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**Today, Would the Supreme Judicial Court of Massachusetts  
Have Granted Sacco and Vanzetti a New Trial Based  
on Current, Retroactively Applied Case Law?**

*John Cavicchi*



# Today, Would the Supreme Judicial Court of Massachusetts Have Granted Sacco and Vanzetti a New Trial Based on Current, Retroactively Applied Case Law?

JOHN CAVICCHI†

## I. INTRODUCTION

It is easy, with the arrogance of a new generation, to exhibit disdain for the transgressions of the past. Does anyone today believe it possible for twenty people to have been executed for witchcraft, in Salem, in 1692? More than seventy years after the executions of two Italian anarchists, Nicola Sacco and Bartolomeo Vanzetti, on August 23, 1927, for the 1920 murder of a paymaster and his guard during a shoe factory robbery in South Braintree, Massachusetts, the debate continues over their guilt or innocence.

What is universally agreed by both those who believe the men guilty, and those who believe in their innocence, is that by today's standards, the two did not receive a fair trial.<sup>1</sup> This article will not attempt to propound guilt or innocence, but will attempt to demonstrate whether Sacco and Vanzetti would have been given a new trial by today's Supreme Judicial Court [hereinafter SJC] of Massachusetts applying case law retroactively to the judge's jury instructions on "reasonable doubt" and "moral certainty." Thus, two questions are posed: first, would Sacco and Vanzetti be entitled to a new trial on the grounds that the judge's charge to the jury improperly shifted the burden of proof in using the term moral certainty and in explaining the concept of reasonable doubt? Second, assuming the defendants would have been entitled to a new trial, would the SJC have granted them one?

## II. BACKGROUND

On August 23, 1977, Governor Michael Dukakis proclaimed the fiftieth anniversary of the executions of Sacco and Vanzetti, Nicola Sacco and Bartolomeo Vanzetti Memorial Day. The proclamation stated, in part:

The limited scope of appellate review then in effect did not allow a new trial to be ordered based on the prejudicial effect on the proceedings as a whole; and

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1. *Commonwealth v. Sacco*, 151 N.E. 839 (Mass. 1926).

This situation was later rectified as a direct result of their case by the adoption of Chapter 341 of the acts of 1939, which permitted the Massachusetts Supreme Judicial Court to order a new trial not merely because the verdict was contrary to the law, but also if it was against the weight of the evidence, contradicted by newly discovered evidence, or, "for any other reason that justice may require."<sup>2</sup>

The statute to which the proclamation referred, MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1977), was enacted to broaden the scope of appellate review in capital cases. Prior to the enactment of this statute, the SJC had no ability to correct manifest injustices, and could decide only issues of law or whether there had been an abuse of discretion by the judge. Questions regarding the conduct of judges were limited to whether the judge had acted "conscientiously, intelligently and honestly."<sup>3</sup>

Two issues regarding the charge to the jury in the Sacco-Vanzetti case, i.e., the reasonable doubt charge and the use of the term moral certainty, have for the past several years, been litigated in the courts of the Commonwealth. On July 14, 1921, Norfolk Superior Court Judge Webster Thayer charged the jury as follows:

What is reasonable doubt? In the prosecution of criminal cases, the law requires that the burden of proof rests upon the Commonwealth to establish beyond reasonable doubt the guilt of every defendant. . . .

At the very beginning of this subject, you must thoroughly understand that it means the doubt of a reasonable man who is earnestly seeking the truth. It does not mean the doubt of a man who is earnestly looking for doubts. It means such a doubt that exists in the mind of a juror after there has been, on his part, an honest and conscientious effort to ascertain the truth. It does not mean a doubt beyond all peradventure. Neither does it mean beyond all imaginary or possible doubt, because everything relating to human affairs and human evidence is open to some possible or imaginary doubt.

The law does not require proof so positive, so unerring and convincing that amounts to a mathematical or absolute certainty. You might obtain proof of that character in the exact sciences, but not in human investigations. For, you must remember, gentlemen, that we are involved in human investigations, in which all the evidence must be considered and weighed and determined by jurors who are human beings. You must, then, see that we are not dealing with absolute certainties, because God has never yet endowed men with sufficient power of intelligence and reason to reduce the results of human investi-

2. UPTON SINCLAIR, BOSTON: A DOCUMENTARY NOVEL OF THE SACCO - VANZETTI CASE 797-799 (1979).

3. HERBERT B. EHRMANN, THE UNTRIED CASE, THE SACCO-VANZETTI CASE AND THE MORELLI GANG 179 (1960).

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gations to absolute certainty. Crime could be proven with difficulty if the law required proof to this extent, and practically never in those cases that are dependent for their proof upon circumstantial evidence.

If, then, reasonable doubt does not require absolute proof, certainty of proof, it becomes my duty to explain to you as intelligently as I can what degree of certainty it requires. Inasmuch as I have told you we are dealing with human investigation, you must, then, see that it requires reasonable and moral certainty as distinguished from absolute certainty. Therefore, whenever the proof satisfies a jury to a reasonable and moral certainty, then proof beyond a reasonable doubt has been established. This is so because proof to a reasonable and moral certainty is, as a matter of law, proof beyond a reasonable doubt.

*Now, perhaps I may be able to further assist you in understanding the meaning of reasonable and moral certainty, because, as I have told you, proof to a reasonable and moral certainty is, as a matter of law, proof beyond a reasonable doubt. Let me partially answer this question by asking one: What certainty of proof, as careful and cautious men, would you require before completing the most important affairs of your own life? You could not obtain absolute certainty because there is always some possible uncertainty in human transactions even among such transactions that require and receive most thorough, painstaking and conscientious investigation, but you could, however, satisfy your minds that such transactions were safe and wise to a reasonable and moral certainty before acting upon them.*

*If then you would be willing to act upon such a degree of proof in the most important affairs of your own life, then that is proof to a reasonable and moral certainty. If, therefore, having determined the degree of proof that exists in these cases on trial, would you be willing upon such degree of proof to act upon the most important affairs of your own life? If you would, then proof has been established to a reasonable and moral certainty, and therefore you should find, as a matter of law, proof beyond a reasonable doubt. If you would not be willing to so act, then proof beyond a reasonable doubt has not been established and, therefore, you should return a verdict of not guilty.<sup>4</sup>*

... One piece of testimony standing alone by itself may be weak or strong. Another piece of testimony separated from all the rest may be weak or strong, but you must consider the evidence in its entirety, for the real test is this: *Whether or not you are satisfied to a reasonable and moral certainty from all the evidence introduced on both sides that the defendants, or either of them, were at South Braintree on the day in question. This evidence applies not only to the affirmative testimony of the Commonwealth which tended to prove the*

4. THE SACCO - VANZETTI CASE, TRANSCRIPT OF THE RECORD OF THE TRIAL OF NICOLA SACCO AND BARTOLOMEO VANZETTI IN THE COURTS OF MASSACHUSETTS AND SUBSEQUENT PROCEEDINGS 1920-7, AT 2243-2244 (Henry Holt & Company 1928) (emphasis added).

*presence of the defendants at South Braintree at the time when said homicides were committed, but also to the negative testimony introduced by the defendants which tended to prove their absence.*<sup>5</sup>

In sum, the judge instructed the jury that the defendants' mere presence in South Braintree would be sufficient to convict. He shifted the burden on the defendants to prove reasonable doubt by calling upon the jurors to weigh the evidence on both sides of the case. The jurors were asked to weigh this evidence by equating their deliberations in a death penalty case with deciding important matters in their own lives. They were to reach such a conclusion based on feelings or moral convictions, rather than certainty based upon the evidence.

### III. WOULD SACCO AND VANZETTI HAVE BEEN ENTITLED TO A NEW TRIAL UNDER CURRENT, RETROACTIVELY APPLIED STANDARDS REGARDING THE SHIFTING OF THE BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT?

In January 1995, the SJC reversed a conviction for first degree murder and rape in *Commonwealth v. Pinckney*.<sup>6</sup> The defendant had been convicted and sentenced to death in 1971.<sup>7</sup> The judge had charged regarding the use of the term "moral certainty." In its decision, the SJC ruled that "a constitutionally deficient reasonable doubt instruction amounts to a structural error which defies analysis by harmless error standards."<sup>8</sup>

The court also applied the rule retroactively and found that because the law was not developed at the time of the defendant's original appeal, and because the defendant had not pursued any other postconviction claims, "we may properly consider this claim."<sup>9</sup> The SJC held that where the judge instructed, "what is required is not an absolute or mathematical certainty, but a moral certainty," the use of the term "moral certainty," rather than "evidentiary certainty" in explaining reasonable doubt, could be interpreted to allow a juror to convict based on a degree of proof below that required by the Due Process Clause.<sup>10</sup>

In what could be a virtual analysis of Judge Thayer's charge to the jury in the Sacco and Vanzetti case, the SJC examined the context in which the term moral certainty was used and found that phrases defining reasonable doubt as "such doubt as would give rise to grave uncertainty" and an "actual substantial doubt"

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5. *Id.* at 2254 (emphasis added).

6. See *Commonwealth v. Pinckney*, 644 N.E.2d 973 (Mass. 1995).

7. See *Pinckney*, 644 N.E.2d 974; see also *Commonwealth v. A Juvenile*, 300 N.E. 2d 439 (Mass. 1973) (vacated as to death penalty).

8. *Id.* at 975 (citing *Sullivan v. Louisiana*, 508 U.S. 275,279, 113 S.Ct. 2078, 1082-1083 (1993)).

9. See *id.* This reasoning seems to favor the guilty defendant who, after the conviction has been affirmed, usually accepts his fate. Contrarily, cases where there is a patent injustice continuously haunt the system. It also seems to conflict with the SJC's own stated duty in ample case law, discussed *infra*. Including supplemental motions, counsel for Sacco and Vanzetti filed eight motions for a new trial.

10. See *id.*

11. See *id.*

12. See *Pinck*

13. See *id.*

14. See *id.* a panel included

15. See *Comu* with Sacco and murder and exo 125 (1931).

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to be flawed.<sup>11</sup> The court found that equating reasonable doubt with "some doubt a juror can find if he goes looking for doubt . . . contributed to the potential confusion of the jurors."<sup>12</sup>

In addition, the court ruled that the judge's definition of reasonable doubt as a doubt which a juror "finds abiding in his mind at the end of a full consideration of the facts of the case" shifts the burden and requires the defendant "to establish doubt in the jurors' minds, thereby lowering the Commonwealth's burden of proof."<sup>13</sup> The SJC concluded that the jury instructions failed to convey accurately the definition of reasonable doubt because of the combination of the "moral certainty language, which potentially understated the degree of certainty required to convict, in conjunction with conflicting reasonable doubt definitions."<sup>14</sup>

The court's analysis in *Pinckney* is applicable to *Sacco*. In fact, the judge in *Pinckney* instructed the jury from the *Madeiras* charge, which was comparable to the charge given in *Sacco*.<sup>15</sup> In addition to using moral certainty in explaining the process by which the jurors could reach their decision, the court in *Sacco* defined reasonable doubt by using the personal affairs analogy. The use of the personal affairs analogy in defining reasonable doubt has been found to trivialize or lessen the burden of proof required under the Constitution. Anything that shifts the burden to the defendant or lessens the duty of the prosecutor is a violation of the defendant's constitutional rights. This is such a fundamentally important right, it has retroactive effect. No objection need to have been taken at trial. What this meant was that this reasoning, although not in effect at the time of *Sacco* and *Vanzetti*, would, because of its importance, have to be considered and applied on any Motion for New Trial by a defendant.

The SJC was in the forefront of judicial activism, and asserted and reasserted what it considered its obligation in reviewing first degree murder convictions:

Our function. . . in reviewing a conviction of murder in the first degree is to consider, not only issues clearly preserved for appellate review, but also issues apparent on the record . . . to determine whether there is a substantial likelihood of a miscarriage of justice. For example, in *Commonwealth v. Callahan*, 380 Mass. 821, 822, 406 N.E.2d 385 (1980), this court rejected all arguments advanced on appeal by a defendant convicted of murder in the first

11. See *id.*

12. See *Pinckney*, *supra* note 6, at 977.

13. See *id.*

14. See *id.* at 978 (emphasis added). The decision was written by Associate Justice Nolan. The panel included Chief Justice Liacos, Associate Justices Abrams, O'Connor and Greaney.

15. See *Commonwealth v. Madeiros*, 151 N.E. 297 (Mass. 1926). Celestino Madeiros was executed with *Sacco* and *Vanzetti*. He confessed to his own participation in the South Braintree robbery and murder and exonerated *Sacco* and *Vanzetti*. See OSMOND K. FRAENKEL, *THE SACCO - VANZETTI CASE* 125 (1931).

degree, and then, based on its independent review of the record, identified an error, not argued below . . . that required the court to order a new trial."<sup>16</sup>

The SJC had taken it upon itself to reverse convictions where the personal decision making analogy was used to define reasonable doubt, even though counsel for the appellant "did not specifically except" to the charge. In a decision written by Chief Justice Hennessey, the court cited its statutory authority under the General Laws, MASS. GEN. LAWS ch. 278, § 33E, concluding there was "grave prejudice" to the defendant. The court stated:

"We . . . consider that no part of the usual instructions to juries in criminal cases is of more significance than the discussion of reasonable doubt. The judge charged the jury that '[y]ou must be as sure as you would have been any time in your own lives that you had to make important decisions affecting your own economic or social lives. You know, any time that you had to make an important decision, you couldn't be absolutely, mathematically sure that you were doing the right thing — you weigh the pros and cons; and unless you were reasonably sure beyond a reasonable doubt . . . .' He went on to give examples of these 'important' decisions: '[W]hether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are, and go someplace else for what you hoped was a better job.' *We think these examples understated and tended to trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt.*"<sup>17</sup>

In cementing its position, the SJC, in a decision also written by Hennessey, reversed a murder conviction, stating:

It would be inconsistent to hold on the one hand that a substantive rule of constitutional dimension is completely retroactive and to insist, on the other hand, that defense counsel must have anticipated the rule in the form of an objection or exception before it may be applied retroactively. Therefore, we conclude that . . . a specific objection to the judge's instructions on burden of proof need not be shown in order to secure appellate review."<sup>18</sup>

In applying the reasoning of the SJC in these cases, we must conclude that not only would Sacco and Vanzetti be entitled to a new trial under the current standards, but also that the court, in accordance with its own stated duty, would be *required* to grant a new trial, even if the issues were not raised below or raised on appeal.

16. Commonwealth v. Ciampa, 547 N.E.2d 314, 321 (Mass. 1989).

17. Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272-3 (Mass. 1977) (emphasis added).

18. Commonwealth v. Stokes, 374 N.E.2d 87, 92 (Mass. 1978).

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20. Interview  
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21. See *id.*

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IV. ALTHOUGH THE SJC WOULD HAVE BEEN REQUIRED TO GRANT SACCO AND VANZETTI A NEW TRIAL, WOULD IT HAVE DONE SO?

In order to answer this question, it is necessary to examine a notorious 1968 murder trial which has been litigated in the courts almost continuously in the thirty years since the original convictions.<sup>19</sup>

Because of the notorious McLean-McLaughlin gang war, Boston, during the 1960s, had become the murder capital of America.<sup>20</sup> During this same time, the Justice Department believed there was an organized crime cartel being run by Italians. Joseph "The Animal" Barboza had done most of the killing for the McLean faction and had become an enforcer for the local Mob.<sup>21</sup>

On March 12, 1965, Barboza and his gang left the Ebb Tide restaurant on Revere Beach and murdered a small-time thug, Teddy Deegan, in an alley in Chelsea. Deegan had robbed a Mafia-controlled card game. The participants in this murder were known the night of the murder, as the Ebb Tide was a known meeting place for gangsters and had been under surveillance from the outside. There had also been an "informant" who reported pertinent events to the police.<sup>22</sup> However, nothing occurred until late 1967, when Barboza, while leaving a Combat Zone strip joint, was arrested for unlawful possession of a firearm and was ultimately charged with being a "habitual criminal." Facing a lengthy prison sentence, he turned on his fellow mobsters, and became the first person in the newly created Witness Protection Program.

The Deegan Murder Trial was the last of the trials in which Barboza testified against reputed organized crime figures.<sup>23</sup> The trial began on May 27, 1968, and ended on July 31, 1968. Solely on the uncorroborated accomplice testimony of Barboza, four men were sentenced to death; two men were sentenced to life in prison.<sup>24</sup>

19. See *Commonwealth v. French*, 259 N.E.2d 195 (Mass 1970) (Judgment vacated as to death penalty *sub nom* *Limone v. Massachusetts*, 408 U.S. 936 (1972)).

20. Interview with James Southwood, former Boston Herald Traveler reporter, in Boston, Mass. (May 17, 1996). See also VINCENT TERESA, *MY LIFE IN THE MAFIA* 169-181 (1973); GERARD O'NEILL/DICK LEHR, *THE UNDERBOSS* 71-93 (1989); WILLIE FOPLANO, *THE GODSON* 78-102 (1993).

21. See *id.*

22. The information contained in the report as it pertains to the SJC will be discussed *infra*.

23. The first trial took place in January, 1968, in Suffolk Superior Court, *Commonwealth v. Lepore*, Indictment Nos. 31082-3. Gennaro Angiulo, Benny Zinna, Mario Lepore and Richard DeVincent were acquitted of the murder of Rocco DeSiglio. The second trial occurred in Federal District Court, Boston, in March 1968. Raymond Patriarca, Henry Tameleo and Ronald Cassesso were convicted of conspiring to use interstate commerce to commit a crime of violence, i.e., conspiracy to the murder of William Marfeo. The defendants were sentenced to five years in prison and received a ten thousand dollar fine. See *Patriarca v. United States*, 402 F.2d 314, *cert. denied*, 393 U.S. 1022, *rehearing denied*, 393 U.S. 1124 (1969).

24. Wilfred "Roy" French was found guilty of first degree murder and Joseph Salvati was convicted of being an accessory. The jury recommended that the death sentence not be imposed. Henry Tameleo, Ronald Cassesso, and Peter Limone were found guilty as accessories and sentenced to death. Louis Greco was found guilty of first degree murder and conspiracy and sentenced to death. Each

As in the Sacco-Vanzetti case, prejudice against those of Italian descent permeated the trial.<sup>25</sup> As in the Sacco-Vanzetti case, the prosecution conducted a "highly unscrupulous prosecution"<sup>26</sup> and indulged in an "outrageous breach of professional ethics."<sup>27</sup>

Having systematically excluded Italian-Americans from the jury, the prosecutor, in his opening statement before twelve of sixteen Irish-American jurors, directed the jurors to the physical appearance of the predominantly dark-haired, swarthy, olive-skinned, brown-eyed, aquiline-nosed defendants: ". . . I ask you very respectfully to look at the defendants during the course of the trial. I ask you to look at them for their physical characteristics; I ask you to look at them with regard to the story that is told about them."<sup>28</sup>

defendant was convicted of conspiracy to murder one Siathopolous. Barboza pled guilty to two conspiracy indictments on the opening day of the trial. Tameleo died in prison in 1983, Cassesso in 1992, and Greco in 1995. In 1997, Salvati's sentence was commuted. After the convictions, Barboza was given probation and was relocated to California where he murdered again. He ultimately pled guilty, served a short period of time in prison, and was gunned down in San Francisco in 1976.

25. In *Sacco*, cross-examination of a witness who claimed to have seen Vanzetti was as follows:

- Q. Well, the day before, did you see any Italians get on the train?  
 A. I didn't notice any.  
 Q. Have you ever seen any Italians get on that train? Did you ever during that month of April?  
 A. Yes.  
 Q. When?  
 A. I don't know the dates.  
 Q. How frequently?  
 A. Why, I couldn't say. Perhaps once or twice a week.  
 Q. Not in the vernacular—You have heard the old saying, 'All coons look alike to me'—but most Italians look alike? Some Italians look a good deal alike?  
 A. There is a difference. Some are big and some are small—  
 Q. I know, a big Italian don't look like a small one, not as a rule, but two small Italians look a good deal alike?  
 A. There is a difference in them. You might get two alike and two not alike.  
 Q. Have you ever worked with Italians?  
 A. No, sir."

See Transcript of the Record, *supra* note 4, at 432. On cross-examination a defense witness was asked:

- Q. Do you know what nationality is meant by the term 'wop,' the colloquial term 'wop'?  
 A. Certainly.  
 Q. What nationality?  
 A. Italian.

See *id.* at 1020. In summation, Vanzetti's lawyer told the jury: "Please don't construe the ordinary man by an Italian. If you go out and flock a dozen Italians together, the chances are that you will get a gun or two, anyway. You could handle one hundred—fifty other men and you won't find a revolver." See *id.* at 2170.

26. PAUL AVRICH, SACCO AND VANZETTI, THE ANARCHIST BACKGROUND 3 (1996).

27. See EHRMANN, *supra* note 10, at xix.

28. Prosecution's Opening Statement, Commonwealth v. Lewis Grieco, et al., No. 31601, at 2976 (Mass. July 31, 1968); see also Commonwealth v. French, 357 Mass. 356 (1970).

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The prosecution further sought to inflame the jury by creating the impression that the killing had been based on an ethnic rivalry between Irish and Italians. On direct examination, the prosecutor unnecessarily elicited from Barboza ethnic slurs attributed to defendant Peter Limone, calling Deegan "an Irish mother-fucker."<sup>29</sup> After the murder, Barboza claimed Limone said, "that Irish bastard won't bother me—anybody any more."<sup>30</sup>

After Limone testified and was subject to an ineffective cross-examination, the prosecutor turned the questioning to an appeal to prejudice based on national origin. Having inquired whether Limone knew other notorious gangsters with Italian surnames, he resorted to that overworn canard, when referring to a club that the men frequented: "Was it not true, sir, that in the year 1965, the Doghouse was a meeting place for the *Cosa Nostra*?"<sup>31</sup>

Reaction was swift. After vociferous objections, a recess was called. Subsequently, the court heard arguments demanding a mistrial because of the use of the term *Cosa Nostra*. Having raised the issue that there was nothing in the indictment which alleged that defendants were part of any criminal enterprise, or that such an enterprise was, in fact, criminal, prominent Boston Attorney Lawrence O'Donnell stated:

The term is a hate term, designed to appeal to people's glands and not their reason. It is a class libel. It is the same as saying all Negroes are lazy. It is designed as hate literature, a hate-mongering phrase and propaganda against Italo-Americans. . . . I say to you, your Honor, Lewis Grieco could no more overcome the tide of propaganda on that phrase in this courtroom than—it would be the type of propaganda that is known as universally as sunrise. And he doesn't have to face the death sentence because of that hate-mongering phrase, class libel, designed to try to get this jury to despise every Italo-American that stands accused. That's why it's in this case, because they haven't got the evidence and they want to carry the day by hate propaganda and not by an analysis of the government's witness, Mr. Barboza, his evidence . . .<sup>32</sup>

The cross-examination of Louis Greco<sup>33</sup> was equally unprincipled. Over objection, the prosecutor was allowed to read the unproved inflammatory allegations of serious domestic abuse in a complaint for divorce. Greco and his wife had since reconciled.

Having successfully branded the defendants as members of the *Cosa Nostra*, and otherwise base characters and wife-beaters, all of which were unproved, the prosecutor sought to blame the defendants for unsolved murders and threats for

29. Direct Examination, Commonwealth v. Lewis Grieco, et al., No. 31601, at 3222 (Mass. July 31, 1968); see also Commonwealth v. French, 357 Mass. 356 (1970).

30. *Id.* at 3453.

31. *Id.* at 6283.

32. *Id.* at 6290-92.

33. Born of immigrant parents, Luigi Greco was a highly decorated, severely disabled World War II veteran. Although he was well known as Louie Greco, he was indicted under the name Lewis Grieco.

which they had not been indicted. In summation, the prosecutor, referring to Barboza, stated:

... If there was a deal—and we do not suggest for one minute there was ever any deal with him—if there was a deal, what does he have to do—keep on making up these stories for the rest of his life? The FBI told him that in return for his testimony, they will protect his wife and family and that they would call it to the attention of any judge<sup>34</sup> that tries his other cases. . . Now, why did he testify in this case? He gave you the reasons why. He says to you that Bratsos and DePriso were killed. And there you have the evidence that they were killed. He says that Chico Amico was killed, and we have the evidence that he was killed. He says to you that his wife and kid were threatened. That's his evidence.<sup>35</sup>

This argument was a serious breach of professional ethics<sup>36</sup> and was designed to inflame the jury against the defendants by bringing other irrelevant murders into the case and attributing them to the defendants. The prosecutor also implied that the defendants were behind threats to Barboza's family, also without proof.

The SJC addressed this very issue in *Commonwealth v. Ciampa*<sup>37</sup> in which it chided both trial and appellate counsel and once again restated its duty under MASS. GEN. LAWS ANN. ch. 278, § 33E, that "[w]e must disregard omissions of counsel if justice requires us to order a new trial."<sup>38</sup> The court, which cited cases regarding threats to witnesses and references to protective custody for witness's family, called such language "unfairly prejudicial."<sup>39</sup>

In the *Deegan* case, the prosecutor continued this barrage by telling the jury that the allegations against the *Cosa Nostra* have to be true because the government would not cooperate in fabricating these allegations or be involved in a criminal conspiracy:

"Can you believe Joseph Baron? I suggest to you, ladies and gentlemen, Joseph Baron—and this would apply to anyone who took the stand—that in

34. During the trial, Judge Forte instructed the jury that Barboza was serving a sentence of "four to five years to be served" at M.C.I. Walpole for unlawful possession of a firearm, stiletto, and conspiracy. See Direct Examination, *supra* note 29, at 3802. His record included twenty-one convictions for burglaries, three assaults and batteries by means of dangerous weapons, two armed robberies, and one kidnapping. He was facing sixteen habitual criminal indictments. On November 1, 1968, the judge sentenced Barboza to a one year sentence on the conspiracy to murder indictments to be served concurrently. On March 28, 1969, less than nine months after the trial, the judge, upon the prosecutor's recommendation, revoked and suspended the sentence. Barboza was relocated to California where he murdered Clayton Wilson. He pled guilty, served a short period of time, and was ultimately gunned down in San Francisco on February 11, 1976.

35. Prosecutor's Summation, *Commonwealth v. Lewis Grieco, et al.*, No. 31601, at 7440 (Mass. July 31, 1968)(emphasis added); see also *Commonwealth v. French*, 357 Mass. 356 (1970).

36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR-706(C)(1-4)(1981).

37. See *Ciampa*, *supra* note 16, at 322.

38. See *id.*

39. See *id.* at 318.

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order for that person to tell a story such as Joseph Baron told in this case, he would have to have the cooperation of the FBI, the Chelsea Police Department, the District Attorney's Office, the Federal Bureau of Investigation, the United States Attorney's Office: that in order for a man to make up a story, as counsel for the defendants suggest, the man would have to be literal genius. I suggest to you, ladies and gentlemen, that when you heard Joseph Baron tell this story, you heard the true story. And I ask you now only to make a decision that is in the best interests of your consciences. Thank you."<sup>40</sup>

The SJC found this type of argument improper because it was witness vouching, meaning the prosecutor could not state the witness was telling the truth or make other statements which implied that the government would not fabricate a case or suggest that "the government has special knowledge by which it can verify the witness's testimony. . . ."<sup>41</sup> It is also a serious breach of ethics.<sup>42</sup>

Suffolk Superior Court Judge Felix Forte, age 73, charged the jury:

[T]he burden of proof is to convince you beyond a reasonable doubt. Now, that doesn't mean beyond any doubt. It means beyond a doubt with a reason behind that doubt. It does not mean beyond a doubt in the mind of someone who is looking for a doubt, and it does not mean to a mathematical certainty. . . .

*Suppose you have an important question of your own, a real serious problem, one that means a great deal to your future—whether you should buy a business or not; shall you sell your house or not and buy another; shall you move your family to another state or not. Questions of serious import, and if you make a mistake, it will be a serious mistake. On the other hand, if you decide correctly, it will be an improvement in your future and that of your family.*

Now, you received some information from a certain person. If he has related the truth, you should make the change. But if he is not telling you the truth, you will make a terrible mistake. Now, shall you believe him or not. You don't know whether he's telling you the truth or not. You were not present when this occurrence, this incident took place about which he talked. You don't know whether he's telling the truth or not. You just have to make up your own mind, and you meditate and you think of him, think of all you know about him, his past, his education, his intelligence, his reputation, anything you know about him you think about. And after serious thought and meditation you say to yourself, 'Well, I don't have enough confidence in him. He doesn't sound correct to me. I'm not convinced.' You have not been convinced beyond a reasonable doubt.

On the other hand, suppose you say, "Well, I don't know whether he is telling the truth or not but I have confidence in him. He is in a position to know. I don't know why he shouldn't be telling me the truth. He made a sufficiently

40. See Summation, *supra* note 35, at 7456.

41. See Ciampa, *supra* note 16, at 320.

42. See MODEL CODE, *supra* note 36.

good impression upon me for me to accept that story and I am going to make the change."

*Now, that's the whole story. I could tell you about proving a case beyond virtual certainty and I could tell you that you have to believe it to a moral certainty, but then I would have to explain what is meant by moral certainty or other kinds of certainty.*<sup>43</sup>

It is clear, from the analysis of the *Sacco-Vanzetti* charge on moral certainty and reasonable doubt, and the cases cited subsequent to the trials of both Sacco and Vanzetti and the *Deegan* defendants, that both charges to the jury are, by present standards, constitutionally deficient. In the *Deegan* case, the judge used the personal decision-making analogy to define reasonable doubt, and then neglected to instruct the jury what type of certainty is required to sustain the burden of proof. There are additional issues regarding the charge in the *Deegan* case that were not present with regard to Sacco and Vanzetti: the alibi charge, the accomplice charge, and an attempt at the end of the charge by the prosecutor to clarify the judge's attributing the acts of one defendant to another which remained uncorrected.

In the *Sacco* case, Judge Thayer charged:

For instance, the defendants claim you must consider with care the evidence tending to prove alibi, for the reason that, if they were elsewhere when the alleged homicides were committed, that is evidence which tends to corroborate the witnesses of the defendants to the effect that they were neither at the place when the alleged homicides were committed, nor were they in the bandit car. . . .<sup>44</sup>

[T]here remains for me to consider with you the defense of alibi that has been raised by these defendants. It is sometimes called a plea of not guilty, because as the defendants say in these cases that they were elsewhere at the time the alleged crimes were committed at South Braintree and therefore they could not have committed them. In other words, the defendants say it was physically impossible for them to have committed these crimes because at the very moment they were committed Vanzetti was in Plymouth and Sacco was in Boston—if you find such to be a fact, as it is purely a question of fact—then that would be a complete defense to these indictments and therefore you should return verdicts of not guilty. An alibi is always a question of fact. Therefore, all testimony which tends to show the defendants were in another place at the time the murders were committed tends also to rebut the evidence that they were present at the time and place the murders were committed. If the evidence of an alibi rebuts evidence of the Commonwealth to such an extent that it leaves reasonable doubt in your minds as to the commission of

43. See *Jury Charge*, *Commonwealth v. Lewis Grieco, et al.*, No. 31601, at 7475-8 (Mass. July 31, 1968); see also *Commonwealth v. French*, 357 Mass. 356 (1970).

44. See *Transcript of the Record*, *supra* note 4, at 2253.

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On the other hand, if you find that the defendants or either of them committed the murders and the Commonwealth has satisfied you of such fact beyond a reasonable doubt from all the evidence in these cases, including the evidence of an alibi, then you will return a verdict of guilty against both defendants or against such defendants as you may find guilty of such murders.<sup>45</sup>

Although this charge may be considered burden shifting by present standards, it pales in comparison to the alibi charge given by Judge Forte forty-seven years later in the *Deegan* trial:

A little more than a hundred years ago-1850, to be exact-in the case of the *Commonwealth v. Webster*, we have this language regarding an alibi: *This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny.* because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious, that all testimony, tending to show that the accused was in another place at the time of the offense, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence, whatever tends to support the one, tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies.<sup>46</sup>

In reversing convictions using this language, which presumes the defense witnesses untruthful, the SJC called the *Webster* charge "clear error" because it put the burden of proof on the defendant to prove alibi. The court also called it "unwise" to refer to alibi as a "defense." The SJC further ruled that it was "not helpful to single out alibi evidence for subjection to 'rigid scrutiny.'" The jury should have been instructed that an alibi "may be the only refuge of the innocent."<sup>47</sup>

Judge Forte increased the burden of the ancient alibi charge by refusing to give a similar charge to the jury with regard to the testimony of the accomplice, Barboza. Forte told the jury:

Well, of course, a person who admits himself to be an accomplice of a crime is a criminal himself, and that in itself raises a question, but that does not

45. *See id.* at 2262-3.

46. *See Jury Charge, supra* note 43, at 7471 2 (emphasis added).

47. *Commonwealth v. McLeod*, 326 N.E.2d 905, 906 (Mass. 1975); *see also Commonwealth v. Ramey*, 330 N.E.2d 193 (Mass. 1975); *Commonwealth v. Rodriguez*, 352 N.E.2d 203 (Mass. 1976); *Commonwealth v. Cobb*, 363 N.E.2d 1123 (Mass. 1977); *Commonwealth v. Bowden*, 399 N.E.2d 482, 489 (Mass. 1980).

mean that you cannot believe an accomplice. The evidence of an accomplice need not be corroborated by other witnesses. Whether you should believe it or not remains for you to say.

Now, the fact that even if there is an accomplice and it is not corroborated does not mean that the defendant is necessarily innocent or that he is entitled to a verdict of not guilty; but if you are satisfied and convinced beyond a reasonable doubt that the defendant is guilty, you can find that defendant guilty even on the uncorroborated testimony of an accomplice or a participant who is not on trial. Incidentally, the indictments for conspiracy mention Baron as one of the conspirators, but he was not on trial before you because before you were empanelled as a jury he appeared before me and pleaded guilty to both indictments, so that you have just the other defendants to act upon."<sup>48</sup>

The judge gave the impression that Barboza had no motive for his testimony. Because he had already pled guilty and was now testifying, the jury's role was simply to ratify the guilt of the other defendants.

As early as 1972, the United States Supreme Court recognized the problem with accomplice testimony and said in *Cool v. United States* that there was "[no] constitutional problem when the judge instructs a jury to receive the prosecution's accomplice testimony with 'care and caution.'"<sup>49</sup>

The Court recognized that this lessened the prosecution's burden of proof for proving guilt beyond a reasonable doubt. It further said that because the jury was instructed that it could convict solely on the basis of accomplice testimony, it was reversible error to fail to instruct the jury that it could acquit on that same basis.<sup>50</sup> Clearly, this error was identical to that made in the *Deegan* trial.

The SJC, also in *Commonwealth v. Ciampa*, recognized the substantive constitutional dimension of the effect of the failure to charge the jury regarding an accomplice.<sup>51</sup> Because the error was substantial, it had to be retroactively applied. The court's decision emphasized that "the judge must specifically and forcefully tell the jury to study the witness's credibility with particular care."<sup>52</sup> In addition, the SJC stated that "witnesses testimony must be considered with caution and great care. Moreover, their guilty plea is not to be considered as evidence against the defendants."<sup>53</sup> The court also said that the jury should have been instructed that the agreement to testify "does not mean that the government has a way of knowing that the testimony is truthful," and that the jury

48. See Trial Transcript, *supra* note 25, at 7474 (emphasis added).

49. *Cool v. United States*, 409 U.S. 100, 103 (1972).

50. See *Cool*, 409 U.S. 100, 103 n. 4.

51. See *Ciampa*, *supra* note 16, at 320.

52. See *id.*

53. See *id.* (citing *United States v. Mealy*, 851 F2d 890, 900 (7<sup>th</sup> Cir. 1988)).

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It is clear that under current principles of law, the summation of the prosecutor and the charge to the jury had serious errors of constitutional dimension. As for the charge to the jury, the errors were so serious that they were either new and substantial or considered burden shifting and would have to be given retroactive effect on subsequent appeals.

On May 4, 1970, the SJC affirmed the convictions.<sup>55</sup> Thus began a twenty-five year odyssey through the state and federal judicial systems, culminating with the death of defendant Greco in December 1995.<sup>56</sup> There had been seven hundred and ninety two exceptions at trial and four hundred and sixty nine assignments of error.

The SJC overruled the objection to the naming of other notorious individuals with Italian surnames on the grounds that it was not seasonably brought.<sup>57</sup> The court allowed the questioning of Greco's domestic affairs on the grounds that it pertained to "matters conceivably bearing upon the truth of [his] alibi testimony. . . ."<sup>58</sup> The SJC also made the following *non sequitur* in justifying the inference that the defendants were members of a corrupt criminal enterprise, the *Cosa Nostra*, the existence of which was unproven:

One could hardly say that reference to the F.B.I. or the Internal Revenue Service by itself refers to a particular employee of those agencies. If one joins, takes orders from, or works for an illdefined [sic] organization (e.g., the 'Mafia,' the 'Cosa Nostra') which may have incurred public disrepute, one voluntarily risks that some opprobrium from a general reference to the organization will rub off on him.<sup>59</sup>

54. See *id.* at 320 (citing *United States v. Shaw*, 829 F.2d 714, 718 (9<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1577, 99 L.Ed.2d 892 (1988)).

55. See French, *supra* note 19.

56. See *Greco v. Meachum*, 533 F. 2d 713 (1976), *cert. denied*, 429 U.S. 858; see also *Greco v. Workman*, 481 F. Supp. 481 (Mass. 1979), *cert. denied*, 100 S. Ct. 2992 (1980) (polygraph, known use of perjured testimony); *Commonwealth v. Tameleo*, 425 N.E.2d 287 (Mass. 1981); *Commonwealth v. Greco*, 425 N.E.2d 287 (Mass. 1981) (jury charge); *Commonwealth v. Limone*, 573 N.E.2d 1 (Mass. 1991) (jury charge); *Commonwealth v. Salvati*, 650 N.E.2d 782 (Mass. 1995) (suppression of police reports, perjured testimony). There are two unpublished memorandum decisions from the First Circuit Court of Appeals. See generally *Greco v. Dickhaut*, No. 83-8058 (1983); *Greco v. Nelson*, No. 93-1969, *cert. denied*, May 23, 1994 (citation omitted); A Motion for Leave to Appeal (jury charge, i.e., accomplice testimony, failure to charge regarding identification testimony, witness vouching summation of prosecutor) to the SJC, No. SJ-93-0014 was denied on February 2, 1993, by Associate Justice Lynch; *cert. denied*, May 17, 1993, *Greco v. Massachusetts* (citation omitted); An eighth motion for new trial (ineffective assistance of defense counsel because of conflict of interest) on behalf of Greco was denied on November 28, 1995, by Suffolk Superior Court Judge Banks.

57. See French, *supra* note 19, at 229.

58. See *id.*

59. See *id.* at 221 n.33.

Probably the most patently erroneous ruling was when the SJC tried to justify an error regarding the charge to the jury, which the prosecutor himself had sought to correct. The judge erroneously stated that Fitzgerald's testimony was to be considered against Cassesso and Tameleo, rather than Greco and Tameleo. Fitzgerald, an attorney, had testified regarding a conspiracy to obstruct justice and suborn perjury by bribing his client Barboza not to testify.<sup>60</sup> Fitzgerald, whose leg was blown off by a car bomb, is presently a judge.<sup>61</sup> He had implicated Tameleo and Greco in the conspiracy. Glavin, on the other hand, had been serving a life sentence for first degree murder and testified regarding an attempt to bribe him, attributed to Cassesso, to confess to Deegan's murder.<sup>62</sup> At the conclusion of his charge, the judge stated:

When I said to you that once the conspiracy was over, what each person did or said would be used only against him, in reference to the testimony of Mr. Fitzgerald, he talked about Ronald Cassesso and Henry Tameleo—

PROSECUTOR: I beg your pardon, That's not true, your Honor, It wasn't Cassesso. It was Lewis Grieco and Henry Tameleo, your Honor. . . .

THE COURT: All right. The defendant Lewis Grieco and Henry Tameleo. I specifically instruct you then that the evidence was admitted solely against them—Grieco and Tameleo—and not against any one of the other defendants. I want to repeat that. That was in Mr. Glavin's testimony.<sup>63</sup>

Rather than acknowledge that this instruction totally confused the jury and was "Plain Error," requiring automatic reversal, because it was against Cassesso that Glavin had testified, not Greco or Tameleo, the SJC, in total disregard of the need for the jury to understand the judge's instructions in a death penalty case, or any other case, ruled that "it would seem that all counsel (if not the stenographer) understood what the judge said as not being confusing."<sup>64</sup>

With regard to the requested accomplice charge, the SJC stated that the "judge may tell the jury to scrutinize the testimony of an accomplice with care, especially when the testimony is not corroborated. He is not required to do so."<sup>65</sup> As for the allegations that the alibi charge shifted the burden of proof and the judge did not charge properly on the issue of reasonable doubt, these were identified by the court and described as "Various less significant issues raised by assignments of error. . . ."<sup>66</sup> On the issue concerning reasonable doubt, the court ruled that the judge "made it clear that the burden rests upon

60. *See id.* at 221-2.

61. Hon. John Fitzgerald, 7th Judicial Circuit, PO Box 230, Rapid City, SD 57709. Francis P. Salemme was convicted in the bombing. *See Commonwealth v. Salemme*, 323 N.E.2d 922 (Mass. 1975); *Commonwealth v. Salemme*, 416 N.E.2d 205 (Mass. 1981).

62. *See French*, *supra* note 19, at 218-9.

63. *See Jury Charge*, *supra* note 43, at 7523.

64. *See French*, *supra* note 19, at 222.

65. *See id.* at 225 (emphasis added).

66. *See id.* at 227.

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67. *See id.* at

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the Commonwealth and not upon a defendant. There was no error."<sup>67</sup> As for the ancient alibi charge, the SJC found "the rule of the *Webster* case does not shift to the defense the burden of proving alibi or lack of guilt."<sup>68</sup>

The next time the case was heard by the SJC regarding the charge to the jury was in 1981.<sup>69</sup> The appeal was from the denial of motions for new trial brought by Tameleo and Greco on the burden shifting effect of the judge's charge to the jury regarding the use of personal decision-making examples in defining reasonable doubt, the shifting of the burden of proof on the defendant to prove alibi, and the otherwise incorrect explanation of burden of proof. An additional murder case, raising the same issues, which had been reduced from first to second degree murder by the SJC, was briefed and argued at the same time.<sup>70</sup>

Single Justice Liacos allowed Applications for Leave to Appeal.<sup>71</sup> In a significant ruling the justice stated, "the defendants raise issues they could not have raised before, at least with regard to some of which the constitutional significance was not established until after the defendants' trial and subsequent actions for post conviction relief."<sup>72</sup>

Massachusetts General Law, ch. 278, § 33E, enabled a defendant convicted of first degree murder to appeal from the denial of a motion for a new trial after the case had already been decided by the SJC. Conversely, it also prevented frivolous appeals. The laws were enacted as a result of the *Sacco-Vanzetti* case. There was ostensibly no vehicle by which the SJC could correct a manifest injustice. As a result, the court had no jurisdiction to decide the appeals of Sacco and Vanzetti.

On May 5, 1981, the cases were argued before Chief Justice Hennessey, Associate Justices Wilkins,<sup>73</sup> Abrams, Nolan,<sup>74</sup> and Lynch. The issues before the court were the judge's charge regarding alibi, the standard of proof required of

67. See *id.* at 232.

68. See French, *supra* note 19, at 232.

69. Barboza's recantation was the subject of a previous appeal. See *Commonwealth v. Cassesso*, 276 N.E.2d 698 (Mass. 1971). A motion for leave to appeal to the SJC from the denial of a 1978 motion for new trial was denied by Associate Justice Braucher which included the affidavits of Barboza's former attorney, F. Lee Bailey, Boston Herald reporter James Southwood, and two polygraphs of defendant Greco. The Miami Police polygraph had been in the possession of prosecuting authorities prior to the trial. See also, *Greco v. Workman*, 481 F.Supp. 481 (1979), *cert. denied* 100 S.Ct. 2992 (1980).

70. See *Commonwealth v. Pisa*, 363 N.E.2d 245 (Mass. 1977) *cert. denied*, 434 U.S. 869 (1977) 393 N.E. 2d 386 (1979); *Pisa v. Streeter*, 491 F.Supp. 530 (Mass. 1980).

71. See MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1977). Referring to motions for new trials in capital cases, Massachusetts law states, in part: "[i]f any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a *new and substantial question* which ought to be determined by the full court." See *id.* (emphasis added).

72. *Commonwealth v. Grieco*, Nos. 80-389/80-427, slip op. at 1-2 (Mass. Dec. 31, 1980) (order granting applications for leave to appeal).

73. Justice Wilkins' father had been the chief justice on the original appeal.

the Commonwealth, and the use of personal decision-making analogies in explaining reasonable doubt.<sup>75</sup>

Because counsel for Tameleo had not raised the issue regarding the alibi charge, it was not addressed by the court, contrary to its earlier stated position.<sup>76</sup> As for the use of personal decision-making examples in explaining the burden of proof beyond a reasonable doubt, the SJC contradicted its earlier ruling in *Commonwealth v. Ferreira*, written by Hennessey,<sup>77</sup> and stated, "[w]e have never held . . . that the use of specific examples necessarily imports error, constitutional or otherwise. . . . We decline to depart from that principle."<sup>78</sup>

The SJC further contradicted its earlier position stated in *Commonwealth v. Callahan*<sup>79</sup> and *Commonwealth v. Stokes*,<sup>80</sup> in which it espoused its statutory duty to correct substantive errors of constitutional dimension in order to avoid a miscarriage of justice. The court ruled that because "[t]he defendant did not object to the now challenged portion of the charge at trial . . . our consideration is limited to the impression made by the instruction as a whole."<sup>81</sup> Simply put, the SJC was now requiring the *Deegan* defendants to have objected at trial to the judge's charge even though the constitutional theory upon which the appeal had been based had not existed at the time of the defendants' trial. This statement completely contradicted its earlier position where it had stated the opposite,<sup>82</sup> and the ruling of Justice Liacos certifying the appeal.<sup>83</sup> Even more egregious was the court's statement, "[e]rror in a charge is determined by reading the charge as a whole, and not by scrutinizing bits and pieces removed from their context."<sup>84</sup> The SJC itself was scrutinizing "bits and pieces removed from their context."

In a separate rescript opinion, the court dismissed the issues raised by *Greco*, and claimed that because the issue of the burden shifting alibi charge had not been raised in his 1978 Motion for a New Trial, it was "not thought to be critical."<sup>85</sup> However, the court ignored the fact that it had been raised at trial

74. Justice Joseph Nolan had been an assistant district attorney in the office that prosecuted the *Deegan* defendants from 1960-1971. A petition for rehearing alleging a conflict of interest was denied. Neither the grand jury testimony nor Barboza's reported polygraph have ever been made public.

75. All defendants raised the issue regarding the presumption of malice from the use of a dangerous weapon. See *Sandstrom v. Montana*, 442 U.S. 510 (1979).

76. See *Commonwealth v. Callahan*, 406 N.E.2d 385 (Mass. 1980).

77. See *Commonwealth v. Ferreira*, 364 N.E.2d 1264 (Mass. 1977).

78. *Commonwealth v. Tameleo*, 425 N.E.2d 287, 290 (Mass. 1981) (citing *Commonwealth v. Smith*, 407 N.E.2d 1291 (1980)).

79. See *Callahan*, 406 N.E.2d at 387-8.

80. See *Commonwealth v. Stokes*, 374 N.E.2d 87, 92 (Mass. 1978).

81. *Tameleo*, 425 N.E.2d at 290.

82. See *Stokes*, 374 N.E.2d at 92.

83. See Grieco, *supra* note 72 (order granting applications for leave to appeal).

84. See *Tameleo*, *supra* note 78 (citing *Commonwealth v. Cundriff*, 415 N.E.2d 172 (1980)).

85. See *Commonwealth v. Greco* 425 N.E.2d 287, 287 n.1 (Mass. 1981).

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In what appears to be a *Vanzetti* Proclamation, the court stands the reason for the Third Report of the Commission on the Administration of the Courts of Massachusetts.

There should be no more. One cannot read the record of the court's scrutiny and find that the court finds no error on every element. It should be no question whether

In truth, the SJC was forced to find that "no error of discretion" had occurred. The view expressed from the conviction of the defendant was not justifiable. Consequently, the justice, such as or was not justified of discretion the find that "no error of discretion" had occurred. The view expressed from the conviction of the defendant was not justifiable. Consequently, the justice, such as or was not justified of discretion the find that "no error of discretion" had occurred.

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86. See French, *supra* note 72.

87. See *Tameleo*, *supra* note 78.

88. See *Commonwealth v. Callahan*, 406 N.E.2d 385 (Mass. 1980).

89. *Pisa*, 425 N.E.2d 1264 (Mass. 1977).

90. Third Report of the Commission on the Administration of the Courts of Massachusetts, Doc. No. 144, 39-40.

91. Third Report of the Commission on the Administration of the Courts of Massachusetts, Doc. No. 144, 39-40.

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and preserved in the original appeal.<sup>86</sup> The court also ignored the fact that it had just stated that to determine error, the charge is to be read as a whole, and not by "scrutinizing bits and pieces."<sup>87</sup> The court continued to disregard its publicly stated duty under MASS. GEN. LAWS ANN. ch. 278, § 33E appeals. Instead, the court referred to the *Tameleo* decision, *supra*, and the case of *Pisa*, which was also decided that day.<sup>88</sup>

In what appears to have been a wanton disregard of the spirit of the *Sacco-Vanzetti* Proclamation made less than four years earlier, and a failure to understand the reason the cases were there in the first place, the court quoted from the Third Report of the Judicial Council of Massachusetts convened after the executions of Sacco and Vanzetti:

There should be one appeal as of right in a capital case, but there need be no more. One convicted of murder must be given an opportunity to submit the record of the trial to the court of last resort and he is entitled to have that record scrutinized with the greatest of care. If as a result of such scrutiny the court finds no error in the conduct of the trial, it would seem that the defendant should not have an unqualified right thereafter to appeal from the decision on every eleventh hour application for a new trial. . . . In our opinion there should be no right of appeal at this juncture unless the appeal is allowed by a justice of the Supreme Judicial Court as presenting a new and substantial question which ought to be passed upon by the full court.<sup>89</sup>

In truth, the *Sacco-Vanzetti* case had caused such controversy that the Council was forced to recognize that there were "some serious defects in our methods of administering justice in murder cases."<sup>90</sup> As previously discussed, at the time of the appeals of Sacco and Vanzetti the SJC reviewed only issues of law. Consequently, there was no means by which the court could pass upon issues of justice, such as whether the verdict was contrary to the weight of the evidence, or was not justified by the facts. Although the court could reverse on an abuse of discretion theory, such an abuse was rare, requiring the appellate tribunal to find that "no conscientious judge acting intelligently could have honestly taken the view expressed by the trial judge."<sup>91</sup> Therefore, there was no real appeal from the conviction.

The Judicial Council felt the issue of an appeal on a capital murder case so important that it stated "[a]s the verdict on such an indictment involved the issue of life and death, we think the responsibility too great to be thrown upon

86. See French, *supra* note 19, at 195.

87. See Tameleo, *supra* note 78.

88. See *Commonwealth v. Pisa*, 425 N.E.2d 290 (Mass. 1981).

89. *Pisa*, 425 N.E.2d at 292 n.4 (citing Third Report of the Judicial Council of Massachusetts, Pub. Doc. No. 144, 39-40 (1927)).

90. Third Report of the Judicial Council of Massachusetts, Pub. Doc. No. 144, at 37 (1927), reprinted in 13 Mass.L.Q. (No. 1, 1927).

91. Third Report at 41.

one man."<sup>92</sup> The Council recommended changes in the law which would "broaden the function of the Supreme Judicial Court on appeal in that it will pass upon the whole case, and will have the power to order a new trial upon any ground if the interests of justice appear to require it."<sup>93</sup>

The Council further recommended Massachusetts adopt the statutory law in New York and quoted from Section 528 of the Criminal Procedure Law referring to death penalty cases: "[T]he court of appeals may order a new trial if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, *whether any exception shall have been taken or not in the court below.*"<sup>94</sup>

Abrams' unanimous decision had the effect of nullifying Justice Liacos' ruling which had recognized the seriousness of the burden shifting jury charge and signaled a return to pre-Sacco-Vanzetti legal reasoning. In fact, the court had contradicted its earlier decision in *Commonwealth v. Brown*,<sup>95</sup> specifically referring to the Sacco-Vanzetti case and the statutory amendment which was passed "to remedy the defects . . . which had been especially evident"<sup>96</sup> in that case. The court called the statute a "safety valve" which guaranteed "review as to all aspects of cases regardless of the absence of claim of error."<sup>97</sup>

In 1991, defendant Limone's case was certified for review by Associate Justice Wilkins. Once again, the issue revolved around the use of personal decision-making analogies to explain reasonable doubt. Limone's case was heard before Liacos, (now the chief justice), Wilkins, Abrams, Nolan, and Lynch (who wrote the opinion).

This time the court did not require an objection at trial "because the constitutional theory on which he relies was not sufficiently developed at the time of his trial and appeal."<sup>98</sup> However, the SJC edited the transcript of the charge to the jury and changed the issue before it although it stated, "[i]n *Commonwealth v. Tumeleo*, (citation omitted), *we scrutinized this very charge. . . . There, we held that the charge, read in its entirety, did not so trivialize the concept of proof beyond a reasonable doubt as to require reversal of the convictions.*"<sup>99</sup>

There had never been any claim by the prosecution that the jury charge on reasonable doubt was anything other than the standard of proof regarding guilt or innocence. The court was now saying that the charge was relative to whether a witness should be believed or disbelieved. The charge, as was now interpreted by the justices, left no instruction to the jury on what constitutes "proof

92. *Id.* at 40.

93. *Id.* at 42 (emphasis added).

94. Crim. Proc. § 528 (emphasis added).

95. See *Commonwealth v. Brown*, 380 N.E.2d 113, 120 (Mass. 1978).

96. See *id.*

97. See *id.*

98. *Commonwealth v. Limone*, 573 N.E.2d 1, 2 (Mass. 1991).

99. *Limone*, 573 N.E.2d at 2-3 (emphasis added).

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100. *Id.* at 3

101. *Id.*

102. *Id.*

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The SJC was now on the public record as changing the facts of a case. Unanimously, the court said. "[w]e recognize that there is a certain amount of tension between *Tameleo* and our later decision in *Rembiszewski*."<sup>100</sup> In *Rembiszewski*, the SJC had reversed a first degree murder conviction because the charge regarding reasonable doubt "used specific examples of personal decisions in jurors' lives."<sup>101</sup> It found that the reasonable doubt charge "was not distinguishable in any significant way" from other erroneous charges and was, therefore, "constitutionally inadequate."<sup>102</sup>

The court claimed that it has never decided that the use of personal decision-making analogies in defining reasonable doubt "necessarily imports error, constitutional or otherwise."<sup>103</sup> It stated that "to determine whether a definition of reasonable doubt accurately conveys the meaning of the term, it is necessary to consider the charge as a whole."<sup>104</sup> Although the court had identified the charge as having used personal decision-making analogies to define reasonable doubt in the *Tameleo*<sup>105</sup> and *Greco*<sup>106</sup> decisions a decade earlier, it now claimed that the charge "did not compare the jurors' duty in rendering a verdict to weighing the wisdom of taking a future course of action in their personal lives."<sup>107</sup> The SJC claimed that the charge compared the jury's duty "to making a decision as to the truth of a factual proposition, based on the credibility of the person making it."<sup>108</sup> If we consider the charge as a whole, following the latest interpretation by the SJC, the only logical conclusion is that there was no charge to the jury whatsoever which defined reasonable doubt!

In 1995, the SJC ruled again on the case.<sup>109</sup> This time the allegations centered around the police reports that had never been given to the de-

100. *Id.* at 3.

101. *Id.*

102. *Id.*

103. *See* Limone, *supra* note 98 at 3.

104. *See id.*

105. *See* Tameleo, *supra* note 78.

106. *See* Greco, *supra* note 85.

107. *See* Limone, *supra* note 98, at 3-4.

108. *See id.*

109. A Motion for Leave to Appeal from the denial of a motion for a new trial, brought by Greco, was denied by Justice Lynch on February 2, 1993. The issues presented were the charge regarding accomplice testimony, failure of the judge to charge regarding identification, and the prosecutor's witness vouching summation to the jury. Greco did not perfect an appeal regarding the systematic exclusion of Italian-Americans from the jury. *See generally* Teague v. Lane, 489 U.S. (1989). The judge who denied the motion, Judge Hamlin, had been a legal assistant in the office that prosecuted the defendants during the prosecution. She had also been an assistant district attorney in that office during subsequent appeals of the defendants.

fense.<sup>110</sup> By now, the record before the court included, in addition to the court's collective knowledge of a constitutionally flawed jury charge, the following:

The affidavit of the accomplice Barboza wherein he stated that:

[H]e wishes "to recant certain portions of . . . (his) testimony during . . . trial insofar as . . . (his) testimony concerned the involvement of Henry Tameleo, Peter J. Limone, Joseph L. Salvati and Lewis Grieco [sic] in the killing of Teddy Deegan," and that the testimony (not described) which he now offers "to give concerning the killing of . . . Deegan and those individuals responsible for his death will be the whole truth known to" him.<sup>111</sup>

A four page affidavit of prominent attorney Francis Lee Bailey, whom Barboza had engaged to enable him to recant his testimony. According to the Bailey affidavit:

He [Barboza] stated of the people against whom he had testified, Roy French and Ronnie Cassesso were in fact involved, French directly and Cassesso indirectly. He told me that Henry Tameleo and Peter Limone were not involved, but that he implicated them because was led to understand by various authorities that in order to escape punishment on charges pending against him, he would have to implicate someone of 'importance.' He told me that the story he had told to Judge Forte and the jury in the trial of Commonwealth vs. French was in very large measure a fabrication, and that he had in that story implicated Louie Greco because of a personal grudge arising from a disagreement between himself and Greco. He further said that he did not expect a conviction to result from his testimony and, indeed, that the authorities had generally assured him that a conviction was unlikely, but the mere fact of bringing such prominent people to public trial would accomplish its own purpose. He told me that he knew that Louie Greco was in Florida at the time of the murder and expected that fact to be so clearly shown by the evidence that his entire testimony would be cast in doubt and an acquittal — probably of all the defendants — would surely result. He stated that he wished to somehow cause at least those defendants who were in no way involved with the Deegan murder to be freed from prison.<sup>112</sup>

Two polygraph examinations of the defendant Greco, one taken by the Miami Police Department Polygraph Unit which showed him to be innocent of Deegan's murder and supported his statement that he was in Florida when Deegan

110. In *Commonwealth v. French*, the SIC upheld the judge's refusal to give the grand jury testimony and police reports to the defense. See *French*, *supra* note 19, at 213, 227.

111. *Commonwealth v. Cassesso*, 276 N.E.2d 698, 701 (Mass. 1971).

112. Affidavit of Francis Lee Bailey at 2 (Oct. 26, 1978). The Bailey affidavit was obtained in connection with Greco's 1978 Motion for New Trial. See *Commonwealth v. Lewis Grieco et al.*, Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978) (order denying defendant's motion for new trial); see also *Greco v. Workman*, 481 F.Supp. 481, *cert. denied*, 100 S.Ct. 2882 (1980). In the 1995 appeal, the affidavit was reproduced in the Record at Appendix 41.

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was murdered. This polygraph was in the possession of prosecuting authorities prior to the trial. A second polygraph conducted by the American Polygraph Association also supported Greco's claims of innocence.<sup>113</sup>

A sworn statement of Barbara Dones-Brown who claimed that she had seen Greco and his wife at their Hollywood, Florida home and had given this information and a calendar indicating dates relevant to Greco's alibi to Massachusetts authorities. She was specific about the dates because Greco's wife, Roberta, had testified as a character reference in divorce court on her behalf. She bought a bouquet of flowers to reciprocate. When she went to their house to deliver the flowers, she spoke to Greco for "more than an hour." She had kept a receipt for the flowers which she had also given to Massachusetts authorities.<sup>114</sup>

An affidavit from Greco's Florida lawyer, Richard Barest, Esq. Barest had been a former judge in Opa Locka and a prosecuting attorney in Dade County. He arranged the Miami Police polygraph examination for Greco, and conducted the investigation which concluded that Greco was in Florida when the murder was committed. Barest petitioned the Governor to contest rendition and sought to compel a polygraph examination of Barboza. However, Massachusetts counsel<sup>115</sup> intervened, and Greco waived rendition.<sup>116</sup>

An affidavit/memorandum of United States Attorney Edward F. Harrington wherein Barboza admitted he would take a polygraph, which "lie detector would prove . . . the truth" with no polygraph results being produced.<sup>117</sup>

An affidavit of former Boston Herald Traveler reporter James Southwood who was brought in by the Justice Department to write a book about Barboza. Barboza told Southwood, "Louie Greco wasn't in the alley." This statement

113. See *id.* at 1, 10. The Miami Police Department Polygraph was also referred to at Appendix 38 of the Record of the 1995 appeal. The American Polygraph Association Polygraph was also referred to at Appendix 40. In 1983, a third polygraph was administered by Ed Gelb, past president of the American Polygraph Association, on the nationally televised program, "Lie Detector," which supported Greco's claims of innocence. Neither the prosecutor nor the administrations of Governors Dukakis and Weld would arrange for an evaluation by the State Police Polygraph Unit. Both governors denied petitions for commutation despite two separate votes of the Advisory Board of Pardons.

114. See *id.* at 1; Appendix 38; see also Statement of Barbara Dones Brown at 3-7. (Dec. 19, 1977).

115. On February 17, 1994, it was learned that the "lead counsel" at the trial, Joseph J. Balliro, had represented both Barboza and Vincent Flemmi. According to an affidavit filed in Suffolk Superior Court, subsequent to the denial of Greco's 1995 appeal, Greco followed Balliro's advice and returned to Massachusetts to face trial. None of the evidence gathered by Barest was ever presented at trial. When questioned regarding Barboza and Flemmi, Balliro cited the "lawyer-client privilege." See Kenney, *Dan Rea's Mission Impossible*, BOSTON GLOBE, Feb. 17, 1994, 69 at 72.

116. See Affidavit of Richard Barest at 1-2 (Dec. 21, 1977); Commonwealth v. Grieco et al., Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978). The affidavit was filed in connection with the 1978 Motion for New Trial, but was not addressed by the judge. See Appendix 38 of the Record of the 1995 appeal.

117. See *id.* at 3. See also Aff. of Edward F. Harrington at 2 (Oct. 31, 1978); Commonwealth v. Grieco et al., Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978).

meant that Barboza had lied about Greco's involvement in the Deegan murder. Southwood had told FBI agents that Barboza was lying and decided not to write the book.<sup>118</sup>

An affidavit of convicted murderer Roy French stating, "Louis Greco and Henry Tameleo, Peter Limone were not in fact involved with me directly or indirectly in the shooting death of Teddy Deegan, on March 12, 1965."<sup>119</sup>

An affidavit of convicted murder William Geraway in whom Barboza confided that he murdered while in the Witness Protection Program, and that he had given perjured testimony in the Deegan and other trials. Geraway reported both incidents to prosecuting officials, and was responsible for Barboza's being tried for murder in California.<sup>120</sup> Barboza eventually pled guilty to second degree murder and received a short prison sentence.

#### V. CONCLUSION

The issue regarding the suppression of the police reports was the subject of a Motion for New Trial brought by defendants Salvati, Limone and Greco, in 1992. According to the trial testimony of Barboza,<sup>121</sup> he left the Ebb Tide restaurant with Martin, Amico, Salvati and Cassesso, to murder Deegan. Greco, who had left in a separate car with Martin, entered the alley in Chelsea where they waited for Deegan and one Stathopolous to arrive with French under the pretext of committing a burglary. Barboza also testified that Tameleo ordered the murder, and that he was paid by Limone.

The defense claimed that Barboza substituted members of his gang who were the real murderers for people against whom he bore grudges, namely: Tameleo, Limone, Greco and Salvati. Barboza was asked whether he left the Ebb Tide with his gang members, which, of course, he denied.

The newly discovered police reports proved that Barboza had lied at the trial, and he had, in fact, left with members of his gang that night to murder Deegan. A report made the night of the murder stated:

I received information from Capt. Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation had left with the

118. See *id.* at Appendix A, at 3; Summary of Motions for New Trial: Appendix 38 of the Record of the 1995 Appeal; Aff. of James Southwood at 1 (June 6, 1971), *Commonwealth v. Grieco et al.*, Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978).

119. Aff. of Wilfred Roy French (April 27, 1983). See Appendix 40 of the Record of the 1995 Appeal.

120. See Appendix 39 of the Record of the 1995 Appeal, see also Aff. of William R. Geraway at 2-4 (March 1, 1971). Curiously, Geraway's conviction of first degree murder was reversed by the SJC, even though the conviction had been affirmed by the same court in 1969. The appeal from the denial of a motion for new trial was not certified according to MASS. GEN. LAWS ANN. ch. 278, § 33E by a single justice. See *Commonwealth v. Geraway*, 301 N.E.2d 814 (1973).

121. See French, *supra* note 19.

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124. *Salvati*,

125. *Id.*

126. *Id.* at 8.

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of William R. Geraway at 2-4 er was reversed by the SJC, The appeal from the denial of n. c. 3, § 33E by a single

following men; Joseph Barboza, Ronald Cassesso, Vincent Flemmi, Francis Imbruglia, Romeo Martin, Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a 'Strongarm.' They are said to have returned at about 11:P.M. and Martin was alleged to have said to French, '[w]e nailed him.'<sup>122</sup>

The reports also showed that it was Cassesso, not Greco, who had entered the alley to commit the murder.<sup>123</sup>

Suffolk Superior Court Judge Robert Banks declined to order an evidentiary hearing and ruled that because the defense asked Barboza about each man mentioned in the report, it had the information contained in the report. The report did not aid Limone because Limone was not alleged to have been at the Ebb Tide. It did not address Limone's argument that Barboza lied about with whom he left the Ebb Tide; therefore, if his testimony was false in one aspect, it was false in every aspect (*falsus in uno, falsus in omnibus*). The court made no mention of a separate report showing that Barboza lied about Greco's entering the alley.

Further, the court, without the benefit of an evidentiary hearing, characterized the police "informant" as "tipster or citizen witness" who observed "otherwise normal legal activity."<sup>124</sup> Ignoring the fact that these were known gangland associates, who had been under surveillance, and who had been implicated by Martin's statement "[w]e nailed him," the court ruled that statement "vague."<sup>125</sup> In addition, the judge found that the informant had merely observed "innocuous and legal activity-namely the comings and goings of patrons in a nightclub."<sup>126</sup>

It was then necessary to seek leave to appeal from a Single Justice of the SJC. Salvati proceeded on his own. Justice Wilkins certified Salvati's appeal to proceed to the full court, but he minimized the information contained in the reports. Although the prosecutor in his summation told the jury that the defendants did not prove that Deegan had pulled a gun on Barboza at the Ebb Tide, a charge which Barboza had specifically denied, one of the reports showed that it had, in fact, happened. In his decision, Wilkins called the failure to disclose the report in this regard "not prejudicial" and was "already reflected at trial" where it was

122. *Commonwealth v. Salvati*, Nos. 32368-70, slip op. at 6 (Superior Court Jan. 11, 1994) (order denying defendant's motion for a new trial).

123. A separate report shows that Salvati was identified from photos by an unidentified waitress at the Ebb Tide, who refused to testify. She claimed that he left and returned with the murderers. Salvati stated that he did not know where he was the night of Deegan's murder.

124. *Salvati*, Nos. 32368-70, slip op. at 8-9.

125. *Id.*

126. *Id.* at 8,18.

testified that "Deegan had caused trouble at the Ebb Tide Restaurant."<sup>127</sup> He also referred to the "informant" as a "tipster."<sup>128</sup>

Limone's and Greco's cases were heard solely by single Justice John Greaney. On June 22, 1994, a Memorandum and Order was issued which devastated the prosecution's position and focused on the issue before the court. For the first time in twenty-five years, a justice of the SJC appeared to recognize that the wrong people were unjustly convicted and sentenced in this case. Justice Greaney wrote:

The information in the Evans report identifies an entirely different set of killers. If disclosed and properly developed, the information could have had considerable relevance to the credibility of Baron's<sup>129</sup> testimony which was at the core of the Commonwealth's case, and it would have supported the *defendants' alibi and other defenses*. Quite simply, the jury might have concluded that a reasonable doubt existed as to Baron's identification of the killers and their activities, which doubt necessarily would have included Limone and Grieco.<sup>130</sup>

Justice Greaney's decision meant that any discussion of the statements impeaching the credibility of Barboza in the police report which could give rise to the jury's concluding "reasonable doubt" would necessitate a discussion on reasonable doubt and the charge to the jury.

After the briefs were filed, and before the case was argued, Greco asked the court to take judicial notice of two federal circuit courts of appeals decisions regarding the use of the term moral certainty, decided subsequent to the filing of the briefs.<sup>131</sup> The court was also reminded of the "tension" between the *Tameleo* and *Limone* decisions, discussed *supra*. In addition, the SJC, on January 19, 1995, released its decision on the *Pinckney* case,<sup>132</sup> relative to the use of the term moral certainty in the explanation to the jury of proof beyond a reasonable doubt. The SJC's own stated duty in reviewing first degree murder cases would require it to reverse this case on the jury charge alone.<sup>133</sup>

On February 7, 1995, the case was argued before Chief Justice Liacos, Associate Justices Abrams, Lynch and Greaney. At oral argument, referring to the

127. *Salvati v. Commonwealth*, No. 94-131, slip op. at 15 (Mass. May 4, 1994) (order granting leave to appeal *solely* with respect to the alleged failure of the Commonwealth to disclose the existence of the Evans report before trial) (emphasis added).

128. *Id.*

129. *Joseph Barboza, a/k/a Joseph Baron, a/k/a Joseph Bentley, a/k/a Joseph Donati*.

130. *Limone et al. v. Commonwealth*, Nos. 94-223-24, slip op. at 3 (Mass. June 22, 1994) (order granting limited application for leave to appeal and consolidating appeals of Limone, Grieco, and Salvati).

131. See *Adams v. Aiken*, 41 F.3d 175 (4th Cir. 1994), *cert denied Adams v. Moore*, 515 U.S. 1124 (1995); see also *Nutter v. White*, 39 F.3d 1154 (11th Cir. 1994), *appeal after remand* 109 F.3d 771 (11th Cir. 1997) a copy of which was sent to the court; see M.R.A.P. 16 (f).

132. See *Pinckney*, *supra* note 6.

133. See *Ciampa*, *supra* note 16.

*Pinckney* decision. Counsel for Limone and Greco argued that the *Pinckney* decision, which held that the justices written by Justice Greaney in 1968, and the defendants' counsel.

The justices written by Justice Greaney in 1968, and the defendants' counsel.

The court ignored the fact that the defendant had entered the courtroom, supporting the defendant's statement.

The court's decision was consistent with the fact that either Limone or Greco's principal was not at the scene. Moreover, Barboza was an automobile.

The court's decision regarding the information was evidence that it was punishment.<sup>134</sup>

Moreover, the status of the witness that it agreed with the witness' rather.

134. See *Comr*.

135. See *id.* at

136. See *Tameleo*.

137. See *Salvati*.

admitted murderer.

138. See *id.* at

139. See *id.*

*Pinckney* decision, counsel for Greco reminded the court of its own stated duty. Counsel for Limone specifically directed the court's attention to the Bailey affidavit, which had been appended to Limone's brief.

The justices decided the case June 12, 1995.<sup>134</sup> In an unanimous opinion written by Justice Lynch, the court upheld the convictions. Rather than apply current standards of law, the court stated, "[t]he defendants' trial took place in 1968, and therefore, we look to the law that existed at that time to assess the defendants' claims."<sup>135</sup>

The court ignored Justice Greaney's earlier ruling that the report[s] identify "an entirely different set of killers . . . which would have supported defendants' alibi and other defenses."<sup>136</sup> With regard to Salvati, the justices omitted Barboza's trial testimony that he left the Ebb Tide with Salvati to commit the murder. The court disregarded Limone's argument that if Barboza was shown to have been lying regarding the participants in the murder, his testimony implicating Limone in the conspiracy could not be believed. As for Greco, the court ignored the separate Cass report, which showed it was Cassesso, not Greco who had entered the alley to murder Deegan, despite having the entire record before it, supporting Greco's claims of innocence, and corroborating Barboza's numerous statements to various people that he had lied at the trial.

The court said that the information contained in the reports was not inconsistent with the accomplice's testimony, "[t]here was no evidence introduced that either Limone or Grieco were ever at the Ebb Tide on the night of the murder." Limone's primary criminal act was soliciting "the hit" on Deegan and Grieco was not at the Ebb Tide with Baron, rather in an alley waiting for Deegan. Moreover, Baron testified that when he left the Ebb Tide, Salvati was tending to an automobile in the Ebb Tide parking lot.<sup>137</sup>

The court also concluded that because Barboza was questioned by defense counsel regarding other men named in the report to impeach his credibility, the information was "available to trial counsel . . . and was merely cumulative evidence that did not materially aid the defendants on the issue of guilt or punishment."<sup>138</sup>

Moreover, the SJC sustained the judge's demotion of the police informer to the status of "tipster or citizen witness" without an evidentiary hearing stating that it agreed with the "characterization of the informant as a 'tipster or citizen witness' rather than a confidential informant."<sup>139</sup> Therefore, the court said,

134. See *Commonwealth v. Salvati*, 650 N.E. 2d 782 (1995).

135. See *id.* at 784.

136. See Tameleo, *supra* note 78.

137. See *Salvati*, 650 N.E. 2d at 785. The court does not take into account that Barboza was an admitted murderer and perjurer and was lying.

138. See *id.* at 786.

139. See *id.*

"nondisclosure of the tipster's identity or the contents of the tipster's statements did not constitute reversible error."<sup>140</sup>

The information contained in the police reports corroborated both Barboza's admission that he lied at trial and some defendants' claims of innocence. The judiciary's characterization of a police informant as a "tipster or citizen witness, rather than a confidential informant" without an evidentiary hearing is, at best, an unprincipled and disgraceful changing of the record in order to minimize the importance of the information in the possession of prosecuting authorities. In order to have made this finding, the court had to have found that the "informant did not participate in the crime charged."<sup>141</sup> There was nothing in the record by which the court could have made this determination.

However, upon reflection, such a characterization, if it were true, would have an even more compelling result. These were ruthless, notorious gangsters who generated fear in the law-abiding community. In addition to Barboza, Romeo Martin, Chico Amico and Nicky Femia died violent deaths.<sup>142</sup> Vincent Flemmi died in prison, in 1979. For a "citizen witness" to have come forward and incriminate these individuals in a gangland murder would have been a heroic act. Such testimony would have been unbiased and, therefore unimpeachable, unlike the testimony of an informant whose participation in criminal activity makes his testimony suspect and vulnerable to cross-examination.

Based upon the foregoing analysis of the SJC's reasoning as applied to the *Deegan* defendants, who were as unpopular as Sacco and Vanzetti, it is easy to conclude that if today, the Supreme Judicial Court of Massachusetts had to decide whether Sacco and Vanzetti should live or die, it would have demonstrated intellectual dishonesty in order to engage in result-oriented decision-making, ignoring the record, the spirit of the law, and the fundamental concept of logic as understood in Western Civilization, just as it did more than seventy years ago. Indeed, although the Sacco-Vanzetti Memorial Day Proclamation stated "[t]he people of Massachusetts today take pride in the strength and vitality of their governmental institutions, particularly in the high quality of their legal system,"<sup>143</sup> a more accurate assessment was made by renowned attorney F. Lee Bailey, regarding the *Deegan* case, in 1991:

It's the most shameful case in the commonwealth. It's a disgrace. The commonwealth should hang its head in shame.<sup>144</sup>

140. *See id.*

141. *Commonwealth v. Brzezinski*, 540 N.E.2d 1325 (1989), cited by the SJC in explaining the difference between an "informant" and "tipster."

142. Martin was murdered in 1965, Amico, in 1966. Femia was gunned down attempting a holdup in 1983.

143. *See SINCLAIR, supra note 2.*

144. Cullen, K., *To Die a Free Man*, BOSTON GLOBE, May 28, 1991, 13 at 14.