CHAPTER 28

JUNE, 2011

# *Defendant's Presence & Appearance at Trial / Security Restraints*

*Written by Eric Blumenson and David Duncan (1st edition)*
*and Nancy T. Bennett (this revision)*

*Table of Contents:*



*Cross References:*
Confrontation of witnesses, §§ 48.3 (child witnesses) and 32.6A (generally)
Contempt, ch. 46
Competency to stand trial, ch. 9
Defaults, §§ 9.9 (generally) and 3.11F (failure to appear for de novo appeal)

## § 28.1 RIGHT TO BE PRESENT

### § 28.1A. GENERALLY

Under Mass. R. Crim. P. 18(a), the right of the defendant to be personally present at his trial extends to "all *critical stages* of the proceedings."[1] The right is also

[1] This right predates the adoption of the Criminal Rules and is in fact of "ancient origin." Commonwealth v. Bergstrom, 402 Mass. 534, 543 (1988); Commonwealth v. Millen, 289 Mass. 441, 452–53 (1935). These cases refer to the right as one belonging to a defendant

constitutionally required,[2] in order to effectuate the rights to confrontation of witnesses[3] and to a fair trial.[4] "Critical stages" has been defined to include arraignment;[5] suppression hearings,[5.5] all trial proceedings[6] including jury selection[7]

charged with a felony, as provided for by repealed G.L. c. 278, § 6. The right was extended to all criminal defendants by Mass. R. Crim. P. 18(a).

[2] Kentucky v. Stincer, 482 U.S. 730 (1987); United States v. Gagnon, 470 U.S. 522 (1985); Commonwealth v. Robichaud, 358 Mass. 300 (1970); Illinois v. Allen, 397 U.S. 337 (1970); Snyder v. Massachusetts, 291 U.S. 97, 106–08 (1934) (defendant's presence is condition of due process if necessary to defend against charge).

[3] U.S. Const. amend. 6; Mass. Const. Declaration of Rights art. 12; Crawford v. Washington, 541 U.S. 36 (2004). The confrontation right also ensures that "the accused shall not be tried without the presence, in a court of law, of both himself and the witnesses testifying against him." Commonwealth v. Bergstrom, 402 Mass. 534, 542 (1988). *See also* Commonwealth v. Rios, 412 Mass. 208 (1992) (defendant had right to be present when defense counsel questioned police about secret surveillance location); § 32.6A regarding the confrontation clause.

[4] U.S. Const. amend. 14; Mass. Const. Declaration of Rights art. 12.

[5] Commonwealth v. Costello, 121 Mass. 371, 372 (1876). Presence at arraignment may be waived pursuant to the procedure detailed in Mass. R. Crim. P. 7(a)(2) and 7(c)(2). *See also* Rule 12(a)(1) (presence required for guilty or *nolo* plea).

[5.5] Robinson v. Commonwealth**,** 445 Mass. 280, 285 (2005).

[6] Commonwealth v. Bergstrom, 402 Mass. 534 (1988); Commonwealth v. Robichaud, 358 Mass. 300 (1970). *But see* Commonwealth v. Martin, 424 Mass. 301, 306 (1997) (reversing Appeals Court and affirming conviction because absence of defendant does not automatically constitute reversible error and defendant was held not to have been prejudiced by the particular security restraints imposed).

[7] Commonwealth v. Tropeano, 364 Mass. 566 (1974); Commonwealth v. Robichaud, 358 Mass. 300 (1970). However, the defendant does not have a right to be present for those aspects of jury selection that are not related to the particular case, such as general instructions or medical excuses. Commonwealth v. Dominico, 1 Mass. App. Ct. 693 (1974); Commonwealth v. McKay, 363 Mass. 220 (1973).

In Commonwealth v. Owens, 414 Mass. 595, 599 (1993), the defendant claimed his exclusion from sidebar questioning of prospective jurors violated the Sixth and Fourteenth Amendments to the U.S. Constitution and art. 12 of the Mass. Const. Declaration of Rights, but the S.J.C. found the error harmless under the circumstances. *See also* Commonwealth v. Skinner, 34 Mass. App. Ct. 490, 491 (1993) ("it must now be taken as established that (barring, perhaps, exceptional and demonstrable considerations of courtroom security) a defendant is entitled to be physically present at side bar during voir dire examinations of jurors who . . . [indicate] reservations about serving," but here no prejudice); Commonwealth v. Treadwell, 37 Mass. App. Ct. 968, 969 (1994) (rescript); People v. Antommarchi, No. __, slip op. (N.Y. Ct. App., 10/27/92). *See also* Commonwealth v. Ford, 35 Mass. App. Ct. 752, 759 (1994) (defendant not entitled under Mass. R. Crim. P. 18(a) to be present at process for making up of jury panels, described as "an administrative step in a randomized process" particularly where the defendant was unable to show that he was prejudiced in any way by his absence); Commonwealth v. Barnoski, 418 Mass. 523, 528–29 (1994) (no right to be present during judge's "administrative" discussions with entire jury pool about hardship of serving in a particular case in another county). In Commonwealth v. White, 37 Mass. App. Ct. 757 (1994), the pro se defendant was excluded from the courtroom during jury impanelment. The Appeals Court held that the defendant had a fundamental right to be present and to participate in jury selection and, because there was no waiver of that right and no behavior that might support a "forfeiture" of the right, the conviction was reversed.

and the delivery of verdict;[8] entry of a plea;[9] a voir dire hearing on the voluntariness of a confession;[10] a motion by the defendant for discharge of her counsel;[10.5] the decision to undergo psychiatric evaluation;[11] and sentencing.[12] Lobby conferences in the absence of the defendant may raise constitutional questions in some circumstances.[13] A probation revocation hearing may not be held in the defendant's absence, unless the defendant knowingly and voluntarily waives his right to be present.[13.5]

The right to be present does not extend to all communications with jurors,[14] but as a matter of Massachusetts law (and probably as a matter of federal law as well), the defendant seems to have the right to be present at any questioning of a juror regarding outside influence or possible discharge[15] and at any communication with the jury

[8] Commonwealth v. McCarthy, 163 Mass. 458 (1895).

[9] Mass. R. Crim. P. 12.

[10] Amado v. Commonwealth, 349 Mass. 716, 720 (1965).

[10.5] Commonwealth v. Britto, 433 Mass. 596, 599 & n.3 (2001).

[11] Commonwealth v. Trapp, 423 Mass. 356, 359 (1996) (the decision to undergo psychiatric evaluation is a critical stage of the criminal process, entitling a defendant to assistance of counsel, but the psychiatric interview itself is not a critical stage.) *See also* Commonwealth v. Baldwin, 426 Mass. 105 (1997) (S.J.C. declined to adopt a rule requiring tape recordings of psychiatric interviews of defendants).

[12] Mass. R. Crim. P. 28; Katz v. Commonwealth, 379 Mass. 305 (1979); Thompson v. United States, 495 F. 2d 1304 (1st Cir. 1974).

[13] Clearly a lobby conference cannot be used to circumvent the defendant's constitutional rights, but presumably the constitutionality of such conferences depends on their subject matter. In Commonwealth v. Fanelli, 412 Mass. 497, 500–01 (1992), the defendant argued that his exclusion from a *plea bargaining lobby conference* violated his right to be present and Mass. R. Crim. P. 18. Avoiding that issue, the S.J.C. indicated that the "better practice" is to record lobby conferences and to provide a copy of the recording to the defendant on request. *See also* Commonwealth v. Martin, 39 Mass. App. Ct. 658, 668 n.6 (1996), *rev'd*, Commonwealth v. Martin, 424 Mass. 301, 306 (1997).

[13.5] Commonwealth v. Harrison, 429 Mass. 866, 868-869 (1999).

[14] *See* United States v. Gagnon, 470 U.S. 522 (1985), where an in camera interview of one juror (who had expressed concern that a defendant had been sketching the jurors during the trial) without defendants and in the presence of one of four counsel was held not to violate due process. *See also* Commonwealth v. Owens, 414 Mass. 595, 605 (1993) (harmless error to exclude defendant from voir dire of individual jurors because counsel consulted with defendant regarding jury selection) (citing Commonwealth v. Martino, 412 Mass. 267, 286 (1992) (defendant's absence from communication between judge and jury did not constitute reversible error)); Commonwealth v. Bobilin, 25 Mass. App. Ct. 410, 415 (1988) (conference without defendant or counsel regarding proper attire for jurors presented no risk of miscarriage of justice, but "[i]t is advisable to have the defendant and counsel on hand when judge and juror appear to be colliding").

[15] Commonwealth v. Sleeper, 435 Mass. 581, 588-589 (2002) (defendant has right to be present at any inquiry into allegations involving the impartially of a juror); Commonwealth v. Angiulo, 415 Mass. 502, 530 (1993) (same) Commonwealth v. Perez, 30 Mass. App. Ct. 934 (1991) (rescript) (reversed); Commonwealth v. Bobilin, 25 Mass. App. Ct. 410 (1988); Commonwealth v. Connor, 392 Mass. 838, 843 n.1 (1984); Commonwealth v. MacDonald (No. 1), 368 Mass. 395, 398 (1975); Commonwealth v. Robichaud, 358 Mass. 300 (1970). *Robichaud* suggests that there is a fundamental right to be present at voir dire of veniremen to select jurors, but other cases have held that the defendant is not entitled to be present when a judge excuses venirepersons. Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 707 (1974); Commonwealth v. McKay, 363 Mass. 220 (1973); Commonwealth v. French, 357 Mass. 356,

during deliberations.[16] The absence of the defendant from such a colloquy, however, does not automatically constitute reversible error.[16.5]

Some phases of a prosecution have been held "so remote and so collateral that it cannot be said that the presence of the defendants bore any relation reasonably substantial to their opportunity to defend against the crime charged."[17] Thus, the defendant's presence is not required at motions for a continuance or a change of venue;[18] a motion for a new trial[19] or most posttrial proceedings;[20] or the period between trial and sentencing.[21] Presence of the defendant at a "view" is discretionary.[22] Presence at a voir dire concerning witness competency is required under the state, but not always the federal constitution.[23] In a *Franks v.* Delaware[23.5] hearing to determine

400 (1970), *vacated in part sub nom.* Limone v. Massachusetts, 408 U.S. 936 (1972). It is not clear how the *Robichaud* suggestion can be squared with these cases. *See also* Commonwealth v. Martino, 412 Mass. 267 (1992) (defendant's absence from a colloquy discharging a juror did not necessitate reversal where: defendant was fully informed of all events; defense counsel did not object to the procedures followed by judge; defendant through his attorney was given sufficient opportunity to evaluate and respond; and defendant agreed through counsel to the discharge of the juror. *Martino, supra,* 412 Mass. at 284–87); Commonwealth v. Caldwell, 45 Mass. App. Ct. 42 (1998) (even though judge dismissed juror for "good cause" without defendant being present and without determining if defendant had waived his presence, error held harmless).

[16] Commonwealth v. Mimless, 53 Mass. App. Ct. 534, 535-536, *rev.* denied, 436 Mass. 1101 (2002); Commonwealth v. Dosanjos, 52 Mass. App. Ct. 531, 534-535, *rev.* denied, 435 Mass. 1106 (2001). As a general matter of common law, not restricted to criminal cases, "no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in the presence of counsel in the cause." Lewis v. Lewis, 220 Mass. 364, 366 (1915) (quoting Sargent v. Roberts, 1 Pick. 337 (1823)).

[16.5] Commonwealth v. Baro, 73 Mass. App. Ct. 218, rev. denied 453 Mass. 1102 (2009) (permissable to answer a deliberating jury's questions in defendant's absence because defendant was not entitled to the Muckle procedure [Commonwealth v. Muckle 59 Mass. App. Ct. 631(2003)] where the proceeding was beyond the midtrial point in final deliberation); Commonwealth v. Olszewski, 416 Mass. 707, 720–27 (1993)(new trial not required where judge dismissed a juror before deliberations without presence of defendant, where requiring the service of the juror would have caused extreme hardship),

[17] Commonwealth v. Bergstrom, 402 Mass. 534, 544 (1988); Commonwealth v. Millen, 289 Mass. 441, 457 (1935).

[18] Commonwealth v. Burbank, 27 Mass. App. Ct. 97 (1989) (in this case it would have been "preferable" had defendant been present, but no right to be present at continuance conference, insofar as absence did not thwart "fair and just hearing," citing Kentucky v. Stincer, 482 U.S. 730 (1987)); Commonwealth v. Robichaud, 358 Mass. 300 (1970); Commonwealth v. Millen, 289 Mass. 441, 453 (1935).

[19] Commonwealth v. Costello, 121 Mass. 371 (1876).

[20] Commonwealth v. Dupont, 2 Mass. App. Ct. 566, 573 (1974); Commonwealth v. Medina 64 Mass. App. Ct. 708(2005)

[21] Commonwealth v. Cody, 165 Mass. 133 (1986).

[22] Commonwealth v. Curry, 368 Mass. 195 (1975); Commonwealth v. Dascalakis, 246 Mass. 12 (1923); Snyder v. Massachusetts, 291 U.S. 97 (1934) (defendant's presence at "view" not required by Fourteenth Amendment); Berlandi v. Commonwealth, 314 Mass. 424, 451 (1943) (defendant's presence at "view" not required by article 12).

[23] *Compare* Commonwealth v. Doucette, 22 Mass. App. Ct. 659, 663 (1986), *aff'd,* 400 Mass. 1005 (1987) (rescript) *with* Kentucky v. Stincer, 482 U.S. 730 (1987).

whether the affidavit supporting a search warrant application was made with intentional or reckless falsity, the judge may exclude the defendant from the courtroom when a confidential informant testifies to prevent disclosure of the informant's identity.[23.7] Finally, the defendant has no right to be present at grand jury proceedings against him.[24]

## § 28.1B. WAIVER

A defendant may waive her right to be present in three ways:

1. The defendant may constructively waive her right to be present by disruptive behavior, discussed below. Nondisruptive behavior, such as voluntarily ingesting a large quantity of cocaine, has been held in a First Circuit case *not* to constitute a voluntary waiver of the right to be present.[25]

2. If the offense is a misdemeanor, the defendant may waive her presence with leave of court, and be represented by counsel or a legally authorized agent.[26] The Supreme Judicial Court has held that a defendant may voluntarily waive his presence in a felony case as well.[27]

3. The defendant may waive her right to be present by absenting herself without cause, provided the trial began in her presence.[27.5] In this situation, trial and verdict may proceed, but sentence may not be imposed until the defendant is again present.[28] There should first be a vigorous inquiry, and the Commonwealth bears the burden of proving the defendant's absence is voluntary.[29]

---

[23.5] 438 U.S. 154 (1978).

[23.7] Commonwealth v. Ramirez, 49 Mass. App. Ct. 257, 267-268 (2000).

[24] Foley v. Commonwealth, 310 F. Supp. 1330 (D. Mass. 1970).

[25] United States v. Latham, 874 F.2d 852 (1st Cir. 1989). *But see* Commonwealth v. Guyon, 27 F.3d 723, 727 (1st Cir. 1994) (trial permitted to proceed in absence of defendant where absence found to have been voluntary).

[26] Mass. R. Crim. P. 18(a)(2).

[27] In Commonwealth v. L'Abbe, 421 Mass. 262, 267–68 (1995), the question presented to the S.J.C. was whether the judge erred in permitting the defendant in a murder trial to waive his right to be present in the courtroom, and if not, what level of competency should be required to waive this right. The Court held that the right to be present at all critical stages of criminal proceedings, which derives from the confrontation guarantees of the Sixth Amendment to the U.S. Constitution, the due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, and art. 12 of the Mass. Const. Declaration of Rights is not an absolute right. It can be lost by consent or at times even by misconduct. The S.J.C. saw "no compelling reason to establish a different standard, even under article 12, for competency to waive presence at a criminal trial from that of waiving the right to counsel in order to plead guilty." Finally, the S.J.C. rejected the defendant's argument that his right to be present at a capital trial cannot be waived. The federal courts have upheld this ruling. L'Abbe v. Dipaolo, 311 F.3d 93 (2002) cert. den. 538 U.S. 932(2003)

[27.5] Commonwealth v. Elizondo, 428 Mass. 322, 325-326 (1998).

[28] Mass. R. Crim. P. 18(a) (1); Commonwealth v. Higgins, 23 Mass. App. Ct. 552, *rev. denied*, 399 Mass. 1105 (1987); Commonwealth v. Yelle, 19 Mass. App. Ct. 465, *rev. denied*, 395 Mass. 1101 (1985); Taylor v. United States, 414 U.S. 17, 18–19 (1973).

Trial cannot begin in the absence of the defendant. Diaz v. United States, 223 U.S. 442 (1912). In a case interpreting analogous Fed. R. Crim. P. 43, which did not reach constitutional issues, the Supreme Court reversed a conviction which began in the absence of the defendant.

4. If the defendant's counsel fails to state an objection to the defendant's absence from any part of the proceedings, or fails affirmatively to request that the defendant be present, the issue is deemed to have been waived.[29.5]

---

Crosby v. United States, 506 U.S. 255 (1993) (the defendant's failure to appear for any part of his trial did not constitute a valid waiver of his right to be present under Fed. R. Crim. P. 43).

Sentencing cannot proceed in absentia. Mass. R. Crim. P. 18(a)(1); Katz v. Commonwealth, 379 Mass. 305 (1979); United States v. Leavitt, 478 F.2d 1101 (1st Cir. 1973). For defendants who default on their de novo appeal, see *supra* § 3.7.

[29] Commonwealth v. Kane, 19 Mass. App. Ct. 129, 135, *rev. denied*, 394 Mass. 1101 (1984) (formal inquiry should be conducted); Commonwealth v. Stack, 49 Mass. App. Ct. 227, 238-239, *rev. denied*, 432 Mass. 1105 (2000) (same). Moreover, a more recent case holds that "face-to-face" confrontation under Mass. Const. Declaration of Rights art. 12, is of paramount importance to the truth-seeking process. Commonwealth v. Bergstrom, 402 Mass. 534, 544, 546 (1988). The discussion in that case provides support for an argument that waiver should not he casually construed.

In some circumstances the court may instruct the jury that they may infer consciousness of guilt from the defendant's absence, but that they may not convict on such evidence alone. The charge must be "circumspect." *Kane, supra*, 19 Mass. App. Ct. at 135–38.

In Commonwealth v. Muckle 59 Mass. App. Ct. 631, 639-40 (2003), the Appeals Court restated the protocol for continuing with trial in the unexcused absence of the defendant as follows:

"When a defendant fails to appear midtrial, the judge is to determine whether the trial should proceed in the defendant's absence or whether a mistrial should be declared. Commonwealth v. Kane, 19 Mass. App. Ct. at 136. In determining this question, the judge must determine whether the defendant's absence is without cause and voluntary. Ibid. Mass.R.Crim.P. 18(a)(1). This judicial determination, in turn, requires that there be time allotted for some measure of inquiry and investigation into the reasons for the defendant's absence and the results of the efforts to locate the defendant. To this end, the judge should grant a recess of such duration as the judge deems appropriate to allow for investigation. [Note 9] There must be evidence introduced on the record. The preferable practice -- and the practice that is generally controlling -- is that a voir dire hearing should be held directed to the evidence garnered concerning the circumstances of the defendant's failure to appear and the efforts to find the defendant. [Note 10]

"Following this hearing, the judge should state a finding concerning whether the defendant's absence is without cause and voluntary. If the judge determines not to declare a mistrial, but rather to continue the trial in absentia, then the judge should give a neutral instruction to the jury to the effect that the defendant may not be present for the remainder of the trial, that the trial will continue, and that the defendant will continue to be represented by his attorney. If there will be no evidence adduced before the jury concerning consciousness of guilt, the judge may add that the jury should not speculate as to the reasons for the defendant's absence and should not draw adverse inferences, as there are many reasons why a defendant may not be present for the full trial.

"Conversely, if the prosecution seeks to bring before the jury evidence of the defendant's flight to lay a foundation for a consciousness of guilt instruction, the judge should determine (based on the evidence adduced on voir dire) whether introducing such evidence is warranted. If so, the prosecution briefly may develop the facts and circumstances of the defendant's failure to appear, subject to such discretionary limitations as the judge believes necessary. If the judge determines that a consciousness of guilt instruction is appropriate based on the evidence, and that this instruction will be incorporated in the final charge, that instruction should be stated in accord with Commonwealth v. Toney, 385 Mass. at 585, and cases cited therein -- all as tailored to the defendant's failure to appear at trial. See generally Model Jury Instructions for Use in the District Court § 4.12 (1997)."

[29.5] Commonwealth v. Perry, 432 Mass. 214, 237-238 (2000),Commonwealth v. Davis, 78 Mass. App. Ct. 1112 (2010)

*Preservation of testimony on default:* A related but more restricted waiver may be construed from the defendant's default at any hearing. If defense counsel is present and the judge finds that hardship prevents the later appearance of a witness, the testimony of that witness may be taken and preserved for later use at trial.[30] Counsel may examine or cross-examine the witness even though the defendant is not present.[31] However, it would appear that the Rule's prerequisites are insufficient to satisfy the defendant's state and federal constitutional confrontation rights. Clearly, no "knowing and intelligent waiver"[32] of these rights can be found from the mere fact of default, which could be caused by a wide variety of conditions, including some entirely outside the control of the defendant. As in the context of a Rule 18 waiver of presence at trial, there should be a vigorous inquiry into the voluntariness of the defendant's absence.[33] Moreover, because the state constitutional right to confront a witness "face to face" "was made to exclude any evidence by deposition which could be given orally in the presence of the accused,"[34] even a voluntary absence from a hearing should arguably not be construed as a waiver when based on the witness's "hardship" rather than unavailability.

## § 28.1C. REMOVAL OF A DISRUPTIVE DEFENDANT

If the defendant is so disruptive that the orderliness of the proceeding depends on it, she may be removed provided she has been previously warned.[35] Alternatively, a judge might bind and gag the defendant or cite her for contempt.[36]

Mass. R. Crim. P. 45 authorizes such a removal, or gagging or shackling, when necessary to maintain order. Under this rule, the defendant is entitled to an instruction

---

[30] Mass. R. Crim. P. 6(d)(2). *See also* Mass. R. Crim. P. 10, permitting the court to condition a continuance on the preservation of the testimony of witnesses then in court.

[31] Even if a witness's deposition is taken, it may not be admissible at trial. The prosecution must show that it is relevant and material and that the deposed witness is absent from the hearing. Mass. R. Crim. P. 35(g). Moreover, as outlined above, the voluntariness of the default should be shown.

[32] Johnson v. Zerbst, 304 U.S. 458 (1938).

[33] The Reporter's Notes suggest that courts will find an implicit waiver of the defendant's rights in his voluntary absence from the hearing, citing the language of Rule 35(c): "his failure to appear after notice and without cause shall constitute a waiver of the right to be present" at a deposition to perpetuate testimony. Reporter's Notes, Mass. R. Crim. P. 6(d)(2); *see also* Mass. R. Crim. P. 18(a) and 35(c). Defense counsel should be prepared to request a hearing on the issues of whether the defendant's absence is "after notice" and "without cause," before the testimony is taken or at least before it is introduced at trial. *Cf.* Commonwealth v. Kane, 19 Mass. App. Ct. 129, 135, *rev. denied*, 394 Mass. 1101 (1984) (vigorous inquiry required before *trial* can proceed in defendant's absence); Commonwealth v. Tanso, 411 Mass. 640 (1992) (Rule 35 deposition erroneously admitted at trial because defendant had not been ordered to either cross-examine or waive it). *See* Commonwealth v. Muckle 59 Mass. App. Ct. 631 (2003) and Robinson v. Commonwealth**,** 445 Mass. 280 , 288 (2005) for discussion of factors to be considered by the court on the issue of waiver.

[34] Commonwealth v. Bergstrom, 402 Mass. 534, 545 (1988); Commonwealth v. Slavski, 245 Mass. 405, 413 (1923).

[35] Commonwealth v. Chubbuck, 384 Mass. 746 (1981); Commonwealth v. North, 52 Mass. App. Ct. 603, 618 (2001), *rev. denied,* 435 Mass. 1108 (2002); Commonwealth v. Senati, 3 Mass. App. Ct. 304 (1975); Illinois v. Allen, 397 U.S. 337 (1970).

[36] Illinois v. Allen, 397 U.S. 337, 344 (1970).

that the restraint or removal is not to be considered in assessing the proof and determining guilt;[37] must be advised that she has the right to be returned on her request and assurances of good behavior;[38] and even without a request, must be returned to the courtroom periodically in the absence of the jury, to be advised anew.[39]

### § 28.1D. DEFENDANT'S OBLIGATION TO BE PRESENT

Most often, counsel will not be asserting the defendant's right to be present but defending against the defendant's obligation to be present. The subject of defaults is addressed *supra* at §§ 9.9 and 3.7B. Additionally, Mass. R. Crim. P. 18(a)(3) provides that the defendant need not be present at any proceeding where evidence will not be taken or at a revision or revocation of sentence pursuant to Rule 29.

## § 28.2 SECURITY MEASURES

If the defendant is in pretrial detention, is incarcerated on the basis of previous convictions, or requires restraint because of disruptive conduct, his or her appearance before the jury becomes a significant issue. The pressures to impose security measures while the defendant is in the courtroom may undermine the defendant's right to a fair trial by a jury uncontaminated by extraneous, prejudicial information. The sight of the defendant in prison clothing, shackled or guarded, or held in a retaining area within the courtroom might encourage juror prejudgment of the defendant as dangerous and therefore likely guilty of the charges. Additionally, security restraints may interfere with the defendant's thought process and ease of communication with counsel.[40]

The Supreme Judicial Court addressed these conflicts in *Commonwealth v. Brown.*[41] Although the Court affirmed the defendant's conviction notwithstanding egregious circumstances,[42] it also prospectively required that in cases where security was likely to be an issue, a trial judge confer with counsel, make a record of reasons for his actions, and, if security is necessary, "try to find the least drastic and conspicuous

---

[37] Mass. R. Crim. P. 45(a); Commonwealth v. Cavanaugh, 371 Mass. 46 (1977); Commonwealth v. Brown, 364 Mass. 471 (1973).

[38] Mass. R. Crim. P. 45(b).

[39] Mass. R. Crim. P. 45(b).

[40] Commonwealth v. Brown, 364 Mass. 471 (1973); Illinois v. Allen, 397 U.S. 337 (1970). *See also* Commonwealth v. Martin, 39 Mass. App. Ct. 658, 668 n.6, *further appellate review allowed,* 422 Mass. 1105 (1996) (lobby conference about the imposition of restraints found to be "a consequential matter" at which defendant has a right to be present). *But see* Commonwealth v. Martin, 424 Mass. 301, 306 (1997) (reversing Appeals Court and affirming conviction because absence of defendant does not automatically constitute reversible error and defendant was held not to have been prejudiced by the particular security restraints imposed).

[41] 364 Mass. 471 (1973).

[42] The defendant in that case was a prisoner charged with assaulting a guard. Because the defendant had a record of two escape attempts and the courtroom was relatively open, the judge required him to sit handcuffed and wearing waist belts, flanked by two uniformed court officers. Defense witnesses, also prisoners, were similarly shackled while they testified. The Court relied heavily on the fact that the prisoners' status was of necessity known to the jury through the evidence, concluding that the additional reminder of the security measures would not add significantly to this. The Court also held that the facts at the judge's disposal warranted his decision that *some* security measures were in order.

measures reasonably available that will meet the particular need."[43] The court provided a list of relevant factors in making the decision.[44] In *Commonwealth v. Martin,*[45] however, the Supreme Judicial Court affirmed the defendant's conviction where the trial judge had ordered leg irons, some separation between the defendant and his attorney, and stationing of court officers near the defendant. The Court concluded that these measures, as implemented, were not as obvious and apparent as those in *Brown*, even though it agreed that the judge had overreacted to a report from a court officer about the defendant. If security measures are used, an instruction warning against bias and against inferring guilt should be given.[46]

Requiring a defendant to appear before the jury in distinctive prison garb is unconstitutional.[47] Reasoning from this premise, the First Circuit has held that, without some record justification based on security requirements, placing a defendant in the "dock," which was at the time still in use in Massachusetts,[48] also violated the defendant's constitutional right to a fair trial.[49]

In *Commonwealth v. Moore,*[50] the Supreme Judicial Court essentially accorded with the result of the federal cases, without relying on a constitutional ground for its decision:

> For the future, we think that a judge confronted with a request that the defendant be permitted to sit at counsel table [rather than in the dock] should

[43] Commonwealth v. Brown, 364 Mass. 471, 479 (1973). Failure to follow the *Brown* procedures does not result in automatic reversal; the judge's decision apparently remains subject to an abuse of discretion standard, and clearly will not avail a defendant who cannot show prejudice. *See* Commonwealth v. Martin, 424 Mass. 301, 306 (1997) (declining to treat *Brown* "as a rigid legislative formulation, any deviation from which must result in reversal" and holding that even defendant's absence from colloquy does not automatically constitute reversible error); Commonwealth v. Montgomery, 23 Mass. App. Ct. 909, 911–12, *rev. denied,* 398 Mass. 1107 (1986) (judge made inquiry before requiring defendant to wear leg shackles; allowed him to sit at counsel table; did not put reasons on record; no abuse of discretion). *See also* Oses v. Massachusetts, 775 F. Supp. 443 (D. Mass. 1991), *aff'd,* 961 F.2d 985 (1st Cir. 1992) (habeas granted, in part because judge abdicated discretion to decide whether to shackle defendant to court personnel).

[44] Commonwealth v. Brown, 364 Mass. 471, 479 n.18 (1973).

[45] 424 Mass. 301 (1997), *overruling* 39 Mass. App. Ct. 658 (1996). *See also Comment: Due Process Restrained: the Dual Dilemmas of Discriminate and Indiscriminate Shackling in Juvenile Delinquency Proceedings*, 29 B.C. THIRD WORLD L.J. 401(2009).

[46] Commonwealth v. Brown, 364 Mass. 471, 480 (1973).

[47] Estelle v. Williams, 425 U.S. 501 (1976). *Cf.* Commonwealth v. Jackson, 388 Mass. 98 (1983) (no violation where defendant not compelled to wear prison clothes).

[48] "Absent unusual circumstances, it is the customary practice in Massachusetts that defendants in criminal cases sit in a dock. . . . The dock is a box approximately four feet square and four feet high. It is open at the top so that the defendant's head and shoulders can be seen when he or she is seated. The dock is placed typically at the center of the bar enclosure which separates the spectators' section from that portion of the courtroom reserved for trial principals. The dock is usually fifteen to twenty feet behind counsel table, and is sometimes on a raised platform." Walker v. Butterworth, 457 F. Supp. 1233, 1238 (D. Mass. 1978), *rev'd,* 599 F.2d 1074 (1st Cir. 1979), *cert. denied,* 444 U.S. 937 (1980).

[49] Young v. Callahan, 700 F. 2d 32 (1st Cir.), *cert. denied,* 464 U.S. 863 (1983); *see also* Walker v. Butterworth, 599 F.2d 1074, 1080–81 (1st Cir. 1979), *cert. denied,* 444 U.S. 937 (1980) (finding practice unconstitutional but not relying on that finding to reverse).

[50] 379 Mass. 106, 110–11 (1979).

> not deny the request unless he follows the "more circumspect procedure" we have prescribed for unusual security measures. *See Commonwealth v. Brown,* 364 Mass. 471, 478–480 (1973). In particular, the reasons for the denial should be stated on the record. But where inquiry reveals that the dock is the least restrictive measure available, we think its use is proper.

Conditional use of restrains clearly remains open after these cases,[51] provided special circumstances and sound reasons exist that are placed on record.[52] If such restraints are used, the defendant is entitled to a jury instruction warning against inferring guilt from the restraints.[53]

Additionally, it should be noted that a juror's accidental viewing of the defendant in restraints outside the courtroom poses related problems. In such a case, it is within the trial judge's discretion whether to poll the jurors or give cautionary instructions.[54]

Finally, in identification cases counsel should raise a due process objection to an in-court identification procedure that highlights the defendant through security restraints.

---

[51] *See, e.g.*, Commonwealth v. Drew, 397 Mass. 65, 80–81 (1986) (denial of motion to sit at counsel table upheld where defendant specifically found to be a security risk based on jailhouse informant information that defendant was planning an escape, and fact that defendant was about to be indicted for a second murder charge; defendant seated behind counsel table with guard next to him); Commonwealth v. Stanton, 19 Mass. App. Ct. 1001 (1985) (no error to seat defendant in dock where counsel, without consulting defendant, did not object to dock and where court found no prejudice to defendant given defendant was impeached with four prior convictions); Commonwealth v. Flanagan, 17 Mass. App. Ct. 366, *rev. denied,* 391 Mass. 1103 (1984) (dock was least restrictive measure available); Commonwealth v. Lynes, 13 Mass. App. Ct. 1028, *rev. denied,* 386 Mass. 1103 (1982) (no denial of fair trial by use of dock); Commonwealth v. Lockley, 381 Mass. 156 (1980) (dock and counsel table are not only two options available).

[52] *See* Commonwealth v. Moyles, 45 Mass. App. Ct. 350, 352-354 (1998) (error for judge to deny defendant's motion to sit at counsel table without stating her reasons on the record); Commonwealth v. Dougan, 23 Mass. App. Ct. 1012, *rev. denied,* 400 Mass. 1101 (1987); Commonwealth v. Montgomery, 23 Mass. App. Ct. 909, *rev. denied,* 398 Mass. 1107 (1986); Commonwealth v. Drayton, 386 Mass. 39, 44 (1982) (judge must seat defendant at counsel table absent special circumstances); Commonwealth v. Hogan, 12 Mass. App. Ct. 646, *rev. denied,* 385 Mass. 1102 (1981); Commonwealth v. Stokes, 11 Mass. App. Ct. 949 (1981); Commonwealth v. DeVasto, 7 Mass. App. Ct. 363 (1979) (reversal for failure to justify security measures on record).

The court may consider such factors as the availability of additional court officers and the defendant's history of escapes or defaults. Commonwealth v. Meuse, 11 Mass. App. Ct. 966 (1981).

[53] Mass. R. Crim. P. 45(a); Commonwealth v. Cavanaugh, 371 Mass. 46 (1977); Commonwealth v. Brown, 364 Mass. 471 (1973).

[54] Commonwealth v. Szczuka, 391 Mass. 666, 672–73 (1984); Commonwealth v. Edgerly, 390 Mass. 103, 107 (1973). Defense counsel should be asked if she would prefer that nothing be done so as to avoid drawing attention to the defendant's custody. *Szczuka, supra;* Commonwealth v. Charles, 397 Mass. 1, 11 (1986) (silence permissible option where defense counsel acceded to judge's suggestion jurors not be polled).

## § 28.3 COMPELLED APPEARANCE OF SANITY / FORCED MEDICATION [55]

The Supreme Judicial Court has held it constitutional error under both federal and state constitutions to require a defendant raising insanity as a defense to be medicated sufficiently throughout the trial to affect his behavior and demeanor before the jury:

In a case where an insanity defense is raised, the jury are likely to assess the weight of the various pieces of evidence before them with reference to the defendant's demeanor. Further, if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. . . . This tendency may render also valueless the defendant's right to testify on his own behalf.[56]

Similarly, the First Circuit Court of Appeals has held it a violation of Fifth Amendment rights to require a defendant relying on the insanity defense to personally exercise his peremptory challenges to prospective jurors.[57]

The U.S. Supreme Court has found that forcing antipsychotic medication on a defendant is unconstitutional absent a finding of "overriding justification" because it may prevent him from assisting in his own defense or alter his demeanor during trial. Justification for forced medication requires not only that the treatment be medically appropriate, but also that no less intrusive alternatives are available to protect the defendant's safety or the safety of others.[58] While Massachusetts has held that a defendant may refuse medication even when this will render him incompetent to stand trial, treating such refusal as a waiver,[59] the Supreme Court case did not address this issue.

---

[55] *See* Mass. R. Prof. C. 1.14 (client under a disability). *See also supra* ch. 10 (competency to stand trial).

[56] Commonwealth v. Louraine, 390 Mass. 28, 34–35 (1983). *But cf.* United States v. Vachon, 869 F.2d 653, 661 (1st Cir. 1989) ("We are aware of no principal of law that permits a defendant to present an insanity defense by means of intentional (and controllable) outbursts in court"; summary contempt judgments affirmed). *See also* Commonwealth v. Gurney, 413 Mass. 97 (1992), which discusses a related issue of the right of a defendant to present a psychologist's testimony to explain to the jury his controlled outright appearance at trial due to the effect of antipsychotic medication. Without this evidence, the S.J.C. ruled that the jury could easily discount the defendant's defense of a mental illness, based on his calm, placid demeanor at trial. *Gurney, supra*, 413 Mass. at 100–04.

[57] Walker v. Butterworth, 599 F.2d 1074, 1081–84 (1st Cir. 1979). The Court held that this constituted forced communication of present rationality and sanity to the jury that ultimately passed on his insanity defense.

[58] Riggins v. Nevada, 504 U.S. 127 (1992). *See also* United States v. Lopez, 71 F.3d 954 (1995) (trial judge acted properly within his discretion when deciding, with expert medical advice and after investigation, to compel defendant to go forward to trial despite being heavily medicated for a brain tumor).

[59] Commonwealth v. Louraine, 390 Mass. 28 (1983).