CHAPTER 15

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Pretrial Motions and Pretrial Hearings

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§ 15.1 INTRODUCTION

At arraignment, the court will assign both a pretrial conference date (covered in the preceding chapter) and a pretrial hearing date. On the pretrial hearing date the attorneys must file a written, signed report listing their binding agreements and their disagreements. On this date also, a plea may be taken which, in district court, may be a contingent plea offered without the agreement of the prosecutor. At the pretrial hearing, the court will assign the case a trial date, a trial assignment date, or a compliance hearing depending on the completeness of the pretrial report and automatic discovery. The sequence of events is charted on the preceding page.

MASS. R. CRIM. P. 13 and DIST./MUN. CTS. R. CRIM P.[1] 4(b) and 6 govern pretrial motions. The more common include motions for a continuance, a bill of particulars, discovery,[2] suppression of evidence, dismissal, or other appropriate relief. Under Rule 13(c) former pleas, demurrers, challenges, and motions to quash are consolidated under the heading of a motion to dismiss or grant appropriate relief, in effect retaining the statutory and common law governing such pleas.[3] It is worth underscoring that pretrial motions are as appropriate in a district court bench trial as in any other.[4]

Motion forms are helpful and time-saving but may not be ideally suited to a particular case. In such cases counsel should use his own language and not hesitate to seek unprecedented but justified relief; the history of law reform is partially a history of unusual and extraordinary motions.

Following this chapter are chapters addressing different motions, but all are governed by the rules described here. Failure to follow these rules for filing and scheduling motions may result in the waiver of the motion and any statutory or constitutional rights underlying it.

§ 15.2 TIMING AND SCHEDULING ISSUES

§ 15.2A. PRETRIAL CONFERENCE PREREQUISITE [5]

Pretrial conferences, described in detail in Ch. 14, are mandatory in all district court and superior court cases, and will be scheduled at arraignment (along with a separate pretrial hearing date). Under the pretrial conference system, *only those pretrial*

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[1] Promulgated on November 3, 1995, and effective for criminal actions commenced on or after January 1, 1996.

[2] MASS. R. CRIM. P. 13(d) and (e) govern the filing and hearing of discovery motions, while MASS. R. CRIM. P. 14 governs the procedures for discovery. Discovery is addressed in detail in Chapter 16.[3] Reporter's Notes to MASS. R. CRIM. P. 13(c).

[3] Reporter's Notes to MASS. R. CRIM. P. 13(c).

[4] *See* Commonwealth v. Soucy, 17 Mass. App. Ct. 471, 472 (1984) (counsel cannot rely on district court practices regarding discovery, but must follow requirements of the Criminal Rules to preserve rights). *Cf.* Commonwealth v. Silva, 10 Mass. App. Ct. 784, 791 (1980) (discovery motions are appropriate before district court probable-cause hearings and may provide "the means for intelligent consideration of probable-cause and . . . speed that part of the process along").

[5] *See also supra* § 14.3 (pretrial conference effect on motions practice).

motions that were not agreed to by the prosecutor may be filed.[6] If a party fails to appear and file the report on the report date, it may not file a pretrial motion or obtain a continuance of the trial date without leave of the court or cause, and other sanctions are also possible.[7]

§ 15.2B. MOTIONS THAT MUST BE BROUGHT PRETRIAL

According to Rule 13(c)(2) "a defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion."[8] A statute also requires that defenses based on defects in the initiation of the prosecution or the charging paper be brought pretrial or waived, unless the defect is jurisdictional or a failure to charge an offense.[9] Additionally, a motion to dismiss or to suppress evidence must ordinarily be heard and decided by the court before the defendant is placed in jeopardy, so as to preserve the possibility of interlocutory appeal.[10]

However, certain motions may be cognizable even if raised for the first time at trial. These exceptions are addressed *infra* at § 15.2E.

§ 15.2C. TIME FOR FILING AND HEARING

All cases commencing prior to September 7, 2004, now have mandatory pretrial conferences, regardless of whether the case is docketed in a superior, juvenile, district, or municipal court.[11] Cases that commenced before that date are governed by the prior version of MASS. R. CRIM. P. 13.

The timing requirements for all pretrial motions, including discovery motions, are governed by MASS. R. CRIM. P. 13(d).[12] MASS. R. CRIM. P. 13 imposes different deadlines for filing motions depending on whether it is a discovery motion. The rules governing the method of calculating time periods for all motions are contained in MASS. R. CRIM. P. 46(a).

1. Discovery Motions

The 2004 amendments to Rule 14, which provide for automatic discovery of commonly sought items by the pretrial conference, means that discovery motions should be limited to materials that are not included in the mandatory discovery categories. According to MASS. R. CRIM. P. 13, discovery motions must be filed before the conclusion of the pretrial hearing, or after for good cause shown.[13] There are two

[6] MASS. R. CRIM. P. 13(d). This requirement, and exceptions to it, are more fully addressed *supra* at § 14.3. The pretrial conference is addressed fully *supra* at ch. 14.

[7] MASS. R. CRIM. P. 11(a)(2)(B).

[8] MASS. R. CRIM. P. 13(c)(2).

[9] MASS. GEN. LAWS ch. 277, § 47A. *See also* Commonwealth v. Rodriguez, 17 Mass. App. Ct. 547, 556 (1984).

[10] MASS. R. CRIM. P. 15(c). *See also* SUPER. CT. R. 61 (suppression motion must be filed before trial); Commonwealth v. Shine, 398 Mass. 641, 653 (1986) (same). Effective March 1, 1996, Rule 15(e) has been amended to provide a stay of trial proceedings for a defendant to seek leave to appeal a denial of motion to suppress. *See infra* § 15.5.

[11] Reporter's Notes to MASS. R. CRIM. P. 11(a).

[12] Reporter's Notes to MASS. R. CRIM. P. 13(d).

[13] MASS. R. CRIM. P. 13(d)(1).

specific, non-exhaustive circumstances that are considered good cause. One is when the discovery sought could not reasonably have been requested or obtained before the pretrial hearing.[14] The other, allows later filing by the Commonwealth if it "could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing." As the Reporter's Notes of Rule 13 suggest, this provision is necessary because according to the rules, the Commonwealth must first fulfill its discovery obligations before it can receive discovery. Thus if the Commonwealth has been unable to provide discovery before the pretrial hearing for good reason, the Commonwealth's reciprocal discovery rights should not be prejudiced by being barred.[15] There is also an exhaustive provision in Rule 13 that "other good cause" could warrant consideration of a later filed motion.[16]

2. Non-Discovery Pretrial Motions

Non-discovery pre-trial motions are to be filed no later than 21 days after the court's assignment of a trial date or trial assignment date[17], unless the court allows later filing for good cause shown.[18] As a result, the non-discovery pretrial motions are to be filed 21 days after the pretrial hearing or compliance hearing, whichever is later. As of this writing. There are some inconsistencies between MASS. R. CRIM. P. 13 as revised in 2004 on the one hand, and the Boston Municipal Court and District/Municipal Court rules on the other.[19]

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[14] MASS. R. CRIM. P. 13(d)(1)(A).

[15] MASS. R. CRIM. P. 13(d)(1)(B).

[16] MASS. R. CRIM. P. 13(d)(1)(C)

[17] In addition, the defendant must provide notice of intent to defend by reason of insanity, or by reason of license or privilege, within this time period. MASS. R. CRIM. P. 14(b)(2) and (3).

[18] MASS. R. CRIM. P. 13(d)(2). According to the Reporter's Notes of Rule 13(d), the time limits for the filing of pretrial motions are intended to set the norm. The clause "for good cause shown" leaves ample opportunity for the court to exercise its discretion in the interest of justice.

[19] Non-discovery pretrial motions are treated differently under DIST./MUN. CTS. R. CRIM. P. 6. Such motions "may be filed before or after the defendant's initial decision on waiver of the right to jury trial." If filed *before* a decision on waiver is made, they are generally supposed to be transmitted to the jury session and scheduled for hearing on the trial date. The judge before whom such motions are filed, however, may, "as a matter of his or her discretion," hear and decide such motions prior to the trial date. Motions filed *after* the defendant's initial decision on waiver of jury trial must be filed in the court where the trial is scheduled no later than twenty-one days after defendant's decision on waiver, or later, if good cause is shown.

The presiding justice of the court in which the pretrial hearing is conducted, however, if that is different from the court in which the trial will occur, may require such motions to be heard and decided in the pretrial hearing court, in which case transmission of the file to the trial court should be deferred.

The Boston Municipal Court (BMC) has slightly different deadlines for discovery and nondiscovery motions. In the BMC, Rule 6(b)(1) provides that discovery motions timely filed must be heard and decided prior to the scheduling of a trial session assignment date. Discovery motions filed after that date shall be allowed only: (1) if the discovery sought could not reasonably have been sought or obtained prior to the scheduling of the trial session assignment date; or (2) if other good cause can be shown. Nondiscovery pretrial motions may be filed at any time but no later than 21 days after the date of filing of the Pretrial Conference Report.

A clerk is not generally empowered to refuse to accept and docket a motion without the court's express approval, but if she does so, counsel should move the court to have the motion docketed.[20]

3. Scheduling a Pretrial Motions Hearing

MASS. R. CRIM. P. 13(e) governs the scheduling of the hearing of motions. The clerk or judge must assign a date for hearing the motion within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal.[21] However, the clerk or judge will be guided by other provisions. First, the opposing party must be provided with an adequate opportunity to prepare and submit a memorandum prior to the hearing.[22] The deadline for opposing affidavits is at least one day before the hearing.[23] Second, *discovery* motions must be heard and decided prior to the defendant's election of a jury or jury waived trial.[24] If there are any discovery motions pending at the time of the pretrial hearing or the compliance hearing, then they should be heard at that hearing.[25] Third, *non-discovery* motions may be heard at the pretrial hearing, at a hearing scheduled to hear that motion, or at the trial session.[26] Finally, the parties can agree to a mutually convenient time for hearing when the motion is filed. The clerk must notify the parties of the date assigned.[27]

4. Renewal of Motion

On a showing that substantial justice requires, the judge may permit a previously denied motion to be renewed.[28]

§ 15.2D. COMPLIANCE HEARING

In both the district courts and the BMC, rulings on pretrial motions rendered prior to the transmission of a case to a trial session are to be final as provided by MASS. GEN. LAWS ch. 278, § 18.

[20] Bolton v. Commonwealth, 407 Mass. 1003, 1003–04 (1990) (appeals court clerk refused to accept procedurally questionable motion).

[21] MASS. R. CRIM. P. 13(e)(3).

[22] MASS. R. CRIM. P. 13(e). See also Commonwealth v. Robinson, 13 Mass. App. Ct. 1065 (1982).

[23] MASS. R. CRIM. P. 13(a)(3). *See also* DIST./MUN. CTS. R. CRIM. P. 6.

[24] MASS. R. CRIM. P. 13(e)(1).

[25] *Id*. *See* Rule 11(b)(2)(iii) and (c)(3); DIST./MUN. CTS. R. CRIM. P. 4(e).

[26] MASS. R. CRIM. P. 13(e)(2). The default date for motions filed at the pretrial hearing is the next scheduled court date. *Id*.

[27] According to the Reporter's Notes of Rule 13(e), precedent establishes that some motions may be heard ex parte, especially when they do not affect an interest of the opposing party or would reveal privileged or other information not entitled to the opposing party. *See* Commonwealth v. Dotson, 402 Mass. 185, 187 (1988); Commonwealth v. Haggerty, 400 Mass. 437, 441(1987).

[28] MASS. R. CRIM. P. 13(a)(5); Nagle v. Regan, 12 Mass. App. Ct. 906 (1981) (rescript) (judge has right and even duty to change his mind when convinced previous view was incorrect). *See also infra* § 15.6; DIST./MUN. CTS. R. CRIM. P. 6.

At the pretrial hearing, the court will determine whether the pretrial conference report and all discovery is complete as of the date of the pretrial hearing. If the pretrial report or discovery is not complete, then a compliance hearing is scheduled and ordered by the court pursuant to Rule 11(c), unless the aggrieved party waives the right to a compliance hearing.[29] If the pretrial report and discovery are complete, then the court will ask the defendant to elect or waive a jury trial and then assign the trial date or trial assignment date.[30]

At the compliance hearing, the court must determine whether the pretrial conference report and discovery are complete and, if necessary, hear and decide discovery motions and order appropriate sanctions for non-compliance.[31] If the pretrial conference report and discovery are complete, the court may receive and act on a tender of plea or admission; obtain the defendant's decision on waiver of the right to a jury trial, and schedule the trial date or trial assignment date.[32]

§ 15.2E. DILATORY FILING: CONSEQUENCES AND EXCEPTIONS

Failure to timely file a motion may waive consideration of the issue,[33] subject to the following exceptions:

1. Counsel may file at any time motions that first became appropriate after the time for filing had passed,[34] such as a motion to dismiss for lack of a speedy trial, a motion to suppress identification based on facts that were first discovered after the filing deadline, or a motion to suppress evidence that counsel could not anticipate would be introduced at trial.[35]

2. The time requirements above may be altered by court order for cause shown, in the court's discretion.[36]

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[29] MASS. R. CRIM. P. 11(b)(2)(iii). Additionally, in practice, the court may try to schedule both the trial date and the compliance hearing date at the pretrial hearing even though the Rules suggest that a trial date should be set after the compliance hearing.

[30] According to the Reporter's Notes of Rule 11(b), the jury decision should be fully considered and resolved at the pretrial hearing, but nothing in the rule prevents a defendant who elects a jury trial from waiving the right at a later date.

[31] MASS. R. CRIM. P. 11(c)(1).

[32] MASS. R. CRIM. P. 11 (c)(2) and MASS. R. CRIM. P. 11(c)(3).

[33] *See* Henry v. Mississippi, 379 U.S. 443, 447 (1965) (requiring suppression motion to be brought pretrial or waived is constitutional); Commonwealth v. DeArmas, 397 Mass. 167, 169 (1986); Commonwealth v. Pope, 15 Mass. App. Ct. 505, 507 (1983); Commonwealth v. Bailey, 370 Mass. 388, 397–98 (1976); Commonwealth v. Stanley, 363 Mass. 102, 104 (1973); Commonwealth v. Cooper, 356 Mass. 74, 78–80 (1969); Commonwealth v. Fleury-Ehrhart, 20 Mass. App. Ct. 429, 437–38 (1985); Commonwealth v. Hawkins, 17 Mass. App. Ct. 1041, 1042 (1984) (rescript); Commonwealth v. LaPierre, 10 Mass. App. Ct. 641, 642–43 (1980); Commonwealth v. Perkins, 6 Mass. App. Ct. 964 (1979) (rescript).

[34] MASS. R. CRIM. P. 13(d)(1) and 13(d)(2) permit late filing for cause shown. *See, e.g.,* Commonwealth v. Bongarzone, 390 Mass. 326, 337–38 (1983) (delay justified if facts not known by deadline but should be filed soon after grounds become known).

[35] *See, e.g.,* Commonwealth v. Carter, 39 Mass. App. Ct. 439, 440 (1995).

[36] MASS. R. CRIM. P. 13(d)(1), (2), 46(b); SUPER. CT. R. 61 (suppression motion). *See, e.g.,* Commonwealth v. Mendez, 8 Mass. App. Ct. 914 (1979) (judge offered to hear motions late if counsel submitted affidavit); Commonwealth v. Perkins, 6 Mass. App. Ct. 964 (1979) (whether to allow late motion is discretionary). *See also* Commonwealth v. White, 44 Mass. App. Ct. 168 (1998) (upholding judge's refusal to hear late-filed suppression motion).

3. In certain cases, applying a procedural waiver might be unconstitutional under the Sixth Amendment if it resulted from ineffective assistance.[37] In extreme cases other constitutional rights arguably might be abridged by denying a hearing on procedural grounds.[38]

4. Particular subjects may be raised after the deadlines (if during trial, outside the presence of the jury[39]):

a. Lack of jurisdiction or failure to charge a crime;[40]

b. Challenge to the statute as unconstitutionally vague;[41]

c. Suppression of wiretap evidence;[42]

d. *Voluntariness of statement*: at least if the issue first becomes known at trial, the judge is required to conduct *sua sponte* a *voir dire* on this issue;[43]

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[37] *See* Murray v. Carrier, 477 U.S. 478, 488 (1986) (procedural default must be imputed to the state only when it is product of ineffective assistance).

[38] *Cf.* Commonwealth v. McColl, 375 Mass. 316, 322 (1978) (noting but not deciding defendant's argument that missed deadline cannot waive Fourth Amendment rights). *But see* Henry v. Mississippi, 379 U.S. 443, 447 (1965) (requiring suppression motion to be brought pretrial or waived is constitutional). Regarding preclusion of evidence as a sanction for failure to provide timely notice where required, *see infra* § 16.8(E).

[39] Commonwealth v. Riveiro, 393 Mass. 224 (1984) (because statement was ruled inadmissible, holding hearing in jury presence was error because jury would assume statement damaging). *See also* Watkins v. Sowders, 449 U.S. 341 (1981) (prudent to hold identification *voir dire* outside presence of jury, but unlike confession *voir dire*, jury that observes *voir dire* hearing can be presumed to follow instructions to ignore it); Pinto v. Pierce, 389 U.S. 31 (1967) (prudent to hold confession *voir dire* outside presence of jury, but defendant consented to procedure); Commonwealth v. Acerbi, 16 Mass. App. Ct. 984, 985 (1983) (holding *voir dire* on voluntariness of statement within hearing of jury is not appropriate, but no miscarriage of justice in this case).

[40] *See* Commonwealth v. Cantres, 405 Mass. 238, 239–40 (1989); Commonwealth v. Burns, 8 Mass. App. Ct. 194, 196 (1979) (quoting Commonwealth v. Andler, 247 Mass. 580, 581–82 (1924) (dismissal for failure to state an offense may occur at any time, even on appeal, and the court must consider such a point on its own motion); MASS. GEN. LAWS ch. 277, § 47A (lack of jurisdiction or failure to charge a crime must be heard at any time).

[41] Commonwealth v. Jasmin, 396 Mass. 653 (1986) (defendant may raise issue pretrial or wait until evidence at trial shows circumstances of statute's application to defendant). *But see* Commonwealth v. Peace Chou, 433 Mass. 229 (facial constitutional challenge to statute should be made in a pretrial motion to dismiss.)

[42] MASS. GEN. LAWS ch. 272, § 99(O)(1); Commonwealth v. Angiulo, 415 Mass. 502, 516–18 (1993) (scope of prosecutor's duty to disclose); Commonwealth v. Picardi, 401 Mass. 1008 (1988) (statute's admissibility requirements override any other deadlines imposed by other laws).

[43] Commonwealth v. McCauley, 391 Mass. 697, 703 (1984); Commonwealth v. Brady, 380 Mass. 44, 51 (1980); Commonwealth v. Cobb, 374 Mass. 514, 518–19 (1978); Commonwealth v. Harris, 371 Mass. 462, 470–72 (1976) (voluntariness issue must be considered *sua sponte*, and judge must make affirmative finding of voluntariness, before statement may be admitted); Commonwealth v. Collins, 11 Mass. App. Ct. 126, 133–34 (1981) (a judge must consider admissibility of potentially involuntary statement *sua sponte* when events at trial raise possibility of involuntariness). *But see* Commonwealth v. Serino 436 Mass. 408 (2002) (the trial court was not obliged to *voir dire* witnesses as to whether confessions defendant made while intoxicated were voluntary, as defendant reasonably elected not to try to suppress those confessions and the trial court correctly instructed the jury that the Commonwealth had to prove beyond a reasonable doubt that defendant's statement was voluntary before they could consider it.)

e. Miranda *violation*: Even if the defendant has not moved to suppress his statements the burden is still on the Commonwealth, upon seasonable objection, to prove affirmatively, prior to the admission of these statements, that the statements were properly obtained and that the defendant waived his rights;[44]

f. *Insanity defense*: Notwithstanding the defendant's failure to give timely notice of intent to defend by insanity, the insanity defense may be raised at any time during trial.[45]

§ 15.3 MOTION REQUIREMENTS

If a party fails to appear and file the report on the report date, it may not file a pretrial motion or obtain a continuance of the trial date without leave of the court or cause, and other sanctions are also possible.[46] Apart from this threshold prerequisite, pretrial motions must be filed according to the following requirements:

Motions: Motions must be in writing signed by the attorney or client,[47] stating with particularity all grounds known in numbered paragraphs.[48] If there are multiple charges, the motion must specify the particular charge to which it applies.[49]

Affidavits: Any facts relied on in support of the motion must be detailed in an affidavit signed by a person with knowledge of the facts.[50] Therefore, discovery

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[44] Commonwealth v. Adams, 389 Mass. 265, 269–70 & n.1 (1983) (although the defendant should normally move to suppress objectionable statements before trial, objection cognizable at trial). *Accord* Commonwealth v. Miranda, 37 Mass. App. Ct. 939 n.1 (1994); Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 510–11 (1989). *But see* Commonwealth v. Woods, 419 Mass. 366, 372 (1995) (holding that issue was not properly preserved by a general objection at trial); Commonwealth v. Rodwell, 394 Mass. 694, 699 (1985) (defendant's evidence that fellow prisoner who heard confession was government agent should have been submitted before trial, and the fellow prisoner's status "was not a jury question").

[45] *See infra* § 16.7B(3).

[46] MASS. R. CRIM. P. 13(d).

[47] MASS. R. CRIM. P. 13(a)(1); Super. Ct. R. 9. *See also* Super. Ct. R. 61 (motion to suppress). While an oral motion may be considered if the opposing party is afforded an opportunity to present facts and law in opposition, Commonwealth v. Geoghegan, 12 Mass. App. Ct. 575, 575–76 (1981), because it violates Rule 13's writing requirement, it need not be acted on. Commonwealth v. Pope, 392 Mass. 493, 498 n.8 (1984). *See also* Commonwealth v. Ceria, 13 Mass. App. Ct. 230 (1982) (motion for line-up should have been made in writing in advance).

[48] MASS. R. CRIM. P. 13(a)(2). Under this subsection, unincluded grounds that could reasonably have been known are deemed waived, but the judge may for good cause grant relief from the waiver. *See also* MASS. GEN. LAWS ch. 277, § 47A.

[49] MASS. R. CRIM. P. 13(a)(2).

[50] MASS. R. CRIM. P. 13(a)(2); Super. Ct. R. 9; Super. Ct. R. 61 (motions to suppress). *Compare* Commonwealth v. Benjamin, 358 Mass. 672, 676 n.5 (1971) (affidavit requirement should be strictly enforced) *with* Commonwealth v. Santosuosso, 23 Mass. App. Ct. 310, 312–13 (1986) (strict application of affidavit requirement not always appropriate) *and* Commonwealth v. Santiago, 30 Mass. App. Ct. 207, 213 (1991) (court abused discretion in denying defendant's motion to suppress where affidavits, although defective, sufficiently fulfilled two purposes of affidavit requirement: a statement of anticipated evidence supporting motion, and fair notice to prosecutor). *See also* Commonwealth v. Luce, 34 Mass. App. Ct. 105, 112 (1993); Commonwealth v. Parker, 412 Mass. 353, 356–57 (1992) (failure to file affidavit may be dispositive).

motions usually will not require affidavits, but most other motions will. As a tactical matter, counsel will wish to include only as much specificity as is required by the Rule so as to avoid unnecessary discovery to the prosecution.[5138.5]

Opposing affidavits must be served at least one day before the hearing.[52]

Memorandum: According to Rule 13(a)(4), "no motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered

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Generally, a rendition of hearsay does not satisfy the personal knowledge requirement. Commonwealth v. Trigones, 397 Mass. 633, 641 n.4 (1986); Commonwealth v. Smallwood, 379 Mass. 878, 888 (1980). Commonwealth v. Chase, 14 Mass. App. Ct. 1032 (1982). *See also* Commonwealth v. Parker, 412 Mass. 353, 356–57 (1992) (defense counsel's affidavit quoting from psychiatrist's report not sufficient but affidavit from psychiatrist or appended copy of report would have satisfied requirements). *But see Santosuosso*, *supra,* 23 Mass. App. Ct. at 313–14 (authenticated transcript is equivalent to affidavit and where unavailable counsel's affidavit as to what he heard satisfied rule).

However, affidavits accompanying a motion requesting a summons for the production of documentary evidence and objects under MASS. R. CRIM. P. 17(a)(2) may be based on hearsay from a reliable source. *See* Commonwealth v. Lampron, 441 Mass. 265, 270-71 (2004) (an affidavit accompanying a motion requesting a summons for production of documentary evidence or objects may be based on hearsay from a reliable source, which the affidavit must identify and the affidavit must establish the relevance of the requested documents with specificity).

See also Commonwealth v. DeArmas, 397 Mass. 167, 169 (1986) (unexplained absence of affidavit sufficient to deny motion); Commonwealth v. Pope, 392 Mass. 493, 497–98, 501 (1984) (no affidavit with motion to dismiss); Commonwealth v. Bongarzone, 390 Mass. 326, 337 (1983) (same); Commonwealth v. Pond, 24 Mass. App. Ct. 546, 551–52 (1987) (no affidavit or grounds submitted with motion to dismiss); Commonwealth v. Burke, 20 Mass. App. Ct. 489, 505 (1985) (unsigned affidavit not sufficient); Commonwealth v. Pope, 15 Mass. App. Ct. 505, 507–08 (1983) (no affidavit on motion to suppress).

Contrary to the position of some judges, the Rule does not require the affidavit to be signed by the defendant, but only by a person with personal knowledge of the factual basis of the motion. An affidavit by counsel was found sufficient under the circumstances of the case in *Santosuosso, supra,* and in Commonwealth v. Oks, Memorandum and Order, Superior Court No. 89-3861 (Flannery, J.) (3/30/1990). In many cases a defendant's affidavit will not be possible because he has no personal knowledge (e.g., whether a search warrant was issued) or because counsel has communication problems with the defendant (e.g., failure to show for interviews, inability to speak English, etc.). Insisting on a defendant's affidavit in such circumstances is not only unwarranted under Rule 13(a)(2) but would violate Rule 2(a)' s stricture that the criminal rules be construed to secure simplicity and fairness and eliminate expense and delay. It is also possible that requiring a defendant's affidavit when other affiants are available would violate his privilege against self-incrimination.

[51] However, affidavits that lack detail may result in the denial of a suppression hearing. *See* Commonwealth v. Zavala, 52 Mass. App. Ct. 770 (2001).

[52] MASS. R. CRIM. P. 13(a)(3).

by the judge or special magistrate."[53] Additionally, the court may require a memorandum of law as a condition precedent to hearing the motion.[54]

Service: The original papers are sent to the court, accompanied by a certificate of service certifying that the district attorney's office and any other counsel have been served. Copies of the papers must simultaneously be sent to these attorneys.[55] The court may waive these requirements for good cause.[56]

§ 15.4 THE PRETRIAL HEARING

Prior to the hearing, it is essential to determine the elements of proof necessary to support the motion and where the burden of proof lies.[57] If facts are in dispute and an evidentiary hearing will be held,[58] witnesses will need to be lined up and examinations prepared just as for trial. In some pretrial hearings, evidentiary restrictions may be applied less strictly.[59]

§ 15.4A. TAKING OF EVIDENCE

1. Sequence of Examination

At the evidentiary hearing, the party with the burden of proof will introduce evidence, including witnesses who are subject to cross-examination; then the opposing party presents evidence. Counsel for other defendants do not have a right to cross-

[53] *Accord* Super. Ct. R. 9. *See* also Commonwealth v. Pope, 392 Mass. 493, 497–98 (1984) (failure to submit memorandum of law); Commonwealth v. Lopes, 25 Mass. App. Ct. 988, 990 (1988) (rescript) (lack of memorandum sufficient to deny motion); Commonwealth v. Fudge, 20 Mass. App. Ct. 382, 385 (1985) (no memorandum of law required for filing suppression motion involving seizure of items not listed in warrant).

[54] MASS. R. CRIM. P. 13(a)(4); Super. Ct. R. 9.

[55] MASS. R. CRIM. P. 13(a)(3). Failure to serve defense counsel may violate the Sixth Amendment right to counsel. *See, e.g.,* Satterwhite v. Texas, 486 U.S. 249 (1988); United States v. Curran, 926 F.2d 59 (1st Cir. 1991).

[56] MASS. R. CRIM. P. 13(a)(3). The S.J.C. has held, however, that a defendant is not entitled to an ex parte hearing when seeking privileged records under Commonwealth v. Bishop, 416 Mass. 169 (1993). Pare v. Commonwealth, 420 Mass. 216 (1995). *See also* Common v. Fuller, 423 Mass. 216 (1996) (modifying *Bishop* procedure); Commonwealth v. Dwyer, 448 Mass. 122 (2006) (modifying *Bishop-Fuller* protocols). *See infra* § 16.3C.

[57] Often the burden of proof will be with the moving party, but it sometimes lies with the adverse party. For example, the Commonwealth has the burden of proof on a defendant's *Miranda* suppression motion or motion to suppress a warrantless search. Thus, in these two cases, if no evidence is presented by either side, the defendant's motion should be allowed. The burden of proving particular issues is addressed *infra* in the chapters following.

[58] *Cf.* Commonwealth v. Santiago, 30 Mass. App. Ct. 207, 212–15 (1991) (denial of hearing on suppression motion was error, notwithstanding technical defects in affidavit); Commonwealth v. LaSota, 29 Mass. App. Ct. 15, 28 (1990) (court should have had evidentiary hearing and findings of fact).

[59] *See* United States v. Matlock, 415 U.S. 164 (1974) (in suppression hearing, evidentiary rules of criminal trials do not operate with full force; privileges apply but some hearsay is admissible).

examine if the evidence will not be offered against their clients but may do so in the judge's discretion.[60]

2. Discovery Benefits

Although the evidentiary hearing is limited in scope to what is relevant to the motion, it is still frequently a good source of discovery. For example, a motion to suppress identification will include questioning the victim on her opportunity to observe the defendant and on police identification procedures — precisely the same areas on which defense counsel will want to cross-examine the victim at trial. Also remember that defense counsel cross-examining a witness has constitutional confrontation rights to elicit the witness's present address,[61] the identities of witnesses,[62] and all other relevant evidence.[63]

3. Evidence Should Not Influence the Trial

Suppression hearings should be held outside of the presence of the jury. If the trial is without a jury, a judge who has been exposed to prejudicial, inadmissible facts at the pretrial evidentiary hearing may be unable to be a completely impartial fact finder. Although generally judges are presumed to be able to avoid such influence, in some circumstances recusal may be required.[64]

In district court bench trials, what should be a pretrial motion is sometimes heard during the trial. For example, the judge may require that counsel's motion to suppress defendant's statements be reserved until the statement is about to be introduced at trial; the officer's trial testimony will then be interrupted for an evidentiary hearing on the motion. Counsel should ordinarily argue against this

[60] Commonwealth v. French, 357 Mass. 356, 402 (1970).

[61] Smith v. Illinois, 390 U.S. 129 (1968). The S.J.C. has held that this is a confrontation right that may be denied only where safety considerations are apparent. *See* Commonwealth v. Cobb, 379 Mass. 456, 469–70 (1980) *judgment vacated in part sub nom.* Massachusetts v. Hurley, 449 U.S. 809 (1980), *appeal dismissed sub nom.* Commonwealth v. Hurley, 382 Mass. 690 (1981), *appeal reinstated,* 391 Mass. 76 (1984); Commonwealth v. Johnson, 365 Mass. 534, 544–46 (1974); Commonwealth v. McGrath, 364 Mass. 243, 250–52 (1973). Where the Commonwealth objects, it has the burden of explaining the reasons unless safety concerns are apparent from the charge and circumstances. *McGrath, supra,* 364 Mass. at 251–52; *Cobb, supra,* 379 Mass. at 470. If cross-examination to elicit the present address is denied, private disclosures to defense counsel may be proper. *McGrath, supra,* 364 Mass. at 252 n.5.

[62] Commonwealth v. Johnson, 365 Mass. 534 (1974).

[63] Commonwealth v. Johnson, 365 Mass. 534, 543–46 (1974). *Johnson* provides strong authority that wide-ranging cross-examination is guaranteed under art. 12 of the Declaration of Rights of the Mass. Const. and the Sixth Amendment of the U.S. Constitution, stating that such concerns as embarrassment or safety cannot justify proscribing cross-examination, with two exceptions: safety considerations may provide a bar to (1) disclosure of the identity of informants when it would not affect the fairness of the trial and (2) disclosure of a witness's present address where the court finds an actual danger and considers alternatives to full nondisclosure.

[64] *See* Commonwealth v. Coyne, 372 Mass. 599, 601–03 (1977) (recusal may be required in jury-waived trial where judge found confession involuntary). *See also* Furtado v. Furtado, 380 Mass. 137, 151 (1980) (pretrial contact in some circumstances might require recusal). *But see* Commonwealth v. Williams, 364 Mass. 145, 149 (1973). Recusal for exposure to prejudicial facts is more fully addressed *infra* at § 25.2.

sequence since it makes it far more difficult for the judge to isolate and ignore the suppression testimony in deciding guilt or innocence.

4. Defendant's Testimony

The defendant may testify at a suppression hearing without waiving his fifth amendment right not to testify at trial, and the defendant's testimony at a pretrial evidentiary hearing is not admissible at trial as part of the Commonwealth's case in chief.[65] However, it is arguably admissible for impeachment purposes should the defendant take the stand.[66] Therefore, any defendant testimony at a suppression hearing should be carefully limited in scope to those areas relevant to the motion.[67] In deciding whether to use the defendant as a pretrial witness, counsel must weigh the importance of his testimony to the motion against the risks of providing impeachment material or investigative leads to the prosecution.[68]

§ 15.4B. ARGUMENT

Argument on pretrial motions should usually conform to the following recommendations: (1) Be brief, generally focusing on no more than two or three issues. (2) Be well organized. State your premise and the results sought at the beginning, summarize the issues, and then elaborate. (3) Utilize the facts with the most favorable slant possible that still safeguards against an image of unfairness. (4) Case law not only provides the general rule, but fact situations detailed in cases should be scoured for

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[65] Simmons v. United States, 390 U.S. 377, 394 (1968) (search suppression). *See also* Commonwealth v. Sperrazza, 404 Mass. 19, 20 (1989); Commonwealth v. Curtis, 388 Mass. 637, 647 (1983); Commonwealth v. Franklin, 376 Mass. 885, 900 n.16 (1978); Commonwealth v. Amendola, 26 Mass. App. Ct. 713, 718 n.8 (1988).

[66] In United States v. Salvucci, 448 U.S. 83 (1980), the Supreme Court noted that this issue had not been decided but that *Simmons* should not be deemed a "license for false representations." *Compare* Harris v. New York, 401 U.S. 222, 224–26 (1971) (statement excluded as violation of *Miranda* may be used to impeach) *and* Commonwealth v. Harris, 364 Mass. 236, 238–40 (1973) (same) *with* New Jersey v. Portash, 440 U.S. 450 (1979) (immunized testimony "coerced" from defendant cannot be used for any purpose) *and Harris*, *supra,* 364 Mass. at 241 (involuntary statement cannot be used for impeachment). A defendant might argue that suppression testimony designed to remedy unconstitutional state action cannot be deemed "voluntary" or "uncoerced."

[67] *But see* Commonwealth v. Hicks, 356 Mass. 442 (1969) (holding the "scope or extent of cross-examination is largely discretionary with the judge" on pretrial motions).

[68] There are significant risks for a defendant who testifies at a suppression hearing. The S.J.C. has held that a defendant who takes the stand in a suppression hearing waives his privilege against self-incrimination as to all facts relevant to the crime charged and may be cross-examined as to those facts, including whether statements he allegedly made admitting he committed the crime were true. Commonwealth v. Judge, 420 Mass. 433, 444 (1995). (In federal courts, the privilege is waived only as to matters reasonably related to the subject matter of direct examination.) *Judge, supra*, 420 Mass. at 444. *See also* Commonwealth v. Rivera, 425 Mass. 633 (1997) (no substantial risk of a miscarriage of justice where defendant who testified at trial was impeached by affidavit filed in support of motion to suppress; S.J.C. noted, however, that in the future on request, a trial judge should conduct a *voir dire* on the question of impeaching a defendant with a pretrial affidavit and, if the evidence is admitted, on request the judge should instruct the jury to consider the omission of any facts from the affidavit only if they find that the witness naturally should have spoken up in the circumstances).

similarity to your case. (5) Both the argument and appellate posture are strengthened if the argument relies on *both* narrow grounds that limit discretion, and underlying basic constitutional guarantees stated in broad, compelling equitable principles. (6) Discover all you can about the judge you will face at the hearing. (7) Expect questions from the bench and constant disruptions. Prepare your notes so that eye contact with them will remind you of your important points. Expect that you may not be able to follow your outline because of questioning, and answer every question at the time it is put to you. (8) Avoid anger or personal invective.

§ 15.4C. MEMORANDUM OF LAW

A memorandum of law is frequently called for on important motions and is required with the filing of most motions to suppress or dismiss by Rule 13(a)(4).[69] A brief written in advance of the hearing must anticipate the evidence. Counsel should make a tactical decision as to whether his chances of success are greatest if the court makes a ruling immediately following the hearing or instead accedes to a request for time to prepare and submit a brief. No copy should be handed to the other side until it is submitted to the judge, either with the filing of the motion when required by Rule 13(a)(4), at the beginning or end of the oral argument, or within the time allotted for submission of briefs following the hearing.

§ 15.5 RULINGS AND FACT-FINDINGS; STANDARD OF REVIEW

The rulings and fact-findings are made by a judge because the constitutional right to trial by jury extends only to issues of fact that determine guilt or innocence.[70] (Under Massachusetts' "humane practice" rule, however, the defendant has a second chance to challenge a confession as involuntary because the jury must make an independent finding of voluntariness.[71]) The judge should make findings of subsidiary facts;[72] she may use counsel's proposed findings,[73] but the findings must be the result of

[69] Under this provision, the judge may require a memorandum in any case, and the defendant *must* submit one with any motion to dismiss or to suppress evidence other than evidence seized in a warrantless search.

[70] Commonwealth v. Brady, 357 Mass. 213, 214–15 (1970).

[71] *See infra* § 19.3D(1).

[72] Commonwealth v. O'Connor, 21 Mass. App. Ct. 404, 405 n.1 (1986); Commonwealth v. Brady, 380 Mass. 44, 52 (1980) (prudent and desirable to make record of facts found). But a failure to make explicit fact findings is not per se reversible error, *Brady, supra;* Commonwealth v. Forrester, 365 Mass. 37, 45 (1974), and courts have at times remanded for further findings, or analyzed the record to see if findings implicit in the trial judge's ruling are supported. Commonwealth v. Gaulden, 383 Mass. 543, 547 (1981).

[73] Commonwealth v. DeMinico, 408 Mass. 230, 238 (1990); Lovett v. Commonwealth, 393 Mass. 444, 446–47 (1984); Lewis v. Emerson, 391 Mass. 517, 524 (1984). The S.J.C. has indicated that trial judges should not adopt verbatim counsel's proposed findings of fact, but has nonetheless refused to set aside such findings if they are supported by the evidence. *See* Commonwealth v. DeMinico, 408 Mass. 230, 255 (1990) (citing Lovett v. Commonwealth, 393 Mass. 444, 447 (1984)). *See also* United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964).

independent judicial analysis.[74] On appeal the judge's findings on credibility are ordinarily conclusive; other subsidiary findings are open to reexamination but entitled to deference.[75] However, the reviewing court will make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found.[76] Additionally, if the judge decides an issue before all the evidence is in, the case will be reversed.[77]

Effective March 1, 1996, MASS. R. CRIM. P. 15(e) provides that defendants in both superior and district courts are entitled, as of right, to a stay of the trial proceedings, for at least ten days (or for such additional time as the trial judge or a single justice of the Supreme Judicial Court shall order) in which to file an application with the single justice seeking leave to appeal the trial court's denial of a motion to suppress evidence. If application for leave to appeal is granted, the trial must be stayed pending the entry of the appellate court's decision on the appeal.

The subject of interlocutory appeals of pretrial motions is addressed at § 45.6.

§ 15.6 PRESERVING APPELLATE REVIEW BY RENEWING THE MOTION AT TRIAL; RECONSIDERATION OF THE MOTION

Preserving the issue: To preserve the issue for appellate review, it may be necessary to renew the motion each time it would bear on events at trial. The Supreme Judicial Court has ruled that a suppression motion was not preserved when the defendant failed to renew the objection at the time the evidence was offered at trial,[78] even though this ruling was at odds with both previous practice and precedent.[79]

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[74] Lovett v. Commonwealth, 393 Mass. 444, 446–47 (1984); Cormier v. Carty, 381 Mass. 234, 236–38 (1980).

[75] Commonwealth v. White, 374 Mass. 132, 137–38 (1977), *aff'd,* 439 U.S. 280 (1979); Commonwealth v. Doyle, 12 Mass. App. Ct. 786, 795 n.3 (1981); Commonwealth v. Hunt, 12 Mass. App. Ct. 841, 843 (1981). *See also* Commonwealth v. Shine, 398 Mass. 641, 651 (1986) (deference regarding judge's findings regarding *Miranda* suppression motion); Commonwealth v. Franklin, 376 Mass. 885, 898 (1978) (in suppression motion, assessment of credibility of uncontradicted witness is for trial judge).

[76] Commonwealth v. Berry, 410 Mass. 31, 34 (1991) *citing* Commonwealth v. Libran, 405 Mass. 634, 639 (1989).

[77] Commonwealth v. Coleman, 390 Mass. 797, 801–03 (1984), *citing* Preston v. Peck, 271 Mass. 159, 163–64 (1930).

[78] Commonwealth v. Acosta, 416 Mass. 279 (1993). This ruling cited cases declaring that motions in limine were unpreserved since unrenewed. In its first *Acosta* ruling, the S.J.C. had held that a suppression motion was not preserved when the defendant failed to renew the objection at trial. The opinion, however, was "amended" by the S.J.C. to state that although the defendant did not object at trial, the objection to the motion to suppress "is sufficient to preserve the issue on appeal." *Acosta*, *supra*, 416 Mass. at 284 n.1. The safest practice at this point would be to "object" to the denial of a motion to suppress, perhaps by including in the motion language to the effect that, "if this motion is denied, the defendant objects to its denial"; to object orally to the denial of such a motion; to file a written objection to the denial; and, notwithstanding the amended opinion, to object at trial. *See also* Commonwealth v. Oeun Lam, 420 Mass. 615, 617 n.2 (1995) (denial of motion in limine does not preserve issue for appeal).

[79] Commonwealth v. Dirring, 354 Mass. 523, 530 n.4 (1968); Commonwealth v. Mitchell, 350 Mass. 458, 464 (1966); Commonwealth v. Jacobs, 346 Mass. 300 (1963).

Reconsideration: On a showing that substantial justice requires, the judge may permit a previously denied motion to be renewed.[80] Additionally, the court has the inherent power to reconsider its ruling; reconsideration should ordinarily be sought within a reasonable time, at least before the deadline for filing an appeal.[81] The judge may exercise sound discretion in deciding whether to rehear a denied motion when new charges arising from the same incident are consolidated for trial with the older one.[82]

The motion for reconsideration should ordinarily be brought before the original judge. Any other judge may be reluctant to reconsider the decision of a judge of the same court,[83] unless there is significant new factual information alleged and the prior judge is unavailable.[84]

§ 15.7 REFILING AT RETRIAL OR IN DISTRICT COURT JURY SESSION

When a case is reversed and remanded for a new trial, prior rulings on motions need not be relitigated in the absence of new evidence or a change in the law, unless the appellate court found them erroneous.[85]

In district court, under MASS. GEN. LAWS ch. 278, § 18, any motion resolved in the primary court shall not be refiled or reheard in the jury session except in the court's discretion. But this obviously should not restrict refiling of previously denied motions when newly discovered evidence or changed situations might warrant a different ruling. Also under § 18, motions filed in primary court that have not been resolved at transfer

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[80] MASS. R. CRIM. P. 13(a)(5); Nagle v. Regan, 12 Mass. App. Ct. 906 (1981) (rescript).

In certain instances, a judge should reconsider the issue *sua sponte* when events at trial provide additional information, especially involving the voluntariness of statements. *See, e.g.,* Commonwealth v. Collins, 11 Mass. App. Ct. 126 (1981). *See* DIST./MUN. CTS. R. CRIM. P. 6; and the discussion *supra* at § 15.2E (concerning exceptions to filing deadlines).

An affidavit is desirable but not absolutely required for a Rule 13(a)(5) motion, and a hearing is desirable if the motion contains "fresh material" or the judge might substantially alter the initial ruling. Commonwealth v. Downs, 31 Mass. App. Ct. 467, 470–71 (1991).

[81] If the order is dispositive, amounting to a final judgment, the motion must be filed within 30 days; otherwise it must be brought "within a reasonable time during the pendency of the case before the trial court." Commonwealth v. Downs, 31 Mass. App. Ct. 467, 469 (1991). *See also* Commonwealth v. Montanez, 410 Mass. 290, 294 & n.4 (1991) (motion for reconsideration of denial of new trial should have been filed within the 30-day period for claiming appeal); Commonwealth v. Cronk, 396 Mass. 194, 196–97 (1985); Commonwealth v. Mandile, 15 Mass. App. Ct. 83, 85–92 (1983). Once an appeal is entered in the appellate court, the trial court loses jurisdiction to act on motions to rehear or vacate. *Cronk,* 396 Mass. at 197.

[82] Commonwealth v. Upton, 390 Mass. 562, 565 n.3 (1983), *rev'd per curiam on other grounds,* 466 U.S. 727 (1984), *decision after remand,* 394 Mass. 363 (1985) (citing Commonwealth v. Richmond, 379 Mass. 557, 558 (1980)).

[83] *Compare* Peterson v. Hopson, 306 Mass. 597, 603 (1940) (judge has power to do so, but should hesitate before reconsidering another judge's order) *with* Commonwealth v. Carrunchio, 20 Mass. App. Ct. 943, 944 (1985) ("while it is appropriate for a judge to honor what a colleague has ordered . . . that is a practice, not an inflexible rule").

[84] STANDARDS OF JUDICIAL PRACTICE: TRIALS AND PROBABLE CAUSE HEARINGS 1:04.

[85] Commonwealth v. Parker, 412 Mass. 353, 356 (1992) (citing Commonwealth v. Richmond, 379 Mass. 557, 558 (1980)).

should be refiled in the jury session, and failure to file a motion in the primary session does not bar subsequent filing in the jury session.[86]

[86] DIST./MUN. CTS. R. CRIM. P. 6, promulgated on November 3, 1995, and effective for criminal actions commenced on or after January 1, 1996, governs certain aspects of the procedure for hearing on motions that have not been decided in the primary session. *See* discussion *supra* at § 15.2C.