CHAPTER 2

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Probable-Cause Hearings

Written by Eric Blumenson [*]

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§ 2.1 GOVERNING LAW

§ 2.1A. DEFINITION OF "PROBABLE CAUSE"

* With thanks to Noah Ertel for research assistance.

"Probable cause" and "probable cause hearing" are terms with multiple meanings and functions. In Massachusetts, "probable cause" is most commonly used as the burden necessary to justify most police arrests and searches, but is also invoked to signify the standards of proof necessary to justify the bind-over of a defendant to superior court, the issuance of a grand jury indictment, or the continued detention of an arrested defendant.[1] *This chapter focuses on probable cause hearings to determine whether there is sufficient evidence to bind-over the defendant to the Superior Court. Detention probable cause determinations are primarily covered* infra *at Chapter 9.3.*[1.4]

As noted in the next section, bind over probable cause hearings are to be held when the district court either lacks or declines subject matter jurisdiction on a charge, absent an intervening Superior Court indictment. To determine whether a defendant is to be bound over to the superior court, the court must determine whether (1) a crime has been committed and (2) there is probable cause to believe that the defendant committed it.[2] The quantum of evidence required to support a probable-cause finding is measured not by arrest law but by a "directed verdict rule":

> The examining magistrate should view the case as if it were a trial and he were required to rule on *whether there is enough credible evidence to send the case to the jury*. Thus, the magistrate should dismiss the complaint when, on the evidence presented, a trial court would be bound to acquit as a matter of law.[3]

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[1] *See generally* In the Matter of a Grand Jury Investigation, 427 Mass. 221 (1998) (discussing different uses of the term *probable cause*). As to the quantum of evidence necessary to sustain a grand jury indictment, *see* Ch. 4; as to the standard of proof required to justify pretrial detention of an arrested defendant, *see* Ch. 9.3. Although a strong argument can be made that the three standards are the same—and require the same procedural protections—in practice they have come to differ. *See infra* §§ 2.1B(3), 2.1B(4).

[1.4] Probable cause for continued detention is satisfied by 1) the authorization of issuance of a complaint by a clerk or 2) an arrest warrant, or 3) an *ex parte* probable cause determination for suspects who will not be brought to Court within twenty-four hours of a warrantless arrest. The latter type of hearing is covered by Mass. R. Crim. P. Rule 3.1 (2004), which was drafted in response to Jenkins v. Chief Justice of the District Court Dep't, 416 Mass. 221 (1993). *See* detailed discussion at Ch. 9.3

[2] Burke v. Commonwealth, 373 Mass. 157 (1977); Stefanik v. State Board of Parole, 372 Mass. 726 (1977) (preliminary hearing for parole revocation not necessary when parolee has had probable cause hearing on new criminal charges); Corey v. Commonwealth, 364 Mass. 137, 141 (1973). *See also* G.L. c. 276, § 38 (preliminary hearings generally); G.L. c. 218, § 30 (bind-over hearings); and Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 3:00 (District Court Administrative Office, Nov. 1981). Although bind-over hearings may occur in crimes within or outside the district court's jurisdiction, both circumstances are governed by the same statutes: G.L. c. 218, § 30, and G.L. c. 276, §§ 38–42. Corey, *supra* at 142(1973); Eagle-Tribune Publ'g Co. v. Clerk-Magistrate of the Lawrence Div. of the Dist. Court Dep't, 448 Mass. 647, 654 (2007).

[3] Myers v. Commonwealth, 363 Mass. 843, 850 (1973) (emphasis added); *accord* Commonwealth v. Blanchette, 54 Mass. App. Ct. 165, 173-75 (2002); Commonwealth v. O'Dell, 392 Mass. 445, 451–52 (1984) (probable-cause hearing burden of proof is statutorily derived so more stringent than grand jury burden). In Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), the S.J.C. held that a directed verdict challenge is *not* met by "some record evidence, however slight, to support each essential element of the offense." *Compare* Paquette v. Commonwealth, 440 Mass. 121 (Mass. 2003) (the probable cause to arrest standard, rather than the standard of probable cause to bind over ("directed verdict") set forth in *Myers v. Commonwealth* is appropriate to a bail revocation hearing.

The District Court Standards advise that the burden is automatically satisfied as to criminal responsibility because of the "presumption of sanity."[4]

§ 2.1B. RIGHT TO A PROBABLE-CAUSE HEARING

Pursuant to Mass. R. Crim. P. 3(f) and 7(e), a case brought to district court on a charge which is beyond the district court's subject matter jurisdiction should be scheduled for a probable cause hearing, although as detailed below that hearing may be pre-empted by an intervening indictment. Additionally, when the case is within the district courts' subject matter jurisdiction, the judge may decide to decline jurisdiction "to allow consolidation of cases, in recognizing the exclusive power of the Superior Court to sentence defendants to state prison, or if the interests of justice would best be served by doing so."[4.5] In that case, Rule 3(f) similarly mandates that the court hold a bind-over probable cause hearing absent an intervening indictment.

1. Intervening Indictments

Abundant case law holds that an intervening indictment preempts a probable-cause hearing,[5] except in limited but important circumstances.[6] However, some older case law also leaves open the possibility that the district court retains discretion to hold the probable-cause hearing or, in concurrent felonies, hold trial despite an intervening

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[4] District Court Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 3:03 (Nov. 1981).

[4.5] Commonwealth v Zannino, 17 Mass App Ct 73, 78-79 (1983). Where a charged crime is within the concurrent jurisdiction of both the District and Superior Court, the judge, not the prosecutor, makes the final determination of whether to exercise jurisdiction. Mass. R. Crim. P. 3(f) mandates a probable cause hearing when the court declines jurisdiction, absent an intervening indictment.

[5] Commonwealth v. Chamberlin, 22 Mass. App. Ct. 946, 947 (1986) (rescript); Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 471–72 (1986); Commonwealth v. Burt, 393 Mass. 703, 706–07 (1985) (either court's dismissal or prosecutor's *nol pros* is proper where intervening indictment); Commonwealth v. Hinterleitner, 391 Mass. 679, 682–83 (1984) (indictment preempts district court trial); Commonwealth v. Raposa, 386 Mass. 666, 668–69 (1982); Commonwealth v. Xiarhos, 2 Mass. App. Ct. 225, 228–30 (1974) (10-day rule not violated because preempting indictment within period); Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 529–33 (1974)(probable cause hearings and Grand Jury indictments are two separate, alternative processes for establishing probable cause, and a defendant cannot invoke one when probable cause was found in the other); Commonwealth v. Britt, 362 Mass. 325, 330 (Mass. 1972); Commonwealth v. Moran, 353 Mass. 166, 171–72 (1967); Commonwealth v. Nason, 252 Mass. 545, 548 (1925).

[6] *See, e.g.,* Commonwealth v. Raposa, 386 Mass. 666, 669 n.8 (1982) (where *trial* preempted, "[w]e would not look with favor" on prosecution waiting until day of trial to seek indictment), *id.* at 670–71 (Liacos, J., concurring); Commonwealth v. Silva, 10 Mass. App. Ct. 784 (1980) (speedy trial right violated by Commonwealth's repeated unexplained continuances and failure to comply with discovery orders); Commonwealth v. Thomas, 353 Mass. 429 (1967) (speedy trial right violated when, to evade court denial of continuance, Commonwealth *nol prossed* complaint and indicted). *See also* Hadfield v. Commonwealth, 387 Mass. 252, 257 (1982) (dicta) (circumventing probable-cause hearing may be invalid where "effrontery to district court," "obstruction of criminal process," or "waste of judicial resources"). Additionally, agreements between the parties that a probable-cause hearing will be held may entitle the defendant to one despite an intervening indictment. *See infra* section § 2.2, note 38.

indictment. Although in practice the district court case is almost invariably dismissed following indictment, these cases might be utilized by a court which was dissatisfied with the Commonwealth's conduct in evading a probable-cause hearing.[7]

Beyond this, rules, case law, and historical practice conflict regarding when a probable-cause hearing is required, as described *infra* § 2.1B(3).

2. Defendants in Superior Court No Longer Required to Elect Between a Probable-Cause Hearing and a Grand Jury Indictment

Mass. R. Crim. P. 3(b) was amended in 2004 to remove the requirement that the defendant "elect" a probable cause hearing. Previously, non-capital defendants who had a right to an indictment[8] were forced to choose between a probable-cause hearing and a grand jury indictment, although this election was never required in practice.[9] With the change in Rule 3(b), this *de facto* practice was adopted into statute, and defendants no longer need to choose between a probable cause hearing and an indictment.[10]

3. Probable Cause Hearings When the District Court Takes Jurisdiction

Before the 1990's, no probable cause hearing was afforded in cases where the district court retained jurisdiction.[14] But in 1993 the Supreme Judicial Court ruled that

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[7] Commonwealth v. Gallo, 2 Mass. App. Ct. 636, 640–41 (1974) (after indictment defendant should have sought district court hearing). *See also* Corey v. Commonwealth, 364 Mass. 137, 144 (1973) (Quirico, J., concurring) (dicta re possible right to trial in district court).

[8] Jones v. Robbins, 74 Mass. 329 (Mass. 1857) held "that punishment in the state prison is an infamous punishment, and cannot be imposed without … indictment …"; Brown v. Commissioner of Correction, 394 Mass. 89, 90 (Mass. 1985). See *supra* Ch. 4.

[9] Before the rule change in 2004, a single justice opinion found no election was required because Rule 3 did not make the statutory right to a probable-cause hearing contingent on a request. (Butler v. Dabrowski, Civil No. 79-445 (S.J.C. for Suffolk Co. Oct. 25, 1979) (Wilkins, J.). *Accord* Chabot v. Dabrowski, Civil No. 79-319 (S.J.C. for Suffolk Co. July 19, 1979) (Wilkins, J.)). Additionally, Chief Justice Zoll had advised that the courts probably still could not compel an election and that even a "request" might not have constituted a knowing waiver of indictment. (Dist. Ct. Dept. Bulletin 4-85 (Oct. 31, 1985), item 21.)

[10] The original intent of the "forced waiver" provision was efficiency. However, this efficiency can still be maintained since the prosecutor can simply elect to indict the defendant and save the duplicity of a probable cause hearing. This ability to simply indict, combined with the constitutional concerns regarding waiving the right to indictment and the statutory right to a probable cause hearing, led to the 2004 rule change. Mass. R. Crim. P. 3.

[11 - 13] [Omitted]

[14] Massachusetts practice had provided no probable-cause determination at all in such cases, despite the Supreme Court's ruling in Gerstein v. Pugh, 420 U.S. 103 (U.S. 1975) (persons arrested without a warrant and held by the police must be given a preliminary hearing to determine if there is probable cause). Court clerks had been instructed to issue complaints for all arrested defendants without a determination of probable cause because this can be done at arraignment. Standards of Judicial Practice: The Complaint Procedure (District Court Administrative Office June 20, 1975), Standards 2:00 and 2:04 and accompanying commentary. However, generally the required determination was not being made at arraignment.

to justify continued detention, a clerk or judge must make a finding of probable cause within twenty-four hours of arrest,[15] and in 2004 a new rule codified this change.[16] Note that these are "*detention* probable cause determinations" applicable to defendants arrested without a warrant, not "*bind-over* probable cause hearings," and the purpose and procedures are different, as summarized in the following section and described in greater detail at Chapter 9.3.

Apart from this modest detention hearing requirement in custody cases, a case might be made that statutory language requires a full, adversarial probable-cause hearing in *all* cases, although this language is most unlikely to undo decades of practice to the contrary. It is nevertheless worth noting that G.L. c. 276, § 38 requires a probable cause hearing "as soon as may be" in *all* district court cases. In *Corey v. Commonwealth*,[17] the Supreme Judicial Court found nothing in § 38 that limited its probable-cause requirement to charges beyond the district court's jurisdiction; therefore it applied to concurrent jurisdiction crimes. Similarly, nothing in § 38 limits the hearing to decline-of-jurisdiction cases; it applies whenever the defendant may be "held for trial."

4. Probable-Cause Finding Required to Support Continued Detention

In the 1993 ruling of *Jenkins v. Chief Justice* particularly affecting weekend arrestees, the Supreme Judicial Court interpreted Art. 14 of the state's constitution to require that "a warrantless arrest must be followed by a judicial determination of probable cause no later than reasonably necessary," defined as within twenty-four hours.[21] The *Jenkins* decision was codified in 2004 as Mass. R. Crim. P. 3.1. Under this rule, "[n]o person shall be held in custody more than twenty-four hours following an arrest, absent exigent circumstances," unless a determination of probable cause for detention has been made by a neutral judicial officer. Thus, no further probable cause determination need be made if the defendant has been arrested pursuant to warrant, or if a complaint has been issued on the basis of a probable cause showing. But if neither exception applies, the defendant is entitled to an *ex parte* probable cause determination by a judicial officer pursuant to Rule 3.1(b). This rule's requirements, and the remedies for their violation, are addressed in more detail *infra* at Sec. 9.3.

§ 2.1C. PROCEDURAL RIGHTS

[15] Jenkins v. Chief Justice of the District Court Dep't, 416 Mass. 221 (1993).

[16] Mass. R. Crim. P. 3.1

[17] 364 Mass. 137 (1973).

[18 - 20] [Omitted]

[21] Jenkins v. Chief Justice of the District Court Dep't, 416 Mass. 221 (1993). The court ruled that the 24-hour time limit was presumptively unreasonable; where the limit is exceeded, the state bears the burden of demonstrating that an extraordinary circumstance caused the delay. *Id.* at 238. Earlier the United States Supreme Court had required a judicial determination of probable cause be made within 48 hours of arrest. Riverside County v. McLaughlin, 500 U.S. 44 (1991), effectuating its decision in Gerstein v. Pugh, 420 U.S. 103 (1975), that a neutral magistrate must make a determination of probable cause before the defendant may suffer prolonged detention.

[22 - 25] [Omitted]

Because the court must assess the credibility of the evidence, defense counsel has a statutory right to cross-examine Commonwealth witnesses and present affirmative evidence at a probable-cause hearing.[32] The Supreme Judicial Court has recognized that in addition to contesting probable cause, the defendant may use the hearing for important impeachment and discovery purposes. Therefore, "the judge should allow reasonable latitude to the scope of the defendant's cross-examination of prosecution witnesses to effectuate the ancillary . . . functions."[33] Additionally, failure to provide a full hearing may implicate the equal protection clause[34] and the right to counsel.[35]

Other procedural guarantees include the rights to counsel and an impartial factfinder, and an opportunity to prepare, present, and cross-examine evidence.[36] A defendant's silence at a probable cause hearing may not be used against him at trial.[36.5] Rules of evidence apply.[37] The defendant has a right to obtain the court's tape recording[38] and/or record the proceedings herself,[39] and indigents will generally be able to obtain a transcript at state expense.[40]

Although a finding of no probable cause will ordinarily end the matter, jeopardy has not attached, and it is not legally a bar to a subsequent indictment for the same offense, even on precisely the same evidence.[41] If the case is within the final jurisdiction of the District Court judge, the judge must announce that the court will

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[32] Myers v. Commonwealth, 363 Mass. 843, 851–53 (1973), interpreting G.L. c. 276, § 38. *See also* Commonwealth v. Blanchette, 54 Mass. App. Ct. 165, 173-75 (2002)(credibility is to be considered); Commonwealth v. Ortiz, 393 Mass. 523, 534–35 (1984) (juvenile and adult probable-cause hearings serve identical functions and both provide the defendant rights to cross-examine and present evidence).

[33] Myers v. Commonwealth, 363 Mass. 843, 857 (1973).

[34] Myers v. Commonwealth, 363 Mass. 843, 855 n.13 (1973) (if the right to a full hearing is subject to the trial court's discretion, some defendants would be given full adversarial hearings while others would be given summary hearings).

[35] Coleman v. Alabama, 399 U.S. 1, 9 (1969) (counsel's function at preliminary hearing includes discovery and impeachment in addition to arguing against the defendant being bound over until trial).

[36] *See* Commonwealth v. Bennett, 2 Mass. App. Ct. 575, 581 (1974); Myers v. Commonwealth, 363 Mass. 843 (1973).

[36.5] G.L. c. 278, § 23; Commonwealth v. Bennett, 2 Mass. App. Ct. 575, 581 (1974). *See infra* § 2.3

[37] Myers v. Commonwealth, 363 Mass. 843, 849 n.6 (1973); Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 3:02 (District Court Administrative Office, Nov. 1981).

[38] If the court has a tape recording system it must tape the probable-cause hearing. Dist. Ct. Dep't Suppl. R. Crim. P. 9. *See also* Dist. Ct. Special R. 211; Boston Mun. Ct. Special R. 308.

[39] Dist. Ct. Dep't Suppl. R. Crim. P. 9. The defendant also has a right to have a stenographer record the hearing under G.L. c. 221 § 91B. Connaughton v. District Court of Chelsea, 371 Mass. 301 (1976).

[40] This is the practice, although an indigent defendant does not have a *right* to a free transcript of the probable-cause hearing under Commonwealth v. Britt, 362 Mass. 325, 328–31 (1972), interpreting G.L. c. 221, § 91B. *See infra* § 29.5.

[41] *See supra* § 1.4.

decline jurisdiction before hearing sworn testimony from any witness, which is when jeopardy attaches in a non-jury trial.[41.5]

§ 2.2 STRATEGY CONSIDERATIONS

Because a probable-cause hearing (or district court trial) is ordinarily preempted by an intervening indictment,[42] counsel facing this risk will want to seek an early hearing by invoking the thirty-day rule and other timing provisions,[43] or obtain an arguably enforceable agreement from the prosecutor that a probable-cause hearing will be guaranteed.[44]

Strategy at the hearing itself depends on an assessment of the likelihood of a finding of probable cause. In some cases, it may be reasonable to execute a "tight" case in the hope of winning, or at least convincing the judge to reduce the charge to one within the court's jurisdiction (*see* strategy outlined *supra* § 1.5). In most cases, however, counsel can expect a probable-cause finding and is best advised to use the hearing for its "ancillary benefits" of discovery and impeachment.[45] Although all

[41.5] Commonwealth v. De Furia, 400 Mass. 485, 487 (1987); Crist v Bretz, 437 US 28, 37 n.15 (1978); Serfass v. United States, 420 U.S. 377, 388 (U.S. 1975). *See also* Commonwealth v. Crosby, 6 Mass App Ct 679 (1978) (the proceedings constituted a trial on the merits and jeopardy barred the defendant's indictment because judge failed to announce that he was declining jurisdiction prior to hearing sworn testimony).

[42] *See supra* § 2.1B(1).

[43] G.L. c. 276, § 35 requires that no district court continuance exceed 30 days if the defendant is incarcerated. The "15-day rule" of G.L. c. 119, § 68 has, however, been retained in juvenile delinquency proceedings. *See infra* § 49.4 (discussing St. 1996, c. 200, § 11).

See also G.L. c. 276, § 38 (requiring the hearing "as soon as may be"); and Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 3:04 (District Court Administrative Office, Nov. 1981) (advising district court dismissal only after the superior court arraignment)

[44] Agreements of counsel "might entitle a defendant to further pursuit of a probable cause hearing which was in progress at the time an indictment was returned." Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 531 n.6 (1974) (citing Commonwealth v. Benton, 356 Mass. 447 (1969)). In Commonwealth v. Spann, 383 Mass. 142, 144–46 (1981), the court stated that a prosecutorial promise not to indict in exchange for a continuance of the probable-cause hearing would, if violated, require holding a probable-cause hearing despite the intervening indictment where prejudice was shown; in the circumstances of that case, however, the court found merely a nonenforceable prediction of likely events. *See also* Commonwealth v. Smith, 384 Mass. 519 (1981) (no enforceable offer to plea bargain where offer was made before trial and defendant sought to accept during jury deliberations); Commonwealth v. Tirrell, 382 Mass. 502, 512 (1981) (no enforceable offer where there is no detrimental reliance by defendant); Commonwealth v. St. John, 173 Mass. 566, 569–70 (1899) (promise by police officer not enforceable).

[45] In Commonwealth v. Martin, 417 Mass. 187, 196–97 (1994), a witness at trial said she could not remember what the assailant had been wearing at the time of the alleged crime. On defense counsel's attempt to refresh her recollection with a transcript of her probable-cause hearing testimony (during which she had said that the assailant had worn jeans), she claimed no refreshment and, further, that she was "not sure" that what she was shown had in fact been her testimony. The S.J.C. rejected the defendant's argument that prior testimony from a probable-cause hearing was admissible as a prior inconsistent statement, because "there is no inconsistency between a present failure of memory on the witness stand and a past existence of memory." The Martin Court left open the question raised in Commonwealth v. Daye, 393 Mass.

questioning must be relevant to ascertaining probable cause,[46] and the judge may limit repetitive questioning,[47] within that limit such a strategy might entail (1) the subpoena of all Commonwealth witnesses *and* documents, because the prosecution is under no obligation to present any more of its case than necessary to "allow a reliable determination of probable cause";[48] (2) presentation by the defense of uncalled prosecution witnesses; (3) open-ended and extensive questioning of prosecution witnesses for discovery purposes, and/or tight questioning designed to pin down the testimony or elicit facts useful for mitigation or impeachment; (4) withholding evidentiary objections to the prosecution's testimony to the degree they would impede discovery; (5) presentation of no defense witnesses (especially the defendant) to avoid providing discovery or impeachment material to the prosecution; (6) locking in testimony by asking whether the witness has left out any details, remembers any other features of the assailant, did anything else, etc.; and (7) saving defense theories and arguments for trial.[49]

Obviously, this strategy would not be used if (1) counsel believed the case could be won at the probable-cause hearing or (2) counsel wanted to avoid preservation of testimony of a Commonwealth witness who might not be available for trial. In such

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55, 73, n.17 (1984) of "whether when the circumstances at trial indicate that a witness is falsifying a lack of memory, a judge may admit the statement as 'inconsistent' with the claim of lack of memory." But in Commonwealth v. Le, 444 Mass. 431, 432 (Mass. 2005), the Supreme Judicial Court adopted the federal view under Fed. R. Evid. 801(d)(1)(C), allowing the substantive use of pretrial identifications, not merely for impeachment.

[46] Commonwealth v. Look, 379 Mass. 893, 904 (1980), *cert. denied sub nom.* Look v. Massachusetts, 449 U.S. 827 (1980); Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 529–30 (1974); Myers v. Commonwealth, 363 Mass. 843, 857 (1973). *Lataille* held that there is no right to the discovery a probable-cause hearing would afford where an indictment has already established probable cause. (Similarly, *Look* found no individual right of discovery unrelated to the probable-cause determination and upheld admission of trial testimony that had been barred at probable-cause hearing.) The District Court Administrative Office has interpreted *Lataille's* language as a limit on discovery opportunities during a probable-cause hearing. This seems a misconstruction, because intelligent discovery and impeachment questions do help ascertain probable cause, even if counsel's emphasis is discovery rather than victory at that stage. The district court's opinion that, for example, calling adverse witnesses for discovery might be "improper" is not embodied in its own standards, but in commentary to Standard 3:02. Standards of Judicial Practice: Trials and Probable Cause Hearings (Nov. 1981). Failure to provide a full hearing also implicates the constitutional guarantees of equal protection and right to counsel as noted *supra* § 2.1C.

[47] Although there is a statutory right to cross-examine at a probable-cause hearing under G.L. c. 276, § 38, the judge may use sound discretion in limiting the extent of examination, Commonwealth v. Rahilly, 10 Mass. App. Ct. 911, 912 (1980) (rescript); Myers v. Commonwealth, 363 Mass. 843, 857 (1973), but "should allow reasonable latitude [of cross-examination] to effectuate the ancillary discovery and impeachment functions. . . . [W]here the subject of cross-examination concerns the matter at issue there can be no doubt that the refusal to permit such question results in a denial of a fair hearing." *Meyers, supra* at 857 (quoting Jennings v. Superior Court, 66 Cal. 2d 867, 879). *See also* Commonwealth v. Britt, 362 Mass. 325, 330–31 (1972).

[48] Commonwealth v. Look, 379 Mass. 893, 904, *cert. denied sub nom.,* Look v. Massachusetts, 449 U.S. 827 (1980).

[49] *See also* Massachusetts Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases, Guideline 3.2 (March 5, 1985).

cases, counsel might want to limit prosecution testimony by not calling adverse witnesses, and fully cross-examining those the prosecution did call.[50] Additionally, note that the Supreme Judicial Court has held that discovery and impeachment opportunities are guaranteed only insofar as they are relevant to ascertain probable cause.[51]

Following the hearing, counsel should order the tape recording for trial preparation and impeachment purposes.

§ 2.3 PROSECUTORIAL COMMENT AT TRIAL ON DEFENSE TACTICS AT PROBABLE-CAUSE HEARING

At trial, the prosecution cannot introduce evidence of certain tactical choices made by the defense at the probable-cause hearing, including the defendant's failure to testify,[52] failure to present witnesses or other evidence,[53] or failure to cross-examine prosecution witnesses.[54]

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[50] Because the prosecution can introduce the testimony of a probable-cause hearing witness who becomes unavailable so long as defense counsel had an earlier opportunity to cross-examine, a "discovery strategy" is not without dangers. *See* Commonwealth v. Taylor, 32 Mass. App. Ct. 570 (1992), and cases cited therein at 575; *but see* Commonwealth v. Robinson, 69 Mass. App. Ct. 576 (2007) (reversible error where trial judge admitted probable cause hearing testimony of missing witness, where insufficient showing of a good faith effort to locate witness).

[51] *See supra* note 46.

[52] G.L. c. 278, § 23; Commonwealth v. Bennett, 2 Mass. App. Ct. 575, 581 (1974).

[53] Comment on failure of the defense to present witnesses at the present trial may also infringe on the defendant's rights. *See infra* § 35.3B(5).

[54] G.L. c. 278, § 23. *See also* Commonwealth v. Palmarin, 378 Mass. 474 (1979); Commonwealth v. Bennett, 2 Mass. App. Ct. 575, 580–82 (1974) (error to allow impeachment by prior silence); Commonwealth v. Morrison, 1 Mass. App. Ct. 632, 636–37 (1973) (construing G.L. c. 278, § 23). *Cf.* Commonwealth v. Barros, 24 Mass. App. Ct. 964 (1987) (rescript) (no violation of § 23); Commonwealth v. Sherick, 23 Mass. App. Ct. 338, 341–47, *aff'd,* 401 Mass. 302 (1987) (distinguishing permissible from impermissible prosecutorial comment).

In varying circumstances, violation of this statute at trial may be found harmless error, or remedied by declaring a mistrial or giving a cautionary instruction. Commonwealth v. Paradiso, 368 Mass. 205, 213 (1975). *See also* Commonwealth v. Barber, 14 Mass. App. Ct. 1008 (1982); Commonwealth v. Stokes, 10 Mass. App. Ct. 434 (1980) (convictions affirmed where single trial witness asked if had ever previously testified).