

CHAPTER 23

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Speedy Trial and Related Issues

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Rules and principles governing when a defendant must be charged and brought to trial in Massachusetts are grounded in many sources: the United States Constitution, the Massachusetts Declaration of Rights, the Massachusetts Rules of Criminal Procedure, statutes of limitations, and other state statutory provisions. Constraints on delays between the lodging of a criminal charge and the commencement of trial are controlled by speedy trial safeguards. The principles of law governing the time period between the occurrence of an offense and the filing of criminal charges are related to speedy trial considerations but are analyzed separately.

§ 23.1 PRECHARGE DELAY: STATUTORY AND CONSTITUTIONAL PROTECTION

When criminal charges are initially brought months or years after an alleged offense, the hardship imposed on the defendant can be considerable. Beyond inconvenience and anxiety, the defendant may suffer the loss of evidence important to the defense case. The erosion of significant evidence is even more likely to occur when delays precede rather than follow accusation: without notice of a criminal charge or perhaps even an arrest, defendants may have no reason to preserve sources of evidence that can weaken or vanish with age. As Justice Douglas wrote in his concurring opinion in *United States v. Marion*:

The impairment of the ability to defend oneself may become acute because of delays at the pre-indictment stage. Those delays may result in loss of alibi witnesses, the destruction of material evidence and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.¹

This impaired ability to defend oneself against criminal charges is the most severe form prejudice can take, because it “skews the fairness of the entire system.”²

§ 23.1A. STATUTES OF LIMITATIONS

The traditional protection against hardship resulting from protracted delay in charging is the statute of limitations. The purpose of statutes of limitations is to limit

¹ *United States v. Marion*, 404 U.S. 307, 331 (1971) (Douglas, J., concurring).

² *Barker v. Wingo*, 407 U.S. 514, 532 (1972). *See also* *Commonwealth v. Lutoff*, 14 Mass. App. Ct. 434, 443 (1982).

exposure to criminal prosecution to a fixed period following allegedly criminal acts.³ This avoids the problem of having to defend oneself against charges that involve incidents long obscured by time and encourages officials to commence prosecutions with reasonable dispatch. The U.S. Supreme Court has indicated that criminal statutes of limitation should be liberally construed in the defendant's favor.⁴

G.L. c. 277, § 63, establishes the limitations periods for criminal prosecutions. Various serious felonies, specifically listed, must be charged within ten years⁵ or fifteen years⁶ of the commission of the alleged crime. Most other offenses must be charged within six years of their commission; exceptions include murder (no statute of limitation⁷); specified sexual offenses against children or mentally retarded persons (no limitation, but complaints or indictments filed more than 27 years after the alleged date of commission must be supported by admissible independent evidence corroborating victim's allegation⁸); gaming offenses (eighteen months);⁹ consumer protection

³ See *Toussie v. United States*, 397 U.S. 112 (1970)

⁴ *United States v. Habig*, 390 U.S. 222, 227 (1968). *But see* *Commonwealth v. George*, 430 Mass. 276, 279-280 (1999) (criminal limitations statutes are to be construed liberally in favor of repose, but are not penal statutes subject to strict construction against the Commonwealth).

⁵ The specifically listed crimes are commission of, conspiracy to commit, or accessory in the commission of:

- (1) G.L. c. 265, § 17 (armed robbery)
- (2) G.L. c. 265, § 18 (assault with intent to rob or murder; dangerous weapon; victim 60 or older)
- (3) G.L. c. 265, § 19 (robbery by unarmed person, victim 60 or older)
- (4) G.L. c. 265, § 21 (stealing by confining or putting in fear)
- (5) G.L. c. 272, § 17 (incestuous marriage or intercourse)

⁶ G.L. c. 277, § 63 was amended by Stat. 1996, § 26, effective May 23, 1996. The limitations period was changed from 10 to 15 years for the following offenses, or conspiracy or indictment as an accessory:

- (1) G.L. c. 265, § 22 (rape)
- (2) G.L. c. 265, § 24 (assault with intent to commit rape)

⁷ However, the crime of conspiracy to commit murder, as opposed to the substantive offense of murder, falls within the six-year "catchall" statute of limitations period of G.L. c. 277, § 63. See *Commonwealth v. McLaughlin*, 431 Mass. 241, 249-250 (2000).

⁸ G.L. c. 277, §63. The specified offenses are:

- (1) G.L. c. 265 § 13B [indecent assault on a child under 14]
- (2) G.L. c. 265 § 13B1/2 [indecent assault on a child under 14 during commission of certain offenses or by mandated reporters]
- (3) G.L. c. 265 § 13B3/4 [indecent assault on a child under 14 by certain previously convicted offenders]
- (4) G.L. c. 265 § 13F [indecent assault on a mentally retarded person]
- (5) G.L. c. 265 § 13L [wanton or reckless behavior creating a risk of serious bodily injury or sexual abuse to a child]
- (6) G.L. c. 265 § 22A [rape of a child by the use of force]
- (7) G.L. c. 265 § 22B [rape of a child by the use of force during commission of certain offenses]

offenses (four years);¹⁰ and certain blue laws (six months).¹¹ The statute of limitations period begins to run when every element in the statutory definition of an offense has occurred. It does not begin to run on a continuing offense (such as conspiracy or being an accessory) until that offense ends,¹² but a crime will not be considered “continuing” unless the legislature has clearly so indicated.¹³ For certain offenses, however, G.L. c. 277, § 63, provides that the limitation period will not commence until the victim has reached age sixteen or the violation is reported to a law enforcement agency, whichever occurs earlier. Additionally, the limitations period is tolled for any time “during which the defendant is not usually and publicly a resident” within the Commonwealth.¹⁴ An application for a complaint is not the beginning of a case for purposes of a statute of limitations.¹⁵ Nor will the mere issuance of a citation for a criminal motor charge toll the statute of limitations.¹⁶

An amendment increasing the period permitted by a statute of limitations cannot revive an offense that has already been time barred.¹⁷ However, an extension that becomes effective while the offense may still be prosecuted does apply to that crime and is not an unconstitutional *ex post facto* law.¹⁸

(8) G.L. c. 265 § 22C [rape of a child by the use of force by certain previously convicted offenders]

(9) G.L. c. 265 § 23 [rape and abuse of a child]

(10) G.L. c. 265 § 23A [rape and abuse of a child aggravated by age difference between defendant and victim or by when committed by mandated reporters]

(11) G.L. c. 265 § 23B [rape and abuse of a child by certain previously convicted offenders]

(12) G.L. c. 265 § 24B [assault on a child under 16 with intent to rape]

⁹ G.L. c. 271, § 1.

¹⁰ G.L. c. 260, § 5A.

¹¹ G.L. c. 136, § 9.

¹² *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 362 (1971), *cert. denied*, 407 U.S. 914 (1972).

¹³ *Commonwealth v. Ciesla*, 380 Mass. 346, 348 (1980).

¹⁴ *Commonwealth v. George*, 430 Mass. 276, 277-278 (1999); *Couture v. Commonwealth*, 338 Mass. 31, 34 (1958); G.L. c. 277, § 63. For those offenses in which the limitations period does not commence until the victim turns 16 or the violation is reported to law enforcement, any asserted tolling based on defendant’s absence from the Commonwealth must depend on evidence concerning defendant’s whereabouts after the limitations period commences. *See Commonwealth v. Shanley*, 455 Mass. 752, 780 (2010) (error to instruct the jury that it could consider evidence which included defendant’s absence prior to the commencement of limitations in deciding whether defendant was not a usual and public resident of the Commonwealth during the limitations period).

¹⁵ *Commonwealth v. Vitale*, 44 Mass. App. Ct. 908, 909 (1997) (upholding dismissal of a complaint for possession of female egg-bearing lobsters in violation of G.L. c. 130, § 41).

¹⁶ *Commonwealth v. Valchius*, 40 Mass. App. Ct. 556 (1996). The *Valchius* court also held that the crime of leaving the scene of an accident is not “a continuing offense.”

¹⁷ *Commonwealth v. Rocheleau*, 404 Mass. 129 (1989); *Commonwealth v. Cogswell*, 31 Mass. App. Ct. 691 (1991).

¹⁸ *Commonwealth v. Barger*, 402 Mass. 589 (1988). *See also Commonwealth v. George*, 430 Mass. 276, 278-280 (1999).

Waiver: Under federal law the defendant may expressly waive the statute of limitations defense; furthermore, the defense is implicitly waived if not raised at or before trial.¹⁹ The Supreme Judicial Court has similarly held that a failure to raise the statute of limitations by the defendant will serve as a waiver of the affirmative defense, and furthermore there is no requirement that a judge, *sua sponte*, instruct the jury on the issue.²⁰ However, a defendant may receive relief from her counsel's failure to invoke an applicable statute of limitations by advancing a claim of "ineffective assistance of counsel" on appeal,²¹ or by pressing on appeal a claim of error in the denial of a motion for required finding of not guilty, where the Commonwealth's evidence at trial was insufficient to show that the indictment was not time-barred.²²

Delayed citations: A special statute applies to Ch. 90 traffic citations, requiring that a copy of the citation be given to the violator at the time and place of violation, and that in criminal or "mixed" cases a copy be delivered to the court within four business days of the violation. Failure to do so "constitutes a defense" except in circumstances specified in the statute.²³

¹⁹ *United States v. Wild*, 551 F.2d 418, 424–25 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 916 (1977).

²⁰ *Commonwealth v. Purinton*, 32 Mass. App. Ct. 640, 647 (1992). *See also* *Commonwealth v. Stenberg*, 404 Mass. 602, 606 (1989).

²¹ *Commonwealth v. Barrett*, 418 Mass. 788, 791-793 (1994).

²² *Commonwealth v. Cogswell*, 31 Mass. App. Ct. 691, 694-695 (1991), *rev. denied*, 411 Mass. 1106 (1992).

²³ G.L. c. 90C, § 2. *See* *Commonwealth v. Carpellucci*, 429 Mass. 579, 580-582 (1999). In *Commonwealth v. Cameron*, 34 Mass. App. Ct. 44 (1993), the Appeals Court had upheld a dismissal of a complaint due to a violation of G.L. c. 90C, § 2. On further review, however, the S.J.C. reversed the Appeals Court and excused a delay in the issuance of a citation because there was an obvious, life-threatening injury in the case, no purpose of G.L. c. 90, § 2 was seen by the Court to be thwarted, and the police were "not seriously deficient or negligent in their handling of the matter." *Commonwealth v. Cameron*, 416 Mass. 314, 317 (1993). *See also* *Commonwealth v. Rovario*, 32 Mass. App. Ct. 956 (1992) (reversed; prejudice not required for dismissal); *Commonwealth v. Nadworny*, 30 Mass. App. Ct. 912 (1991); *Commonwealth v. Ryan*, 22 Mass. App. Ct. 970, 971–72 (1986) (defendant need not show prejudice); *Commonwealth v. Perry*, 15 Mass. App. Ct. 281, 283 (1983); *Commonwealth v. Drew*, 11 Mass. App. Ct. 517, 521–22 (1981) (defendant must submit sufficient evidence to place defense in issue); *Commonwealth v. Pappas*, 384 Mass. 428, 431 (1981) (traffic citations uniquely subject to manipulation, which § 2 defense intended to eliminate); *Commonwealth v. Clinton*, 374 Mass. 719 (1978).

Exceptions to the statutory dismissal sanction include cases in which: the offense is vehicular homicide or death results from the violation, *see* *Commonwealth v. Nadworny*, 30 Mass. App. Ct. 912, 914 (1991); the violator could not be stopped, or additional time was "reasonably necessary to determine the nature of the violation or the identity of the violator," G.L. c. 90C, § 2, and *Commonwealth v. Ryan*, 22 Mass. App. Ct. 970, 971 (1986), although the complaint should be dismissed if important features of c. 90C, § 2, are "flouted through sloth or sheer inattention of the police." *Commonwealth v. Barbuto*, 22 Mass. App. Ct. 941, 942 (1986).

Failure to provide a citation has also been excused where the defendant was arrested for the motor vehicle violation; where the defendant or his condition frustrated delivery; where necessary investigation occasioned delay; or where the circumstances made it clear that the statute's purpose had not been frustrated. *Commonwealth v. Kenney*, 55 Mass. App. Ct. 514, 519-20 (2002) (failure to issue citation for serious motor-vehicle offenses excused where severity of the underlying incident put defendant on notice of the likelihood of charges); *Commonwealth v. Ryan*, 22 Mass. App. Ct. 970, 971 (1986). *See* *Commonwealth v. Barbuto*, 22

§ 23.1B. CONSTITUTIONAL PROTECTIONS

The Supreme Court has indicated that although the Sixth Amendment's speedy trial clause does not apply to pre-accusation delay, the due process clauses of the Fifth and Fourteenth Amendments to the federal Constitution do establish limits.²⁴ If charges are brought within the limitations period but long after the offense, defendants may make out due process violations under the federal constitution or article 12 of the Massachusetts Constitution Declaration of Rights by demonstrating that (1) the delay substantially prejudiced the defense²⁵ and (2) it was intentionally or recklessly caused by the Commonwealth.²⁶ If a defendant can establish both prongs of this test, the appropriate remedy is dismissal of the charges.²⁷

Defense counsel who file motions to dismiss for precharge delay should bear in mind the difficulties of establishing actual prejudice. Despite heroic efforts, they may not be able to learn precisely what evidence has been lost over time.²⁸ Nor may they be able to establish that but for the delay, the evidence would have been both available and

Mass. App. Ct. 941 (1986) (174-day delay in issuing citation justified when time was necessary to identify violator). The Commonwealth has the burden of establishing that one of these exceptions existed. *See* Commonwealth v. Barbuto, 22 Mass. App. Ct. 941, 942 (1986) (citing Commonwealth v. Mullins, 367 Mass. 733, 734–35 (1975)). *See also* Commonwealth v. Steadward, 43 Mass. App. Ct. 271 (1997) (where complaints are issued on an application made by a citation for a criminal motor vehicle violation pursuant to G.L. c. 90C, §§ 2 and 3(B)(1) and (2), proceedings on identical complaints issued on an application made under § 4 are barred).

²⁴ United States v. Marion, 404 U.S. 307 (1971). *See* Burton v. Commonwealth, 432 Mass. 1008, 1009 (2000).

²⁵ The prejudice must be to the defendant's ability to mount a defense. Commonwealth v. George, 430 Mass. 276, 281-282 (1999) (loss of certain evidence did not constitute actual prejudice, let alone "severe" prejudice which is a prerequisite for dismissal of the indictment); Commonwealth v. Ridge, 455 Mass. 307, 332-33 (2009) (delay of 15 years did not prejudice defendant in defense of murder charge and thus did not warrant dismissal of indictment); Commonwealth v. Imbruglia, 377 Mass. 682 (1979) (dismissal not warranted by defendant's alleged loss of opportunity to receive a state sentence concurrent with a federal sentence). In the criminal motor vehicle violation context, however, the defendant does not have to show prejudice to successfully challenge a precharge delay in issuing and delivering a citation. *See supra* note 23.

²⁶ Commonwealth v. Ridge, 455 Mass. 307, 332-333 (2009) (15 year delay between charged murders and indictments caused by prosecutor's awaiting cooperation of essential witness); Commonwealth v. Richardson, 49 Mass. App. Ct. 82, 84-85 (2000) (six-year delay between alleged crime and date of indictment was not attributable in any way to dilatory tactics on part of Commonwealth); Commonwealth v. McColgan, 31 Mass. App. Ct. 932, 933 (1991) (rescript opinion) (10-year delay was result of defendant's decision to flee, not any intentional or reckless conduct on part of Commonwealth); Commonwealth v. Patten, 401 Mass. 20 (1987) (ten-year preindictment delay not chargeable to Commonwealth, which did not uncover evidence incriminating defendant until that period had elapsed); Commonwealth v. Ward, 14 Mass. App. Ct. 37 (1982); Commonwealth v. Geoghegan, 12 Mass. App. Ct. 575 (1981); Commonwealth v. Wilson, 12 Mass. App. Ct. 942 (1981); Commonwealth v. Best, 381 Mass. 472 (1980); Commonwealth v. Imbruglia, 377 Mass. 682 (1979).

²⁷ *See* Burton v. Commonwealth, 432 Mass. 1008, 1009 (2000).

²⁸ *See* Commonwealth v. Look, 379 Mass. 893, cert. denied, 449 U.S. 827 (1980) (recognizing that testimony that is forgotten may not be able to be shown).

exculpatory.²⁹ Even if a non-speculative showing of actual prejudice is made, the cases establish a quantitative burden of “substantial” prejudice.³⁰ In order to make the best possible showing in litigating a motion to dismiss for precharge delay, counsel should detail all efforts to find the witnesses and evidence that have been lost by virtue of delay and report what the evidence would likely have indicated.

In addition to prejudice, the defendant must demonstrate the prosecution's intentional delay to gain a tactical advantage, or its reckless disregard of known risks to the defendant-to-be's ability to prepare a defense, before dismissal will be warranted.³¹ Multiple-year periods of precharge delay have been excused by appellate courts where the reasons for delay were viewed as unobjectionable. Such reasons include the prosecution's lack of knowledge about the crime itself,³² its inability to locate a defendant who has fled,³³ its inability to secure the testimony of an essential witness,³⁴ or its need for time to investigate a complex case.³⁵

²⁹ See *Commonwealth v. Patten*, 401 Mass. 20 (1987) (dismissal improper where missing evidence was as likely to be inculpatory as exculpatory); *Commonwealth v. Best*, 381 Mass. 472 (1980) (dismissal improper where testimony of unavailable witnesses not likely to have been helpful); *Commonwealth v. Imbruglia*, 377 Mass. 682 (1979) (dismissal improper where no showing that absence of witness was due to delay or that testimony would have been exculpatory); *Commonwealth v. Horan*, 360 Mass. 739 (1972) (dismissal improper where no showing that deceased witnesses would have been helpful).

³⁰ See *United States v. McCoy*, 977 F.2d 706 (1992); *Commonwealth v. Wilson*, 12 Mass. App. Ct. 942 (1981) (prejudice insufficient although defendant was unable to remember names of potential witnesses or where he was on the dates of offenses); *Commonwealth v. Best*, 381 Mass. 472 (1980) (prejudice insufficient where defendant's memory had dimmed); *Commonwealth v. Imbruglia*, 377 Mass. 682 (1979) (same).

³¹ *Commonwealth v. Patten*, 401 Mass. 20 (1987); *Commonwealth v. Geoghegan*, 12 Mass. App. Ct. 575 (1981); *Commonwealth v. Imbruglia*, 377 Mass. 682 (1979); *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Lovasco*, 431 U.S. 783, *rehearing denied*, 434 U.S. 881 (1977).

³² *Commonwealth v. Patten*, 401 Mass. 20 (1987) (more than 10 years of delay was excusable where defendant charged with murder promptly after his identity was revealed by another participant); *Commonwealth v. Ward*, 14 Mass. App. Ct. 37 (1982) (five-year delay was excusable where Commonwealth had received certain information four years after the crime); *Commonwealth v. Imbruglia*, 377 Mass. 682 (1979) (two-year delay was excusable due to prosecutor's lack of knowledge of defendant's criminal activities and prompt charging once evidence obtained); *Commonwealth v. Canon*, 373 Mass. 494, *cert. denied*, 435 U.S. 933 (1977) (six-year delay was excusable due to secrecy of venture investigated).

³³ *Commonwealth v. McColgan*, 31 Mass. App. Ct. 932 (1991) (rescript opinion).

³⁴ *Commonwealth v. Ridge*, 455 Mass. 307, 332 (2009).

³⁵ *Commonwealth v. Lanigan*, 419 Mass. 15 (1994) (no constitutional violation where 53-month span between arraignment and trial was attributable to DNA testing and appeals, the Commonwealth was not culpable, defendant agreed to various continuances and sought others, and defendant suffered no prejudice); *Commonwealth v. Best*, 381 Mass. 472 (1980) (three-year and eight-month delay justified by complexity of investigation); *United States v. Lovasco*, 431 U.S. 783, *rehearing denied*, 434 U.S. 881 (1977) (more than 18-month delay justified by good-faith investigation, although investigation produced little after the first month); *Commonwealth v. Horan*, 360 Mass. 739 (1972) (31-month delay justified by complexity and length of investigation).

§ 23.2 POSTCHARGE DELAY: THE RIGHT TO A SPEEDY TRIAL

§ 23.2A. GENERALLY

In Massachusetts, the defendant's speedy trial rights derive both from the state criminal rules and from the state and federal constitutions, and ordinarily each ground should be argued.³⁶ The Sixth Amendment guarantee, which applies to state criminal proceedings,³⁷ and article 11 of the Declaration of rights require a weighing of the same four factors in deciding a constitutional speedy-trial claim: the length of delay, the reason for the delay, the resulting prejudice to the defendant, and the defendant's assertion of speedy trial rights.³⁸ Rule 36 of the Massachusetts Rules of Criminal Procedure, entitled Case Management, establishes more precise time limits, violation of which may result in dismissal.³⁹ Additionally, the rule provides for dismissals where delays short of its time limits result in defense prejudice.⁴⁰

The general framework constructed by Rule 36 is quite simple: All defendants, whether or not detained prior to trial,⁴¹ are guaranteed a trial within twelve months of

³⁶ See, e.g., *Commonwealth v. Lauria*, 411 Mass. 63, 67 & n.7 (1991) (Rule 36 is wholly separate from the constitutional right). See also *Turner v. Commonwealth*, 423 Mass. 1013 (1996) (Rule 36 is a rule of case management which is separate from the constitutional right to a speedy trial; “that right which the rule can be said to have vested . . . is the opportunity for a speedy trial; and the opportunity is not a fundamental constitutional right, or even a right created by statute).

³⁷ *Klopfer v. North Carolina*, 386 U.S. 213 (1967). The state analog is Mass. Const. Declaration of Rights art. 11. A defendant's Sixth Amendment right to speedy trial attaches when she is arraigned, but ceases to apply when the Commonwealth drops the charge. *Burton v. Commonwealth*, 432 Mass. 1008, 1008-1009 (2000); *Commonwealth v. Butler*, 79 Mass. App. Ct. 751, 755 (2011) (citing *Burton*).

³⁸ *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972); *Commonwealth v. Look*, 379 Mass. 893, 897-98 (1980) (applying the four *Barker* factors in assessing art. 11 speedy-trial claim). See also *Doggett v. United States*, 505 U.S. 647, 657-58 (1992) (given eight-and-one-half-year delay attributable to governmental negligence between indictment and arrest, defendants did not need to show particularized prejudice; presumptive prejudice increases with length of delay); *Commonwealth v. Gore*, 79 Mass. App. Ct. 745, 748-49 (2011) (12 ½ year delay attributable to governmental negligence entitled defendant to relief without showing prejudice). *But see Commonwealth v. Lattimore*, 423 Mass. 129 (1996) (due process is not violated simply because a long interval of time separated the conclusion of the appellate process from the subsequent order for a new trial; distinguishing *Doggett v. United States*, 505 U.S. 647 (1992)).

³⁹ Rule 36, which replaced G.L. c. 277, §§ 72–72A, is similar to the Federal Speedy Trial Act, 18 U.S.C. §§ 3161–74, and is based in part on the ABA Standards Relating to Speedy Trial. However, “reliance upon the reasoning of Federal cases should be undertaken with caution.” *Commonwealth v. Lauria*, 411 Mass. 63, 71 (1991).

⁴⁰ See *Commonwealth v. Sheridan*, 40 Mass. App. Ct. 700 (1996) (judge permitted to dismiss a second complaint where first complaint had been dismissed without prejudice, Commonwealth did nothing for some three months, clerk *without any hearing* issued a second complaint, but defendant's most important witness was now unavailable; judge concluded that conduct of prosecutor was “clearly unreasonably lacking in diligence,” and defendant was prejudiced).

⁴¹ This provision expands on prior speedy trial law. Repealed G.L. c. 277, §§ 72–72A, had referred only to those who had been detained prior to trial.

the return day in the court in which the case is awaiting trial.⁴² Effectively, this amounts to a guarantee of trial within twelve months of the first appearance on a complaint if the case is tried in district court, or on an indictment if the case is tried in superior court.⁴³ If a defendant is facing retrial, the twelve-month time period begins to run from the day that the judicial order granting the retrial becomes final.⁴⁴ If the twelve-month period elapses before trial or retrial commences,⁴⁵ a defendant is entitled, on motion, to dismissal of the charges.⁴⁶ This dismissal bars subsequent prosecution in any court for the same or any related offenses.⁴⁷ The placing of the defendant on a trial list does not mean that the defendant has been “brought to trial” within the meaning of rule 36.⁴⁸

Massachusetts has adopted a broad definition of what constitutes a related offense for which prosecution following speedy trial relief is barred. *Related offenses* are those “based on the same criminal conduct or episode or aris[ing] out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.”⁴⁹ Essentially, this means that any charges that could have been joined under Rule 9(a)(2) are barred from future prosecutions along with those charges actually dismissed. The breadth of this definition prevents the Commonwealth from benefiting through subsequent related charging from its failure to afford

⁴² Mass. R. Crim. P. 36(b)(1)(c). The return day is defined by Mass. R. Crim. P. 2(b)(15) as the date on which “a defendant is ordered by summons to first appear, or if under arrest, does first appear.” *See also* Commonwealth v. Mattos, 404 Mass. 672, 674 (1989) (superior court arraignment became “return day” for speedy trial purposes); Commonwealth v. Sanchez, 403 Mass. 640, 646–47 (1988) (absent prejudice or intentional misconduct, remedy for delay between indictment and arraignment is suppression of any evidence obtained because of delay).

⁴³ Counsel should remember that if a case commences by complaint in district court, but is bound over to superior court after a probable-cause hearing, or if the complaint is superseded by direct indictment, then the 12-month time limit starts over again on the return day in superior court.

⁴⁴ Mass. R. Crim. P. 36(b)(1)(D). Per an amendment to Rule 36(b)(1)(D), effective March 1, 1996, the order of an appellate court requiring a retrial is final on the issuance by the appellate court of the rescript unless the clerk of the appellate court fails to comply with Mass. R. App. P. 23, in which case retrial shall commence within one year after the date when the rescript should have issued. *Cf.* Commonwealth v. Bodden, 391 Mass. 356 (1984); Commonwealth v. Levin, 390 Mass. 857 (1984).

⁴⁵ A trial is deemed to have commenced under this rule when jeopardy attaches. Jeopardy attaches when a jury is sworn or, in a nonjury trial, when the first witness is sworn. *See* Commonwealth v. Ludwig, 370 Mass. 31, 33 (1976). If jeopardy has not attached before the 12-month limit is reached, the sanction of Rule 36 applies.

⁴⁶ Mass. R. Crim. P. 36(b)(1). Additionally, if a case has been dismissed for lack of a speedy trial but the defendant was confined for greater than six months awaiting trial, G.L. c. 277, § 73 provides a mechanism for awarding reasonable financial compensation to the defendant, as long as the pretrial delays were without his consent. *See* Commonwealth v. Bunting, 401 Mass. 687 (1988) (no compensation where defendant acquiesced in delays).

⁴⁷ Mass. R. Crim. P. 36(e). This subsection was intended to override the ruling in Commonwealth v. Gove, 366 Mass. 351 (1974), which would have permitted subsequent prosecutions on related offenses following dismissal of charges on speedy trial grounds.

⁴⁸ Commonwealth v. Marable, 427 Mass. 504, 506 (1998) (“The trial itself must at least commence within the one-year period.”).

⁴⁹ *See* Mass. R. Crim. P. 2(a)(14), 9(a)(1).

defendants their speedy trial protections, or from engaging in any sort of harassing tactics through consecutive prosecutions.

The language of Rule 36 is mandatory. If a defendant, after filing a motion to dismiss for lack of a speedy trial,⁵⁰ establishes a *prima facie* case by demonstrating a twelve-month lapse since the return day, the burden shifts to the prosecution to explain the delay in such a manner that it falls within an excludable period.⁵¹ If the prosecution cannot meet this burden, the court *must* dismiss the charges.⁵² No showing of prejudice is necessary to trigger the mandatory sanction.⁵³ If, however, a defendant claims a speedy trial violation and moves for dismissal before the twelve months have elapsed, the defense can prevail only if it can carry the burden of showing unreasonably dilatory behavior on the part of the prosecutor that has resulted in prejudice to the defendant's cause.⁵⁴ Of course, the disposition of a case in a manner that obviates the need for trial — for example, through entry of a guilty plea or dismissal of the charges for other reasons — renders Rule 36 inapplicable.⁵⁵ For these reasons, a defendant with an unsuccessful but arguably meritorious speedy trial claim who wishes to plead guilty should consider a jury-waived trial with factual stipulations in order to preserve the issue on appeal.

§ 23.2B. EXCLUDED PERIODS

Despite the simplicity of the regulatory framework, evaluation of a speedy trial claim is complicated by the exclusion from the tally of all those delays not fairly attributable to the prosecution, including delays that the defendant benefits from, agrees

⁵⁰ The filing of a speedy trial motion tolls the running of the period in which the defendant must be brought to trial. *Barry v. Commonwealth*, 390 Mass. 285 (1983); *Commonwealth v. Rodgers*, 448 Mass. 538, 540 n. 4 (2007) (citing *Barry*).

⁵¹ *See Commonwealth v. Marable*, 427 Mass. 504, 505 (1998); *Commonwealth v. Spaulding*, 411 Mass. 503, 504 (1992) (dismissal should have been ordered); *Commonwealth v. Campbell*, 401 Mass. 698 (1988); *Commonwealth v. Bourbon*, 71 Mass. App. Ct. 420, 424 (2008) (recognizing the burden but holding that the prosecution met its burden by showing that defendant did not object to the various continuances of the trial dates); *Commonwealth v. Edge*, 26 Mass. App. Ct. 976 (1988); *Commonwealth v. Judd*, 25 Mass. App. Ct. 921 (1987), *rev. denied*, 402 Mass. 1103 (1988); *Commonwealth v. Moore*, 20 Mass. App. Ct. 1, *rev. denied*, 395 Mass. 1103 (1985); *Commonwealth v. Farris*, 390 Mass. 300 (1983); *Barry v. Commonwealth*, 390 Mass. 285 (1983); *Commonwealth v. Look*, 379 Mass. 893, *cert. denied*, 449 U.S. 827 (1980).

⁵² *See Commonwealth v. Edge*, 26 Mass. App. Ct. 976 (1988); *Commonwealth v. Judd*, 25 Mass. App. Ct. 921 (1987), *rev. denied*, 402 Mass. 1103 (1988); *Barry v. Commonwealth*, 390 Mass. 285 (1983); *Commonwealth v. Look*, 379 Mass. 893, *cert. denied*, 449 U.S. 827 (1980).

⁵³ Under the controlling constitutional law prior to Rule 36, which became effective July 1, 1979, the burden was on the defendant to show that the Commonwealth unreasonably caused prejudicial delay. *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571 (1977); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 594 (1975); *Commonwealth v. Jackson*, 3 Mass. App. Ct. 511, 517 (1975); *Commonwealth v. Gilbert*, 366 Mass. 18, 22 (1974).

⁵⁴ *See infra* § 23.2D.

⁵⁵ *See Commonwealth v. Stokes*, 18 Mass. App. Ct. 637, *rev. denied*, 393 Mass. 1104 (1984) (speedy trial protection is inapplicable to plea proceeding, because purpose is to protect fair trial); *Commonwealth v. L'Italien*, 3 Mass. App. Ct. 763 (1975) (“valid plea of guilty constitutes waiver of defendant's claim that he was denied his right to a speedy trial.”).

to, or requests.⁵⁶ This is the underlying rationale of Rule 36(b)(2), which delineates the sources of delay, described below, that result in exclusion from the computation of the twelve-month limit:

1. Other proceedings concerning the defendant.

⁵⁶ See *Commonwealth v. Bourbon*, 71 Mass. App. Ct. 420, 424 (2008) (defendant's failure to object to the various continuances of the trial date constituted acquiescence to resulting delay; prosecution need not show defendant's affirmative assent to delay); *Commonwealth v. Amidon*, 428 Mass. 1005, 1005–1007 (1998) (failure to object to passages of deadlines for filing motions or reports without any action having been taken); *Commonwealth v. Marable*, 427 Mass. 504, 507–508 (1998) (when defendant's case was placed on each month's trial list, but was not reached for trial, defendant held to have acquiesced in delay by not objecting to it); *Commonwealth v. Hyatt*, 419 Mass. 815, 817 (1995) (defendant held to have acquiesced in delay where CPCS regional supervisor, who was not counsel of record, indicated to ADA that case would be reassigned to another attorney and agreed that it would be better to wait until after complainant's pregnancy to try the case); *Commonwealth v. Tanner*, 417 Mass. 1 (1994) (no ineffectiveness was found in acquiescing to 16 months of delays; absent showing of prejudice, it was unrealistic to posit that an indictment for first-degree murder would have been dismissed had trial counsel asserted Rule 36 and constitutional grounds for a speedier trial); *Commonwealth v. Spaulding*, 411 Mass. 503, 507 (1992) (excludable delays include those resulting from continuances to which defendant agreed and from defendant's pending pretrial motions); *Commonwealth v. Lauria*, 411 Mass. 63 (1991) (delay from misplaced court papers does not require dismissal since defendant acquiesced and benefited); *Commonwealth v. Conefrey*, 410 Mass. 1, 4–5 (1991); *Commonwealth v. McCants*, 25 Mass. App. Ct. 735 (1988) (delays excludable although attorney consented, not defendant); *Commonwealth v. Stevenson*, 22 Mass. App. Ct. 963, *rev. denied*, 398 Mass. 1104 (1986) (excludable delays include those resulting from continuances granted at defense request or not objected to by defense counsel, including continuances for medical examination of defendant, Commonwealth's interlocutory appeal, and appointment of new defense counsel); *Commonwealth v. Dominigue*, 18 Mass. App. Ct. 987 (1984), *rev. denied*, 393 Mass. 1105 (1985) (delays were excludable, including those caused by continuances to change counsel, obtain discovery, and successfully move for recusal of first judge to preside, because they were for benefit of defense); *Commonwealth v. Ferris*, 390 Mass. 300 (1983) (defendant waived right to trial within statutory time limit by agreeing to continuance); *Barry v. Commonwealth*, 390 Mass. 285 (1983) (defendant not entitled to dismissal if he “acquiesces in, is responsible for, or benefits from, the delay”); *Commonwealth v. Look*, 379 Mass. 893, *cert. denied*, 449 U.S. 827 (1980) (defendant not entitled to dismissal where he failed to assert his speedy trial rights until nearly four years after indictment.) This was also the prevailing interpretation of law under G.L. c. 277, §§ 72–72(A). *Cf. Commonwealth v. Campbell*, 401 Mass. 698 (1988) (not excludable because acquiescence not voluntary).

Even if the defendant acquiesced or failed to object to delay, that does not mean that Rule 36 time begins to run only after the first objection. “Such a holding would upset the balance of obligations envisioned by the rule, under which the ‘primary responsibility for setting a date for trial lies with the district attorney.’” A thorough examination of the record is necessary to determine when failure to object should be counted against the defendant. *Commonwealth v. Spaulding*, 411 Mass. 503, 507 (1992). It is absolutely critical, however, that defense counsel ensure that Rule 36 objections be noted on the record or be filed in writing, with a copy to the Commonwealth. See *Commonwealth v. Fleenor*, 39 Mass. App. Ct. 25 (1995) (defendant held to have acquiesced in delay because docket and transcripts did not indicate that counsel had objected, despite counsel's affidavit of having followed “local practice” and notifying session clerk of objections).

The defendant's obligation to object to delay does not commence until she has either obtained counsel or waived the right to counsel. See *Commonwealth v. Lasher*, 428 Mass. 202, 204–205 (1998).

2. The unavailability of the defendant or an essential witness.
3. The defendant's mental or physical incompetence to stand trial.
4. The period between the dismissal of charges and their subsequent reinstatement.
5. Joinder for trial of a codefendant for whom the prescribed time for trial has not yet run.
6. Continuances granted sua sponte by a judge, or at the request of a defendant, or at the request of a prosecutor if the judge's ruling on the request includes a finding, with reasons stated, that the interests of justice outweigh speedy trial concerns.
7. The period between the reaching of an agreement by prosecution and defense to enter a plea of guilty or nolo contendere and the time at which a judge accepts or rejects the plea agreement.
8. The period between a defendant's entry of a guilty plea and a judicial order permitting its withdrawal.

1. "Other Proceedings" in This Case or Another

Rule 36(b)(2)(A) provides a list of the sorts of proceedings counted as excluded periods, including examination and hearing on mental competency or physical incapacity to stand trial;⁵⁷ proceedings related to the "drug act," including the deliberation period between notice of rights and decision whether to exercise them;⁵⁸ the trial of the defendant on other charges;⁵⁹ interlocutory appeals by either side;⁶⁰

⁵⁷ The excluded period runs from the day that the examination is ordered to the day that the court finds the defendant able to stand trial. Reporter's Notes to Mass. R. Crim. P. 36.

⁵⁸ When a judge advises a defendant as to "drug rights" pursuant to G.L. c. 111, § 10 (formerly c. 123, § 47), the defendant is given five days within which to request an examination to determine whether he or she is drug dependent. These five days, even if permitted to run without a request, are excluded from the speedy trial tally, according to the prescription of subsection (b)(2)(A)(ii). If the defendant requests an examination, the period of time commencing with the advice of rights and running through the period of examination and/or drug treatment, is an excludable period. Reporter's Notes to Mass. R. Crim. P. 36.

⁵⁹ Subsection (b)(2)(A)(iii) excludes from the speedy trial calculation any period of delay caused by such trials no matter in what court or jurisdiction the charges are tried. The excludable period extends from the day trial commences to 14 days after an acquittal or imposition of sentence. *See Commonwealth v. Jackson*, 384 Mass. 572 (1981) (defendant was not denied speedy trial by a 57-month delay between indictment and trial where delay due, in part, to his trials on three other indictments); *Commonwealth v. Edgerly*, 390 Mass. 103, 105 (1983) (no violation by 48-month delay due, in part, to trial on other charges). Trial commences for purposes of this subsection with the first proceedings in anticipation of trial, such as jury selection, or motions hearings deferred to the day of trial. The excluded period runs even while the trial is suspended. *See Commonwealth v. McGillivay*, 78 Mass. App. Ct. 644, 653 & n. 16 (2011) (excluding 185 days attributable to trial on another charge, including delays in that trial due to a mutually agreed-upon continuance, a change in counsel between the bifurcated portions of the trial, and a delay between the second portion of the trial and sentencing), *See also* Reporter's Notes to Mass. R. Crim. P. 36.

⁶⁰ When notice of an interlocutory appeal is filed, subsection (b)(2)(A)(iv) excludes the entire period pending appeal until the rescript opinion is received by the trial court clerk. Reporter's Notes to Mass. R. Crim. P. 36. *See also Commonwealth v. Lanigan*, 419 Mass. 15 (1994) (time taken by Commonwealth's appeal from the allowance of defendant's motion in limine to exclude DNA evidence held properly excluded); *Commonwealth v. McCants*, 25 Mass. App. Ct. 735 (1987); *Commonwealth v. Stevenson*, 22 Mass. App. Ct. 963, *rev. denied*,

where the defendant files a motion, the period between his request for a hearing and the conclusion of the hearing;⁶¹ proceedings related to the transfer of cases⁶² and periods of no more than thirty days during which proceedings concerning the defendant are under advisement.⁶³

2. Unavailability of Defendant, Codefendant, or Witness

If delays are caused by defendants making themselves absent before trial, they will not be permitted to benefit from the effort to avoid prosecution by accumulating speedy trial credit.⁶⁴ If delay is caused by a codefendant's absence, it may be excluded

398 Mass. 1104 (1986); *Commonwealth v. Edgerly*, 390 Mass. 103, 105 (1983); *Commonwealth v. Underwood*, 3 Mass. App. Ct. 522 (1975).

⁶¹ Subsection (b)(2)(A)(v). In *Commonwealth v. Sheridan*, 40 Mass. App. Ct. 700 (1996), the Court discussed, without deciding, three different ways to calculate the exact period of time excluded by hearings on pretrial motions. (*Cf. Barry v. Commonwealth*, 390 Mass. 285, 294 (1983) (only the days of actual hearing are excluded). *See also* Reporters' Notes to Mass. R. Crim. P. 36; *Commonwealth v. Spaulding*, 411 Mass. 503, 507 (1992); *Commonwealth v. Judd*, 25 Mass. App. Ct. 921 (1987) (Commonwealth met burden of justifying delay through showing that it was caused, in part, by defendant's filing of pretrial motions); *Commonwealth v. McDonald*, 21 Mass. App. Ct. 368 (1986) (one-year time limit of Rule 36 was tolled from filing of pretrial motion through long period of defense counsel's preparatory investigation and until thirty days after hearing); *Commonwealth v. Moore*, 20 Mass. App. Ct. 1, *rev. denied*, 395 Mass. 1103 (1985) (granting motion to dismiss where there was no explanation of delay between pretrial motion and trial date); *Commonwealth v. Fasano*, 6 Mass. App. Ct. 325 (1978) (defendant's pretrial motion partially waived 180-day period in Interstate Agreement on Detainers); *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571 (1977) (continuance necessitated by judge's consideration of speedy trial motion was not chargeable to Commonwealth); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 593 (1975) (discovery motions); *Commonwealth v. Underwood*, 3 Mass. App. Ct. 522 (1975) (no dismissal where substantial delay was caused by motion to dismiss and subsequent appeal); *Commonwealth v. Jackson*, 3 Mass. App. Ct. 511, 516–17 (1975) (no violation where delay was caused in part by defendant's pretrial motions).

⁶² Under subsection (b)(2)(A)(vi), delay caused by proceedings relating to the transfer of cases pursuant to Mass. R. Crim. P. 37 suspends the speedy trial clock. For cases transferred under the authority of Rule 37 (a)(1) or (a)(2), for plea or sentence in another division or county, the excludable period begins when the receiving district acquires the transfer papers from the sending district. When, due to community prejudice, a defendant moves for change of venue to another district pursuant to Rule 37(b)(1), the commencement of the hearing on the transfer motion and its subsequent denial respectively begin and end the excluded period. If the motion results in a transfer, the receiving court will determine when the excluded period ends. Reporter's Notes to Mass. R. Crim. P. 36.

⁶³ Mass. R. Crim. P. 36(b)(2)(A)(vii); *Commonwealth v. McDonald*, 21 Mass. App. Ct. 368, 374 (1986); *Commonwealth v. Moore*, 20 Mass. App. Ct. 1, *rev. denied*, 395 Mass. 1103 (1985) (period in excess of 30 days not excludable); *Barry v. Commonwealth*, 390 Mass. 285 (1983) (same). *But see Commonwealth v. Bourbon*, 71 Mass. App. Ct. 420, 426-29 (2008) (excluding 17 months during which motion was under advisement because defense counsel took inadequate steps to press for a decision),

⁶⁴ *See Commonwealth v. Pacifico*, 27 Mass. App. Ct. 254, 257 (1989) (excluding period of outstanding warrant following defendant's default); *Commonwealth v. Giordino*, 9 Mass. App. Ct. 888 (1980) (unavailable); *Commonwealth v. Anderson*, 9 Mass. App. Ct. 699 (1980) (fugitive); *Commonwealth v. Underwood*, 3 Mass. App. Ct. 522 (1975) (fugitive); *Commonwealth v. Jones*, 6 Mass. App. Ct. 750 (1978) (time that defendant out of

as well.⁶⁵ Likewise, when the defendant or the Commonwealth requests a continuance to locate an essential witness, the delay that results when the motion is granted is excludable.⁶⁶ The exclusion spans the period from the date the continuance motion is filed to the date that the court finds the defendant or witness has become available for trial.⁶⁷

3. Competency

Subsection (b)(2)(A)(i) excludes delay caused by an examination of the defendant to determine mental or physical competence to stand trial and any hearing on the matter. If a judge finds the defendant unable to stand trial, this excludable period terminates and a new excludable period commences under subsection (b)(2)(C), such period to run until a judge finds that the defendant has regained competence.

4. Dismissal

When charges are dismissed against a defendant, followed by the filing of new charges for the same offense, Rule 36(b)(2)(D) provides that the period during which no charges are pending suspends the speedy trial clock.⁶⁸ The excluded period extends from the date of dismissal to the return day on the new charges,⁶⁹ although the Commonwealth will still be charged with the speedy trial time that accumulated while the original charges were pending.⁷⁰ Likewise, for Sixth Amendment purposes, the Supreme Court has ruled that the time between dismissal of charges and their subsequent refiling is excluded from speedy trial consideration.⁷¹

Commonwealth's custody is not delay attributable to prosecution where Commonwealth not dilatory in securing defendant's return for trial).

⁶⁵ See *Barry v. Commonwealth*, 390 Mass. 285 (1983) (Commonwealth's pursuit of fugitive codefendant resulted in excludable delay); *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571, 578 (1977) (codefendant's unavailability due to illness resulted in excludable delay).

⁶⁶ *Mass. R. Crim. P. 36(b)(2)(B)*; *Commonwealth v. Johnson*, 16 Mass. App. Ct. 935, *rev. denied*, 390 Mass. 1101 (1983) (defendant not entitled to dismissal where delay caused by prosecutor's great difficulty in locating witness); *Commonwealth v. Jones*, 6 Mass. App. Ct. 750 (1978) (delays granted to allow Commonwealth to locate key witnesses are often justifiable and therefore excludable from speedy trial calculation); *Commonwealth v. Alves*, 6 Mass. App. Ct. 572 (1978) (delay caused by illness of key Commonwealth witness does not weigh against Commonwealth in speedy trial calculus); *Commonwealth v. Ambers*, 4 Mass. App. Ct. 647 (1976) (where absence of Commonwealth's witnesses not due to Commonwealth's dilatory conduct, resulting delay is excludable period); *Commonwealth v. Daggett*, 369 Mass. 790, 793–4 (1976) (same). *Cf.* *Commonwealth v. Whittier*, 378 Mass. 19 (1979) (trial judge did not abuse discretion in dismissing indictment for lack of speedy trial where repeated delays were due to unavailability of prosecution witness); *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571 (1977) (Commonwealth's negligence in summoning its witnesses results in delay chargeable to Commonwealth).

⁶⁷ Reporter's Notes to *Mass. R. Crim. P. 36*.

⁶⁸ See *Commonwealth v. Bailey*, 13 Mass. App. Ct. 1019 (1982) (after dismissal, defendant was not prejudiced by two-month delay in securing subsequent indictment).

⁶⁹ See Reporter's Notes to *Mass. R. Crim. P. 36*.

⁷⁰ See *Commonwealth v. Gove*, 366 Mass. 351, 359 (1974).

⁷¹ *United States v. MacDonald*, 456 U.S. 1 (1982).

5. Joinder

When codefendants have been joined for trial, and there are no grounds for granting a severance motion, a defendant may suffer delay by virtue of the codefendant's time for trial not yet having run. If this period of delay is reasonable, subsection (b)(2)(E) provides for its exclusion from the speedy trial computation.⁷² However, the rule does not permit unreasonable delays, such as those caused by a codefendant's extended unavailability for trial, to suspend indefinitely a defendant's trial.⁷³

6. Continuance

Subsection (b)(2)(F) provides for the exclusion of any period of delay caused by a continuance that the defense requests.⁷⁴ Judges are advised to warn defendants who request continuances that the delay will suspend the running of their speedy trial time.⁷⁵ In addition, even where the defendant does not request a continuance, the continuance period may be excluded if the defense registers no objection to its being granted.⁷⁶

⁷² See *Barry v. Commonwealth*, 390 Mass. 285 (1983) (delay justified where caused by Commonwealth's pursuit of fugitive codefendant); *Commonwealth v. Carr*, 3 Mass. App. Ct. 654, 656–57 (1975) (no denial of speedy trial where delay caused by absence of codefendant at trial). See also *Commonwealth v. Canon*, 373 Mass. 494, *cert. denied*, 435 U.S. 933 (1977) (no speedy trial violation where delay caused by complications from allowing defendant's motion to sever).

⁷³ Reporter's Notes to Mass. R. Crim. P. 36.

⁷⁴ This subsection is not intended to affect a reviewing court's decision as to whether the allowance or denial of a continuance request constitutes an abuse of discretion.

⁷⁵ See *Commonwealth v. McCants*, 20 Mass. App. Ct. 294, 301 n.8, *rev. denied*, 396 Mass. 1102 (1985); *Commonwealth v. Alexander*, 371 Mass. 726, 731 (1977); *Commonwealth v. Fields*, 371 Mass. 274, 280 n.8 (1976). However, in *Commonwealth v. Campbell*, 401 Mass. 698 (1988), a continuance period was not excluded from the speedy trial clock even though the defendant had agreed to it, because the agreement was based on misleading statements from the prosecutor that a plea would be accepted.

⁷⁶ *Commonwealth v. Rodgers*, 448 Mass. 538, 540-43 (2007); *Commonwealth v. Lauria*, 411 Mass. 63 (1991); *Commonwealth v. Conefrey*, 410 Mass. 1, 4–5 (1991); *Commonwealth v. Dias*, 405 Mass. 131, 139 (1989) (defense counsel has obligation to object to delay caused by continuance); *Commonwealth v. Bourbon*, 71 Mass. App. Ct. 420, 424-26 (2008) (same); *Commonwealth v. Stevenson*, 22 Mass. App. Ct. 963, *rev. denied*, 398 Mass. 1104 (1986); *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987 (1984), *rev. denied*, 393 Mass. 1105 (1985); *Barry v. Commonwealth*, 390 Mass. 285 (1983); *Commonwealth v. Farris*, 390 Mass. 300 (1983). But even if the defense registers no objection, a continuance to file a conference report is not excludable because it is required by rules of court. *Commonwealth v. Healy*, 26 Mass. App. Ct. 990 (1988); *Commonwealth v. Corbin*, 25 Mass. App. Ct. 977, *rev. denied*, 402 Mass. 1102 (1988).

Although a defendant must object to a continuance of any scheduled trial date if he wants to preserve speedy trial rights, failure to object to delays in scheduling a case do not similarly count as excluded periods, since the prosecution controls the setting of cases for trial. *Commonwealth v. Spaulding*, 411 Mass. 503, 508–10 (1992), distinguishing *Commonwealth v. Lauria*, 411 Mass. 63 (1991), where the prosecutor diligently brought the case to the court's attention. See also *Commonwealth v. Montgomery*, 76 Mass. App. Ct. 500, 505 (2010) (upholding Rule 36 speedy-trial dismissal where defendant, though competent, was committed

Subsection (b)(2)(F) provides for the exclusion of delay caused by a continuance that the prosecution requests, or that the judge grants sua sponte, if, when ruling, the judge makes a finding that the ends of justice outweigh speedy trial concerns.⁷⁷ The rule states that delay due to a continuance will not be excluded if the judge does not specify, either orally or in writing, the reasons supporting this finding, but as noted above, this requirement may be waived if the defendant does not object to the continuance.

Case law establishes a variety of justifications for excluding delay under this subsection. Such justifications include providing the time that (1) the Commonwealth needs to comply with discovery orders,⁷⁸ (2) recently appointed counsel needs to adequately prepare the case,⁷⁹ or (3) any participant needs to recover from a temporary illness,⁸⁰ or (4) the defendant needs to retain counsel.⁸¹ Delays occasioned by administrative problems, such as court congestion or insufficient numbers of judicial, prosecutorial, or defense personnel, are sometimes unavoidable and therefore

for an extended mental-health commitment without a trial date being set, even though defendant did not object to repeated continuances of the matter for “status” reviews).

However, once a case has been placed on a monthly trial list, the defendant must in some way place on the record her non-acquiescence in the case’s not being reached for trial to avoid the delay’s being held to be “excluded” from Rule 36 computations. *See Commonwealth v. Marable*, 427 Mass. 504, 507–508 (1998) (“At no time did the defendant object, bring a motion for a speedy trial, or move to dismiss.”).

⁷⁷ This provision incorporates prior law. *See Commonwealth v. Ambers*, 4 Mass. App. Ct. 647 (1976); *Commonwealth v. Fields*, 371 Mass. 274, 282 n.8 (1976); *Commonwealth v. Boyd*, 367 Mass. 169, 179 (1975); *Commonwealth v. Loftis*, 361 Mass. 545, 549 (1972). *See also Commonwealth v. Lanigan*, 419 Mass. 15 (1994) (period of delay involved in reconsideration of the admissibility of DNA test results was properly excluded where case presented special circumstances concerning a relatively new method of proof of guilt in criminal cases).

⁷⁸ *Commonwealth v. Anderson*, 6 Mass. App. Ct. 492 (1978).

⁷⁹ *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571 (1977).

⁸⁰ *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571 (1977).

⁸¹ *Commonwealth v. Marable*, 427 Mass. 504, 506 (1998).

excludable,⁸² but standing alone will not be countenanced as the impediment to a reasonably expeditious trial.⁸³

7. Pleas

Delay may occur between the point at which the parties conclude a plea agreement and the plea's presentation to the court. This delay is excludable according to Rule 36(b)(2)(G), which indicates that a guilty plea following a plea agreement constitutes waiver of a claim to a speedy trial violation.⁸⁴ Likewise, delay that transpires between entry of the plea and its withdrawal is excluded under subsection (b)(2)(H).

§ 23.2C. COMPUTING TIME LIMITS

In computing the amount of time encompassed by an excluded period, both the first day and the last day of the excludable event are included in the computation.⁸⁵ On the other hand, computation of any time limit other than an excluded period does not include the day of the event that caused the time period to begin to run.⁸⁶ Clearly, this method of computing time, set forth in Rule 36(b)(31), gives benefit of doubts to the Commonwealth.

⁸² *Commonwealth v. Beckett*, 373 Mass. 329 (1977) (while delay caused by court congestion weighs heavily against Commonwealth, it counts less than deliberate prosecutorial delay). *See also* *Commonwealth v. Lauria*, 411 Mass. 63 (1991) (delay from misplaced court papers does not require dismissal since defendant acquiesced and benefited); *Commonwealth v. Fontaine*, 8 Mass. App. Ct. 51 (1979) (delay caused by court congestion does not warrant dismissal where defendant not prejudiced); *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571 (1977) (delay caused by administrative neglect weighs less heavily than intentional attempt to impair defense and provides only limited support for defendant's constitutional claim); *Commonwealth v. Ambers*, 4 Mass. App. Ct. 647 (1976) (delays caused by court congestion and conflicting obligations of district attorney were insufficient to warrant speedy trial dismissal); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 593 (1975) (delay caused by congested calendars, summer recesses, vacations, and clerical error in district attorney's office did not require dismissal where not intentional and no prejudice); *Commonwealth v. Gove*, 366 Mass. 351, 362–63 (1974) (six-month delay during period of “crowded court dockets and overworked prosecutors” not excessive.)

⁸³ *Commonwealth v. Beckett*, 373 Mass. 329, 332, 335 (1977) (“the deficiencies of the system cannot be a defense to a claim of the denial of a prompt trial . . . we will not tolerate court congestion as an adequate ground for denying a reasonably prompt trial to a defendant who actively pursues his constitutional right to such a trial”). *See also* *Commonwealth v. Plantier*, 22 Mass. App. Ct. 314 (1986) (dismissal within court's discretion where defendant prepared but case continued due to prosecutor's request or court congestion).

⁸⁴ *See* *Commonwealth v. Stokes*, 18 Mass. App. Ct. 637, *rev. denied*, 393 Mass. 1104 (1984) (speedy trial protection is inapplicable to plea proceeding, because purpose is to protect fair trial); *Commonwealth v. L'Italien*, 3 Mass. App. Ct. 763 (1975) (“valid plea of guilty constitutes waiver of defendant's claim that he was denied his right to a speedy trial.”).

⁸⁵ *Commonwealth v. Montgomery*, 76 Mass. App. Ct. 500, 502 n. 2 (2010); *Commonwealth v. McCants*, 20 Mass. App. Ct. 294, 297 n.4, *rev. denied*, 396 Mass. 1102 (1985); *Barry v. Commonwealth*, 390 Mass. 285, 292 (1983).

⁸⁶ *Commonwealth v. McCants*, 20 Mass. App. Ct. 294, 297 n.4, *rev. denied*, 396 Mass. 1102 (1985); *Barry v. Commonwealth*, 390 Mass. 285, 292 (1983). *See also* *Commonwealth v. Levin*, 390 Mass. 857, 861 (1984); *Commonwealth v. Farris*, 390 Mass. 300, 306 (1983).

§ 23.2D. PREJUDICIAL DELAY OF LESS THAN TWELVE MONTHS

Rule 36(c) sets forth the standard by which to evaluate a speedy trial claim that has occurred within twelve months of the charge. The defendant is entitled to dismissal with prejudice if the court determines that (1) the conduct of the prosecutor in bringing the defendant to trial has been unreasonably lacking in diligence and (2) this conduct has resulted in prejudice to the defendant. The burden of proof is on the defendant.⁸⁷ If that burden is not met, counsel should consider moving for dismissal for want of prosecution, although ordinarily such a remedy would permit new charges to be filed.⁸⁸

Essentially, Rule 36(c) incorporates the constitutional standards under the Sixth Amendment to the United States Constitution and article 11 of the Massachusetts Constitution Declaration of Rights as its criteria for evaluating those speedy trial violations which occur before the first twelve-month period has elapsed.⁸⁹ *Barker v.*

⁸⁷ See, e.g., *Commonwealth v. Butler*, 68 Mass. App. Ct. 658, 663-67, *rev. denied*, 449 Mass. 1106 (2007) (Rule 36(c) relief unwarranted notwithstanding delay of 10 years and eight months because defendant demonstrated neither unreasonable lack of prosecutorial diligence nor prejudice); *Commonwealth v. McCants*, 25 Mass. App. Ct. 735 (1988) (no dismissal because prosecutor not unreasonably lacking in diligence); *Commonwealth v. Stevenson*, 22 Mass. App. Ct. 963 (1986), *rev. denied*, 398 Mass. 1104 (1986) (prosecution caused delay but no prejudice); *Commonwealth v. Plantier*, 22 Mass. App. Ct. 314, *rev. denied*, 398 Mass. 1103 (1986) (dismissal warranted where government was unprepared three times, resulting in prejudice); *Commonwealth v. Willis*, 21 Mass. App. Ct. 963, 965-66, *rev. denied*, 397 Mass. 1102 (1986) (lack of diligence but no prejudice); *Commonwealth v. Bodden*, 391 Mass. 356 (1984) (assuming prosecution unreasonably lacked diligence, defendant not entitled to dismissal absent showing of prejudice); *Commonwealth v. Levin*, 390 Mass. 857 (1984) (prejudice suffered not result of lack of diligence by prosecutor); *Commonwealth v. Balliro*, 385 Mass. 618 (1982) (upholding dismissal based on negligence of prosecutor resulting in prejudice to defendant); *Commonwealth v. Geoghegan*, 12 Mass. App. Ct. 575 (1981) (dismissal improper where defendant failed to show reasons for delay or prejudice); *Commonwealth v. Look*, 379 Mass. 893, *cert. denied*, 449 U.S. 827 (1980) (failure of Commonwealth to explain delay does not require dismissal where defendant failed to demonstrate prejudice); *Commonwealth v. Jones*, 6 Mass. App. Ct. 750 (1978) (dismissal not required where delay attributable to Commonwealth was unintentional and resulted in only speculative prejudice to defendant); *Commonwealth v. Beckett*, 373 Mass. 329 (1977) (no violation where no deliberate prosecutorial attempt to delay and no showing of prejudice).

⁸⁸ This motion may be granted by a judge upset at the Commonwealth's failure to be prepared for trial, but ordinarily does not preclude the Commonwealth from seeking a new complaint if it so chooses. See, e.g., *Commonwealth v. Joseph*, 27 Mass. App. Ct. 516 (1989) (police officer not summoned and not present for trial); *Commonwealth v. Anderson*, 402 Mass. 576 (1988) (prosecutor repeatedly late for court); *Commonwealth v. Pomerleau*, 13 Mass. App. Ct. 530 (1982). However, in cases where prosecutorial lack of diligence has prejudiced the defendant, a dismissal with prejudice is possible, *Commonwealth v. Balliro*, 385 Mass. 618, 623 (1982), provided the *Brandano* requirements are observed. *Commonwealth v. Brandano*, 359 Mass. 332 (1971) (affidavits, hearings, and findings required); *Commonwealth v. O'Leary*, 17 Mass. App. Ct. 979 (1984) (rescript) (findings of fact required). See also *Commonwealth v. Sheridan*, 40 Mass. App. Ct. 700 (1996) (affirming dismissal of complaint due to Commonwealth's negligence). See *supra* note 34.

⁸⁹ The constitutional speedy trial standards under the Mass. Const. Declaration of Rights and under the Sixth Amendment of the United States Constitution are equivalent. See *Commonwealth v. Dixon*, 458 Mass. 446, 458-59 (2010); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 591 n.3 (1975); *Commonwealth v. Underwood*, 3 Mass. App. Ct. 522, 526 (1975); *Commonwealth v. Gove*, 366 Mass. 351, 356 n.6 (1974). See also *Commonwealth v. Willis*, 21

Wingo,⁹⁰ the leading Supreme Court case on interpretation of the speedy trial guarantee in the federal constitution, and *Commonwealth v. Horne*,⁹¹ its state counterpart, both adopt balancing tests for the determination of a constitutional deprivation of the right to a speedy trial. The Supreme Court has identified four factors to be weighed in the balance in making such a determination: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant.⁹² Because the factors of length of delay and assertion of the right are built into Rule 36(c), the rule emphasizes the importance of the remaining two factors: the reason for the delay and the prejudice to the defendant.⁹³

1. Unreasonable Prosecutorial Delay

To prevail on a motion to dismiss for violation of this subsection, the defendant must first show that the delay was unreasonable and that the prosecution caused it.⁹⁴ What is considered unreasonable will vary with the facts of each case.⁹⁵ Clearly, intentional delay for tactical advantage over the defense is an unreasonable explanation; less unreasonable, but still the responsibility of the Commonwealth, is negligence in bringing the case to trial.⁹⁶ The complexity of a case will significantly affect judgment

Mass. App. Ct. 963, 964, *rev. denied*, 397 Mass. 1102 (1986) (stating that the constitutional speedy trial right is protected by Rule 36(c)).

⁹⁰ 407 U.S. 514 (1972).

⁹¹ 362 Mass. 738 (1973).

⁹² *Barker v. Wingo*, 407 U.S. 514 (1972).

⁹³ *See* Mass. R. Crim. P. 36(c) and Reporter's Notes to Mass. R. Crim. P. 36.

⁹⁴ *See* *Commonwealth v. Gore*, 79 Mass. App. Ct. 745, 748-50, *rev. denied*, 460 Mass. 1112 (2011) (Twelve-and-a-half-year delay, over nine years of which attributable to prosecution's negligent failure to seek governor's warrant to extradite defendant although knowing where he was incarcerated, constituted unreasonable prosecutorial delay requiring dismissal of the indictments); *Commonwealth v. Marchionda*, 385 Mass. 238 (1982) (error to dismiss complaint for absence of complaining witness where delay caused primarily by defendant's jury challenge).

⁹⁵ *See* *Commonwealth v. Plantier*, 22 Mass. App. Ct. 314, 318, *rev. denied*, 398 Mass. 1103 (1986) (dismissal not abuse of discretion); *Commonwealth v. Whittier*, 378 Mass. 19, 22 (1979) ("delays that would be excused or considered negligible in the ordinary case may amount to excessive delay when the defendant's right to a speedy trial is made specific by court order").

⁹⁶ *See* *Commonwealth v. Gore*, 79 Mass. App. Ct. 745, 748-50, *rev. denied*, 460 Mass. 1112 (2011) (Twelve-and-a-half-year delay, over nine years of which attributable to prosecution's negligent failure to seek governor's warrant to extradite defendant although knowing where he was incarcerated, constituted unreasonable prosecutorial delay requiring dismissal of the indictments); *Commonwealth v. Willis*, 21 Mass. App. Ct. 963, 965, *rev. denied*, 397 Mass. 1102 (1986) (although prosecution could have acted with more diligence, dismissal not required absent prejudice); *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571, 583 (1977) (administrative neglect weighs less heavily against Commonwealth than intentional effort to hamper defendant); *Commonwealth v. Blaney*, 5 Mass. App. Ct. 96, 99 (1977) (administrative inadvertence charged to Commonwealth, but does not weigh as heavily as intentional attempt to frustrate defense); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 594 (1975) (negligent misfiling of case in district attorney's office weighs less heavily than deliberate attempt to frustrate defense).

as to whether the prosecutor's delay has been negligent or necessary.⁹⁷ For example, a case in which several defendants have been joined for trial will typically require more preparation time than will a routine prosecution of a single defendant.⁹⁸ Institutional factors, such as the need to prosecute custody cases first, may count against the prosecution in circumstances of excessive delay.⁹⁹

2. Prejudice

Having demonstrated unreasonable prosecutorial delay, the defendant must show that the delay prejudiced interests that the speedy trial clause was intended to protect. In *Barker v. Wingo, supra*, the Supreme Court listed three distinct interests: (1) prevention of oppressive pretrial incarceration, (2) minimization of anxiety of the accused, and (3) limitation of the possibility that the defense will be impaired.¹⁰⁰ Prejudice to the defendant may result from the undermining of any of these three interests, although prejudice to the preparation and presentation of the defense is generally considered the most severe form of prejudice.¹⁰¹

Prejudice often involves impairment of the ability to present defense witnesses.¹⁰² Defense witnesses may die or become otherwise unavailable during the delay between arrest and trial, or they may be unable to recall accurately the events that took place before the long delay.¹⁰³ If this is the prejudice asserted, defense counsel

⁹⁷ See *Commonwealth v. Lutoff*, 14 Mass. App. Ct. 434, 441 (1982); *Commonwealth v. Underwood*, 3 Mass. App. Ct. 522, 529-30 (1975); *Commonwealth v. Boyd*, 367 Mass. 169, 180 (1975) (amount of delay in complex homicide case with insanity defense not excessive); *Commonwealth v. Gove*, 366 Mass. 351, 362 (1974) (“acceptable delay must be proportional to the complexity of the crime and intractability of the issues”).

⁹⁸ See *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571, 585 (1977) (dismissal not warranted in case with numerous charges and codefendants); *Commonwealth v. Dominico*, 1 Mass. App. Ct. 693, 701 (1974) (16-month delay did not violate speedy trial rights in complex multi-defendant case).

⁹⁹ *Commonwealth v. Lutoff*, 14 Mass. App. Ct. 434, 439 (1982). See also *Commonwealth v. Johnson*, 16 Mass. App. Ct. 935, 935-36 *rev. denied*, 390 Mass. 1101 (1983) (although Commonwealth bears some responsibility for delays due to congestion, they were insufficiently prejudicial here to warrant dismissal); *Commonwealth v. Whittier* 378 Mass. 19, 22 (1979) (court congestion weighs against Commonwealth, but not as heavily as deliberate effort to stall trial); *Commonwealth v. Beckett*, 373 Mass. 329, 332-33 (1977) (Commonwealth responsible for delay caused by assigning greater importance to trying other cases); *Commonwealth v. Dabrieo*, 370 Mass. 728, 735-37 (1976) (Commonwealth responsible for congestion, but delay not prejudicial enough for dismissal); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 594 (1975) (Commonwealth ultimately responsible for delays caused by administrative neglect and overcrowded courts); *Commonwealth v. Gove*, 366 Mass. 351, 363 (1974) (although Commonwealth has some responsibility for turgid court docket, six-month delay not excessive).

¹⁰⁰ *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

¹⁰¹ *Commonwealth v. Lutoff*, 14 Mass. App. Ct. 434, 443 (1977).

¹⁰² See *Commonwealth v. Gore*, 79 Mass. App. Ct. 745, 749 n. 4, *rev. denied*, 460 Mass. 1112 (2011). Impairment of the memories of the Commonwealth's witnesses is not considered a form of prejudice to the defense. See *Commonwealth v. Fontaine*, 8 Mass. App. Ct. 51 (1979); *Commonwealth v. Beckett*, 373 Mass. 329 (1977); *Commonwealth v. Dominico*, 1 Mass. App. Ct. 693 (1974).

¹⁰³ *Commonwealth v. Willis*, 21 Mass. App. Ct. 963, *rev. denied*, 397 Mass. 1102 (1986) (significant loss of memory of witnesses on crucial issues not shown); *Commonwealth v.*

should report to the court the efforts made to locate witnesses or retrieve testimony, describe the nature of the lost evidence,¹⁰⁴ and explain how the evidence would have significantly improved the defense case.¹⁰⁵

Other kinds of prejudice that a judge can consider are the impact of protracted delay on the defendant's employment, finances, family, and associations.¹⁰⁶ The judge may also consider the effect of delay on the defendant's potential sentence, on parole eligibility dates and on the opportunity to participate in rehabilitative programs.¹⁰⁷

Elderly, 390 Mass. 103, 105-06 (1983) (insufficient support for claim that unavailability of one witness and memory failure of another impaired defense); Commonwealth v. Conant, 12 Mass. App. Ct. 287, 291 (1981) (impairment of witnesses' memories not shown); Commonwealth v. Look, 379 Mass. 893, 902, *cert. denied*, 449 U.S. 827 (1980) (insufficient showing of prejudice from missing witnesses); Commonwealth v. Beckett, 373 Mass. 329, 334-35 (1977) (same); Commonwealth v. Campbell, 5 Mass. App. Ct. 571, 584 (1977) (no actual prejudice shown due to absence of witness); Commonwealth v. Dabrieo, 370 Mass. 728, 737-38 (1976) (insufficient showing of unavailability of witness); Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 703 (1974) (death of a defense witness can establish prejudice where, unlike here, evidence supports the contention.)

¹⁰⁴ Commonwealth v. Campbell, 5 Mass. App. Ct. 571, 584 (1977) (prejudice insufficient where no evidence of attempts to locate missing witness and no explanation of how her testimony would have helped defense); Commonwealth v. Dabrieo, 370 Mass. 728, 737-38 (1976) (prejudice insufficient where unavailability of witnesses not proven, and investigator's efforts to find witnesses were meager); Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 530-31 (1975) (prejudice insufficient where claim of deaths of alibi witnesses was unsupported by affidavits or evidence); Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 703 (1974) (same).

¹⁰⁵ Commonwealth v. Willis, 21 Mass. App. Ct. 963, 965, *rev. denied*, 397 Mass. 1102 (1986) (no violation because defense witnesses testified well, despite claims of memory loss); Commonwealth v. Elderly, 390 Mass. 103, 105-06 (1983) (unavailability of one witness and memory failure of another did not prejudice defendant, absent showing that missing testimony would have benefited defendant); Commonwealth v. Lutoff, 14 Mass. App. Ct. 434, 443-45 (1982) (in circumstantial evidence case, defense was weakened by loss of memory of witnesses); Commonwealth v. Look, 379 Mass. 893, 902, *cert. denied*, 449 U.S. 827 (1980) (no prejudice where no showing of memory failure and claim that missing witnesses would have helped defense was speculative); Commonwealth v. Beckett, 373 Mass. 329, 334 (1977) (no prejudice absent showing that missing testimony would have helped defense); Commonwealth v. Campbell, 5 Mass. App. Ct. 571, 584 (1977) (same).

¹⁰⁶ Commonwealth v. Plantier, 22 Mass. App. Ct. 314, 316-17, *rev. denied*, 398 Mass. 1103 (1986) (prejudice shown by lost income, anxiety, and impairment of social and professional relationships); Commonwealth v. Dabrieo, 370 Mass. 728, 737-38 (1976) (defendant's claim of prejudice from lengthy incarceration and anxiety was unpersuasive where he failed to assert speedy trial rights for 19 months.)

¹⁰⁷ Commonwealth v. Rodriguez, 380 Mass. 643, 653 (1980) (prejudice caused by effect of delay on parole eligibility and opportunity to participate in rehabilitation programs). That these factors can constitute prejudice has been recognized in many cases which rejected the defense claim because of insufficient proof. Commonwealth v. Willis, 21 Mass. App. Ct. 963, 965-66, *rev. denied*, 397 Mass. 1102 (1986); Commonwealth v. Jones, 6 Mass. App. Ct. 750, 757 (1978); Commonwealth v. Anderson, 6 Mass. App. Ct. 492, 498 (1978); Commonwealth v. Campbell, 5 Mass. App. Ct. 571, 584-85 (1977); Commonwealth v. Blaney, 5 Mass. App. Ct. 96, 100 (1977); Commonwealth v. Burhoe, 3 Mass. App. Ct. 590, 595 (1975); Commonwealth v. Gove, 366 Mass. 351, 363-64 (1974).

When charges are dismissed on constitutional speedy trial grounds, the dismissal must be with prejudice, barring any subsequent trial on the same or related charges.¹⁰⁸

§ 23.2E. SPECIAL PROTECTIONS FOR INCARCERATED PERSONS

Rule 36(d) gives additional speedy trial protection to incarcerated persons.¹⁰⁹ Subsection (d)(2) simply states that persons incarcerated within the Commonwealth are entitled to be tried on any untried indictment or complaint within the time period provided by Rule 36(b). More intricate regulation is required by Rule 36(d)(3) regarding the Commonwealth's duty to bring to trial promptly those persons who are serving sentences¹¹⁰ in institutions outside the Commonwealth or in federal custody within the Commonwealth.¹¹¹

When an incarcerated defendant is subject to a warrant for arrest for violation of probation on a different matter, he may apply in writing for a speedy probation revocation hearing. Within six months of the court's receipt of such an application, the prisoner must be brought into court for sentencing or other disposition.¹¹²

Massachusetts has adopted the Interstate Agreement on Detainers (addressed in more detail *supra* at § 6.2),¹¹³ which prescribes both a prisoner-initiated and a prosecutor-initiated procedure for securing a foreign prisoner's presence for trial. The provisions of the Interstate Agreement are invoked on the filing of a "detainer," a formal notice given to the out-of-state custodial institution that the prisoner is wanted

¹⁰⁸ *Strunk v. United States*, 412 U.S. 434, 438 (1973).

¹⁰⁹ Rule 36(d)(1) explicitly extends to prisoners all of the safeguards of Rule 36, although incarceration may affect the nature of prejudice caused by delay and the nature of the Commonwealth's duty to bring a defendant to trial. Reporter's Notes to Mass. R. Crim. P. 36. Rule 36(d)(2) and (d)(3) set forth the speedy trial procedures that apply to persons incarcerated inside or outside the Commonwealth.

¹¹⁰ The person must be incarcerated in service of a sentence. *Commonwealth v. Petrozziello*, 22 Mass. App. Ct. 71, 79, *rev. denied*, 397 Mass. 1104 (1986) (period prior to defendant's entry of term of imprisonment is not included in calculating 180-day limit).

¹¹¹ Reporter's Notes to Mass. R. Crim. P. 36. Subsection d(3) largely restates G.L. c. 277, § 72A.

¹¹² G.L. c. 279, § 3. Obviously, a prisoner has a special stake in early disposition of a second case, because a concurrent sentence is possible only as long as he is serving time, and failure to observe speedy trial safeguards which eliminate such an opportunity may warrant dismissal. *Commonwealth v. Jones*, 6 Mass. App. Ct. 750, 757 (1978). *See also* *Commonwealth v. Gove*, 366 Mass. 351, 357 (1974) (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). In *Commonwealth v. Whooley*, 419 Mass. 421 (1995), however, the S.J.C. considered the relationship between G.L. 279, § 3 and Mass. R. Crim. P. 36. The Court held that even if an incarcerated defendant properly requests a speedy disposition of an outstanding probation matter pursuant to G.L. c. 279, § 3, that statute does not require, in the absence of prejudice, automatic dismissal, if such disposition does not occur within the six-month period set forth in the statute. *Whooley*, 419 Mass. at 423-24. Mass. R. Crim. P. 36 was further held not to apply to probation revocation hearings or related proceedings, but exclusively to the speedy trial of original criminal charges. *Id.* at 425. Thus, G.L. c. 279, § 3 should not be read in conjunction with the automatic dismissal provisions of Rule 36.

¹¹³ The appendix of G.L. c. 276 recites the provisions of the Interstate Agreement on Detainers. The agreement's adoption is described in *Cuyler v. Adams*, 449 U.S. 433 (1981), *Commonwealth v. Copson*, 444 Mass. 609, 610-12 (2005), and *Commonwealth v. Petrozziello*, 22 Mass. App. Ct. 71, *rev. denied*, 397 Mass. 1104 (1986).

in another jurisdiction to face criminal charges.¹¹⁴ Rule 36(d)(3) must be read as interlocking with the Agreement,¹¹⁵ which is interpreted as a matter of federal law.¹¹⁶

In general, the Commonwealth must exercise due diligence in bringing prisoners held outside the state's custody to trial, and subsection (d)(3) attempts to translate this broad standard of fairness into mechanisms that the Commonwealth must follow.¹¹⁷ Under this subsection, the Commonwealth must promptly file a detainer, notify foreign prisoners by mail of the charges pending in the Commonwealth and of the right to demand a speedy trial, and undertake the procedures cited in the Agreement to obtain their presence for trial. If the prosecutor unreasonably delays taking these steps and the defendant is prejudiced by a violation of the statutory time limits, then the pending charges must be dismissed.¹¹⁸ Where a defendant's extradition is blocked either by her own opposition or that of the governor of the foreign jurisdiction, the delay would not be charged to the Commonwealth if it had made all reasonable efforts to obtain the defendant's presence for trial.¹¹⁹

The defendant who wishes to request a speedy trial pursuant to the Agreement is required, after he has begun to serve his sentence in the other jurisdiction, to send a written notice and request for final disposition of the outstanding charges against him to the person who has custody of him in the other jurisdiction.¹²⁰ The Agreement requires that the defendant be brought to trial within 180 days of the filing of the request.¹²¹ This period can be extended for good cause after a hearing in open court

¹¹⁴ See *Commonwealth v. Copson*, 444 Mass. 609, 611 n.1 (2005); *Commonwealth v. Wilson*, 399 Mass. 455, 460 n.7 (1987); *Commonwealth v. Petrozziello*, 22 Mass. App. Ct. 71, 75 n.4, *rev. denied*, 397 Mass. 1104 (1986).

¹¹⁵ Reporter's Notes to Mass. R. Crim. P. 36.

¹¹⁶ *Cuyler v. Adams*, 449 U.S. 433 (1981); *Commonwealth v. Copson*, 444 Mass. 609, 616 (2005).

¹¹⁷ Reporter's Notes to Mass. R. Crim. P. 36. See also *Commonwealth v. McGrath*, 348 Mass. 748, 752 (1965) (right to speedy trial requires Commonwealth to take reasonable action to prevent undue delay in bringing the defendant to trial, including obtaining his custody, or dismissal is warranted); *Commonwealth v. Shea*, 35 Mass. App. Ct. 717, 721–22 & n.5 (1994) (defendant could move to dismiss three-year-old charges, brought after his release from federal custody, under Rule 36(d)(3) because it was the Commonwealth's duty to obtain his presence for trial, and his failure to file a speedy trial motion is not a bar).

¹¹⁸ *Commonwealth v. Grant*, 418 Mass. 76, 80 (1994) (failure by the Commonwealth to comply precisely with the written notice provision of Rule 36(d)(3) does not require dismissal if the defendant received actual notice of the charges and of his right to request a speedy trial); *Commonwealth v. Ferreira*, 26 Mass. App. Ct. 67, 72 *rev. denied*, 403 Mass. 1101 (1988) (no dismissal where violation did not prejudice defendant); *Commonwealth v. Wilson*, 399 Mass. 455 (1987) (no violation of agreement where defendant brought to trial within the prescribed period); *Commonwealth v. Martens*, 398 Mass. 674 (1986), *cert. denied*, *Martens v. Massachusetts*, 481 U.S. 1041 (1987) (no violation where defendant failed to follow appropriate notification requirements); *Commonwealth v. Bell*, 11 Mass. App. Ct. 1035 (1981) (dismissal improper where no prejudice shown and prosecutor had not unreasonably delayed filing detainer).

¹¹⁹ Reporter's Notes to Mass. R. Crim. P. 36. See also *Commonwealth v. McGrath*, 348 Mass. 748, 752 (1965).

¹²⁰ See *Commonwealth v. Copson*, 444 Mass. 609, 624–25 (2005); *Commonwealth v. Tracy*, 50 Mass. App. Ct. 435, 440–441 (2000), *rev. denied*, 433 Mass. 1102 (2001).

¹²¹ See *Fex v. Michigan*, 507 U.S. 43 (1993) (180-day period in which trial must begin after prisoner's request under the Interstate Agreement on Detainers begins with the actual

with either the prisoner or counsel present.¹²² The defendant's escape from custody,¹²³ or a defense request for a continuance or waiver of the time requirement,¹²⁴ tolls the 180-day time limit.

Although a defendant has the right to demand a speedy trial under this rule, the absence of a demand does not free the Commonwealth from its duty of due diligence in securing temporary custody of the defendant for trial.¹²⁵ Under the Agreement, where there is no demand, the trial of the defendant must commence within 120 days of his or her delivery to the Commonwealth, unless the time limit is waived or extended for good cause.¹²⁶ The absence of a demand may, however, affect the determination of prejudice to the defendant as a result of the delay.¹²⁷

§ 23.2F. APPELLATE DELAY

receipt by the demanding state's authority of the request); *Commonwealth v. Healy*, 26 Mass. App. Ct. 990, 991 (1988); *Commonwealth v. Corbin*, 25 Mass. App. Ct. 977, 978, *rev. denied*, 402 Mass. 1102 (1988); *Commonwealth v. Martens*, 398 Mass. 674, 678 (1986), *cert. denied*, *Martens v. Massachusetts*, 481 U.S. 1041 (1987). These cases indicate that a foreign defendant must give written notice to the officials with authority over his custody, who in turn must forward the prisoner's request to the Commonwealth. The Commonwealth is bound by the failure of the out-of-state custodial officers to fulfill this responsibility. To be entitled to relief under Rule 36(d)(3), defendants must prove that they have, in fact, filed their request. *See also* *Commonwealth v. Petrozziello*, 22 Mass. App. Ct. 71, 76-77, *rev. denied*, 397 Mass. 1104 (1986), describing the provisions of the Agreement.

¹²² *Commonwealth v. Petrozziello*, 22 Mass. App. Ct. 71, *rev. denied*, 397 Mass. 1104 (1986) (180-day period extended by necessary and reasonable continuances); *Commonwealth v. Dickson*, 386 Mass. 230, 232 (1982) (good cause shown by need to start another murder case before navy witnesses left on long voyage, and where defendant's lawyer represented one of the murder defendants); *Commonwealth v. Carrillo*, 5 Mass. App. Ct. 812 (1977) (continuance granted was reasonable in light of scheduling difficulties).

¹²³ *Commonwealth v. Giordano*, 9 Mass. App. Ct. 888, 889 (1980).

¹²⁴ *Commonwealth v. Corbin*, 25 Mass. App. Ct. 977, 979, *rev. denied*, 402 Mass. 1102 (1988) (defendant waived 180-day time limit by requesting continuances and acquiescing to delays); *Commonwealth v. Fasano*, 6 Mass. App. Ct. 325, 333-34 (1978) (defendant waived 180-day time limit by filing motion); *Commonwealth v. Fields*, 371 Mass. 274, 280 n.8 (1976) (judge advised to state for record that defense requested continuance and that continuance period tolls statutory time limit).

¹²⁵ Reporter's Notes to Mass. R. Crim. P. 36.

¹²⁶ *Commonwealth v. Petrozziello*, 22 Mass. App. Ct. 71, 77, *rev. denied*, 397 Mass. 1104 (1986); *Commonwealth v. Dickson*, 386 Mass. 230 (1982). *See also* *Reed v. Farley*, 114 S. Ct. 2291, 2294 (1994), *rehearing denied*, 115 S. Ct. 25 (1994) (state court's failure to observe IAD article IV(c)'s 120-day rule is not cognizable under 28 U.S.C. § 2254 and Sixth Amendment right to speedy trial not violated when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement); *Cross v. Cunningham*, 87 F.3d 586, 588-89 (1st Cir. 1996) (delayed return, even if violative of IAD, held not to violate Constitution under specific facts of case); *United States v. Neal*, 36 F.3d 1190, 1210 (1st Cir. 1994) (delay attributable to the disposition of motions filed by the defendant is excludable from the 120-day computation); *Whiting v. United States*, 28 F.3d 1296, 1306 (1st Cir.), *cert. denied*, 513 U.S. 994 (1994) (delay caused by a court's resolution of pending codefendant motions may qualify as excludable time under article IV(c) of the IAD).

¹²⁷ Reporter's Notes to Mass. R. Crim. P. 36.

Although neither Rule 36 nor constitutional speedy trial provisions are applicable to circumstances of appellate delay, certain kinds of appellate delay may create constitutional violations as a matter of due process. In order to make out such a violation the circumstances must be extraordinary, such as deliberate frustration of the appellate process or extremely protracted and prejudicial delay without the defendant's consent.¹²⁸ A balancing of all relevant factors including the length of and reason for the delay, and the extent of prejudice caused by the Commonwealth, is required to evaluate this constitutional claim.¹²⁹

§ 23.2G. THE THIRTY-DAY RULE

Under G.L. c. 276, § 35, the district court may not continue a case in which the defendant is held for more than 30 days “at any one time” over the defendant’s objection. Section 35 provides as follows:

The court or justice may adjourn an examination or trial from time to time, and to the same or a different place in the county. In the meantime, if the defendant is charged with a crime that is not bailable, he shall be committed; otherwise, he may recognize in a sum and with surety or sureties to the satisfaction of the court or justice, or without surety, for his appearance for such examination or trial, or for want of such recognizance he shall be committed. While the

¹²⁸ See *Commonwealth v. Lattimore*, 429 Mass. 129 (1996) (due process is not violated simply because a long interval of time separated the conclusion of the appellate process from the subsequent order for a new trial; *Doggett v. United States*, 505 U.S. 647 (1992) (distinguished); *Commonwealth v. Libby*, 411 Mass. 177, 180–81 (1991) (16-year appellate delay does not require dismissal where no evidence of intentional misconduct on part of state agents and claimed prejudice is speculative); *Commonwealth v. Smith*, 29 Mass. App. Ct. 449, 457 (1990) (delay in obtaining trial transcript not deliberate or prejudicial); *Commonwealth v. Hudson*, 404 Mass. 282, 283–85 (1989) (deliberate blocking of appellate rights or inordinate and prejudicial delay may rise to constitutional error); *Commonwealth v. Weichel*, 403 Mass. 103, 109–10 (1988) (no due process violation where ten-year appellate delay not caused by the prosecution and no significant prejudice shown); *Commonwealth v. Thomas*, 400 Mass. 676, 684-85 (1987) (no due process violation where delay due to neglect by stenographer rather than deliberate misconduct by prosecutor and no prejudice shown); *Commonwealth v. Yelle*, 19 Mass. App. Ct. 465, 473, *rev. denied*, 395 Mass. 1101 (1985) (no violation where delay in furnishing trial transcript not prejudicial); *Commonwealth v. Lee*, 394 Mass. 209, 220-21 (1985) (same); *Commonwealth v. Duhamel*, 391 Mass. 841, 847 (1984) (same); *Commonwealth v. Fay*, 14 Mass. App. Ct. 371, 376 (1982) (same); *Petition of Williams*, 378 Mass. 623, 627-28 (1979) (no constitutional violation although court reporter's delay in transcribing proceedings was excessive); *Commonwealth v. Fontaine*, 8 Mass. App. Ct. 51, 56-57 (1979) (no due process violation caused by stenographer's failure to transcribe proceedings promptly where defendant seemed indifferent to delay and no prejudice shown); *Commonwealth v. Swenson*, 368 Mass. 268, 280 (1975) (no due process violation in three-and-one-half-year delay before appeal where delay not attributable to dilatory tactics by Commonwealth and defendant showed no substantial prejudice); *Commonwealth v. Dominico*, 1 Mass. App. Ct. 693, 722–23 (1974) (no due process violation in two-year delay between claiming and docketing of appeal).

¹²⁹ See cases cited *supra* note 128. See also *Campiti v. Commonwealth*, 417 Mass. 454, 456-57 (1994) (post-trial delays do not violate due process where the Commonwealth did not deliberately block defendant's appellate rights and defendant was not prejudiced by 29-month delay in producing transcripts); *Commonwealth v. Thomas*, 400 Mass. 676, 684-85 (1987); *Commonwealth v. Fay*, 14 Mass. App. Ct. 371 (1982); *Commonwealth v. Cavanaugh*, 366 Mass. 277, 279 (1974) (interlocutory appeals should not become additional causes of delay).

defendant remains committed, no adjournment shall exceed thirty days at any one time against the objection of the defendant.¹³⁰

While a violation of Section 35 does not automatically result in dismissal of the charges, such a violation does trigger speedy trial considerations. The statutory violation presumptively establishes a delay of sufficient length to provoke a Rule 36(c) inquiry into whether it was excusable and whether the defendant suffered prejudice as a result.¹³¹

So, where the prosecution intentionally and repeatedly violated the time limits of the rule over the defendant's objection, and where the violations prejudicially impaired the defense case, the Appeals Court held that a dismissal of the charges for lack of a speedy trial was warranted.¹³² Similarly, the S.J.C. held that a dismissal under the now-superseded 10-day rule was warranted when the prosecution elected to withdraw a complaint through a *nolle prosequi*, in order to seek an indictment and evade the rule's time limits.¹³³ On the other hand, where the defendant failed to show that the delay caused him prejudice or was intended to frustrate the defense, dismissal was not warranted as there was no speedy trial deprivation.¹³⁴ A finding of adequate reasons for a continuance beyond ten (or, now, thirty) days precludes dismissal of the charges.¹³⁵

§ 23.2H. PROTECTING THE RECORD

Delay in bringing a case to trial usually benefits the defendant, at least if she has been released on bail in the interim. The opportunity to establish a period of self-

¹³⁰ G.L. c. 276, § 35. On its face, this 30-day rule is limited to defendants in custody. The so-called "fifteen-day rule" of G.L. c. 119, § 68 has been retained in the latest changes to juvenile delinquency proceedings. *See infra* ch. 49.4 (discussing St. 1996, c. 200, § 11).

¹³¹ *Commonwealth v. Plantier*, 22 Mass. App. Ct. 314, 318-19, *rev. denied*, 398 Mass. 1103 (1986) (no abuse of discretion to dismiss charges under Rule 36(c) where Commonwealth's continuances were granted in violation of 10-day rule and defendant suffered prejudice); *Commonwealth v. Balliro*, 385 Mass. 618, 623 (1982) (same, where prejudice shown was merely the assumed anxiety and concern during the long pendency of charges); *Commonwealth v. Conant*, 12 Mass. App. Ct. 287, 289-91 (1981) (despite violation of 10-day rule, dismissal not warranted where delays were unintentional and defendant's claims of prejudice unsupported); *Commonwealth v. Silva*, 10 Mass. App. Ct. 784, 789-90 (1980) (dismissal warranted where Commonwealth's repeated violations of 10-day rule were intentional and hampered effective preparation of defense); *Commonwealth v. Boyer*, 6 Mass. App. Ct. 938, 938 (1978) (although violation of 10-day rule triggers examination of whether delay was excusable, defendant not entitled to dismissal where adequate reasons for continuance); *Commonwealth v. Ludwig*, 370 Mass. 31, 33-34 (1976) (speedy trial dismissal warranted because violation of 10-day rule is presumptively prejudicial).

¹³² *Commonwealth v. Silva*, 10 Mass. App. Ct. 784 (1980). At the time Silva was decided, Section 35 limited the length of allowable continuances over the objection of a committed defendant to ten days. As noted, the statute has since been amended to increase the length of such a continuance to 30 days. *See also* cases cited *supra* at note 122.

¹³³ *Commonwealth v. Thomas*, 353 Mass. 429, 430 (1967). Because G.L. c. 276, § 35 applies solely to district court, the return of an indictment stops the running of the 10-day limit. *See Commonwealth v. Xiarhos*, 2 Mass. App. Ct. 225, 228-29 (1974).

¹³⁴ *Commonwealth v. Conant*, 12 Mass. App. Ct. 287, 289-91 (1981).

¹³⁵ *Commonwealth v. Boyer*, 6 Mass. App. Ct. 938, 938 (1978).

rehabilitation, and the chance that Commonwealth witnesses may move, lose interest in the proceedings, or forget significant details, argues against the assertion of speedy trial rights in some cases.

However, in other cases the speedy trial issue may offer a good possibility of dismissal. Counsel should not wait until a year elapses in such cases before considering speedy trial issues, but should develop a record in anticipation of a motion to dismiss on speedy trial grounds. Speedy trial rights should be asserted and renewed whenever appropriate in the course of litigation. Further, counsel must weigh carefully the speedy trial implications of acquiescence in continuances requested by the prosecution, because acquiescence will likely result in excluding the continuance period from the computation of the amount of delay.¹³⁶ In addition, counsel should ensure that docket entries on the court's case jacket accurately reflect the defense's readiness for trial, objections to continuances, and speedy trial demands.¹³⁷ In the event that a speedy trial motion is granted, counsel should make sure that the court makes adequate findings of fact to support the decision, thereby protecting the result on appeal.

§ 23.3 PRIORITIES IN SCHEDULING TRIALS

As its title denotes, in addition to protecting speedy trial rights, Rule 36 assists the courts in prioritizing their criminal dockets.¹³⁸

Rule 36(a)(1) provides that the case of defendants in custody, and those whose pretrial liberty is reasonably believed to present unusual risks to society, shall be given preference for trial over other criminal cases. G.L. c. 212, § 29, also establishes a preference over civil trials for defendants detained prior to trial for offenses not punishable by death or life imprisonment. Another statute establishes trial priorities for various types of cases, which may be overridden on the Commonwealth's motion.¹³⁹

¹³⁶ See *supra* § 23.2B(6).

¹³⁷ The docket and minutes of the clerk are *prima facie* evidence of the information recorded within. *Commonwealth v. Montgomery*, 76 Mass. App. Ct. 500, 502-03 (2010); *Commonwealth v. McCants*, 20 Mass. App. Ct. 294, 297, *rev. denied*, 396 Mass. 1102 (1985); *Barry v. Commonwealth*, 390 Mass. 285, 289 (1983); *Commonwealth v. Farris*, 390 Mass. 300, 303-04 (1983). However they can be supplemented or rebutted by other evidence. *Commonwealth v. Rodgers*, 448 Mass. 538, 540 (2007); *Commonwealth v. Mattos*, 404 Mass. 672, 676-677 (1989).

¹³⁸ *Commonwealth v. Stokes*, 18 Mass. App. Ct. 637, 639 *rev. denied*, 393 Mass. 1104 (1984); *Barry v. Commonwealth*, 390 Mass. 285, 295-6 (1983); *Commonwealth v. Farris*, 390 Mass. 300, 305 n.5 (1983). *Cf.* *Commonwealth v. Mattos*, 404 Mass. 672, 674-77 (1989) (court could accept representations in prosecutor's memorandum that supplemented and did not contradict docket entries, especially in absence of affidavit in opposition).

¹³⁹ G.L. c. 212, § 24. The statute states that cases charged under the chapters cited are to be given preference for trial in superior court in the following order:

- (1) G.L. c. 119 (juvenile offenders)
- (2) G.L. c. 248 (habeas corpus)
- (3) G.L. c. 138 (violation of alcoholic beverage laws)
- (4) G.L. c. 139 (common nuisance)
- (5) G.L. c. 273 (desertion, nonsupport, illegitimacy).

Rule 36 and other statutes also govern the establishment of the trial calendar in superior and district court.¹⁴⁰ Rule 36(f) requires the courts to maintain a list of all cases pending for six months or longer.

¹⁴⁰ These provisions require the prosecution before each criminal session of the superior court and the jury session of the district court to provide the clerk with a list of cases to be tried at that session. This list is available for inspection by all of the parties and must be followed in a sequence that the court establishes, unless cause is shown to the court to order otherwise. For bench sessions of the district court, Rule 36(a)(2)(A) indicates that preparing and updating the sequence of the trial calendar is solely a judicial responsibility. Regarding the superior court list, *see* G.L. c. 278, § 1, and Mass. R. Crim. P. 36(a)(2)(B); *Commonwealth v. Super*, 431 Mass. 492, 497 (2000); *Commonwealth v. Moore*, 20 Mass. App. Ct. 1, 4–5, *rev. denied*, 395 Mass. 1103 (1985); *Barry v. Commonwealth*, 390 Mass. 285, 296, n.13 (1983); *Commonwealth v. Lutoff*, 14 Mass. App. Ct. 434, 441-42 (1982); *Commonwealth v. Beckett*, 373 Mass. 329, 344 (1977) (Liacos, J. concurring). Regarding the district court jury list, *see* G.L. c. 218, § 27A(e) and Reporter's Notes to Mass. R. Crim. P. 36.