CHAPTER 36

OCTOBER, 2011

The Jury: Contamination, Instructions, Deliberation, and Verdict

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This chapter addresses the jury's role in a criminal trial, including measures designed to prevent, investigate or remedy jury exposure to extraneous influences; instructions to the jury; jury deliberations; and the jury verdict. Jury selection is discussed *supra* at ch. 30.

The rules, laws and judicial decisions detailed herein are designed to safeguard the defendant's constitutional right to trial by a fair and impartial jury.[1] Their vilation may provide a basis for impeaching the jury's verdict or, if discovered during trial, obtaining a mistrial or other remedy.

§ 36.1 EXTRANEOUS OR OTHER IMPROPER INFLUENCES

The defendant is entitled to impartial jurors who have no predisposition to convict before hearing the evidence. Additionally, during the course of trial and deliberations, jurors are supposed to avoid any contact with witnesses or parties; any discussion of the case with nonjurors and, until deliberations begin, among themselves; and any media coverage of the trial they are hearing.[2] As Justice Holmes observed, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[3]

This section examines the circumstances that undermine this ideal when the trier of fact is a jury, and the measures available to combat or remedy those

[1] U.S. Const. amends. 6, 14; Mass. Const. Declaration of Rights art. 12. *See supra* § 34.1.

[2] Inquiry on voir dire of the jury venire is intended to disclose any knowledge of the case by potential jurors, which would subject them to disqualification to sit. Some of the cases discussed in this section involve jurors who have given false answers to voir dire questions as well as jurors subsequently exposed to extraneous information during trial or deliberations.

[3] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.).

circumstances. In the main, the defendant will be the one to complain of outside influence on the jury.

§ 36.1A. SEQUESTRATION

The decision whether, and when, a jury should be sequestered is discretionary with the trial judge.[4] Sequestration has long been exceptional in noncapital cases,[5] and is now the exception even in capital cases.[6] The judge may choose to hear arguments from counsel why sequestration is or is not desirable, but she need not believe either side or ask for any evidentiary basis for assertions made.[7] A defendant complaining about sequestration or the lack thereof must show prejudice in order to make out an abuse of discretion.[8] If the jury is not sequestered, the trial judge "preferably" should inquire each day whether instructions not to discuss or read about the case have been followed, but failure to do so is not reversible error unless prejudice is shown.[9]

§ 36.1B. INQUIRY INTO IMPROPER INFLUENCES

1. Impeaching the Jury's Verdict

Because a jury verdict must be unanimous, exposure of even a single juror to prejudicial extraevidentiary material is grounds for a new trial.[10] When a defendant

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[4] Mass. R. Crim. P. 20(e); Commonwealth v. Clark, 432 Mass. 1, 10 (2000); Commonwealth v. Cordle, 412 Mass. 172, 180 (1992); Commonwealth v. Marshall, 373 Mass. 65, 68 (1977); Commonwealth v. Abbott Eng'g Inc., 351 Mass. 568, 572 (1967). Rule 20(e)(2)–(3), which allows separation of the jury after submission of the case and during deliberations, was characterized as "a significant departure from prior Massachusetts practice" in the Reporter's Notes. The Rule became effective July 1, 1979.

[5] *See, e.g.*, Commonwealth v. Charland, 338 Mass. 742, 745 (1959) (nonsequestration in noncapital felonies and misdemeanors "settled practice").

[6] *Cf.* Commonwealth v. Sperrazza, 379 Mass. 166, 170 (1979) (no abuse of discretion in not sequestering jury in first-degree murder trial); Commonwealth v. Marshall, 373 Mass. 65 (1977) (no abuse of discretion in sequestering jury, then allowing two jurors to separate in order to vote, in first-degree murder trial); Commonwealth v. Azar, 32 Mass. App. 290 (1992)(no abuse in sequestering jury only during deliberations).

[7] Commonwealth v. Marshall, 373 Mass. 65, 69 (1977); Commonwealth v. Damboski, 283 Mass. 315, 320 (1933).

[8] Commonwealth v. Allen, 379 Mass. 564, 582 (1980) (defendants complaining that sequestered jurors allowed to go unescorted to vote had burden of showing improper exposure of jurors to outside influence); Commonwealth v. Marshall, 373 Mass. 65 (1977).

[9] Commonwealth v. Benjamin 369 Mass. 770, 772 (1976); Commonwealth v. Coleman, 366 Mass. 705, 711 (1975).

[10] Commonwealth v. Giusti, 434 Mass. 235, 241 (2001); Commonwealth v. Long, 419 Mass. 798, 802 (1995); Commonwealth v. Cuffie, 414 Mass. 632, 636 (1993); Commonwealth v. Hunt, 392 Mass. 28, 40 (1984); Commonwealth v. Fidler, 377 Mass. 192 (1979); ABA STANDARDS FOR CRIMINAL JUSTICE; TRIAL BY JURY, Standard 15-5.7(c)(1) (3d ed. 1994)(juror testimony admissible to show " whether matters not in evidence came to the attention of one or more jurors, under circumstances which would violate the defendant's constitutional right to be confronted with the witnesses against him or her."

learns that there has been such juror exposure, she must immediately bring the matter to the trial judge's attention or lose the right to complain of prejudice.[11]

Extraneous influences on the jury may occur on the record[12] or off. On-the-record errors, of course, require no further inquiry for the judge to make a ruling.[13] When an off-the-record incident is alleged, the first issue is whether a hearing is

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[11] Commonwealth v. Casey, 442 Mass. 1, 6 (2004)(defendant had obligation to request curative action when he learned an alternate juror had been with the deliberating jury for a short time); Commonwealth v. DiPietro, 373 Mass. 369, 373 (1977). In federal courts, "a defendant who becomes aware of juror misconduct prior to the rendering of the verdict but fails to inform the court before the conclusion of deliberations, waives the right to complain about such conduct after an adverse verdict." United States v. Morris, 977 F.2d 677, 685 (1st Cir. 1992) (citing United States v. Costa, 890 F.2d 480, 482 (1st Cir. 1989)). *See also* Commonwealth v. Talbot, 35 Mass. App. Ct. 766 (1994) (when, in response to judge's offer to question juror about reported exposure, defendant responded that he "would like to hear what the jury has to say," right of inquiry waived).

[12] Ordinarily the jury's exposure to testimony or comments which should have been kept from them is presumed curable by instruction, *see* Commonwealth v. Kilburn, 426 Mass. 31, 37–38 (1997) (curable so long as judge's instructions are prompt and the jury do not hear the inadmissible evidence again); Commonwealth v. Helfant, 398 Mass. 214, 228–29 (1986); Commonwealth v. Cameron, 385 Mass. 660, 668 (1982); Commonwealth v. Crehan, 345 Mass. 609, 613 (1963); Commonwealth v. Mayo, 21 Mass. App. 212, 219 (1985), but the determination whether instruction, dismissal of one or more jurors, or a mistrial is required is left to the judge's discretion. *See* Commonwealth v. Crehan, 345 Mass. 609 (1963); *cf.* Commonwealth v. Brown, 386 Mass. 17, 30 (1982) ("A trial judge has broad discretion to determine whether exposure to extraneous information about a case may have so influenced potential jurors that a new trial should be granted"). The Supreme Judicial Court, in Commonwealth v. Kincaid, 444 Mass. 381, 390-391 (2005) distinguished between extraneous introduction of knowledge of a codefendant's flight into deliberations, which supported a new trial, from allowing, in a joint trial, evidence of a co-defendant's flight, noting that in the latter case, "strong, timely limiting instructions" are presumed to prevent prejudice to the defendant against whom the evidence is not introduced.

The most critical on-record problems arise when the judge is the source of the problem, both because the error is less likely to be corrected, and because of "the concept that any judicial comment is likely to be accorded substantial weight by the jury." Commonwealth v. Sneed, 376 Mass. 867, 870 (1978) (judge improperly displayed bias in questioning witness, instructing jury). *See also* Commonwealth v. Hebert, 379 Mass. 752, (1980)(judge's questioning of juror who expressed reluctance to convict, and stating that the evidence was, in his view, "clear" was coercive); Commonwealth v. Buckley, 17 Mass. App. 373 (1984) (judge in rape case explained likely sentence and parole consequences of prior convictions introduced to impeach defendant); Commonwealth v. Sylvester, 388 Mass. 749 (1983) (judge directed disparaging comments toward defendant's attorney); Commonwealth v. Hassey, 40 Mass. App. 806 (1996)(judge who questioned witness on failure to go to police with exculpatory evidence was improper and overly partisan). However, judges are, in general, permitted to question witnesses. *See* Commonwealth v. Watkins, 63 Mass. App. 69, 74 (2005)(" It is well established that a judge in this Commonwealth may question witnesses to clarify and develop evidence and to avert perjury.") It is thus a difficult to make the case that judicial action merits a mistrial or a new trial..

[13] Indeed in this circumstance inquiry is forbidden: "Even if some juror comments on evidence struck by the judge, it must be presumed that in reaching the verdict, the jurors heeded the judge's instructions. To prove otherwise would require probing the minds of the jurors." Commonwealth v. Fidler, 377 Mass. 192, 198–99 (1979). See, however, cases cited at note 28, *infra*.

required before the court decides what to do. The issue is complicated by the fact that, in the majority of cases, a hearing entails making inquiry of jurors — a step that has long been discouraged as undermining the independence of the jury, candor in jury deliberations, finality, and freedom from harassment or tampering.[14]

The law governing inquiry into off-record influences is set forth in *Commonwealth v. Fidler.*[15] The Supreme Judicial Court there held that jurors can be brought into a hearing to testify, but only as to some matters; the boundary is between testimony that would establish knowledge of an extraneous fact by one or more jurors, and testimony as to the effect such extraneous evidence had on the jury's decision. The Court noted:

> We recognize that the line between overt factors and matters resting in a juror's consciousness is not easily drawn, and difficult cases will arise. Nevertheless, we think it possible to draw the line in most cases, and, in any event, the better course is to try to do so rather than refuse to try.[16]

Before a hearing is required, there must be a showing that some extraneous matter impinged on one or more jurors.[17] The Court has repeatedly expressed distaste for "unrestricted posttrial interviews of jurors," but, within strict limits, counsel have "'the right to conduct enough of an unsupervised investigation' to obtain sufficient information to bring the allegations of jury misconduct to the attention of the judge."[18] This can include interviewing jurors who initiate contact with counsel *without solicitation.*[19] However, on pain of disciplinary sanctions, counsel may neither initiate

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[14] *See, e.g.,* Woodward v. Leavitt, 107 Mass. 453, 460 (1871).

[15] 377 Mass. 192 (1979). *Fidler* involved allegations of improper influences during the jury's deliberations raised on a motion for a new trial. For a discussion of *Fidler,* see Greaney, *Juror Impeachment and Post-verdict Interrogation of Jurors,* 64 MASS. L. REV. 85 (1979).

[16] Commonwealth v. Fidler, 377 Mass. 192, 198 (1979). The Court's holding in *Fidler* is consistent with federal due process requirements. *See* Tanner v. United States, 483 U.S. 107 (1987) (Fed. R. Evid. 606(b), forbidding inquiry into matters internal to jury deliberations, did not violate Sixth Amendment rights to fair trial before an impartial jury). The federal rule, precluding any direct examination of jurors except as to "extraneous" influences on the jury is at least as strict as is the Massachusetts rule. For a general discussion see 3 WEINSTEIN & BERGER, WEINSTEIN'S FEDERAL EVIDENCE ¶¶ 606[03]–[06] (2d ed. 2002).

[17] Commonwealth v. Giusti, 434 Mass. 245 (2001) (when defendant makes colorable showing that extraneous matters may have affected juror's impartiality, judge must conduct post-verdict inquiry of juror); Commonwealth v. Roberts, 433 Mass. 45 (2000) (post-verdict interview of juror by judge should be held only on suggestion of extraneous matter); Commonwealth v. McQuade, 46 Mass. App. Ct. 827, 833-834 (1999).

[18] Commonwealth v. Dixon, 395 Mass. 149, 153 (1985) (quoting Cassamasse v. J.G. Lamotte & Son, 391 Mass. 315, 318–19 (1984). In *Dixon, supra,* 395 Mass. at 153, the court stated that when a juror telephoned counsel, counsel had a right to question the juror in as much detail as possible concerning the subject matter of the extraneous influence, but not about the deliberations themselves. The prohibition of initiating direct contact with jurors does not apply to contacting others who may have information about juror misconduct. *See* Commonwealth v. Philyaw, 57 Mass. App. 730, 738 (2002)("[T]he policy behind the reluctance to question jurors has no application to first questioning [a nonjuror].")

[19] Commonwealth v. Dixon, 395 Mass. 149 (1985). The Appeals Court, in Commonwealth v. Bresnehan, 79 Mass. App. 353 (2011), reversed a finding of extraneous influence where the motion judge refused to allow inquiry into the role of the defendant and/or defense counsel in initiating contact with a juror. While acknowledging that no "exclusionary

any unauthorized communication with jurors nor, if responding to a communication "directly or indirectly" initiated by a juror, inquire concerning the jury's deliberation process.[20] Beyond this limited investigation, any juror interviews must be conducted "under the supervision and direction of the judge,"[21] with counsel present.[22]

Counsel must then present any evidence of extraneous influence to the trial judge. "When confronted with allegations of irregularity in the jury's proceedings, the trial judge has broad discretion to determine what manner of hearing, *if any*, is warranted."[23] However, in some circumstances refusal to inquire will be clear error;[24]

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rule" had been fashioned to address a situation where legitimate evidence of extraneous intrusions into jury deliberations is found through improper contact with jurors, the Court noted that developing the facts around juror contact might affect the judge's determinations of credibility as to whether extraneous matters had in fact been present.

No such limitation applies to contact with members of the venire from which the defendant's jury was selected who did not serve as jurors on the case. Commonwealth v. Lopes, 21 Mass. App. Ct. 11, 15 n.5 (1985)(failure to establish underrepresentation of minorities in jury pool required proof of venire composition rather than composition of petit jury, and *Fidler* did not restrict counsel from gathering evidence from venire members).

[20] *See* Mass. R. Prof. C. 3.5(d), *infra* at Appendix D. The Rule is based on former S.J.C. Rule 3:07, DR 7-108(D). Adoption of Rule 3.5(d) was opposed by two members of the S.J.C., one of whom speculates that it may violate the criminal defendant's constitutional rights. *See* Wilkins, *The New Massachusetts Rule of Professional Conduct: An Overview*, 1997 MASS. L. REV. 261, 264.

[21] Commonwealth v. Fidler, 377 Mass. 192, 202 (1979). *See also* Commonwealth v. Solis, 407 Mass. 398 (1990) (reaffirming *Fidler* restrictions on postverdict juror interviews, but refusing to rule information gathered in violation of *Fidler* inadmissible in defendant's motion for a new trial); *Bresnehan, supra*, discussed at note 19. *Compare* the federal rule in the First Circuit, a blanket prohibition against postverdict interviews except under the supervision of the district judge. United States v. Kepreos, 759 F.2d 961, 967–68 (1st Cir), *cert. denied*, 474 U.S. 901 (1985). Violation of this Rule by counsel has led one district judge to disqualify counsel from further representation. Bushkin Assocs., Inc. v. Raytheon Co., 121 F.R.D. 5 (D. Mass. 1988), *petition for mandamus denied,* 864 F.2d 241 (1st Cir. 1989).

[22] The defendant has a right to have counsel present at all postverdict judicial inquiries of jurors. Commonwealth v. Mahoney, 406 Mass. 843, 856 (1990). If the judge erroneously determines that juror examination is necessary, however, excluding defense counsel from the interview is not reversible error. *Mahoney, supra.*

[23] Commonwealth v. Semedo, 456 Mass. 1, 22 (2010); Commonwealth v. Dixon, 395 Mass. 149, 151 (1985) (emphasis in original; citations omitted). *See also* Commonwealth v. Gilchrist, 413 Mass. 216, 219–21 (1992) (no abuse of discretion to refuse inquiry where allegations of extraneous matter were mostly hearsay, and invasions of jury privacy not shown to have influenced deliberations). Commonwealth v. Amirault, 399 Mass. 617, 627 (1987) ("The scope of a hearing on a motion for a new trial involving an allegation of juror misconduct is entrusted to the sound discretion of the trial judge").

If the matter occurs before the jury begins deliberating, the trial judge may inquire of the jurors what exposure they had and may rely on a juror's statement of continued impartiality within his discretion. *See, e.g.*, Commonwealth v. Martinez, 431 Mass. 168, 179-180 (2000) (judge may rely on juror's statement that juror remains impartial after possibly prejudicial experience); Commonwealth v. Gregory, 401 Mass. 437 (1988) (juror states he can remain impartial after victim's widow introduces herself to him; no error to allow juror to continue to sit, relying solely on his statement of impartiality); Commonwealth v. Schoen, 24 Mass. App. 731 (1987) (trial judge justified in accepting jurors' statements they had not read article stating

and a juror must be questioned individually once she acknowledges having been exposed to extraneous material.[25] Counsel seeking to remove a juror on the ground of exposure to extraneous influence must specifically request the judge to conduct a voir dire, or risk loss of the issue on appeal.[26]

The defendant at a hearing has the burden to show by a preponderance of evidence that extraneous material was in fact introduced into deliberations.[27] If that is shown, then the burden is on the Commonwealth to show beyond a reasonable doubt that the extraneous information did not prejudice the defendant (without inquiring into the juror's actual deliberations): "The judge may not receive any evidence concerning the actual effect of the matter on the juror's decision, for this would involve probing the juror's thought processes. Rather, the judge must focus on the probable effect of the extraneous facts on a hypothetical average jury."[28] The Court in *Fidler* enumerated

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third man had pled); Commonwealth v. Grant, 391 Mass. 645, 653 (1984); Commonwealth v. Coleman, 389 Mass. 667, 676 (1983).

[24] The Court in *Dixon* noted that "'any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial,' " and implied that "(a) trial judge's refusal to conduct some type of investigation into allegations of extrinsic influences upon a jury may constitute reversible error" in those circumstances. Commonwealth v. Dixon, 395 Mass. 149, 152 (1985) (citing Remmer v. United States, 347 U.S. 227, 229–30 (1954)).

[25] Commonwealth v. Jackson, 376 Mass. 790, 800-01 (1978); Commonwealth v. McCaster, 46 Mass. App. Ct. 752, 757 n.11 (1999). *See* also Commonwealth v. Ciminera, 11 Mass. App. Ct. 101, 108-10 (1981), *aff'd*, 384 Mass. 807 (1981) (close question whether individual interviews required when collective response equivocal).

[26] *See* Commonwealth v. Tanner, 417 Mass. 1 (1994) (after judge denied defense motion to excuse juror who reportedly saw defendant in handcuffs, counsel did not ask for voir dire or that identified juror be questioned, so no prejudice shown).

[27] Commonwealth v. Kincaid, 444 Mass. 381, 386 (2005).The defendant, moreover, is not required to show the source of extraneous information; "[i]t is only necessary that there be adequate evidence that the knowledge did not come from the evidence at trial." *Id* at 388 and cases cited.

[28] Commonwealth v. Fidler, 377 Mass. 192, 201 (1979). *Accord* Commonwealth v. Dixon, 25 Mass. App. Ct. 678 (1988). *See also* Commonwealth v. McCaster, 46 Mass. App. Ct. 752, 760 (1999) (asking jurors for content of extraneous material stated in jury room by other jurors would not in itself improperly reveal or intrude into jury deliberations). Once it has been demonstrated that the jury or some juror has been exposed to extraneous matter, it is not clear how any evidentiary burden of proof remains to fall on the Commonwealth. Because no inquiry can follow into what the actual effect of the extraneous matter was, it would seem to be a matter for judicial determination (i.e., a matter of law), whether prejudice has accrued to the defendant. Nonetheless, the Court continues to frame its decisions in terms of "proof beyond a reasonable doubt" even when the issue is what effect a demonstrated breach of the rule *might* have on an average juror." *See* Commonwealth v. Solis, 407 Mass. 398, 402 (1990). *See also* Markee v. Biasetti, 410 Mass. 785 (1991), and Fitzpatrick v. Allen, 410 Mass. 791 (1991), two civil cases in which jurors actively resorted to material not in evidence, resulting in new trials without a showing of prejudice. In Commonwealth v. Kincaid, 444 Mass. 381, 392 (2005), the Supreme Judicial Court reiterated the importance of avoiding any inquiry into the actual effect of the extraneous information on the jury's deliberations, but noted that "[n]evertheless, some inappropriate information may be learned from the postverdict inquiry, as occurred here. If so, that information cannot be ignored. . . . If, as happened here, a judge learns that a juror has, in fact, been influenced by extraneous information, there must be a new trial". See Nevertheless, some inappropriate information may be learned from the postverdict inquiry, as occurred here.

some factors the trial judge should consider in making this determination, including whether the evidence against the defendant was "overwhelming" (presumably a factor against granting relief); whether an improper remark prompted an immediate reprimand from another juror; and whether the matter produced such a high probability of prejudice that error is presumed.

2. Preverdict Inquiry

The Supreme Judicial Court has held that the *Fidler* requirements, described above, apply not only to postverdict inquiries into improper influences but also to interviews of jurors during trial.[29] Although this language would seem to limit inquiry to the degree of exposure and rule out questioning on its effect or other matters "resting in the juror's own consciousness," courts in a preverdict context routinely inquire whether exposure to the extrajudicial information has affected the juror's ability to remain impartial.[30] Such questioning is reasonable given the far wider range of remedies available before verdict,[31] including excusing individual jurors, and is envisioned by *Commonwealth v. Jackson*,[32] the seminal case on procedures to be used where media coverage threatens the fairness of an ongoing trial.

The *Jackson* procedures are as follows:

> When material disseminated during trial is reliably brought to the judge's attention, he should determine whether the material goes beyond the record and raises a serious question of possible prejudice. A number of factors may be involved in making that determination, including the likelihood that the material reached one or more jurors. . . . If the judge finds that the material raises a serious question of possible prejudice, a voir dire examination of the jurors should be conducted. The initial questioning concerning whether any juror saw or heard the potentially prejudicial material may be carried on collectively, but if any juror indicates that he or she has seen or heard the material, there must be individual questioning of that juror, outside of the

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If so, that information cannot be ignored". *See also* Commonwealth v. Cuffie, 414 Mass. 632, 638 (1993)("The judge, having ventured into the forbidden area of the deliberative process ... cannot ignore the fruits of his excursion").

[29] Commonwealth v. Tavares, 385 Mass. 140, 155 n.24 (1982).

[30] *See, e.g.,* Commonwealth v. Gregory, 401 Mass. 437 (1988); Commonwealth v. Sinnott, 399 Mass. 863, 883 (1987); Commonwealth v. Palmariello, 392 Mass. 126, 142 (1984); Commonwealth v. Grant, 391 Mass. 645, 653 (1984); Commonwealth v. Hanscomb, 367 Mass. 726 (1975). The focus is on the effect of extraneous influence on the jurors hearing the case, and not, as is the case with postverdict inquiry, on a hypothetical jury. Commonwealth v. Kamara, 422 Mass. 614 (1996); *see supra* text at note 28.

[31] *See* Commonwealth v. Banister, 428 Mass. 211, 217 (1998) (any problem with a juror's impartiality arising before deliberations solved by designating her alternate juror).

[32] 376 Mass. 790 (1978).

presence of any other juror,[33] to determine the extent of the juror's exposure to the material and its effects on the juror's ability to render an impartial verdict.[34]

Judicial inquiry must be delicately undertaken, as questioning can have a coercive effect.[35] The judge is entitled to rely on the answers of the jurors that they will not be affected by publicity in determining whether they remain impartial,[36] except where "jurors also admit, contrarily, to 'those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force.' "[37] The question whether such a "strong and deep impression" has been manifested is also committed to the trial judge's discretion.[38]

Having polled the jury and determined that one or more jurors have in fact been exposed to prejudicial material, the trial judge, in her discretion, may determine that the giving of "prompt, clear, and forceful instructions to the jury," which "were hardly susceptible of misunderstanding . . ." and "were, in the circumstances, sufficiently *strong* to counteract the possible effect of the adverse publicity" will assure the continued impartiality of the jury.[39] The judge may also, in her discretion, determine

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[33] The defendant has the right to be present during the judge's questioning of a deliberating juror as to extraneous influences, Commonwealth v. Mimless, 53 Mass. App. Ct. 534 (2002); Commonwealth v. Dosanjos, 52 Mass. App. Ct. 531 (2001).

[34] Commonwealth v. Jackson, 376 Mass. 790, 800–01 (1978). The trial judge in *Jackson* did not follow this procedure, failing to question individually all jurors who had read the offending article in that case. The Court affirmed, however, because it found no prejudice in the procedure used:

[t]he collective questioning of the jury brought forth one juror who conceded the prejudicial effect of the newspaper article on her. Any inhibitory effect of the collective questioning of the jury did not deter that juror, and her statements "broke the ice" for any other juror who might have been reluctant to identify him or her self as prejudiced. The judge gave prompt cautionary instructions and later repeated them.

Jackson, *supra*, 376 Mass. at 799. *See also* Commonwealth v. Howard, 46 Mass. App. Ct. 366, 368-369 (1999) (in judge's discretion how far to inquire of jurors to determine whether they have been prejudiced); Commonwealth v. Ali, 43 Mass. App. Ct. 549, 564 (1997) (no abuse of discretion to ask jurors collectively rather than individually whether any had read newspaper article about case, where copy of sports page from issue of newspaper containing article was found in jury room). For discussion of the defendant's right to be present during juror questioning *see supra* § 28.1.

[35] The questioning "must be neutral and not coercive or otherwise calculated to affect the jurors' judgment." Commonwealth v. Hebert, 379 Mass. 752, 755 (1980). *See also* Commonwealth v. Webster, 391 Mass. 271, 275–76 (1984).

[36] *See* Commonwealth v. Sinnott, 399 Mass. 863, 883 (1987); Commonwealth v. Palmariello, 392 Mass. 126, 142 (1984). *Cf.* Commonwealth v. Gregory, 401 Mass. 437 (1988) (juror claim of impartiality after victim's widow introduced herself to him); Commonwealth v. Grant, 391 Mass. 645, 653 (1984); Commonwealth v. Coleman, 389 Mass. 667, 676 (1983).

[37] Commonwealth v. Sinnott, 399 Mass. 863 (1987) (quoting Irvin v. Dowd, 366 U.S. 717, 722 n.3 (1961)).

[38] Commonwealth v. Sinnott, 399 Mass. 863, 884 (1987).

[39] Commonwealth v. Stanley, 363 Mass. 102, 105 (1973). *Accord* Commonwealth v. Eagan, 357 Mass. 585 (1970). *Contrast* Commonwealth v. Crehan, 345 Mass. 609, 613 (1963) (no polling of jurors regarding prejudicial article, instruction to disregard delayed until close of evidence; new trial ordered).

that excusing the juror(s) so exposed may suffice to ensure impartiality, without any cautionary instructions.[40] If the prejudice is "too strong to be removed by inquiry of the jurors or by instructions," the judge may declare a mistrial.[41]

Although the *Jackson* language addresses prejudicial publicity, the decision was intended to apply to any extraneous influence brought to the judge's attention after jury selection.[42] Counsel must also be aware of the professional responsibility and *Fidler* rules governing defense investigation and court inquiry, described *supra* at § 36.1B(1).

3. Particular Types of Improper Influences

Improper influences might include struck evidence, racial bias, other prejudice, communications between jurors and third parties, communications between jurors before the case is submitted, pressure by the judge, unauthorized views by a juror, or news articles. Not all of these are considered "extraneous" influences, and the type of inquiry required will vary among them.[43]

a. Struck Evidence

Struck evidence requires no inquiry to determine the extent of exposure, since it is clear from the record. Moreover, inquiry into any jury discussion of struck evidence is forbidden since to prove a juror ignored instructions would require probing his mind.[44] While the exposure is presumed curable by instruction, in egregious circumstances a mistrial might be required.[45]

b. Bias

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[40] *See* Commonwealth v. Hanscomb, 367 Mass. 726 (1975) (11 jurors exposed to publicity; 10 said they could be impartial, one could not, judge excused the latter, retained the former, refused cautionary instructions); United States v. Anello, 765 F.2d 253, 258 (1st Cir.), *cert. denied*, 474 U.S. 996 (1985).

[41] Worcester Tel. & Gazette, Inc. v. Commonwealth, 354 Mass. 578, 581 (1968). See also Commonwealth v. Sinnott, 399 Mass. 863, 883–84 (1987) (some material might create so indelible an impression that the fact of exposure itself would require a mistrial); Commonwealth v. Reinstein, 381 Mass. 555 (1980); cases discussed at note 12, *supra*. The "manifest necessity" standard for measuring double-jeopardy consequences of a mistrial is addressed *supra* at § 21.3. If a trial judge has followed proper *Jackson* procedures, her refusal to declare a mistrial will be accorded substantial deference on review. Commonwealth v. Kamara, 422 Mass. 614 (1996).

[42] Commonwealth v. Jackson, 376 Mass. 790, 800 (1978).

[43] The boundary between "extraneous" and permissible is not as clear-cut as one might think. In Commonwealth v. Greineder, 458 Mass. 207 (2010), a juror discovered he could conduct an experiment comparing stains on certain objects in evidence with marks made by a pair of gloves with dotted grips, also in evidence, when he picked up a banana at lunch while wearing the gloves. The jurors compared the marks on the banana with stains on the evidence in deliberations and convicted the defendant. The Supreme Judicial Court concluded that the experiment was within the scope of admitted evidence and found no extraneous influence.

[44] Commonwealth v. Fidler, 377 Mass. 192, 198–99 (1979).

[45] *See supra* sec. 36.1B(1).

The *Fidler* regime is at least partially abrogated when the focus is on a single juror's bias. Bias, "strictly speaking," is not an extraneous influence.[46] In *Commonwealth v. Amirault,*[47] the defendant learned after trial that a juror had been raped as a child, the same crime for which the defendant was tried. Although the Supreme Judicial Court denied relief based on lower court findings that the juror had no memory of the incident,[48] the case demonstrates that where bias is alleged a particular, subjective inquiry is the proper procedure; indeed, the defendant must show to the judge's satisfaction and by a preponderance of the evidence that the juror was in fact biased in order to obtain a new trial:

> "A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and [his] understanding of the consequences of [his] actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate [his] answers in light of the particular circumstances of the case." Amirault has produced no other evidence that the juror was actually prejudiced against him and our review of the bearing persuades us that the judge could have accepted the truth of the juror's experience.[49]

In an earlier case, the Supreme Judicial Court enunciated a different theory by which *racial bias* might be investigated despite the *Fidler* strictures. Faced with an allegation that a juror had made racial slurs against a witness to other jurors, the court found it a "difficult case" to categorize as either susceptible or forbidden to judicial inquiry.[50] Noting at inquiry into the racial prejudice of jurors had been held out of bounds in federal cases, the Court stated that

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[46] Commonwealth v. Amirault, 399 Mass. 617, 627 n.4 (1987); *See also* Commonwealth v. Luna, 418 Mass. 749 (1994) (claim that during deliberations a juror indicated that he was prejudiced against police and thought they should never lie was an "expression of the individual juror's personal philosophy, rather than any type of extraneous influence or impermissible personal bias," and did not justify postverdict inquiry); Commonwealth v. Grant, 391 Mass. 645, 653 (1984).

[47] 399 Mass. 617 (1987).

[48] Had the juror consciously lied in voir dire concerning the prior crime, bias would likely have been implied with no further showing. Commonwealth v. Amirault, 399 Mass. 617, 628 n.5 (1987).

[49] Commonwealth v. Amirault, 399 Mass. 617, 626–27 (1987) (quoting Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)). *See* also Commonwealth v. Emerson, 430 Mass. 378, 384 (1999) (standard for obtaining new trial on basis of undisclosed juror bias). However, bias against a party's attorney was found not cognizable in a civil case. MacDonald v. Consolidated Rail Corp., 399 Mass. 25, 31–35 (1987).

[50] Commonwealth v. Tavares, 385 Mass.140 (1982). *See also* Commonwealth v. McCowen, 458 Mass. 461 (2010)(comment on defendant's race); Commonwealth v. Jacobson, 19 Mass. App. Ct. 666, 682–85 (1985) (antisemitism). In *Tavares,* because the trial judge in fact inquired into the racial slur, and the Commonwealth did not argue that the inquiry was itself error, the Court "assumed, without deciding, that the judge acted properly when he asked each deliberating juror whether he had heard any racist comments." *Tavares, supra,* 385 Mass. at 156. The Court went further in Commonwealth v. Laguer, 410 Mass. 89, 97 (1991) (defendant entitled to evidentiary hearing on posttrial allegations, presented by juror's affidavit, that several jurors made repeated ethnic slurs; the "possibility . . . that the defendant did not receive a trial by an impartial jury . . . cannot be ignored") and in *McCowen, supra,* followed a four-step analysis: had the defendant proved (by a preponderance of evidence) that a juror made a

> [n]evertheless, there may be cases in which such evidence may not be excluded without " 'violating the plainest principles of justice.' . . . Where, for example, an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the influence of racial bias in the jury room, to ignore the evidence might well offend fundamental fairness." *Smith v. Brewer,* 444 F. Supp. 482, 490 (S.D. Iowa), *quoting McDonald v. Pless,* 238 U.S. 264, 268–69 (1915).[51]

When a juror gives false answers during voir dire, inquiry into his or her fitness to serve is appropriate. In Commonwealth v. Cousin, 449 Mass. 809 (2007), the Supreme Judicial Court held that the prosecutor has a legitimate basis to review the CORI records of jurors: "Representing the Commonwealth in criminal trials is a quintessential prosecutorial function, of which the selection of a qualified and impartial jury is an integral part."[52] The Court upheld the discharge of three jurors with substantial criminal records based on the trial judge's conclusion that the concealment was deliberate and that the jurors could not be expected to be impartial or follow instructions.[53]

In Commonwealth v. Hampton, 457 Mass. 152 (2010), the Court revisited this issue, and concluded that restrictions on obtaining CORI records of sitting jurors were necessary to avoid the prospect of the prosecutor initiating a search based on perceived juror attitudes. After Hampton, the prosecutor remains free to obtain CORI records of prospective jurors before jury selection, and up until a jury is sworn.[54] Further, the

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statement possibly reflecting bias; has the defendant proved (by a preponderance) that the statement does in fact reflect bias, rather than being "in jest" or otherwise explainable as something other than bias. If the defendant establishes these two facts, a new trial is required because taint is presumed. *Id.* at 495-496. If the defendant does not establish the second, "the judge still must determine whether the statements so infected the deliberative process with racially or ethnically charged language or stereotypes that it prejudiced the defendant's right to have his guilt decided by an impartial jury on the evidence admitted at trial." This determination proceeds under the *Fidler* analysis *Id.* at 496-497.The defendant must show (by a preponderance) that other jurors were exposed to the biased statement, then the Commonwealth must show (beyond a reasonable doubt) that the statement would not have affected a "hypothetical average jury." *Id.* at 497.

[51] Commonwealth v. Tavares, 385 Mass. 140, 155–56 n.25 (1982). *See also* Commonwealth v. Laguer, 410 Mass. 89 (1991) (remanded for hearing whether affidavit alleging racial bias in jury room essentially true; if so, new trial must be held without showing of prejudice). Commonwealth v. Delp, 41 Mass. App. Ct. 435, 438 (1996) (postverdict hearing on juror's claim that he and other jurors were influenced by homophobic bias against defendant; conviction upheld, affirming trial judge's finding that juror was not biased, but simply had "second thoughts of a conscientious juror").

[52] *Id.* at 816. The Court continued that any records should be obtained at the beginning of trial and shared with defense counsel. *Id.* at 818. Justice Ireland concurred but expressed his concern that a framework should be instituted to govern the timing of CORI requests. He suggested that any requests for CORI records after the jury is empaneled should require judicial approval. *Id.* at 823-824. Justice Ireland's proposed scheme was later adopted by the Court in Commonwealth v. Hampton,457 Mass. 152 (2010) discussed in text and at note 54 *infra*.

[53] Id. at 822.

[54] The Court also encouraged judges to authorize the provision of CORI records to defense counsel upon request, after jurors have been selected but before they are sworn, to address "concerns about unevenness of access," *id.* at 169.

prosecutor can announce to the court an intention to obtain CORI records of the seated jury before it is sworn and have a day's grace to obtain the records. Thereafter no party can obtain CORI information on jurors without leave of court.[55]

c. Juror's Preexisting Knowledge

A juror's preexisting knowledge, rather than any outside contact during trial, may ground a finding of extraneous influence.[56]

In Commonwealth v. Carnes, 457 Mass. 812 (2010) the *Hampton* strictures were extended. In that case the Court upheld the discharge of a juror during deliberations, based on the judge's conclusion that she lied about her husband's criminal record and her extensive involvement in criminal proceedings and restraining order proceedings. The prosecutor had ordered a CORI check of the husband after a victim-witness advocate had recognized the juror. While the Court found no impropriety in the prosecutor's actions or violation of the newly-minted Hampton requirements, it amended the Hampton requirements to encompass any investigation of a sitting juror: "should a situation such as the one in this case arise in the future (recognition of a juror as a participant in a prior legal proceeding), the prosecutor (or defense counsel) must inform the judge of the issue and obtain court approval to undertake further investigation of the juror or anyone involved with the subject matter." *Id*. at 836.

[55] "To avoid the risks arising from inquiries into the backgrounds of empanelled jurors, we hold that, in all criminal trials commencing after the issuance of the rescript in this case, a prosecutor's independent authority to conduct checks of jurors' CORI records under G.L. c. 6, § 172, to determine if a juror failed to disclose his or her criminal record during voir dire, without the judge's approval, ends once the jury have been sworn. If the prosecutor, cognizant of the time needed to conduct the checks of prospective jurors' CORI records, does not wish to delay the jury from being sworn by waiting for the completion of such checks, or if the judge will not delay the commencement of trial until such checks are completed, the prosecutor may reserve an entitlement to conduct a check of jurors' CORI records by declaring that he or she is content with the jury, subject to the results of such checks, which the prosecutor will cause to be completed immediately, no later than the beginning of the next trial day. By requiring the prosecutor to reserve this entitlement before the jury are sworn, the danger that a record check will be improperly triggered by signs of juror dissatisfaction with the Commonwealth's case will be substantially diminished. After the jury are sworn, unless the prosecutor has reserved an entitlement to conduct such a check, any check of CORI records or other inquiry into juror misconduct, whether sought by the prosecution or the defendant, may be done only with the approval of the trial judge. We add that the same procedure applies to any investigation of jurors that may be conducted by the defense." *Id.* at 170-171.

[56] *See* Commonwealth v. Hunt, 392 Mass. 28, 37–42 (1984) (single juror's knowledge of extraneous "fact" — defendant's prior record — sufficient to trigger *Fidler* analysis regardless whether juror communicated that knowledge to others). *See also* Commonwealth v. Fidler, 377 Mass. 192 (1979), holding that a juror's comment during deliberations that "He [defendant] got shot last week" is extraneous, because nothing was introduced regarding that incident, and so susceptible to inquiry, even if the juror was the source of the information. This follows from the Court's holding that juror information gathered from an unauthorized view is extraneous and can be inquired into. To the same effect is Commonwealth v. Kincaid, 444 Mass. 381, 388 (2005), rejecting the Commonwealth's argument that the defendant did not establish the source of the juror's extraneous knowledge, holding that the defendant need only show that the knowledge did not come from the evidence.

Under *Hunt*, as one would expect, knowledge by a single juror of extraneous matter is enough to trigger the second part of the *Fidler* analysis, as to what effect such information would have on a hypothetical jury. Because a jury verdict must be unanimous, contamination of even a single juror by information deemed prejudicial under *Fidler* is grounds for a new trial.

d. Communications Between Jurors and Outsiders

Communications between jurors and outsiders regarding the subject matter of the case are presumptively prejudicial.[57] So in *Commonwealth v. Theberge*[58] certain witnesses and spectators at defendant's trial held discussions in the presence of a juror. Stating that "[t]he discussion by those who had been witnesses with those who were spectators at the trial on matters vital and essential to the material issues in the immediate presence of a juror was inexcusable and reprehensible,"[59] the Court, notwithstanding the trial judge's finding that the juror remained impartial, ordered a new trial. Similarly, juror observation of expressive conduct by a victim advocate may taint the trial.[60] Mere "casual contact" between jurors and others, however, is not grounds for action by the trial judge during trial, and *a fortiori* is not grounds for a new trial.[61] Even where there is some communication with a juror that arguably got to the

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Compare Commonwealth v. Ferguson, 425 Mass. 349 (1997) (where juror belatedly recognized Commonwealth witness as his former babysitter, great deference to trial judge's determination, after individual voir dire, of juror's impartiality).

[57] Commonwealth v. Dixon, 395 Mass. 149 (1985). Defendant's counsel in *Dixon* learned from one juror that another juror's husband had spoken with witnesses in the case and had told his wife the content of those conversations. The content of the conversations was not disclosed. Quoting Remmer v. United States, 347 U.S. 227, 229 (1954), which stated that any private communication "with a juror during a trial about the matter pending before the jury is, for obvious reasons, presumptively prejudicial," the Court remanded for a hearing to determine whether any such communications had concerned the subject matter of the trial. *Dixon*, *supra*, 395 Mass. at 152. *See also* Commonwealth v. Giusti, 434 Mass. 245, 251 (2001)(juror's preverdict emails expressing belief in defendant's guilt not extraneous, but fact that juror received responses required remand to determine if responses constituted extraneous influence); Commonwealth v. Solis, 407 Mass. 398 (1990) (new trial ordered where court officer provided improper information); Parker v. Gladden, 385 U.S. 363 (1966) (new trial where court officers communicated their opinion of the defendant's guilt to the jury). *Compare* Commonwealth v. Drumgold, 423 Mass. 230, 261 (1996) (court officer's remarks, "Jesus Christ, I hope to God she is not on the deliberating jury or else this trial will be dragged on and it is already costing the state too much money" did not qualify as extraneous disturbing influence: they did not mention specific facts, not in evidence, concerning parties or matters in litigation, nor express opinion on guilt or character of defendant, nor concern merits of case).

[58] 330 Mass. 520 (1953).

[59] Commonwealth v. Theberge, 330 Mass. 520, 530 (1953). *See also* Commonwealth v. Hardy, 431 Mass. 387, 391-392 (2000) (spectators shouting at jurors on view that defendant was guilty "clearly created" potential for prejudice).

[60] Commonwealth v. Harris, 409 Mass. 461, 470 (1991) (displays of sympathy by victim advocate in front of jury, such as handholding or crying, is similar to Commonwealth's endorsement of victim's credibility, and appeals to emotions of jury; judge must take preventive and, if necessary, remedial measures to avoid prejudice to defendant's right to fair trial).

[61] Commonwealth v. Gregory, 401 Mass. 437 (1988) (after victim's widow introduces herself to jury member, trial judge properly relied on juror's statement he can remain impartial); Commonwealth v. Lovett, 374 Mass. 394, 401–02 (1978) (casual conversation between juror and witness was unrelated to issues in case and did not constitute reversible error); Commonwealth v. French, 357 Mass. 356, 401 (1970), *judgments vacated as to death penalty sub nom.* Limone v. Massachusetts, 408 U.S. 936 (1972) (accidental contact between a juror and a witness in a court house stairwell during a recess was of no consequence).

jury room during deliberations, the presumption of prejudice does not apply without some indication that the content of the communication concerned the case.[62]

e. Intrajuror Communications

In general, *Fidler* forecloses inquiry into any intrajuror communications not involving evidence outside the record. Allegations that one juror was "bullied" by other jurors are not cognizable.[63] Nor are premature expressions of belief in the defendant's

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In *Lovett*, a police witness in that case reported that, while in the lobby, a woman who might have been a juror had commented to him as she passed them "You've got good composure." The Court found this level of contact, assuming the woman was a juror, insufficient to require *any* action by the trial judge. *See also* United States v. O'Brien, 497 F.2d 12, 14 (1st Cir. 1992) (unauthorized communication between jurors and persons associated with the case, such as police witness, raises presumption of prejudice that government must overcome).

[62] *See* Commonwealth v. Dixon, 25 Mass. App. Ct. 678 (1988) *(an appeal following remand from* Commonwealth v. Dixon, 395 Mass. 149 (1985)). After verdict, a juror stated that there had been communication between a party or witness and another juror's husband. The juror stated the fact of the communication was discussed but could not recall the content of it and stated that any such conversation did not enter into the jury's deliberations. The appeals court affirmed denial of further inquiry and a second denial of a new trial. The appeals court was apparently convinced that the juror's testimony reflected his unease with the verdict rather than the presence of prejudicial matters before the jury. *Dixon, supra*, 25 Mass. App. Ct. at 681 n.6. *See also* Commonwealth v. Giusti, 449 Mass. 1018 (2007), an appeal after remand to determine whether responses to a juror's email posting expressing belief that the defendant was guilty introduced extraneous influence (the first appeal is at 434 Mass. 245 (2001)). The court found no extraneous influence where the persons who responded, both lawyers, admonished the juror that she should not be discussing the case, and the juror did not discuss these responses with other jurors).

Compare Commonwealth v. Donovan, 15 Mass. App. Ct. 269 (1983), where a court officer, asked by the (deliberating) jury to convey a question to the judge, inquired whether it pertained to evidence or to law, and was told "evidence." He told them he could not convey a question regarding evidence to the judge and that it was the jurors' collective memory that controlled as to such questions. The judge, after being informed of this, did not take any corrective action. The Appeals Court reversed the defendant's subsequent conviction, although the record did not reveal what the question was or how defendant might have been prejudiced by the lack of an answer:

> In similar circumstances involving an improper communication to the jury, and where the contents of that communication were either unknown or not part of the record, prejudice to the defendant has been presumed. . . . Because the effect on the jury deliberations of the possible answer to the proposed question cannot be determined because of the judge's error, the defendant is excused from demonstrating the judge's error was substantial or prejudicial. The Commonwealth failed to produce any evidence to rebut the presumption and, therefore, we must conclude that the defendant suffered prejudice.

Donovan, supra, 15 Mass. App. Ct. at 273 (citations omitted). In *Donovan* it was clear that, whatever the question was, it pertained to the case; the presumption of prejudice thus applied, and in this case could not be rebutted without evidence from the jurors what the question was.

[63] Commonwealth v. Pytou Heang, 458 Mass. 827 (2011)(judge properly took no action on post-verdict letter from juror complaining of bullying behavior of fellow-jurors); Commonwealth v. Semedo, 456 Mass. 1, 21-22 (2010)(same); Commonwealth v. Royster, 15

guilt by one juror to another or others.[64] Closer to the border is *Commonwealth v. Maltais,*[65] where the jury foreman reported to the trial judge that another juror had asked his opinion of the weight to be given to a certain expert's testimony. The judge then examined all jurors who were aware of the interchange, assured herself they remained impartial, and admonished the jury thenceforth not to discuss the case until the judge gave it to them. Although the Court affirmed the subsequent conviction, the language of the opinion suggests that it viewed this as bordering on an extraneous influence.[66]

f. Unauthorized View

Except under the guidance of the court,[67] jurors are forbidden to take views.[68] Allegations that such views have been taken would justify the court's inquiry into the circumstances, including voir dire of the jurors alleged to have done so.[69] Any error is subject to a harmless error analysis, and is classified with other inadmissible evidence that the jury might hear in being curable by instructions.[70]

g. Publicity

Mass. App. Ct. 970 (1983) (same: complaints go to "internal workings" of the jury that cannot be inquired into). *Accord* Commonwealth v. Drumgold, 423 Mass. 230, 261 (1996) (discussions among jurors about option or desirability of mistrial are not "extraneous influences"); Commonwealth v. Mahoney, 406 Mass. 843, 855–56 (1990) (tension between jurors part and parcel of jury deliberations). *But see infra* note 66.

[64] Commonwealth v. Scanlan, 9 Mass. App. Ct. 173, 184 (1980) ("The jury sat sequestered for sixteen days; it is not realistic that the jurors would succeed in keeping their lips sealed in the face of the alternating drama and tedium of the trial. In the interior workings of a jury there is room for impropriety that is short of unlawfulness").

[65] 387 Mass. 79 (1982).

[66] The Court framed the issue posed by the communication between the two jurors, which it did not decide, as whether the "'overt factors' regarding which a juror may testify are limited to information received by jurors from sources outside the courtroom." Commonwealth v. Maltais, 387 Mass. 79, 91 (1982). The Court did not decide the issue because the trial judge had made inquiry and instructed the jury. But there is some significance in the fact that the issue was left open as an issue, rather than summarily foreclosed.

[67] Court supervised views are discussed *supra* at § 34.4.

[68] Commonwealth v. Cuffie, 414 Mass. 632, 638 (1993) (unauthorized juror visit to crime scene during trial warranted granting of new trial); Commonwealth v. Jones, 15 Mass. App. Ct. 692, 694–96 (1983).

[69] *See supra* § 36.1B(1), (2). *See also* Commonwealth v. Cuffie, 414 Mass. 632, 634–38 (1993) (where juror A reported that juror B had said that she had visited the scene, it was reversible error for trial judge to interview juror A, but not juror B; a juror's unauthorized view is not per se prejudicial, but it is "a potentially serious matter," *Cuffie, supra,* 414 Mass. at 637); Commonwealth v. Jones, 15 Mass. App. Ct. 692 (1983).

[70] Berlandi v. Commonwealth, 314 Mass. 424, 452 (1943); Commonwealth v. Coles, 44 Mass. App. Ct. 463, 467 (1998) (no abuse of discretion for trial judge to set aside conviction on ground that Commonwealth failed to carry "heavy burden" to show absence of prejudice; unauthorized visit to scene is "not per se prejudicial" but it is "potentially serious"); Commonwealth v. Cresta, 3 Mass. App. Ct. 560, 562 (1975).

The most pervasive source of extraneous information is publicity generated in the press. The *Jackson* decision, discussed above, describes the procedures to be used for inquiry of jurors in such cases. Other pretrial motions designed to safeguard the trial against prejudicial publicity are described *supra* at ch. 26.

h. Juror Incompetence

If there is substantial evidence that a juror was adjudicated insane or incompetent near the time of jury service, inquiry may be allowed. However, the Supreme Court has held that a juror's testimony regarding juror alcohol and drug use was neither permitted under Fed. R. Evid. 606(b) nor required under the Sixth Amendment right to an impartial, competent jury.[71]

i. Influences That "Fundamental Fairness" Requires Be Considered

This exception to the *Fidler* limits on inquiry arose in a case involving a racial slur expressed during jury discussions.[72] Other extremely prejudicial influences might require relaxation of the *Fidler* limits where to ignore them would violate "the plainest principles of justice."[73]

j. Independent Research

The availability of the internet adds an entirely new dimension to the calculus of extraneous influence.[74] Jurors with "smartphones" and increasingly high bandwidth access to the internet have the ability to conduct research during deliberations, and the temptation in a heated discussion is great to find authority for your position. There has

[71] Tanner v. United States, 483 U.S. 107 (1987). *But see* Commonwealth v. Rock, 429 Mass. 609, 613-614 (1999) (judge may dismiss juror on his belief of testimony that juror is using drugs during trial).

[72] Commonwealth v. Tavares, 385 Mass. 140 (1982), more fully described *supra* at § 36.2(3)(b). *See also* Commonwealth v. Laguer, 410 Mass. 89 (1991) (remanded for hearing whether affidavit alleging racial bias in jury room essentially true; if so, new trial must be held without showing of prejudice). *Cf.* Commonwealth v. Phoenix, 409 Mass. 408, 425 (1991) (prosecutor's appeal to racial prejudice especially incompatible with fair trial because likely to "sweep jurors beyond a fair and calm consideration of the evidence").

[73] Commonwealth v. Tavares, 385 Mass. 140, 155–56 n.25 (1982). For example, this caveat suggests limits to the holding of Commonwealth v. Royster, 15 Mass. App. 970 (1983), that a juror's report that she was "bullied by her fellow jurors into voting for a finding of guilty but that she felt in her heart then, and continued so to feel, that the defendant was not guilty," fell into the category of "internal workings" of the jury that cannot be inquired into. In an extreme case of bullying, one could argue a violation of "the plainest principles of justice," and rely on *Tavares* to call for further inquiry than would otherwise seem to be warranted under the *Fidler* ruling.

[74] See "As jurors turn to web, mistrials are popping up", N.Y. Times, March 17, 2009 (archived at As Jurors Turn to Web, discussing cases, including a major federal trial which was aborted when it was discovered that nine jurors were doing internet research).

been little discussion in appellate decisions of this issue[75], but it warrants examination by the Supreme Judicial Court, and the generation of policies to address it.

§ 36.2 JUROR NOTE TAKING AND QUESTIONING

§ 36.2A. NOTES

Super. Ct. R. 8(a) provides:

> In any case where the court, in its discretion, permits jurors to make written notes concerning testimony and other evidence, the trial judge shall precede the announcement of permission to make notes with appropriate guidelines. Upon the recording of the verdict or verdicts, the notes of the jurors shall be destroyed by direction of the trial judge. Jurors may also be granted permission by the trial judge to make notes during summation by counsel and during the judge's instructions to the jury on the laws.

In Commonwealth v. St. Germain,[76] the Supreme Judicial Court traced the allowance of note taking by jurors back to colonial days and cited Commonwealth v. Tucker,[77] holding that juror note taking was to be left to the trial judge's discretion. The Court has approved instructions to the jurors that those who took notes should not argue during deliberations that their recollection of the evidence was more accurate because they took notes, and that they should restrict note-taking to important points, leaving themselves opportunity to observe witnesses and make credibility judgments.[78]

The Court in St. Germain also noted that the trial judge had allowed the jurors to take notes during opening statements although Rule 8A specifically refers to evidence, summations, and instructions and does not mention openings. Without deciding that the rule precluded note taking during openings, the Court found no error where the Commonwealth's opening was flanked by instructions that it did not constitute evidence, a point also made by the Commonwealth's attorney.[79]

The Supreme Judicial Court recently signaled a shift in its view of note-taking. In Commonwealth v. Shea,[80] the Court considered the issue pursuant to its obligations

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[75] The issue arose in Commonwealth v. Rodriguez, 63 Mass. App. 660 (2005) and prompted a footnote admonition to trial judges: "The trial judge properly instructed the jury not to do their own research and investigation. The instruction obviously encompassed Internet research as well, although juror fourteen either ignored or misunderstood the instruction. Regardless, given the simplicity, speed, and scope of Internet searches, allowing a juror to access with ease extraneous information about the law and the facts, trial judges are well advised to reference Internet searches specifically when they instruct jurors not to conduct their own research or investigations." 63 Mass. App. at 678 n. 11. *See also* U.S. v. Bristol-Martir, 570 F.3d 29 (1st Cir. 2009);); Romano v. Watson, 17 Mass. L. Rptr. 261 (2004).These are the only cases that the author found raising this issue in the First Circuit or Massachusetts as of October, 2011.

[76] 381 Mass. 256 (1980).

[77] 189 Mass. 457 (1905).

[78] Commonwealth v. St. Germain, 381 Mass. 256, 266 (1980). *See also* Commonwealth v. Wilborne, 382 Mass. 241, 253 (1981).

[79] Commonwealth v. St. Germain, 381 Mass. 256, 265–66 n.16 (1980).

[80] 460 Mass. 163 (2011).

under G.L. c. 211 § 3, apparently because the jury had asked factual questions that note-taking might have provided the answers to. The Court noted the history of note-taking and recent empirical studies that concluded that note-taking is beneficial[81] and cited decisions of other states requiring that jurors be permitted to take notes.[82] Based on this review, the Court concluded, at 179: "we believe that an accurate memory of detailed facts is as important in a court room as it in a lecture hall or board room, where notetaking is almost invariably permitted. We refer the question whether we should revise our rules to require that jurors be permitted to take notes during some or all trials, or whether we should continue to leave such decisions to the discretion of the judge, to this court's standing advisory committees on the rules of criminal and civil procedure." In light of this decision, note-taking is likely in the near future to be a matter for individual jurors' discretion rather than for the trial judge's discretion.

§ 36.2B. QUESTIONING

A judge may permit jurors to ask questions of witnesses pursuant to guidelines set forth in Commonwealth v. Britto,[83] which modified procedures earlier adopted by the Supreme Judicial Court.[84] When jurors are permitted to question witnesses, the judge should instruct them (1) not to let themselves become aligned with any party, and (2) that their questions should not be directed at helping or responding to any party. (3) Because their questions must comply with the rules of evidence, the judge may have to alter or refuse a particular question. (4) If so, the juror asking the question must not hold that against either party. (5) Jurors should not give the answers to their own questions a disproportionate weight, and should not discuss the questions among themselves. These instructions should be repeated during the final charge to the jury before they begin deliberations.

Britto further directs that all questions should be submitted in writing to the judge, with the juror's identification number included on each question. Counsel should have an opportunity, outside the hearing of the jury, to examine the questions with the judge, make any suggestions, or register objections. The judge should rule on any objections at this time, including any objection that the question touches on a matter that counsel purposefully avoided as a matter of litigation strategy, and that, if asked, will cause particular prejudice to the party. Finally, counsel should be given the opportunity to re-examine a witness after juror interrogation. Even with these procedures in place, however, the Court continues to express concern that "allowing jurors to question witnesses has the potential for introducing prejudice, delay, and error

[81] "Today, empirical studies and judicial experience have dispelled the concerns that once caused juror notetaking to be regarded as an undesirable practice. Studies have indicated that notetaking does not distract jurors, does not produce a distorted or inaccurate record of the case, and does not give notetakers undue influence over those jurors who did not take notes. See Heuer, Increasing Juror Participation in Trials Through Note Taking and Question Asking, 79 Judicature 256, 258–259 (1996) (summarizing results)." Shea, *supra*, 460 Mass. at 178.

[82] Id. at 179 & n. 12.

[83] 433 Mass. 596 (2001).

[84] Commonwealth v. Urena, 417 Mass. 692, 701–03 (1994).

into the trial."[85] The facts of Britto demonstrate the difficulties a judge is likely to encounter when inviting jurors to ask questions.[86]

§ 36.3 INSTRUCTIONS TO JURORS

§ 36.3A. REQUESTING INSTRUCTIONS [87]

Mass. R. Crim. P. 24(b) sets forth the procedure governing requesting specific instructions and objecting to the giving or failure to give specific instructions. It provides:

> At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the judge instruct the jury on the law as set forth in the requests. The judge shall inform counsel of his proposed action upon requests prior to their arguments to the jury. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection. Upon request, reasonable time shall be given to each party to object to the charge before the jury retires. Where either party wishes to object to the charge or to request additional instructions, the objection or the request shall be made out of the hearing of the jury, or where appropriate, out of the presence of the jury.

The rule enables counsel to tailor their arguments to the charge.[88] The requirement of objection following the charge enables the judge to correct erroneous instructions before the jury deliberates. A defendant raising an affirmative defense is entitled to an instruction on his theory if there is any evidence that supports it,[89] and

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[85] Britto, *supra*, quoting Urena, *supra.*

[86] *See also* Commonwealth v. Reeder, 73 Mass. App. 750, 756-757 (2009)(admonishing trial judges to consider the potential for prejudice before asking jury questions: "the judge's concern about fairness to the jurors appears to have outweighed the need for appropriate balancing of relevance against prejudice. By permitting the question to be asked, the judge risked a realization of the potential for prejudice, cautioned by Urena, *supra* ,which, in a closer case, might have required a retrial.")

[87] For common jury instructions *see* Model Jury Instructions on Homicide (1999), http://www.mass.gov/courts/sjc/docs/homicideinstructions.pdf; MCLE, Massachusetts Superior Court Criminal Practice Jury Instructions (2004); District Court, Criminal Model Jury Instructions, http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/jury-instructions/criminal; HRONES & HOMANS, MASSACHUSETTS JURY INSTRUCTIONS, CRIMINAL (Lexis Law Publishing 1999). Counsel should beware, however, of using standard jury instructions uncritically.

[88] Commonwealth v. Thomas, 21 Mass. App. 183, *rev. denied*, 396 Mass. 1106 (1985).

[89] When appropriate in the context of a case and upon request, the Massachusetts appellate courts have directed judges to instruct *inter alia* that: defendant's non-participation in a psychiatric examination is not evidence of guilt or criminal responsibility (to be given at time of testimony), Commonwealth v. Vuthy Seng, 436 Mass 537 (2002); the testimony of a Commonwealth witness's plea agreement should be considered with particular caution and that the prosecutor has no special knowledge of the truthfulness of the witness's testimony, Commonwealth v. Marrero, 436 Mass. 488 (2002); certain scientific procedures were not conducted or certain police procedures not followed, Commonwealth v. Lapage, 435 Mass. 480

that instruction should preferably come after instructions describing the elements of the crime.[90] The decision of the Supreme Judicial Court in *Commonwealth v. Biancardi*[91] established that when the trial record shows that the defendant specifically requested a particular instruction, and the judge specifically denied the request before the charge, the instruction issue is saved for appeal without the necessity for defense counsel to state an "objection" or to raise the matter again at the conclusion of the judge's charge.

(2001), citing Commonwealth v. Bowden, 379 Mass. 472 (1980); when grand jury testimony is admitted for its probative value (to be given at time of testimony), Commonwealth v. Farrey, 436 Mass 422 (2002); jury should not rely on out-of-court statement admitted under joint-venture hearsay exception unless jury finds, on basis of other evidence, that joint venture exists, Commonwealth v. Reaves, 434 Mass. 383 (2001); "specific unanimity" instruction required when defendant accused of committing several acts at different times and places, each of which can support a conviction, Commonwealth v. Cyr, 433 Mass 617 (2001); sufficient evidence of defendant's honest and reasonable belief that money he demanded was his as defense to charge of armed assault with intent to rob, Commonwealth v. Mahar, 430 Mass. 643, 648 (2000); cautionary instruction may be required if Commonwealth's case rests solely on spontaneous utterance contradicted at trial by declarant witness with motive to lie, Commonwealth V. Moquette, 53 Mass. App. Ct. 615 (2002); necessity defense, Commonwealth v. O'Kane, 53 Mass. App. Ct. 466, and cases cited; judge should instruct that show-up identification is less reliable than when defendant is picked out of group, Commonwealth v. Ye, 52 Mass. App. Ct. 850 (2001); judge should instruct jury not to consider defendant's disruptive outburst in their deliberations, Commonwealth v. North, 52 Mass. App. Ct. 603 (2001); judge should instruct jury that Commonwealth witness's agreement to provide testimony in exchange for consideration on charge pending against witness does not constitute endorsement by Commonwealth of veracity of witness's testimony, Commonwealth v. Davis, 52 Mass. App. Ct. 75 (2001); Commonwealth's implicit promise of leniency to its witness warrants instruction to scrutinize witness's testimony with particular care, Commonwealth v. O'Neil, 51 Mass. App. Ct. 170 (2001); mistaken identification instruction, Commonwealth v. Burns, 49 Mass. App. Ct. 677 (2000), and cases cited; missing witness instruction, Commonwealth v. Alves, 50 Mass. App. Ct. 796 (2001) and cases cited; self-defense instruction, Commonwealth v. Alebord, 49 Mass. App. Ct. 915 (2000), and cases cited; alibi instruction, Commonwealth v. Spencer, 49 Mass. App. Ct. 383 (2000) and cases cited. See also Commonwealth v. Moyles, 45 Mass. App. Ct. 350, 354–355 & n.6 (1998) (prejudice from judge's refusal to instruct on applicable law not cured by allowing defense counsel to argue point to jury); Commonwealth v. Ward, 426 Mass. 290, 296–97 (1997) (sufficient evidence of mental impairment); Commonwealth v. Cataldo, 37 Mass. App. Ct. 957 (1994), *aff'd*, 423 Mass. 318 (1996) (conviction reversed where evidence, viewed in light most favorable to defendant, was sufficient to raise issue of self-defense); Commonwealth v. Correia, 18 Mass. App. Ct. 178 (1984); Commonwealth v. Bellamy, 391 Mass. 511, 514 (1984).

[90] Commonwealth v. Santiago, 425 Mass. 491, 506 (1997) (trial judge instructed first on self-defense and then on elements; it is generally preferable to instruct first on elements, but no specific order of jury instructions is required).

[91] 421 Mass. 251, 253-254 (1995). *See also* Commonwealth v. Rosario, 460 Mass. 181, 187 (2011); Commonwealth v. Smiley, 431 Mass. 477, 486 (2000); Commonwealth v. Prater, 431 Mass. 86, 97 (2000); Commonwealth v. James, 424 Mass. 770, 786 n.25 (1997); Commonwealth v. Morgan, 422 Mass. 373, 376-377 (1996); Commonwealth v. Drewnowski, 44 Mass. App. Ct. 687, 691-692 (1998); Commonwealth v. Engram, 43 Mass. App. Ct. 804, 806 n.2 (1997).

Biancardi is unavailing if the defendant requests an instruction but the judge does not rule before charging the jury on the request. In that circumstance, the party must object after the jury is instructed if the requested instruction is not given or the matter is waived. Commonwealth v. Thomas, 439 Mass. 362, 371 (2003).

Careful counsel will, however, state an objection to the omission of the requested instruction from the judge's charge upon the conclusion of the charge, at the bench, in order to make certain that the record demonstrates the request was in fact brought to her attention.[92] The court may refuse to consider requests submitted out of time[93] but the appellate courts "have frequently cautioned against applying the rule inflexibly, . . . especially in cases involving a failure to instruct the jury on the correct principles of law."[94] As long as the judge's charge correctly states the law, the defendant is not entitled to have the jury instructed in his own language.[95]

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[92] See Commonwealth v. Rosario, 460 Mass. 181, 187 (2011)(where judge states that requested instruction will be given but it is not given in the form the party requested, objection to the instruction as given must be made after the jury is instructed or the objection is waived). See also Commonwealth v. White, 452 Mass. 133, 138-139 (2008)(where judge stated at charge conference that he would give requested instruction but not verbatim as requested, defendant waived issue where judge gave no instruction on the issue and the defendant failed to object after the jury was instructed: "When the judge did not give the instruction at all, it was entirely likely that the omission was inadvertent and that the judge would have rectified the error had it been brought to his attention.")

The reasoning that bringing an error or omission to the judge's attention at the time it occurs will allow the judge to correct it underlies the more general requirement that parties must object to any trial ruling in order to preserve it for appellate review. *See* Commonwealth v. Collins, 374 Mass. 596, 601 (1978). An instruction, or the failure to give an instruction, will be reviewed only to insure no miscarriage of justice if it has not been subject to an objection. *E.g.*, Commonwealth v. Conley, 34 Mass. App. Ct. 50, 50–56 (1993) (where judge cut off defense counsel's objections, objection deemed made); Commonwealth v. Lazarovich, 410 Mass. 466 (1991); Commonwealth v. Brown, 392 Mass. 632, 636, 642 (1984). It is generally presumed that reinstruction correcting erroneous instructions is sufficient to cure any error. *See* Commonwealth v. Whooley, 362 Mass. 313, 319 (1972); Commonwealth v. Lammi, 310 Mass. 159, 165 (1941). *But see* Commonwealth v. McLaughlin, 433 Mass. 558 (2001) (erroneous instruction on burden of proof, even when followed by contradicting correct instruction, misleads jury).

Objections to jury instructions must be sufficiently specific to afford the judge an opportunity to rectify any errors. *See* Commonwealth v. Chapman, 433 Mass. 481 (2001) (general objection to judge's charge on element of offense will not preserve defendant's appellate rights, and defendant must inform judge of specific language objected to and grounds of objection); Commonwealth v. Reid, 384 Mass. 247, 257–58 (1981); Commonwealth v. McDuffee, 379 Mass. 353, 357 (1979). The S.J.C. has noted, however, that, as a matter of Massachusetts law, attorneys are not expected to be clairvoyant and to object to instructions not yet identified as constitutionally deficient. *See* Commonwealth v. Repoza, 400 Mass. 516, 520 (1987).

All rulings on proposed jury instructions should be on the record, and the appeals court has said that counsel should "respectfully remind" the judge of this if she fails to do so. Commonwealth v. Adams, 34 Mass. App. Ct. 516, n.3 (1993).

[93] Commonwealth v. Deagle, 10 Mass. App. Ct. 748, 751 (1980)(instruction on burden of proof as to self-defense submitted after argument of counsel properly refused, however failure to properly instruct jury on burden of proof required new trial as miscarriage of justice.).

[94] Commonwealth v. Traylor, 43 Mass. App. 239, 244 (1997). The Appeals Court also noted that Rule 24(b) "appears to allow some leeway for last-minute requests." Id.

[95] Commonwealth v. Gilchrist, 413 Mass. 216, 219 (1992); Commonwealth v. Sinnott, 399 Mass. 863, 878 (1987); Commonwealth v. Bumpus, 362 Mass. 672. 682 (1972); Commonwealth v. Martorano, 355 Mass. 790 (1969).

Any error in a reasonable doubt instruction requires reversal.[96]

§ 36.3B. INSTRUCTIONS DURING TRIAL

Certain instructions, particularly with respect to limiting the uses of evidence or precluding the use of evidence erroneously admitted, should be requested immediately after the jury hears the evidence. It is generally within the trial judge's discretion whether to instruct immediately or wait until the general charge,[97] but it may be an abuse of discretion to wait under certain circumstances.[98]

As with instructions generally, "[j]udges are not required, on their own, to instruct juries as to the purposes for which evidence is offered during trial."[99] The defendant must request a limiting instruction if the evidence should be limited. Failure to do so may result in the evidence being admitted for all purposes.[100]

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[96] Commonwealth v. Sleeper, 435 Mass. 581 (2002) (error in reasonable doubt instruction requires reversal on any level of review).

[97] Commonwealth v. Chartier, 43 Mass. App. 758, 761 (1997); Commonwealth v. Robinson, 24 Mass. App. Ct. 680, 686–87 (1987); Commonwealth v. Ferguson, 365 Mass. 1, 11–12 (1974).

[98] *See, e.g.*, United States v. Garcia Rosa, 876 F.2d 209, 236 n.22 (1st Cir. 1989) (trial court should take remedial action after juror accidentally observes defendant in custody, but no mistrial without showing of prejudice); Commonwealth v. Vuthy Seng, 436 Mass. 537 (2002) (instruction to jury that defendant's non-participation in psychiatric examination is not evidence of guilt or criminal responsibility should be given at time testimony about defendant's non-participation is presented); Commonwealth v. Garrey, 436 Mass. 422 (2002) (when grand jury testimony is admitted for its probative value, judge should so inform jury at time of its admission); Commonwealth v. Rodriguez, 49 Mass. App. Ct. 370 (2000) (judge's curative instruction to disregard improper argument cannot be delayed if it is to be actually curative). *But see* Commonwealth v. Auclair, 444 Mass.348, 357-358 (2005)(judge struck inadmissible answer and had previously instructed jury to disregard stricken testimony; no error to reinstruct or declare mistrial); Commonwealth v. Errington, 14 Mass. App. Ct. 733. 739 (1982) (delayed curative instruction insufficient to cure prejudice), *rev'd*, 390 Mass. 875 (1984) (finding the evidence admissible, obviating need for curative instruction); Commonwealth v. Hoppin. 387 Mass. 25, 31 (1982) (highly prejudicial and improper use of "prop" in closing, coupled with delay in curative instruction, require new trial); Commonwealth v. Crehan, 345 Mass. 609. 613–14 (1963) (jurors exposed to newspaper articles mentioning that defendants had prior criminal records: judge waited until evidence closed to instruct jurors; "Postponing any instruction until the charge, however, risked an adverse effect in the interval").

[99] Commonwealth v. Braley, 449 Mass. 316, 326-326 (2007); Commonwealth v. Isabelle, 444 Mass. 416, 420 (2005); Commonwealth v. Roberts, 433 Mass. 45 (2000) (when defendant makes no request for limiting instruction at time evidence is introduced by Commonwealth, he cannot later demand one); Commonwealth v. Rhoades, 379 Mass. 810, 821 (1980); Commonwealth v. Ruiz, 51 Mass. App. Ct. 346 (2001) (judge not required to give jury limiting instructions when evidence admitted for limited purpose unless defendant requests).

[100] Commonwealth v. McAfee, 430 Mass. 483, 491 (1999); Commonwealth v. Reynolds, 338 Mass. 130, 135–36 (1958); Commonwealth v. Baker, 20 Mass. App. Ct. 926, 927 (1985); Commonwealth v. Dello lacono, 20 Mass. App. Ct. 83, 86 n.8 (1985). *Cf* Commonwealth v. Pinnick, 354 Mass. 13, 16–17 (1968) (no error in admitting evidence generally that was properly admissible only against one codefendant, where no objection or request for limiting instruction made). *But see* Commonwealth v. Mills, 47 Mass. App. 500, 506 (1999)(reversible error for judge to fail to limit use of bad act evidence even in the absence of defense request, especially where jury expressly asked how evidence could be used).

§ 36.3C. JURY QUESTIONS

"In reaching their decision, the jury have the right, indeed the duty, to seek from the trial judge reinstruction on those matters of law that the jury do not fully understand."[101] The judge's response to any question by the jury should be made only after consultation with the attorneys for the Commonwealth and the defendant.[102] The scope of any response is within the judge's discretion,[103] but the response must be limited to answering questions of law, not of fact.[104] The jury's question should receive a "yes" or "no" answer from the judge if it can be correctly so answered.[105] It is not error for the court to instruct on matters not included in the original charge.[106] Where the jury requests reinstruction and then withdraws the request before any reinstruction is given,[107] or returns a verdict before the judge has an opportunity to respond,[108] there

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[101] Commonwealth v. Donovan, 15 Mass. App. Ct. 269, 272 (1983).

[102] Commonwealth v. Dyer, 460 Mass. 728 (2011);. Such consultation should be on the record. Commonwealth v. Hicks, 22 Mass. App. Ct. 139, 142–43 n.2 (1986). *See also* Commonwealth v. Floyd P., 415 Mass. 826, 833 (1993) (counsel should be given the opportunity to assist in framing an appropriate response and to place any objections on the record); Commonwealth v. Bacigalupo, 49 Mass. App. Ct. 629 (2000) (question from deliberating jury should be in writing and placed on record).

[103] Commonwealth v. Wolinski, 431 Mass. 228, 233 (2000); Commonwealth v. Scott, 428 Mass. 362, 366-367 (1998); Commonwealth v. Thomas, 21 Mass. App. Ct. 183, 186 (1985) ("'As a general proposition, the necessity, extent, and character of . . . any supplemental instructions are matters within the discretion of the judge,' " quoting United States v. Castenada, 555 F.2d 605, 611 (7th Cir.), cert. *denied*, 434 U.S. 847 (1977)). See Commonwealth v. Pares-Ramirez, 400 Mass. 604, 611 (1987) (judge need not repeat self-defense instructions when asked to explain degrees of murder); Commonwealth v. Small, 10 Mass. App. Ct. 606 (1980) (court not obliged to answer jury's question whether defendant was right or left handed); Commonwealth v. Amazeen, 375 Mass. 73, 82 (1978) (judge need not repeat manslaughter instructions when asked to explain first-and second- degree murder); Commonwealth v. Sires, 370 Mass. 541, 547 (1976) (same); Commonwealth v. Jones, 373 Mass. 423, 428 (1977) (judge need not reinstruct in response to a question whether jury could convict of felony underlying felony-murder yet convict of second-degree rather than first-degree murder).

[104] *See* Commonwealth v. Moore, 53 Mass. App. 334, 343-346 (2002)(error to instruct that "residence" for purposes of exemption from prohibition of unlicensed carrying of firearm required exclusive control, where defendant had roommate); Commonwealth v. Belding, 42 Mass. App. Ct. 435, 439–40 (1997) (conviction reversed where judge answered question whether person with his arm extended into common area was "outside his residence," a question of fact for the jury).

[105] *See* Commonwealth v. Mills, 47 Mass. App. Ct. 500, 507 n.10 (1999).

[106] Commonwealth v. Thomas, 21 Mass. App. Ct. 183 (1985) (no error to charge on joint venture in response to jury question, where charge would have been appropriate in initial instructions and jury question evidenced confusion whether only defendant's personal acts could ground finding of guilt).

[107] Commonwealth v. Scott, 428 Mass. 362, 367 (1998); Commonwealth v. Harvey, 397 Mass. 351, 359–60 (1986). *See also* Commonwealth v. Collins, 36 Mass. App. Ct. 25 (1994).

[108] Commonwealth v. Hakkila, 42 Mass. App. Ct. 129, 131–32 (1997) (where jury had been properly instructed originally, not error for judge to accept verdict returned before judge responded to jury questions); Commonwealth v. Collins, 36 Mass. App. Ct. 25 (1994) (within

is no error in receiving verdicts without further inquiry. Communications with the jury in response to questions that arise during deliberations should take place in open court,[109] and generally in the presence of the defendant.[110]

A jury request to have portions of testimony read or sent to them is addressed *infra* at section 36.4B.

§ 36.3D. DIRECTED VERDICT OF GUILTY, SPECIAL QUESTIONS, AND NULLIFICATION

Three interconnected propositions operate in the deliberations of the jury in criminal cases, all of which protect the jury's unfettered power to acquit. The first is that the judge may never direct a verdict against the defendant, "no matter how overwhelming the evidence of guilt."[111] It is always the jury's decision whether to find the defendant guilty. A corollary is that the judge may not lead the jury toward a finding of guilt through the use of "special verdicts" or "special questions."

Mass. R. Crim. P. 27(c) states that "[t]he trial judge may submit special questions to the jury." The decision is a matter of discretion.[112] "Special questions" are "written interrogatories on one or more issues of fact, the decision of which is essential to the verdict."[113] The answers are to accompany the jury's verdict. Special questions are distinguished from a special verdict, in which the jury resolves issues of fact, and the judge thereafter enters a verdict in accord with the specifically found facts.[114]

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court's discretion to decline to order jury to stop deliberating while court prepared response to jury question, where court had correctly instructed jury on principles to which question pertained).

[109] Lewis v. Lewis, 220 Mass. 364, 366 (1915).

[110] Thames v. Commonwealth, 365 Mass. 477, 478 0.2 (1974). The defendant's right to be present during judicial communications with jurors is addressed *supra* at § 28.1.

[111] United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969). *See* Commonwealth v. Gallison, 384 Mass. 184, 193 n.4 (1981); Commonwealth v. McDuffee, 379 Mass. 353 (1979)(allowing judge to find "materiality" as matter of law in perjury trial violated 6th amendment right to jury trial, following Mullaney v. Wilbur, 421 U.S. 684 (1975) and In re Winship, 397 U.S. 358 (1970)); Commonwealth v. Jones, 372 Mass. 403, 410 (1977); Commonwealth v. Stracuzzi, 30 Mass. App. Ct. 161, 162–63 (1991) (reversible error even though defendant's testimony admitted the charges); Commonwealth v. Chotain, 31 Mass. App. Ct. 336, 338–41 (1991) (reversed because judge's charge implied no issue on most elements); Commonwealth v. Hebert, 379 Mass. 752, 755 (1980). An exception to the ban on directed verdicts of guilty exists when defendant has stipulated to all the facts material to proof of the crime charged. *See Stracuzzi, supra,* (dictum) (citing Commonwealth v. Scagliotti, 373 Mass. 626, 628 (1977) (dictum)). The connections between judicial pressure toward a step-by-step response from the jury, the preference for a general verdict and jury nullification as the manifestation of the conscience of the community is eloquently set forth in *Spock, supra,* at 180–83.

[112] Commonwealth v. Dane Entertainment Servs., Inc. (No. 1), 389 Mass. 902, 916 (1983).

[113] Commonwealth v. Licciardi, 387 Mass. 670, 675 (1982).

[114] Commonwealth v. Licciardi, 387 Mass. 670 (1982).

Special verdicts are not allowed by rule or statute.[115] Special questions have been approved by the Supreme Judicial Court in a number of cases; in each of these cases the Court rejected the argument that the questions had the tendency to lead any juror toward a vote to convict.[116] Submission of special questions with such a tendency has been specifically disapproved,[117] and indeed raises an issue whether due process has been violated by improper influence on the jury's decision as to guilt.[118]

The third proposition has been stated by the Supreme Judicial Court as follows:

> Although it is improper for a juror to disregard the law as given by the judge,[119] it remains within the power of a juror to vote his or her conscience. See *Comm. v. Dickerson,* 372 Mass. 783, 797 (1977), . . . ; *Comm. v. Mutina,* 366 Mass. 810, 819–20 (1975); *Horning v. District of Columbia,* 254 U.S. 135, 138 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of the law and facts") (Holmes, J.). . . . In this case to the very end, the unconvinced juror felt in good conscience that she could not find the defendant guilty. In such a case, there was no unanimous verdict.[120]

Effectively, the jury in a criminal case is to be left free to vote its conscience, even in the face of evidence that would result in a directed verdict in a civil case and even if it requires total disregard of the trial court's instructions.[121] The defendant is

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[115] Commonwealth v. Lowder, 432 Mass. 92 (2000) (special verdict eliminated in criminal cases by Rules of Criminal Procedure); Commonwealth v. Licciardi, 387 Mass. 670 (1982).

[116] *See* Commonwealth v. Pennellatore, 392 Mass. 382, 390–91 (1984) (no error to instruct jury to specify what theory first-degree murder conviction based on; no error in imposing consecutive sentences for felony underlying felony-murder charge and for murder if jury returned murder conviction specifying a different theory); Commonwealth v. Licciardi, 387 Mass. 670, 673–77 (1982) (no error to instruct the jury to specify whether rape forcible or statutory and what theory conviction of murder based on); Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 299–300 (1971) (questions concerning whether and when a bribe was given or offered not "such as to lead 'the jurors down the guilty trial' "(*sic*)).

[117] *See* Reporter's Notes, Mass. R. Crim. P. 27 ("Special questions should, however, be used sparingly as they can "'catechize' a reluctant juror away from an acquittal and towards a seemingly more 'logical conviction.'" Heald v. Mullaney, 505 F.2d 1241, 1245 (1st Cir. 1974), *cert. denied,* . . . 420 U.S. 955 . . . (1975)").

[118] United States v. Spock, 416 F.2d 165, 181 et seq. (1st Cir. 1969); Commonwealth v. Licciardi, 387 Mass. 670, 676 (1982).

[119] Commonwealth v. Lowder, 432 Mass. 92 (2000) (jury has no power to determine question of law against judge's instructions).

[120] Commonwealth v. Hebert, 379 Mass. 752. 755–56 (1980). In *Hebert,* the judge received several jury missives stating that one juror could not vote guilty as "a matter of conscience." The same juror "qualified" her subsequent vote of guilty on being polled, whereupon the judge told her that, in his opinion, the evidence was clear. This statement the S.J.C. found "improper" and 'likely to be coercive because it intruded into the jury's function." *Hebert, supra,* 379 Mass. at 755. The conviction was reversed.

[121] The Court again reversed a conviction in Commonwealth v. Webster, 391 Mass. 271 (1984), based on a similar but more egregious scenario. The judge received a message from jury within forty minutes of commencing deliberations, in response to which he brought the jury into the courtroom, called one juror to the bench, out of the hearing but in view of other jurors, and questioned her regarding her position on the defendant's guilt. When the juror stated she could not vote to convict of kidnapping and rape, the judge asked, "Why? Even though the evidence

not, however, entitled to an instruction informing the jury of its right to nullify the law.[122]

A corollary of this power (though by no means a necessary one) is the upholding of factually inconsistent verdicts.[123]

§ 36.3E. LESSER-INCLUDED OFFENSE INSTRUCTIONS

If given the option, jurors sometimes compromise a verdict by convicting the defendant of a lesser included offense.[124] In general, a judge must give such an instruction if, on the evidence, there is a rational basis for acquitting the defendant of the greater offense and convicting him of the lesser included offense[125] and a party

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might be completely compelling, you can't do it?" The judge effectively gave the juror an instruction to listen to the majority. The juror telephoned in sick the next day and the defendant was thereafter found guilty. Holding that the colloquy was improperly coercive as to that juror, and prejudicial as to the remaining jurors who observed the inquiry and ended up deliberating without the recalcitrant juror, the S.J.C. reversed:

> This colloquy has a coercive quality that invades the province of the jury . . . We cannot, of course tell on this record whether the juror failed to appear on the next trial day because of the effect of the colloquy or because of illness. As a matter of fairness in the trial of criminal cases, we might require more of an investigation, in circumstances such as these, to ensure that the reported illness was real and not a pretext. "A lone juror who could not in good conscience vote for conviction could be under great pressure to feign illness or other incapacity so as to place the burden of decision on an alternate juror." United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975).
>
> We think, in any event, that the effect on the other jurors was substantially prejudicial to the defendant.
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> *Webster, supra,* 391 Mass. at 276–77.

[122] Commonwealth v. Leno, 415 Mass. 835, 842 (1993); Commonwealth v. Diaz, 19 Mass. App. 29, 33–34 (1984). In fact, although finding a statutory grant to the jury of the power to return a verdict inconsistent with the facts, the Supreme Judicial Court has urged trial judges to instruct "that the jury have a duty, if they conclude the defendant is guilty, to return a verdict of guilty of the highest crime which has been proved beyond a reasonable doubt against the defendant." Commonwealth v. Dickerson, 372 Mass. 783, 797 (1977).

[123] Commonwealth v. Sanchez, 70 Mass. App. 699, 702 n. 3 (2007); Commonwealth v. Brown, 66 Mass. App. 237, 240 (2006); Commonwealth v. Pease, 49 Mass. App. Ct. 539 (2000) (factual inconsistencies in jury verdicts are not ground for vacating verdict of guilt). The difference between legally and factually inconsistent verdicts is discussed *infra* at § 36.5D.

[124] "[W]here one offense is a lesser included, a single indictment for the greater offense allows a jury to be instructed on and consider any lesser included offenses for which the evidence may support a conviction. . . . Lesser included offenses serve an important purpose by 'allowing the jury to convict of the offense established by the evidence, rather than forcing them to choose between convicting the defendant of an offense not fully established by the evidence or acquitting, even though the defendant is guilty of some offense." Commonwealth v. Woodward, 427 Mass. 659, 664-665 (1998)." Commonwealth v. Porro, 458 Mass. 526, 532 (2010) (citations omitted).

[125] Commonwealth v. Egerton, 396 Mass. 499, 503 (1986); Commonwealth v. Barklow, 52 Mass. App. Ct. 765 (2001) (not error for judge to refuse to give lesser included instruction when no middle ground in evidence between crime charged and acquittal); Commonwealth v. Hall, 50 Mass. App. Ct. 208, 214, f.a.r. denied, 432 Mass. 1111 (2000). *Cf.* Commonwealth v.

requests the instruction.[126] If this test is met, the instruction may be given over the defendant's objection that he wants to give the jury an "all-or-nothing" choice.[127] Indeed, the judge may sua sponte give a lesser included instruction over the objection of both parties.[128]

§ 36.4 DELIBERATIONS

§ 36.4A. LOSS OF JUROR(S); ALTERNATE JURORS

The verdict of the jury must be unanimous.[129] In addition, a defendant has a right to a verdict by a twelve-person jury in a superior court felony trial[130] and by a six-person jury in a district court.[131] If, after jeopardy has attached at the swearing of the jurors, one or more is unable to continue to serve, reducing the number to less than twelve (or six in district court), the trial cannot continue without the written waiver by all defendants of their right to be tried by a full jury. Oral waiver by counsel for the defendant is insufficient.[132]

Byrne, 49 Mass. App. Ct. 687 (2000) (defense counsel's reasonable tactical decision to allow jury to be erroneously instructed on lesser included offense may require reversal if it works injustice on defendant).

[126] Commonwealth v. Stokes, 460 Mass. 311, 315-316 (2011); Commonwealth v. Miller, 457 Mass. 69, 81 (2010)(no requirement for lesser included instruction where no party requests it); Commonwealth v. Woodward, 427 Mass. 659, 662-663 (1998)(judge must, upon request, instruct on lesser included offense).

[127] Commonwealth v. Chase, 433 Mass. 293 (2001) (error for judge to fail to instruct on lesser included offense warranted by evidence, on Commonwealth's request, though defense counsel objected); Commonwealth v. Woodward, 427 Mass. 659, 662–65, (1998); Commonwealth v. Thayer, 418 Mass. 130, 132–33 (1994).

[128] Commonwealth v. Berry, 431 Mass. 326, 338 (2000).

[129] "At the outset, we note that '[i]t is beyond dispute that the jury verdict in a criminal trial in this Commonwealth must be unanimous.' Commonwealth v. Hebert, 379 Mass. 752, 754, 400 N.E.2d 851 (1980), citing *512 Brunson v. Commonwealth, 369 Mass. 106, 120, 337 N.E.2d 895 (1975). Mass.R.Crim.P. 27(a), 378 Mass. 897 (1979)." Commonwealth v. Conefroy, 420 Mass. 508, 511-512 (1995). The unanimity requirement is not constitutional, but a common-law development. Id. at 512 n. 7; Johnson v. Louisiana, 406 U.S. 356, 359 (1972).

130 This right is nowhere spelled out explicitly, but numerous statutes and rules assume the right to a jury of 12 in superior court cases. See G.L. c. 234, § 25 (clerk in empaneling to draw at least 12 names from venire list, or six in jury-of-six case); § 26 (at least 12 in capital case); § 26B (superior court cases, jury to be reduced to 12 if more remain at close of evidence); G.L. c. 234A, § 68 (court to empanel at least two additional jurors in "any twelve-person jury case"); G.L. c. 119, § 56 (juvenile jury trials to be by jury of 12 where an adult would be tried "only upon an indictment"). The rule also assumes the right to 12 jurors in a superior court trial and 6 in a district court trial.

[131] G.L. c. 218, § 26A.

[132] Mass. R. Crim. P. 19(b) (replacing G.L. c. 234, § 26A) provides:

> If after jeopardy attaches there is at any time during the progress of a trial less than a full jury remaining, a defendant may waive his right to be tried by a full jury and request trial by the remaining jurors by signing a written waiver which shall be filed with the court. If

G.L. c. 234, § 26B, was enacted to avoid the problem of a jury reduced below the required number.[133] Section 26B allows a judge to empanel up to sixteen jurors in a superior court case and up to eight in a district court case. The jurors are undifferentiated until deliberations begin, when four of them are designated alternates.[134] If a member of the reduced jury thereafter is unable to deliberate due to death, illness, or other "good cause," § 26B provides for substitution of one or more alternates for the juror(s) so removed.[135] Until that point, it is reversible error if alternate jurors are present during deliberations.[136]

Even with the availability of alternates, the Supreme Judicial Court has characterized discharge of a juror as "a sensitive undertaking" "fraught with potential for error."[137]

> there is more than one defendant, all must sign and file a waiver unless the court in its discretion severs the cases.

See Commonwealth v. McCaster, 46 Mass. App. Ct. 752, 755 & n.8 (1999) (record must reflect colloquy showing defendant's agreement to decision by fewer than twelve jurors was voluntary and intelligent); Commonwealth v. Smith, 8 Mass. App. Ct. 143 (1979) (defendant's written waiver executed after juror dismissed validated verdict by eleven jurors); Gallo v. Commonwealth, 343 Mass. 397 (1961) (waiver by counsel insufficient under former § 26A).

[133] The provisions of § 26B are also found in Mass. R. Crim. P. 20(d).

[134] The court may designate a foreperson before deliberations, and under § 26B the foreperson is exempt from designation as an alternate. Commonwealth v. Paiva, 16 Mass. App. 561, 564, *rev. denied*, 390 Mass. 1104 (1983); Commonwealth v. Bellino, 320 Mass. 635, 641 (1947).

[135] This procedure was held constitutional in Commonwealth v. Haywood, 377 Mass. 755, 765 et seq. (1979). A different statute, G.L. c. 234A, § 39 (1990 ed.), in counties designated as "participating counties," permits the court, without a hearing, to dismiss an impaneled juror who does not appear for jury service if there is a "strong likelihood" that waiting for the juror would unreasonably delay the trial. *See* Commonwealth v. McCarthy, 37 Mass. App. Ct. 113, 118 (1994); Commonwealth v. Taylor, 33 Mass. App. Ct. 655, 656–58 (1992).

[136] Commonwealth v. Smith, 403 Mass. 489 (1988); Mass. R. Crim. P. 20(d)(2). *Compare* Doyon v. Providence & Worcester R.R., 31 Mass. App. Ct. 751, 752 (1992) (civil cases). *See also* Commonwealth v. Goudreau, 422 Mass. 731, 734 (1996); Commonwealth v. Sheehy, 412 Mass. 235 (1992) (reversible error even absent defense objection or showing of prejudice; G.L. c. 234A, § 74 (1990 ed.), establishing a contrary rule, infringes right to fair jury trial under art. 12 of the Mass. Const. Declaration of Rights); Commonwealth v. Jones, 405 Mass. 661 (1989) (retroactivity of *Smith*). *Compare Sheehy with* United States v. Olano, 507 U.S. 725 (1993) (defendant must show prejudice); *and with* Commonwealth v. Casey, 442 Mass. 1, 5 (2004)(prejudice not presumed where alternate only in room with deliberating jurors for a brief period of time).

[137] Commonwealth v. Connor, 392 Mass. 838, 843 (1984). The Court expressed its concerns, and outlined the required procedure to be followed:

> The discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error. It is to he done only in special circumstances, and with special precautions. Great care must be taken to ensure that a lone dissenting juror is not permitted to evade his responsibilities. . . . Thus a judge must hold a hearing adequate to determine whether there is good cause to discharge a juror. Commonwealth v. Haywood, 377 Mass. 755, 769–770 (1979). However, because the inquiry may well lead to a conclusion that the juror cannot be discharged, the judge must scrupulously avoid any

"Good cause" for removal has been narrowly construed, to "include only reasons personal to a juror, having nothing whatsoever to do with the issues of the case or with the juror's relationship with his fellow jurors."[138] The trial court must hold a hearing before making a determination to remove a juror.[139] The trial court's decision, however, is judged under an abuse of discretion standard, leaving little likelihood that a defendant can successfully challenge either the removal or the failure to remove a juror.[140] Thus, no error was found in discharging a juror who had a job interview

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> questioning that may affect the juror's judgment. Commonwealth v. Webster, 391 Mass. 271, 275–76 (1984). Further, whether a problem" juror is discharged or retained, the judge's words and actions must not convey any improper silent messages to the other jurors. *Id.* at 277. In dealing with all aspects of the problem of discharging a deliberating juror, the utmost caution is required to avoid invading the province of the jury.

Connor, supra, 392 Mass. at 843–44 (footnote omitted). At note 2, the Court quoted at length from the *Haywood* case, which had earlier required a hearing of "all . . . personnel with relevant information" before discharging a juror, and an instruction to the jury to begin deliberations anew if a substitution is effected.

[138] Commonwealth v. Connor, 392 Mass. 838, 844–45 (1984). *See also* Commonwealth v. Leftwich, 430 Mass. 865, 873 (2000) (judge could remove juror complaining of emotional illness without medical examination); Commonwealth v. Swafford, 421 Mass. 329, 337 (2004)(juror's "idiosyncratic" reaction to idiosyncratic response to "behavior that, although less than civil, could not be described as grossly improper or overbearing" was a proper ground for discharge, where juror removed herself from deliberations and repeatedly stated she could not be impartial). *Compare* Commonwealth v. Torres, 453 Mass. 722, 734-735 (2009)(juror's disagreement with fellow jurors did not show improper bias, and desire "to go home" insufficient ground for discharge); Commonwealth v. Olavarria, 71 Mass. App. 612 (2008)(no error in discharge of juror, despite being lone holdout, where juror also did research and brought definitions of reasonable doubt into jury room to argue her position, and could not assure judge that she could disregard materials she brought to jury room.).

[139] Commonwealth v. Haywood, 377 Mass. 755 (1979). Discharge of a juror during deliberations is most problematic, because a claim of "hardship" or "illness" may mask a juror's disagreement with other jurors. Commonwealth v. Olszewski, 416 Mass. 707, 722 n.15 (1993), *cert. denied*, 513 U.S. 835 (1994) (error to excuse impaneled juror for hardship without notice to parties or hearing in defendant's presence, but no prejudice shown). *See also* Commonwealth v. Wood, 37 Mass. App. Ct. 917, 919 (1994) (upholding "emergency" discharge of ill juror on court officer's report, without hearing or notice to counsel, but "at the very least" judge should have attempted to question juror directly); Commonwealth v. Perez, 30 Mass. App. Ct. 934 (1991) (reversal); Commonwealth v. Connor, 392 Mass. 838, 843 (1984). *But see* Commonwealth v. McCarthy, 37 Mass. App. Ct. 113, 118 (1994) (hearing requirement abrogated for "participating counties" under G.L. c. 234A, and defendant must show prejudice to overturn conviction).

[140] *See, e.g.*, Commonwealth v. Martins, 38 Mass. App. Ct. 636 (1995) (no abuse of discretion in refusal to discharge juror with alleged memory lapses, or to hold further hearing on juror's competency, after juror was questioned and denied that problem interfered with performance of his duties as a juror); Commonwealth v. Keaton, 36 Mass. App. Ct. 81, 87–88 (1994) (no right to hearing on defense counsel's claim that juror had been sleeping through testimony, where trial judge disagreed and counsel did not proffer supporting affidavits from courtroom observers); Commonwealth v. Patton, 401 Mass. 20, 24–25 (1987) (judge "well within his discretion" in failing to remove a juror who disclosed acquaintance with witness but said his impartiality would not be affected; later reconsideration and removal not error either). In Commonwealth v. Rodriguez, 63 Mass. App. 660 (2005), however, the Appeals Court found an abuse of discretion where the trial judge dismissed a juror for discussing deliberations in cell phone conversations with relatives, where the conversations related to the tensions between the

scheduled that conflicted with a court day,[141] nor was there error in refusing to discharge a juror who revealed he had seen the defendant where he worked and felt uncomfortable judging him.[142] But discharge of a juror on "mere assertion of inability to abide by his oath," without further inquiry and under circumstances suggesting that the real problems were related to the juror's position in deliberations, was held to be reversible error.[143]

If a juror is discharged, the remaining jurors should be told that the juror left for personal reasons having nothing to do with the case.[144]

§ 36.4B. WHAT GOES IN WITH THE JURY: REVIEWING EXHIBITS

Generally all documentary and physical evidence goes into the jury room with the deliberating jury. However, the decision whether to send evidence in is in the discretion of the trial judge.[145] Cases support the judge's discretion to send binoculars,[146] personal notes belonging to the defendant,[147] and tapes[148] into the jury

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juror and her fellow-jurors rather than any discussion of the evidence, and at the same time the jury was reporting itself deadlocked. The Appeals Court concluded that the discharge was for reasons inseparable from the juror's views of the evidence and disagreement with fellow jurors which gave rise to the tensions which she then complained of in her cell phone conversations.

[141] Commonwealth v. Jiminez, 22 Mass. App. Ct. 286, 293–95, *rev, denied*, 398 Mass. 1102 (1986). The court noted that G.L. c. 234A, § 39, subsequently was enacted to govern excuse of a sitting juror prior to deliberations, and calls for excuse upon a finding of extreme hardship." It seems strained to call the juror's dilemma in *Jiminez* "extreme hardship," but under an abuse of discretion standard, the trial court's decision was upheld, suggesting that the interpretation of that term is largely for the trial judge.

[142] Commonwealth v. Young, 401 Mass. 390, 405–06 (1987). *See also* Commonwealth v. Francis, 431 Mass. 353, 367-369 (2000)(no abuse of discretion in discharging juror who feared giving a verdict because evidence of gang membership had been introduced and she lived in areas where gangs were present)

[143] Commonwealth v. Connor, 392 Mass. 838 (1984). *See also* Commonwealth v. Perez, 30 Mass. App. Ct. 934 (1991) (reversal in part because juror replaced without showing on record of inability to perform function).

[144] Commonwealth v. Connor, 392 Mass. 838, 846 (1984).

[145] Commonwealth v. Pixley, 42 Mass. App. Ct. 927 (1997). Where certain evidence was not sent out with the jury, not as a matter of discretion, but because it "had not been proved," the trial court was reversed in Annawan Mills. Inc. v. Mangene, 237 Mass. 451 (1921).

In Commonwealth v. Marks, 12 Mass. App. Ct. 511 (1981), two photographs of look-alikes to the defendants, both in evidence, were mislaid and thus were not available to the jury during a part of their deliberation. The Appeals Court reversed, stating "the loss of the exhibits could have effectively precluded the jury from fulfilling their obligations and from settling any doubts they might have had as to the sufficiency of the Commonwealth's proof of identification." *Marks, supra,* 12 Mass. App. Ct. at 521. The decision raises the question whether an earlier refusal to send the photographs out would have been an abuse of discretion.

If there are exhibits with which counsel would not want the jurors to conduct "experiments" in the jury room, counsel should consider seeking appropriate limiting instructions. *See* Commonwealth v. Pixley, 42 Mass. App. Ct. 927 (1997) (counsel failed to request limiting instructions prohibiting experimentation with drug surveillance binoculars).

[146] Commonwealth v. Pixley, 42 Mass. App. Ct. 927 (1997).

[147] Commonwealth v. Cross, 33 Mass. App. Ct. 761, 763 (1992).

room. The judge's discretion extends even to copies of criminal records introduced for impeachment purposes.[149] An unexpurgated record, showing nol prossed charges, was taken to the jury room in the *Rondoni* case; it should be error not to allow counsel to sanitize any such records before submitting them to the jury.[150]

As a general rule, items not admitted into evidence are not allowed to go to the jury room; it would be a denial of the due process to allow a jury to convict a defendant based on matters not in evidence.[151] Also, reversible error has been found in allowing the indictment to be sent into the jury room without appropriate instructions concerning its lack of probative significance.[152] Notwithstanding, on occasion the courts have upheld convictions when trial judges have sent items not admitted into evidence into the jury room, finding no error[153] or only harmless error.[154]

The Supreme Judicial Court, in dictum, has endorsed a procedure by which a written copy of the *judge's charge* is made available to a jury, but only if this is agreed to by the parties and if the written instructions are an exact reproduction of the judge's oral charge.[155] The judge may provide the jury with an audiotape or videotape of her

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[148] Commonwealth v. Freiberg, 405 Mass. 282, 305, *cert. denied*, 493 U.S. 940 (1989) (audiotapes). *See also* United States v. Young, 105 F.3d 1 (1st Cir. 1997) (transcripts of tape recording).

[149] Commonwealth v. Rondoni, 333 Mass. 384, 386 (1955); Forcier v. Hopkins, 329 Mass. 668 (1953); Commonwealth v. Kennedy, 4 Mass App. Ct. 772 (1976). To the extent that there are convictions of crimes substantially similar to the crime(s) at issue in the trial, these are excludable (within the judge's discretion, though appellate decisions express a strong view that they should ordinarily be excluded), and any record sheet that goes into the jury room should be sanitized of such convictions if they have been excluded. See Commonwealth v. Elliot. 393 Mass. 824, 832–34 (1985); Commonwealth v. Chase, 372 Mass. 736 (1977).

[150] *See, e.g.*, Commonwealth v. Thayer, 39 Mass. App. Ct. 396 (1995) (presentation to jury of inadequately sanitized mug shots of defendant created substantial risk of miscarriage of justice); Commonwealth v. Lockley, 381 Mass. 156, 165–66 (1980) ("mug shot" photographs should be sanitized as far as possible to minimize implication that defendant has criminal record); Commonwealth v. Rodriguez, 378 Mass. 296, 309 (1979) (same). *But see* Salter v. Leventhal, 337 Mass. 679, 692–93 (1958) (no error in sending unexpurgated letter to jury where no indication in record that defense counsel objected). It is clearly counsel's obligation to make sure any sanitization takes place before exhibits go to the jury.

[151] Commonwealth v. Hrycenko, 31 Mass. App. Ct. 425, 432 (1991) (reversible error to send excluded photographs to jury upon their request).

[152] Commonwealth v. Johnson, 43 Mass. App. Ct. 509 (1997) (error during deliberations to honor jury request for indictment, where request was known to be for irrelevant reasons which carried potential for prejudice to the defendant).

[153] *See* Campbell v. Ashler, 320 Mass. 475, 481 (1946) (without discussion, no error to send into the jury room toy automobiles that had been used "for demonstration purposes" during trial but were not themselves evidence); Commonwealth v. Walter, 10 Mass. App. Ct. 255, 263–64 (1980) (chalk allowed into jury room); Commonwealth v. Trowbridge, 36 Mass. App. 734 (1994)(same).

[154] Brown v. Metropolitan Auth., 341 Mass. 690 (1961).

[155] Commonwealth v. Little, 431 Mass. 782 (2000) (judge should not provide jury with written instructions containing citations to judicial decisions); Commonwealth v. Lavalley, 410 Mass. 641, 652 n.15 (1991); Commonwealth v. Smith, 49 Mass. App. Ct. 827 (2000) (judge may submit draft of proposed instructions to counsel prior to final arguments and provide jury with written copy after charge); Commonwealth v. Martin, 39 Mass. App. Ct. 658, 670 (1996) (error to give written instructions to jury when there was disagreement between parties on the

charge, even without the parties' consent, under the following conditions: (1) the judge must advise counsel for both parties that the judge is going to do it; (2) the tape recording must be audible in its entirety and contain the whole instruction; (3) the judge must instruct the jury about how to use the tape-recorded charge; and (4) the judge should have the tape marked for identification.[156]

Testimonial evidence, in contrast to physical evidence, is generally not made available to jurors in the jury room. Although allowing stenographic notes to be read back to the jurors is within the judge's discretion, trial judges have been admonished "that such discretion should be exercised with caution" as "[t]he reading of testimony may . . . overemphasize certain aspects of the case."[157] The Court in *Mandeville* noted

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record and written instructions did not include all of the judge's oral instructions), S.C., 424 Mass. 301, 311 n.5 (1997) (conviction reinstated on other grounds); Commonwealth v. Dilone, 385 Mass. 281, 287 0.2 (1982). It was reversible error, on the other hand, to provide the jury with statute books without the parties' consent in Merrill v. Nary, 92 Mass. (10 Allen) 416 (1865). The Court in *Merrill* emphasized that the jury was to take the law only from the trial judge's instructions. *See also* Farnum v. Pitcher, 151 Mass. 470, 476 (1890) (foreign statutes' interpretation for the judge, therefore no abuse of discretion in refusing to send copies of statutes that were in evidence into the jury room with the jury); Commonwealth v. Lappas, 39 Mass. App. Ct. 285 (1995) (error to send statutes without excising penalty provisions, knowledge of which could "distort the jury's function" as dispassionate factfinders, but harmless).

[156] Commonwealth v. Baseler, 419 Mass. 500, 506 (1995). While the S.J.C. did not specify how the judge should instruct the jury to use the tape (condition (3)), the instruction probably should include a caution against overemphasizing any one portion of the tape by repeated playing. *See* criticisms of practice, discussed in *Baseler, supra*, 419 Mass. at 505. *See also* Commonwealth v. Graham, 431 Mass. 282, 286-287 n.10 (2000) (tape of instructions sent to deliberating jury must contain entire instructions under rule of *Baseler); but cf.* Commonwealth v. Dykens, 438 Mass.827, 832-833 (2003)(no abuse of discretion to allow note-taking only during portion of instructions on elements of crimes charged). .

[157] Commonwealth v. Mandeville, 386 Mass. 393, 405 (1982). See Commonwealth v. Stockwell, 426 Mass. 17, 24 (1997); Commonwealth v. Richotte, 59 Mass. App. 524, 530 (2003); Commonwealth v. Bacigalupo, 49 Mass. App. 629, 632 (2000). Although the Court in *Mandeville* treated the question as one of first impression, the Appeals Court in Commonwealth v. DiPietro, 4 Mass. App. Ct. 845 (1976), had, without discussion, approved of allowing transcripts of probable-cause testimony into evidence and then into the jury room, apparently treating them as more like documentary evidence than like live testimony. The cases since *Mandeville* have almost uniformly been challenges to a judge's denial of the jury's request to have testimony read back to them. *See* Commonwealth v. Stockwell, 426 Mass. 17, 24 (1997); Commonwealth v. Richenburg, 401 Mass. 663, 675 (1988) ("It is entirely appropriate that the resolution of ambiguities regarding a witness' testimony be left to the recollection of the jury"); Commonwealth v. Bianco, 388 Mass. 358, 370 (1983); Commonwealth v. Richotte, 59 Mass. App. 524 (2003); Commonwealth v. Horn, 23 Mass. App. Ct. 319, 325 (1987); Commonwealth v. Gonzalez, 22 Mass. App. Ct. 274, 283 (1986); Commonwealth v. Hunter, 18 Mass. App. Ct. 217, 224 (1984); Commonwealth v. Fitzpatrick, 18 Mass. App. Ct. 106, 109 (1984). *But see* Commonwealth v. Bacigalupo, 49 Mass. App. Ct. 629 (2000) (when deliberating jury requests transcript of witness's testimony, judge has discretion to provide transcript, or have reporter read testimony to jury, or deny request); Commonwealth v. Phong Thu Ly, 19 Mass. App. Ct. 901 (1984) (no abuse to permit jury to hear tapes of two witnesses' testimony where jury reheard all of direct and cross-examinations and court instructed jury not to give undue emphasis to this testimony), *rev. denied*, 393 Mass. 1105 (1985); United States v. Bennett, 75 F.3d 40, 45–46 (1st Cir.), *cert. denied*, 117 S. Ct. 130 (1996) (no abuse to refuse defense request to have read back cross-examination testimony of witness whose direct testimony was requested

that a cautionary instruction followed the reading of the testimony. It is not clear why the submission of testimony is treated with greater caution than is the submission of physical and documentary evidence, which can pose the same danger of overemphasizing some aspects of a case.

§ 36.4C. FAILURE TO REACH A VERDICT AND THE *TUEY* CHARGE

The requirement that the jury be unanimous in its verdict carries with it the chance that a verdict will not be reached. There is a tension between, on the one hand, respect for the jury's role as factfinder and the concomitant desire to avoid any coercion of a decision from a jury, and, on the other hand, the desire to avoid expenditure of resources in trying a case twice.

If after some time of deliberations, the amount determined within the judge's discretion,[158] the jury has not reached a verdict and seems deadlocked, the judge may instruct the jury with the "dynamite" or *"Tuey"* charge.[159] Under the original *Tuey* charge, the jury was instructed in substance that the case should be decided and can be as well by them as by another jury; and that the minority should reconsider their positions in light of the positions of the majority. The charge was modified by *Commonwealth v. Rodriquez.*[160] The primary change in the instruction is from a

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by jury; while trial judge should exercise "great care" in this situation, defense failed to show why it was unfair to omit cross in this case).

[158] *See* Commonwealth v. Fleming, 360 Mass. 404, 409 (1971) (judge "has discretion to control the conduct of the trial" including "the length of time in which the jury deliberated [and] the further instructions which the jurors were given during the course of their deliberations"); ; Commonwealth v. Schutte, 52 Mass. App. Ct. 796 (2001) (judge's calling in jury sua sponte to give them Tuey charge is disfavored).

[159] So called after Commonwealth v. Tuey, 8 Cush. 1 (1851), in which it was approved.

[160] 364 Mass. 87 (1973). The Tuey charge, as modified by *Rodriquez,* reads as follows: "The principal mode, provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that it is desirable that the case be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. Thus, where there is disagreement, jurors for acquittal should consider whether a doubt in their own minds is a reasonable one, which makes no impression upon the minds of others, equally honest, equally intelligent with themselves, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, jurors for conviction ought seriously to ask themselves, whether they may not reasonably doubt

statement that the minority jurors should reexamine their positions to a statement that the jurors, respectively, for acquittal or for conviction, should reexamine their positions in light of the position of those with opposite positions. The charge was also purged of an assertion that the case must be decided at some time.[161] Notwithstanding the modifications, the Court noted that "[s]till the charge has a sting and our approval of it is not to be taken as an indication that it may be used prematurely or without evident cause."[162] Stronger language clearly courts a reversal.[163]

With or without benefit of the *Tuey-Rodriquez* charge, the judge may determine that the jury is not going to reach a verdict and may declare a mistrial and discharge them. "A 'mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.'"[164] The decision is, again, one within the judge's discretion.[165] The question whether the judge

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the correctness of a judgment, which is not concurred in by others with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows." *Appendix A*, 364 Mass, at 101–02.

[161] *But see* Commonwealth v. Villafuerte, 72 Mass App. 908 (2008)(adding to *Rodriquez* charge that if the jury can't reach a verdict a new jury will have to be selected not coercive); Commonwealth v. Martins, 38 Mass. App. Ct. 636, 641 (1995) (telling jury that "[t]his case is going to be decided . . . by some jury here in Suffolk County" has tendency to coerce, but was not unduly coercive in this case).

[162] Commonwealth v. Rodriquez, 364 Mass. 87, 100 (1973). Although it is within the judge's discretion whether and when to give the *Tuey* charge, it is not to be given prematurely, and it has been characterized as approaching the limit of allowable pressure the judge may place on the jury. *See* Commonwealth v. Evans, 42 Mass. App. Ct. 618, 624 (1997) (not premature to give charge after jury deliberated for one hour and 50 minutes, and sent note saying they were split 50/50 and requesting advice); Commonwealth v. Martins, 38 Mass. App. Ct. 636, 641 (1995) (not coercive, under circumstances of this case, to give *Rodriquez* charge twice); Commonwealth v. Scanlon, 412 Mass. 664, 678–79 (1992) (proper to give charge after receiving note from jurors reporting deadlock after 10 hours of deliberation over two days); Commonwealth v. Brown, 367 Mass. 24, 31 (1975); Commonwealth v. Rollins, 354 Mass. 630, 637 (1968); Highland Foundry Co. v. New York, N.H. & H. R.R., 199 Mass. 403, 407–09 (1908). The trial judge in *Brown,* departing from the Tuey charge, was held to have gone over the limit in charging that a dissenting juror for acquittal should reexamine his position in light of the majority opinion, without balancing that with a charge that a dissenting vote for conviction should do the same. *But see* Commonwealth v. Haley, 413 Mass. 770, 779–80 (1992) (although unclear why judge gave *Tuey* charge after four hours of deliberation where evidence presented was not extensive, issues uncomplicated, and no objection to *Tuey* charge made, new trial not warranted).

[163] *See, e.g.,* Commonwealth v. Webster, 391 Mass. 271 (1984); Commonwealth v. Hebert, 379 Mass. 752 (1980). *But see* Commonwealth v. Sosnowski, 43 Mass. App. Ct. 367, 374 (1997) (judges should not stray from standard language of *Tuey-Rodriquez* charge, but added comment that "[w]e've had juries out for four and five days on cases" does not amount to coercion requiring reversal).

[164] Commonwealth v. Andrews, 10 Mass. App. Ct. 866, 867 (1980) (quoting Arizona v. Washington, 434 U.S. 497, 509 (1978)).

[165] Commonwealth v. Andrews, 10 Mass. App. Ct. 866, 867 (1980); Thames v. Commonwealth, 365 Mass. 477, 480 (1974)

abused his discretion in granting a mistrial determines not whether a conviction will stand but whether double jeopardy attaches barring retrial.[166]

The legislature has imposed a limit of sorts on the judge's discretion, directing that "*after due and thorough deliberation" the jury can only be sent out once* to continue deliberations without its consent.[167] The interpretation of the phrase "due and thorough" opens one avenue of leeway to the trial judge, however.[168] The initial question whether the jury has returned reporting itself deadlocked opens another.[169] Taken together these interpretations may effectively eliminate the statutory limitation on the judge's ability to keep the jury in deliberations.

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[166] Thames v. Commonwealth, 365 Mass. 477, 479 (1974). A finding that the judge correctly concluded that the jury was unable to reach a verdict amounts to "manifest necessity" allowing a mistrial and retrial over defendant's objection. The deference with which the judge's decision is treated is justified by fear that less deference would entail more and more frequent coercion of juries.

[167] G.L. c. 234, § 34, reads:

If a jury, after due and thorough deliberation, return to court without having agreed on a verdict, the court may state anew the evidence or any part thereof, explain to them anew the law applicable to the case and send them out for further deliberation; but if they return a second time without having agreed on a verdict, they shall not be sent out again without their own consent, unless they ask from the court some further explanation of the law.

See Commonwealth v. Jenkins, 416 Mass. 736, 739–40 (1994) (where jury returned second time without reaching verdict, was informed by the judge that he could not send them out again to deliberate without their consent, and asked them to retire and decide whether further deliberations the next day would be useful, their return 15 minutes later with a verdict implicitly satisfied the statutory requirement of consent).

[168] *See* Commonwealth v. Keane, 41 Mass. App. Ct. 656 (1996) (after first deadlock note, judge excused jury without giving *Tuey-Rodriquez* charge, and indicated that "at some point" on next day might give them "further instructions"; after second deadlock note the next day, not error to give charge, because after first note judge had neither found "due and thorough deliberation" nor "returned" jury to courtroom); Commonwealth v. Mayne, 38 Mass. App. Ct. 282 (1995) (no abuse of discretion in deciding that four hours of deliberation after five-day trial involving complex issues and lengthy testimony was not "due and thorough"); Commonwealth v. Winbush, 14 Mass. App. 680, 682–83 (1982) (less than two hours not "due and thorough" deliberations); Commonwealth v. Valliere, 366 Mass. 479, 496 (1974) ("In view of the complexity of the case we think it was open to the judge to determine at the end of the day that deliberation had not yet been 'due and thorough' even though thirteen hours had elapsed since deliberations began"). *Compare* Commonwealth v. Jenkins, 416 Mass. 736 (1994) (absent any indication to contrary, the giving of a *Rodriquez* charge implied that the judge had concluded that the jury's deliberations were "due and thorough").

[169] *See* Commonwealth v. Jenkins, 416 Mass. 736, 739 (1994) (jury note after almost 15 hours of deliberation requesting judge to "suggest a further course of action" did not require discharge under G.L. c. 234, § 34). Commonwealth v. Valliere, 366 Mass. 479, 496 (1978) (foreman's note stating "I do not feel that any more progress can be made regardless of time" could be read as personal opinion rather than collective jury statement of deadlock, allowing trial judge not to count that note as "return" under statute; subsequent "return" thus first, not second, "return" within meaning of statute precluding sending jury out a second time without their consent); Veiga v. Schochet, 62 Mass. App. 440 (2004)(multiple notes using word "deadlock" did not compel conclusion that jury was in fact deadlocked, where notes included request for guidance and in one instance modified "deadlocked" with "currently").

§ 36.5 VERDICT

§ 36.5A. HOW ENTERED

Mass. R. Crim p. 27(a) states

> [t]he verdict shall be unanimous. It shall be a general verdict returned by the jury to the judge in open court. The jury shall file a verdict slip with the clerk upon the return of the verdict.[170]

This rule codifies holdings that a jury's decision, though unanimous, is not a verdict until it has been read in open court and affirmed.[171] The ritual is elaborated as follows:

> A verdict is not effective, even though it may have been agreed upon and reduced to writing, until the jury return to open court and, first, the foreman, as the spokesman for the jury, delivers the verdict by word of mouth,[172] second, the clerk records the verdict on the back of the indictment, third, the clerk says to the jury: " '[H]earken to your verdict as the court has recorded it. You, upon your oaths, do say that the prisoner at the bar is guilty,' (or 'not guilty.') 'So you say, Mr. [or Madame] Foreman, and so . . . you all say.'" Then, fourth, the clerk proclaims the verdict as understood by the Court.[173]

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[170] *See also* Commonwealth v. LaCaprucia, 429 Mass. 440, 453 (1999) (notations by jurors on verdict slips may be used in evaluating defendant's claim of double jeopardy if they identify conduct for which defendant was convicted).

[171] *E.g.*, Commonwealth v. Morgan, 30 Mass. App. Ct. 685 (1991) (one of four verdicts a nullity because not announced orally in open court); Commonwealth v. Harris, 23 Mass. App. Ct. 687 (1987); Rich v. Finley, 325 Mass. 99, 105–06 (1949); Lawrence v. Stearns, 28 Mass. 501, 11 Pick. 501 (1831). *But see* Commonwealth v. Andino, 34 Mass. App. Ct. 423 (1993) (distinguishing Commonwealth v. Harris, 23 Mass. App. Ct. 687 (1987) (exception to rule where, on trial of indictment for receiving stolen motor vehicle, oral colloquy between clerk and jurors referred to "receiving stolen property"; the evidence, arguments, instructions and verdict slips all show jury's intent to convict of crime charged)); Commonwealth v. McCarthy, 37 Mass. App. Ct. 113 (1994) (conviction of breaking and entering in the daytime with intent to commit felony upheld despite clerk's mistaken omission of words "with intent to commit a felony" when asking jury for verdict and when filling out verdict slip; jury correctly instructed as to elements of offense, and no evidence at trial would have permitted guilty verdict on any lesser included offense).

[172] *But see* Commonwealth v. Clements, 36 Mass. App. Ct. 205, 207–208 (1994) (practice whereby foreperson hands written verdict slips to clerk, who reads verdict in open court and obtains jurors' oral affirmation, comports with Mass. R. Crim. P. 27(a) and is sufficient).

[173] Commonwealth *v.* Kalinowski, 12 Mass. App. Ct. 827, 830–31, *rev. denied*, 385 Mass. 1102 (1981). *See also* Commonwealth v. Gagnon, 37 Mass. App. Ct. 626, 634–35 (1994), *further appellate rev. granted*, 419 Mass. 1106 (1995), S.C., 419 Mass. 1009 (1995) (vacating sentence for armed assault with intent to murder where caption on indictment, which was read to jury when verdict was rendered, omitted word *armed*; result reached despite fact that both the indictment and jury instructions included word *armed*).

Although the Supreme Judicial Court has stopped short of holding that, to be valid, the verdict must be orally or physically affirmed by all of the jurors, the Court has prescribed this as the "better practice."[174]

Before the conclusion of this ritual, there is no final verdict on which a defendant may rely. The death of a juror, after concurring in a unanimous decision but before the reading in open court, precludes a verdict;[175] an apparent unanimous decision reached before a juror is excused and an alternate is seated does not obviate the need for the jury to begin deliberations anew, nor does it invalidate the verdict ultimately reached by the newly composed jury.[176] There is no error in requiring a jury to begin deliberations anew as to all charges, where the jury had announced it had reached verdicts on two charges but was deadlocked on a third, but the requirements for receiving verdicts had not been met.[177]

Although a verdict affirmed and recorded precludes further deliberation, the Supreme Judicial Court has "allowed juries to correct formal and clerical errors in the recording of verdicts to which they had properly agreed."[178] Where the jury, immediately after the recording of the verdict and without intervening contact with outsiders, informs the judge of an error in the verdict, the error may be corrected.[179] However, once the jurors have affirmed the verdict in open court, neither a juror's change of heart nor a juror's disclosure of a subjective disagreement with her apparent vote provides a basis for vacating the verdict.[180]

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[174] Commonwealth v. Lawson, 425 Mass. 528, 531–32 (1997) (affirming conviction, on miscarriage of justice standard, where only jury foreperson affirmed verdict in open court, without public indication of disagreement by any juror). In dictum, *Lawson* rejected the argument that collective affirmation of the verdict by the entire jury is constitutionally required. *Lawson, supra,* 425 Mass. at 530 n.5. *See also* Commonwealth v. Fowler, 431 Mass. 30, 34–35 (2000) (no substantial likelihood of miscarriage of justice from omission of jury colloquy to affirm verdict where jurors had ample opportunity to indicate lack of assent; *Lawson* cited in suggesting no constitutional dimension to the affirmation requirement).

[175] Rich v. Finley, 325 Mass. 99 (1949).

[176] Commonwealth v. Kalinowski, 12 Mass. App. Ct. 827, *rev. denied,* 385 Mass. 1102 (1981). *See* A Juvenile v. Commonwealth, 392 Mass. 52, 56–57 (1984) ("It is not enough to show that the jury may have agreed on some issues at some time"); Commonwealth v. Diaz, 19 Mass. App. Ct. 29, *rev. denied,* 393 Mass. 1106 (1984) (no error to send jurors back to deliberate on all charges where formalities of entry of verdicts on two charges the jury had agreed on had not been met, and jury's finding on those two logically compelled a finding on the third charge). *Compare* Commonwealth v. McCarthy, 37 Mass. App. Ct. 113 (1994) (no error to substitute juror on second day of deliberations, although jury had already returned a verdict on one charge, where judge instructed jury to disregard prior deliberations and consider evidence again as to remaining charges).

[177] Commonwealth v. Diaz, 19 Mass. App. Ct. 29, 31 n.2, *rev, denied,* 393 Mass. 1106 (1984). The judge may, however, accept, indeed may require, the jury to return a partial verdict as to any indictment, count, or defendant on which they have reached a verdict. Mass. R. Crim. R. 27(b). *See also* Commonwealth v. Foster, 411 Mass. 762, 763–66 (1992). *But see* Commonwealth v. Floyd P., 415 Mass. 826 (1993) (power to accept partial verdicts does not encompass the power to accept tentative or conditional verdicts, even if verdict slips have been signed).

[178] Commonwealth v. Brown, 367 Mass. 24, 28 (1975).

[179] Commonwealth v. Brown, 367 Mass. 24, 28–29 (1975).

[180] Commonwealth v. Lassiter, 80 Mass. App. 155 (2011)(trial judge erred in striking recorded verdict after speaking with jurors who had left the courtroom but had not been

§ 36.5B. UNANIMITY

Although the Sixth Amendment right to trial by jury in criminal cases applies to the states,[181] the requirement that a jury verdict be unanimous does not.[182] However, "[i]t is beyond dispute that the jury verdict in a criminal trial in this Commonwealth must be unanimous."[183] This holding is now codified at Mass. R. Crim. P. 27(a), quoted above. Where it is shown that the jury's verdict was not unanimous, no further showing is required to mandate a new trial.[184]

The jury must be unanimous "as to each incident which is the basis of the jury's finding,"[185] and also, in a case where guilt might be found on more than one legal theory, as to the theory of liability.[186] In any case, therefore, where the guilty finding

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discharged and having them recommence deliberations); Commonwealth v. Dias, 419 Mass. 698, 703 (1995) (a juror's whispered "no" while rest of jury is affirming the verdict does not qualify as a public disagreement that would render the verdict nonunanimous; the disagreement must be reasonably intelligible beyond the jury box). *Compare* Commonwealth v. Nettis, 418 Mass. 715 (1994) (where juror indicated dissent to verdict by clearly saying "No" to juror beside her, verdict was not unanimous and should not have been recorded; no error in polling jury and subsequently declaring mistrial); Latino v. Crane Rental Co., 417 Mass. 426 (1994) (upholding inquiry of jurors, and declaration of mistrial, after postverdict complaints by jurors that verdicts had not been agreed on).

[181] Duncan v. Louisiana, 391 U.S. 145 (1968).

[182] Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970). Six is the constitutional minimum number of jurors (Ballew v. Georgia, 435 U.S. 323 (1978)), and unanimity is required of a six-person jury. Burch v. Louisiana, 441 U.S. 130 (1979).

[183] Commonwealth v. Hebert, 379 Mass. 752, 754 (1980). *Accord* Commonwealth v. Comtois, 399 Mass. 668, 676 (1987); Brunson v. Commonwealth, 369 Mass. 106, 120 (1977) (dictum); Commonwealth v. McNeil, 328 Mass. 436, 442 (1952). The unanimity requirement is a product of common law. Commonwealth v. Conefroy,420 Mass. 508, 512 n. 7 (1995)

[184] Commonwealth v. Hebert, 379 Mass 752, 756 (1980).

[185] Commonwealth v. Comtois, 399 Mass. 668, 676 (1987); Commonwealth v. Hebert, 379 Mass. 752, 754 (1980). However, "when a single count is charged and where the spatial and temporal separations between acts are short, that is, where the facts show a continuing course of conduct, rather than a succession of clearly detached incidents, a specific unanimity instruction is not required." Commonwealth v. Pimental, 54 Mass. App. Ct. 325 (2002), quoting Commonwealth v. Thatch, 39 Mass. App. Ct. 904, 905 (1995).

[186] Commonwealth v. Cruz, 430 Mass. 182, 192 (1999) (multiple theories of felony murder); Commonwealth v. Berry, 420 Mass. 95, 112 (1995), rejecting rule of Schad v. Arizona, 501 U.S. 624, 632 (1991), and Commonwealth v. Ramos, 31 Mass. App. Ct. 362, 366–369 (1991). *But see* Commonwealth v. Benjamin, 430 Mass. 673, 677 (2000) (when jury unanimously find "extreme atrocity or cruelty" in murder case, they need not agree unanimously on which *Cunneen* factors, *see Benjamin, supra* at 677 n.3, underlie verdict); Commonwealth v. Hunter, 427 Mass 651, 657-658 (1998)(*Cunneen* factors are evidentiary considerations rather than theories of culpability and jury need not be unanimous in finding specific factors); Commonwealth v. Zanetti, 454 Mass. 449, 467 (2009) (no distinction to be made in jury instructions between principal or co-venturer – jury to be given general instruction that the defendant is guilty if he knowingly participated in crime and shared the requisite intent). See also Commonwealth v. Scherer, 460 Mass. 163, 175 (2011)(jury must be unanimous as to theory of first degree murder where prosecution proceeds on more than one theory, but no error in guilty verdict of first degree murder where jury failed to check box for "deliberate premeditation" on verdict slip where that was the sole theory of guilt).

can be based on alternate sets of facts or theories, the defendant is therefore entitled, on request, to an instruction to the jury that they must unanimously find him guilty of the charges (so-called *general unanimity*) and that they must be unanimous both as to the facts[187] and the legal theory[188] grounding their finding of guilt (so-called *specific unanimity*). An instruction requiring specific unanimity as to the *facts* is often needed where the charges encompass acts committed "at diverse times and dates," and different jurors might find guilt on proof as to different incidents.[189] An instruction

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On a related point, a new trial is required if a jury is given two theories of guilt, returns a general verdict, and the evidence supported a guilty verdict on only one of those theories. Commonwealth v. Plunkett, 422 Mass. 634, 638 (1996) (first-degree murder conviction reversed where jury was instructed on deliberate premeditation and felony-murder theories, but evidence supported only the latter); Commonwealth v. Berry, 431 Mass. 326, 333 (2000) (defendant must challenge unsupported theory by motion for required finding); Commonwealth v. Flynn, 420 Mass. 810 (1995); Commonwealth v. Zuluaga, 43 Mass. App. Ct. 629, 641 (1997). This problem should not continue to arise, however; the S.J.C. has established a new procedural rule requiring separate verdict slips in cases involving more than one theory on which the defendant might be found guilty of a crime. *Plunkett, supra*; Commonwealth v. Accetta, 422 Mass. 642, 646–47 (1996). The Supreme Court's rule is different. *See* Griffin v. United States, 502 U.S. 46, 54–56 (1991). *But see* Commonwealth v. Blackwell, 422 Mass. 294 (1996) (although one of the theories on which jury was instructed was not supported by evidence, no prejudice because the jury "necessarily and unavoidably" based verdict on alternate, proper instruction). *Compare* Commonwealth v. Glanden, 49 Mass. App. Ct. 250, 252 n.1 (2000) (when crime can be committed in any one of several ways joined by conjunction "and" in indictment, defendant may be convicted on proof he committed crime in any of those ways).

[187] Commonwealth v. Conefry, 420 Mass. 508 (1995) (where significant likelihood exists that conviction could result from different jurors concluding that the defendant committed different acts, denial of requested specific unanimity instruction is error requiring automatic reversal). *Compare* Commonwealth v. Kirkpatrick, 423 Mass. 436 (1996) (indictment charging child sexual abuse "on a day between 1989 and 1991," supported by young victim's testimony as to continuing pattern of abuse but not specific dates and time, did not defeat unanimity requirement; *Conefry* does not apply where jury not offered choice between discrete incidents to support single charge); Commonwealth v. Pimental, 54 Mass. App. Ct. 325 (2002), quoting Commonwealth v. Thatch, 39 Mass. App. Ct. 904 (1995) (no right to instruction when single count is charged, and facts show a continuing course of conduct; instruction required only if there are separate events or episodes and the jurors could otherwise disagree concerning which act a defendant committed and yet convict of crime charged).

[188] Commonwealth v. Cyr, 433 Mass. 617 (2001); Commonwealth v. Berry, 420 Mass. 95, 112 (1995) (ruling prospectively as matter of common law that, on request in first-degree murder cases, judge should instruct jury that they must agree unanimously on the theory of culpability); Commonwealth v. Accetta, 422 Mass. 642, 646–47 (1996) (where alternative theories of guilt are viable, and evidence would warrant a guilty verdict "of manslaughter *or some other crime* on more than one theory," judge should instruct that unanimity required as to theory of culpability; also, verdict slip should indicate theory or theories on which verdict based) (*emphasis supplied*).

[189] *See, e.g.*, Commonwealth v. Conefry, 420 Mass. 508 (1995); Commonwealth v. Lewis, 48 Mass. App. Ct. 343, 350 (1999). In other such cases, where the alleged victim does not identify discrete instances when particular acts took place, but testifies to consistent and repetitive conduct, it is unlikely that different jurors might find guilt on proof as to different incidents, and no specific unanimity instruction is required. Commonwealth v. Sanchez, 423 Mass. 591, 598–600 (1996) (citing Commonwealth v. Kirkpatrick, 423 Mass. 436, 437 (1996)); Commonwealth v. Erazo, 63 Mass. App. 624 (2005); Commonwealth v. Monzon, 51 Mass.

requiring specific unanimity as to the *theory of liability* is appropriate, for example, where defendant could be found guilty of manslaughter on a theory of either voluntary or involuntary manslaughter.[190] The distinction is not always easy to discern, and the Supreme Judicial Court has addressed it in a number of cases, most recently in Commonwealth v. Scherer, concluding that a specific unanimity instruction is not required as to the particular facts making out the assault element of robbery.[191] Moreover, where appropriate, failure to request specific unanimity instructions, and failure to object to their absence in the charge, will result in a review to see only if the evidence is sufficient to meet the statutory elements and withstand a directed verdict motion.[192]

§ 36.5C. POLLING THE JURY

Mass. R. Crim. P. 27(d) provides for polling the jurors following the verdict in the discretion of the judge.[193] The rule followed well-established precedent in leaving

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App. Ct. 245 (2001) (when Commonwealth presents evidence of alternate incidents which may support charge, defendant entitled to "specific unanimity" instruction, but not where victim testifies to pattern of abusive conduct).

[190] *See, e.g.,* Commonwealth v. Accetta, 422 Mass. 642, 646 (1996). Accomplice and principal are not separate legal theories of liability, however. Commonwealth v. Zanetti, 454 Mass. 449 (2009; Commonwealth v. Santos, 440 Mass. 281 (2003). After *Zanetti* no distinction is made in instructing the jury between principal and accomplice liability, *see* model instruction, *id*. at 470 Appendix.

[191] Commonwealth v. Santos, 440 Mass. 281 (2003). *See also* Commonwealth v. Laurore, 437 Mass. 65 (2002)(jury need not agree on the theory of assault to convict of assault with intent to murder). The Court in Santos acknowledged that the jury must be unanimous as to a specific incident where they hear evidence of multiple incidents, but stated that "if the offense is alleged to have been committed as part of a single episode, ... [t]he jury must be unanimous that the crime was committed on the occasion alleged, but they need not agree as to every detail concerning how the crime was committed." Id. at 285. The Court generalized this conclusion as follows: "The rule laid down in Commonwealth v. Berry, [420 Mass. 182 (1999)], and Commonwealth v. Accetta, 422 Mass. 642 . . . (1996), incorporates a similar restriction on its scope, namely, that it applies only in cases where the alternative 'theories' presented are substantively distinct or dissimilar. While it may be difficult to construct a precise definition identifying those alternate 'theories' that will require specific unanimity, it is clear that the rule does not automatically extend to every alternate method by which a single element may be established. As here, those alternatives are often closely related, and no purpose would be served by requiring the jury to dissect the evidence and agree as to which related, or even overlapping, variant of the same element had been proved." Id. at 288-289. In Santos, the Court concluded that the jury did not have to be unanimous whether the assault element of robbery was accomplished by force or by threat of force, and further noted that jury unanimity is not required as to the theory of malice for murder or whether rape was accomplished by force or by threat of injury: "These alternative methods of establishing a required element are not distinct 'theories' of how the crime may be committed, but are merely similar, equivalent types of conduct any one (or more) of which will suffice to prove a single element." Id. at 289.

[192] Commonwealth v. Morgan, 422 Mass. 373 (1996); Commonwealth v. Keevan, 400 Mass. 557, 567 (1987); Commonwealth v. Comtois, 399 Mass. 668, 676–77 (1987). *See* Commonwealth v. Lemar, 22 Mass. App. Ct. 170 (1986) (applying "miscarriage of justice" standard of review).

[193] "When a verdict is returned and before the verdict is recorded, the jury may be polled in the discretion of the judge. If after the poll there is not a unanimous concurrence, the

the matter to the judge's discretion.[194] However, counsel is entitled to an opportunity to request polling.[195] The rule calls for polling to precede recording of the verdict;[196] under the cases discussed in section A above, this leaves the trial judge with the authority to either declare a mistrial or send the jury out to deliberate further if polling shows no unanimous verdict, no verdict having been entered.[197] The verdict cannot be entered if polling shows that the verdict was not unanimous.[198]

§ 36.5D. INCONSISTENT VERDICTS

Until 1996, "legally inconsistent" verdicts required a mistrial, but "factually inconsistent" verdicts did not. Thus, if the defendant was charged with two offenses that were mutually exclusive (such as larceny and receiving stolen goods, both concerning the same property), both convictions, as a "legal impossibility," had to be set aside. The court or prosecutor could not elect to dismiss after the verdict, because each conviction, as inconsistent in law with guilt of the other, was considered

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jury may he directed to retire for further deliberations or may be discharged." *See* Commonwealth v. Dias, 419 Mass. 698, 701 (1995) (where counsel failed to support polling request with any special reason and had not "seen or heard anything that prompted his motion," judge's denial was not abuse of discretion; however, it is "better practice" to poll the jury on request if deliberations have been lengthy or the trial has been long); Commonwealth v. Wilson, Commonwealth v. Wilson, 427 Mass. 336, 356 (1998)(no requirement to poll jury absent "specific evidence" the verdict is not unanimous)Commonwealth v. Jenkins, 416 Mass. 736, 741 (1994) (although a show of hands would be better than a voice vote when a judge declines a request to poll the jurors individually, judge did not abuse his discretion by asking for a collective, oral response). *Compare* Commonwealth v. Lawson, 425 Mass. 528, 531–32 (1997) (better practice, even without request by counsel, to obtain "clear sign of each juror's assent to the announced verdict, by polling the jurors or otherwise") (quoting *Dias, supra,* 419 Mass. at 703).

[194] *See, e.g.*, Commonwealth v. Jones, 373 Mass. 423, 428 (1977); Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 300 (1971); Commonwealth v. Fleming, 360 Mass. 404, 408 (1971).

[195] Commonwealth v. Floyd P., 415 Mass. 826, 834 (1993).

[196] A request to poll jurors following the recording of the verdict must be supported by a manifestation of "public disagreement" by a juror with the verdict as it was being received. Commonwealth v. Reaves, 434 Mass. 383 (2001) (request and polling must be made before verdict is recorded; jury may be polled after verdict is recorded only if juror expresses "public disagreement" while verdict is being taken). Commonwealth v. Hardy, 431 Mass. 387, 399 (2000). *See also* Commonwealth v. Fernandes, 30 Mass. App. Ct. 335, 344 n.5 (1991) (request to poll jury after verdict recorded is untimely). *But see* Commonwealth v. Gelmette, 426 Mass. 1003 (1997) (rescript) (vacating verdict that should not have been recorded because, as subsequent polling revealed, it was not unanimous).

[197] Commonwealth v. Fernandes, 30 Mass. App. Ct. 335, 345 (1991) (citing Mass. R. Crim. P. 27(d) and Commonwealth v. Hebert, 379 Mass. 752, 756 (1980)). While a further instruction might be helpful at that point, it was not error to refuse defense counsel's request for an instruction that "each juror's views should be listened to but that one should not surrender their conscientious belief merely because there is a majority or to reach a verdict." *Fernandes, supra*, 30 Mass. App. Ct. at 344.

[198] Commonwealth v. Hebert, 379 Mass. 752, 755 (1980).

"conclusive of a mistrial."[199] In *Commonwealth v. Nascimento,* the Supreme Judicial Court adopted a new rule in keeping with the law of most jurisdictions: "legally inconsistent verdicts may be cured by dismissing one of the inconsistent counts.[200] When the verdicts are not inherently inconsistent but just factually so, the verdict also stands.[201] For example, in one case the only evidence of any touching was of intercourse by the defendant, but the jury found the defendant not guilty of rape and guilty of indecent assault and battery. Unlike a conviction, an acquittal may be based on many grounds other than the defendant's factual guilt, so this inconsistency with the evidence did not give rise to a claim.[202]

[199] Commonwealth v. Carson, 349 Mass 430, 436 (1965) (quoting Commonwealth v. Haskins, 128 Mass. 60, 61 (1880). *See also* Commonwealth v. Hamilton, 411 Mass. 313, 323–24 (1991); Commonwealth v. Chandler, 29 Mass. App. Ct. 571, 580 (1990).

[200] Commonwealth v. Nascimento, 421 Mass. 677, 684–85 (1996) (convictions of larceny and receiving stolen property). *See also* Commonwealth v. Gajka, 425 Mass. 751, 754 (1997) (convictions of crimes and of being accessory after the fact to same crimes).

[201] Commonwealth v. McCoy, 456 Mass.838, 844 (2010); Commonwealth v. Gratereaux, 49 Mass. App. Ct. 1, 3 n.1 (2000).

[202] Commonwealth v. Simcock, 31 Mass. App. Ct. 184, 196–97 (1991). *See also* Commonwealth v. Sherry, 386 Mass. 682, 697–99 (1982); Commonwealth v. Scott, 355 Mass. 471, 475 (1969).