COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11398

COMMONWEALTH OF MASSACHUSETTS

v.

RODRICK JAMES TAYLOR,

On Further Appellate Review of a Judgment of the Suffolk Division of the Superior Court Department

BRIEF OF THE BOSTON BAR ASSOCIATION AS AMICUS CURIAE

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ISSUE DISCUSSED

Is the time a criminal defendant spends seeking mandatory discovery from the Commonwealth excludable from the speedy-trial clock under Mass. R. Crim. P. 36(b)(2) where the Commonwealth fails to produce mandatory, automatic discovery to the defendant as required under Mass. R. Crim. P. 14(a), the Commonwealth requests more time to comply with its discovery obligations, and the defendant objects to the exclusion of such time under rule 36(b)(2)?

INTEREST OF THE AMICUS CURIAE

The **Boston Bar Association (BBA)** traces its origins to meetings convened by John Adams in 1761, distinguishing it as the oldest bar association in the United States. The BBA works to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large. The BBA has an interest in the proper functioning of the Massachusetts courts, as well as in the just and correct interpretation of the Massachusetts Rules of Criminal Procedure that govern those courts' proceedings.

The issue presented in this case involves tension between the requirement of Mass. R. Crim. P. 14(a)

that the Commonwealth produce certain categories of mandatory, automatic discovery, on the one hand, and the requirement of Mass. R. Crim. P. 36(b) that defendants be brought to trial within one year (with only limited exceptions), on the other. The BBA submits this brief in the hope that it will assist this Court in the proper interpretation of both provisions and in striking an appropriate balance between the interests of the Commonwealth and of criminal defendants awaiting trial. The BBA takes no position on the application of the rule to the contested facts of this particular case.

STATEMENT OF THE CASE

I. LEGAL FRAMEWORK.

Under rule 14(a)(1)(A), the Commonwealth must "disclose to the defense, and permit the defense to discover, inspect and copy," any items or information falling into any of nine different categories,[1] "pro-

[1] These include, for example, the defendant's statements, the grand jury minutes, the testimony of grand jury witnesses, any facts of an exculpatory nature, the identity of the Commonwealth's prospective witnesses, intended expert opinion evidence, police reports, police photographs, and physical evidence. See Mass. R. Crim. P. 14(a)(1)(A)(i)-(vii). The rule reciprocally imposes certain mandatory discovery obligations on defendants for the Commonwealth's benefit. See Mass. R. Crim. P. 14(a)(1)(B).

vided it is relevant to the case and is in the possession, custody or control of" the Commonwealth or its agents. "The purpose of mandatory discovery is to encourage full pretrial discovery, increase what will be discovered by both sides, and promote judicial efficiency." Commonwealth v. Frith, 458 Mass. 434, 439 (2010), quoting Commonwealth v. Green, 72 Mass. App. Ct. 903, 903 n.1 (2008).

The disclosure required by rule 14(a)(1)(A) is automatic, i.e., the Commonwealth must turn over the materials "at or prior to the pretrial conference." No defense motion or request for disclosure is necessary, for the obligation imposed by the rule "shall have the force and effect of a court order, [so that] failure to provide discovery pursuant [thereto] may result in [the] application of sanctions." Mass. R. Crim. P. 14(a)(1)(C). Once the Commonwealth has provided all the discovery which rule 14 or other court orders require it to provide, "it shall file with the court a Certificate of Compliance," which "shall state that, to the best of its knowledge and after reasonable inquiry, the [Commonwealth] has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item pro-

vided." Mass. R. Crim. P. 14(a)(3). See also Frith, 458 Mass. at 440-41 (explaining prosecutor's duty of "reasonable inquiry").

The duty of disclosure imposed under rule 14(a)(1) is a continuing one: "If . . . the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce" earlier, it must "promptly" inform the defense of its discovery and produce the new material. Mass. R. Crim. P. 14(a)(4). The production of additional discovery will in turn obligate the Commonwealth to file a supplemental certificate of compliance under rule 14(a)(3), "identifying the additional items provided." The failure to comply with rule 14's discovery obligations may prompt the imposition of sanctions under rule 14(c), which "are remedial, not punitive, in nature," as they "are designed to protect a defendant's right to a fair trial." Frith, 458 Mass. at 442. Possible sanctions may include dismissal of the criminal charges, typically without prejudice to refiling. See Commonwealth v. Hernandez, 421 Mass. 272, 280 n.8 (1995). Dismissal with prejudice is reserved for cases of "egregious prosecutorial misconduct" or "'irremediable harm' to the defendant's opportunity to

obtain a fair trial." Id. at 277, quoting Commonwealth v. Lewin, 405 Mass. 566, 579 (1989); see also Commonwealth v. Cronk, 396 Mass. 194, 198-99 (1985).

Rule 36(b) imposes a separate obligation: to ensure that the defendant is brought to trial within a reasonable time. The rule provides that defendants must be brought to trial within one year of their arraignment "unless the Commonwealth justifies the delay." Commonwealth v. Spaulding, 411 Mass. 503, 504 (1992); see also Commonwealth v. Rodgers, 448 Mass. 538, 540 (2007) ("The burden is on the Commonwealth" to justify the delay by "demonstrat[ing] that a particular period or periods should be excluded from the calculation"). A period of delay "may be excused by a showing that it falls within one of the '[e]xcluded [p]eriods' provided in rule 36(b)(2), or by a showing that the defendant acquiesced in, was responsible for, or benefited from the delay." Rodgers, 448 Mass. at 540, quoting Mass. R. Crim. P. 36. Failure to bring the defendant to trial within the time set forth in rule 36(b) requires that the charges be dismissed, with prejudice, on the defendant's motion. Mass. R. Crim. P. 36(b)(1), (e). See also Commonwealth v. Balliro, 385 Mass. 618, 624 (1982) ("When a complaint

for an offense has been dismissed on speedy trial grounds, a subsequent prosecution for the same and any related offense is barred.").[2]

II. PRETRIAL PROCEEDINGS REGARDING DISCOVERY AND SPEEDY-TRIAL MOTION.

After a Suffolk County grand jury indicted defendant, Rodrick Taylor, for murder in the first degree, G. L. c. 265, § 1, he was arraigned on August 3, 2006, in the Superior Court, which set a presumptive trial date in late August 2007. RA8.[3] The defendant was held without bail pending trial. RA2, 8, 22.

Beginning in September 2006, the defendant began filing a series of discovery motions, including a motion to compel the production of automatic discovery under Mass. R. Crim. P. 14, a motion for all statements by a certain individual to the police, and a motion for all videotape recordings produced or obtained in connection with the investigation. RA8, 27-30.

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[2] Though rule 36(b) "quantif[ies] the time limits beyond which a defendant's speedy trial rights shall be deemed to have been denied," Reporter's Notes to Mass. R. Crim. P. 36 (1996), "[i]t is wholly separate from the . . . constitutional right to a speedy trial," being primarily "a rule of case management." Commonwealth v. Lauria, 411 Mass. 63, 67 (1991).

[3] Materials included in the defendant's amended record appendix are cited as "RA__." Materials included in the defendant's addendum to his principal brief are cited as "A__."

The defendant's motions were all heard by the Superior Court (Hinkle, J.) on November 9, 2006. RA8-9. At the defendant's request, the motion to compel automatic discovery was reserved for a later hearing if necessary. RA8, 27. The motion for statements was allowed without objection, and the Commonwealth was directed to comply within four days. RA9, 29. The motion for videotape recordings similarly was allowed without objection, and the court ordered the Commonwealth to comply within thirty days. RA9, 30. The judge later entered an endorsed order on the motion for videotape recordings, treating it as a motion to compel and ordering the not-yet-produced recordings to be turned over by January 15, 2007, which extended the original deadline by thirty-five days. Id.

At a hearing held in late January 2007, defense counsel reported that "the discovery that I'm still seeking is outstanding," and the Commonwealth asked for thirty more days to comply. RA124-25. When asked whether that was agreeable, defense counsel replied, "I'm not waiving Rule 36," and the judge repeated, "Rule 36 will not be waived from this date until the time of the compliance." RA125. The judge further confirmed her understanding of the defense's position:

THE COURT: I guess you don't object to the additional time, but you will not waive your client's right; is that correct?

MR. SWOMLEY: That's correct.

THE COURT: Okay.

RA126.

Shortly after that hearing, defense counsel followed up with a letter to the prosecutor, which summarized outstanding discovery items that had yet to be produced, including surveillance video, crime scene photos, police notes, names and addresses of all witnesses, and telephone records. RA59. Defense counsel provided copies of this correspondence to the judge during the next compliance hearing held in late March 2007, where he again reported that discovery from the Commonwealth remained outstanding. RA75-81. The Commonwealth at that time reported that it hoped to be able to comply in "no more than two weeks." RA79-80. Due to the prosecutor's absence, the next compliance hearing was delayed until April 20, 2007, about four weeks later. RA10, 116-17, 131, 158, 162. At that hearing, the same pattern repeated: the Commonwealth again reported that some discovery remained outstand-

ing and requested an additional two weeks' time.[4] RA162-63.

On May 17, 2007, the parties appeared for a trial assignment conference. RA11. Defense counsel reported receiving "some more discovery" that day, but also conveyed his "understanding that there's some more that's missing" and that the prosecutor "thinks he can have it by [early June 2007]." RA95-96. The presumptive trial date, which the parties jointly moved to reschedule, also was discussed. RA31, 96-97. Defense counsel queried whether his joinder in that motion would be construed as a waiver of the defendant's speedy-trial rights under rule 36, and argued that it should not be "because of the difficulty in getting the discovery." RA97-98. The judge responded:

> [A]s to that period of time where the Commonwealth should have provided discovery and did not provide discovery, the record should be made clear that. . . if there is a motion to dismiss on speedy trial grounds filed that that particular delay is attributed to the Commonwealth absent the Court reviewing whatever the reasons were for the delay and making a decision that there is some basis for exclusion because of that.

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[4] Defense counsel did not appear at this hearing; he later explained that he arrived late, but averred that he spoke after the hearing with both the judge and the prosecutor about outstanding discovery. RA117.

RA98. The court ordered the Commonwealth to provide all discovery by June 5, 2007. RA11.

On June 12, 2007, the court held another discovery status hearing. Id. The Commonwealth reported its belief that "discovery . . . is just about complete," with "a couple of items" still outstanding. RA168. Even so, ten days later defense counsel wrote to the Commonwealth to report that "there are still many transcribed statements which we do not have," each of which was listed in prior correspondence. RA61. At a court conference held in mid-October 2007, the Commonwealth agreed to provide those materials by November 8, 2007. RA177-79. On that date, however, the defense reported that it still did not have all discovery. RA183. The Commonwealth reported "some outstanding discovery" again on November 20, 2007, but promised production within two weeks; defense counsel agreed, but noted that "Rule 36 is not being waived by me even as of this date." RA191.

The Commonwealth made a substantial production of discovery materials on December 4, 2007, which was reported to the court at a conference that same day by defense counsel, who also said he "need[ed] to look at" the production to determine whether it represented

full compliance with the Commonwealth's discovery obligation and noted again his nonwaiver of rule 36 rights. RA201. Shortly thereafter, defense counsel wrote again to the Commonwealth, "documenting all the discovery items . . . believe[d] [to be] either incomplete or missing."[5] RA63-64. At a conference held on December 27, 2007, defense counsel reported again that the Commonwealth "has yet to fully comply with discovery" and repeated his contention that no time should be chargeable to the defense for rule 36 purposes as a result of that delay. RA209. Discovery was again reported outstanding at a court conference held on February 7, 2008. RA228.

On April 2, 2008, the defendant moved to dismiss the indictment on speedy-trial grounds under both the Sixth Amendment to the United States Constitution and art. 11 of the Massachusetts Declaration of Rights, as well as under Mass. R. Crim. P. 36. RA38-120. The defendant also moved for discovery sanctions under Mass. R. Crim. P. 14(c). RA14. Both motions were denied, after a nonevidentiary hearing, by a different judge (Neel, J.), who would eventually serve as the

[5] Defense counsel sent similar deficiency letters in February, March, and April 2008. RA65-70.

trial judge. RA16, 121, 386-480; A1-29. At the time of that hearing, held on May 5, 2008, the Commonwealth still had not yet filed the certificate of compliance required under Mass. R. Crim. P. 14(a)(3). RA405-06. The Commonwealth filed the certificate on May 9, 2008, while jury selection was underway. RA17.

III. CONVICTION AND POSTCONVICTION PROCEEDINGS.

On July 3, 2008, following a six-week trial,[6] a jury found the defendant guilty of murder in the second degree. RA18-22. The defendant appealed from that conviction. RA370. After that appeal was docketed in the Appeals Court in 2011, the defendant sought postconviction relief under Mass. R. Crim. P. 30, which a different Superior Court judge denied. RA25, 380-84. The defendant appealed from that denial as well, and then moved to consolidate that appeal with his direct appeal. Id. In January 2013, the Appeals Court affirmed the defendant's conviction in an

[6] The jury were sworn on May 14, 2008, almost twenty-two months after the defendant's arraignment in early August 2006. RA8, 18. According to the latest data, only thirty-four per cent of disposed cases in the Superior Court criminal sessions during the last quarter of 2012 were disposed within the applicable time standards. See Executive Office of the Trial Court, Case Flow Metrics Report, Calendar Year 2012, Quarter 4 (Feb. 19, 2013), available at http://www.mass.gov/courts/cmab/metrics-report-4quarter12.pdf.

unpublished memorandum issued pursuant to its rule 1:28. A57-59.

This Court subsequently allowed the defendant's application for further appellate review. See Commonwealth v. Taylor, 464 Mass. 1105 (2013). It later solicited amicus briefs to address "important issues regarding the application of Mass. R. Crim. P. 36" in light of "lengthy delays in the Commonwealth's production of discovery materials."

SUMMARY OF ARGUMENT

Rules 14(a)(1)(A) and 36(b) impose independent obligations on the Commonwealth: first, to turn over certain enumerated items of discovery to the defense automatically and promptly without waiting for any request for production, and second, to bring the defendant to trial within a limited, readily ascertainable time. A special problem arises, though, where the Commonwealth fails to comply with its mandatory discovery obligations under rule 14(a). Such failures will prompt either a request for a continuance or a motion to compel, and force the trial court to decide whether the time spent on either is excluded from the Commonwealth's speedy-trial clock. If that time is excluded, the provisions of rule 14(a) and rule

36(b)(2) may work at cross-purposes in such circumstances, putting defendants in the position of having to choose between insisting on the mandatory discovery to which they are automatically entitled or insisting on their speedy-trial rights. See infra at 16-19.

At least where there is no dispute that the Commonwealth owes the defense mandatory discovery items, defendants should not be forced to choose between the procedural guaranties of automatic discovery and a speedy trial. Instead, defendants should be free to move to compel the production of outstanding mandatory discovery from the Commonwealth while at the same time objecting to the exclusion of further time that the Commonwealth may request for compliance. That approach accords with the text, logic, and purposes of the relevant rules and is consistent with decisions in the Commonwealth and beyond. See infra at 19-33.

This is to not say that the time requested by the Commonwealth to comply with its discovery obligation can never be excluded from the speedy-trial calculation under rule 36(b)(2). That rule provides ample flexibility to trial judges to exclude time from the speedy-trial analysis where the "ends of justice" and the interests of the defendant and of the public jus-

tify exclusions. Moreover, exclusion may well be justified where the parties dispute in good faith whether the materials sought by the defense may properly be called automatic discovery under rule 14(a)(1)(A). But in the absence of any good-faith dispute about whether the Commonwealth owes the discovery the defendant demands, the time should not be excluded under rule 36(b)(2). See infra at 33-37.

This case presents this Court with an important opportunity to clarify the proper application of rule 14 and rule 36 in circumstances like the one presented in the case at bar. A clear rule, whatever its content, holds great value for trial judges, prosecutors, defense counsel and defendants alike. By making clear under what circumstances (and pursuant to what type of objections) the trial judge must make an individualized, case-specific finding about the "ends of justice" before the judge may exclude time attributable to discovery-related delay, this Court may obviate future disputes over discovery and over the trial schedule. Regardless of the Court's disposition of this particular case, a matter on which the BBA expresses no view, the Court's clear guidance will be valuable

to all stakeholders in the criminal sessions of the Commonwealth's courts. See infra at 37-39.

ARGUMENT

I. DEFENDANTS SHOULD NOT BE FORCED TO CHOOSE BETWEEN THEIR RIGHT TO AUTOMATIC DISCOVERY UNDER RULE 14 AND THEIR SPEEDY-TRIAL RIGHTS UNDER RULE 36.

The trial judge concluded, and the Appeals Court agreed, that a defendant faced with a failure by the Commonwealth to provide mandatory discovery under rule 14(a) must choose between discovery rights and the right to a speedy trial: if the defendant acquiesces, however grudgingly, in a continuance for the Commonwealth to comply with its discovery obligation, then the defendant may not simultaneously object to the exclusion of time under rule 36(b)(2). A23-26, 58. Further, the trial judge determined, a defendant who moves to compel in the face of the Commonwealth's failure to produce automatic discovery cannot demand that the time spent resolving that motion be excluded from the speedy-trial calculation because "[t]ime consumed by defense motions for discovery is generally excludable . . . because the delay is caused by and for the benefit of the defendant." A24.

The upshot of those holdings is effectively to place defendants between a procedural Scylla and Cha-

rybdis, forcing them to forgo one of two important procedural rights that the rules independently bestow: the right to automatic discovery and the right to a speedy trial. Under the rulings below, a defendant who chooses to pursue discovery through motions to compel or for sanctions, or even one who agrees merely to await the Commonwealth's promised production, will be held to have stopped the Commonwealth's speedy-trial clock. On the other hand, a defendant who chooses to oppose any continuance runs the risk of being ill-prepared for a trial date that may arrive before the Commonwealth has turned over the mandatory discovery needed to prepare a defense.

That result is neither grounded in the rules nor justified by principles of fairness, at least where there is no dispute that the discovery the defendant seeks is within the scope of the Commonwealth's mandatory and automatic disclosure obligation. In those circumstances, such discovery should be turned over without the need for any motion practice at all, so time consumed by defense motions to compel such discovery cannot be said to have benefited the defendant or to have been the defendant's fault. That time therefore should not be charged to the defendant for

purposes of rule 36(b), so long as the defendant has clearly objected to the exclusion of that time.

A. *The Rules Make The Commonwealth Responsible For Honoring Two Independent Rights: The Defendant's Right To Receive Mandatory Discovery And The Defendant's Right To A Timely Trial.*

As relevant here, the Massachusetts Rules of Criminal Procedure impose two independent obligations on the Commonwealth: the obligation to disclose certain categories of materials and information automatically to the defense under rule 14(a)(1)(A), and the obligation to bring the defendant to trial within the time prescribed by 36(b). And because the Commonwealth must honor each of these obligations equally, it cannot be permissible for the Commonwealth to cite its need to comply with one, the automatic discovery obligation of rule 14(a)(1)(A), as a per se justification or excuse for any failure to comply with the other, the speedy-trial obligation of rule 36(b)(2).

To be sure, the Commonwealth does not shoulder alone the obligation created by rule 36(b). This Court has long recognized that "[t]he goal of providing defendants with speedy trials can be obtained only if the rule is interpreted to place certain obligations on all parties, including prosecutors, the trial

courts, and defendants." Barry v. Commonwealth, 390 Mass. 285, 296 (1983). Such obligations include that of "defendants . . . to press their case through the criminal justice system." Id. at 296-97. Even so, the Court also has noted that "the primary responsibility for setting a date for trial lies with the district attorney." Id. at 296 n.13. Likewise, "[t]he [trial] court, also, has a duty to control its own docket and to ensure that criminal cases are brought to trial within the time prescribed by rule 36." Id.

B. *Defendants Should Not Be Forced To Sacrifice Their Speedy-Trial Rights To Obtain Discovery That The Commonwealth Must Provide Automatically.*

Because rules 14(a)(1)(A) and 36(b) impose separate and independent obligations on the Commonwealth, they do not contemplate that the defendant will be put in the position of having to choose between them. Rather, the Commonwealth is expected to comply with both obligations in every case, and defendants should be able to insist that both be respected, without placing either right in jeopardy. See, e.g., Commonwealth v. Amidon, 428 Mass. 1005, 1006 (1998) ("[T]he Commonwealth cannot now argue that any motion filed as a result of its untimely disclosure meant that the defend-

ant was unprepared for trial during the preceding year," so as to justify delay as benefiting defendant); Commonwealth v. Wysocki, 28 Mass. App. Ct. 45, 49-50 (1989) (refusing to exclude additional thirty days for Commonwealth to comply with apparently routine discovery requests); Commonwealth v. Silva, 10 Mass. App. Ct. 784, 789-90 (1980) (ordering dismissal with prejudice where "government's failures in this case as to discovery [were] intrinsically linked with the defendant's right to a speedy trial").[7]

For that reason, where the defendant objects to the exclusion of the time requested by the Commonwealth to produce mandatory discovery, that time should not be excluded under rule 36(b)(2). As discussed below, that principle finds ample support in the text and logic of the relevant procedural rules, is fair to all concerned, and is consistent with deci-

[7] The Silva case antedates the adoption of rule 36; it concerned the statutory prohibition of certain delays established by G. L. c. 276, § 35, a statute whose "legislative policies . . . have been held to be similar to those expressed by the statutory speedy trial guaranty [formerly] contained in G. L. c. 277, § 72A." Silva, 10 Mass. App. Ct. at 789. Because the current rule 36(b) "encompasses all [pre]existing case law under former G. L. c. 277, § 72A," Commonwealth v. Look, 379 Mass. 893, 898 n.2, cert. denied, 449 U.S. 827 (1980), overruled on other grounds by Commonwealth v. Butler, 464 Mass. 706, 711 (2013), Silva remains a useful guidepost in interpreting rule 36's provisions.

sions of both Massachusetts and other courts. To hold otherwise, moreover, "would upset the balance of obligations envisioned by the rule, under which the 'primary responsibility for setting a trial date lies with the district attorney.'" Spaulding, 411 Mass. at 506, quoting Barry, 390 Mass. at 296 n.13.

1. The Massachusetts Rules Of Criminal Procedure Do Not Force Defendants To Choose Between Their Automatic Discovery Rights And Their Speedy-Trial Rights.

The issue here is essentially whether additional time, requested by the Commonwealth so that it may comply with automatic discovery obligations it does not appear to contend are inapplicable, is to be excluded from the rule 36(b)(2) calculation. The text of the rule presents only two conceivable bases for exclusion in these circumstances: as "delay resulting from hearings on pretrial motions," Mass. R. Crim. P. 36(b)(2)(A)(v), or as delay resulting from a continuance granted by the judge with the defendant's consent. See Mass. R. Crim. P. 36(b)(2)(F); see also Commonwealth v. Martin, 447 Mass. 274, 284 (2006) (defendant's consent to continuances justified exclusion of time under rule 36).

The rationale for excluding delays of those types is much the same as for excluding other types of delay under rule 36(b)(2): delays should not count against the Commonwealth where the defendant has caused, acquiesced in, or even benefited from them. See, e.g., Spaulding, 411 Mass. at 504. In this sense, the rule's exclusions reflect "the application of 'traditional indicia of waiver of rights,'" and are justified largely on that basis. Barry, 390 Mass. at 296, quoting Commonwealth v. Carr, 3 Mass. App. Ct. 654, 656 (1975).

But the rationale of waiver does not fit where the Commonwealth does not deny that it has failed to turn over some quantum of outstanding mandatory discovery, where the Commonwealth has requested additional time to comply, and where the defense has sufficiently objected. To the contrary, a defendant in that situation has put the Commonwealth on notice that there is no agreement to stop the speedy-trial clock. Rather, the Commonwealth must justify any further delay, or else allow the speedy-trial clock to run while it takes additional time to produce discovery. See Commonwealth v. Murphy, 55 Mass. App. Ct. 332, 333 (2002) (defendant's resistance to continuance is

"enough to impose on the Commonwealth the obligation to get the case to trial"). The defendant's objection also puts the court on notice that it must make appropriate, contemporaneous findings if the delay is to be excluded. Cf. Commonwealth v. Bourdon, 71 Mass. App. Ct. 420, 426 (2008) ("[F]ormalized objection . . . serves the vital purpose of notifying both the prosecutor and the court that attendant delays may not be excluded from the operation of the rule.").[8]

The rationale of excluding time that benefits the defendant also has no force here. While the defendant may benefit from receiving automatic discovery, the defendant does not benefit from any delay in its production. Indeed, lengthy delay may well create a substantial impediment to a defendant's ability to prepare a defense if, say, the identities of prospective

[8] A defendant's insistence that the time be included for purposes of the speedy trial calculation under rule 36(b)(2) distinguishes that situation from cases in which the defendant stood silent, or objected to only certain continuances and thereafter stood silent. Cf. Commonwealth v. Marable, 427 Mass. 504, 507 (1998) (time when defendant's case "was placed on each month's trial list, [but] each month passed without his case being reached for trial," was properly excluded by defendant's failure to object); Commonwealth v. Fling, 67 Mass. App. Ct. 232, 236 n.9 (2006) (isolated objections to delays on rule 36 grounds, each of which was resolved before start of 383-day delay at issue, did not excuse defendant's failure to object to relevant period of delay).

prosecution witnesses and what they have said to police or to the grand jury are among the materials that have yet to be produced. See Mass. R. Crim. P. 14(a)(1)(A)(ii), (iv)-(v). The consideration by the court of a defense motion to compel likewise is no benefit to the defense in these circumstances. The very aim of rule 14(a)(1), as most recently revised, was to promote the practice of "discovery without the need for motions or argument." Reporter's Notes to Mass. R. Crim. P. 14 (2004). That the Commonwealth's delay proves sufficient to precipitate defense motion practice to enforce its discovery obligations represents no benefit to defendants, but a deprivation of the benefits intended by rule 14.

Massachusetts case law, moreover, is consistent with the principle that a defendant may insist that the Commonwealth honor both its automatic discovery obligations and its speedy-trial obligations without placing either of the defendant's rights in jeopardy. In the Amidon case, for example, this Court rejected the Commonwealth's contention that certain pretrial delay should be excluded because the defendant benefited from the delay, which the Commonwealth claimed was demonstrated by the defendant's filing of a dis-

covery motion, showing him to have been unready for trial absent the delay. See Amidon, 428 Mass. at 1010. As the Court noted, any unreadiness on the defendant's part was itself the result of the Commonwealth's late disclosure of evidence. Id. The Court therefore held that "the Commonwealth cannot now argue that any motion filed as a result of its untimely disclosure meant that the defendant was unprepared for trial during the preceding year." Id. Accord Spaulding, 411 Mass. at 508 n.11 (where defendant was informed late of rape kit's existence, continuance, if granted to allow defendant to examine rape kit, "should not stop the running of rule 36 time").

Likewise, in the Wysocki case, the Commonwealth contended that a thirty-day period granted to allow it to comply with discovery requests should be excluded under rule 36. Wysocki, 28 Mass. App. Ct. at 49. The Appeals Court disagreed; it noted that "there was no reason to assume [that the] provision [of the requested discovery] was anything but routine." Id. Recognizing that "[g]enerally a defendant need not object when his case proceeds in accordance with procedures and timetables established by the rules," the court could identify no basis for excluding thirty days tak-

en by the Commonwealth to comply with its ordinary discovery obligations. Id. at 49-50.

Similarly, in the Silva case, the Appeals Court determined that a speedy-trial violation had occurred as a result of delay stemming from the Commonwealth's failure to provide discovery to the defense. Silva, 10 Mass. App. Ct. at 789-90. Defense counsel there had "requested voluntary disclosure of pertinent information contained in [a police] file," but was rebuffed; counsel accordingly "filed several discovery motions," which were allowed, giving the Commonwealth two months to comply. Id. at 785. Yet, despite counsel's "contact[ing] the police and the court on several occasions to expedite compliance with the discovery orders," "[n]o discovery was provided" during the ensuing three and a half months, and the prosecutor offered no explanation for that failure. Id. at 785-86. The Appeals Court held that "[n]one of the delay . . . can be attributed to the defendant, who vigorously pressed for a speedy hearing." Id. at 789. To the contrary, the court concluded that "the government's failures in this case as to discovery [were] intrinsically linked with the defendant's right to a speedy trial." Id. at 790.

As these cases confirm, Massachusetts decisional law by no means precludes defendants from seeking to hold the Commonwealth accountable both for the timely production of mandatory discovery and for bringing the defendant to trial. Rather, when the Commonwealth fails to produce the mandatory discovery that it is automatically obligated to turn over, a defendant may press the Commonwealth to meet its obligation, including by motion practice, while also insisting that the time spent remedying such delays should not be excluded under rule 36(b)(2). Such a procedure is consonant with the text, logic, and purpose of the relevant procedural rules. Mechanically excluding time spent on defense discovery motions, regardless of the circumstances, is not.

2. Federal And Other States' Courts Also Recognize That Delays In Providing Mandatory Discovery Do Not Justify Stopping The Speedy-Trial Clock.

Courts in other jurisdictions have faced virtually the identical problem this Court confronts in this case. Those courts, recognizing that prosecutorial delay threatens to frustrate the very purpose of automatic discovery, have in appropriate cases refused to

allow the government's discovery delays to justify trial delays.

The U.S. Court of Appeals for the First Circuit, for example, recognized long ago that prosecutors' failure meaningfully to honor their automatic discovery obligations could "effectively circumvent the [Federal Speedy Trial] Act's time limitations," "[b]y forcing the accused to open a window of prosecutorial opportunity for excludable delay." United States v. Hastings, 847 F.2d 920, 923 (1st Cir.), cert. denied, 488 U.S. 925 (1988).[9] Such failures, the court observed, "placed [defendants] snugly between a rock and a hard place." Id. A defendant in that situation would be faced with a dilemma: "he could either forgo discovery to which he was entitled or he could file a motion to obtain it, thus stopping the speedy trial clock and easing the pressure on the government to bring him to trial." Id. In Hastings, the defendant chose the former: he was detained pending trial and anxious for a speedy trial date, so he "abjured the

[9] This Court has approved looking to "Federal decisions which construe the Federal Speedy Trial Act," 18 U.S.C. §§ 3161-3174, though "Federal cases must be used with caution," as the provisions of the Federal Act "differ in certain material respects" from those of rule 36. Barry, 390 Mass. at 290 & n.9.

filing of any motions in respect to discovery."[10] Id. In such circumstances, the First Circuit recognized the consequences of the government's failure to provide discovery as "particularly invidious." Id.

It is no surprise, then, that Federal courts in appropriate cases have rejected attempts to exclude delays resulting from the government's failure to supply mandatory discovery for speedy-trial purposes. For example, in United States v. Mentz, 840 F.2d 315 (6th Cir. 1988), the government argued that a portion of the delay at issue was excludable under the Federal Speedy Trial Act as delay attributable to the filing and taking under advisement of a defense discovery motion. See id. at 326-27. But the U.S. Court of Appeals for the Sixth Circuit disagreed: it held that the defendant's motion, consistent with the spirit and

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[10] For that reason, there was no question in the Hastings case whether delays stemming from defense motions to compel mandatory discovery should be excluded; the question instead was whether the dismissal of the indictment under the Federal Speedy Trial Act should be with prejudice, an issue which, unlike under Massachusetts law, is a matter of judicial discretion under the Federal Act, 18 U.S.C. § 3162(a)(2). Hastings, 847 F.2d at 924. The First Circuit ultimately thought not because the government's gamesmanship, though willful, lacked any "causative link" to the delay in bringing the defendant to trial: the defendant "had not taken the bait" by filing a discovery motion that would stop the clock. Id. at 923, 929-30.

letter of the operative rules of criminal procedure, was "merely a pro forma request for discovery directed at the government, rather than an invitation for district court intervention." Id. at 329. Accordingly, the motion had no real significance and "did not toll the speedy-trial clock." Id. ("Because the district court never held a hearing or ruled on the motion, and there is no other indication that the motion was 'actually under advisement,' the motion did not trigger the statutory exclusions for delay occasioned by the filing of a pretrial motion.").

Even more instructive is United States v. Blauner, 337 F. Supp. 1383 (S.D.N.Y. 1971). In that case, defense motions for a bill of particulars and for discovery and inspection were allowed early in the case, but the prosecutor had failed to produce either, despite persistent defense requests, by the time of the first pretrial conference almost twenty months later. Id. at 1386-87. The prosecutor indicated that he had been distracted by other commitments, but assured defense counsel and the court that the government would produce the ordered bill and discovery soon. Id. at 1387. Even so, the government failed to comply in the ensuing ten months, whereupon the de-

fense moved to dismiss on speedy-trial grounds. Id. at 1388.

The government resisted on the basis that the delay had been justified by staffing difficulties in the local U.S. Attorney's Office and that the defense in any event was not prejudiced. Id. at 1389. The court soundly rejected both contentions, noting that no request for additional time to comply was ever made, and that "[t]he Government is no more entitled to unilaterally decide which orders to obey and which to ignore than is any other party to a litigation." Id. The court also considered whether any waiver of speedy trial rights had occurred and concluded that none had: "neither of these defendants can be deemed to have waived his right to a speedy trial since 'a defendant with an order outstanding against the government to produce a bill of particulars . . . has not waived any rights, and the burden lies on the prosecutor to obey the orders of the court and move the case forward to

its next stage.'" Id. at 1393, quoting United States v. Chin, 306 F. Supp. 397, 400 (S.D.N.Y. 1969).[11]

The decisions of other States' courts provide further guidance. In Pennsylvania, for example, it has been the rule for more than twenty years that the government's failure to provide mandatory discovery, where the government's obligation is uncontested, will not toll the speedy-trial clock. See, e.g., Commonwealth v. Edwards, 528 Pa. 103, 110 (1991); Commonwealth v. Preston, 904 A.2d 1, 12 (Pa. Super. 2006) ("Failure to provide mandatory discovery, without more, does not toll the running of the adjusted run date," regardless whether "the delay in providing discovery is due to either intentional or negligent acts, or merely stems from the prosecutor's inaction"). There is no indication that Pennsylvania's rule has proved unworkable, has imposed unmanageable burdens on

[11] In Massachusetts, rule 14(a)(1)(A)'s mandatory discovery requirement "shall have the force and effect of a court order," Mass. R. Crim. P. 14(a)(1)(C), putting prosecutors on notice just as the express orders to produce discovery and a bill of particulars did in the Blauner case.

that State's prosecutors, or has created perverse incentives for criminal defendants and counsel.[12]

II. RULE 36(B) GIVES TRIAL JUDGES SUFFICIENT FLEXIBILITY TO ADDRESS GENUINE EXIGENCIES AND DISCOVERY DISPUTES.

Harmonizing rules 14 and 36 in the manner proposed here creates no moral hazard or unfair benefit for defendants. Defendants do not automatically keep the clock running merely by making the objection. Instead, the Commonwealth's request for a continuance may be treated as any other prosecution request for more time to which the defendant objects: under rule 36(b)(2)(F), the trial court must consider whether the exclusion of time from the speedy-trial clock is in the interests of justice under the circumstances and make appropriate findings. See Mass. R. Crim. P. 36(b)(2)(F) (excluding "[a]ny period of delay resulting from a continuance granted by the judge . . . at the request of the prosecutor, if the judge granted

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[12] In that regard, it is worth noting that in Pennsylvania, unlike Massachusetts, the defendant has no duty to note an objection to a continuance requested by the prosecutor, only to avoid indicating affirmative agreement to it. See, e.g., Preston, 904 A.2d at 12-13. Contrast Bourdon, 71 Mass. App. Ct. at 424, quoting Commonwealth v. Fleenor, 39 Mass. App. Ct. 25, 27 (1995) ("Lack of an objection to a continuance of a scheduled trial date shows that the defendant acquiesced in the delay.").

the continuance on the basis of his finding that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial," which must be made "either orally or in writing").

Thus, where there is some genuine need for a continuance, the trial judge can make the necessary findings. The key point, though, is that the finding cannot be based on the notion that the defendant's insistence on the discovery the rules require waives his speedy-trial rights; rather, the finding must be based on a genuine, case-specific assessment of the "ends of justice." See, e.g., Commonwealth v. Beckett, 373 Mass. 329, 332 (1977), quoting Dickey v. Florida, 398 U.S. 30, 38 (1970) (though Commonwealth ultimately is responsible for court congestion that causes trial delays, congestion is weighted less than deliberate prosecutorial delay, since "[c]rowded dockets, the lack of judges or lawyers, and other factors no doubt make some delays inevitable").

The "ends of justice" will not typically countenance delay where no one disputes that the Commonwealth was obliged to turn over mandatory discovery within the scope of rule 14(a)(1)(A) but failed to do

so. If the government may delay production without consequence to its speedy-trial clock, and if any defense discovery motions will automatically stop that clock, the natural result can only be to encourage delay. For the reasons explained above, the Commonwealth's delay in producing mandatory discovery, and the resulting time spent by the defense in ensuring that the Commonwealth delays no longer, clearly is of no benefit to the defendant. That time therefore is not fairly chargeable to the defendant on the basis of such a purported benefit, and upon proper objection, it should count against the Commonwealth for speedy-trial purposes.

A different result may obtain where there is a good-faith dispute about whether the discovery the defendant demands is properly encompassed by rule 14(a)(1)(A)'s automatic disclosure obligations. See, e.g., Commonwealth v. Montevecchio, 367 Pa. Super. 435, 447-48 (1987) (prosecutor was justified in resisting unwarranted defense discovery demands and time spent on that contest was excludable). "Discovery of items not included in the automatic discovery regime remains subject to the court's discretion, and may be

requested by pretrial motion." Reporter's Notes to Mass. R. Crim. P. 14 (2004).

But such disputes about the scope of mandatory discovery should be uncommon. By design, materials falling into most of the categories of mandatory discovery listed in rule 14(a)(1)(A) are readily identified as such; there ordinarily can be little doubt about whether something is or is not a defendant's own statement, a witness's grand jury testimony, a prospective witness's identifying information, or physical evidence related to the police's investigation. See Mass. R. Crim. P. 14(a)(1)(A)(i)-(ii), (iv)-(v), (vii). Trial judges are well-equipped to resolve any such disputes quickly if they arise. Even where there is room for disagreement--e.g., about whether evidence truly is "exculpatory" under rule 14(a)(1)(A)(iii), see Commonwealth v. Laguer, 448 Mass. 585, 595-99 (2007)--rule 36(b)(2) allows for the time spent resolving the dispute to be excluded. See Murphy, 55 Mass. App. Ct. at 333.[13] When the scope of mandatory discovery is clear, however, the time spent complying

[13] Questions concerning whether the Commonwealth has in fact completed its disclosure of mandatory discovery can most easily be prevented by promptly filing the certificate of compliance required under rule 14(a)(3).

with that obligation is not excludable, except pursuant to a specific finding that the exclusion serves the "ends of justice," taking into account "the best interests of the public and the defendant in a speedy trial." Mass. R. Crim. P. 36(b)(2)(F).

In sum, where there is no dispute, or where there could be no reasonable dispute, about whether the Commonwealth owes the defendant mandatory discovery, the defendant should not be automatically made to shoulder the consequences of delay. Rather, the Commonwealth should bear responsibility for demonstrating that the ends of justice warrant excluding the time, or else bear the consequences of its own delay. In such circumstances, so long as the defendant's objection to the exclusion of time is clear, there is no basis in the rules or in fairness for denying him the right to a speedy trial that rule 36(b) provides.

III. THE COURT SHOULD CLARIFY THE APPLICATION OF RULE 36(B), INCLUDING WHEN AN OBJECTION TO THE EXCLUSION OF TIME SUFFICES.

While the foregoing principles are consistent with the letter and spirit of rule 36, the text of the rule as now drafted does not expressly address this situation or give the necessary clear guidance to judges and criminal-law practitioners. The ambiguity

in the rule's language has the potential to create substantial confusion as to its proper application in situations like the one presented here. Accordingly, the Court may wish to refer these issues to its rules committee, so that the appropriate rules' language may be clarified to eliminate any doubt. See, e.g., Commonwealth v. Simmons, 448 Mass. 687, 699-700 (2007).

Integral to the proper application of rule 36(b)(2) to the types of situations under discussion, and perhaps equally appropriate for referral to the rules committee, is the issue of what type of objection will suffice to avoid the exclusion of time under rule 36(b)(2) when the Commonwealth delays in producing mandatory discovery. The importance of such clarity is on full display in this case: the parties here strenuously dispute whether the defendant objected with sufficient clarity to the Commonwealth's request for a continuance.

The BBA takes no position on who has the better of the argument on this record. But in the absence of further guidance from this Court as to what is sufficient to raise an objection to the exclusion of time under rule 36(b)(2), one may expect disputes of this type to recur with significant frequency, to the det-

riment of all stakeholders. Regardless of the ultimate disposition, therefore, the Court should supply this much-needed guidance, so that judges, attorneys, and defendants may know which objections will suffice and which will not.

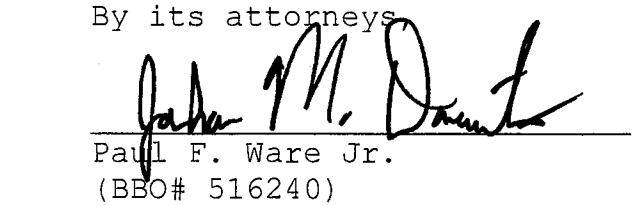
CONCLUSION

The BBA respectfully submits that this Court should hold that the time a defendant spends seeking to compel the Commonwealth's compliance with its mandatory, automatic discovery obligations is not per se excludable under Mass. R. Crim. P. 36(b). Instead, the defense may by appropriate steps assert its rights to pretrial automatic discovery, without automatically stopping the speedy-trial clock. To hold otherwise would be to "place[] [the defendant] snugly between a rock and a hard place," Hastings, 847 F.2d at 923, and undermine the Commonwealth's duty automatically to provide mandatory discovery to the defendant under rule 14(a)(1)(A). Where a defendant objects to the exclusion of time, that time should properly count against the Commonwealth under rule 36(b) unless the Commonwealth can show, and the court finds, that the requested delay is in the interests of justice.

Respectfully submitted,

THE BOSTON BAR ASSOCIATION
AS AMICUS CURIAE

By its attorneys,



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Dated: November 27, 2013

MASS. R. A. P. 16 (k) COMPLIANCE CERTIFICATION

I, Joshua M. Daniels, hereby certify that the foregoing Brief Of The Boston Bar Association As Amicus Curiae complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. A. P. 16(a) (contents of briefs); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 17 (amicus briefs); Mass. R. A. P. 18 (appendix to briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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CERTIFICATE OF SERVICE

I, Joshua M. Daniels, hereby certify that on November 27, 2013, I caused two copies of the foregoing Brief Of The Boston Bar Association As Amicus Curiae to be delivered via first-class U.S. mail, postage prepaid, to counsel for each of the parties identified below:

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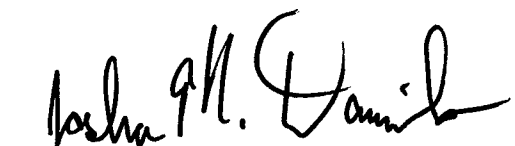

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ADDENDUM

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MASSACHUSETTS GENERAL LAWS
PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES
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CHAPTER 265

Section 1. Murder defined

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

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Section 35. Adjournments of examinations and trials

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

MASSACHUSETTS GENERAL LAWS
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CHAPTER 277

Section 72A. (Former text as amended by St. 1963, c. 343; subsequently repealed by St. 1979, c. 344, § 42.)

The commissioner of correction, the sheriff, master or keeper of a jail or house of correction, or in Suffolk county, the penal institutions commissioner of the city of Boston, shall, upon learning that an untried indictment, information or complaint is pending in any court in the commonwealth against any prisoner serving a term of imprisonment in any correctional institution, jail or house of correction, which is under his supervision or control, notify such prisoner in writing thereof, stating its contents, including the court in which it is pending, and that such prisoner has the right to apply, as hereinafter provided, to such court for prompt trial or other disposition thereof.

Such application shall be in writing and given or sent by such prisoner to the commissioner of correction, or such sheriff, master, keeper or penal institutions commissioner, who shall promptly forward it to such court by certified mail, together with a certificate of said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner, stating (a) the term of commitment under which such prisoner is being held, (b) the amount of time served, (c) the amount of time remaining to be served, (d) the amount of good time earned, (e) the time of parole eligibility of such prisoner, and (f) any decisions of the board of parole relating to such prisoner. Said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner shall notify the appropriate district attorney by certified mail of such application to the court.

Any such prisoner shall, within six months after such application is received by the court, be brought into court for trial or other disposition of any such indictment, information or complaint, unless the court shall otherwise order.

Rule 14. Pretrial Discovery

(a) Procedures for Discovery.

(1) Automatic Discovery.

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) The names and business addresses of prospective law enforcement witnesses.

(vi) Intended expert opinion evidence, other than evidence that pertains to

the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A) (vi), (vii) and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall

have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that

preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) Motions for Discovery. The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) Continuing Duty. If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) Work Product. This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discov-

ery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) Notice of Alibi.

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the

time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Mental Health Issues.

(A) Notice. If a defendant intends at trial to raise as an issue his or her mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition will be relied upon by a defendant's expert witness, the court, on its own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions

of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical, psychiatric, and psychological tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer into evidence expert testimony based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.

Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) after the defendant expresses the clear intent to raise as an issue

his or her mental condition, the judge is satisfied that (1) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time.

At the time the report of the Commonwealth's examiner is disclosed to the parties, the defendant shall provide the Commonwealth with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.

If these reports contain both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include

exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(C) Additional discovery. Upon a showing of necessity, the Commonwealth and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

(3) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(4) Self Defense and First Aggressor.

(A) Notice by Defendant. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses and dates of birth of the witnesses the defendant intends to call to provide evidence

of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

(c) Sanctions for Noncompliance.

(1) Relief for Nondisclosure. For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Exclusion of Evidence. The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible can-

not be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

Rule 36. Case Management

(a) General Provisions.

(1) Order of Priorities. The trial of defendants in custody awaiting trial and defendants whose pretrial liberty is reasonably believed to present unusual risks to society shall be given preference over other criminal cases.

(2) Function of the Court.

(A) District Court. The court shall determine the sequence of the trial calendar.

(B) Superior Court. The court shall determine the sequence of the trial calendar after cases are selected for prosecution by the district attorney.

(b) Standards of a Speedy Trial. The time limitations in this subdivision shall apply to all defendants as to whom the return day is on or after the effective date of these rules. Defendants arraigned prior to the effective date of these rules shall be tried within twenty-four months after such effective date.

(1) Time Limits. A defendant, except as provided by subdivision (d)(3) of this rule, shall be brought to trial within the following time periods, as extended by subdivision (b)(2) of this rule:

(A) During the first twelve-month period following the effective date of this rule, a defendant shall be tried within twenty-four months after the return day in the court in which the case is awaiting trial.

(B) During the second such twelve-month period, a defendant shall be tried within eighteen months after the return day in the court in which the case is awaiting trial.

(C) During the third and all successive such twelve-month periods, a defendant shall be tried within twelve months after the return day in the court in which the case is awaiting trial.

(D) If a retrial of the defendant is ordered, the trial shall commence within one year after the date the action occasioning the retrial becomes final, as extended by subdivision (b)(2) of this rule. The order of an appellate court requiring a retrial is final upon the issuance by the appellate court of the rescript. In the event that the clerk of the appellate court fails to issue the rescript within the time provided for in Massachusetts Rule of Appellate Procedure 23, retrial shall commence within one year after the date when the rescript should have issued.

If a defendant is not brought to trial within the time limits of this subdivision, as extended by subdivision (b)(2), he shall be entitled upon motion to a dismissal of the charges.

(2) Excluded Periods. The following periods shall be excluded in computing the time within which the trial of any offense must commence:

(A) Any period of delay resulting from other proceedings concerning the defendant, including, but not limited to:

(i) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(ii) delay resulting from a stay of the proceedings due to an examination or treatment of the defendant pursuant to section 47 of chapter 123 of the General Laws;

(iii) delay resulting from a trial with respect to other charges against the

defendant, which period shall run from the commencement of such other trial until fourteen days after an acquittal or imposition of sentence;

(iv) delay resulting from interlocutory appeals;

(v) delay resulting from hearings on pretrial motions;

(vi) delay resulting from proceedings relating to transfer to or from other divisions or counties pursuant to Rule 37;

(vii) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(B) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness. A defendant or an essential witness shall be considered absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(C) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(D) If the complaint or indictment is dismissed by the prosecution and thereafter a charge is filed against the defendant for the same or a related offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge.

(E) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is no cause for granting a severance.

(F) Any period of delay resulting from a continuance granted by a judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecutor, if the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial. No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subdivision unless the judge sets forth in the record of the case, either orally or in writing, his reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.

(G) Any period of time between the day on which a defendant or his counsel and the prosecuting attorney agree in writing that the defendant will plead guilty or nolo contendere to the charges and such time as the judge accepts or rejects the plea arrangement.

(H) Any period of time between the day on which the defendant enters a plea of guilty and such time as an order of the judge permitting the withdrawal of the plea becomes final.

(3) Computation of Time Limits. In computing any time limit other than an excluded period, the day of the act or event which causes a designated period of time to begin to run shall not be included. Computation of an excluded period shall in-

clude both the first and the last day of the excludable act or event.

(c) Dismissal for Prejudicial Delay. Notwithstanding the fact that a defendant is not entitled to a dismissal under subdivision (b) of this rule, a defendant shall upon motion be entitled to a dismissal where the judge after an examination and consideration of all attendant circumstances determines that: (1) the conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence and (2) this conduct on the part of the prosecuting attorney has resulted in prejudice to the defendant.

(d) Special Procedures: Persons Serving Term of Imprisonment.

(1) General Provisions. A person serving a term of imprisonment either within or without the prosecuting jurisdiction is entitled to all safeguards afforded him under subdivisions (a), (b), and (c) of this rule in the conduct of any criminal proceeding, subject to the limitations stated herein.

(2) Persons Detained Within the Commonwealth. Any person who is detained within the Commonwealth upon the unexecuted portion of a sentence imposed pursuant to a criminal proceeding is entitled to be tried upon any untried indictment or complaint pending against him in any court in this Commonwealth within the time prescribed by subdivision (b) of this rule.

(3) Persons Detained Outside the Commonwealth. Any person who is detained outside the Commonwealth upon the unexecuted portion of a sentence imposed pursuant to a criminal proceeding, and against whom an untried indictment or complaint is pending within the Commonwealth shall, subsequent to the filing of a detainer, be notified by the prosecutor by mail of such charges and of his right to demand a speedy trial. If the defendant pursuant to such notification does demand trial, the person having custody shall so certify to the prosecutor, who shall promptly seek to obtain the

presence of the defendant for trial. If the prosecutor has unreasonably delayed (A) in causing a detainer to be filed with the official having custody of the defendant, or (B) in seeking to obtain the defendant's presence for trial, and the defendant has been prejudiced thereby, the pending charges against the defendant shall be dismissed.

(e) Effect of a Dismissal. A dismissal of any charge ordered pursuant to any provision of this rule shall apply to all related offenses.

(f) Case Status Reports.

(1) District Court. The First Justice of each division of the District Court shall be advised periodically by the clerk of the status of all cases which have been pending in that court for six months or longer. The report shall be transmitted to the Administrative Justice for the District Court Department.

(2) Superior Court. The Administrative Justice for the Superior Court Department shall be notified by the clerk for each county of the status of all cases which have been pending in that court for six months or longer within the following time periods:

(A) for the first twelve-month period following the effective date of this rule, sixty days after the last day of a sitting;

(B) for the second such twelve-month period, forty-five days after the last day of a sitting;

(C) for the third and all successive such twelve-month periods, thirty days after the last day of a sitting.

Such notice shall include the number of the case, the name of the defendant, the offense charged, the name of defense counsel, if any, and the name of the prosecutor.