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## Commonwealth v. Woodward, a Failure of Justice Averted

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## COMMONWEALTH v. WOODWARD, A FAILURE OF JUSTICE AVERTED

*“The search is not for justice, but rather for that rare collection of circumstances, the grave failure of justice.”<sup>1</sup>*

### I. INTRODUCTION

In *Commonwealth v. Woodward*,<sup>2</sup> the Supreme Judicial Court (“SJC”) of Massachusetts held that the trial judge acted within his discretion under Rule 25(b)(2) of the Massachusetts Rule of Criminal Procedure (MRCP) in reducing the defendant’s verdict from second degree murder to involuntary manslaughter.<sup>3</sup> Rule 25(b)(2) allows a trial judge to modify a jury’s verdict of guilty in a criminal case.<sup>4</sup> The SJC defended the trial judge’s discretion in determining that the evidence as a whole “comported more closely” with involuntary manslaughter than with second degree murder.<sup>5</sup>

This comment examines a trial court judge’s discretion to invoke Rule 25(b)(2), and how the trial judge in *Woodward* used this discretion. Part II of the comment traces the history of Rule 25(b)(2) and the history of the *Woodward* case.<sup>6</sup> Part III provides a detailed analysis of Rule 25(b)(2) and how the trial judge applied it in the

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<sup>1</sup> *Commonwealth v. Woodward*, No. 97-0433, 1997 WL 694119, at \*7 (Mass. Super. Nov. 10, 1997).

<sup>2</sup> 427 Mass. 659, 694 N.E.2d 1277 (1998).

<sup>3</sup> *Woodward*, 427 Mass. 659, 694 N.E.2d 1277 (1998).

<sup>4</sup> MASS. R. CRIM. P. 25(b)(2) reads in part:

[I]f a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

*Id.*

<sup>5</sup> See *Woodward*, 427 Mass. at 671, 694 N.E.2d at 1287 (quoting *Commonwealth v. Keough* 385 Mass. 314, 320, 431 N.E.2d 915, 919 (1982)); *Commonwealth v. McCarthy*, 375 Mass. 409, 416, 378 N.E.2d 429, 433 (1978) (holding trial judge not required to base decision on particular legal error at trial).

<sup>6</sup> See *infra* notes 9-34.

Woodward decision.<sup>7</sup> Finally, Part IV concludes by analyzing the impact the Woodward decision and Rule 25(b)(2) will have on the future of criminal defense.<sup>8</sup>

## II. HISTORY

### A. *Rule 25(b)(2)*

The post-conviction powers granted by the legislature to the courts under Rule 25(b)(2) reflect the evolution of legislative policy promoting judicial responsibility to ensure the result in every criminal case comports with justice.<sup>9</sup> In effect, Rule 25(b)(2) constitutes a form of post-conviction remedy, adding to the remedy provided for in Rule 30.<sup>10</sup> Under Rule 25(b)(2), the trial judge has the power to

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<sup>7</sup> See *infra* notes 34-60.

<sup>8</sup> See *infra* note 61.

<sup>9</sup> See *Commonwealth v. Gauden*, 383 Mass. 543, 553-554 n.7, 420 N.E.2d 905, 911 (1981) (stating greater judicial economy where evidence will not support charge); see generally *Commonwealth v. Brown*, 376 Mass. 156, 167-68, 380 N.E.2d 113, 120 (1978) (finding court empowered when the needs of justice warrant action); *Commonwealth v. Baker*, 346 Mass. 107, 109, 190 N.E.2d 555, 557(1963)(declaring court must consider case broadly to determine whether miscarriage of justice occurred). Prior to 1939, only a trial judge could order a new trial, but had no power to reduce a jury verdict. MASS. GEN. LAWS ch. 278, § 33E. In 1939, the legislature granted to the SJC the power to consider the facts of a capital case, as well as the law, authorizing the SJC to order a new trial if justice so required. MASS. GEN. LAWS ch. 341 (1939). In 1962, the legislature further authorized the SJC to consider a defendant's degree of guilt in capital cases allowing the SJC to order a reduction in the verdict in appropriate capital cases, in lieu of a new trial. MASS. GEN. LAWS ch. 343 (1962). In 1979, the Legislature granted trial judges the power to enter a finding of guilty of any lesser included offense in all criminal cases. MASS. GEN. LAWS ch. 278, § 11, as appearing in St. 1979, c. 344, § 13A; see also *Commonwealth v. Woodward*, 427 Mass 659, 666, 694 N.E.2d 1277, 1284 n.11 (1998).

<sup>10</sup> See MASS. R. CRIM. P. 30 (allowing trial judge to grant new trial if justice not served); MASS. GEN. LAWS ch. 278, § 11 (West 1996) provides:

If a motion for a directed verdict of not guilty is denied and the case is submitted to the jury and a verdict of guilty is returned, the judge may on a renewed motion for a directed verdict of not guilty pursuant to the

ameliorate injustice caused by the Commonwealth, defense counsel, the jury, the judge's own error, or the interaction of any of these circumstances.<sup>11</sup> Although a failure of justice occurs when the result of a trial is so palpably wrong as to shock the moral sense, the judge's responsibility to identify and correct a failure of justice is not clearly defined.<sup>12</sup>

Under the rule, a trial court may find the defendant guilty of a lesser offense even when the evidence warrants conviction of the greater offense.<sup>13</sup> In most cases, however, the trial judge's primary conclusion that the evidence does not support the verdict is accompanied by the secondary conclusion that the court's interpretation of the evidence supports a guilty verdict of some lesser included offense.<sup>14</sup> The trial judge must review the jury's verdict and weigh the evidence to determine whether the jury carefully considered the evidence or

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Massachusetts Rules of Criminal Procedure set aside the verdict and order a new trial, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

*Id.*

<sup>11</sup> See *Commonwealth v. Millyan*, 399 Mass. 171, 188-189, 503 N.E.2d 934, 944 (1987) (declaring judge's failure to instruct on intoxication appropriate justification for reduction in verdict).

<sup>12</sup> BLACK'S LAW DICTIONARY 595 (6th ed. 1990). Failure of Justice is defined as:

The defeat of a particular right, or the failure of reparation for a particular wrong, from the lack or inadequacy of a legal remedy for the enforcement of the one or the redress of the other. The term is also colloquially applied to the miscarriage of justice which occurs when the result of a trial is so palpably wrong as to shock the moral sense.

*Id.*

<sup>13</sup> See *Commonwealth v. Carter*, 423 Mass. 506, 512, 669 N.E.2d 203, 207 (1996) (allowing judge to "mold" verdict in light of experience with other verdicts); *Commonwealth v. Ghee*, 414 Mass. 313, 321, 607 N.E.2d 1005, 1011 (1993) (holding reduction not based on evidentiary issue but because more consonant with justice); *Commonwealth v. Keough*, 385 Mass. 314, 319-21, 431 N.E.2d 915, 918 (1982) (holding murder conviction warranted, but manslaughter more consonant with justice).

<sup>14</sup> See *Commonwealth v. Williams*, 364 Mass. 145, 151, 301 N.E.2d 683, 688 (1973) (declaring court has discretion in examining facts).

whether its verdict resulted from bias, misapprehension, or prejudice.<sup>15</sup> General common law restraints prohibit judges from invoking the rule arbitrarily for unarticulated reasons.<sup>16</sup>

The trial court's power to change a verdict does not undermine the role of the jury.<sup>17</sup> The judge may, however, consider testimony that the jury chose not to believe.<sup>18</sup> His decision is guided primarily by the broad interpretation of whether failing to reduce the verdict raises a substantial risk of a miscarriage of justice.<sup>19</sup> It is not enough

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<sup>15</sup> See *Commonwealth v. Gricus*, 317 Mass. 403, 406, 58 N.E.2d 241, 243-44 (1944) (describing the nature of the SJC's power of review of trial facts under Rule 33E).

<sup>16</sup> See *Commonwealth v. Cobb*, 399 Mass. 191, 192, 503 N.E.2d 945, 946 (1987) (stating trial judge may not make arbitrary or unreasonable conclusions); *Commonwealth v. Dalton*, 385 Mass. 190, 197, 431 N.E.2d 203, 209 (1982) (declaring judge must, above all, use power sparingly). *Cf.*, *Commonwealth v. Williams*, 364 Mass. 145, 151, 301 N.E.2d 683, 688 (1973) (stating regard for public interest compels court to use rule with restraint.); *Commonwealth v. Gaulden*, 383 Mass. 543, 556, 420 N.E.2d 905, 913 n.9 (1981) (declaring court should state reasons for reduction).

<sup>17</sup> See *Commonwealth v. Carter*, 423 Mass. 506, 512, 669 N.E.2d 203, 207 (1996) (stating judge does not act as thirteenth juror); *Commonwealth v. Little*, 35 Mass. App. Ct. 949, 949, 626 N.E.2d 21, 21 (1994)(quoting *Commonwealth v. Earltop*, 372 Mass. 199, 204, 361 N.E.2d 220, 223 (1977) (proclaiming judge does not sit as "second jury")); *Commonwealth v. Millyan*, 399 Mass. 171, 188, 503 N.E.2d 934, 944 (1987) (declaring judge should not second guess jury).

<sup>18</sup> See *Commonwealth v. Keough*, 385 Mass. 314, 320, 431 N.E.2d 915, 919 (1982) (indicating judge may consider credibility of defendant's testimony).

<sup>19</sup> See *Commonwealth v. Ghee*, 414 Mass. 313, 321, 607 N.E.2d 1005, 1011 (1993) (considering whether reduced verdict would be more consonant with justice); *Commonwealth v. Ravida*, 371 Mass. 243, 249, 356 N.E.2d 254, 257 (1976) (emphasizing judge must weigh fundamental fairness of result); *Commonwealth v. Mahnke*, 368 Mass. 662, 702, 335 N.E.2d 660, 684 (1975) (holding court considers law and evidence of entire case "broadly" to determine whether miscarriage of justice); *Commonwealth v. Baker*, 346 Mass. 107, 119, 190 N.E.2d 555, 562 (1963) (determining whether justice "will be more nearly achieved" by reduction). See also *Commonwealth v. Shelley*, 381 Mass. 340,

that the judge have a reasonable doubt as to whether the defendant is guilty.<sup>20</sup> The court must address the issue of whether the jury actually decided the case on the evidence.<sup>21</sup>

Rule 25(b)(2) is designed to increase the options available to the trial judge after the verdict and provide greater judicial economy.<sup>22</sup> It is a means of rectifying a miscarriage of justice before it reaches the appellate level.<sup>23</sup> A reviewing court may not, in a noncapital case, conduct an independent analysis of the evidence when the trial judge invokes Rule 25(b)(2).<sup>24</sup> The standard of review for Rule 25(b)(2) is whether the trial judge abused his discretion or committed an error of law.<sup>25</sup>

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349-350, 409 N.E.2d 732, 738 (1980) (questioning whether evidence raised a “substantial risk of miscarriage of justice”).

<sup>20</sup> See *Commonwealth v. Gricus*, 317 Mass. 403, 407, 58 N.E.2d 241, 244 (1944) (declaring suspicion of reasonable doubt insufficient in considering use of rule).

<sup>21</sup> *Id.*

<sup>22</sup> *Cf. Commonwealth v. Jones*, 366 Mass. 805, 807, 323 N.E.2d 726, 728 (1975) (discussing options of SJC under Rule 33E).

<sup>23</sup> See *Commonwealth v. Ghee*, 414 Mass. at 321, 607 N.E.2d at 1011 (stating judicial test whether lesser verdict more comports with justice); *Commonwealth v. Gaulden*, 383 Mass. at 556, 420 N.E.2d at 913 (holding rule is “means of rectifying disproportionate verdicts”); *Commonwealth v. Cole*, 380 Mass. 30, 38, 402 N.E.2d 55, 61 (1980) (indicating rule acts as “safety valve”).

<sup>24</sup> See *Gaulden*, 383 Mass. at 557 n.10, 420 N.E.2d at 913 (stating court would engage in independent analysis for appeal under section 33E). The reviewing court would, however, undertake an independent analysis under MASS. GEN. LAW. ch. 278, § 33E, if a judge denied a defendant’s motion for a reduction in verdict from murder in the first degree. *Commonwealth v. Woodward*, 427 Mass. 659, 669 n.13, 694 N.E.2d 1277, 1286 (1998) (quoting *Gaulden*, 383 Mass. at 557 n.10, 420 N.E.2d at 913.)

<sup>25</sup> See *Commonwealth v. Millyan*, 399 Mass. at 188, 503 N.E.2d at 943 (quoting *Gaulden*, 383 Mass. at 557, 420 N.E.2d at 913).

### B. The Woodward Case

On February 9, 1997, Matthew Eappen ("Eappen") died after being rushed to Children's Hospital in Boston, Massachusetts with a severe head injury.<sup>26</sup> Subsequently, a grand jury indicted Louise Woodward ("Woodward"), a British woman who had been the au pair for the Eappen family, for Eappen's murder.<sup>27</sup> Woodward had been the only person to care for the victim from the time the family left in the morning until he was taken to the hospital.<sup>28</sup>

After a three week trial, Justice Hillar B. Zobel, Associate Justice of the Superior Court of Massachusetts, instructed the jury on first and second degree murder only.<sup>29</sup> The judge allowed the defense's motion to omit manslaughter from the instruction.<sup>30</sup> On October 30, 1997, the jury returned a guilty verdict, convicting Woodward of murder in the second degree.<sup>31</sup> The following day the judge imposed the statutorily mandated term of life in prison.<sup>32</sup>

On November, 10, 1997, invoking his power pursuant to Rule 25(b)(2), the judge reduced the jury's verdict from murder to involuntary manslaughter, and vacated Woodward's life sentence.<sup>33</sup> Hours after the judge released Woodward, both sides promptly filed cross

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<sup>26</sup> Woodward, 427 Mass. at 660, 694 N.E.2d at 1281.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The Commonwealth objected to this request. *Id.* On October 27, 1997, before the case was sent to the jury, the Commonwealth appealed the judge's refusal to give a manslaughter instruction, under G.L. c. 211, § 3, before a single justice of the SJC. *Id.* The SJC denied the Commonwealth's requested relief without a hearing. *Id.*

<sup>31</sup> Commonwealth v. Woodward, 427 Mass. 659, 660-61, 694 N.E.2d 1277, 1281 (1998).

<sup>32</sup> *Id.* at 660, 694 N.E.2d at 1281.

<sup>33</sup> *Id.* The judge denied the defense's request for a required finding of not guilty or for a new trial. *Id.*

appeals.<sup>34</sup> The Commonwealth again sought relief before a single justice, and that justice reserved and reported the case without decision to the full court.<sup>35</sup>

### III. ANALYSIS

The Commonwealth argued that the trial court inappropriately reduced the jury's verdict from second degree murder to manslaughter, and the judge incorrectly failed to give the manslaughter instruction.<sup>36</sup> The Commonwealth argued that these errors impaired the integrity of the justice system.<sup>37</sup> The Commonwealth also urged the

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<sup>34</sup> *Id.* The judge imposed a sentence of 279 days for Woodward's manslaughter conviction. *Id.* The judge deemed the sentence served by Woodward while incarcerated awaiting trial and while awaiting action on her postconviction motion. *Id.*

<sup>35</sup> *Id.* The Commonwealth, pursuant to MASS. GEN. LAWS ch. 211, § 3, sought a stay, pending appeal of the judge's order reducing the verdict to manslaughter and of Woodward's time-served sentence, and an order reinstating the jury verdict of murder in the second degree. *Id.* Alternatively, the Commonwealth sought to vacate the post trial order and sentence, and a new ruling on Woodward's motion to reduce the jury verdict, or an order remanding the defense's motion to reduce the jury verdict to the superior court for a hearing and determination by another judge. *Id.* The defense also appealed the judge's refusal to dismiss the indictment and the judge's denial of the defense's motion for a required finding of not guilty. *Id.*

<sup>36</sup> *Commonwealth v. Woodward*, 427 Mass. 659, 662, 694 N.E.2d 1277, 1282 (1998). The SJC pointed out that the Commonwealth was prohibited from challenging the judge's jury instruction. The court reasoned that prior to the conviction the Commonwealth appealed to a single justice for interlocutory relief from the judge's decision not to give a manslaughter instruction. *Id.* The Commonwealth failed to appeal from the single justice's order denying relief. *See* SJC Rule 2:21, 421 Mass. 1303 (1995)(explaining procedure for appealing single justice's ruling to the full court). The SJC, therefore, addressed the Commonwealth's claimed error in the jury instructions only on the grounds that the judge abused his discretion in refusing an instruction on manslaughter, and reducing Woodward's conviction to manslaughter. *Woodward*, 427 Mass. at 662, n.3.

<sup>37</sup> *Woodward*, 427 Mass. at 662.

SJC to use their extraordinary power of superintendence over the lower courts to vacate the judge's post-verdict order and restore the jury's verdict.<sup>38</sup>

### *A. Jury Instructions*

The SJC held that the trial court erred in acceding to the defense's request to omit a jury instruction on manslaughter.<sup>39</sup> If the evidence supports the claim, the trial court must instruct the jury on the possibility of conviction of the lesser crime.<sup>40</sup> The court took no-

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 662. The Commonwealth sought instructions on first degree murder on the theory of extreme atrocity or cruelty. *Id.* In Massachusetts, section one of chapter 265 states:

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life [felony-murder], is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree.

MASS. GEN. LAW. c. 265, § 1.

<sup>40</sup> *Commonwealth v. Gould*, 413 Mass. 707, 715, 603 N.E.2d 201, 205. (1992). *See Commonwealth v. Hobbs*, 385 Mass 863, 871, 434 N.E.2d 633, 640 (1982) (stating instruction necessary when rational basis exists for lesser offense); *Commonwealth v. Richmond*, 379 Mass. 557, 562, 399 N.E.2d 1069, 1073 (1980) (holding instruction not necessary if not requested unless possibility of miscarriage of justice); *Commonwealth v. Campbell*, 352 Mass. 387, 392, 226 N.E.2d 211, 215 (1967) (declaring reversible error where evidence warrants lesser offense and no instruction given). The dissent in *Woodward* claimed this case was unique because of Woodward's decision to "knowingly and voluntarily agree to the choices that would be given to the jury." *Woodward*, 427 Mass. at 691 (Greaney, J., dissenting). Generally, a defendant may choose to omit a lesser included offense in the jury's instruction, without creating a structural flaw in the trial. *See Commonwealth v. Roberts*, 407 Mass. 731, 737, 555 N.E.2d 588, 592 (1990) (stating instruction not necessary when parties do not request); *Commonwealth v. Pagan*, 35 Mass. App. Ct. 788, 791-92, 625 N.E.2d 579, 581 (1994) (commenting judge must give instruction in certain circumstances). The defense strategy, however, is "irrelevant" to whether the judge should charge on a lesser included offense. *Commonwealth v. Jackson*, 419 Mass. 716, 725 n.8, 647 N.E.2d 401, 407 (1995). The court also addressed Judge Zobel's reliance on

tice of the uniqueness of this appeal in that the prosecution sought the lesser included offense, and the defense opposed it.<sup>41</sup> Overwhelming support exists, however, to allow the prosecution an absolute right to a lesser included offense instruction, regardless of the defense's objection.<sup>42</sup> The case also is unique in that the judge apparently thought

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Commonwealth v. Pagan. *Woodward*, 427 Mass. at 663, n.7, 694 N.E.2d at 1282. In *Pagan*, the court held that when the defense decides not to seek a manslaughter instruction, the judge "has no duty to undercut such a strategy by giving an instruction which the defendant on appeal would surely argue tempted the jury to a compromise verdict adverse to the defendant." Commonwealth v. Pagan, 35 Mass. App. Ct. 788, 625 N.E.2d 579 (1994). Furthermore, the Commonwealth did not request a manslaughter instruction in *Pagan*. *Id.* The SJC "disavowed dictum that may suggest that the judge must honor, in the face of the Commonwealth's objection, the defendant's choice not to have a manslaughter instruction." *Woodward*, 427 Mass. at 663, n.7.

<sup>41</sup> *Woodward*, 427 Mass. at 664.

<sup>42</sup> See *Schmuck v. United States*, 489 U.S. 705, 717 n.9 (1989) (citing *Beck v. Alabama*, 447 U.S. 625, 633 (1980)). In *Beck v. Alabama*, the Supreme Court looked to FED. R. CRIM. P. 31(c) which "suggests that a lesser included offense instruction is available in equal measure to the defense and to the prosecution," and notes that the rule "developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." 447 U.S. 625, 633 (1980); see also *State v. Cruz*, 189 Ariz. 29, 33, 938 P.2d 78, 80 (1996) (concluding court should give instruction even over defendant's objection); *State v. Jones*, 321 Ark. 451, 455, 903 S.W.2d 170, 172 (1995) (holding error occurs when no instruction given and evidence warrants instruction); *People v. Bradford*, 15 Cal. 4th 1229, 1345, 65 Cal. Rptr.2d 145, 939 P.2d 259, 267 (1997), *cert. denied*, 118 S.Ct. 1796 (1998) (declaring jury should not be confronted with "all or nothing" choice); *People v. Garcia*, 940 P.2d 357, 361 (Colo. 1997) (holding defendant entitled to instruction on lesser offense as theory of case construction); *State v. Gibson*, 682 So. 2d 545, 547 (Fla. 1996) (overturning decision where lesser included offense omitted from instruction); *State v. Kupau*, 76 Hawaii 387, 394, 879 P.2d 492 (1994) (holding instruction must be given when prosecution requests); *State v. Curtis*, 130 Idaho 522, 944 P.2d 119, 120 (1997) (enforcing statute requiring instruction on lesser included offense); *People v. Ivory*, 217 Ill. App. 3d 619, 623-625, 161 Ill. Dec. 151 (1991) (upholding decision where trial court gave lesser included offense instruction over prosecution's objection); *State v. Wallace*, 475 N.W.2d 197, 199

the evidence was not consonant with a conviction of murder, but refused to give that instruction to the jury.<sup>43</sup>

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(Iowa 1991) (requiring court instruct jury on all lesser-included offenses); *State v. Baacke*, 261 Kan. 422, 434, 932 P.2d 396 (1997) (asserting trial court has a statutory duty to instruct jury on lesser included offenses); *Hagans v. State*, 316 Md. 429, 453-454, 559 A.2d 792 (1989) (concluding court should not give lesser included offense instruction unless requested by either side); *People v. Torres*, 222 Mich. App. 411, 416-17, 564 N.W.2d 149 (1997) (citing error when evidence supports lesser offense and instruction not given); *Pleasant v. State*, 701 So. 2d 799, 800, 804 (Miss. 1997) (requiring if possibility jury could find not guilty of greater offense and guilty of lesser offense); *State v. Maynard*, 954 S.W.2d 624, 629-31 (Mo. App.1997) (affirming obligation of trial court to instruct on lesser included offense when evidence supports); *State v. Swan*, 279 Mont. 483, 488, 928 P.2d 933 (1996) (holding court must give instruction when properly requested by one party); *State v. Pribil*, 224 Neb. 28, 35-36, 395 N.W.2d 543 (1986) (asserting neither defense or prosecution has option of precluding court from instructing jury); *State v. Brent*, 137 N.J. 107, 116-17, 644 A.2d 583 (1994) (reaffirming court must give lesser included instruction when charge is consistent with evidence); *State v. Meadors*, 121 N.M. 38, 47, 908 P.2d 731 (1995) (overruling case where lesser included offense instruction warranted); *State v. Sheldon*, 301 N.W.2d 604, 608 (N.D. 1980), *cert. denied*, 101 S. Ct. 1711 (1981) (dismissing contention that court erred by instructing on all lesser included offenses); *State v. Schmidt*, 100 Ohio App. 3d 167, 171, 652 N.E.2d 254 (1995) (denying right of one party to refuse instruction on lesser included offense); *State v. Cunningham*, 320 Or. 47, 58, 880 P.2d 431 (1994), *cert. denied* 115 S.Ct. 1317 (1995) (holding when evidentiary basis for jury to convict on lesser included offense, court should instruct) *Arevalo v. State*, 943 S.W.2d 887, 890 (Tex. Crim. 1997) (clarifying instruction on lesser included offense must be given regardless of which party requests); *State v. Wallace*, 175 W. Va. 663, 667, 337 S.E.2d 321 (1985) (observing it is reversible error for not giving instruction when evidence warrants); *State v. Fleming*, 181 Wis. 2d 546, 554-55, 510 N.W.2d 837 (1993) (declaring court obligated to give instruction on lesser included offense at state's request); *State v. Keffer*, 860 P.2d 1118, 1134 (Wyo. 1993) (requiring lesser included offense instruction when evidence exists that defendant guilty on only lesser offense).

<sup>43</sup> *Woodward*, 427 Mass. at 665.

*B. Rule 25(b)(2) Reduction in Verdict*

Because of its broad power, the trial judge must use Rule 25(b)(2) sparingly.<sup>44</sup> In fact, since 1979 the appellate courts of Massachusetts reviewed only ten verdict reductions.<sup>45</sup> Of those ten, the appellate courts reviewed and affirmed four decisions lowering verdicts from murder in the second degree to manslaughter.<sup>46</sup> In re-

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<sup>44</sup> Commonwealth v. Keough, 385 Mass. at 321, 431 N.E.2d at 915.

<sup>45</sup> See Commonwealth v. Ghee, 414 Mass. 313, 607 N.E.2d 1005 (1993) (reaffirming judge could reduce murder verdict even if evidence supported deliberate premeditation); Commonwealth v. Sabetti, 411 Mass. 770, 585 N.E.2d 1385 (1992), *cert. denied*, 513 U.S. 916 (1994) (concluding trial judge erred in reducing verdict); Commonwealth v. Cobb, 399 Mass. 191, 503 N.E.2d 945 (1987) (deferring to trial judge's reasonable decision to reduce verdict); Commonwealth v. Millyan, 399 Mass. 171, 503 N.E.2d 934 (1987) (holding no abuse of discretion when verdict lowered because of intoxication of defendant); Commonwealth v. Aguiar, 400 Mass. 508, 510 N.E.2d 273 (1987) (holding motion for reduction in verdict timely even though nine months after verdict returned); Commonwealth v. Keough, 385 Mass. 314, 431 N.E.2d 915 (1982) (declaring judge did not abuse discretion in lowering verdict to manslaughter when evidence warranted murder); Commonwealth v. Gaulden, 383 Mass. 543, 420 N.E.2d 905 (1981) (stating SJC should not engage in independent analysis and defer to trial judge's finding); Commonwealth v. Burr, 33 Mass. App. Ct. 637, 604 N.E.2d 36 (1992) (overturning judge's decision to lower verdict when not proper basis); Commonwealth v. Greaves, 27 Mass. App. Ct. 590, 541 N.E.2d 349 (1989) (stating judge could lower verdict based on facts presented at trial); Commonwealth v. Zitano, 23 Mass. App. Ct. 403, 502 N.E.2d 952 (1987) (holding judge justified in lowering verdict to manslaughter based on facts of victim's wound).

<sup>46</sup> Commonwealth v. Woodward, 427 Mass. 659, 667 n.12, 694 N.E.2d 1277, 1285 (1998); See Commonwealth v. Keough, 385 Mass. 314, 431 N.E.2d 915 (1982) (affirming judge's decision to vacate verdict even though evidence warranted jury's verdict); Commonwealth v. Gaulden 383 Mass. 314, 431 N.E.2d 905 (1981) (acknowledging judge's discretion to enter verdict of manslaughter even if evidence supported murder conviction); Commonwealth v. Greaves, 27 Mass. App. Ct. 590, 541 N.E.2d 349 (1989) (affirming judge's discretion to enter

viewing *Commonwealth v. Keough*, the SJC noted that in virtually all cases in which a trial judge reduced a defendant's degree of guilt the evidence warranted the jury's verdict.<sup>47</sup> Despite that consideration, however, the verdict returned by the juries required a reduction in the interest of justice.<sup>48</sup>

### C. *The Woodward Decision*

The SJC did not find an error of law in the judge's conclusion that Woodward's actions were not characterized by malice, which is necessary to support a conviction of second degree murder.<sup>49</sup> The lack of malice provided the impetus for the judge's decision to reduce the verdict.<sup>50</sup>

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verdict of manslaughter based on evidence); *Commonwealth v. Zitano*, 23 Mass. App. Ct. 403, 502 N.E.2d 952 (1987) (finding reasons for reduction in verdict sufficient).

<sup>47</sup> 385 Mass. at 319, 431 N.E.2d at 918.

<sup>48</sup> *Id.*

<sup>49</sup> *Woodward*, 427 Mass. at 669. The court supported the trial judge's reasoning that "the circumstances in which [Woodward] acted were characterized by confusion, inexperience, frustration, immaturity and some anger, but not malice (in the legal sense) supporting a conviction for second degree murder." *Id.* See *Commonwealth v. Keough*, 385 Mass. at 320, 431 N.E.2d 915 (affirming judge's reduction to manslaughter for similar reasons).

<sup>50</sup> *Woodward*, 427 Mass. 659, 669, 694 N.E.2d 1277, 1286 (1998). See *Commonwealth v. Skinner*, 408 Mass. 88, 93, 556 N.E.2d 1014, 1017 (1990) (distinguishing murder from manslaughter); *Commonwealth v. Judge*, 420 Mass. 433, 437, 650 N.E.2d 1242, 1246 (1995) (stating "Without malice, an unlawful killing can be no more than manslaughter"). Malice may be proved by establishing any one of three facts beyond a reasonable doubt: if, without justification or excuse, (1) the defendant intended to kill the victim, or (2) the defendant intended to do the victim grievous bodily harm, or (3) in the circumstances known to the defendant, a reasonably prudent person would have known that, according to common experience, there was a plain and strong likelihood that death would follow the contemplated act. *Commonwealth v. Grey*, 399 Mass. 469, 470 n.1, 505 N.E.2d 171 (1987); *Commonwealth v. Sneed*, 413 Mass. 387, 388 n.1, 597 N.E.2d 1346, 1347 (1992). The judge in *Woodward* instructed the jury only on the third prong of malice. *Woodward*, 427 Mass. at

The issue of malice hinged upon whether Woodward shook Eappen and slammed his head against a hard object causing a skull fracture, subdural hematoma, brain swelling and ultimately death.<sup>51</sup> The defendant argued that Eappen suffered a skull fracture and subdural hematoma several weeks earlier, which did not manifest itself in any detectable manner until the baby was under the care of Woodward.<sup>52</sup> The jury credited the prosecution's theory, yet the judge appeared to credit the defendant's theory.<sup>53</sup> As a result, the trial judge reduced Woodward's conviction to manslaughter.<sup>54</sup>

At the heart of the matter lies the difference between involuntary manslaughter and the third prong of malice, or second degree murder.<sup>55</sup> The question for the jury became whether the defendant knew, or should have known, the degree of physical harm created by particular conduct.<sup>56</sup> The risk satisfying the standard for involuntary manslaughter "involves a high degree of likelihood that substantial harm will result to another."<sup>57</sup> The evidence of the injuries to Eappen may have supported a jury finding of malice; however, even evidence of repeated blows to a young child does not require this inference.<sup>58</sup>

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665, 694 N.E.2d at 1284. Therefore, the jury based their verdict on the conclusion that Woodward, under the circumstances, would have known that according to common experience, there was a plain and strong likelihood that Eappen's death would follow her actions. *Id.* at 669 n.14, 694 N.E.2d at 1286.

<sup>51</sup> Consolidated Br. R. App. For Commonwealth, p. 24.

<sup>52</sup> *Id.*

<sup>53</sup> See *Commonwealth v. Woodward*, No. 97-0433, 1997 WL 694119, at \*6 (Mass.Super. Nov. 10, 1997) (citing actions characterized by confusion but not malice).

<sup>54</sup> *Id.*

<sup>55</sup> *Commonwealth v. Woodward*, 427 Mass. 659, 669-670, 694 N.E.2d 1277, 1286 (1998).

<sup>56</sup> *Id.*

<sup>57</sup> *Commonwealth v. Sires*, 413 Mass. 292, 303 n.14, 596 N.E.2d 1018, 1025 (1992) (quoting *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902, 910 (1944)).

<sup>58</sup> See *Commonwealth v. Starling*, 382 Mass. 423, 426, 416 N.E.2d 929, 931 (1981) (reserving judgment on whether inference essential to finding of malice); see *Commonwealth v. Vizcarrondo*, 427 Mass. 392, 397-398, 693

Most Massachusetts cases of child battery resulting in death show a pattern of abuse, not death from a single blow.<sup>59</sup> In *Woodward*, no evidence existed of “repeated caretaker abuse.”<sup>60</sup> There was no error, therefore, in the trial judge's verdict reduction under Rule 25(b)(2).<sup>61</sup>

The SJC suggests, in fact, that the trial judge could have corrected his own error of failing to give the manslaughter instruction by invoking his authority under Rule 25(b)(2) and reducing the verdict.<sup>62</sup> The judge, however, used the rule and credited another basis for reducing the verdict.<sup>63</sup> Using his discretion, the trial judge credited the defense experts who suggested that Eappen had a pre-existing blood clot, and found that Woodward merely aggravated the problem, with-

N.E.2d 677, 682 (1998) (stating evidence must support likelihood of death for second degree murder).

<sup>59</sup> Cf. *Commonwealth v. Day*, 409 Mass. 719, 720-721, 723-726, 569 N.E.2d 397, 398, 400-401 (1991) (reversing conviction based on erroneous admission of “profile” testimony); *Commonwealth v. Hutchinson*, 395 Mass. 568, 573-575, 481 N.E.2d 188, 192-193 (1985) (describing repeated abuses preceding death).

<sup>60</sup> *Commonwealth v. Woodward*, 427 Mass. 659, 670, 694 N.E.2d 1277, 1286 (1998).

<sup>61</sup> *Id.* at 670, n.17.

Where there was no evidence in this case of repeated caretaker abuse, the judge did not abuse his discretion in concluding that the jury verdict of murder was not proportionate with convictions in other cases, including those cases resulting in convictions of manslaughter rather than murder.” See Gaulden, *supra* at 556, 420 N.E.2d 905 (deciding whether jury verdict “markedly inconsistent” with verdicts returned in similar cases appropriate consideration in deciding rule 25(b)(2) motion).

*Id.* at 670-71.

<sup>62</sup> See *id.* at 671. Speculating what the judge may have considered, the SJC noted the judge could conclude that a verdict of manslaughter was more “consonant with justice” than allowing the murder verdict to stand. See *Commonwealth v. Woodward*, 427 Mass. 659, 671, 694 N.E.2d 1277, 1287 (1998) (quoting *Commonwealth v. Keough*, 385 Mass. 314, 320, 431 N.E.2d 915, 919 (1982) in turn quoting *Commonwealth v. McCarthy*, 375 Mass. 409, 416, 378 N.E.2d 429, 433 (1978)).

<sup>63</sup> *Woodward*, 427 Mass. at 671.

out malice, leading to Eappen's death.<sup>64</sup> In effect, the judge independently weighed the evidence as if he received the manslaughter instruction, and determined that a manslaughter verdict "comports more closely" with justice.<sup>65</sup>

#### IV. CONCLUSION

"The search is not for justice, but rather for that rare collection of circumstances, the grave failure of justice."<sup>66</sup> In *Woodward*, the trial judge invoked the rarely used power under MRCP 25(b)(2) to prevent a grave failure of justice.<sup>67</sup> The failure of justice can be an elusive concept that is not easily identifiable.<sup>68</sup> The jury's verdict in *Woodward* constituted a failure of justice because the evidence did not support a verdict of second degree murder. The jury's verdict, therefore, led to results so palpably wrong that it shocked the moral sense.<sup>69</sup> Rule 25(b)(2) recognizes that our criminal justice system is not perfect, and judges and juries are human. The rule draws its strength from its vagueness, making it difficult to specifically identify

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<sup>64</sup> *Id.*

<sup>65</sup> See *Commonwealth v. Woodward*, 427 Mass. 659, 671, 694 N.E.2d 1277, 1287 (quoting *Commonwealth v. Keough*, 385 Mass. 314, 320, 431 N.E.2d 915, 919 (1982) in turn quoting *Commonwealth v. McCarthy*, 375 Mass. 409, 416, 378 N.E.2d 429, 433 (1978)). The Commonwealth objected to the judge's reasons for reducing the verdict to manslaughter because his "unparticularized finding that the defendant was 'a little rough' with the baby fails . . . altogether to describe an act which has a high degree of likelihood that substantial harm would result." *Woodward*, No. 97-0433, 1997 WL 694119, at \*6 (Mass. Super. Nov. 10, 1997). The SJC did not find, however, that the judge made a "finding" that *Woodward* was only "a little rough" in handling Eappen. *Woodward*, 427 Mass. at 671, n.18, 694 N.E.2d at 1287. The SJC notes that judge relied on *Woodward*'s own testimony suggesting a range of possible force with which she may have handled Eappen, from which the fact finder could draw various conclusions. *Id.*

<sup>66</sup> *Commonwealth v. Woodward*, No. 97-0433, 1997 WL 694119, at \*7 (Mass. Super. Nov. 10, 1997).

<sup>67</sup> 427 Mass. 659, 694 N.E.2d 1277 (1998).

<sup>68</sup> See *infra*, note 12 (defining failure of justice).

<sup>69</sup> *Id.*

a failure of justice. As a result, the trial judge becomes the safety valve for preventing failures of justice.

The judge neither abused his discretion, nor committed an error of law in *Woodward*. The SJC speculates that in reducing the verdict the trial judge gave credence to Woodward's defense theory, and also states that he could have corrected his own error in failing to give a manslaughter jury instruction. Alternatively, the judge may have merely realized that the constant media scrutiny of the trial may have affected the jury's discretion and evaluation of the evidence. Regardless of the exact reason behind the decision, Rule 25(b)(2) exists for situations exactly like Woodward's. The rule exists to avert failures of justice.

*Daniel P. Barry*