he fully explained the nature and consequences of waiver to defendant, who had prior criminal record and had waived jury trial before, conviction reversed; *Ciummei* "requires that the critical evidence for determining the [validity of] the waiver . . . come directly from the defendant in the colloquy").

absence of a written waiver, even if an oral colloquy was held which could support a finding that the waiver was voluntary and intelligent.[10]

The colloquy must be conducted by the judge or clerk, and it must be recorded. The Supreme Judicial Court in *Ciummei* set forth the following elements of a valid colloquy, which the Court has since characterized "merely as suggestions of possible lines of inquiry":[11] (1) advise the defendant of her constitutional right to a jury trial; (2) ensure that the defendant conferred with counsel[12] and is not pressured, intoxicated, or otherwise irrational; (3) ascertain whether the waiver is voluntary and intelligent; and (4) in cases where the defendant "needs a compendious reminder" of the role of a jury, explain that jurors are members of the community, that the defendant may participate in their selection, and that while the judge decides the law and instructs the jury, the jury finds the facts and must do so unanimously.[13]

The colloquy's constitutional significance is merely as evidence of whether a voluntary and intelligent waiver occurred. The colloquy's form may vary, and its adequacy depends on the specific facts of each case.[14] Waiver will be found if the choice is voluntary[15] and "the defendant, being competent ... indicated a comprehension

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[10] Commonwealth v. Wheeler, 42 Mass. App. Ct. 933, 934 (1997) (citing Gallo v. Commonwealth, 343 Mass. 397 (1961)); Commonwealth v. Osborne, 445 Mass. 776, 781 (2006).

[11] Commonwealth v. Hardy, 427 Mass. 379, 383 (1998) (quoting Commonwealth v. Schofield, 391 Mass. 772, 774 (1984)). *See* Commonwealth v. Hendricks, 452 Mass. 97, 107 (2008) (omission of inquiries suggested as appropriate in *Ciummei* alone are not enough to make a colloquy inadequate).

[12] Commonwealth v. Hardy, 427 Mass. 379, 384 (1998) (failure to inquire whether defendant had conferred with counsel not reversible error where both counsel and defendant signed written waiver, from which it could be inferred that they had discussed the waiver).

[13] *See* Commonwealth v. Towers, 35 Mass. App. Ct. 557, 558-60 (1993) (waiver invalid where judge failed adequately to explain difference between jury trial and judge trial, to inquire about defendant's level of education, or to ask whether defendant had imbibed alcohol that day). *Compare* Commonwealth v. Collado, 426 Mass. 675, 678 (1998) (judge's failure to ask defendant whether he understood that the fact finder (in defendant's bench trial) would also make rulings of law and hear all the evidence in codefendant's case, or that there would be no instructions of law in his own case, did not render colloquy invalid); Commonwealth v. Ridlon, 54 Mass. App. Ct. 146, 148 (2002) (judge's failure to inform defendant that a jury trial was a constitutional right or that the verdict had to be unanimous did not make colloquy invalid).

[14] Commonwealth v. Hardy, 427 Mass. 379, 383 (1998) (quoting Commonwealth v. Abreu, 391 Mass. 777, 779 (1984)); Commonwealth v. Ridlon, 54 Mass. App. Ct. 146, 150 (2002). The colloquy should follow the topic outline appearing in K. Smith, 30A MAPRAC §23.55 (3d. ed. 2007 & Supp. 2011), but it will be held sufficient if it was adequate to show that the defendant acted with understanding and on his own volition in waiving the jury. Commonwealth v. Onouha, 46 Mass. App. Ct. 904 (1998).

[15] *See* Commonwealth v. Lebon, 37 Mass. App. Ct. 705, 705-06 (1994) (judge's pledge in lobby conference to sentence the defendant more severely if he claimed a jury trial than if he waived the right and had a bench trial, rendered waiver involuntary). The court distinguished imposing harsher punishment on defendants who elect to stand trial rather than plead guilty; that practice is not necessarily vindictive because a guilty plea deserves leniency as a "first step toward rehabilitation." But defendants who elect jury trials and bench trials equally maintain their innocence. *Lebon, supra*, 37 Mass. App. Ct. at 707. *See also* Commonwealth v. Carter, 50 Mass. App. Ct. 902, 903 (2000) (rescript) (reversing plea-based conviction where during plea negotiations judge informed defendant that he would face a substantially harsher sentence if found guilty after jury trial than if found guilty at a jury-waived trial).

of the nature of the choice."[16] Conversely, a seemingly valid colloquy on the record is not dispositive, but in such a case the defendant bears the burden of proving that the waiver was invalid.[17]

§ 34.1B. DISTRICT COURT

1. Pre-1994 cases: Waiver of First-Instance Jury Trial Under the Former De Novo System

District court cases originating prior to January 1, 1994 are still governed under the abolished de novo system,[18] under which the defendant had the option to waive the right to a first-instance jury trial, with appeal to a de novo trial by jury.[19] Waivers were often conducted without the detail required in the *Ciummei* colloquy, described *supra*, even though that case arguably applies to first-instance waivers.[20]

2. Waiver of Final Jury Trial

For district court cases originating after January 1, 1994, governed by the single-trial district court system,[21] jury waivers are governed by G.L. c. 263, § 6; Mass. R. Crim. P. 19(a); Dist./Mun. Cts. R. Crim. P. 4 and 5; and the colloquy requirements of *Ciummei v. Commonwealth*, discussed *supra* at § 34.1A.[22]

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[16] Commonwealth v. Schofield, 391 Mass. 772 (1984) (waiver upheld even though judge did not describe all aspects of trial by jury) (quoting Ciummei v. Commonwealth, 378 Mass. 504, 510 (1979)). *Compare* Commonwealth v. Towers, 35 Mass. App. Ct. 557 (1993) (colloquy inadequate).

[17] Ciummei v. Commonwealth, 378 Mass. 504, 510 n.9 (1979); Commonwealth v. Osborne, 445 Mass. 776, 781 (2006) (holding burden met as a "bright-line" matter where defendant did not execute written plea waiver); Commonwealth v. Backus, 78 Mass. App. Ct. 625, 629 (2011); Commonwealth v. Wheeler, 42 Mass. App. Ct. 933, 934 (1997) (holding that *Ciummei*'s "bright line" rule, discussed *supra*, requires reversal in the absence of a written waiver, even if the oral colloquy could support a finding that the waiver was voluntary and intelligent); Commonwealth v. Lebon, 37 Mass. App. Ct. 705 (1994) (where judge in lobby conference had threatened incarceration if defendant claimed a jury trial, but not if defendant waived the right, defendant's denial of coercion in subsequent colloquy was no bar to his arguing involuntariness of waiver).

[18] *See supra* part one of this book concerning district court practice.

[19] The defense had a right of waiver regardless of codefendant choices, but not on only some of several joined complaints. Commonwealth v. Paiva, 16 Mass. App. Ct. 561, 563 (1983).

[20] *See* Costarelli, Petitioner, 378 Mass. 516, 518–19 (1979).

[21] *See supra* part one of this book concerning district court practice.

[22] The same was true, by statute and case law, for second-tier jury waivers in district court cases handled under the former de novo system. G.L. c. 218, § 27A(g) (waiver in district court's second tier governed by c. 263, § 6); Costarelli, Petitioner, 378 Mass. 516, 518–29 (1979); Commonwealth v. Connor, 14 Mass. App. Ct. 488, 491-92 (1982). Moreover, some *first*-tier admissions in pre-1994 cases governed by the de novo system could be designed to permanently waive a jury trial or any trial, and in such cases special colloquy requirements applied. The *Ciummei* colloquy is clearly required for any final jury waiver, and the colloquy established by *Commonwealth v. Duquette*, 386 Mass. 834 (1982) is required for any final admission. *See supra* § 3.11C (colloquy requirements for admissions in the district court).

The single-trial legislation imposes additional rules for district court jury waivers, including special timing requirements[23] and a *certificate of defense counsel* indicating that he or she has made the necessary explanations and determinations regarding waiver, on a form prescribed by the District Court Chief Justice.[24] While counsel's certification does not relieve the court of its obligation to conduct an oral colloquy, the judge may take it into account in assessing whether the waiver is voluntary, knowing, and intelligent.[25] The certificate requirement, insofar as it requires counsel to state his opinion that the defendant's waiver was voluntary, knowing, and intelligent, appears subject to attack for infringing on lawyer-client confidentiality, for making defense counsel a potential witness against his client, and for placing counsel in a judicial role.

§ 34.2 MOTIONS IN LIMINE

§ 34.2A. GENERALLY

Motions in limine can be used to obtain advance rulings on the admissibility of evidence. A motion can be used to prevent any reference to prejudicial, immaterial, or inadmissible evidence. Conversely, a motion can obtain a ruling that a particular piece of information will be admitted at trial.

By preempting the mention of inadmissible evidence, motions in limine avoid the use of objections and curative instructions that may highlight rather than cure prejudice. Motions in limine may sharpen the issues. Even if denied, the use of a motion in limine may better protect the defendant's rights on appeal than would an oral motion during a witness's testimony. Argument on the motion may inform counsel of the opposing party's intended use of the challenged evidence. For a judge, presentation of an issue before trial allows time for a thoughtful and considered judgment. This extra time at the beginning of a trial might save the time used in curative instructions, mistrials, and even appeals.

A motion in limine should comply with Mass. R. Crim. P. 13.[26] The motion should be in writing and supported by affidavit. It should enumerate the specific item or information that is the subject of the motion.[27] It should apprise the Court of the

[23] *See supra* § 3.5. As noted above, *see* §34.1A, *supra*, unless there is more than one defendant, a jury waiver filed in district court or in the Boston municipal court prior to the transfer of the case to the jury session must be permitted. G.L. c. 263, § 6.

[24] G.L. c. 218, § 26A. *See also* Dist./Mun. Cts. R. Crim. P. 4(c).

[25] Commonwealth v. Hernandez, 42 Mass. App. Ct. 780, 784–86 (1997) (waiver valid despite "sparse" oral colloquy, because judge could also rely on information contained in waiver form signed by defendant and in defense counsel's certificate; however, judge should include in colloquy questions concerning the defendant's understanding of information conveyed to him by defense counsel); Commonwealth v. Ridlon, 54 Mass. App. Ct. 146, 149 (2002) (quoting *Hernandez* for proposition that in assessing jury-trial waiver judge may rely on signed waiver form and defense counsel's certificate).

[26] Commonwealth v. O'Malley, 14 Mass. App. Ct. 314, 321 n.9 (1982). *See* Super. Ct. R. 9 (providing that "[i]n criminal cases the court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit").

[27] *See* Commonwealth v. Polydores, 24 Mass. App. Ct. 923, 924 (1987) (upholding trial court's requirement that specific convictions be enumerated before the court rules on which convictions would be permitted to be used to impeach the defendant).

particular considerations that affect the admissibility of the item. A memorandum of law in support of the motion may be submitted. In some cases, counsel may request a voir dire hearing in support of the motion.

§ 34.2B. MOTION IN LIMINE TO EXCLUDE EVIDENCE

A motion in limine to exclude evidence asks the judge to prevent any mention of a particular piece of information in front of the jury.[28] A motion in limine that asks that a piece of evidence be excluded from the trial is analogous to a motion to suppress, but it is based on the law of evidence. The judge's discretion in deciding a motion in limine is the same as when deciding to admit or reject evidence.[29]

1. Timing Issues

A motion in limine that is successfully made before trial can be particularly useful in preventing any reference to the prejudicial material in the prosecutor's opening.[30] However, counsel may elect to file a motion later in the trial to avoid educating the prosecutor about a potential piece of inculpatory evidence or in response to an issue that develops during trial.

It is preferable that the judge rule immediately following the presentation of a motion in limine, as the ruling may determine counsel's presentation of the case.[31] However, a judge is not required to make an immediate ruling and may reserve decision.[32] If a judge elects to reserve the decision, counsel might ask that the motion be allowed subject to the evidence being submitted in compliance with the motion's offer of proof.[33] Alternatively, counsel should ask that the piece of evidence not be mentioned until the ruling. Counsel should also state on the record the prejudice that is created by the decision's delay.

2. Preserving Appellate Rights

Defense counsel must always keep in mind that the denial of a motion in limine by the trial judge *does not preserve for appellate review* the correctness of the judge's

[28] Commonwealth v. Vaidulas, 433 Mass. 247, 249 (2001); Commonwealth v. Hood, 389 Mass. 581, 594 (1983).

[29] Commonwealth v. Lopez, 383 Mass. 497, 500 n.2 (1981).

[30] *See supra* § 31.3A regarding opening statements.

[31] Commonwealth v. Diaz, 383 Mass. 73, 81 (1981). In *Diaz* the Court stated that a ruling on a motion concerning the use of the defendant's prior convictions for impeachment should come at an early moment "since it may affect counsel's conduct of the trial all down the line." *See also* Commonwealth v. Blaney, 12 Mass. App. Ct. 730, *737* (1981), *rev'd on other grounds*, 387 Mass. 628 (1982).

[32] Commonwealth v. Barber, 14 Mass. App. Ct. 1008, 1010-11 (1982) (no error in judge's delay in ruling when the motion presented novel issues of law the resolution of which would likely be affected by the direct defense testimony); Commonwealth v. Ranieri, 65 Mass. App. Ct. 366, 367 (2006) (judge has discretion to defer ruling on motion in limine until the issue was raised by the evidence).

[33] Commonwealth v. Diaz, 383 Mass. 73, 81–82 (1981). The case notes the factors to be considered in ruling on the defendant's request not to be impeached by prior convictions, and states that a judge's ruling may be made contingent on the evidence coming in as has been represented by counsel at the motion hearing.

ruling (unless it is effectively a motion to suppress on constitutional grounds).[34] If the motion was to exclude evidence, defense counsel must object when the evidence is introduced by the Commonwealth at trial,[35] asking for a sidebar conference if she does not want to make the objection in front of the jury.[36] The only exception to this requirement that counsel must object when the contested evidence is offered during trial is if the judge, in denying the motion to exclude evidence, tells counsel that the objection is noted and the rights are preserved.[37] Nevertheless, a trial objection is advisable even if the court, in denying the motion in limine, notes the objection and states the rights are preserved.

Interlocutory review is generally not available to review a ruling on a motion in limine barring the admission of evidence.[38]

3. Examples of Subject Matter

The nature of each particular case determines which motions in limine are necessary. Counsel must carefully evaluate every aspect of the trial to determine areas of the evidence that should be addressed by motions in limine.

Counsel may file a motion in limine to prevent any reference to such items as the client's prior criminal record;[39] other offenses alleged to have been committed by the client, even if the offenses were never formally charged in court;[40] the defendant's

[34] Commonwealth v. Whelton, 428 Mass. 24, 25 (1998). The sole exception to this rule of non-preservation arises when the motion seeks exclusion of evidence on constitutional grounds; in that event, under *Whelton, supra* at 25–26, it will be treated by the appellate court as a motion to suppress which does not require objection at trial to preserve the issue of the judge's refusal to suppress the evidence.

[35] Commonwealth v. Martin, 57 Mass. App. Ct. 272, 275 (2003); Commonwealth v. Spencer, 53 Mass. App. Ct. 45, 51 (2001); Commonwealth v. Hardy, 47 Mass. App. Ct. 679, 680–681 (1999); Commonwealth v. Loach, 46 Mass. App. Ct. 313, 315–316 (1999); Commonwealth v. Grenier, 45 Mass. App. Ct. 58, 59, 62 (1998).

[36] An objection made at a sidebar conference need not be repeated in front of the jury. *See* Commonwealth v. Kruah, 47 Mass. App. Ct. 341, 345 (1999).

[37] *See Commonwealth v. Aviles*, 461 Mass. 60, 64, 66-67 (2011) (holding that defense counsel was not required to object at trial to the introduction of contested evidence where counsel had argued the objection during three pretrial colloquies, the final colloquy ending with counsel's asking – after the judge noted the objection – if his rights were preserved and the judge responding, "Very much so."); Commonwealth v. Kee, 449 Mass. 550. 553 n. 5 (2007) (holding defense counsel relieved of the need to object to contested evidence at trial where, after denying defendant's motion in limine to exclude that evidence, the court said, "Your objection's noted, and your rights are saved").

[38] Commonwealth v. Anderson, 401 Mass. 133, 134 (1987); Commonwealth v. Yelle, 390 Mass. 678, 686-87 (1984). *Contrast* Commonwealth v. Beausoleil, 397 Mass. 206, 208 n.2 (1986) (interlocutory review permitted where issue raised in numerous cases and speedy resolution warranted).

[39] Commonwealth v. Little, 453 Mass. 766, 772 (2009); Commonwealth v. Gonzalez, 22 Mass. App. Ct. 274, 279 n.7 (1986); Commonwealth v. Maguire, 392 Mass. 466, 470 (1984); Commonwealth v. Diaz, 383 Mass. 73, 78 (1981). Such a motion is more fully addressed at § 32.12C(4).

[40] Commonwealth v. Nighelli, 13 Mass. App. Ct. 590, 598–600 (1982). *See also* Commonwealth v. Harris, 409 Mass. 461, 469 (1991) (testimony implying that defendant was known to carry a knife was relevant, but unfairly prejudicial).

prior incarceration;[41] "mug shots" or the fact that the defendant's photograph is in police files;[42] reference to the complaining witness as a "victim"[43] or the client's exercise of his rights to remain silent or to refuse to submit to tests.[44] The prosecutor should inform police witnesses as to the subjects which the judge has excluded. [45]

A motion in limine may be used to prevent the opposing counsel from using a particular phrase or line of argument,[46] or to control the courtroom behavior of victim advocates.[47]

§ 34.2C. MOTION IN LIMINE TO ADMIT EVIDENCE

A motion in limine may be used to obtain a ruling from the judge that a particular piece of evidence will be admitted into evidence. Support for the use of a motion in limine to obtain a ruling on the admissibility of evidence is found in *Commonwealth v. Earltop*[48] and *Commonwealth v. Hood.*[49] In *Hood,* the Court expressed its "endorsement of the practice of informal conferences between counsel and the judge, before trial and during trial, for advance discussion of matters of doubtful admissibility. . . . Such a conference is certainly in order when the mere offer of evidence in open court on a controversial subject may create a prejudice to the objecting party which could not be eradicated by a curative instruction."[50]

A motion in limine is a vehicle for obtaining an advance ruling on the admissibility of evidence akin to the conferences referred to by the Supreme Judicial Court. A motion in limine to admit evidence should be considered to obtain a ruling on the admissibility of such items as a witness's psychiatric or other mental health history,

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[41] Commonwealth v. Bailey, 12 Mass. App. Ct. 104, 106 n.3 (1981).

[42] Commonwealth v. Smith, 21 Mass. App. Ct. 619, 622 (1986), 400 Mass. 1002 (1987); Commonwealth v. Blaney, 387 Mass. 628, 636–40 (1982).

[43] *See, e.g.,* Commonwealth v. McCants, 25 Mass. App. Ct. 735, 743 (1988).

[44] Commonwealth v. Ruffen, 399 Mass. 811, 812-13 (1987); Commonwealth v. Barber, 14 Mass. App. Ct. 1008, 1010 (1982).

[45] Commonwealth v. Ellerbe, 430 Mass. 769, 781 n.22 (2000).

[46] In Commonwealth v. United Books, 389 Mass. 888, 889-90 (1983), the assistant district attorney moved to prevent defense counsel from arguing that the defendant had not disseminated obscene material because the films in question were viewed by "consenting adults."

[47] *See* Commonwealth v. Harris, 409 Mass. 461, 469–71 (1991) (judge should have prevented victim advocate from holding hand of victim's mother in view of jury; visible displays of sympathy for victim by prosecution agent endanger defendant's right to fair trial).

[48] 372 Mass. 199, 206 (1977) (Hennessey, C.J., concurring). In a concurring opinion, then-Chief Justice Hennessey stated that when a prosecutor believes that defense counsel has argued improperly, the prosecutor should seek "redress from the judge." Noting that an improper prosecutorial argument risks reversal if the defendant is convicted, the opinion endorses the use of conferences between counsel and the trial judge during the trial.

[49] 389 Mass. 581 (1983).

[50] Commonwealth v. Hood, 389 Mass. 581, 595 n.5 (1983). *See* Commonwealth v. Botticelli, 51 Mass. App. Ct. 802, 806-07 & n.7 (2001) (noting with approval trial judge's use of motions in limine, in the words of the trial judge, "to become familiar ... with the circumstances surrounding the problem, so that the court won't be making rulings on the fly, as is most often required during the course of a trial").

the use or addiction to narcotic drugs, and the witness's involvement with social service agencies such as the Department of Mental Health or the Department of Social Services. The admissibility of the testimony of a witness who might invoke the fifth amendment's right to silence may also be grounds of a motion in limine.[51]

A motion in limine to admit evidence is required by the rape shield statute before the defense may offer evidence of a purported rape victim's prior sexual conduct.[52]

§ 34.2D. OPPOSING THE PROSECUTOR'S MOTION

The timing, purpose, and strategy for the appropriate use of a motion in limine by a prosecutor are similar to the considerations discussed above. Defense counsel should prevent the prosecution from using motions in limine to preclude the presentation of a defense or as a vehicle to get a preview of the defendant's case.

A motion in limine should be narrowly focused to exclude as inadmissible a specific piece of evidence. A motion should not be used to challenge the sufficiency of the defendant's evidence to raise a defense since such a ruling could infringe on the defendant's rights under the Sixth and Fourteenth Amendments of the federal Constitution as well as the Massachusetts Constitution Declaration of Rights.[53] Prosecutorial use of a motion in limine may also abridge the defendant's right to a jury trial.[54] If faced with such a motion, counsel should argue that the appropriate course is for all of the evidence to be presented to the jury. At the conclusion of the defendant's case, the prosecutor may argue that the evidence is not legally sufficient to establish the defense. If the judge agrees, the evidence is stricken. The judge can instruct the jury not to consider the evidence.

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[51] Commonwealth v. Funches, 379 Mass. 283 (1979).

[52] G.L. c. 233, § 21B. *See* Commonwealth v. Pearce, 427 Mass. 642, 647 (1998); Commonwealth v. Cameron, 69 Mass. App. Ct. 741, 747 (2007).

[53] In Commonwealth v. O'Malley, 14 Mass. App. Ct. 314 (1982), the prosecutor orally made a motion in limine to exclude the defendant's evidence supporting a necessity defense. The prosecutor asserted that the defendant's evidence would be insufficient as a matter of law to establish the defense and should not even be presented to the jury. The Court discussed the inappropriateness of a prosecutor's use of a motion in limine to challenge the sufficiency of evidence rather than its admissibility, and suggested that the use of a motion in limine by the prosecutor to prevent presentation of a defense would run afoul of the defendant's state and federal constitutional rights to present a defense. In Commonwealth v. Hood, 389 Mass. 581 (1983), the Court stated that it was "constitutionally sounder" for a judge to wait for all of the evidence before deciding whether it is sufficient to raise a proffered defense. "Ordinarily, a judge should not allow a motion which serves to exclude, in advance of its being offered, potential evidence of the defense." *Hood*, *supra*, 389 Mass. at 595 n.5. *See also* Commonwealth v. Lora, 43 Mass. App. Ct. 136, 142–43 (1997) (error to grant prosecution's motion to exclude defendant's medical records of treatment for chronic illness related to defense of medical necessity, but harmless); Commonwealth v. Noble, 24 Mass. App. Ct. 421 (1987), (allowance of the prosecution's motion in limine to preclude evidence of police hostility required a new trial).

In Commonwealth v. Burke, 390 Mass. 480 (1983), a prosecutor's motion to exclude evidence of consent in a case charging indecent assault and battery on a child was deemed useful and appropriate. It is important to note that the issue raised by the motion was whether or not consent was a defense to the charge, not whether the evidence to be offered was sufficient to establish the defense.

[54] *See* then-Chief Justice Liacos's concurring opinion in Commonwealth v. Brogan, 415 Mass. 169, 179 (1993), and in Commonwealth v. Leno, 415 Mass. 835, 842 (1993).

Whenever a motion in limine is granted that excludes the presentation of defense evidence, counsel should be sure to make a sufficient offer of proof as to the evidence that would have been presented to establish the defense.

§ 34.3 MOTION TO SEQUESTER

§ 34.3A. GENERALLY

Mass. R. Crim. p. 21 provides for the sequestration of witnesses. On the motion of either party or by the judge, witnesses other than the defendant may be excluded from the court room during a hearing.

A sequestration order "requires each witness to remain out of the courtroom until he or she has testified, and prohibits the disclosure of what the evidence has been to a witness yet to testify."[55] When a motion to sequester has been allowed, the judge should instruct each witness about the order and should instruct the attorneys that they are to enforce the order's provisions.[56]

Sequestration is designed to enhance the truth seeking function of the trial by preventing each witness's testimony from influencing other testimony. Sequestration aids the fact finder in assessing the witnesses' credibility.[57] Thus, although the trial judge has discretion in deciding a motion to sequester, several court decisions support the position that it is the better practice to allow the motion.[58]

The judge may choose to exclude only some of the witnesses to be called to testify.[59] Expert witnesses[60] and witnesses "essential to the management of the case" are sometimes exempted from sequestration orders. Both the prosecution and the defense may request the judge to permit a witness to remain in the courtroom to assist counsel.[61] However, if the judge exempts a particular witness from the sequestration

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[55] Commonwealth v. Bianco, 388 Mass. 358, 369 (1983); Commonwealth v. Duncan, 71 Mass. App. Ct. 150, 157 (2008).

[56] Commonwealth v. Watkins, 373 Mass. 849, 851 (1977). In *Watkins* the Court states that the decision to sequester lies within the sound discretion of the trial judge, but the better practice in "capital cases" is to allow such a procedure.

[57] WIGMORE, EVIDENCE § 1838 at 461 (Chadbourne rev. 1976); Geders v. United States, 425 U.S. 80, 87 (1976). In *Geders* the Court notes that sequestration prevents witnesses from influencing each other, detects the less than candid witness, and prevents attempts to influence witnesses during breaks in testimony.

[58] Commonwealth v. Pope, 392 Mass. 493 (1984). *See also* Commonwealth v. Sevieri, 21 Mass. App. Ct. 745, 757 (1986) ("to deny such a motion as a matter of practice rather than for reasons related to the particular case presents unnecessary problems on any appeal").

[59] Commonwealth v. Bonner, 33 Mass. App. Ct. 471, 474 n.3 (1992) (given special circumstances and lack of prejudice to defendant, no error to approve Commonwealth motion to sequester defense witnesses while denying defense motion to sequester mother of alleged minor victim of sexual assault); Commonwealth v. Clark, 3 Mass. App. Ct. 481, 485–86 n.4 (1975); Commonwealth v. Therrien, 359 Mass. 500, 508 (1971).

[60] Commonwealth v. Jackson, 384 Mass. 572, 582 (1981) (because expert testimony is not likely to be perjurious or influenced, it is permissible to exempt experts from a sequestration order). *See* Commonwealth v. Duncan, 71 Mass. App. Ct. 150, 157 (2008) (sequestration orders designed to prevent perjury by a witness).

[61] Commonwealth v. Jackson, 384 Mass. 572, 581 (1981); Commonwealth v. Clark, 3 Mass. App. Ct. 481, 485-86 n.4 (1975). Note that in United States v. Anagnos, 853 F.2d 1, 4-5

order, counsel may seek to have the nonsequestered witness testify first. In this way, the witness's testimony can be insulated from the influence of hearing the other witnesses' testimony.[62]

An attorney may request, and a judge may order, that a witness finish testifying before any break in his or her testimony.[63] Finally, a judge may modify the sequestration order during the trial.[64]

§ 34.3B. DEFENSE RIGHT OF ACCESS TO WITNESSES AND THE DEFENDANT

Sequestration orders may implicate the defendant's rights to a fair trial and to counsel.

A sequestration order that prohibits a witness from discussing her testimony with anyone during a break in the trial implicates the defendant's right to a fair trial if defense counsel is included in the prohibition. If faced with such an order, defense counsel should specifically request permission to speak with the witness and object if permission is denied.[65]

The defendant's right to counsel is implicated by any order that restricts counsel from communicating with the defendant. A defense objection to such an order should cite both the federal Constitution and the Massachusetts Constitution Declaration of Rights.[66]

§ 34.3C. VIOLATION OF A SEQUESTRATION ORDER

A violation of a sequestration order may result in sanctions on the witness, the prosecution, or the defense. A defense motion for sanctions should include an explanation of why the violation prejudices the defendant's case. The violation or

(1st Cir. 1988), the First Circuit advised against seating the police officer at the prosecutor's table to avoid enhancing the officer's credibility.

[62] United States v. Frazier, 417 F.2d 1138, 1139 (4th Cir. 1969).

[63] Geders v. United States, 425 U.S. 80, 90 (1976).

[64] *See* Commonwealth v. Parry, 1 Mass. App. Ct. 730, 736 (1974) (witness permitted to hear the testimony of other witnesses during break in her own testimony; however, the defendant did not cite any resulting prejudice).

[65] Meggs v. Fair, 621 F.2d 460, 462 (1st Cir. 1980) (upholding order that prohibited the witness from talking to anyone, including counsel for either side, during a recess; but the defense did not request access to the witness and made no showing that it had not had prior access). For a discussion of the right of access to witnesses generally, *see supra* § 16.6F(6).

[66] *Compare* Geders v. United States, 425 U.S. 80, 88 (1976) (defendant had right to communicate with counsel during seventeen hour, overnight break in the defendant's testimony) *with* Perry v. Leek, 488 U.S. 272, 283-85 (1989) (upholding order prohibiting attorney from speaking with his retarded client during a 15-minute break in the defendant's testimony). Art. 12 of the Mass. Const. Declaration of Rights has been held to provide broader protection of the right to counsel than does the federal Constitution. *See* Commonwealth v. Richard, 398 Mass. 392, 393 (1986) (citing Commonwealth v. Hodge, 386 Mass. 165, 169–70 (1982)). *See also supra* ch. 8.

prejudice may be established through the representations of counsel[67] or through a voir dire hearing.[68]

The court has several options to redress a violation of a sequestration order. The judge may elect to admonish the witness,[69] to institute contempt proceedings against the witness,[70] or to exclude the testimony of the witness who has violated the order.[71] If the violation is particularly egregious, the judge may dismiss the case.[72]

If the judge permits the witness to testify, counsel should cross-examine the witness about the violation of the sequestration order in front of the jury. Counsel may establish and explore the content of the discussions between the witnesses, and the fact that the witness knew that the discussions violated the court's order.[73] Counsel should request that the judge instruct the jury that the violation of the order and the discussions may be considered in evaluating the credibility of the witnesses.[74]

§ 34.4 MOTION FOR A VIEW

A motion for a view requests the judge or the jury to see something in order to better understand the case.[75] The motion may request that a scene be visited or that an object be observed. Counsel should always investigate the scene or observe the object before requesting or responding to a motion for a view.

A court has statutory power to order a view,[76] but the exercise of this power is discretionary.[77] A motion for a view may be denied if the view will not assist the fact

[67] Commonwealth v. Gogan, 389 Mass. 255, 261 (1983) (judge accepted counsel's representation that one police officer told another, “our weak spot is hitting Gogan”).

[68] Commonwealth v. Gogan, 389 Mass. 255, 262 (1983); United States v. Cox, 752 F.2d 741, 748 (1st Cir. 1985); United States v. Arruda, 715 F.2d 671, 684 (1st Cir. 1983).

[69] Commonwealth v. Gogan, 389 Mass. 255, 261 (1983).

[70] Commonwealth v. Navarro, 2 Mass. App. Ct. 214, 223 (1974).

[71] Commonwealth v. Bianco, 388 Mass. 358, 369-70 (1983); Commonwealth v. Jackson, 384 Mass. 572, 582 (1981). *See also* Commonwealth v. Shagoury, 6 Mass. App. Ct. 584, 594–595 (1978) (testimony of witness who violated sequestration order was struck on different ground); Commonwealth v. Crowley, 168 Mass. 121 (1897) (preventing defense witness from testifying when the witness stayed in the court room after it became clear the witness’s testimony would be necessary; however, the witness’s testimony was withdrawn for other reasons).

[72] Commonwealth v. Navarro, 2 Mass. App. Ct. 214, 223 (1974). *See* Commonwealth v. Youngworth, 55 Mass. App. Ct. 30, 39 (2002) (noting trial court’s exclusion of Commonwealth rebuttal witness for violation of a sequestration order).

[73] Commonwealth v. Gogan, 389 Mass. 255, 262 (1983); United States v. Cox, 752 F.2d 741, 748 (1st Cir. 1985); United States v. Arruda, 715 F.2d 671, 684 (1st Cir. 1983) (meetings between witnesses in violation of the sequestration order properly subject of cross-examination to impeach credibility).

[74] United States v. Cox, 752 F.2d 741, 748 (1st Cir. 1985). *See also* United States v. Arruda, 715 F.2d 671, 684 (1st Cir. 1983).

[75] Commonwealth v. Curry, 368 Mass. 195, 197-98 (1975).

[76] G.L. c. 234, § 35. The Court also has a common law right to inform itself by taking a view. Berlandi v. Commonwealth, 314 Mass. 424, 450 (1943).

finder. A view should replicate the conditions that were present at the time of the incident. A view should not be permitted if the scene or object has changed with the passage of time.[78] Nor should a view be taken if it would only serve to prejudice the jury.[79]

If photographs, diagrams, videotapes, measurements, and replicas can be used in place of a view, then it is not error to deny the request for a view.[80]

A motion for a view is usually filed before testimony begins, but a view may be requested and taken later if that is appropriate.[81] When a motion for a view is allowed, court officers are sworn to prevent anyone from communicating with the jury during the view. Counsel is permitted to point out particular features of the scene or to object but is not otherwise permitted to speak to the jury.[82] If a prosecutor makes an objectionable comment at the view, counsel must object and may request a curative instruction.[83] Counsel can request that a demonstration occur while taking the view, but it is not necessarily reversible error for the judge to deny the request.[84]

The information gathered on a view can and should be used by the fact finder in determining the issues in the case.[85] In this sense, what is observed is effectively

[77] Commonwealth v. Rodriguez, 378 Mass. 296, 307 (1979); Commonwealth v. Curry, 368 Mass. 195, 198 (1975); Searcy v. Paul, 20 Mass. App. Ct. 134, 142 n.13 (1985); Uraneck v. Lima, 359 Mass. 749, 749 (1971).

[78] Commonwealth v. Jewett, 17 Mass. App. Ct. 354, 361 (1984), 392 Mass. 558 (1984). *Compare* Commonwealth v. Rodriguez, 378 Mass. 296, 307 (1979) (upholding denial of view where trial court believed conditions changed and misleading) *with* Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 708–09 (1974) (no abuse to allow daytime view of scene although crime took place at night in rain).

[79] Commonwealth v. King, 391 Mass. 691, 694 (1984); Commonwealth v. Andrews, 12 Mass. App. Ct. 901, 902 (1979).

[80] United States v. Drougas, 748 F.2d 8, 30-31 (1st Cir. 1984); Commonwealth v. Campbell, 378 Mass. 680, 704-05 (1979).

[81] Yore v. Newton, 194 Mass. 250, 253 (1907), permits a view to be taken after a jury has begun deliberations.

[82] Commonwealth v. Dascalakis, 246 Mass. 12, 29-30 (1923); Commonwealth v. Gomes, 459 Mass. 194, 199 (2011) (error for prosecutor during a crime-scene view in an identification case to say to the jurors, "I'm going to stand in the middle of the street and ask you to take notice of whether or not you can see my physical features from the porch"); Commonwealth v. Cresta, 3 Mass. App. Ct. 560, 562 (1975).

[83] Commonwealth v. Gomes, 459 Mass. 194, 199 (2011) (defense counsel's failure to object to prosecutor's improper demonstration – *see* note 82, *supra*. – during view taken as "an indication that the prosecutor's demonstration was not prejudicial" and thus not a basis to reverse); Commonwealth v. Cresta, 3 Mass. App. Ct. 560, 562-63 (1975). In *Gomes*, the trial judge had not attended the view, which the SJC noted prevented the judge from taking steps to address and cure any improprieties that there occurred. As a matter of common law, the SJC required that henceforth trial judges attend views in order to take objections and be able immediately to address improprieties. Gomes, 459 Mass. at 201-02.

[84] Commonwealth v. Gabbidon, 17 Mass. App. Ct. 525, 535, *rev. denied*, 391 Mass. 1104 (1984), *appeal after retrial*, 398 Mass. 1 (1986) (judge's decision not to have jurors sit in car upheld); Commonwealth v. Nassar, 351 Mass. 37, 47 (1966) (permissible not to put defendant next to car for jury to observe).

[85] Commonwealth v. Rogers, 351 Mass. 522, 534 (1967), *cert. denied*, 389 U.S. 991 (1967); Jarvinen v. Commonwealth, 353 Mass. 339, 341 (1967); Berlandi v. Commonwealth,

evidence, even though what is seen is not part of the record. A verdict can be reviewed by an appellate court even though a view has been taken.[86]

The defendant does not have an absolute right to attend a view.[87] Counsel should decide whether it is advantageous for the client to attend the view. The client may wish to communicate with the attorney about the view, particularly if the defendant is familiar with the scene or object being observed. If the defendant is excluded from the view, counsel should object and should state the benefits that the defense would have had from the defendant's presence.

§ 34.5 MOTION FOR STATEMENTS OF A WITNESS UNDER RULE 23[88]

§ 34.5A. GENERALLY

Mass. R. Crim. P. 23 mandates the production, on motion, of witness statements in the custody, possession, or control of opposing counsel. The rule – operating independently from the pretrial discovery process – made sense at a time when pretrial discovery of such statements under Rule 14 was discretionary and thus not guaranteed by the time of trial. However, after Rule 14 was amended in 2004 to impose a continuing, mandatory obligation on each party to produce the statements of persons that a party intends to call as trial witnesses,[89] it no longer seems necessary to provide for separate, trial production of statements already covered by Rule 14.[90] As set forth below, however, the definition of "statements" subject to production under Rule 23 is slightly broader than the corresponding definition in Rule 14, resulting in two narrow categories of witness statements that are subject to production under Rule 23 but not under Rule 14. This difference in coverage between the two rules may

314 Mass. 424, 451 (1943); Commonwealth v. Gomes, 459 Mass. 194, 199 (2011); Commonwealth v. Semedo, 456 Mass. 1, 13 (2010).

[86] Keeney v. Ciborowski, 304 Mass. 371, 372 (1940).

[87] Commonwealth v. Evans, 438 Mass. 142, 150 (2002); Commonwealth v. Gordon, 422 Mass. 816, 849 (1996); Commonwealth v. Curry, 368 Mass. 195, 199 (1975); Commonwealth v. DiMarzo, 364 Mass. 669, 674-75 (1974); Snyder v. Massachusetts, 291 U.S. 97, 108 (1934); Commonwealth v. Dascalakis, 246 Mass. 12, 30-31 (1923).

[88] In November 2009, the S.J.C.'s Standing Advisory Committee for the Rules of Criminal Procedure posted on the S.J.C.'s website a Notice Inviting Comment on Proposed Amendments to Rule 14 and Rule 23 of the Massachusetts Rules of Criminal Procedure. According to the Notice, "The proposal eliminates Rule 23 on the ground that the 2004 revision of Rule 14 has made it largely irrelevant. It incorporates what remains of Rule 23's discovery obligation into Rule 14 by expanding the definition of a statement in Rule 14(d)." *See* Massachusetts Supreme Judicial Court Website, Court Rules , http://www.mass.gov/courts/sjc/comment-crimproc-r14-r23-112009.html. To date (March 2012), the Court has taken no action on this proposed elimination of Rule 23 and concomitant expansion of Rule 14 (d).

[89] *See* Mass. R. Crim. P. 14(a)(1)(A) & (B), as appearing in 442 Mass. 1518 (2004).

[90] In 2010, the SJC's Standing Advisory Committee on the Rules of Criminal Procedure proposed amending Rule 14 to include those statements covered by Rule 23 but not by Rule 14 and eliminating Rule 23 altogether. The Committee invited public comment on the proposal, but to date, no action has been taken.

necessitate a Rule 23 motion to obtain statements falling into either of those two categories.

Under Rule 23, the moving party must receive the statements no later than the completion of direct examination. If the statements are produced after direct examination, counsel must be afforded the time to evaluate the material before proceeding with cross-examination. Counsel should be aware that, as with Rule 14, the prosecutor may resort to Rule 23 to obtain discovery of the statements of defense witnesses after they have testified.

§ 34.5B. DEFINITION OF "STATEMENTS"

Rule 23(a) defines what constitutes a statement for the purposes of the rule, and as noted it largely tracks Rule 14's definition.

Under both Rules 14 and 23, a *writing* made by the witness is a statement,[91] but unlike Rule 14, Rule 23 further provides that a writing made by another person that is "signed or otherwise adopted or approved" by the witness is also a statement.[92] Thus, if the witness has in some way unambiguously approved of a writing made by another person that summarizes the witness's comments, the writing is discoverable under Rule 23.[93] Any type of writing approved by a witness, including a note or a letter, may constitute a statement for the purposes of this rule.[94]

Under both Rules 14 and 23, a stenographic, mechanical, or electronic recording or a transcript of a recording of a witness's comments is discoverable if it is a "substantially verbatim" recital of an oral declaration of the witness.[95] Under both rules, such a recording must be made "contemporaneously" with the making of the declarations, but it need not be simultaneous.[96] In the case of an audio recording, the witness's voice need not be what is recorded. A tape recorded interview with a witness

[91] Mass. R. Crim. P. 14(d)(1), as appearing in 442 Mass. 1518 (2004); Mass. R. Crim. P. 23(a)(1), 378 Mass. 893 (1979).

[92] Mass. R. Crim. P. 23(a)(1), *supra*.

[93] *See* Goldberg v. United States, 425 U.S. 94, 106-07 (1976), discussing the applicability in federal cases of a similar section of the Jencks Act. So, for example, if a defense investigator takes notes during the interview of a potential witness and then asks the witness to verify the accuracy of the notes, the notes might constitute a statement "adopted or approved" by that potential witness under Rule 23 and thus be subject to production if he or she testifies. *See* Goldberg, 425 U.S. at 106-07 (holding that a government lawyer's notes written while interviewing a potential witness were subject to production under similar provision of the Jencks Act if unambiguously adopted or approved by the witness). Counsel should consider how investigators are used in each case to ensure that production of the investigator's writings will not be detrimental to the defense.

[94] Rosenburg v. United States, 360 U.S. 367, 374 (1959), discussing a similar provision of the Jencks Act.

[95] Mass. R. Crim. P. 14(d)(2), *supra*; Mass. R. Crim. P. 23(a)(2), *supra*. In determining whether a particular item is substantially verbatim, the Court will consider the extent to which the recording matches the witness's language, the length of the tape or transcript in comparison to the length of the interview and the proximity of time of the making of the recording to the actual interview. *See* Palermo v. United States, 360 U.S. 343 (1959), interpreting similar provisions of the Jencks Act.

[96] *See* Palermo v. United States, 360 U.S. 343 (1959), for an analysis of a similar provision of the Jencks Act.

or tape recorded summary of the witness's comments made shortly after the interview are both discoverable.

Under both Rules 14 and 23, the testimony of a witness before a grand jury is discoverable.[97]

Finally, Rule 23 provides that "verbatim" declarations of a witness contained in any written report are discoverable without regard to when such declarations were recorded,[98] whereas Rule 14 has no such provision specifically covering witness declarations contained in a "written report."[99] Even if the entire report is not discoverable under Rule 23, that part containing the verbatim witness statement would be.[100]

§ 34.5C. PROCEDURE

Either party may invoke Rule 23. Although the rule mandates discovery after a witness has testified on direct examination, the rule permits the motion to be made at an earlier stage of the case.[101]

The rule requires the production of relevant statements. If there is a question whether a particular item is discoverable, Rule 23(c) provides for an in camera inspection of the material. A voir dire hearing may also be used to determine whether the statement is relevant or, if pertinent, whether the writing in question was adopted or approved by the witness.[102]

Either party may request that a protective order be issued when an item is made available to opposing counsel. The judge may issue such an order sua sponte.[103] However, if the order limits defense counsel's ability to discuss the statement with the client or other witnesses, the order may violate the defendant's rights to effective assistance of counsel and to a fair trial.

Rule 23(f) provides sanctions for noncompliance with an order issued under this rule. In such a case, counsel should outline on the record the prejudice that has resulted from the violation. For example, the defense may have been prevented from investigating evidence in the case, or counsel's opening statement and the cross-

[97] Mass. R. Crim. P. 14(a)(1)(A)(ii); Mass. R. Crim. P. 23(a)(3), *supra*.

[98] Mass. R. Crim. P. 23(a)(4), *supra*. The considerations to be made in determining whether a particular part of a report is a "verbatim" declaration is the same as the determination made in evaluating a whether a recording is "substantially verbatim" under both rules. *See* Note 96, *supra*.

[99] Mass. R. Crim. P. 14(d)(2), *supra*. Presumably, a "verbatim" recitation of a witness's declarations contained in a report subject to production under Rule 23(a)(4) would also qualify as a "substantially verbatim" recital of the witness's oral declarations and thus would be subject to mandatory production under Rule 14(d)(2) if the declarations were recorded "contemporaneously" with their making. The difference, then, between the reach of Rules 23(a)(4) and 14(d)(2) as they relate to verbatim declarations of a witness set forth in the written report of another is the time lapse, if any, between the declaration and its recording in the report. Rule 14(d)(2) requires contemporaneous recording; Rule 23(a)(4) does not.

[100] Commonwealth v. Lewinski, 367 Mass. 889, 902-03 (1975).

[101] Mass. R. Crim. P. 23(e), *supra*.

[102] As a practical matter, a writing adopted by the witness or a witness statement incorporated into a written report would seem to be the only statements subject to production under Rule 23, the remaining Rule-23 "statements," as noted, now being subject to mandatory pre-trial production under Rule 14. *See* Section 34.5B, *supra*.

[103] Mass. R. Crim. P. 23(c), *supra*.

examination of witnesses may have been undermined.[104] Counsel should ask for specific relief. In appropriate cases, a mistrial may be declared or a witness's direct testimony may be stricken.

If the defense is denied access to any item, counsel should move that a copy of the item be made a part of the record to facilitate appellate review.[105]

§ 34.6 MOTION FOR A REQUIRED FINDING OF NOT GUILTY

§ 34.6A. GENERALLY

A motion for a required finding of not guilty is governed by Mass. R. Crim. P. 25. The standard to be applied in deciding the motion is whether, taking the evidence in the light most favorable to the prosecution, any rational trier of fact could find that each of the essential elements of the crime has been proven beyond a reasonable doubt.[106] Under this standard, issues of credibility are normally left for the jury to decide.[107]

To survive a motion for a required finding of not guilty, the prosecution must have presented more than some record evidence of each of the elements of the charged offense. The evidence must be enough to convince a rational trier of fact beyond a reasonable doubt on each element of the charged offense.[108] The evidence may not leave the issue of guilt as a matter for conjecture.[109] Inferences from the evidence may

[104] *See* Commonwealth v. Lam Hue To, 391 Mass. 301 (1984).

[105] Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975).

[106] Commonwealth v. Latimore, 378 Mass. 671, 677-78 (1979); Commonwealth v. Handy, 30 Mass. App. Ct. 776, 776 (1991) (insufficient evidence of possession); Commonwealth v. Cardenuto, 406 Mass. 450, 454 (1990) (weak circumstantial case of arson). Mass. R. Crim. P. 25(a) requires the judge, sua sponte, to enter a required finding of not guilty when the Commonwealth has presented insufficient evidence for conviction. Commonwealth v. Assad, 19 Mass. App. Ct. 1007, 1008 (1985); Commonwealth v. Miranda, 458 Mass. 100, 113-14 (2010); Commonwealth v. James, 73 Mass. App. Ct. 383, 385-87 (2008) (vacating threats conviction because evidence insufficient that defendant intended his threatening statements, made to a third party, be communicated to the complainant).

[107] Commonwealth v. Hanlon, 44 Mass. App. Ct. 810, 815 (1998) (rejecting defense claim that testimony of prosecution witness, who had history of alcohol abuse and of lying, including lying under oath, was "inherently unreliable"; claim "is the equivalent of the assertion that [the testimony] is not credible, [but court] resolve[s] issues of credibility in favor of the Commonwealth," quoting Commonwealth v. James, 424 Mass. 770, 785 (1997)). *But see infra* § 34.6C..

[108] Commonwealth v. Latimore, 378 Mass. 671 (1979) (citing Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), *rehearing denied*, 444 U.S. 890); Commonwealth v. Powell, 459 Mass. 572, 578-79 (2011). The standard is the same for jury–waived and jury trials. Commonwealth v. Velasquez, 48 Mass. App. Ct. 147, 151–152 (1999). Where the sufficiency of the Commonwealth's case depends on the defendant's *not* doing a particular act, the Commonwealth must prove in its case in chief that the defendant did not do it. *See* Commonwealth v. Santos, 47 Mass. App. Ct. 639, 644 & n.6 (1999).

[109] Even reasonable prosecution inferences may be insufficient to survive the motion if "there are equally reasonable but inconsistent inferences available on the same facts." Commonwealth v. Caraballo, 33 Mass. App. Ct. 616, 618–19 (1992). *See also* Commonwealth v. McCauliff, 461 Mass. 635, -- (2012) (holding in prosecution for larceny by false pretense that defendant's evasive actions and misrepresentations after securing the unrepaid loan insufficient to prove false statements in seeking the loan, observing that "[c]onflicting

be considered by the judge in ruling on the motion. The allowable inferences need not be inescapable or necessary.[110] Whether inferences from the evidence are close enough for the prosecution's case to survive the motion is determined by common sense and experience, not by rules of law.[111] But the prosecution may not pile inference on inference and survive the motion.[112] Evidence of consciousness of guilt alone is not enough to allow the case to be submitted to the jury,[113] nor is evidence of an uncorroborated confession.[114]

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inferences of equal likelihood do not provide proof beyond a reasonable doubt"); Commonwealth v. Rodriguez, 456 Mass. 578, 582 (2010) (vacating conviction because evidence was insufficient to conclude beyond a reasonable doubt that defendant had distributed crack cocaine as charged, noting that there must be more than "some record evidence, however slight, to support each essential element"); Commonwealth v. Lane, 27 Mass. App. Ct. 527, 527-28 (1989).

[110] Commonwealth v. Feyenord, 445 Mass. 72, 84 (2005) (quoting Commonwealth v. Medeiros, 354 Mass. 193, 197 (1968). *See* Commonwealth v. Clary, 388 Mass. 583, 588 (1983) (test is "whether the evidence received, viewed in a light most favorable to the Commonwealth, is sufficient so that the jury 'might properly draw inferences, not too remote in the ordinary course of events, or forbidden by any rule of law, and conclude upon all the established circumstances and warranted inferences that the guilt of the defendant was proved beyond a reasonable doubt.' ") (quoted by *Feyenord*, 445 Mass. at 582); Commonwealth v. Walker, 68 Mass. App. Ct. 194, 198 (2007) (reinstating jury's guilty verdict that trial court had reduced post-trial to a lesser charge, noting that "[t]he inferences cannot be too remote but 'allowable inferences need not be necessary or inescapable.' " quoting Commonwealth v. Walker, 401 Mass. 338, 340 (1987)). *See also* Corson v. Commonwealth, 428 Mass. 193, 198 (1998) (motion cannot be defeated by "unreasonable" inferences).

[111] Commonwealth v. Gonzalez, 452 Mass. 142, 146 (2008); Commonwealth v. Lao, 443 Mass. 770, 779 (2005).

[112] Commonwealth v. McCauliff, 461 Mass. 635, -- (2012) (reversing larceny by false pretenses conviction because "there was little or no evidence from which to infer that the statements were false when made; the Commonwealth's repeated assertions that they were false does not make them so"); Commonwealth v. Swafford, 441 Mass. 329, 342-43 (2010) (reversing first-degree murder and assault with intent to murder convictions on sufficiency grounds); Commonwealth v. Armand, 411 Mass. 167, 170 (1991); Commonwealth v. Montalvo, 76 Mass. App. Ct. 319, 329 (2010) (reversing various narcotics convictions on sufficiency grounds). *But see* Commonwealth v. Dostie, 425 Mass. 372, 376 (1997) (jury may make inference based on another inference, so long as inferences are not "speculative"); Commonwealth v. Vega, 54 Mass. App. Ct. 249, 253 (2002) (upholding jury instructions to same effect).

[113] Commonwealth v. Mandile, 403 Mass. 93 (1988) (evidence of motive, means, unexplained possession of money and consciousness of guilt not enough to establish guilt of the defendant). Commonwealth v. Toney, 385 Mass. 575 (1982); Commonwealth v. Mandile, 403 Mass. 93, 98 (1988) (reversing armed-robbery conviction on sufficiency grounds).

[114] Commonwealth v. Landenburg, 41 Mass. App. Ct. 23 (1996) (reversing conviction) (citing Commonwealth v. Costello, 411 Mass. 371, 374 (1991) (uncorroborated confession insufficient unless there is "some evidence, besides the confession, . . . that the crime was real and not imaginary"), quoting Commonwealth v. Forde, 392 Mass. 453, 458 (1984) (reversing conviction)). *Compare* Commonwealth v. Manning, 41 Mass. App. Ct. 18 (1996) (sufficient corroborative evidence, in addition to out-of-court admission, to raise inference of OUI). *See generally supra* § 19.3E.

A motion for a required finding of not guilty can be allowed in whole or in part.[115] The judge may decide that the prosecution's evidence does not support every count or only supports a possible finding of guilt on a lesser offense. If part of the motion is allowed, the judge instructs the jury on the lesser offense or on the remaining charges. The judge should also instruct the jury to draw no inference from the fact that some indictments or charges have been withdrawn.[116] If the Commonwealth is putting separate theories of liability before the jury, e.g., the defendant's guilt both as the "principal" and as a "joint venturer," defense counsel in argument on the motion for required finding must specifically assert the insufficiency of the evidence as to each such theory.[117]

Obviously, a "required finding" or "directed verdict" cannot be ordered in favor of the Commonwealth.[118]

§ 34.6B. TIMING

A motion for a required finding is made outside of the jury's hearing.[119] It may be made when the prosecution rests, after the defense rests, and after a jury has been discharged.[120]

That said, defense counsel should always move for a required finding after the prosecution has rested. Under Rule 25, the judge must rule on the motion before the defense presents its case.[121] If the motion is allowed, even erroneously, double jeopardy principles preclude appeal; entry of the required finding constitutes an acquittal as to the offenses to which it applies.[122] Moreover, if other counts (or a lesser included offense) survive the motion for a required finding, double jeopardy similarly bars reconsideration of the motion once the defense presents evidence concerning the remaining counts.[123] If the motion is denied and there is a conviction, the only evidence that will be considered on appeal in reviewing the denial of the motion is the evidence that preceded the making of the motion.[124] When the defense rests, the motion

[115] Commonwealth v. Yelle, 19 Mass. App. Ct. 465, 475 (1985); Commonwealth v. Keough, 385 Mass. 314 (1982) (judge can reduce to lesser included even if evidence exists of greater offense); Commonwealth v. Pasciuti, 12 Mass. App. Ct. 833, 840 n.7 (1981); Commonwealth v. Novicki, 324 Mass. 461, 465-66 (1949).

[116] Commonwealth v. Minkin, 14 Mass. App. Ct. 911. 914 (1982) (noting with approval trial judge's instruction to jury that it should draw no inference from the removal of an indictment from its consideration, where the judge had entered a required finding of not guilty on that indictment).

[117] Commonwealth v. Berry, 431 Mass. 326, 331–332 (2000).

[118] *See infra* § 36.3D.

[119] Commonwealth v. Stroud, 375 Mass. 265, 271–72 (1978).

[120] Mass. R. Crim. P. 25.

[121] Mass. R. Crim. P. 25(a), as amended, 420 Mass. 1502 (1995); Commonwealth v. Robinson, 48 Mass. App. Ct. 329, 330 n. 2 (1999); Commonwealth v. Smithson, 41 Mass. App. Ct. 545, 547-49 (1996) ("in light of the explicit and mandatory language of [Rule 25(a)]," judge erred in reserving judgment on sufficiency of evidence to prove public way, and, because evidence was insufficient to sustain denial of defendant's motion, this was reversible error).

[122] *See* Smith v. Massachusetts, 543 U.S. 462, 467-68 (2005).

[123] Smith v. Massachusetts, 543 U.S. 462, 473 (2005).

[124] Commonwealth v. Roderick, 429 Mass. 271, 276 (1999); Commonwealth v. Auclair, 444 Mass. 348, 364 n. 10 (2005); Commonwealth v. Santos, 47 Mass. App. Ct. 639,

for a required finding should be renewed. The renewal is essential so that a reviewing court can consider the totality of the evidence in evaluating the denial of the motion.[125] The motion requires the judge to evaluate whether the strength of the prosecution's case has deteriorated because of the evidence presented by the defense.[126]

Finally, if defendant is convicted, Rule 25 provides for two separate bases by which the defense can seek reduction or vacation of the conviction. First, defense may renew a previously denied motion for a required finding of not guilty within five days of the jury's discharge, affording the trial judge a final opportunity to reconsider whether the case should have been submitted to the jury.[127] Alternatively, Rule 25 provides for a motion to set aside the verdict and order a new trial, to order entry of a not-guilty finding, or to enter a finding of guilt on a lesser-included offense when, in view of all of the evidence, a new trial, an acquittal or a lesser conviction is more consistent with the interests of justice.[128] In exercising this limited discretion, the judge "should be guided by the same considerations that have guided [the Supreme Judicial Court] in the exercise of its powers and duties under (G.L. c. 278,) s 33E to reduce a

644 n.6 (1999); Commonwealth v. Vaughn, 23 Mass. App. Ct. 40, 44-45 (1986). By contrast, if no motion for required finding is made, the appellate court will consider all the evidence, including evidence introduced by the defense, in determining whether it was sufficient to support a verdict of guilty. Commonwealth v. Crimmins, 46 Mass. App. Ct. 489, 492 n.5 (1999).

[125] Commonwealth v. Blow, 370 Mass. 401, 407 n.4 (1976); Commonwealth v. Aguiar, 370 Mass. 490, 498 (1976); Commonwealth v. Morris M., 70 Mass. App. Ct., 688, 691 n.3 (because no renewal for motion after defense presented, sufficiency analysis limited to the evidence at close of Commonwealth's case).

[126] Commonwealth v. Vaughn, 23 Mass. App. Ct. 40, 45 n.4 (1986). For the purpose of ruling on a renewed motion for a required finding, "deterioration" does not mean that the defense case has created conflicts in the testimony, but that "evidence for the Commonwealth necessary to warrant submission of the case to the jury [has been] shown to be incredible or conclusively incorrect." Commonwealth v. Merry, 453 Mass. 653, 663-64 (2009) *citing* Commonwealth v. O'Loughlin, 446 Mass. 188, 203 (2006) *quoting* Kater v. Commonwealth, 421 Mass. 17, 20 (1995); Commonwealth v. Patton, 458 Mass 119, 131 (2010) (holding same approach applies in assessing sufficiency of evidence in probation revocation); Commonwealth v. McGahee, 393 Mass. 743, 750 (1985). *See* Commonwealth v. Torres, 24 Mass. App. Ct. 317, 324 (1987) (holding that in deciding a post-verdict motion for acquittal, the Court applies the *Latimore* standard and does not weigh the credibility of the testimony). However, the Court must inherently consider the credibility of the evidence to determine that it could convince a rational trier of fact. *See* § 34.6C.

[127] Mass. R, Crim. P. 25 (b)(2), as amended , 420 Mass. 1502 (1995). The judge is to apply the *Latimore* standard in considering the sufficiency of the evidence to support the verdict. However, because an appellate reversal such a post-verdict entry of a required finding would not require further proceedings but only reinstatement of the verdict, the Commonwealth may appeal a decision of the judge to vacate or reduce that verdict on sufficiency grounds without running afoul of double jeopardy protections. *See* Smith v. Massachusetts, 543 U.S. 462, 467 (2005).

[128] Commonwealth v. Woodward, 427 Mass. 659, 666–67 (1998). The court may reduce a verdict to "ameliorate injustice caused by the Commonwealth, defense counsel, or . . . the interaction of several causes." Woodward, *supra,* 427 Mass. at 666–67.

verdict"[129] and may consider the credibility of the evidence, including the defendant's testimony.[130] *See generally* the more detailed discussion *infra* at § 44.2.

It is ineffective assistance if appellate counsel fails in an appropriate case to argue wrongful denial of a motion for required finding of not guilty.[131]

§ 34.6C. PARTICULAR CIRCUMSTANCES SUPPORTING THE MOTION

1. Documentary Evidence Supporting Innocence

Reviewing courts have shown willingness to allow motions for a required finding of not guilty in cases in which documentary evidence supports the defendant's innocence.

In *Commonwealth v. Vaughn,*[132] the defendant was charged with armed robbery and held in lieu of bail. While he was in custody, the same store was robbed by the same number of men and in the same manner as the first robbery. The robberies were filmed by a security camera.

The Appeals Court reversed the conviction, holding that the motion for a required finding of not guilty should have been allowed. The Court found that the case required an exception to the rule of letting the jury weigh the credibility of identification evidence.[133] Because of the film, the Appeals Court found that it was in as good a position as was the jury to weigh the evidence.

In *Commonwealth v. Woods,*[134] the defendant was charged with rape after being identified through photographs. At trial, the defense introduced documents establishing that on the day of the incident, the defendant was incarcerated at the Deer Island House of Correction. In reviewing the motion for a new trial, the court stated that strict review would be applied to the denial of a motion for a required finding when an alibi is supported by documentary evidence.[135]

Vaughn and *Woods* suggest that counsel should strongly press a motion for a required finding when documentary evidence supports the defendant's innocence.

2. Circumstantial Evidence Consistent with Another's Guilt

If the prosecution's case, viewed in its most favorable light, is consistent with both the theory that the defendant may be guilty and the theory that someone other than

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[129] Commonwealth v. Keogh, 385 Mass. 314, 319 (1982).

[130] Commonwealth v. Woodward, 427 Mass. 659, 669 (1998). As noted, the trial judge should weigh the same factors which are appropriately considered on motions to reduce verdicts under G.L. c. 278, § 33E.

[131] *See* Commonwealth v. Cormier, 41 Mass. App. Ct. 76, 77 (1996) ("if the evidence . . . at trial was insufficient to sustain the conviction, [appellate] counsel's failure to argue this issue on appeal necessarily amounted to ineffective assistance") (quoting Commonwealth v. Cardenuto, 406 Mass. 450, 454 (1990)).

[132] 23 Mass. App. Ct. 40, 42-3 (1986).

[133] Commonwealth v. Vaughn, 23 Mass. App. Ct. 40, 43 (1986).

[134] 382 Mass. 1, 3-4(1980).

[135] Commonwealth v. Woods, 382 Mass. 1, 5-7 (1980). *But see* Commonwealth v. Maia, 429 Mass. 585, 588–589 (1999) (records which are not uncontroverted proof of defendant's alibi do not require allowance of motion for required finding at close of all the evidence).

the defendant may have committed the crime, then a motion for a required finding of not guilty should be granted.[136] Similarly, if fingerprints are the sole proof of guilt, a required finding should be granted unless other evidence excludes the possibility that the defendant left the prints at some other time.[137]

3. Uncontroverted Evidence

If the defense presents evidence that has not been countered by the prosecution, the judge may allow a motion for a required finding of not guilty.[138]

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[136] Commonwealth v. Cannon, 449 Mass. 462, 467-68 (2007) (holding evidence insufficient to prove first-degree murder on a theory of principal liability based on defendant's role as the shooter in an attempted armed robbery where, viewing the evidence in the light most favorable to the prosecution, it was just as likely that another man was the shooter); Commonwealth v. Fancy, 349 Mass. 196, 200 (1965); Commonwealth v. Salemme, 395 Mass. 594 (1985) (overturning a murder conviction). In *Salemme*, the prosecution proceeded on the theory that the defendant had shot the victim. In its best light, the prosecution's evidence established that the victim, the defendant, and another man had been together 10 minutes before the shooting. The SJC stated that although it was not necessary for the prosecution to show that no one else could have shot the person, the motion for a required finding should have been allowed because the finding of guilt could be based only on conjecture or surmise that the defendant rather than the other man had been the shooter.

See also Commonwealth v. Reid, 29 Mass. App. Ct. 537, 539 (1990) (conviction of possession with intent to distribute reduced to simple possession; evidence showed defendant's participation with two others in exchange of drugs for money, but equally as likely that he was the buyer as the seller); Commonwealth v. Lane, 27 Mass. App. Ct. 527, 527-28 (1989) (rape conviction reversed because defendant was held in custody awaiting trial when the victim saw a second man on a subway and identified him as the rapist, so evidence "proved only that one of two individuals committed the crime"); Berry v. Commonwealth, 393 Mass. 793, 796 (1985) (defendant and the child's mother had equal opportunity and an equal likelihood of killing their child, so mother was equally susceptible to the inferences that could be drawn from the evidence). *Compare* Commonwealth v. Anderson, 48 Mass. App. Ct. 508, 511–512 (2000) (when other possible perpetrator testifies as Commonwealth witness at trial and denies guilt, evidence against defendant is sufficient to withstand motion for required finding); Commonwealth v. Latney, 44 Mass. App. Ct. 423, 426 (1998) (Commonwealth not obliged to negate possibility that someone other than defendant might have committed the crime; here "there was no evidentiary gap, merely a question of the weight of a continuous chain of circumstantial evidence [including possession of recently stolen property] strongly connecting the defendant directly to the burglary").

[137] Commonwealth v. Morris, 422 Mass. 254, 257-58 (1996) (where evidence merely created reasonable inference that defendant's thumbprint *might* have been placed on mask used in crime, shortly before or during the crime, court should have granted motion for required finding of not guilty). *Compare* Commonwealth v. Keaton, 36 Mass. App. Ct. 81, 85 (1994) (sufficient corroborative evidence to sustain conviction beyond mere presence of defendant's fingerprint at the scene); Commonwealth v. Baptista, 32 Mass. App. Ct. 910, 911 (1992); Commonwealth v. Wei H. Ye, 52 Mass. App. Ct. 390, 393 (2001) (holding evidence sufficient where fingerprints were "very fresh", the cabinet from the inside of which the fingerprints were lifted was rarely used but was open after the robbery, the defendant had never visited the home prior to the robbery, along with other circumstantial evidence was enough to exclude the possibility that the fingerprints were left at time other than the crime).

[138] In Commonwealth v. Bouvier, 316 Mass. 489, 496 (1944), the defendant testified that she had not known that the gun was loaded and that it had accidentally discharged, shooting her husband. No evidence was introduced to contradict the defendant's testimony. Therefore, the motion for required finding should have been allowed. *But see* Commonwealth v. McInerney,

4. Joint Venture Versus Mere Presence, Association, or Consciousness of Guilt

If the prosecution proceeds on a theory of joint venture, it must prove each element of "joint venture" beyond a reasonable doubt.[139]

Defense counsel should carefully evaluate the evidence to be sure that it establishes more than presence at the scene of the incident,[140] association with principals,[141] or consciousness of guilt.[142] The defendant must be proved to have shared

373 Mass. 136, 145–148 (1977) ("conclusive effect" cannot be given to "defendant's self-serving attempt at justification or palliation of his crime"), *overruling* Commonwealth v. Johnson, 3 Mass. App. Ct. 226, 233 (1975).

[139] Commonwealth v. Duong, 52 Mass. App. Ct. 861, 866 (2001).

[140] Commonwealth v. Amparo, 43 Mass. App. Ct. 922, 923 (1997) (defendant's possession of beeper while present in, and attempting to flee from, apartment in which drugs hidden inside of vacuum cleaner insufficient to prove constructive possession) (citing Commonwealth v. Cruz, 34 Mass. App. Ct. 619, 623 (1993) (where cocaine found in front bedroom of apartment in which defendant lived but no evidence tied defendant to that bedroom, evidence that defendant knew of the presence of drugs and was present in the vicinity held insufficient to prove defendant's joint possession of drugs)); Commonwealth v. Cormier, 41 Mass. App. Ct. 76, 79-80 (1996) (evidence insufficient to prove constructive possession where defendant was passenger in back seat of car, next to drugs, not readily visible, which were located inside sneakers; defendant was wearing shoes, and driver rather than defendant attempted to flee with sneakers); Commonwealth v. Meehan, 33 Mass. App. Ct. 262, 265-66 (1992) (defendant's presence at scene of drug trafficking, even combined with his association with principal, his consciousness of guilt, and his evident intent to distribute narcotics himself was insufficient to show required nexus with principal). *But see* Commonwealth v. Gonzalez, 452 Mass. 142, 147-48 (2008) (holding evidence that three defendants' presence in a room in which there were large quantities of narcotics and cash, much of which was inferably in plain view before the police arrived, coupled with the presence of barricades and sparse furnishings consistent with use of the apartment as a place to sell drugs, went beyond "mere presence" and was sufficient to prove the defendants' constructive possession of the illicit drugs). In *Gonzalez*, the SJC noted that *Amparo*, *supra*, is arguably inconsistent with its holding in *Gonzalez*, but stated that to the extent this was so, it declined to follow *Amparo*. *Compare also* Commonwealth v. Gilbert, 423 Mass. 863, 868-70 (1996) (although "[m]ere opportunity to commit the crime or presence at the scene is insufficient without other evidence," sufficient evidence to support conviction where defendant had motive and opportunity to injure victim, was only other person in apartment at time of victim's death, and gave inconsistent statements to police which showed consciousness of guilt) (quoting Commonwealth v. Cordle, 404 Mass. 733, 742 (1989)).

[141] Commonwealth v. Avery, 44 Mass. App. Ct. 781, 783 (1998) (defendant's presence in restroom of bar, failure to take affirmative steps to prevent companion from assaulting and robbing victim, and flight with perpetrator insufficient to convict of joint venture; "Our cases do not allow for guilt by association."); Commonwealth v. Meehan, 33 Mass. App. Ct. 262, 265 (1992) (citing Commonwealth v. Booker, 31 Mass. App. Ct. 435, 437 (1991)); Commonwealth v. McCoy, 59 Mass. App. Ct. 284, 290 n.6 (2003).

[142] Commonwealth v. Ahart, 37 Mass. App. Ct. 565, 571 (1994) (insufficient evidence of joint venture by defendant, first seen 45 minutes after crime driving "getaway car" carrying principal as passenger, even though defendant resisted police attempts to stop car); *Compare* Commonwealth v. Mattos, 49 Mass. App. Ct. 218, 223 (2000) (sufficient evidence of joint venture when defendant driving "getaway" car carrying principal as passenger 13 minutes after robbery). *See also* Commonwealth v. Ward W., 47 Mass. App. Ct. 208, 210–212 (1999);

the same mental state as the principal actor. If the crime was a spontaneous act of violence, counsel should argue that the evidence has not proved that the defendant shared the required mental state.[143] If use of a weapon is an element of the crime, the prosecution must prove that the defendant had knowledge that the other actor possessed and intended to use the weapon.[144]

§ 34.7 MOTION TO REOPEN THE EVIDENCE

After the parties have rested, counsel for either side may request permission to reopen his or her case. The decision is within the judge's discretion.[145] The evidence to be offered in reopening must be of such importance to a just result that the need to resume the trial overrides the enforcement of the usual trial procedures,[146] and it is thus important in moving to reopen to make a record concerning what the evidence would

Commonwealth v. Meehan, 33 Mass. App. Ct. 262, 265 (1992); Commonwealth v. Fancy, 349 Mass. 196, 201 (1965).

[143] Commonwealth v. Spina, 1 Mass. App. Ct. 805, 806 (1973). *Cf*. Commonwealth v. Lopez, 80 Mass. App. Ct. 390, 396-97 (2011) (dismissing indictment for first-degree felony murder, based on defendant's alleged participation as a joint venturer in unarmed robbery where the grand jury heard no evidence that, prior to robbery of deliveryman, defendant – who was present and who later shared in the proceeds – knew that the co-defendant principal planned either to rob or to punch the victim, much less in a life-threatening manner).

[144] Commonwealth v. Fickett, 403 Mass. 194, 196-97 (1988); Commonwealth v. Knight, 16 Mass. App. Ct. 622, 626 (1983), *rev'd on other grounds*, 392 Mass. 192 (1984); Commonwealth v. Washington, 15 Mass. App. Ct. 378, 382 (1983); Newman v. Commonwealth, 437 Mass. 599, 604 (2002) (citing *Fickett* but holding evidence sufficient for the jury to find knowledge of the weapon).

[145] Commonwealth v. Hurley, 455 Mass. 53, 69 (2009) (trial judge did not abuse her discretion in permitting the Commonwealth to reopen its case after it had rested, recalling police officer to formally identify defendant, where "defendant had yet to offer evidence in his defense; [defendant] suffered no unfair prejudice; and [the officer's] failure to identify the defendant during his earlier testimony arose from "mere inadvertence" by the Commonwealth."). While as noted the SJC in *Hurley* upheld the trial court's discretion to allow the Commonwealth to re-open after it had rested but before the defense presented evidence, the SJC went on to observe that its earlier decision in Commonwealth v. Wood, 302 Mass. 265 (1939), which had permitted discretionary re-opening of the Commonwealth's case at any stage in trial, had been narrowed by Rule 25's requirement that the trial judge rule on a defense motion for a required finding after the Commonwealth rests. *Id*., at 69 n. 15. *See also* Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 777-779 (2001) (judge abused discretion and committed prejudicial error by allowing Commonwealth to reopen its case in order to supply proof of necessary element of crime); Commonwealth v. Guidry, 22 Mass. App. Ct. 907, 908 (1986); Commonwealth v. Shine, 398 Mass. 641, 656 (1986); Commonwealth v. Watts, 22 Mass. App. Ct. 952, 952 (1986) (reopening may be permitted in response to a required finding motion); Commonwealth v. Small, 10 Mass. App. Ct. 606, 612 (1980) (not error to deny defendant reopening after jury deliberations began). A distinction must be made between moving to reopen the case and moving to offer rebuttal witnesses. Even if the Commonwealth is foreclosed from reopening its case, *see, e.g.*, *Hurley*, 455 Mass. at 69 n. 15, it, like any party, has a right to rebut new facts which are raised by the opponent's case. *See* Commonwealth v. Wood, 302 Mass. 265, 267 (1939) (partially superseded other grounds).

[146] Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 778-779 (2001) (error to allow Commonwealth to reopen its case in order to avoid grant of defendant's motion for required finding of not guilty); Blaikie v. Callahan, 691 F.2d 64, 68 (1st Cir. 1982)).

be if the motion is allowed.[147] A judge may consider whether mere inadvertence has caused the party to fail to introduce a piece of evidence or whether some compelling circumstance justifies reopening the evidence.[148] The judge must also consider whether prejudice will result from the reopening.[149] Occasionally, the jury might submit questions to the judge that ask for additional pieces of evidence or for a rereading of a witness's testimony,[150] and particularly when the request is to review a transcript of certain testimony the trial judge has broad discretion to grant or deny the request.[151] These subjects are addressed respectively *infra* at § 36.3C and 36.4B.

§ 34.8 MOTION TO ALLOW THE DEFENDANT TO MAKE AN UNSWORN STATEMENT

A defendant may move to make an unsworn statement to the judge or the jury deciding the case. It is in the discretion of the judge to permit or deny such a request.[152] A defendant's unsworn statement is not evidence in the case.[153]

The practice of permitting a criminal defendant to make an unsworn statement at trial developed as a response to the legal doctrine that held the defendant to be incompetent to testify in his or her own behalf. This incompetence was an outgrowth of the longstanding common law rule that all parties in a litigation were incompetent to testify, mostly out of a concern that such testimony was unreliable. Although this rule gradually gave way in civil cases, as applied to criminal defendants it lasted well into the 19th century. The concern at this point had shifted from reliability to protecting the defendant's right to silence, the fear being that permitting a criminal defendant to testify would place inordinate pressure on an accused to do so. Nevertheless, by the early

[147] *See* Commonwealth v. Moore, 52 Mass. App. Ct. 120, 136 (2001) (upholding trial court's denial of defendant's motion to re-open in order to testify, where defendant had exercised his right not to testify as part of his case, the parties had rested but had yet to argue, and defendant gave no indication concerning what his testimony would be).

[148] Commonwealth v. Hurley, 453 Mass. 53, 68 (2009).

[149] Commonwealth v. Hurley, 453 Mass. 53, 68 (2009); Commonwealth v. Shine, 398 Mass. 641, 656 (1986); Commonwealth v. Cote, 15 Mass. App. Ct. 229, 241 (1983); Commonwealth v. Ierardi, 17 Mass. App. Ct. 297, 302-03 (1983) (permissible for prosecution to reopen case to introduce a stipulation entered into between counsel before the trial began). In Commonwealth v. Bennett, 8 Mass. App. Ct. 935, 935 (1979), a summoned witness could not attend the first day of the trial. The defense called its other witnesses and rested. The next day, counsel moved to reopen to introduce the testimony of the then-present witness. The denial of the request was upheld. If a witness has not arrived, counsel should ask for a continuance to secure the witness's attendance.

[150] *See* Commonwealth v. Mandeville, 386 Mass. 393, 405 (1982); Commonwealth v. Small, 10 Mass. App. Ct. 606, 612 (1980).

[151] *See* Commonwealth v. Richotte, 59 Mass. App. Ct. 524, 530 (2003) (upholding trial court's denial of jury request to review transcripts of testimony).

[152] Commonwealth v. Rodriquez, 364 Mass. 87, 96 (1973); Commonwealth v. O'Brien, 360 Mass. 42, 48-50 (1971).

[153] Commonwealth v. O'Brien, 360 Mass. 42, 49 (1971).

twentieth century, virtually all American jurisdictions permitted criminal defendants to testify at their respective trials.[154]

Now that criminal defendants have a right to testify, the purpose of allowing the defendant to make an unsworn statement would seem to have evaporated. In certain cases, however, the defense may seek to have the defendant address the jury without being sworn. Counsel should carefully consider the strategic consequences of making such a statement. The statement is made after the close of the evidence. Although the defendant's statement may be presented through questioning by counsel, the differences between the prior presentation of sworn testimony subject to cross-examination and the defendant's unsworn statement may hurt the jury's impression of the defendant. Moreover, the judge may instruct the jury that the defendant's statement is not testimony and is not evidence in the case.

However, the fact that the defendant speaks to the jury has the potential to impress the jurors in the defendant's favor especially when an admissible prior record rules out presenting the defendant as a witness.

§ 34.9 MOTION FOR A MISTRIAL

§ 34.9A. GENERALLY

A motion for a mistrial asserts that something has happened that cannot be remedied and that the continuation of the trial would be unjust. A motion for a mistrial may be based upon the mistaken admission of relevant but highly prejudicial evidence; misconduct by the prosecution, defense counsel, or other person in the courtroom; the sudden unavailability of a witness; or a problem with the continuation of the trial, such as the unavailability of a juror. The decision whether to declare a mistrial lies within the trial judge's discretion.[155]

§ 34.9B. PROCEDURE

A mistrial can be declared at any time in the trial proceedings. The judge may declare a mistrial for good cause even before jeopardy has attached. The judge's discretion is more limited after jeopardy has attached because, once jeopardy attaches, the bar against double jeopardy[156] gives the defendant the right to have the trial proceed to a conclusion. At that point, a mistrial may be declared over the defendant's objection only if the judge determines that there is a manifest necessity for the mistrial.[157]

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[154] *See* Ferguson v. Georgia, 365 U.S. 570 (1961), for a discussion of the historical underpinnings of the practice of permitting a defendant in a criminal case to make an unsworn statement.

[155] Commonwealth v. Martino, 412 Mass. 267, 282 (1992); Commonwealth v. Martinez, 458 Mass. 684, 701 (2011).

[156] Commonwealth v. Sheffield, 16 Mass. App. Ct. 342, 343 (1983). This section does not discuss whether the mistrial prevents retrial of the defendant. The application of the bar against double jeopardy to cases that end in a mistrial is discussed *supra* at § 21.3.

[157] Collins v. Commonwealth, 412 Mass. 349, 352 (1992) (the level of necessity must be high, and the record must show that the judge gave “reasoned consideration” to less severe alternatives). *See* Commonwealth v. Nicoll, 452 Mass. 816, 818 (2008) (holding that a district court’s declaring a mistrial when a juror was disqualified after jeopardy attached, reducing the jury to five, was not manifestly necessary because the judge failed to explore possible

If some prejudicial event occurs that necessitates a mistrial, counsel should move for a mistrial as soon as he or she becomes aware of the grounds for the motion.[158] Counsel should state the reason for the motion and explain why nothing short of a mistrial will cure the prejudice resulting from what has occurred. If the request for a mistrial is denied, counsel may ask that the evidence be stricken, for a curative instruction, or for other appropriate relief.[159]

On the other hand, counsel opposing a motion for a mistrial should suggest alternate remedies for the perceived problem. The judge must allow counsel to be heard before declaring a mistrial. Counsel may suggest that the error can be cured through severance, curative instructions, or a continuance. A voir dire of the jury might be conducted to determine the extent of the perceived prejudice. Counsel should establish on the record that there is not a manifest necessity for the judge to declare a mistrial.[160]

§ 34.9C. EXAMPLES OF SUBJECT MATTER

Events that may prompt a mistrial motion include, inter alia:

1. Introduction of a topic or evidence that is so unfairly prejudicial that an objection and motion to strike will not cure the harm;[161] a motion is particularly appropriate if the evidence was excluded by a motion in limine;[162]

2. Denial by the prosecution of exculpatory evidence, or violation of discovery orders;[163]

3. Improper opening or closing statements by the prosecutor[164] or by the defense;[165]

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alternatives); Commonwealth v. Smith, 404 Mass. 1, 4-5 (1989); Oregon v. Kennedy, 456 U.S. 667, 672 (1982).

[158] Commonwealth v. Bailey, 12 Mass. App. Ct. 104, 106 (1981); Commonwealth v. DiPietro, 373 Mass. 369, 387 (1977).

[159] *See* Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 9-10 n.4 (2000).

[160] *See* Commonwealth v. Denson, 16 Mass. App. Ct. 678, 680-81 (1983); Barton v. Commonwealth, 385 Mass. 517, 519 (1982); United States v. Jorn, 400 U.S. 470, 485 (1971);

[161] *Cf.* Commonwealth v. Martino, 412 Mass. 267, 281–82 (1992) (striking of unanticipated testimony that homicide victim told witness that defendant had threatened to kill victim, and curative instruction, made mistrial unnecessary); Commonwealth v. McDermott, 448 Mass. 750, 777-78 (2007) (single reference to "September 11th attack" in a multiple-homicide case did not require mistrial).

[162] *See supra* § 34.2, on motions in limine; Commonwealth v. Lavin, 42 Mass. App. Ct. 711, 714 (1997) (conviction reversed where prosecution witness testified to defendant's father's arrest, violating prosecutor's agreement to refrain from introducing that evidence; in dictum, court considers need for "per se rule" which would place burden on prosecutor "to advise witnesses, on the record, as to the permissible nature and scope of their testimony").

[163] Brady v. Maryland, 373 U.S. 83, 87 (1963) (exculpatory evidence); Commonwealth v. Lam Hue To, 391 Mass. 301, 309-10 (1984) (defendant denied exculpatory evidence concerning murder weapon); Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 438–443 (1992) (variation in prosecution witness's testimony from pretrial statements revealed exculpatory evidence of witness's inconsistency which should have been disclosed to defendant prior to trial); Commonwealth v. Green, 72 Mass. App. Ct. 903, 903-04 (2008) (prosecution's failure to disclose mandatorily discoverable, exculpatory evidence until after defense rested required a mistrial) (rescript). *See also* ch. 16 (discovery).

[164] Commonwealth v. Hoilett, 430 Mass. 369, 372 (1999) (improper opening statement); Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 10 (2000) (same); Commonwealth

4. The judge's unavailability to continue the case; however, if the unavailability is only temporary, it may not be appropriate to allow the motion;[166]

5. Juror unavailability or bias. If a juror is absent and a mistrial is not desired, counsel might suggest that attempts be made to contact the juror or that the case be continued to determine if the juror will be able to return to court. Alternatively, counsel could suggest that the case proceed and the juror be excused.[167] A juror might also be excused if it is discovered that she is biased. Counsel should request a voir dire of the remaining jurors to determine whether the entire panel has been tainted by the biased juror;[168]

6. An outburst by a defendant's family member or by another spectator at the trial;[169]

7. The placing of an advertisement concerning the trial in the local newspaper;[170]

8. If the jury is deadlocked, the judge will declare a mistrial.[171]

§ 34.10 MOTION FOR RULINGS OF LAW UNDER RULE 26

When the defendant waives the right to a jury trial, the judge will decide the factual issues and will determine the law to be applied to the case. Because there are no jury instructions, the legal standards applied by the judge will not be on the record. In some cases, it is beneficial to the defense to have the judge's legal reasoning specifically enumerated. A motion for rulings of law accomplishes this end.[172]

A request for a ruling of law is made pursuant to Mass. R. Crim. P. 26. A request must be in writing and should state what counsel believes to be the correct rule

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v. Morgan, 449 Mass. 343, 360-62 (2007) (same); Commonwealth v. Clarke, 48 Mass. App. Ct. 482, 488 n.6 (2000) (improper closing statement). *See infra* § 35.4 (remedies for improper closing) and *supra* § 31.3 (remedies for improper opening).

[165] Commonwealth v. Murray, 22 Mass. App. Ct. 984, 985 (1986); Lovett v. Commonwealth, 393 Mass. 444, 447-48 (1984).

[166] Commonwealth v. Phillips, 12 Mass. App. Ct. 486, 487-88 (1981).

[167] Commonwealth v. Steward, 396 Mass. 76, 79-80 (1985). If excusing the juror results in a jury of less than the prescribed number and defense counsel does not want a mistrial, counsel should consider discussing with the client the possibility of waiving his or her right to a full jury and going forward with a jury of 11 (superior court) or five (district court) as the case may be. *See* Commonwealth v. Nicoll, 452 Mass. 816, 820 (2008) (holding that both the Sixth Amendment and Mass. R. Crim. P. 19(b) permit a defendant to waive the right to a full jury and to go forward to verdict with a reduced jury). *See also* discussion concerning loss of jurors *infra* at § 36.4A.

[168] Commonwealth v. McCormick, 130 Mass. 61 (1881). *See* discussion regarding extraneous influences on the jury *infra* at § 36.1.

[169] Commonwealth v. Denson, 16 Mass. App. Ct. 678, 681-82 (1983).

[170] Commonwealth v. Reinstein, 381 Mass. 555, 560-61 (1980).

[171] *See* discussion *infra* at § 36.4C.

[172] Commonwealth v. Kingston, 46 Mass. App. Ct. 444, 447–448 (1999); Caleb Pierce v. Commonwealth, 354 Mass. 306, 311-12 (1968).

of law.[173] It should be made before closing arguments, although the judge has the discretion to allow later requests.[174]

Strategically, the request for a ruling can be used as a tactic to educate and persuade the judge. It is also a vehicle for preserving an issue for appeal. When the judge's ruling leaves uncertain how the judge instructed herself on a critical issue, reversal is required.[175] A motion for a ruling can be combined with other motions, such as a motion to dismiss or a motion for a required finding of not guilty, to protect the defendant's appellate rights.[176]

[173] Commonwealth v. Kingston, 46 Mass. App. Ct. 444, 448 & n.9 (1999); Commonwealth v. Lammi, 310 Mass. 159 (1941).

[174] Commonwealth v. Zaleski, 3 Mass. App. Ct. 538, 541-43 (1975).

[175] Commonwealth v. Kingston, 46 Mass. App. Ct. 444, 451 (1999).

[176] Commonwealth v. Baker, 17 Mass. App. Ct. 40, 40-41 (1983). In *Baker* the defendant was charged with deriving support from the earnings of a prostitute who was a minor. The defense contended that the prosecution had to prove beyond a reasonable doubt that the defendant knew that the prostitute was a minor. The issue was raised by a motion for a required finding of not guilty at the end of the prosecution's case and by a motion for a ruling of law.