CHAPTER 4

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Complaints and Indictments

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§ 4.1 COMPLAINTS AND INDICTMENTS: IN GENERAL

Every criminal defendant must be prosecuted either by complaint—issued by a district court magistrate[1]—or by grand jury indictment.[2] These charging documents must contain "a plain, concise description of the act which constitutes the crime or an appropriate legal term descriptive thereof."[3] Defects in the charging document must normally be raised before trial by motion to dismiss.[4] This chapter discusses the complaint process, show-cause hearings, cross-complaints, and the right to indictment. Chapters 5 and 20 *infra* discuss grand jury proceedings and defects in the charging document, respectively.

District court prosecutions are initiated by complaint.[5] Superior court prosecutions must be initiated by indictment, although a defendant bound over by the district court to the superior court may waive the right to indictment and be prosecuted under the complaint.[6]

§ 4.2 COMPLAINTS

§ 4.2A. THE COMPLAINT PROCESS

A case commences in district court by complaint. For the most part, persons seeking the issuance of a complaint are police officers following up on an arrest, but any person who knows of facts constituting a crime may seek a complaint.[7] No matter who the complainant is, he or she must inform the court of the complained-of facts, which must be reduced to writing or recorded.[8] The magistrate taking the complaint[9] must then review the facts presented and determine if they constitute probable cause to

[1] The District Court Committee on Standards defines "magistrate" to refer to district court personnel authorized by law to issue criminal process under G.L. c. 218, §§ 32, 33, and 35. These include a justice, special justice, clerk, temporary clerk, assistant clerk or temporary assistant clerk, but not a deputy assistant clerk. Standards of Judicial Practice: The Complaint Procedure, Standard 1:01 (District Court Administrative Office, revised Oct. 2008). *See also* Commonwealth v. Hanley, 12 Mass. App. Ct. 501, 503 n.3 (1981) (G.L. c. 276, § 22, applies to oaths administered by clerks).

[2] G.L. c. 263, § 4.

[3] Mass. R. Crim. P. 4(a).

[4] Mass. R. Crim. P. 13 (c). But jurisdictional defects, such as failure to allege an essential element of the crime, may be raised at any time. *See infra* § 20.3.

[5] Mass. R. Crim. P. 3(a).

[6] Mass. R. Crim. P. 3 (c) (1). Waiver of indictment is not permitted in capital cases.

[7] Mass. R. Crim. P. 3(g)(1).

[8] Mass. R. Crim. P. 3(g)(1). Ordinarily, the complainant submits a written statement of facts, in the case of police officers often a copy of a police report. However, the facts can be reduced to writing by the judicial officer receiving the complaint based on oral statements made by the complainant, or they can be memorialized by a recording of the complainant's oral statement. See Reporter's Notes, Mass. R. Crim. P. 3(g)(1)(2004).

[9] Typically, it is the district-court clerk-magistrate or an assistant clerk-magistrate who takes the complaint. *See supra* §. 4.1.

believe that the person against whom the complaint is taken committed an offense.[10] If the magistrate finds probable cause, the complainant must sign the ensuing complaint under oath before the magistrate.[11]

If the defendant has been arrested without warrant, as noted the complainant is generally a police officer. Most police departments have a specific officer assigned to apply for complaints based on the police report or "affidavit" that duplicates the narrative portion of the police report. In this situation, the clerk-magistrate will review the application to determine probable cause and, if probable cause is found, prepare the complaint for the officer's oath and signature.

If the defendant has not been arrested, the situation differs in two respects: (1) The complainant applies for the issuance of process (summons or arrest warrant) as well as for a complaint.[12] (2) The defendant may have the right to a show-cause hearing.[13]

There is no requirement that a complainant have firsthand knowledge of the underlying incident;[14] a complaint issued solely on the basis of hearsay is not necessarily invalid.[15] The magistrate receiving the application must examine the complainant and any witnesses under oath,[16] and the complaint must bear both the magistrate's and the complainant's signatures.[17] The magistrate lacks authority to hold a complaint "open" over the objection of the Commonwealth or complainant.[18]

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[10] Mass. R. Crim. P. 3(g)(2). The probable-cause standard on which a complaint must rest is the same as that which would justify the issuance of an arrest warrant or which would support an indictment. Reporter's Notes, Mass. R. Crim. P. 3(g)(2)(2004)(equating the standard of probable cause to issue a complaint with that necessary to support an indictment). *See* Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982) (holding that to indict, a grand jury must "hear sufficient evidence to establish the identity of the accused … and probable cause to arrest him"); Commonwealth v. Moran, 453 Mass. 880, 884 (2009)(same).

[11] Mass. R. Crim. P. 3(g)(1).

[12] A complaint must be issued as the basis for process. G.L. c. 276, § 22.

[13] *See infra* § 4.2B.

[14] Commonwealth v. Cote, 15 Mass. App. Ct. 229, 236 (1983); Commonwealth v. Haddad, 364 Mass. 795, 799 (1974); Commonwealth v. Dillane, 77 Mass. (11 Gray) 67, 71 (1858); Standards of Judicial Practice: The Complaint Procedure, Commentary to Standards 1:01, 3:24 (District Court Administrative Office, revised Oct. 2008).

[15] Commonwealth v. Cote, 15 Mass. App. Ct. 229, 236 (1983). The commentary to the District Court Standards approves the practice whereby a single police officer presents complaints of offenses of which he has no firsthand knowledge as "a sound administrative practice that should be encouraged." Standards of Judicial Practice: The Complaint Procedure, Commentary to Standard 1:01 (District Court Administrative Office, revised Oct. 2008), approved in Commonwealth v. Daly, 12 Mass. App. Ct. 338 (1981).

[16] G.L. c. 276, § 22. *But see* Victory Distrib. v. Ayer Div. of the Dist. Court Dep't., 435 Mass. 136, 141 (2001) (clerk-magistrate must "act" on private citizen's application for complaint, but citizen has no constitutional or statutory right to challenge denial of application, even if no show-cause hearing was held); Standards of Judicial Practice: The Complaint Procedure, Standard 3:00 and Commentary (District Court Administrative Office, revised Oct. 2008).

[17] G.L. c. 276, § 22. Standards of Judicial Practice: The Complaint Procedure, Standard 3:24 (District Court Administrative Office, revised Oct. 2008). *See also* Commonwealth v. Barhight, 9 Gray 113, 114 (1857), disapproving "looseness and carelessness in instituting criminal procedures." *But see* Commonwealth v. Avola, 28 Mass. App. Ct. 988 (1990) (rescript), in which the complaint was upheld despite a discrepancy between named "complainant" in the top space of the form (the arresting officer) and the person signing as

Counsel should study both the application and the complaint for several purposes:

1. *Discovery:* Both the application and the complaint contain allegations about the alleged crime.[19] Also, the application typically contains a list of witness names and addresses. These documents give counsel a starting point for investigation and for the initial client interview.

2. *Inconsistent statements of Commonwealth witnesses:* Factual inconsistencies may appear in the application and/or complaint and the police incident report. Depending on who signed the differing accounts, these inconsistencies might have impeachment value at trial.

3. *Defects in the complaint:* Complaints are subject to dismissal[20] if they do not conform to legal requirements or were issued in an improper manner. Moving to dismiss a defective complaint may have only limited value because the prosecution can correct the deficiency by amendment[21] or by obtaining a new complaint. However the prosecution is not always motivated or able to take the required action. Therefore counsel should always check the complaint for formal sufficiency at an early stage.[22]

§4.2B. SHOW-CAUSE HEARINGS [23]

1. The right to a show-cause hearing

In theory,[24] an unfounded complaint will be screened out by arraigning judges and prosecuting attorneys. In practice, however, the mere fact that a complaint has been issued often suffices to propel a defendant through the criminal process. This fact magnifies the importance of the show-cause hearing to protect defendants from unwarranted prosecution.

The show-cause hearing is required by statute; the Rules of Criminal Procedure do not provide for such a hearing. G.L. c. 218, § 35A requires a magistrate who

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"complainant or authorized officer" (police prosecutor); Commonwealth v. Hanley, 12 Mass. App. Ct. 501, 503 –04 (1981), upholding complaint signed in blank where the complainant had previously signed the application and testified under oath at the show-cause hearing. The complaint must also contain a caption "as provided by law." G.L. c. 277, § 79: Mass. R. Crim. P. 4(a). *See* 30 MASS. PRAC. § 15.4 (3d ed. Smith 2007).

[18] Commonwealth v. Clerk of Boston Div. of Juvenile Court Dep't., 432 Mass. 693 (2000).

[19] *See* Dist./Mun. Cts. R. Crim. P. 2, requiring police and civilian applicants to provide to the clerk-magistrate written factual information supporting issuance of the complaint.

[20] *See infra* ch. 15 (pretrial motions generally). Defects in the content of the complaint are addressed *infra* at ch. 20.

[21] *See infra* § 20.6.

[22] See *infra* § 20.4.

[23] Motor vehicle offenses are governed by special rules. *See* G.L. c. 90C, §§ 1, 2; 30 MASS. PRAC. § 12.25 (3d ed. Smith 2007).

[24] *See* Standards of Judicial Practice: The Complaint Procedure, Standard 3:08 and Commentary (District Court Administrative Office, revised Oct. 2008) (in reviewing application for felony complaint by law enforcement officer, issuing magistrate may not exercise discretion beyond the determination of probable cause).

receives an application for the issuance of process[25] against a person not under arrest to notify the accused in writing and give him "an opportunity to be heard in opposition" in cases of a misdemeanor complaint[26] or in cases of a felony complaint received from a law enforcement officer who requests a show cause hearing. Under the statute, this requirement for a show-cause hearing is only excused in cases in which the magistrate determines that the accused poses "an imminent threat of bodily injury,[27] of the commission of a[nother] crime,[28] or of flight from the Commonwealth."[29] However, the magistrate has discretion to hold a show-cause hearing for felony complaints sought by private complainants,[30] and in the absence of public safety or other reasons for not doing so, the District Court Standards recommend a show cause hearing for all civilian complaints, whether of misdemeanors or felonies.[31]

The right to a show-cause hearing belongs to the person complained against, and not to the private complainant. The screening function thus is not limited to determining the existence of probable cause; "a judge or clerk-magistrate can decline to issue a criminal complaint even … where probable cause may exist …."[32] The aggrieved complainant in that case would need to enlist the support of the prosecutor, or resort to civil remedies.

2. Nature of hearing; standard

Show-cause hearings exist to permit an accused person to demonstrate that a complaint and process should not issue because "probable cause" is absent. Unlike the

[25] Section 35A actually speaks of receipt of a "complaint" rather than an "application." From the context, "complaint" here seems to mean an accusation of criminal conduct in an application for issuance of process. *See* Hobbs v. Hill, 157 Mass. 556 (1893), discussed in Standards of Judicial Practice: The Complaint Procedure, Commentary to Standard 1:01 (District Court Administrative Office, revised Oct. 2008); s*ee also* 30 MASS. PRAC. §§ 12.4, 12.14 (3d ed. Smith 2007) ("receipt" of complaints in statute refers to making of oral allegations to magistrate that are reduced to writing by the court).

[26] Under Section 35A, magistrates who receive a complaint from a private complainant alleging a felony have discretion as to whether to schedule a show cause hearing, assuming there is no "imminent threat of bodily injury, commission of a crime, or flight from the Commonwealth by the accused." There is thus no automatic right to a show cause hearing in the case of a private complaint alleging both a misdemeanor and a felony. *See* Commonwealth v. Cote, 15 Mass. App. Ct. 229, 235-36 (1983).

[27] *See* Commonwealth v. Tripolone, 44 Mass. App. Ct. 23, 27 (1997) (exception not satisfied by mere allegation that defendant violated 209A order; court policy requiring automatic issuance of complaint without prior hearing in such cases violates statute).

[28] Gordon v. Fay, 382 Mass. 64, 72 (1980) (purpose of exceptions to prevent retaliation by defendant on receipt of notice, in the form of "intentional acts of criminality . . . in addition to the acts which form the basis of the complaint against him").

[29] G.L. Ch. 218, §35A.

[30] *See id*.; *see also* Commonwealth v. Smallwood, 379 Mass. 878, 884–85 (1980).

[31] Standards of Judicial Practice: The Complaint Procedure, Standard 3:09 (District Court Administrative Office, revised Oct. 2008).

[32] Victory Distrib. v. Ayer Div. of the Dist. Court Dep't., 435 Mass. 136, 141 (2001) (clerk-magistrate must "act" on private citizen's application for complaint, but citizen has no constitutional or statutory right to challenge denial of application, even if no show-cause hearing was held).

more stringent bind-over standard of probable cause,[33] the complainant need not establish a prima facie case, but only that "reasonable cause" exists to believe that a crime has been committed and that the accused committed it.[34]

The procedure is usually informal. The rules of evidence do not apply. Hearings take place in a variety of courthouse settings; if necessary, the accused should insist on a hearing in private.[35] Although by statute the accused has a right to be heard "personally or by counsel,"[36] lawyers often do not appear,[37] and the scope of counsel's participation is at the discretion of the presiding magistrate. For example, defense counsel has no right to cross-examine the complaining witnesses, but magistrates often permit questioning.[38]

The law specifically permits the summonsing of witnesses to show-cause hearings[39] and permits the defendant to record the proceedings stenographically or by tape at his own expense.[40]

3. Strategic considerations at the show-cause hearing

Because counsel often enters a case after the complaint has issued, she cannot usually take advantage of the defensive opportunities offered by a show-cause hearing. Where counsel is involved before the hearing date, however, she might use the show-cause hearing to achieve various goals. But because some of these goals conflict with others, counsel should decide on strategy before the hearing.

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[33] See supra § 2.1.

[34] Standards of Judicial Practice: The Complaint Procedure, Standard 3:18 and Commentary (District Court Administrative Office, revised Oct. 2008); Paquette v. Commonwealth, 440 Mass. 121, 132 (2003) This is the same probable cause standard that would support an arrest or the issuance of an arrest warrant. *Id.*

[35] Standards of Judicial Practice: The Complaint Procedure, Standard 3:15 (District Court Administrative Office, revised Oct. 2008). Standard 3:15, approves of public hearings in exceptional cases. *See* Commonwealth v. Harris, 231 Mass. 584 (1919) (importance of grand jury secrecy to protect target's privacy before probable cause established).

[36] G.L. c. 218, § 35A.

[37] An indigent who has been accused has no right to the appointment of counsel at this stage. *See* Commonwealth v. Holliday, 450 Mass. 794, 813 (2008) (acknowledging well-settled precedent that complaint procedure does not trigger the Sixth Amendment right to counsel). Eagle Tribune Pub. Co. v. Clerk Magistrate of Lawrence Div. of Dist. Court Dept., 448 Mass. 647, 653 (2007) (no right to appointed counsel at show cause hearing).

[38] Commonwealth v. Riley, 333 Mass. 414 (1956) (no right to cross-examine); 30 MASS. PRAC. § 12.27 (3d ed. Smith 2007); Commonwealth v. Hanley, 12 Mass. App. Ct. 501, 502 (1981) (cross-examination was permitted). *See* Standards of Judicial Practice: The Complaint Procedure, Standard 3:17 and Commentary (District Court Administrative Office revised Oct. 2008). *See also Chelsea Officer Accused of Rape Wins Legal Round,* BOSTON GLOBE, Dec. 6, 1990, at 40 (S.J.C. single justice refused to bar clerk-magistrate from permitting defense counsel to cross-examine alleged victim at show-cause hearing), regarding Jane Doe v. Victor F. Zuchero, Clerk-Magistrate and James Shannon, Attorney General, S.J.C. No. 90-512.

[39] G.L. c. 218, § 37. *See also* Commonwealth v. DiBennadetto, 436 Mass. 310, 314-16 (2002) (although magistrates have discretion to limit the scope of testimony at show cause hearings, a refusal to permit defense witnesses to testify might violate the accused's right to be heard under G.L. c. 218, sec. 35A).

[40] G.L. c. 221, § 91B (stenographer); Dist. Ct. Special R. 211(B)(2) (tape recording).

a. Contesting probable cause

The primary purpose of the show-cause hearing is to avoid harassment of innocent persons by private complainants.[41] Thus the magistrate will not issue process if the complained-of conduct does not constitute a crime.

Even if the complainant's account appears to meet the threshold probable-cause standard, process should not issue if the accused produces evidence that "completely refute[s] the complainant's evidence of probable cause".[42] This can be done by presenting an uncontroverted legal defense (such as double jeopardy), or by demonstrating the complainant's abusive motives and incredibility. Either defense will probably require the defendant to give sworn evidence under questioning from the magistrate and/or the complainant, and neither will prevail unless "the accused completely discredits the complainant's credibility or establishes a defense based on uncontradicted facts."[43] This tactic should be avoided in the normal course: If it fails, counsel will have prematurely disclosed his defense to the opposition. A defense "on the merits" at this stage also risks generating damaging client admissions and statements admissible to impeach defense witnesses at trial. Therefore, as in the bind-over hearing context,[44] counsel should carefully weigh the risks before advising this course of action.

b. Diversion

The probable-cause standard is easy to satisfy, especially when the complaining witness is a police officer. In most cases therefore counsel should focus on the hearing's broader, implicit purpose of diverting minor criminal cases from the courts by encouraging informal dispute settlement.[45] This process can occur informally outside the hearing or by influencing the hearing magistrate in his important mediating role. If the magistrate can be persuaded that the dispute can be "worked out" short of criminal prosecution, he might prevail on the complainant to withdraw or defer his application in return for an alternative remedy such as restitution, conditions on the defendant's behavior or further mediation. Alternatively, the magistrate might be persuaded to "continue" the application for a period of time, then dismiss it contingent on the client's behavior meanwhile. In appropriate cases initiation of a cross-complaint on the client's behalf (*infra* § 4.2C) might positively affect the outcome.

If otherwise acceptable to the client, the goal of diversion can be pursued without presenting defense witness testimony. It is therefore a safer strategy than contesting probable cause. Even if diversion efforts fail to avert issuance of a

[41] Commonwealth v. Haddad, 364 Mass. 795, 799 (1974); Gordon v. Fay, 382 Mass. 64, 69–70 (1980); *See* Standards of Judicial Practice: The Complaint Procedure, Standard 3:00 (District Court Administrative Office, revised Oct. 2008).

[42] Standards of Judicial Practice: The Complaint Procedure, Standard 3:18 Commentary (District Court Administrative Office, revised Oct. 2008).

[43] *Id*.

[44] See supra § 2.2.

[45] Gordon v. Fay, 382 Mass. 64, 69–70 (1980); Standards of Judicial Practice: The Complaint Procedure, Standard 3:00 and Commentary (District Court Administrative Office, revised Oct. 2008).

complaint, a non-confrontational approach at this stage might bear fruit during later plea negotiations.

c. Informal Discovery

The defense may benefit from informal discovery generated by the show-cause hearing. Counsel should therefore record[46] the hearing unless compelling countervailing considerations apply.[47]

4. Following the show-cause hearing

If the magistrate refuses to issue a complaint/process the complainant may "appeal" the decision to a judge.[48] In such a case if the judge issues a complaint, the defendant may disqualify that judge from presiding over the trial.[49]

If the magistrate issues a complaint/process, the defendant can move to dismiss based on a claim either that the evidence at the hearing did not constitute probable cause or that the hearing procedure was for some reason defective.[50] However, the defendant may not challenge the result by seeking a new show-cause hearing before a judge.[51] To discourage harassment by the complainant, denied applications are kept on file for one year before being destroyed.[52]

5. If defendant has been denied his right to a show-cause hearing

If a complaint has issued without giving the defendant prior notice required by G.L. c. 218, § 35A, counsel may move to dismiss, thereby forcing the complainant to reapply for issuance of process.[53] If the Commonwealth has obtained a confession or

[46] *See supra* § 4.2B(2).

[47] Recording escalates the hearing's formality and might inhibit the complaining witnesses from making statements valuable to the defense. Recording also undermines the cooperative atmosphere that might be most conducive to diversion. Alternatively, counsel could bring to the hearing an investigator or other credible third party who could testify at trial to the complainant's inconsistent statements at the hearing. *But see* Standards of Judicial Practice: The Complaint Procedure, Standard 3:16 (District Court Administrative Office, revised Oct. 2008) (exclusion of non-interested persons).

[48] *But see infra* 4.2(C), numbered paragraph 1 and accompanying footnote.

[49] G.L. c. 218, § 35.

[50] Standards of Judicial Practice: The Complaint Procedure, Standard 4:00 (District Court Administrative Office, revised Oct. 2008).

[51] The defendant's sole remedy is a motion to dismiss for failure to present sufficient evidence to the magistrate, or on other grounds that might apply. Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002), *citing* Commonwealth v. McCarthy, 385 Mass. 160, 430 (1982).

[52] G.L. c. 218, § 35. *See also* Standards of Judicial Practice: The Complaint Procedure, Standard 5:01 (District Court Administrative Office, revised Oct. 2008).

[53] Commonwealth v. Tripolone, 44 Mass. App. Ct. 23, 27 (1997) (citing Commonwealth v. Lyons, 397 Mass. 644, 647 (1986)). The defendant would be entitled "at most, to a dismissal without prejudice, after which the complaint could be filed again and a show-cause hearing then provided." Commonwealth v. Leger, 52 Mass. App. Ct. 232, 242 (2001).

other evidence pursuant to the original unlawful process, counsel should consider filing a motion to suppress.[54]

§ 4.2C. CROSS-COMPLAINTS

In cases where the defendant has himself been victimized, counsel should consider the advisability of having the defendant seek criminal complaints against the perpetrators.[55] This is often appropriate when the defendant is charged with assault and battery in circumstances of mutual civilian affray and/or police brutality. Cross-complaints can help the defendant in two ways. *First,* issuance of the complaints (and sometimes even the application) can succeed in shifting the focus psychologically from defendant's conduct to that of the "victim" or the police. This is especially likely to occur if counsel can persuade the court to schedule the cross-complaints for trial on the same date as the complaints against the defendant, so that they can be disposed of together in a single trial, or in successive trials before the same judge. (To succeed, counsel should set the application process in motion as promptly as possible.) *Second,* the prospect of criminal and/or civil liability may give the cross-accused party an incentive to withdraw or compromise the complaint against defendant. This could lead to an agreement to seek dismissal of the complaints on both sides. Often in such cases the police insist on the client's waiver of civil claims against them.[56]

In deciding whether to seek cross-complaints counsel should consider several negative points:

1. Despite the low probable-cause threshold in show-cause hearings, magistrates may be reluctant to issue cross-complaints, especially against the police, even though police officers are not legally entitled to special consideration in the complaint process.[57] If a clerk-magistrate denies the defendant's application for a cross-complaint, counsel may request a prompt hearing before a judge.[58]

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[54] *See* Commonwealth v. Lyons, 397 Mass. 644, 647 (1986) (neither the United States nor Commonwealth constitutions guarantees the right to a show-cause hearing, and no "automatic" exclusionary consequence follows violations of § 35A, but suppression might be appropriate for flagrant police misconduct in avoiding a required show-cause hearing).

[55] Court-appointed counsel may surely advise the client to seek cross-complaints, but it is arguable whether he may also represent the client as a complainant. This question was avoided by the Supreme Judicial Court in Whitley v. Commonwealth, 369 Mass. 961 (1975).

[56] *See infra* § 43.5A.

[57] Standards of Judicial Practice: The Complaint Procedure, Standard 2:01 and Commentary (District Court Administrative Office, revised Oct. 2008). When an application for a complaint is made against a police officer employed within the court's territory, Standard 3:02 counsels the magistrate to give "strong consideration" to requesting that the Regional Administrative Justice either transfer the matter of another division or assign a magistrate from another division to determine the application. Finally, Standard 3:06 disapproves the practice of routine magistrate referrals of lay complainants to the police; this is warranted only if further investigation is necessary.

[58] *See* G.L. c. 276, § 22 ("upon a complaint to a justice . . . he shall [hold a hearing]"). Despite this apparently clear mandate, the District Court Standards question whether this law indeed guarantees a rehearing or only requires that a complainant who "manifests serious dissatisfaction" with the denial of his application be informed of his right to request that a judge re-determine that matter. Standards of Judicial Practice: The Complaint Procedure, Standard 3:22 and Commentary (District Court Administrative Office, revised Oct. 2008). Under the Standard, upon such a request the magistrate is to provide the judge with the application and supporting materials so that the judge can promptly decide what to do with the request. A

2. An application for cross-complaints might harden the determination of the opposing parties to go forward. This is especially true if the police are the targets because even an unsuccessful application suggests that the defendant is contemplating bringing a subsequent civil suit. In response the police might press the prosecutor to obtain a guilty finding against the defendant in order for protection. Thus, a tactic designed to strengthen the defendant's bargaining power might backfire by preventing a favorable disposition that was otherwise possible.

3. Even if the cross-complaint issues, the defendant cannot prevent the prosecution from delaying its trial until after his trial and conviction on the original complaint.[59] Such scheduling frustrates use of the cross-complaint as leverage.

4. Applying for a cross-complaint in effect requires the defendant to give up his right to silence in connection with the pending complaint against him: Both at the show-cause hearing and (if the cross-complaint issues) at trial he will have to testify as the complaining witness. If the cross-complaint is tried before the original complaint, he risks incriminating himself on the original charges without having the opportunity to test the government's prima facie case.

§ 4.3 THE RIGHT TO INDICTMENT AND WAIVER OF THE RIGHT

§ 4.3A. THE RIGHT TO INDICTMENT; EXPRESS WAIVER

Defendants charged with offenses punishable by imprisonment in state prison have a state constitutional right to grand jury indictment.[60] Because the district courts may not impose state prison sentences, the right does not apply when a district court retains jurisdiction over an offense within its concurrent jurisdiction.[61]

The defendant may waive his right to indictment either at the district court or superior court stage.[62] The waiver, which does not prevent the prosecution from proceeding by indictment anyway,[63] must be in writing[64] and, unless the defendant has

district court judge's inherent authority to hold a rehearing after denial of an application was affirmed in Bradford v. Knights, 427 Mass. 748 (1998) (BMC judge has inherent authority). *But see* Victory Distrib. v. Ayer Div. of the Dist. Court Dep't., 435 Mass. 136, 141 (2001) (private complainant has no statutory or constitutional right to challenge denial of application). If the rehearing fails to win a cross-complaint, then without police or prosecution support the defendant has no remedy other than civil suit. Whitley v. Commonwealth, 369 Mass. 961, 962 (1975).

[59] Commonwealth v. Belmonte, 4 Mass. App. Ct. 506 (1976).

[60] The right is implicit in Mass. Const. Declaration of Rights art. 12. Jones v. Robbins, 74 Mass. (8 Gray) 329, 349 (1857). The federal constitutional right to grand jury indictment under the Fifth Amendment does not apply to state proceedings. Branzburg v. Hayes, 408 U.S. 665, 688 n.25 (1972); Hurtado v. California, 110 U.S. 516, 538 (1884).

[61] Mass. R. Crim. P. 3(b).

[62] *See* Mass. R. Crim. P. 3(c)(2); *see also* Super. Ct. R. 59.

[63] Mass. R. Crim. P. 3(e); Brown v. Commissioner of Correction, 394 Mass. 89, 93 (1985).

[64] Mass. R. Crim. P. 3(c)(2). *But see* Commonwealth v. Peterson, 445 Mass. 782, 785-788 (2006) (holding that oral waiver of indictment on eve of trial was valid where the defendant had been indicted, the indictment was defective, and on advice of counsel the defendant knowingly and voluntarily agreed to felony prosecution in Superior Court by a superseding, district-attorney complaint mirroring the charges in the original defective indictment).

waived the right to counsel, counseled. Like waivers of other basic rights, it must also be "intelligent and competent."[65]

§ 4.3B. WAIVER OF INDICTMENT: STRATEGY [66]

Most defendants facing trial in superior court are best served by insisting on the right to grand jury indictment rather than waiving the right and permitting the prosecution to proceed based on the complaint. Several benefits attend prosecution on indictment: (1) although the chance is remote, the grand jury might refuse to return a true bill; (2) if the charging document proves to be materially defective, prosecutors are less likely to re-present the case to a grand jury than apply for a new complaint; (3) insisting on grand jury screening raises the possibility of a later challenge to the indictment based on defects in the grand jury process;[67] and (4) should the Commonwealth present any key witnesses to the grand jury,[68] the transcript will be available to impeach their testimony at trial.

Therefore, the defendant should not waive indictment except for a good reason. Certain circumstances favor waiver for particular defendants:

1. The defendant may have other charges pending in Superior Court as to which a guilty plea is being or has been negotiated and may wish to include pending District Court charges in the guilty plea. Waiving indictment and proceeding on a district-attorney's complaint gives the Superior-Court judge jurisdiction to take a guilty plea on the unindicted charges and to sentence the defendant to state prison, perhaps concurrently with other charges, in accordance with the plea agreement, a result that is beyond the authority of the District Court.[69]

2. The grand jury process usually involves more delay than proceeding on the complaint. If the defendant is certain to be indicted and would benefit from speeding up the process, waiver might make sense. For example, the defendant might be incarcerated pending trial on charges for which he is unlikely to be imprisoned.

3. If the defendant will plead guilty, counsel might be able to use waiver of indictment as a bargaining chip.

4. The grand jury process might bring unwanted publicity.

5. In some cases, the grand jury process may strengthen the Commonwealth's case or result in additional charges. For example, the prosecution might subpoena defense witnesses and gather evidence useful for impeachment at trial.

6. The complaint may be substantially defective, precluding later amendment. Waiving indictment avoids substitution of a corrected charge at the grand jury stage.

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[65] DeGolyer v. Commonwealth, 314 Mass. 626, 631 (1943).

[66] This section principally relies on 1 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 156–58 (5th ed. 1988).

[67] See *infra* § 5.8C.

[68] This may be unlikely because grand jury indictments may rest solely on hearsay. *See infra* § 5.6A.

[69] *See* G.L. c. 218, §27 (providing that the district court may not impose a sentence to state prison).