CHAPTER 1

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Trial or Probable-Cause Hearing: Determining the Role of the District Court

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§ 1.1 INTRODUCTION

The Trial Court of the Commonwealth is divided into several departments, including a District Court Department and a Superior Court Department.[1] The district court[2] has jurisdiction to try some crimes; for more serious offenses, it is empowered

* With thanks to John Brooks for research assistance.

[1] G.L. c. 211B § 1.

[2] The Boston Municipal Court department generally serves the same functions as the District Court Department and is governed by the Massachusetts Rules of Criminal Procedure, Mass. R. Crim. P. 2(b)(7), although it is additionally governed by Special Rules of the Boston Municipal Court Department Sitting for Criminal Business.

only to hold a probable-cause hearing to determine whether the case should be bound over for indictment and trial in the superior court.

Because the superior court has original jurisdiction over all crimes,[3] the prosecutor may initiate a case in superior court by direct indictment and thereby deny the defense the discovery inherent in a probable-cause hearing.[4] Nevertheless, the vast majority of cases commence in district court, for trial or bind-over.[4.5] This keeps the superior court caseload manageable by eliminating cases without merit, disposing of most lesser crimes, and passing on only the more serious cases to the superior court.[4.7]

The first thing counsel must do on receiving a case is determine whether the crime is outside the district court's jurisdiction, because a probable-cause hearing requires a strategy diametrically opposed to a trial.[5] Moreover, as detailed below, wherever possible the defense will want the district court to take jurisdiction, which may require a reduction of charges.

§ 1.2 DEFINITION OF SUBJECT MATTER JURISDICTION

In general, crimes punishable by more than five years in state prison are outside the district court's final jurisdiction,[5.5] with significant exceptions. As defined by G.L. c. 218, § 26,[5.7] the district court may try the following offenses:

New District/Municipal Courts Rules of Criminal Procedure, promulgated on November 3, 1995, and effective for criminal actions commenced on or after January 1, 1996, clarify many of the procedural details of the legislation that abolished the de novo system. *See infra* chs. 3A, 14, 15, 16. The reader should read "district court" to include the BMC in this text. The Housing Court of Boston and the Housing Court of Hampden County also have concurrent jurisdiction over certain crimes. G.L. c. 185C, § 3; Commonwealth v. Haddad, 364 Mass. 795 (1974).

[3] G.L. c. 212, § 6.

[4] An indictment is deemed to constitute a probable-cause finding, which in theory obviates the need for a probable-cause hearing. Therefore, even a scheduled district court probable-cause hearing is eliminated by an intervening indictment, unless a special agreement was made with the prosecutor. *See infra* § 2.2, note 38.

[4.5] 91.9% of the 50.233 convictions in Massachusetts in fiscal year 2009 were in district court. Mass. Sentencing Comm'n "Survey of Sentencing" 2009 pg. 9.

[4.7] The primary function of the District Court is to screen out cases that should not go to trial and to determine whether there is sufficient evidence which justifies binding the defendant over to Superior Court. Commonwealth v. Blanchette, 54 Mass. App. Ct. 165, 173 (2002).

[5] *E.g.*, because discovery rather than victory is usually the realistic goal, ordinarily counsel will not object to Commonwealth evidence at a probable-cause hearing; not present defense evidence; and schedule the hearing as soon as possible. *See infra* § 2.2.

[5.5] For purposes of determining District Court jurisdiction of felonies not specifically listed by statute, the maximum penalty governs. Commonwealth v. Wahid, 60 Mass. App. Ct. 1123, FN 2, (2004) (unpublished opinion, WL583643); Commonwealth v. Grace, 43 Mass. App. Ct. 905, 907 (1997) (District Court lacks jurisdiction over conspiracy to distribute heroin, a ten year felony). *Cf.*, Commonwealth

1. Crimes punishable by no more than five years in state prison;[6]

2. Certain crimes punishable by more than five years in state prison:

G.L. c. 273, §15A	Abandonment and willful nonsupport[7]
G.L. c. 90 § 24(1)(a)(1)	Driving under the influence of intoxicating liquor or controlled substance[8]
G.L. c. 90, § 24G(a)	Homicide by motor vehicle
G.L. c. 90, § 24L(1)	Serious bodily injury by reckless or negligent driving while intoxicated
G.L. c. 90B, § 8(a)(1)	Operation of vessels under influence of intoxicating liquor or controlled substance[9]
G.L. c. 94C, § 32(a)	Manufacture, distribution, or possession with intent to distribute, of class A drug (first offense)

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v. Stoico, 45 Mass. App. Ct. 559, 566 (1999) (District Court has jurisdiction over conspiracy to distribute marijuana because maximum punishment under G.L. c. 94C, § 40 depends upon crime which was object of conspiracy).

[5.7] St. 2010, c. 74, §1A, effective July 11, 2010. This statute is updated often and counsel should be careful to use the most recent version, which can be found online here: http://www.lawlib.state.ma.us/source/mass/mgl.html.

[6] This includes crimes whose penalties provide for incarceration solely in state prison, without including a house of correction alternative, because an MCI Concord sentence is available to the district court. Commonwealth v. Graham, 388 Mass. 115 (1983). However, in fiscal year 2009 not one defendant was sentenced to DOC custody from the district courts. Mass. Sentencing Comm'n "Survey of Sentencing Practices" 2009, pg. 9. Where a defendant is convicted of a crime in district court for which the only penalty is state prison, the court "shall impose such sentence, according to the nature of the crime, as conforms to common usage and practice in the Commonwealth." G.L. c. 279 §5.

The minimum penalty is irrelevant to the jurisdictional determination. Commonwealth v. Lightfoot, 391 Mass. 718 (1984). The district court has jurisdiction despite its inability to impose the maximum penalty. Commonwealth v. Drohan, 210 Mass. 445 (1912). *See also* Commonwealth v. Cedeno, 404 Mass. 190, 197 (1989) (possession of cocaine with intent to distribute is crime within district court jurisdiction if charged under G.L. c. 94C, § 32A(a) but not if charged under § 32a(c), and prosecutorial discretion in choice of charges is constitutional if not arbitrarily exercised); Commonwealth v. Zuzick, 45 Mass. App. Ct. 71 (1998) (prosecutors have wide range of discretion in deciding whether to bring charges and deciding what charges to bring); Commonwealth v. Ortiz, 39 Mass. App. Ct. 70, 73–74 (1995) (caption on indictment used to determine whether charge was under G.L. c. 94C, § 32A(a) or (c));Commonwealth v. Fearon 53 Mass. App. Ct. 1113, (2002)(unpublished opinion, WL 72942)(district court judge's handwritten amendment in caption of complaint to change offense to one in district court jurisdiction proper).

[7] St. 1995, c. 5, § 90, approved Feb. 10, 1995.

[8] St. 1994, c. 318, § 23, approved Jan. 11, 1995.

[9] St. 1994, c. 318, § 23, approved Jan. 11, 1995.

G.L. c. 94C, § 32A(a)	Manufacture, distribution, or possession with intent to distribute, of class B drug (first offense)
G.L. c. 94C, § 32J	Controlled substance violations near school property
G.L. c. 127, § 38B	Assault and battery on correctional facility employee
G.L. c. 140, § 131E	Improper purchase of firearms for use by another[10]
G.L. c. 265, § 13B	Indecent assault and battery of child under fourteen
G.L. c. 265, § 13K	Assault and battery upon an elderly or disabled person[11]
G.L. c. 265, § 15A	Assault and battery with a dangerous weapon
G.L. c. 265, § 21A	"Whoever, with intent to steal a motor vehicle, assaults, confines, maims or puts any person in fear for the purpose of stealing a motor vehicle whether he succeeds or fails . . ."[12]
G.L. c. 266, § 16	Breaking and entering a building or ship in the nighttime
G.L. c. 266, § 17	Breaking and entering a building or ship in the daytime, or entering without breaking a building or ship in the nighttime
G.L. c. 266, § 18	Breaking and entering a dwelling in the daytime or entry without breaking in the nighttime
G.L. c. 266, § 19	Breaking and entering a railroad car
G.L. c. 266, § 28	Theft or concealment of a motor vehicle or trailer; or operating without the owner's consent after revocation of license
G.L. c. 266, § 30 (5)	Larceny[13]
G.L. c. 266, § 49	Making, possession, or use of burglarious instruments
G.L. c. 266, § 127	Malicious destruction of property
G.L. c. 267, §§1, 5	Forgery and uttering.
G.L. c. 268, § 13B	Intimidation of a witness[14]
G.L. c. 268, §16	Escape or attempt to escape from a penal institution.
G.L. c. 273, § 1	Abandonment and nonsupport; failure to comply with support order[15]
G.L. c. 273, § 15	Child support[16]

3. All offenses that carry no state prison sentence: misdemeanors[17] (except libel) and violations of local ordinances, bylaws, orders, rules, and regulations. The

[10] St. 1994, c. 24, § 5, effective July 1, 1994.

[11] St. 1995, c. 297, § 3, approved Dec. 18, 1995.

[12] St. 1996, c. 450, § 244, approved, with emergency preamble, Dec. 27, 1996.

[13] St. 1995, c. 297, § 2, approved Dec. 18, 1995.

[14] St. 1996, c. 393, § 1, approved Sept. 26, 1996, effective Dec. 25, 1996.

[15] St. 1995, c. 5, § 90, approved Feb. 10, 1995.

[16] St. 1995, c. 5, § 90, approved Feb. 10, 1995.

S.J.C. has also clarified that District Court judges have jurisdiction under G.L. c. 209A, § 3 to entertain requests for permanent abuse prevention orders.[17.5]

§ 1.3 COURT ELECTION BETWEEN TRIAL AND PROBABLE-CAUSE HEARING

If the offense is beyond its final jurisdiction, the district court is limited to conducting a probable-cause hearing to determine whether the defendant "appears to be guilty". [18] If the defendant appears to be guilty, the defendant *must* be bound over to superior court for trial.[18.5] The requirement of jurisdiction may not be waived;[19]however, it may be possible to obtain a reduction of the crime charged to one within the district court's jurisdiction (*see infra* § 1.5).

If the offense is within the concurrent final jurisdiction of the district court, it has two options: It may decline jurisdiction, limiting its role to conducting a probable-cause hearing, or it may accept jurisdiction and hold a trial on the merits.[19] This

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[17] G.L. c. 274, § 1, defines a felony as any crime punishable by death or incarceration in a state prison. Misdemeanors are all other crimes. *See also* Commonwealth v. Hill 57 Mass. App. Ct. 240, 248 (2003) (crimes punishable in state prison are felonies); Commonwealth v. Barsell, 424 Mass. 737, 742 (1997) (misdemeanors are not punishable by incarceration in state prison). Although a district court is not empowered to sentence to state prison, a statute carrying such a sentence remains a felony even though the district court takes jurisdiction. Commonwealth v. Sheeran, 370 Mass. 82, 88 (1976).

[17.5] Caplan v. Donovan, 450 Mass. 463 (2008); Crenshaw v. Macklin, 430 Mass. 633 (2000). *See infra* ch. 50.

[18] G.L. c. 218, § 30; G.L. c. 276, § 38; Mass. R. Crim. P. 3(f); Mass. District/Municipal Court Crim. R. 4(f): Pretrial Hearing. *See* Eagle-Tribune Pub. Co. v. Clerk-Magistrate, 448 Mass. 647, 654 n. 16 (2007) *citing* Myers v. Commonwealth 363 Mass. 843 (1973) (standard for a probable cause hearing is similar to motion for required finding of not guilty standard where judge must view the case as if it were a trial and he were required to rule on whether there is enough credible evidence to send the case to the jury).; Commonwealth v. Reese, 438 Mass. 519, 522 (2003) (bind-over hearing requires some assessment of credibility and is a more stringent standard than probable cause to arrest used at ex-parte grand jury proceedings); Commonwealth v. Blanchette, 54 Mass. App. Ct. 165 (2002) (the primary function of the District Court bind-over hearing is to screen out at an early but critical stage those cases that should not go to trial, thereby sparing individuals from being held and unjustifiably prosecuted).

[18.5] G.L. c. 218, § 30; Mass. R. Crim. P. 3(f).

[19] G.L. c. 277, § 47A. *See also* Commonwealth v. Wilson, 72 Mass. App. Ct. 416 (2008) (a jurisdictional defect may be raised at any time and is not waived by a defendant's guilty plea).

[19] G.L. c. 218, § 30;G.L. c. 276, § 38;Mass. R. Crim. P. 3(f). *See* Commonwealth v. Heiser 56 Mass. App. Ct. 917 (2002) (reversible error where district court judge determined defendant would be tried in Superior Court without "unambiguous declination of charges within District Court's final jurisdiction"); Commonwealth v. Clemmons, 370 Mass. 288, 291 (1976) (election in advance); Corey v. Commonwealth, 364 Mass. 137 (1973) (applying *Myers* safeguards and requiring

decision may be made after discussion with counsel,[20] sometimes including recital of inadmissible evidence that may lead to subsequent recusal rights.[21] It often happens that a district court judge will initially decline jurisdiction or explicitly reserve decision but at the close of the prosecution's probable-cause case accept jurisdiction with the defendant's consent.[22] The court must exercise its discretion in deciding whether a concurrent jurisdiction offense should be a trial or a probable cause hearing and cannot simply defer to the prosecutor's wishes.[23]

Because defense strategy is so different depending on which option is exercised, the hearing will be deemed a trial unless the court specifically announces in advance that it is declining jurisdiction.[24] Therefore, defense counsel should not ask the

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court election in advance); Commonwealth v. Rice, 216 Mass. 480, 481 (1914) (decline of jurisdiction is discretionary).

[20] "[I]nformal discussion . . . limited to those circumstances of the case necessary to aid in making a decision" is advised in Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 1.03 (District Court Administrative Office, Nov. 1981).

[21] Corey v. Commonwealth, 364 Mass. 137, 141 n.7 (1973). *Corey* states that where the judge has decided to retain jurisdiction following discussion with counsel of facts which are inadmissible and prejudicial at trial, the defendant has a right to be tried by another judge. For example, frequently the judge will inquire into defendant's prior criminal record, which is relevant to the decline determination but inadmissible and prejudicial at trial.

[22] *See, e.g.,* Commonwealth v. Friend, 393 Mass. 120 (1984). *But see* Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 1:03 (District Court Administrative Office, Nov. 1981), requiring a judge to elect whether to accept or decline jurisdiction *prior* to taking evidence. The decline or acceptance of jurisdiction is decided by the judge, not the prosecutor. Commonwealth v. DeFuria, 400 Mass. 485, 488 (1987); Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 78–79 (1983).

[23] This was the holding of a superior court case dismissing indictments that followed a probable-cause hearing held because the judge did not exercise his judgment but deferred to the prosecutor. Commonwealth v. Lussier, Sup. Ct. No. 92-1970-001-003 (Memorandum and Order of 5/24/1993, Neel, J.) (citing Commonwealth v. DeFuria, 400 Mass. 485, 489 (1987); Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 79 (1983); Corey v. Commonwealth, 364 Mass. 137, 143 n.9 (1973)).

[24] Commonwealth v. Mesrobian, 10 Mass. App. Ct. 355, 356–58 (1980) (unless concurrent jurisdiction is declined "unambiguously" before hearing, it is a trial and jeopardy attaches). *See also* Commonwealth v. Graham, 388 Mass. 115 (1983); Commonwealth v. Maloney, 385 Mass. 87, 89–90 (1982); Commonwealth v. Crosby, 6 Mass. App. Ct. 679 (1978); Commonwealth v. Clemmons, 370 Mass. 288 (1976); Corey v. Commonwealth, 364 Mass. 137 (1973); *cf.* Commonwealth v. DeFuria, 400 Mass. 485, 487 (1987) (admission and prosecutor's recital of facts followed by judge's decision to decline jurisdiction did not constitute trial because no witness sworn); Commonwealth v. Friend, 393 Mass. 120 (1984) (where defendant is on notice that court is considering declining jurisdiction, no permissible inference that trial has commenced).

Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 1.03 (District Court Administrative Office, Nov. 1981), requires the court to "announce its decision, if it intends to conduct a probable cause hearing, before taking any

court whether the hearing is for trial or bind-over but should proceed with trial — which will bar subsequent bind-over as "double jeopardy."[25.5]

Unless the defendant is charged with an extremely serious crime, faces companion charges outside the district court's jurisdiction,[25] or is a multiple recidivist, ordinarily the district court will exercise jurisdiction and hold trial on offenses within its jurisdiction without hearing argument on the issue. Where the court does decline jurisdiction, however, some attorneys favor requesting a statement of reasons on the record, since arbitrary denial of jurisdiction is error.[26]

§ 1.4 BENEFITS OF THE DISTRICT COURT EXERCISING JURISDICTION

Except in rare instances,[27] defense counsel should seek to have the district court exercise its jurisdiction over the case. If the case is tried in district court rather than superior court:

1. For cases originating after January 1, 1994, the defendant has the benefit of greater mandatory discovery, and the right to offer a plea contingent on the court's acceptance of her own dispositional request, in district court. For pre-1994 cases, the defendant has the benefit of the "two-trial system" in district court (*see infra* ch. 3).

2. The potential sentence is greatly reduced. The district court can sentence the defendant to jail or the house of correction but may not sentence to state prison.[28] The maximum jail/house sentence — and therefore district court sentence — is two and

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evidence." The rule applies only to concurrent jurisdiction cases, because otherwise the hearing can only be a probable-cause hearing. Commonwealth v. Gonzales, 388 Mass. 865, 869 n.8 (1983).

[25.5] Jeopardy attaches in a jury-waived trial when a judge hears testimony; subsequent indictment or bind-over is barred. Commonwealth v. Love, 452 Mass. 498, 499 (2008).

[25] Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 77 (1983) ("inappropriate" but within discretion to hold probable-cause hearing on one complaint and trial on companion complaint).

[26] Commonwealth v. Rice, 216 Mass. 480 (1914). *Cf*. Commonwealth v. Zannino, 17 Mass. App. Ct. 73 (1983) (retaining jurisdiction cannot be arbitrary).

[27] Such rare instances might be, for example, where sentencing is not at issue and the advantage of a 12-person jury seems important; or where the district court judge and prosecutor will not give the defendant a fair shake; or where immunity is needed for a key defense witness to testify because district court judges cannot grant immunity to a witness. G.L. c. 233, § 20E; Commonwealth v. Russ, 433 Mass. 515, 517 (2001)

[28] G.L. c. 218, § 27; Mass. Const. Declaration of Rights art. 12, as interpreted in Brown v. Commissioner of Correction, 394 Mass. 89 (1985), Jones v. Robbins, 74 Mass. (8 Gray) 329, 342–50 (1857) (constitutional prerequisite to a state prison sentence is grand jury indictment), and Commonwealth v. Spencer, 53 Mass. App. Ct. 45 (2001). The district court may sentence to Concord or Framingham Reformatories, but the length of sentence cannot exceed two and one-half years. Commonwealth v. Graham, 388 Mass. 115 (1983).

one-half years.[29] For example, distribution of a class B drug is a felony punishable by 2 ½ years in the house of correction or up to 10 years in state prison; therefore retention of jurisdiction by the district court will reduce the defendant's potential incarceration by seven and one half years.[30.5] Even where the defendant is likely to receive a short sentence, the difference in sentencing range may predispose the district court toward more lenient sentences.

3. A decline of jurisdiction will delay the entire process, leaving some defendants with a much longer period of anxiety, uncertainty, and possible pretrial incarceration.

4. Trial serves as a double-jeopardy bar;[30] a finding of "no probable cause" does not bar subsequent indictment,[31] or even another probable cause hearing in some circumstances.[32]

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[29] G.L. c. 279, § 23 (male convicts). Of course, multiple counts may be punished consecutively. *See also* Commonwealth v. Leavey, 60 Mass. App. Ct. 249, 252 (2004) (sentence of two and one-half years in the house of correction upon defendant's felony conviction was maximum penalty within District Court's sentencing authority).

[30.5] G.L. c. 94C, § 32A(a) (manufacture, distribution or possession with intent to distribute class B drug). G.L. c. 94C, §32A(a) is the most frequently occurring drug charge in both the district and superior courts (21.8% and 67.6% of all drug offenses respectively). "Survey of Sentencing Practices" Mass. Sentencing Comm'n Page 27-28.

[30] *See infra* ch. 21. Reduction and trial on a *lesser included offense* bars indictment on the greater offense, even though it was beyond the district court's jurisdiction, on double jeopardy grounds. Commonwealth v. Norman, 27 Mass. App. 82, *aff'd*, 406 Mass. 1001 (1989); *see also* Commonwealth v. Gonzales, 388 Mass. 865, 869, 870 n.9 (1983) (noting but not resolving defense claim of double jeopardy). This overturned previous case law, which held that reduction to a lesser included was functionally equivalent to a "no probable cause" finding, and thus no bar to indictment on a greater offense beyond the district court's jurisdiction. *See* Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 76 n.3 (1983); Commonwealth v. Nazzaro, 7 Mass. App. Ct. 846 (1979) (rescript); Commonwealth v. Lovett, 374 Mass. 394, 399 (1978) (if district court does not have jurisdiction, jeopardy does not attach); Commonwealth v. Mahoney, 331 Mass. 510 (1954); Commonwealth v. McCan, 277 Mass. 199 (1931). *But see* Commonwealth v. Rabb, 431 Mass. 123 (2000) (prior guilty plea in District Court to possession was not a double jeopardy bar to prosecution in Superior Court for intent to distribute because possessions were sufficiently differentiated by location and purpose).

[31] Commonwealth v. Dale, 431 Mass. 757 (2000); Burke v. Commonwealth, 373 Mass. 157, 159–161 (1977); Lataille v. District Court, 366 Mass. 525, 530 n.5 (1974); Myers v. Commonwealth, 363 Mass. 843, 857 n.16 (1973); Commonwealth v. Britt, 362 Mass. 325, 330 (1972); Commonwealth v. Mahoney, 331 Mass. 510, 511–512 (1954). *See also* Commonwealth v. Allain, 36 Mass. App. Ct. 595 (1994) (judge's order of suppression of evidence and concomitant finding of no probable cause does not bar subsequent indictment); Carrington v. Commonwealth, 455 Mass. 1014, 1015 (2009) (where defendant was held on bail and Commonwealth failed to hold a probable cause hearing, the conduct not egregious enough to warrant dismissal of later indictment, but in other circumstances might warrant dismissal); Commonwealth v. Love, 452 Mass. 498 (2008) (indictments dismissed because jeopardy attached when district court heard testimony for suppression motion and for trial simultaneously)

§ 1.5 REDUCING THE CHARGE TO PERMIT DISTRICT COURT DISPOSITION

As indicated above, defense counsel should almost always seek a district court trial rather than a probable-cause hearing. Therefore when the offense charged is beyond the district court's jurisdiction, counsel must attempt to reduce the offense to a lesser included crime within the district court's jurisdiction. This usually is accomplished in one of two ways. First, defense counsel may bargain with the prosecutor, offering an admission to a lesser included offense in return for the prosecutor's motion to dismiss that part of the complaint that makes out the greater crime. Second, the court before but usually after the probable-cause hearing may determine that the case is more appropriate for district court disposition; with or without prodding from defense counsel, the judge would then seek the agreement of both parties[33] to reduce the offense and dispose of it in district court. This latter course is also effectively a plea bargain, for the court will usually require the defendant to admit to the lesser charge and accept disposition.[34]

If reduction is a realistic goal, counsel might not use the probable-cause hearing for discovery but instead execute a "tight" case, keeping out prejudicial inadmissible

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[32] A second probable-cause hearing may be held on receipt of additional evidence if not harassive. Juvenile v. Commonwealth, 375 Mass. 104, 107 (1978); In re Maldonado, 364 Mass. 359, 363 (1978); Burke v. Commonwealth, 373 Mass. 157, 161 (1977). *See also* Commonwealth v. Gallarelli, 372 Mass. 573, 578–79 (1977) (bar on harassive successive prosecutions).

[33] The agreement of the prosecutor may be necessary unless the court finds "no probable cause" on the greater offense. In Commonwealth v. Gordon, 410 Mass. 498 (1991), the S.J.C. held that the separation of powers provision of art. 30 of the state constitution forbids a judge from accepting plea to lesser included offense in the absence of a "legal basis" or the prosecutor's consent. This decided an issue noted earlier in Commonwealth v. Nessolini, 19 Mass. App. Ct. 1016, 1017 (1985) (rescript). Note, however, that agreement of the prosecutor is *not* required to hold trial on a concurrent jurisdiction offense because that decision must be made in the judge's discretion. *See supra* note 24.

In the past, prior prosecutorial agreement was also required to eliminate the risk of recharging after a "no probable cause" finding, since it was held that jeopardy did not attach to an offense beyond the court's jurisdiction. However, Massachusetts courts have held that trial on a lesser included offense precludes subsequent charging of the greater offense as a violation of double jeopardy, even though the first court was without jurisdiction to try the greater offense. Commonwealth v. Norman, 27 Mass. App. 82, *aff'd*, 406 Mass. 1001 (1989); *see also* Commonwealth v. Gonzales, 388 Mass. 865, 869, 870 n.9 (1983) (noting but not resolving defense claim of double jeopardy).

[34] Where the greater charge was unwarranted, it is obviously unfair to require the defendant to choose between being bound over to superior court or waiving his right to trial in return for reduction to the proper charge. Counsel should press for a finding of no probable cause or for the court to dismiss the greater charge and permit trial on the lesser included.

Such "overcharging" by the prosecutor is unethical under Mass. R. Prof. C. 3.8(a), S.J.C. Rule 3:07, and ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d. ed., (1993), Standard 3-3.9(a).

evidence and emphasizing mitigating factors. At the close of the hearing, counsel might ask to approach the bench where he would seek to persuade the court that reduction is appropriate. Apart from failure of the evidence to sustain the charged offense, points that the court might consider persuasive include (1) the expressed willingness of the defendant to admit to the lesser charge coupled with the agreement or lack of objection to reduction by the prosecution, police, and/or complainant; (2) the inappropriateness of a state prison sentence months down the line and/or the immediate availability of a district court sentence or program; (3) mitigating factors that make the case less egregious than the average circumstances for such a charge or that indicate that the events were an aberration for the defendant; and (4) weaknesses in the Commonwealth's ability to prove its case before a superior court jury or to obtain the cooperation of its witnesses far into the future.

Counsel will be in the best position to decide whether to try the probable-cause hearing for reduction only if she walks into court knowing what lesser included offense she seeks, the defendant's attitude to an admission and agreed disposition, and (through discussion with the prosecutor) whether — and how vigorously — the Commonwealth will fight any reduction proposed by counsel or the judge.