COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

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No. 2017-P-0865

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COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

KEVIN GRAHAM, JR.,
Defendant-Appellee

_____

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

_____

SUFFOLK COUNTY

_____

DANIEL F. CONLEY
District Attorney
For The Suffolk District

SARAH MONTGOMERY LEWIS
Assistant District Attorney
For the Suffolk District
BBO# 683156
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
sarah.lewis@State.MA.US

AUGUST 2017

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II. Whether the judge's interpretation of Rule 36(b) is unconstitutional.

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STATEMENT OF THE CASE AND PROCEDURAL FACTS

This is the Commonwealth's appeal from the judge's allowance of defendant's motion to dismiss a murder indictment for a violation of Rule 36(b) and lack of prosecution.

On June 10, 2016, a Suffolk County Grand Jury indicted defendant, Kevin Graham, for first-degree murder, in violation of G.L. c. 265, § 1; armed robbery, in violation of G.L. c. 265, § 17; and unlawful possession of a firearm, in violation of G.L. c. 269, §

10(a) (No. 1684CR00423; C.A. 4-6).[1,2]

The case was before the court on June 20, 2016, at which time the Commonwealth filed its first notice of discovery (C.A. 6). Although the defendant was not in court, and thus not arraigned until June 22, 2016, the court designated the case as "Track C" under the Superior Court Standing Order 2-86, and assigned the following presumptive dates: July 14, 2016, for a pre-trial conference; December 13, 2016, for a pre-trial hearing; June 1, 2017, for a final pre-trial hearing; and June 12, 2017, for trial (C.A. 6-7, 34).

The pretrial conference was held on July 14, 2016, at which time the parties filed a pre-trial conference report (C.A. 7). An out of court filing date of September 6 was set, and the case was continued "by agreement" to September 29 for a status conference (C.A. 7). On that date, the case was continued "by agreement" to November 3 for the out of court filing of motions (C.A. 7). On October 27, the Commonwealth filed its second notice of discovery (C.A. 8).

A pretrial hearing was held on December 13, at

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[1] The Commonwealth's addendum will be cited as (C.Add. __); its record appendix will be cited as (C.A. __); and the hearing transcripts that the judge relied on, which are included herein (C.A. 141-247), will be cited by date and page number as (__:__).

[2] The grand jury also indicted co-defendant, Ellis Golden (No. 1684CR00424). The Commonwealth's appeal of Golden's case, which was also dismissed, is entered in this Court under docket number 2017-P-0866.

which time the Commonwealth filed its Certificate of Discovery Compliance (C.A. 8). The case was then continued "by agreement" to January 11, 2017 (C.A. 8).[3] Defense counsel was not present on that date, and the case was continued "by agree[ment]" to February 16 for a status conference (C.A. 8).

On February 16, defendant filed a motion for updated Rule 14 discovery, and the case was continued "by agreement" to March 23 (C.A. 8). On that date, a hearing was held on defendant's discovery motion, and the case was continued "by agreement" to April 25 (C.A. 8). On April 12, the Commonwealth filed a response to defendant's discovery motion (C.A. 8).

On April 25, the Commonwealth filed its third notice of discovery, and defendant filed a second motion for updated Rule 14 discovery; a response to the Commonwealth's response to his updated Rule 14 motion; and a motion to dismiss counts two and three based on a statute of limitations violation (C.A. 8). The case was then continued to May 2 for a "hearing re discovery," and again to May 11, both without objection by defendant (C.A. 8).

On May 11, the Commonwealth filed a motion to continue in order to perform DNA testing, which the

[3] Although the docket references a motion to dismiss on both December 13, 2016, and January 11, 2017, this appears to be in reference to defendant Golden.

court denied that same day (C.A. 8). Also on May 11, the court allowed defendant's two motions for updated Rule 14 discovery and ordered the Commonwealth to provide the requested discovery "ASAP" (C.A. 8, 50). The docket then indicates: "Case has next date" (C.A. 8).

The final pre-trial conference was held on June 1, after which the case was continued to June 6, without objection by defendant, for motions in limine (C.A. 9). As the docket indicates, "Case on track for trial on June 12, 2017" (C.A. 9).

At a hearing on June 6, the Commonwealth filed its witness list and six motions in limine, while defendant filed a motion for sanctions citing Rule 14 violations (C.A. 9).[4] Again, the docket indicates, "case on track for trial on 6/12/17" (C.A. 9).

At a hearing on June 9, the Commonwealth moved to continue the trial date based on the unavailability of a necessary and material witness, Juan Garcia (C.A. 9; 6/9:3-5).[5] The purpose of the continuance was to seek out of state process in order to compel Garcia's presence at trial (6/9:6). Defendant objected to the continuance (6/12:3; *see* C.A. 134-39).

After a hearing on June 12, the judge denied the

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[4] After a hearing on June 12, the judge denied defendant's motion, finding, in relevant part, that "[t]here [wa]s no showing of 'willful' violation as opposed to negligence . . . ." (C.A. 83).

[5] The Commonwealth filed a written motion following the hearing (C.A. 9, 56-62).

Commonwealth's motion, but approved its request for out of state process (C.A. 9-10, 63-65; 6/12:12; 6/19:10). Meanwhile, the Commonwealth answered not ready for trial, after which defendant moved for dismissal for want of prosecution (6/12:15-17). The judge denied the motion, and continued the case to June 19 for a status conference, stating that he would begin impanelment if the Commonwealth answered ready for trial (6/12:18-23). The judge also scheduled a "provisional[]" date of June 21 for a hearing on a speedy trial motion to dismiss (6/12:19-20).

On June 16, the Commonwealth filed a motion to continue the conference date based on the continued unavailability of Garcia (C.A. 10, 66-82). At a hearing on June 19, the judge denied the Commonwealth's motion "as moot" (6/19:4-5).[6] The defendant then filed a motion to dismiss, which the judge denied without prejudice "as premature" (6/19:16; *see* 6/22:5). He then encouraged both defendants to re-file their motions once the Rule 36 clock had run (6/19:16, 19-20).[7]

The clerk's minutes indicate that defendant filed

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[6] The judge explained, "I'm denying [the motion to continue the conference date] because we've accomplished what I wanted to accomplish in the conference."

[7] The judge appears to have anticipated that he would dismiss *with prejudice* based on a violation of Rule 36(b), rather than simply denying the Commonwealth's motions to continue and, in turn, dismissing the case without prejudice (6/12:9, 15-16, 18-19; 6/19:9, 13-16, 19-20).

his motion to dismiss on June 22, and that the Commonwealth opposed it that same day (C.A. 27). Nonetheless, because the motion was still premature at that point, defendant refiled it on June 26 (C.A. 10; *see* 6/22:5-7). The judge allowed defendant's motion on June 27, and issued an amended decision on June 30 (C.A. 10; C.Add. 1-38). The Commonwealth filed a timely notice of appeal on June 29, 2017 (C.A. 140).

STATEMENT OF FACTS[8]

I. The Murder of Thomas Hawkins

The Commonwealth alleges that at around 1:00 a.m. on August 12, 2004, two men shot and killed Thomas Hawkins on Marden Avenue in Dorchester. Juan Garcia, who had been standing in the rear hallway of 20 Wildwood Street, heard the gunshots and witnessed the immediate aftermath of the shooting.

After hearing the gunshots, Garcia observed two men -- whom he later identified as defendants Golden and Graham -- fleeing from the area where the victim's body was later found. As they were fleeing, Garcia saw a firearm in Graham's hand, and then saw them

[8] These facts are taken from the Commonwealth's motion to continue on June 9; its motion to continue the conference date on June 16, and affidavit in support; and its opposition to defendant's motion to dismiss. The Commonwealth recognizes that the court did not hold an evidentiary hearing on this matter, and that in its decision, specifically noted that it was merely assuming the truth of the prosecutor's affidavit for the sake of argument.

passing a wallet between them as they ran. Defendants eventually turned left onto Hildreth Street, which dead ended at a schoolyard, where Garcia saw them splitting the contents of the wallet. Later that day, the victim's wallet was recovered from the schoolyard. The wallet was empty but for some personal papers. Meanwhile, despite having been seen at a local convenience store with a large sum of money earlier that evening, the victim was found without any money on either his person or in his vehicle.

II. The Investigation

Despite the initial investigation, the Commonwealth was unable to develop evidence that led to the identification of any suspects. The investigation remained stagnant until a proffer with Garcia on August 31, 2005. During that proffer, Garcia informed the Commonwealth of his observations and identified "Kev" and "Mook" as the two people he had seen fleeing. He also identified two people -- "Susan" and Little" -- that were with him at the time of the shooting.

After further investigation, the Commonwealth identified two people whom it believed to be "Kev" and "Mook," but was unable to meet with Garcia again until September 12, 2007. On that day, Garcia selected Kevin Graham from a photo array as the person he knew as "Kev," and selected Ellis Golden from a separate photo array as the person he knew as "Mook."

Meanwhile, in an effort to corroborate Garcia's statement, the Commonwealth sought to identify "Susan" and "Little." Eventually, the Commonwealth identified "Susan" as Susan Bentley and "Little" as Daran Herbin. After confirming their identities with Garcia on October 22, 2007, the Commonwealth worked to locate them.

The Commonwealth made contact with Herbin on February 2, 2008. During a telephone interview, Herbin corroborated Garcia's location at the time of the gunshots, although he could not recall whether Bentley had been present. Herbin would not provide his address nor would he agree to meet with the Commonwealth to discuss the matter further.

On July 12, 2010, after being arrested by Boston Police, Herbin asked to speak with the Commonwealth. He again corroborated Garcia's presence in the rear hallway of 20 Wildwood Street, and also corroborated Garcia's account that Bentley was there as well.

Meanwhile, the Commonwealth was actively searching for Bentley. Despite its efforts, investigators were unable to locate and interview her until December 2014. During that interview, Susan recounted the morning of August 12, 2004, when she was living at 20 Wildwood Street. She told investigators that there were three men outside of her apartment in the rear hallway, one being "Dreadie" and the other being "Little." Based on photographs, she identified "Dreadie"

as Garcia, and "Little" as Herbin.

The Commonwealth reconnected with Garcia in October 2015. On October 28, 2015, members of the Boston Police Homicide Squad travelled to Florida and met with Garcia. During that meeting, he disclosed that on August 12, 2004, the victim had been coming to visit him in order to purchase drugs. Garcia was cooperative and willing to testify about the events of that day. On December 4, 2015, a new grand jury investigation began,[9] and on June 10, 2016, defendants were indicted for murder.

III. The Commonwealth's Motions to Continue

The Commonwealth maintained contact with a cooperative and willing Garcia between October 2015, when Homicide Detectives met with him in Florida, and April 2017. In May 2017, prior to Memorial Day Weekend,[10] the Commonwealth and its agents attempted to call Garcia, but his phone was not in service according to the recorded message. Despite making several more attempts to reach him, the Commonwealth and its agents continued to receive the same recorded message. They believed that Garcia's phone was experiencing technical difficulties, such as being "out of minutes," as this was not the first time since 2015 that they had

[9] Garcia had first testified before the grand jury in 2007, and that testimony was read into the grand jury in 2015.

[10] Memorial Day weekend began on Friday, May 26, 2017.

reached the "out of service" recording.

Just before the final pretrial conference on June 2, 2017, the Commonwealth's agents again called Garcia. The "out of service" message had disappeared and the agents were able to leave a voicemail, a pattern that was once again consistent with their prior experience in contacting Garcia. Garcia, however, did not return their call. The agents left additional messages for Garcia that weekend (June 2 to 4, 2017), but those too went unreturned. As a result, the Commonwealth and its agents discussed going t Florida to check on the health and safety of Garcia, speak with him, and secure his presence for trial. Indeed, a Homicide Detective traveled to Florida on June 7, but was unable to locate Garcia either on that date or on the morning of June 8, despite diligent efforts.

In the afternoon of June 8, the detective received a call from Garcia. Garcia was angry and, "in a curse laden tirade," accused the detective of going to his residence, his job, and other family members' residences and harassing them. He further stated that, due to this harassment to his family and disclosure to his employee about these matters, he would not meet with the detective nor did he want to be bothered any longer regarding the case. The detective, however, had never gone to Garcia's workplace while in Florida. And, when he contacted any other person con-

nected to Garcia, he had simply said, "I am a friend of his from Boston," before leaving his phone number and asking that Garcia call him. This was specifically done so as to not cause any alarm amongst anyone connected to Garcia.[11]

The Commonwealth filed its first motion to continue on Friday, June 9, and sought out of state process for Garcia on Monday, June 12.[12] After the judge approved the request for out of state process, the Commonwealth made contact with the Florida State Attorney's Office for the 9th Judicial Circuit in order to effectuate the process. As is the practice in Florida, the State Attorney's office scheduled a hearing for Friday, June 16 at 1:30 p.m. to allow Garcia to challenge the court's determination that he was a material witness in the instant case, should he be served at least 24 hours in advance. Garcia also had the option of waiving the hearing and voluntarily making himself available to attend the proceedings in the

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[11] While Graham's investigator had gone to Garcia's house around this time, he denied going to Garcia's workplace (C.A. 134-39).

[12] The prosecutor did not seek out of state process on Friday, June 9, for two reasons. First, the prosecutor understood that Florida requires 48 hour notice when serving process to its residents in order to give them the opportunity to be heard. Second, Florida will not effectuate service of process on Sundays, FL Stat § 48.20 (2016), which would have made it nearly impossible to send the paperwork on Friday, June 9, and have Garcia in Court on Monday, June 12.

instant case.

On Thursday, June 15, an investigator for the State Attorney's Office went to Garcia's address in an attempt to serve him. The investigator spoke to a person who was present at the address, who said that Garcia lived there but was not home at the time. As a result, the investigator was unable to serve Garcia.

Also on June 15, Garcia called Sergeant Detective Richard Daley of the Boston Police Homicide Department and stated, "Leave me the fuck alone, fuck you," before hanging up the phone.

The Commonwealth filed its second motion to continue the following day, Friday, June 16, noting that it "was still searching for [Garcia]," and requesting "a short status date to give [it] an opportunity to continue [its] efforts" (6/19:4). As noted, the judge denied this request (C.A. 10; 6/19:4).

IV. The Motion to Dismiss

In his motion to dismiss, defendant argued: (1) that the Commonwealth's thirteen-year delay in prosecuting the case, coupled with its failure to timely disclose discovery, prejudiced defendant; and (2) that the Commonwealth failed to bring him to trial within the time limits of Rule 36(b) (C.A. 89-102).

The judge allowed defendant's motion on Rule 36(b) grounds, and also dismissed the case for lack of

prosecution (C.Add. 1-38).[13] As for Rule 36(b), the judge reasoned that no intermediate event between defendant's arraignment and the presumptive trial date actually moved the trial date, and thus that entire time period counted against the Commonwealth (C.Add. 12-24). He further reasoned that the period between the trial date and the filing of defendant's motion to dismiss counted against the Commonwealth (C.Add. 34). Because this amounted to a total of 367 days, the judge concluded that defendant had not been brought to trial within one year and was therefore entitled to dismissal of his indictment with prejudice (C.Add. 1).

Moreover, the judge concluded that dismissal was warranted based on a "failure to prosecute" (C.Add. 25). Relying on Mass. R. Crim. P. 10 and Superior Court Rule 4, the judge found that the Commonwealth had not used due diligence to secure Garcia's presence for trial (C.Add. 25-27). The judge contended that the Commonwealth viewed its case as weak, and reasoned that there "would be no end in sight" if the case was not dismissed, as "it seems unlikely that Mr. Garcia will suddenly appear voluntarily in Massachusetts," or that the Commonwealth "will improve its lackluster efforts to date or exercise due diligence to produce an

[13] The judge did not dismiss the case based on prejudicial pre-indictment delay, as defendant appeared to have alleged in his motion.

increasingly hostile witness" (C.Add. 25-27). Finally, he reasoned that because the Rule 36(b) period had expired, he no longer had the discretion to wait before dismissing the case with prejudice (C.Add. 27).

SUMMARY OF THE ARGUMENT

The judge erred in dismissing the murder charge against defendant based on an alleged violation of Mass. R. Crim. P. 36(b) (27-28). He did so based on the view that no event, nor any agreement or acquiescence by defendant, had an effect on the presumptive trial date set at arraignment pursuant to Superior Court Standing Order No. 2-86, and that, as a result, the entire time preceding the presumptive trial date must he held against the Commonwealth under Rule 36(b) (28-41). The judge's view of Rule 36(b) is fundamentally flawed and cannot stand (28-41).

Rule 36(b) is a case management tool which takes a prospective look at pretrial events. It calculates each excluded period -- those contemplated by the rule itself, in addition to those acquiesced in by defendant -- starting from the return date and ending with the date on which a defendant files his motion to dismiss, with each excluded period effectively pushing back the date by which defendant must be brought to trial (23-24, 29-31). This mechanical approach is fundamental to the operation of the rule and to its application in each individual case (31-33).

Here, the judge turned the rule on its head by starting with the presumptive trial date and counting the entire time prior to that date, even time acquiesced in by defendant, against the Commonwealth (27-28, 30, 34). This flawed view of Rule 36(b) operates from an erroneous premise that elevates a Superior Court Standing Order (an administrative order), over well-established principles of Rule 36(b) (a rule of criminal procedure) (22-24). Moreover, it ignores the mechanical approach of the rule, in addition to the fact that a defendant can waive his right to a trial within one year (31-32, 34-35). Such an idiosyncratic view of the rule is contrary to well-established Rule 36(b) jurisprudence (28-45). Not only that, but such an interpretation is unconstitutional, as it allows for the dismissal with prejudice of a valid murder indictment where there is no constitutional violation (45-48). Accordingly, this Court should reject the judge's flawed and novel approach and reverse his order dismissing the indictment against defendant for a violation of Rule 36(b).

Moreover, this Court should reverse the judge's order dismissing the indictment, with prejudice, for lack of prosecution (48-56). As an initial matter, the judge erred when he denied the Commonwealth's motions to continue based on the unavailability of a necessary witness, Juan Garcia (48-53). He then com-

pounded that error by allowing defendant's motion to dismiss based on an incorrect legal standard (53-56). Indeed, he considered whether the Commonwealth had exercised due diligence in securing Garcia's presence for trial, rather than determining whether the Commonwealth had engaged in any egregious misconduct, and considered whether a dismissal for failure to prosecute would result in a miscarriage of justice, rather than a serious threat of prejudice (53-55). Finally, where the judge dismissed the case, in part on findings regarding the alleged weakness of the Commonwealth's case, his decision amounted to separation of powers violation (55-56).

ARGUMENT

I. THE JUDGE ERRED IN DISMISSING DEFENDANT'S MURDER PROSECUTION BASED ON A VIOLATION OF MASS. R. CRIM. P. 36(b) WHERE DEFENDANT AGREED TO OR ACQUIESCED IN THE OVERWHELMING MAJORITY OF CONTINUANCES, AND THE JUDGE'S FLAWED INTERPRETATION OF THE RULE IS CONTRARY TO ITS PLAIN LANGUAGE, THE RELEVANT CASE LAW, AND THE OBLIGATIONS THAT THE RULE PLACES ON ALL PARTIES INVOLVED.

A. Superior Court Standing Order No. 2-86 and Mass. R. Crim. P. 36(b).

Standing Order No. 2-86, which concerns "Criminal Case Management," was written with the express purpose of "improv[ing] procedures in criminal cases in the Superior Court," "promot[ing] uniformity in practice throughout the Commonwealth," and "insur[ing] compliance with the provision of the Rules of Criminal Pro-

cedure and the Rules of the Superior Court" (C.A. 35). The order recognizes "that a defendant's right to speedy trial, and the public, including victims and witnesses, interest in a timely, fair and just resolution of criminal cases, is best achieved by application of uniform and consistent time standards for the conduct of criminal cases," and encourages "cooperation between the court, the prosecuting attorneys and the defense bar with a view towards a just and efficient disposition of criminal cases" (C.A. 35).

To effectuate its purpose, the Standing Order requires the judge or clerk, at arraignment, to issue a "Notice of Presumptive Track Designations in the form of a Scheduling Order, setting forth dates at or before which certain events shall occur" (C.A. 36). The presumptive designations must be "determined based solely on the lead indictment or charge," except where the judge determines otherwise based on "good cause shown," and must include the date for a pretrial conference report, pretrial hearing, final pretrial conference, and presumptive trial date (C.A. 36). As the standing order indicates, the presumptive track that is set at arraignment "establish[es] a presumptive time period for disposition of the case" (C.A. 36). It does not, however, override Rule 36. Instead, Rule 36 -- as a Rule of Criminal Procedure -- must govern.

Rule 36(b)(1)(C) states that "a defendant shall

be tried within twelve months after the return day in the court in which the case is awaiting trial." Mass. R. Crim. P. 36 (b)(1)(C).[14] "If a defendant is not brought to trial within the time limits of this subdivision . . . he shall be entitled upon motion to dismissal of the charges." Mass. R. Crim. P. 36 (b)(1); *accord Commonwealth v. Rodgers*, 448 Mass. 538, 539 (2007). "However, charges are not to be dismissed if the delay comes within one of the '[e]xcluded [p]eriods' set forth in rule 36(b)(2), or if the defendant 'acquiesced in, was responsible for, or benefited from the delay.'" *Rodgers*, 448 Mass. at 539-40 (quoting *Commonwealth v. Spaulding*, 411 Mass. 503, 504 (1992)). "For these purposes, '[a] failure to object to a continuance or other delay constitutes acquiescence.'" *Id.* at 540 (quoting *Commonwealth v. Tanner*, 417 Mass. 1, 3 (1994)); *accord Commonwealth v. Taylor*, 469 Mass. 516, 524 (2014) ("A defendant must . . . explicitly and formally object, on the record, to each and every proposed continuance or delay.").

The return day in the instant case is the day of defendant's arraignment, June 22, 2016. At the outset, there has been no violation of Rule 36(b) where

[14] "The 'return day' is 'the day upon which a defendant is ordered by summons to first appear or, if under arrest, does first appear before a court to answer to the charges against him, whichever is earlier.'" *Barry*, 390 Mass. at 291 (quoting Mass. R. Crim. P. 2(b)(15)).

defendant filed his motion to dismiss on June 22, 2017, thereby tolling the running of the Rule 36(b) clock on day 365 (C.A. 27).[15] *See Rodgers*, 448 Mass. at 541 n.4 ("The filing of a motion pursuant to rule 36 tolls the running of the rule 36 time limits.") (citing *Spaulding*, 411 Mass. at 505 n.4). Assuming this Court accepts June 26, 2017 (C.A. 10), as the filing date of defendant's motion to dismiss, then 369 days have passed.[16] Because this period exceeds the twelve months allowed the Commonwealth by four days, defendant has narrowly made out a prima facie case of a Rule 36(b) violation. The Commonwealth, however, can justify well in excess of four days, and can therefore show that defendant was brought to trial within the Rule 36(b) time limits.

The period between defendant's arraignment and the pretrial conference on July 14, 2016, is included in the Rule 36(b) calculation (22 days included). *See Spaulding*, 411 Mass. at 506-07; *accord Barry v. Commonwealth*, 390 Mass. 285, 296 n.13 (1983).[17] However,

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[15] While the judge noted at the hearing on June 22 that defendant's motion was not in fact pending at that time (6/22:7-8), this Court can determine otherwise.

[16] The twelve-month period began to run on June 23, 2016, "which was the day after the event which caused this 'period of time to begin to run.'" *Barry*, 390 Mass. at 291-292 (quoting Mass. R. Crim. P. 36(b)(3)).

[17] While *Barry* states "that counsel need not object where a procedure and timetable is established by the rules," 390 Mass. at 296 n.13, this should not be confused with the timetable established by the Standing

the period between July 14, 2016, and June 9, 2017, when defendant objected to the Commonwealth's motion to continue the trial date, is excluded from the calculus where the docket and clerk's minutes shows that defendant either agreed to or acquiesced in each continuance (334 days excluded) (C.A. 4-33). *Barry*, 390 Mass. at 289 ("When a claim is raised under rule 36, the docket and minutes of the clerk are prima facie evidence of the facts recorded therein."). The period between March 23 and May 11, 2017, absent the three days between April 22 and April 25, is likewise excluded, as it was during this time that the court heard and ruled on the defendant's discovery motions.[18] *See Rodgers*, 448 Mass. at 546 n.12 ("Ordinarily, the time taken to hear and rule on a defendant's [pretrial motion] is excluded from the Rule 36(b) calculation because the defendant has filed the motion and resolution of such issues is considered a benefit to the de-

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Order. Not only that, but the footnote is limited to the inclusion of time between the return date and seven days after the pretrial conference, which -- under the version of the rules in place at the time -- was the date set for the filing of pretrial motions. It should be noted, however, that Rules 11 and 13 have since been revised and no longer include a seven day window for the filing of pretrial motions. As such, it is only the return date to the pretrial conference date that is automatically included in the calculus.

[18] Defendant's first motion was heard on March 23, but not decided until May 11. Therefore, under Mass. R. Crim. P. 36(b)(2)(A)(vii), only the thirty days between March 23 and April 22 are excluded.

fendant."); *see also* Mass. R. Crim. P. 36(b)(2)(A)(v).[19] Finally, June 19, 2017, is included based on defendant's filing of his first motion to dismiss, which the judge denied that day (1 day) (6/19:16-17). Accordingly, the Commonwealth has met its burden under Rule 36(b).

Nonetheless, without taking any testimony and instead relying on the docket, clerk's minutes, relevant transcripts, and the party's submissions, the judge found that the *entire time* between defendant's return day and the presumptive trial date was included in the Rule 36(b) calculation, as was the time between the presumptive trial date and the filing of defendant's motion to dismiss. In the judge's view, the presumptive trial date automatically generated under Superior Court time standards was the pivotal determinant, and because no intervening event or acquiescence by defendant delayed that date, then all the time preceding it was to be counted against the Commonwealth.

This Court is "in as good a position as the judge

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[19] The Commonwealth did not altogether "concede[] that none of [the] exclusions specifically listed in Mass. R. Crim. P. 36(b)(2) applies" (C.Add. 16). While that was the prosecutor's representation at the hearing, such a representation cannot change the rule nor effect the application of the time periods established by the rule. What is more, the chart attached to the Commonwealth's opposition to defendant's motion to dismiss indeed notes defendant's discovery motions as a basis for the excluded time.

below to decide whether the time limits imposed by the rule have run." *Barry*, 390 Mass. at 289. While this Court "give[s] deference to the determination made by the judge below, [it] may reach [its] own conclusions." *Id.* at 290. Here, the judge's flawed approach is entirely contrary to the plain language of Rule 36(b) and the well-established body of Rule 36(b) case law. Indeed, the judge's interpretation turns the rule on its head and upsets the carefully crafted balance of case management obligations embodied in the rule. In the end, the judge's decision is not entitled to deference.

B. The Judge's View Of The Rule 36(b)(2) Exclusions Is Contrary To The Plain Language Of The Rule, And Subverts The Mechanical Operation Of The Rule Set Forth In *Barry*.

"In interpreting a rule of criminal procedure, [the court] turn[s] first to the rule's plain language." *Commonwealth v. Denehy*, 466 Mass. 723, 733 (2014) (citing *Commonwealth v. Hanright*, 465 Mass. 639, 641 (2013)). The court "consider[s] no words to be superfluous," *id.* (citing *Bolster v. Commissioner of Corps. & Taxation*, 319 Mass. 81, 84-85 (1946)), and "[w]here possible, [it] construes the various provisions of [the] [rule] in harmony with one another," *id.* (quoting *Locator Servs. Group, Ltd. V. Treasurer & Receiver Gen.*, 443 Mass. 837, 859 (2005), citing *Kargman v. Commissioner of Revenue*, 389 Mass. 784, 788

(1983)). Furthermore, the court looks to the mandates of Mass. R. Crim. P. 2(a), which states that the "rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay." Mass. R. Crim. P. 2(a); *see Barry*, 390 Mass. at 290 (1983).

As noted, Rule 36(b)(1)(C) provides that "a defendant shall be tried within twelve months after the *return day* in the court in which the case is awaiting trial." Mass. R. Crim. P. 36 (b)(1)(C) (emphasis added). The rule further provides that certain periods of delay listed in Rule 36(b)(2) "shall be excluded in computing the [twelve month] time [limit] *within which the trial of any offense must commence*," and states that "[i]f a defendant is not brought to trial within [that time limit], *as extended by subdivision (b)(2)*, he shall be entitled upon motion to a dismissal of the charges." Mass. R. Crim. P. 36(b)(1) (emphasis added); *accord Barry*, 390 Mass. at 291. As this Court has articulated, the exceptions enumerated in Rule 36(b)(2) "are meant to ensure that the Commonwealth is not unfairly charged with delays that, if included, 'would upset the balance of obligations envisioned by the rule.'" *Commonwealth v. Davis*, 91 Mass. App. Ct. 631, 637 (2017) (quoting *Spaulding*, 411 Mass. at 506).

In the judge's view, "[t]o establish an excluded period" under Rule 36(b)(2), "the Commonwealth must show two things: (a) a listed event and (b) 'delay resulting' from that event," with the caveat that the "delay resulting" from the event must be delay to the trial date itself (C.Add. 15). Otherwise, the judge reasoned, "to exclude time when the trial date remains constant would make meaningless[] the phrase 'delay resulting from' and would unlawfully penalize[] the defendant's efforts to defend himself through motions and otherwise without any offsetting benefit in case management (or any other public purpose)" (C.Add. 15). This interpretation, however, is contrary to the plain language of the rule, as well as to the purpose of the enumerated exceptions.

Rule 36(b) identifies the "return date" -- rather than the presumptive trial date -- as the starting point for the analysis. The rule then looks prospectively toward the twelve month time limit, and excludes time periods -- resulting from certain enumerated events -- "within which the trial of any offense must commence." Mass. R. Crim. P. 36(b)(1). It is the enumerated event that creates -- or "result[s]" in -- the delay, and that delay then effectively extends the date within which defendant must be tried.[20] Thus,

[20] Put another way, the excluded periods under Rule 36(b)(2), or a defendant's acquiescence to an individ-

the delay is measured with respect to the certain event that causes it; it is not measured with reference to the first-assigned trial date. If the rule intended otherwise, it would say it. *Cf. Denehy*, 466 Mass. at 734 ("If [Rule 36(b)(2)(D)] intended a broader application, it would simply omit the prepositional phrase ['dismissed by the prosecution'].").

The SJC's opinion in *Barry* supports this interpretation. There, the Court held that "once [the Commonwealth] establishes that an act or event [listed in Rule 36(b)(2)] triggers an excludable period of time, the exclusion of the period is automatic." *Barry*, 390 Mass. 292. The Court reached this conclusion, based not only on the plain language and structure of the rule, but also on the fact that "any other approach would be unworkable." *Id.* As the Court reasoned,

> The rule is designed in some measure to operate mechanically. A mechanical operation of [rule 36] allows all parties to calculate with certainty the date within which the defendant must be tried. This certainty would be wholly lost if the Commonwealth had to prove the precise manner in which each excluded period caused delay. Further, given the multitude of factors which might influence the date a trial commences, the Commonwealth would face a formidable task. The

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ual continuance (*see infra*, § I.C), serve as proxies for a defendant's affirmative waiver of a trial date within one year. That the clerk does not in fact move the trial date each time there is an excluded period under the rule, or acquiescence by defendant, is irrelevant to the operation of the rule.

> "virtual impossibility" of determining whether an act or event "did or did not actually delay the commencement of a trial" requires the conclusion that each period listed in subdivisions (b)(2) is automatically a period of delay.

Id. at 292-93.[21]

Although the judge asserted that his approach to Rule 36(b) fits into the contours of *Barry*, the unworkable nature of his approach proves otherwise. According to the judge, the test is a simple one: where the first-assigned trial date never moves, then no listed event actually delayed "'the commencement of a trial'" (C.Add. 16). "This observation," he reasons, "takes this case outside the scope of Barry's concern about the 'virtual impossibility' of proving 'that an act or event did or did not actually delay the commencement of a trial,'" and also "satisfies Barry's need for certainty, 390 Mass. at 294, because the parties will know whether the trial date has ever been continued" (C.Add. 16 n.10). Preliminarily, the judge's reasoning founders on the fallacy that the presumptive trial date occasioned by a track selection is, indeed, an assigned trial date. It is not. It is at best an aspirational tracking tool. Closer to re-

[21] Although the Court went on to say that "[c]ommon experience suggests also that the occurrence of the events giving rise to an excluded period will delay a trial," *id.* at 293, it never said that the Commonwealth had to show that the excluded period in fact delayed the trial. Instead, it said the very opposite. *Id.* at 292-93.

ality is what happens when the presumptive trial date is in fact continued, as occurs, for example, in a vast number of homicide cases in Suffolk County. In the judge's view, then the parties and the court would have to first determine whether a particular excluded period under Rule 36(b)(2), or a particular period in which defendant acquiesced (*see infra*, § I.C), actually had an effect on, or possibly had an effect on, the presumptive trial date (*see* C.Add. 18). And if multiple events may have had an effect on the presumptive trial date, then presumably the court would have to determine which among them should be excluded from the calculus. Contrary to the judge's view, the many questions that abound under such an approach are unworkable and undermine the mechanical operation of the rule that *Barry* approves. *See id.* at 292.

C. The Judge's View Of Waiver And Acquiescence Is Not Only Contrary To The Applicable Case Law, But It Upsets The Balance Of Obligations Envisioned By The Rule.

Rule 36(b) is concerned not only with the eight enumerated exceptions in Rule 36(b)(2), but also with "periods of delay in which a defendant acquiesces, for which he is responsible, or from which he benefits . . . ." *Id.* at 296. While these periods of delay are not addressed in the rule itself, *id.* at 295, they are nonetheless "excluded from the calculation of the twelve-month period," *Commonwealth v. Sigman*, 41 Mass.

App. Ct. 574, 579 n.6 (1996).

The question the judge sought to resolve is whether the court's Rule 36(b) calculation must "exclude time needed to complete intermediate events that had no effect upon the trial date, on the ground that defense failure to object to scheduling (or continuing) these events waived Rule 36 deadlines or acquiesced in exclusion of time" (C.Add. 12-13) (emphasis in original). The judge answered this question in the negative, arguing for a rule that "waiver or acquiescence occurs when a continuance affects, or potentially affects, the trial date" (C.Add. 24). The judge's proposed interpretation is illogical, contrary to the case law, and would entirely "'upset the balance of obligations envisioned by the rule.'" *Davis*, 91 Mass. App. Ct. at 637 (quoting *Spaulding*, 411 Mass. at 506).

Rule 36(b) is "'primarily a management tool, designed to assist the trial courts in administering their dockets.'" *Barry* 390 Mass. at 295-96 (quoting Reporters' Notes to Mass. R. Crim. P. 36). Although the rule creates an "opportunity for a speedy trial . . . that opportunity is not a fundamental constitutional right, or even a right created by statute." *Turner v. Commonwealth*, 423 Mass. 1013 (1996). Thus, "the application of 'traditional indicia of waiver of rights' is appropriate." *Barry*, 390 Mass. at 296 (quoting *Commonwealth v. Carr*, 3 Mass. App. Ct. 654,

656 (1975)).

"For criminal defendants, [Rule 36] creates a means through which defendants who desire a speedy trial can secure one." *Id.* "The goal of providing defendants with speedy trials," however, "can be obtained only if the rule is interpreted to place certain obligations on all parties, including prosecutors, the trial courts, and defendants." *Id.* To that end, Massachusetts courts have "specifically emphasized the obligation of defense counsel to object to delay" and to "'press their case through the criminal justice system.'" *Commonwealth v. Lauria*, 411 Mass. 63, 68 (1991) (quoting *Barry*, 390 Mass. at 297); *see Commonwealth v. Bourdon*, 71 Mass. App. Ct. 420, 425-26 (2008) ("It cannot be gainsaid that a defendant must object to periods of delay in order to claim later that such delays were objected to and should inure to his benefit"). Indeed, with a proper objection, the trial court judge can make contemporaneous findings regarding the basis for including any delay, or, in appropriate cases, for excluding the time in the interest of justice. *See* Mass. R. Crim. P. 36(b)(2)(F). Where defendant has not entered an objection, however, "he will be held to have acquiesced in the delay." *Barry*, 390 Mass. at 290.

Against these well-established principles, the judge's novel view that "waiver or acquiescence [only]

occurs when a continuance affects, or potentially affects, the trial date" (C.Add. 24) cannot stand. First, Massachusetts courts have never said that a defendant's agreement or acquiescence to "intermediate dates" must actually delay the trial date to be excluded from the Rule 36(b) calculation. Instead, the courts have said that continuances[22] that a defendant agrees to or acquiesces in are "treated as excluded periods," and are automatically excluded from the Rule 36 calculation, regardless of a defendant's motivation in agreeing or acquiescing, and regardless of the effect of such an agreement or acquiescence on the trial date itself. *See Commonwealth v. Farris*, 390 Mass. 300, 304 n.3 & 306 (1983).

Farris is directly on point. There, defendant was arraigned on September 29, 1980, and on October 20, 1980, the case was continued for trial until January 19, 1981, at which time defendant did not enter an objection when the trial failed to commence. *Id.* at 301. On January 28, 1982, when the case was set to

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[22] Contrary to the judge's suggestion, the Commonwealth does not improperly "seize[]" upon the word "continue" (C.Add. 21-22). Instead, the Commonwealth relies on how appellate courts have interpreted the word in the Rule 36(b) context. *See e.g. Taylor*, 469 Mass. at 522, 525 (noting that "the case was continued twenty-three times" in the nearly two years between defendant's arraignment and motion to dismiss, and that "[o]f th[ose] twenty-three continuances . . ., sixteen were 'by agreement'").

commence, defendant requested a delay and agreed to a continuance until April 5, 1982. *Id.* at 301-02. In allowing defendant's motion, the judge reasoned that "without consideration of any excluded period under [Rule 36(b)(2)], [defendant] should have been tried on or before March 29, 1982;" that this date was extended to April 30, 1982, based on thirty-two days of excludable time for pretrial motions; and that there were no other excludable periods. *Id.* at 303. As is relevant here, "[h]e ruled that, while [defendant] had validly waived his rights under the rule on January 28, 1982, the waiver was a nullity, since the date set for trial was within the limits of the rule." *Id.* The Court reversed, and in so doing, specifically rejected the judge's reasoning, stating:

> In these circumstances, the periods from the date of the continuance until the date set for trial, or the date the defendant objects to the failure of the trial to commence, whichever is later, are not to be included in the calculation of time limits of this rule. *The fact that such a continuance did not extend beyond the time limits imposed by the rule is irrelevant*.

Id. at 306. Put another way, a defendant's acquiescence can still result in an excluded period, even if such acquiescence does not have an effect on the first-assigned trial date.

This Court's recent opinion in *Davis* is not to the contrary. There, the Court rejected an argument

by the Commonwealth that would have imputed defendant's waiver of "the thirty day rule" under G.L. c. 276, § 35, onto his acquiescence in the setting of the first trial date for the purposes of Rule 36(b). In so doing, the Court reasoned that, "[a]bsent some extraordinary circumstance, which is not apparent on the record here, there is no reason to characterize the defendant as having acquiesced in the setting of his first trial date." *Id.* at 639. This reasoning should be confined to its context, that is, to a defendant's waiver of "the thirty day rule" vis-à-vis Rule 36(b). But even if it is applicable to Rule 36(b) itself, it does not mean that the entire time between arraignment and the first trial date, or even intermediate dates to which a defendant acquiesces (C.Add. 18), are included in the calculus. Instead, the Court looks at each period of delay following the return day and determines whether the period is included or excluded. This is how Rule 36(b) is designed to operate.

Second, were it to stand, the judge's view would absolve defendant of his responsibility to "'press [his] case through the criminal justice system.'" *Lauria*, 411 Mass. at 68 (quoting *Barry*, 390 Mass. at 297). True, the judge's approach would still require defendant to object to a continuance that "affects, or potentially affects, the trial date" for the resulting delay to count against the Commonwealth (C.Add. 24) --

a standard that raises its own questions given the mechanical operation of the rule (*see supra*, § I.B) -- but it would not require defendant to voice an objection to any "intermediate dates" prior to the presumptive trial date on the grounds that such an objection would be "futile" (C.Add. 18-19). Futile or not, however, it is what the rule -- and the case law interpreting the rule -- requires of defendant.

The SJC's opinion in *Denehy* is instructive. There, defendant was arraigned on August 21, 2008, and on November 17, 2010, filed a Rule 36 motion to dismiss. *Denehy*, 466 Mass. at 725-26. In between that time, the court continued the case on two occasions – from March 9 to May 5, 2009, and from January 6 to February 26, 2010 -- due to "court congestion or lack of available trial judges or jurors." *Id.* at 731. Defendant did not object to these continuances, and on appeal, argued that his failure to do so "should not be considered an 'acquiescence' because any such objection would have been futile." *Id.* The Court rejected this argument, reasoning that "[o]ur precedent firmly establishes that a defendant must object to a continuance to include the resulting delay in a [rule 36] calculation." *Id.* The Court "decline[d] to differentiate for [rule 36] purposes between continuances ordered by the court and those requested by the parties," and noted that "[e]ven if the objection is fu-

tile, where short staffing in the court renders a continuance essentially nondiscretionary, defendant nonetheless carries the duty of reminding the court of the [rule 36] implications of continuing the proceedings." *Id.* at 731 n.12. While *Denehy* involved court-ordered continuances of the trial date, rather than of intermediate dates prior to the presumptive trial date, this is of no consequence -- defendant's obligation under the rule remains the same.

Third, the judge's interpretation of Rule 36(b) would lead to an impossible result. First, in a case where the court has not set a trial date,[23] then no in-

[23] There appears to be some confusion over who exactly is responsible for setting the trial date in criminal cases. In *Commonwealth v. Weed*, 82 Mass. App. Ct. 123 (2012), this Court relied on *Spaulding* for the proposition that the "'primary responsibility for setting a trial date lies with the district attorney.'" *Weed*, 82 Mass. App. Ct. at 127 (quoting *Spaulding*, 411 Mass. at 506). However, Massachusetts case law since *Spaulding* has explicitly recognized that the setting of the trial date is the responsibility of both the district attorney and the court. Indeed, in *Commonwealth v. Super*, 431 Mass. 492 (2000), the Court concluded "that there is no requirement that the prosecution answer ready for trial as a condition precedent to commencing a criminal trial." *Id.* at 498. In so doing, the Court relied on G.L. c. 278, § 1, which "indicates that the district attorney does not have sole responsibility for developing trial lists for criminal cases." *Id.* at 497. The Court further stated, "The clear intent of the statute is to empower courts to take an active role in determining the trial list." *Id.* at 497; *see also Commonwealth v. Jenkins*, 431 Mass. 501 (2000). Notably, this is exactly what Standing Order 2-86 does (C.A. 35-42). Where Rule

termediate event would actually delay the trial date. Accordingly, all of the time between the return date and the one year date would count against the Commonwealth and the case would be dismissed. Second, in a case where the court has in fact set a trial date, and that date has not moved, then the time between the return date and the first trial date would count against the Commonwealth and the case would be dismissed after one year. In effect, the judge would write out of existence the excluded periods contemplated by the rule and the case law, and allow for the dismissal of complex and serious criminal cases after one year. This is, simply put, not what the rule contemplates.

D. The Judge Erroneously Places Blame On The Commonwealth For The Delay In This Case.

Similar to the obligations that the rule places on all parties involved, courts have looked to each party's responsibility for the delay in deciding whether dismissal is warranted. *Lauria*, 411 Mass. at 68-69. What underpins the judge's analysis in this case is his view that defendants indeed "pressed for trial," while the Commonwealth engaged in dilatory conduct (C.Add. 20). In reaching this conclusion, the judge focused on the Commonwealth's motion to continue to conduct DNA analysis, and the Commonwealth's fail-

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36(b) jurisprudence appears to be to the contrary, it should be clarified.

ure to secure Garcia's presence for trial. But his findings and analysis on each of these points are unsupported by the record, and in turn, do not support his ultimate conclusion that the Commonwealth was responsible for the alleged delay in this case.

First, the judge found that "[t]he likely reason for the Commonwealth's motion [to continue in order to analyze DNA] was its desire to delay the matter out of concern for its prospects at trial" (C.Add. 2-3), and further found that "[c]onsistent with that conclusion, the Commonwealth would later disclose that, at the time of the May 11 motion [to continue], it had not had contact with its identification witness, Juan Garcia, since early April, 2017" (C.Add. 3). The judge, however, ignores the Commonwealth's reasonable explanation for moving to continue on May 11, 2017, namely that it "ha[d] been informed by the Boston Police Department Crime Lab that the victim's pants pockets may contain untested evidence in the form of DNA," and that "[t]his evidence could potentially inculpate one or both defendants *or equally exculpate them*" (C.A. 54-55) (emphasis added).[24] Meanwhile, at the time of this motion, the Commonwealth had every reason to believe -- based on its contact with Garcia in April

[24] That the Commonwealth should have conducted such testing earlier, or that the court denied the Commonwealth's motion, has no bearing on whether the Commonwealth had a good faith basis for filing the motion.

2017 -- that Garcia remained cooperative and willing to testify. It was not until the end of May that the Commonwealth received an "out of service" message on Garcia's phone, but even that was not unusual. Accordingly, there is simply no indication that the Commonwealth's motion to continue in May had anything to do with Garcia or the Commonwealth's "concern for its prospects at trial" (C.Add. 3).

Second, the judge reasoned that "[d]espite Mr. Garcia's Florida residence, the lack of contact with him since early April 2017, the Commonwealth's apparent difficulty in disclosing his location to the defense,[25] his record of violating the law in both Massachusetts and New Hampshire,[26] and the apparent failure to deliver on sentencing consideration that Mr. Garcia

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[25] On this point, the judge found that "[d]uring the discovery in this case, the Commonwealth never provided a valid address for Mr. Garcia" (C.Add. 4), and that "[t]he Commonwealth has not explained its apparent inability or unwillingness to provide a correct address, except to say that Mr. Garcia appeared to be moving around" (C.Add. 4). As an initial point, there is no indication that the judge reviewed the hearings where the discovery over Garcia's address was addressed, presumably in more detail. In any event, that the Commonwealth had difficulty in obtaining a valid address for Garcia had no bearing on whether it believed Garcia to be a cooperative witness. Indeed, as the prosecutor explained at the hearing on June 9, 2017, it did not communicate with Garcia by "going to his door," but instead by talking to him and keeping him apprised of upcoming events (6/9:25).

[26] The transcript indicates that he had prior cases in Florida, not New Hampshire (6/9:22).

likely expected, the Commonwealth took no steps to compel his presence" (C.Add. 7). The judge therefore found that "[t]he Commonwealth's desire to delay the trial . . . on June 12 is the only sensible explanation for its failure to secure timely compulsory process" of Garcia (C.Add. 8). This ignores, however, the reasonable explanations in the prosecutor's affidavit for not securing out of state process before June 12, namely that Garcia had "never wavered in his willingness to testify in these matters prior to June 8, 2017" (C.A. 73).[27] Where the judge made clear that he was only "assuming the truth [of the prosecutor's affidavit] for purposes of argument, but [was] ma[king] no factual findings that the statements [we]re true" (C.Add. 4-5), he could not then draw inferences and conclusions about the Commonwealth's intent in failing "to secure timely compulsory process" and in turn moving to continue the trial date that were wholly unsupported by -- and contrary to -- the prosecutor's affidavit, and which had no evidentiary support in the record (C.Add. 8).

In the end, Rule 36(b) requires defendant to explicitly object to each continuance for the resulting time to count against the Commonwealth. Here, according to the docket, defendant never objected to the

[27] It also ignores the fact that the Commonwealth had otherwise been preparing for trial (*see* C.A. 9-10).

Commonwealth's motion to continue on May 11, 2017, and thus such time is excluded from the calculus.[28] In contrast, because defendant objected on June 9, and again on June 12, the resulting delay is included in the calculus. This is how courts have long construed Rule 36(b), and how it should be interpreted in the instant case.

II. ASSUMING *ARGUENDO* THAT RULE 36(b) ITSELF DOES NOT VIOLATE THE SEPARATION OF POWERS, THE JUDGE'S INTERPRETATION OF THE RULE IS UNCONSTITUTIONAL.

"[T]he judicial [department] shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Mass. Dec. of Rights art. 30. Here, notwithstanding his assertion to the contrary (C.Add. 27-29), the judge's interpretation of Rule 36 (b) violates the separation of powers guaranteed by the Massachusetts Declaration of Rights. Indeed, the interpretation of this judicially created rule in such a manner as to permit dismissal with prejudice in the absence of a constitutional violation unconstitutionally intrudes upon both the executive branch's power to prosecute cases and the legislative branch's prerogative to define crimes. Such an interpretation can

[28] Even if defendant did object, as he claims in his motion to dismiss (C.A. 95), the Commonwealth would still be able to justify a sufficient amount of time under Rule 36(b).

therefore not stand.[29]

In his concurrence in *Davis*, Justice Neyman correctly determined that "strict application of rule 36 case law places an unfair burden on the executive branch to resolve an issue [*i.e.*, court congestion] not of its making." 91 Mass. App. Ct. at 643 (Neyman, J., concurring).[30] More importantly, when Justice Neyman noted that "[p]recluding prosecution of the case in these circumstances unnecessarily penalizes the Commonwealth, contrary to the intent of rule 36," *id.*, he highlighted the fact that by applying Rule 36 (b) to dismiss a case where the prosecutor was ready and willing to give defendant the jury trial he desired, the judicial branch acted to foreclose the executive branch from prosecuting a valid complaint without any constitutional basis. *See id.* ("The remedy of dismissal in such circumstances seemingly impedes a fundamental executive function"). This is a violation of Mass. Dec. of Rights art. 30, and thus an unconstitutional application of the rule. *Cf. Commonwealth v. Gordon*, 410 Mass. 498, 500-501 (1991) (unconstitution-

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[29] The Commonwealth filed a petition for further appellate review in *Commonwealth v. Davis*, 91 Mass. App. Ct. 631 (2017), on this issue (No. FAR-25436).

[30] In *Davis*, the majority "conclude[d] that delays attributable to court congestion - if the defendant objects - are not excludable from the [rule 36] calculation, unless the judge makes the necessary findings under [rule 36(b)(2)(F)]." 91 Mass. App. Ct. at 632.

al for a judge to attempt to nol pros a valid indictment over the Commonwealth's objection).

The same can be said for the instant case. Indeed, the judge's improvident dismissal of a homicide case -- based on a novel and flawed reading of Rule 36(b) -- unnecessarily penalizes the Commonwealth where (1) a trial date had been set, (2) the Commonwealth had not, contrary to the judge's unfounded view, intentionally sought to delay the trial, and (3) defendant had explicitly agreed to and acquiesced in the majority of continuances. This dismissal of serious charges is contrary to the intent of the rule, and "raises public safety concerns." *Davis*, 91 Mass. App. Ct. at 643 (Neyman, J., concurring). Not only that, but it forecloses the executive branch from prosecuting a valid complaint without any constitutional basis, thereby amounting to a violation of art. 30.

The judge's decision also obstructs the legislative branch's power to make and define laws. Specifically, where the judicial branch applies a judicially created rule such as Rule 36 (b) to dismiss a valid criminal charge, the judicial branch violates Mass. Dec. of Rights art. 20: "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide

for." Only the legislative branch promulgates statutes of limitations dictating the dismissal of cases based on time restrictions. "[T]he Legislature's power to proscribe conduct and to prescribe penalties is necessarily broad and its judgment is to be accorded due respect." *Op. of Justices to House of Representatives*, 378 Mass. 822, 830 (1979).

In sum, even assuming *arguendo* that Rule 36(b) itself does not violate the separation of powers, the judge's interpretation of the rule in this case does and is unconstitutional.

III. THE JUDGE ABUSED HIS DISCRETION IN DENYING THE COMMONWEALTH'S TWO MOTIONS TO CONTINUE, AND COMPOUNDED THAT ERROR BY DISMISSING THE CASE WITH PREJUDICE FOR LACK OF PROSECUTION WHERE THERE WAS NEITHER EGREGIOUS GOVERNMENTAL MISCONDUCT NOR A SHOWING OF PREJUDICE.

A. The Judge Abused His Discretion In Denying The Commonwealth's Two Motions To Continue.

Rule 10, which governs continuances, states that a continuance shall be granted when "based upon cause and only when necessary to insure that the interests of justice are served." Mass. R. Crim. P. 10(a)(1). "The decision whether to grant a motion to continue lies within the sound discretion of the trial judge." *Super*, 431 Mass. at 496 (quoting from *Commonwealth v. Miles*, 420 Mass. 67, 85 (1995)). "The judge's discretion is not unfettered, however, but bound by important considerations." *Commonwealth v. Clegg*, 61

Mass. App. Ct. 197, 200 (2004). In considering whether to grant the motion, the judge "should balance the movant's need for additional time against the possible inconvenience, increased costs, and prejudice which may be incurred by the opposing party if the motion is granted." *Super*, 431 Mass at 496-97 (quoting *Commonwealth v. Gilchrest*, 364 Mass. 272, 276 (1973)). "Among the factors a judge must consider is '[w]hether the failure to grant a continuance . . . would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice,'" *Clegg*, 61 Mass. App. Ct. at 200 (quoting Mass. R. Crim. P. 10(a)(2)(A)), and also "whether there has been a failure by a party to use due diligence to obtain available witnesses," Mass. R. Crim. P. 10(a)(2)(C).

The judge abused his discretion in concluding without evidentiary basis that the Commonwealth had failed to exercise due diligence in securing Garcia's presence at trial. As the Commonwealth stated in its motion to continue filed on June 9, and in the prosecutor's affidavit in support of its June 16 motion to continue, there was no reason to seek out of state process for Garcia prior to April 2017, given Garcia's cooperation and willingness to testify since 2007 (C.A. 56-62; 6/9:24-25). As noted, in May 2017, just prior to Memorial Day, the Commonwealth was unable to

reach Garcia, but this was not unusual and did not provide any indication that he was no longer cooperative. When they were again unable to reach him the following week and weekend, the Commonwealth took the reasonably diligent step of sending a Homicide Detective to Florida. It was during this visit, on June 8, that the detective received the phone call from Garcia indicating -- for the first time since 2007 -- his unwillingness to cooperate. With the first trial date just days away, the Commonwealth immediately moved to continue in order to seek out of state process, which it initiated on June 12, 2017 (C.A. 9).[31] While hindsight suggests that seeking out of state process earlier may have been wiser (C.A. 75; 6/9:25), this in no way means that the Commonwealth's conduct -- particularly when viewed contemporaneously -- was lacking in diligence. Indeed, this is not a case where the Commonwealth simply chose not to summons a local witness

[31] While the judge takes issue with the prosecutor's statement that he could not "use an out-of-state process if I don't have a date," he misreads this statement (C.Add. 7-8; 6/9:7). When read in context, the prosecutor was not referring to the previously scheduled trial date; he was referring to needing a decision on his motion to continue and a *new* date before seeking out of state process (6/9:6-8). While the judge pointed out that he could seek such process even while impaneling a jury, the prosecutor reasonably noted that he did not want to "waste the Court's time with impaneling a jury," nor have jeopardy attach, without first knowing if he would able to meet his burden at trial (6/9:8, 25).

for trial. *See Commonwealth v. Burston*, 77 Mass. App. Ct. 411, 417 (2010). Instead, it is a case where the prosecutor relied on his experience in not initially seeking out of state process for a cooperative and willing witness; took reasonable steps to locate the witness when he could not be reached; and immediately sought out of state process once there was a clear indication of a lack of cooperation.

Even assuming the Commonwealth should have earlier sought out of state process, the judge improperly balanced the remaining factors. First, while the judge "ha[d] no difficulty concluding that Mr. Garcia [wa]s a necessary and material witness" (C.Add. 3), his denial of the Commonwealth's motion undoubtedly "ma[d]e a continuation of the proceeding impossible," Mass. R. Crim. P. 10(a)(2)(A), which in turn, subverted the public's interest in the just resolution of the case. Second, there is no indication that allowing the Commonwealth additional time to secure Garcia's presence at trial would have "result[ed] in a miscarriage of justice," or prejudice for that matter. *Id.* While defendant was ready for trial, there had been no violation of defendant's right to a speedy trial under Rule 36(b). Meanwhile, as the judge himself suggested, a continuance would not have posed a problem to the court's calendar (6/9:8).

The judge likewise erred in denying the Common-

wealth's second motion to continue "as moot" (C.Add. 10). Two erroneous and troubling findings underpin the judge's decision in this regard. First, in addressing the fact that the Florida investigator was unable to serve Garcia on June 15, as he was not home at the time, the judge found "[t]hat conclusion does not follow, as there were ample ways to pursue Mr. Garcia's attendance beyond the very rudimentary steps actually taken" (C.Add. 10). Not only is there no support in the record for this assertion, but to the extent it is true, the judge did not give the Commonwealth an opportunity to pursue those additional steps. The Florida investigator attempted to serve Garcia on a Thursday, and the following Monday was the date of the status conference in the Superior Court. And it was on that date that the Commonwealth moved to continue for the very reason that it needed the Florida officials to schedule a new hearing date and to again attempt to serve Garcia. The Commonwealth, however, was never given the opportunity to do so.

Second, in addressing Garcia's June 15 phone call to Sgt. Det. Daley, the judge reasoned, "It is clear that, given Mr. Garcia's hostile response, the District Attorney [DA] continues to have serious grounds to believe that a trial would not go well for the Commonwealth" (C.Add. 10; *see* 6/19:10). The judge's assertion that given Garcia's hostility, the DA had

grounds to believe the trial would not go well for the Commonwealth is nothing more than unwarranted speculation as to how Garcia would testify once placed under oath. Moreover, nowhere in Rule 10, or Superior Court Rule 4 for that matter (*see* C.Add. 25-26), is the judge given discretion to make an assessment as to the apparent strength or weakness of the Commonwealth's case in deciding whether to grant a continuance. Doing so was a clear abuse of the judge's discretion.

B. The Judge Abused His Discretion In Allowing Defendant's Motions To Dismiss For Lack Of Prosecution.

Rather than allowing the Commonwealth's motions to continue, the judge denied the motions and ultimately allowed defendant's motions to dismiss for lack of prosecution. This too was an abuse of discretion.

"Where a dismissal is without prejudice, the judge's action should be upheld in the absence of an abuse of discretion." *Commonwealth v. Connelly*, 418 Mass. 37, 38 (1994) (citing *Commonwealth v. Anderson*, 402 Mass. 576, 579 (1988), and cases cited). "Where, as here, the dismissals are with prejudice, there must be a showing of egregious misconduct or at least a serious threat of prejudice." *Id.* (citing *Commonwealth v. Cronk*, 396 Mass. 194, 199 (1985). "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to

justice." *Commonwealth v. Cinelli*, 389 Mass. 197, 210 (1983); *accord Commonwealth v. Ortiz*, 425 Mass. 1011, 1012 (1997).

There are two glaring problems with the judge's decision to dismiss defendant's murder indictment. First, he applied an incorrect legal standard when he dismissed the case with prejudice, and in doing so, held defendant to a much lower standard. More specifically, he measured the Commonwealth's conduct against a standard of "due diligence" found in Rule 10 and Superior Court Rule 4, both of which concern motions to continue rather than motions to dismiss. He then found that "dismissal for failure to prosecute will not result in a miscarriage of justice" (C.Add. 26). But for a case to be dismissed with prejudice, "there must be a showing of *egregious misconduct* or at least a serious threat of *prejudice*." *Connelly*, 418 Mass. at 38 (citing *Cronk*, 396 Mass. at 199) (emphasis added). Here, there was no such showing.

Even if the Commonwealth should have earlier sought out of state process for Garcia, it did not engage in any egregious misconduct. *See Connelly*, 418 Mass. at 38 ("Although we do not excuse the prosecutor's failure to ensure that the police officer would be present . . ., we conclude that such conduct does not rise to the level of 'egregious misconduct.'") (quoting *Commonwealth v. Carrunchio*, 20 Mass. App. Ct.

943, 944 (1985)); *cf. Commonwealth v. Washington W.*, 462 Mass. 204, 213-214 (2012) (dismissal with prejudice was warranted where prosecutor intentionally refused to turn over evidence). Moreover, even if the Commonwealth's alleged delay in locating Garcia "inconvenienced the court, the defendant[s], and [their] attorney[s], 'such inconvenience does not, in the circumstances of this case, prejudice the defendant's ability to receive a fair trial.'" *Ortiz*, 425 Mass. at 1012-13 (quoting *Connelly*, 418 Mass. at 39, citing *Cronk*, 396 Mass. at 201). To that end, the judge's finding that "dismissal for failure to prosecute will not result in a miscarriage of justice," comes nowhere close to a finding of "at least a serious threat of prejudice." *Id.* Not only that, but as discussed, the judge erred in finding that Rule 36(b) constrained him to dismiss the case for lack of prosecution (C.Add. 27). *See Connelly*, 418 Mass. at 39 ("'concern for the avoidance of a congested [court] calendar must not come at the expense of justice.'") (quoting *Monahan v. Washburn*, 400 Mass. 126, 129 (1987)).

Second, absent egregious misconduct by the Commonwealth or at least a serious threat of prejudice, the judge's dismissal of the case with prejudice amounted to a violation of separation of powers. Indeed, art. 30 "does not 'permit judges to substitute their judgment as to whom and what crimes to prose-

cute, for the judgment of those who are constitutionally charged with that duty,' namely the prosecution." *Commonwealth v. Manning*, 75 Mass. App. Ct. 829, 832 (2009) (quoting *Commonwealth v. Cheney*, 440 Mass. 568, 574-75 (2003)). Here, the judge's dismissal of murder charges -- based in part on findings regarding the alleged weakness of the Commonwealth's case -- "improperly intruded on the constitutionally allocated prerogative of the executive branch to decide which criminal cases to prosecute." *Id.* at 832. While the Commonwealth might have decided, after having additional time to serve Garcia in Florida, that he could not be located or that compelling him to appear would not be in the interests of justice, it was for the Commonwealth to be given that opportunity and to then file a *nolle prosequi* of the charges. This is not to say that the court cannot dismiss a case where it determines that the Commonwealth is unprepared to prosecute, but it cannot do so *with* prejudice where there has been no egregious misconduct, or at least a showing of prejudice, and where the dismissal is based, at least in part, on its own view of the weaknesses of the Commonwealth's case.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse the motion judge's decision.

Respectfully submitted
FOR THE COMMONWEALTH,

DANIEL F. CONLEY
District Attorney
For The Suffolk District

/s/Sarah Montgomery Lewis
SARAH MONTGOMERY LEWIS
Assistant District Attorney
For The Suffolk District
BBO# 683156
One Bulfinch Place
Boston, MA 02114
sarah.lewis@state.ma.us
(617) 619-4070

AUGUST 2017

ADDENDUM

Article 20 of the Massachusetts Declaration of Rights

The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

Article 30 of the Massachusetts Declaration of Rights

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

G.L. c. 265, § 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.

G.L. c. 265, § 17. Armed robbery; punishment

Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years; provided, however, that any person who commits any offence described herein while masked or disguised or while having his features artificially distorted shall, for the first offence be sentenced to imprisonment for not less than five years and for any subsequent offence for not less than ten years. Whoever commits any offense described herein while

armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years. Any person who commits a subsequent offense while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than 15 years.

G.L. c. 269, § 10. Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical

or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

* * * *

G.L. c. 276, § 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.

G.L. c. 278, § 1. Trial list of criminal cases, adding cases to list

At each session of the superior court for criminal business, the district attorney, before trials begin, shall make and deposit with the clerk, for the inspection of parties, a list of all cases to be tried at that session, and the cases shall be tried in the order of such trial list, unless otherwise ordered by the court for cause shown. Cases may be added to such list by direction of the court, on its own motion or upon motion of the district attorney or of the defendant.

Mass. R. Crim. P. 2: Purpose; Construction; Definition of Terms

(a) Purpose; Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay.

(1) Words or phrases importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter.

(2) When in these rules reference is made to a subdivision of a rule, that reference is to that subdivision and to any subdivisions thereof.

(b) Definition of Terms. In construing these rules the following words and phrases shall have the following meanings unless a contrary intent clearly appears from the context in which they are used:

* * * *

(15) "Return Day" means the day upon which a defendant is ordered by summons to first appear or, if under arrest, does first appear before a court to answer to the charges against him, whichever is earlier.

* * * *

Mass. R. Crim. P. 10: Continuances

(a) Continuances.

(1) After a case has been entered upon the trial calendar, a continuance shall be granted only when based upon cause and only when necessary to insure that the interests of justice are served.

(2) The factors, among others, which a judge shall consider in determining whether to grant a continuance in any case are:

(A) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice.

(B) Whether the case taken as a whole is so unusual or so complex, because of the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation of the case at the time it is scheduled for trial.

(C) Whether the overall caseload of defense counsel routinely prohibits his making scheduled appearances, whether there has been a failure of diligent preparation by a party, and whether there has been a failure by a party to use due diligence to obtain available witnesses.

(3) An attorney who is to be otherwise engaged in a trial, evidentiary hearing, or appellate argument so as to require a continuance shall notify the court and the adverse party or the attorney for the adverse party of such conflicting engagement not less than twenty-four hours before the scheduled appearance, or within such other time as is reasonable under the circumstances.

(4) A motion for a continuance may include a request that the court rule on the motion without a hearing. If such a motion is filed at least three court days prior to the scheduled appearance or trial date and indicates that all parties have agreed to the continuance, the court shall, prior to the scheduled

date, rule on the motion without a hearing unless it deems a hearing to be necessary. In any other case, the court may in its discretion rule on a continuance motion without a hearing, provided that all parties have had an adequate opportunity to file an opposition to the motion. If the court continues the case without a hearing, defendant's counsel shall inform the defendant of the revised date. Any motion filed pursuant to this subdivision shall provide one or more proposed continuance dates and state all supporting grounds, and any factual allegations shall be supported by affidavit.

* * * *

Mass. R. Crim. P. 11: Pretrial Conference and Pretrial Hearing

(a) The Pretrial Conference. At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.

(1) Conference Agenda. Among those issues to be discussed at the pretrial conference are:

> (A) Discovery and all other matters which, absent agreement of the parties, must be raised by pretrial motion. All motions which cannot be agreed upon shall be filed pursuant to Rule 13(d).
>
> (B) Whether the case can be disposed of without a trial.
>
> (C) If the case is to be tried, (i) the setting of a proposed trial date which shall be subject to the approval of the court and which when fixed by the court shall not be changed without express permission of the court; (ii) the

probable length of trial; (iii) the availability of necessary witnesses; and (iv) whether issues of fact can be resolved by stipulation.

(2) Conference Report.

(A) Filing. A conference report, subscribed by the prosecuting attorney and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court pursuant to subdivision (b)(2)(i). The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.

(B) Failure to File. If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall notify the clerk of such failure. If a conference report is not filed and a party does not appear at the pretrial hearing, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report or do not appear at the pretrial hearing, the case shall be presumed to be ready for trial and shall be scheduled for trial at the earliest possible time. The parties shall be subject to such other sanctions as the judge may impose.

(b) The Pretrial Hearing. At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to appear before the court on a date certain for a pretrial hearing. The defendant shall be available for

attendance at the hearing. The pretrial hearing may include the following events:

(1) Tender of Plea. The defendant may tender a plea, admission or other requested disposition, with or without the agreement of the prosecutor.

(2) Pretrial Matters. Unless the Court declines jurisdiction over the case or disposes of the case at the pretrial hearing, the pretrial hearing shall include the following events:

(i) Filing of Pretrial Conference Report. The prosecuting attorney and defense counsel shall file the pretrial conference report with the clerk of court.

(ii) Discovery and Pretrial Motions. The court shall hear all discovery motions pending at the time of the pretrial hearing. Other pending pretrial motions may be heard at the pretrial hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.

(iii) Compliance and Trial Assignment. The court shall determine whether the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has been accomplished. If so, the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial date or trial assignment date. If completion of either the pretrial conference report or discovery is still pending, the court shall schedule and order the parties to appear for a compliance hearing pursuant to Rule 11(c) unless the aggrieved party waives the right to a compliance hearing.

(iv) The court may issue such additional orders as will promote the fair, speedy and orderly disposition of the case.

(c) Compliance Hearing. A compliance hearing ordered pursuant to Rule 11(b)(2)(iii) shall be limited to the following court actions:

(1) determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;

(2) receiving and acting on a tender of plea or admission; and

(3) if the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date.

Mass. R. Crim. P. 13: Pretrial Motions

(a) In General.

(1) Requirement of Writing and Signature; Waiver. A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule.

(2) Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) Service and Notice. A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) Memoranda of Law. The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he or she may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) Renewal. Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars.

(1) Motion. Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) Amendment. If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief.

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) Filing. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court.

(1) Discovery Motions. Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

(2) Non-discovery Pretrial Motions. A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

(e) Hearing on Motions. The parties shall have a right to a hearing on a pretrial motion. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

(1) Discovery Motions. All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall be heard at that hearing. Discovery motions filed pursuant to subdivision (d)(1) after the defendant's election shall be heard and decided expeditiously.

(2) Non-Discovery Pretrial Motions. A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

(3) Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to the approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

Mass. R. Crim. P. 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 discovery 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 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 court-appointed examiner (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 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) Discovery for the purpose of a court-ordered examination under Rule 14(b)(2)(B).

(i) If the judge orders the defendant to submit to an examination under Rule 14(b)(2)(B), the defendant shall, within fourteen days of the court's designation of the examiner, make available to the examiner the following:

(a) All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel's possession;

(b) All medical records concerning the defendant in defense counsel's possession; and

(c) All raw data from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

(ii) The defendant's duty of production set forth in Rule 14(b)(2)(C)(i) shall continue beyond the defendant's initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

(iii) In addition to the records provided under Rule 14(b)(2)(C)(i) and (ii), the examiner may request records from any person or entity by filing with the court under seal, in such form as the Court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor

without either leave of court or agreement of the defendant.

Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14(b)(2)(C)(iii). Within thirty days of the court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judge's discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii), at which point the records related to the examiner's request, including the records of any hearing, shall be released to the parties unless the court, in its discretion, determines that it would be unfairly prejudicial to the defendant to do so.

If the judge grants any part of the examiner's request, the judge shall indicate on the form prescribed by the Court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying, subject to a protective order under the same terms as govern disclosure of reports under Rule 14(b)(2)(B)(iii). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify

the examiner, the defendant, and the prosecutor of the denial.

(iv) Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant by the Commonwealth's examiner or at the request of the Commonwealth's examiner.

(D) 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 cannot 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 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.

Mass. R. Crim. P. 36: Case Management

* * * *

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

* * * *

Superior Court R. 4: Postponement

The court need not entertain any motion for post-ponement, grounded on the want of material testimony,

unless supported by an affidavit, which shall state (1) the name, and, if known, the residence, of the witness whose testimony is wanted, (2) the particular testimony which he is expected to give, with the grounds of such expectation, and (3) the endeavors and means that have been used to procure his attendance or deposition; to the end that the court may judge whether due diligence has been used for that purpose. The party objecting to the postponement shall not be allowed to contradict the statement of what the absent witness is expected to testify, but may disprove any other fact stated in such affidavit. Such motion will not ordinarily be granted if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree that the same shall be received and considered as evidence at the trial or hearing, as though the witness were present and so testified; and such agreement shall be in writing, upon the affidavit, and signed by such adverse party or his attorney. The same rule shall apply, mutatis mutandis, when the motion is grounded on the want of any material document, thing or other evidence. In all cases the granting or denial of a motion for postponement shall be discretionary, whether the foregoing provisions have been complied with or not.

The court will not ordinarily grant a motion for postponement grounded on the absence of a material witness whom it is in the power of the moving party to summon, unless such party has caused such witness to be regularly summoned and to be paid or tendered his travel and one day's attendance.

COMMONWEALTH'S ADDENDUM OF MOTION JUDGE'S DECISION

39

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. SUCR 16-423
NO. SUCR 16-424

COMMONWEALTH
v.
KEVIN GRAHAM, JR.
ELLIS GOLDEN

AMENDED* MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PROSECUTION AND RULE 36 VIOLATIONS

Thomas Hawkins was robbed of his wallet and shot with a firearm, causing his death on August 12, 2004, according to the indictments in this case. Nearly twelve years later, on June 10, 2016, the Commonwealth indicted the defendants, Kevin Graham, Jr. ("Graham") and Ellis Golden ("Golden") on first degree murder charges for the killing of Mr. Hawkins. More than a year has passed since both arraignments. The Commonwealth answered "not ready for trial" on the first and only trial date in this case, June 12, 2017. On June 22, 2017 (367 days after arraignment), Golden filed his "Motion to Dismiss." Graham filed his "Defendant's Omnibus Motion to Dismiss" on June 26, 2017 (369 days after arraignment). The Commonwealth opposes both Motions. After hearing and review of the written submissions, the Defendants' Motions are **ALLOWED.**

BACKGROUND

1. Procedural History

The June 12, 2017 presumptive trial date in this case was set at arraignment: June 20, 2016 for defendant Golden and June 22, 2016 for Graham. The Pre-trial Conference Date

* This Amended Memorandum makes some minor corrections, adds some updates, explanations and clarifications, and, in the only substantive change, modifies the stay.

(7/14/16), Pre-Trial Hearing Date (12/13/16), Final Pre-Trial Hearing Date (6/1/17) and Presumptive Trial Date (6/12/17) all appear in the Clerk's Minutes at arraignment. In the words of the Clerk's Minutes for June 22, 2016: "case has its next dates." The trial date was apparently confirmed at the pretrial hearing (Tr. 19 (June 9, 2017)) and on May 11, 2017 and has never been continued at all, let alone delayed by defense motions, consent or acquiescence.

After a hearing on January 11, 2017, the Court (Roach, J.) denied Defendant Golden's motion to dismiss for lack of sufficient evidence presented to the Grand Jury, filed October 25, 2016. See Commonwealth v. McCarthy, 385 Mass. 160 (1982). On January 13, 2017, it endorsed Golden's motion as follows:

> Following hearing and a thorough review of the grand jury minutes, the motion is respectfully DENIED. The grand jury heard sufficient identification and circumstantial evidence (location of shots fired, location of defendant and co-defendant immediately following shots, behavior of this defendant in relationship to a gun and a wallet, recovery of the victim's wallet, the defendant's connection to the neighborhood and, finally, the identification of this defendant) reasonably to conclude probable cause had been demonstrated that this defendant knowingly participated in the crimes alleged with the required intent. Any suggested weaknesses in the Commonwealth's case are for another day.

No delay resulted from Golden's Motion to Dismiss, as the case remained on track for the June 12, 2017 trial date. Defendant Graham filed no McCarthy motion. He did file a Motion to Dismiss on April 25, 2017 (Docket #19), attacking counts 2 (Armed Robbery) and 3 (Unlawful carrying of a firearm) on statute of limitations grounds. No delay resulted from this motion, either. Indeed, the docket reflects no hearing or ruling on Graham's motion to dismiss.

On May 11, 2017, the Commonwealth filed its first motion to continue the trial date, which the Court (Sanders, J.) denied. As grounds for this motion, the Commonwealth cited its desire to analyze DNA from the pockets of the victim's shorts. That DNA evidence had existed from the date of the 2004 murder and could have been analyzed much earlier – at least during the grand jury proceedings, or even in 2016, after the indictments. The likely reason for the

Commonwealth's motion was its desire to delay the matter out of concern for its prospects at trial. Consistent with that conclusion, the Commonwealth would later disclose that, at the time of the May 11 motion, it had not had contact with its identification witness, Juan Garcia, since early April, 2017.[1]

The Court held a final pretrial conference on June 1, 2017 and a hearing on motions in limine on June 6, 2017. During the June 6, 2017 hearing, the Commonwealth acknowledged that it could not refute the statute of limitations arguments on the non-homicide indictments in this case. It stated that it would file a nolle pros on those indictments on the trial date, but never did.

2. The Witness

The ADA's Affidavit (paragraph 1 a, b) describes Mr. Garcia's importance to the Commonwealth's case as follows:

> a. Juan Garcia is a necessary and material witness in the above captioned matter. He is a material witness because after hearing gunshots shortly after 1:00 AM on August 12, 2004, [he] observed two men fleeing from the area where the body of Thomas Hawkins, the victim, was located. He also saw the two men tossing a wallet amongst them as they ran. He also observed a firearm in the hand of one of those men. He made those observations within seconds of hearing the gunshots. Mr. Garcia knew the two men he saw fleeing. He subsequently identified the defendant Kevin Graham, as the man with the firearm. He also subsequently identified the defendant Ellis Golden, as the other man who was fleeing with Kevin Graham. After he observed the two men turn onto Hildreth Street he made further observations of them splitting the contents of a wallet near the Pauline Shaw School yard. The victim's wallet was ultimately recovered from the area of the Shaw School yard later in the same day.
>
> b. Juan Garcia testified under oath before the Suffolk County Grand Jury as to his observations and identifications of the defendants. Juan Garcia is the only identification witness of either defendant in this matter. The Commonwealth has not developed any forensic evidence to date that would identify either defendant as the perpetrators of this murder. Therefore, Juan Garcia is a material witness.

The Court has no difficulty concluding that Mr. Garcia is a necessary and material witness.

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1 The Court rejects the other prominent possibility, namely that the delay in analyzing the DNA resulted from incompetence. The prosecution team has full competence to analyze DNA evidence in timely fashion if it is motivated to do so. Inattention, though another possible explanation, would not likely have occurred if the Commonwealth assigned a high priority to pursuing this case diligently at any time during the past 13 years.

During the discovery in this case, the Commonwealth never provided a valid address for Mr. Garcia. On February 16, 2017, the defense filed a motion for updated Rule 14 discovery, including current addresses of witnesses. The Commonwealth opposed the motion, offering instead to bring Mr. Garcia to be interviewed, citing a purported gang background of the defendant. Counsel filed a second motion for updated addresses on April 12, 2017. On May 11, 2017, the Court (Sanders, J.) ordered the Commonwealth to provide Mr. Garcia's address. The Commonwealth then provided an address in Orlando, Florida that, upon investigation, the defendant's investigator found did not exist, as there is no building as the address. The Commonwealth then provided an address in Kissimmee, Florida, which had the wrong street name (although it had the right street number). Eventually, the defense investigator located Mr. Garcia, who declined to talk to the investigator. The Commonwealth has not explained its apparent inability or unwillingness to provide a correct address, except to say that Mr. Garcia appeared to be moving around.

In its Motion to Continue Trial Date of June 12, 2017, the Commonwealth also revealed that it had had no actual contact with Mr. Garcia from early April until June 8, 2017. In the "Commonwealth's Opposition to Defendant Graham's Motion to Dismiss" (at 17), it also states that "[t]he Commonwealth was not able to locate Garcia while in Florida from June 7 to June 9, 2017, despite diligent efforts."

The ADA's latest Affidavit (paragraph 1 c, e-i) describes some but not all of the facts concerning the Commonwealth's efforts to keep in contact with Mr. Garcia. The Court assumes the truth of this affidavit only for purposes of argument, but makes no factual findings that the statements are true, because many of the statements are second-hand from an unnamed Commonwealth source, some information favorable to the defense (discussed above) has been

omitted, and there has been no evidentiary hearing of witnesses who have first-hand knowledge and who could be cross-examined meaningfully. The affidavit states:

c. Mr. Garcia remained in regular contact with the Commonwealth and its agents (members of the Boston Police Department Homicide Unit assigned the investigation of this matter). Throughout the pendency of the investigation beginning again in 2015 until June 8, 2017 on these matters, the Commonwealth and its agents maintained contact with Mr. Garcia via telephone and an in person visit to the state of Florida. Mr. Garcia never wavered in his willingness to testify in these matters prior to June 8, 2017. He also never communicated with the Commonwealth or its agents that he no longer wanted to cooperate with law enforcement in these matters.

d. [Omitted]

e. The Commonwealth and its agents attempted to contact Mr. Garcia via telephone in the latter part of May, 2017, prior to Memorial Day Weekend. The Commonwealth and its agents were unable to make contact with Mr. Garcia as his telephone was not in service according to the recorded message. It was believed that Mr. Garcia was experiencing some technical difficulties with his telephone contact such as being "out of minutes." As this was not the first time since 2015 that the "out of service" recording had manifested in prior attempts to reach Mr. Garcia from 2015. [sic]. Several other attempts were made during the time frame to contact him via telephone but the same recording continued to play during those attempts.

f. The Final Pretrial Conference for these matters was held before the Court on June 2 [sic], 2017. Just prior to the Final Pretrial Conference, the service message on Mr. Garcia's phone disappeared and it allowed for a caller to leave a voicemail. This again was consistent with the Commonwealth's agent's prior experience. The Commonwealth's agents did leave a message for Mr. Garcia. The message went unreturned. The other messages left for Mr. Garcia over that weekend also went unreturned. During that same weekend, the Commonwealth and its agents discussed going to Florida to see about the health and safety of Mr. Garcia, as well as securing his presence for the June 12, 2017 trial date on these matters. Arrangements were subsequently made for an agent of the Commonwealth to travel to speak with Mr. Garcia and secure his presence for trial on June 12, 2017.

g. The Commonwealth's agent was not able to locate Mr. Garcia while in Florida on June 7, 2017 or the morning of June 8, 2017 despite diligent efforts. In the afternoon o[f] June 8, 2017, the Commonwealth's agent, while still in Florida, received a telephone communication from Mr. Garcia. Mr. Garcia was angry and in a curse laden tirade accused the agent of going to his residence, his job and other family member's residences and harassing them. He further stated to the agent, that due to this harassment to his family and disclosure to his employee about these matters he would not meet with the agent nor did he want to be bothered any longer regarding these matters. The conversation ended very shortly thereafter.

h. The Commonwealth's agent never went to Mr. Garcia's workplace while in Florida. Furthermore, any other person connected to Mr. Garcia that the agent spoke with, he simply said "I am a friend of his from Boston" before leaving his phone number and asking that Mr. Garcia give him a call. The Commonwealth's agent purposefully used that language so as to not cause any alarm amongst anyone connected to Mr. Garcia about these matters.

i. Mr. Garcia does not currently reside in Massachusetts. The Commonwealth did not seek out of state process to secure Mr. Garcia's presence as a witness at trial prior to the June 8, 2017 telephone communications with Mr. Garcia. The Commonwealth concedes that in hindsight, out of state process would have been a better method of securing his presence here for trial on June 12, 2017. However, in the Commonwealth's experience it has never needed to obtain out of state process for cooperative witnesses who reside out of state. Prior to the June 8, 2017 telecommunication with Mr. Garcia, the Commonwealth, nor its agents, had any direct evidence that Mr. Garcia was no longer cooperative.

Defense counsel for Mr. Graham attempted to shed some light on, among other things, the reason why Mr. Garcia may have decided to testify at an earlier date (which the court, again, does not take as fact without an evidentiary hearing). The June 9 transcript shows (at pp. 9-10):

> MR. SOLOMON: As the Court knows the homicide
> 11 happened in 2004. In December of 2006, Juan Garcia
> 12 came forward and there was some talk about a proffer,
> 13 he had a pending drug case in district court in Suffolk
> 14 County. Proffer was not reached.
> 15 Subsequently, he was tried, he was convicted on
> 16 some of the counts of his district court case, and then
> 17 he reached out again and he testified in the grand
> 18 jury, yes, I'm testifying, and it's my understanding
> 19 that the Commonwealth will support a motion to revise
> 20 and revoke once my testimony is done and if I
> 21 cooperate.
> 22 The motion to revise and revoke was not even heard
> 23 by Judge Desmond at the district court, I don't know if
> 24 it was properly filed or not, and then nothing else
> [Page 10 of 30]
> 1 happened which is odd because there were at least a
> 2 couple of other ways I can think where if the
> 3 Commonwealth wanted to get his sentence reduced or his
> 4 lawyer whoever it was actively wanted to get his
> 5 sentence reduced, it could have been done but nothing
> 6 happened. The case sat.

The Commonwealth did not contest the basic fact of Mr. Garcia's record in Massachusetts or the alleged failure to deliver on anticipated sentencing consideration, although it vigorously disputed that Mr. Garcia's testimony should be discredited.

Despite Mr. Garcia's Florida residence, the lack of contact with him since early April, 2017, the Commonwealth's apparent difficulty in disclosing his location to the defense, his record of violating the law in both Massachusetts and Florida, and the apparent failure to deliver on sentencing consideration that Mr. Garcia likely expected, the Commonwealth took no steps to compel his presence. On Thursday, June 8, the Commonwealth disclosed by phone to the courtroom clerk that it was unable to go forward at trial, because it could not produce Mr. Garcia. The Court called a hearing for the next day, Friday, June 9, 2017.

At the hearing on June 9, the Commonwealth stated that it would be filing a motion to continue the trial. The following exchange occurred between the Court and the Assistant District Attorney (Tr. (6/9/12 at pp. 6-7):

> [Mr. King] . . .We were actually in
> 10 telephone contact with Mr. Garcia up until about April
> 11 of this year. Once we had a confirmed trial date in
> 12 May, we began reaching out to him, and we found out
> 13 that his phone was not working. It then began working,
> 14 and we left messages and he hadn't returned calls. So
> 15 then we went down to Florida in an effort to make sure
> 16 that he was on board. The Commonwealth did not seek
> 17 out-of-state service for Mr. Garcia because as this
> 18 matter unfolded, Mr. Garcia has been on board with us
> 19 the entire time. I've only used out-of-state process
> 20 in my experience when there are people who are not on
> 21 board, and we are worried about securing their presence
> 22 at court. So, therefore, we did not do that in this
> 23 case. I don't know how many homicide cases I've had,
> 24 Your Honor, but anytime we've had someone on board, we
> [Page 7 of 30]
> 1 talk to them, we bring them in, we give them a ticket,
> 2 and they come. That's not –
> 3 THE COURT: So are you trying to use an out-of-
> 4 state process now?
>
> 7

5 MR. KING: Well, I can't use an out-of-state
6 process if I don't have a date, Judge.
7 THE COURT: You don't have a what?
8 MR. KING: A date.
9 THE COURT: Monday, Monday is the date.

This exchange is troubling; everyone knew the "date." The Court is not persuaded that the lack of a "date" had anything to do with out of state process, given the longstanding and firm trial date of June 12 and the expectation that it would take at least two days to empanel, followed by about six days of evidence before the Commonwealth rested – and there was always the possibility of taking a break of a day or two to allow for out of state process. The Commonwealth's desire to delay the trial in this case on June 12 is the only sensible explanation for its failure to secure timely compulsory process. The Court so finds.

The conference ended with the scheduling of the motion to continue on Monday, June 12, 2017.

3. The Trial Date and Commonwealth Motion to Continue

On the trial date itself, Monday, June 12, 2017, the Commonwealth filed the "Commonwealth's Motion to Continue the [Trial] Date of June 12, 2017." After argument, the Court denied the Motion from the bench on June 12, 2017 and announced that it would be filing a written order. In its written order, dated June 12, 2017 the Court first found that "the Commonwealth has failed to use available means to compel attendance by the 'necessary and material witness.'" It found:

> This failure occurred despite clear warning signs, including the Commonwealth's inability to provide the witness' correct address after being ordered to disclose it; the Commonwealth's own representation at argument that the witness was changing his residence; the inability to reach Mr. Garcia before Memorial Day and apparently for some time afterwards; and the unrebutted representations that the witness had troubles with the criminal justice system both in Massachusetts before his departure and in Florida. There is no assurance that the Commonwealth will be able to produce the witness, with whom it has had no contact from early April until June 8, when there was reportedly an angry

> "curse laden tirade" between the witness and the Commonwealth's representatives.[2] The Commonwealth's own failure to employ interstate process in these circumstances is not good cause for a continuance.

The Court also cited Superior Court Rule 4, which requires affidavit support for a continuance based upon the absence of a material witness and contemplates that, ordinarily, the moving party must employ the compulsory process contemplated by Rule 4 and show due diligence.

As an alternative ground for denying the continuance, the Court noted that granting the Motion, over defense objection, would likely raise serious issues under Mass. R. Crim. P. 36.

4. Aftermath

Immediately after its oral ruling on June 12, the Court asked the Commonwealth whether it was ready for trial. The Commonwealth responded that it was not. The Court suggested that it saw only two options: a nolle prosequi or empanelling the jury. The Commonwealth objected to empanelment, citing Commonwealth v. Super, 431 Mass. 492 (2000).

In its discretion (and pending its review of the Super case), the Court declined to empanel a jury on June 12, and scheduled a status conference for June 19. It reasoned that the case was still pending, and a status conference was necessary to determine how to proceed. The Court explicitly told the Commonwealth on June 12 that, if the Commonwealth was ready for trial on June 19, the Court would empanel a jury. That latter statement was not a continuance.[3] Rather the court decided to "wait and see," in an attempt to accommodate the interests of all parties, including the Commonwealth. Given the parties' notice of, and preparation for the June 12 date,

[2] As noted, the Court is not assuming the truth of unsworn factual representations. It is certainly possible that the efforts of the defense investigator, made necessary by the failure to the Commonwealth to provide accurate contact information, caused more contact between the investigator and Mr. Garcia's friends and employers than would have occurred if the Commonwealth had made full, accurate and timely disclosure.
3 The June 19 transcript has some errors, including the following (at p. 13): "There was new [sic: should be "no"] continuance of the trial date. The trial date was last Monday."

the Court expected no prejudice to anyone, if, on June 19, it proceeded to trial on that same date.[4] In any event, for Rule 36 purposes, it is enough that the defendants moved to dismiss the case on June 12 and never agreed to or acquiesced in a continuance of the trial to June 19.

After the Court adjourned on June 12, the Commonwealth finally presented papers to the Clerk for the Court's signature, to effectuate service on Mr. Garcia and compel his appearance in Massachusetts. This was too little, too late. The Commonwealth contacted the Florida State's Attorney Office for the 9th Judicial Circuit in an effort to accomplish out of state process for Mr. Garcia. That office set a hearing for Friday, June 16, 2017 at 1:30 P.M. to allow Mr. Garcia to challenge the process. An investigator for the Florida State's Attorney's Office informed Assistant District Attorney King on June 15, 2017 that he had been to Mr. Garcia's address on that same day, but Mr. Garcia was not present. "Someone present" told the investigator that Mr. Garcia lived there but was not there at the time. In the words of the ADA's affidavit, "Thus, he was unable to serve Mr. Garcia." That conclusion does not follow, as there were ample ways to pursue Mr. Garcia's attendance beyond the very rudimentary steps actually taken.

According to the ADA's affidavit, on Thursday, June 15, 2017 at 11:37 A.M., Sgt. Det. Richard Daley of the Boston Police Homicide Unit, received a phone call from Juan Garcia. Mr. Garcia stated, "Leave me the fuck alone, fuck you," before he hung up the telephone. This conversation may have been prompted by the Florida investigator's visit to Mr. Garcia's residence, but the ADA's affidavit does not make clear the sequence of events. It is clear that, given Mr. Garcia's hostile response, the District Attorney continues to have serious grounds to believe that a trial would not go well for the Commonwealth.

4 The Docket for these cases reflects both a status conference and a trial date on June 19, but that simply reflects the limitations of the Trial Court's case management system, known as MassCourts. There is no scroll-down entry that allows the docket to reflect the Court's particular form of exercising its discretion. Likewise, the entry of "jury trial" is the best way, within system limitations, to reflect the need to have

The Commonwealth cites no additional efforts to secure Mr. Garcia's presence at trial. Those belated efforts do not strike the Court as thorough or as sufficient to show due diligence in the face of a June 12 trial date, or even a June 19 status conference.

The parties appeared for a status conference on June 19. The Commonwealth again stated that it was not ready for trial and could not represent when it would be ready. It presented the "Commonwealth's Motion to Continue the Conference Date of June 17, 2017." The Court denied that motion as moot, because the Commonwealth's responses to the Court's questions fulfilled the purpose of the status conference. The Commonwealth orally moved for a finding that a continuance was in the interest of justice. The Court declined to make that finding on June 19:

> [THE COURT]. . . I cannot
> 9 find, and I do not find, that the Commonwealth being
> 10 unprepared for trial because they can't find a witness
> 11 who has been known to them since I believe at least
> 12 2007, if that's what the grand jury testimony was, that
> 13 the Commonwealth applied to for [compulsory] process
> 14 only a week ago which was after an in-court hearing.
> 15 and I did sign those papers, but still you haven't
> 16 found him, he's avoiding you, and quite properly you
> 17 could make no representation to the Court about whether
> 18 you would be prepared and when.
> 19 So those circumstances are not, in my estimation,
> 20 sufficient to show that continuance would be in the
> 21 interest of justice, and I do not make the finding.
> 22 MR. KING: As for Rule 36.

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jurors available on June 19 in case the Commonwealth reported that it was ready for trial.

23 THE COURT: Yes, for Rule 36, right, right.

Tr. (June 19, 2017). In making this ruling, the Court of course had in mind all of the circumstances that led it to deny the Commonwealth's motion to continue the June 12 trial date in the first place, as set forth in the Court's written Order of June 12 denying the continuance. It was also acutely aware that, by June 19, so few days remained on the Rule 36 clock that empanelling and swearing-in a jury within the deadline was an uncertain proposition in at least one of these cases. See Reporters Notes to Subdivision (b)(1) of Rule 36 ("For purposes of this rule, a trial is deemed to have commenced when jeopardy attaches.").

The Court issued its original decision on the Motions on June 27, 2017. The Commonwealth filed notices of appeal in both cases on June 29, 2017. After hearing, the Court confirmed the stay pending appeal (which it shortened by one day) and granted bail pending appeal that same day.

DISCUSSION

I.

The Defendants have moved to dismiss these cases for violation of Mass. R. Crim. P. 36. While that issue requires extended discussion of novel issues of law, a violation of Rule 36 would leave the Court no discretion. Moreover, it would require dismissal with prejudice. Commonwealth v Lauria, 411 Mass. 63, 70 (1991). The Court therefore addresses this issue first.

The Motions and Commonwealth's response raise one central issue under Rule 36, which arises in a simple procedural context: the first and only trial date in this case complied with the one-year deadline for commencement of trial (Mass. R. Crim. P. 36(a)) and has never been continued or delayed. The issue is:

In this situation, must the Court's Rule 36 calculation exclude time needed to complete

> intermediate events that had no effect upon the trial date, on the ground that defense failure to object to scheduling (or continuing) these events waived Rule 36 deadlines or acquiesced in exclusion of time?

The Court answers the question "no."[5]

a. Rule 36

Except as provided by Mass. R. Crim. P. 36 (d)(3) or as "extended by subdivision (b)(2) of" Rule 36, "a defendant shall be tried within twelve months after the return day in the court in which the case is awaiting trial." Mass. R. Crim. P. 36(b)(1)(D). "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." Mass. R. Crim. P. 36(b)(1) (final sentence).

Mass. R. Civ. P. 36(b)(2) provides in relevant part:

> 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:
>
> . . .
>
> **(v) delay resulting from hearings** on pretrial motions;
>
> . . .
>
> **(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.

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5 The undersigned reached this same conclusion in a Suffolk County case decided last summer, shortly after the indictments in this case. Commonwealth v. Hunt, Suffolk Superior Court No. SUCR 14-10859 (Order on the Defendants' Motions to Dismiss for Rule 36 Speedy Trial Violation, August 11, 2016) (denying motion to dismiss).

(C) . . .

(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.

[Paragraphs (G) and (H) omitted]

This case is now beyond the one year period allowed for conducting a trial in a criminal matter. Mass. R. Crim. P. Rule 36(b)(1)(C) (". . . a defendant shall be tried within twelve months after the return day in the court in which the case is awaiting trial."). Because the total time from indictment to present in this case exceeds 365 days, the Commonwealth has the burden of proving "that a particular period or periods should be excluded from the calculation." Commonwealth v. Weed, 82 Mass. App. Ct. 123, 125 (2012). For Rule 36 calculations, "the docket and the clerk's log are prima facie evidence of the facts recorded therein." Commonwealth v. Roman, 470 Mass. 85, 93 (2014)

There is common ground on some crucial points. First, the Commonwealth and defendants all agreed on the record at the June 22, 2017 hearing that none of the dates at issue had any impact on moving the June 12, 2016 trial date. See Tr. 21 (June 22, 2017).[6] The

6 The Transcript reads:

19 THE COURT: But you'll acknowledge that setting
20 that date for the motions in limine had no impact on

Commonwealth also acknowledged on the record that it does not rely upon delay resulting from any of the events specifically enumerated in Mass. R. Crim. P. 36(b)(2). Id. at 21.[7]

Rule 36(b)(1) sets the period within which "trial shall commence." Apart from certain "excluded periods," listed in Mass. R. Civ. P. 36(b)(2), its plain language does not address delay in intermediate dates as an end in itself. The Rule's "excluded periods" refer to "[a]ny period of **delay** resulting from" those proceedings. Mass. R. Civ. P. 36(b)(2). To establish an excluded period, therefore, the Commonwealth must show two things: (a) a listed event and (b) "delay resulting" from the event.

Giving words their plain meaning in context, the phrase "delay resulting from" refers to delay in "the time within which the **trial of any offense must commence**" (emphasis added). Rule 36(b)(2) See Barry, 390 Mass. at 292-293. To be sure, if there is both a listed 36(b)(2) event and delay in the trial, the causal connection between them is "automatic." Id., citing United States v. Stafford, 697 F.2d 1368 1368, 1371 (11th Cir. 1983). But to exclude time when the trial date remains constant would make meaningless[8] the phrase "delay resulting from" and would unlawfully penalize[9] the defendant's efforts to defend himself through motions and otherwise without any offsetting benefit in case management (or any other public purpose).

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21 the trial date.
22 MR. KING: None of the dates that we have talked
23 about have had an impact on moving the trial date,
24 Judge.

7 The Transcript reads:

1 [THE COURT:] Are there any specifically enumerated events in B2 that
2 you are relying on, or is it just waiver and
3 acquiescence?
4 MR. KING. It's waiver and acquiescence, Your
5 Honor.

8 The Court cannot interpret Rule 36 in a fashion that makes that language meaningless. See Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375-376 (2000) ("In interpreting statutes, none of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute.").

9 See discussion below at 18-19, regarding unlawful penalties upon defendants' exercise of their rights to be heard.

Neither Barry nor any case cited by the parties or found by the Court suggests that the listed 36(b)(2) exclusions apply where there the first-assigned trial date never moves. In that situation, because there is no delay, it is impossible for any listed event to delay "the commencement of a trial."[10] Perhaps for this reason, the Commonwealth conceded that none of exclusions specifically listed in Mass. R. Crim. P. 36(b)(2) applies. The Commonwealth's concession is commendable and correct.[11]

b. Waiver and Acquiescence

The Commonwealth does argue that doctrines of waiver and acquiescence apply. The Commonwealth would exclude "all the dates in between" the date on which a trial date is set and the first trial date itself.[12] Rule 36, though, does exactly the opposite, unless a Rule 36(b)(2) exclusion applies. The doctrines of acquiescence and waiver are not meant to rewrite Rule 36, but to supplement it by requiring the defense to make any available objections contemporaneously.

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10 This observation takes this case outside the scope of Barry's concern about the "virtual impossibility" of proving "that an act or event did or did not actually delay the commencement of a trial." Id. It also satisfies Barry's need for certainty, 390 Mass. at 294, because the parties will know whether the trial date has ever been continued.

11 There were a few "proceedings concerning" each defendant, including "hearings on pretrial motions," but no "delay resulting from" those proceedings or motions that affected or potentially affected the June 12, 2017 trial date. Mass. R. Crim. P. 36(b)(2)(A)(v), (vii). The Commonwealth has not produced Mr. Garcia, who is a "material witness", but it has not convinced the court that he is "unavailable" or "absent" considering the general lack of due diligence shown by the prosecution in that regard -- and, in any event, the Court denied the Commonwealth's motion to continue the June 12 trial date for failure to take steps that due diligence would require and the Commonwealth has not moved to set any other trial date, so there was no "delay resulting from" Mr. Garcia's absence that affected the trial date. Mass. R. Crim. P. 36(b)(2)(A)(v), (vii). The Court has previously stated on the record that the Commonwealth's failure to take necessary steps to prepare for trial, including requiring Mr. Garcia's presence, persuades the Court not to find that "the ends of justice served by taking such action [i.e. continuing the trial] outweighed the best interests of the public and the defendant in a speedy trial." Mass. R. Crim. P. 36(b)(2)(F).

12 The prosecutor argued here that "there's also a case of Commonwealth v. Montgomery that says once you agree to a trial date that the dates in between don't count against the Commonwealth." Tr. 20 (June 9, 2017). That is not a correct reading of Montgomery, as discussed below. It does, however, appear to reflect the standard approach in the District Attorney's Office. See p. 10, FN 5, above.

In particular, the Commonwealth would exclude 330 days from the Rule 36 calculation in both cases, on the ground that the defendants agreed to, acquiesced in, or failed to object to, the scheduling or continuance of intermediate events that did not affect the trial date. Comm. Mem. (Rule 36 Charts), citing Commonwealth v. Taylor, 469 Mass. 516, 524 (2014); Barry v. Commonwealth, 390 Mass. 285, 298 (1983). See Commonwealth v. Spaulding, 411 Mass. 503, 504 (1992) (defendant "acquiesced in, was responsible for, or benefited from the delay."). As the Commonwealth points out, the Reporters Notes to Rule 36 (b)(2)(F) state:

> Although the Rule does not say so, case law since its promulgation has held that the defendant's failure to object to a continuance may render the continuance period excludable. [Citations Omitted]. Moreover, as indicated in the Reporter's Notes, supra at (b)(2), caselaw has enunciated a broader rule which may exclude some delays which the defense acquiesced in, is responsible for, or benefitted from.

The Reporters Notes to Rule 36(b)(2) add: "because the Commonwealth has the primary obligation for setting a trial date, a thorough examination of the record is necessary to determine whether failure to object should be counted against the defendant." The Court's thorough examination of the docket (as confirmed by review of the Clerk's Minutes) appears in Appendices A and B below, as explained and supplemented by the following discussion.

Even before examining the dockets and the case law, however, several problems arise with the Commonwealth's argument.

First, it ignores the realities of pre-trial proceedings and their relationship to the trial date. Based upon the "track" of the case (Track "C" for murder), the Court sets both a date for the pre-trial hearing and a presumptive trial date. Further dates are set at the Pretrial Hearing. Id. at VI. A presumptive trial date necessarily implies that pre-trial events will occur in the interim. See generally Superior Court Standing Order 1-86, II, VI, X. That is why there is a period of nearly a year from indictment to trial date in murder cases – to allow time for those pre-trial events. In a recent case, the Appeals Court made a related point about the interplay between trial

management and the setting of a trial date:

> Absent some extraordinary circumstance, which is not apparent on the record here, there is no reason to characterize the defendant as having acquiesced in the setting of his first trial date. Rather, this period is a feature of ordinary trial [FN omitted] management realities encountered by judges and trial attorneys. See Commonwealth v. Montgomery, 76 Mass. App. Ct. 500, 505 (2010) ("Absent a trial date having been set in the first instance, there is no basis upon which this court can conclude that the defendant acquiesced in a delay of that date. . . . To conclude otherwise would foist upon the defendant the government's obligation to set a trial date").

Commonwealth v. Davis, 91 Mass. App. Ct. 631, 639 (2017). The scheduling and rescheduling of intermediate events that have no effect on the trial date are "ordinary trial management realities."

In any given case, a continuance in a pretrial hearing or conference might well cause delay in the trial (see Commonwealth v. Roman, 470 Mass. 85, 92-93 (2014)), but it does not necessarily do so. The principal way to assess that possibility is to ask whether the presumptive trial date ever changed. While Davis did not address the effect of scheduling or continuing intermediate dates, its recognition of "ordinary trial management realities," coupled with the focus on the absence of acquiescence in setting the first trial date, strongly suggest the correct rule for this case – namely that continuances of intermediate dates do not support a finding of Rule 36 acquiescence if they have no impact on the first trial date.

Measured against trial management realities, the Commonwealth's approach makes no sense. A defendant cannot honestly object to the setting of each pretrial hearing and conference that Standing Order 2-86 requires. Rule 36 provides no basis to object unless the continuance threatens to delay the trial beyond the one-year deadline. Nor is there ground to object to the scheduling of motion hearings or status conferences that do not affect, and may even aid in observing, the first trial date. Ethically, defense counsel cannot advance a frivolous objection. Mass. R. Prof. Conduct 3.1, Supreme Judicial Court Rule 3:07. Such an objection would also be

futile – and "[th]e law does not require the doing of a futile act." See Ohio v. Roberts, 448 U.S. 56, 74 (1980). When an objection is frivolous or futile, the wavier or acquiescence doctrines do not apply, because a predicate for both doctrines is action by the defendant, or failure to take action when there is a duty to do so.

Second, a rule that extends Rule 36 deadlines for events having no effect on the trial date impairs defendants' rights without serving any legitimate purpose. Unlike Rule 36(b)(2) exclusions, and the principles of waiver, acquiescence or benefit to the defendant (See Barry; Taylor, above), there is no legitimate governmental reason for excluding time when the first and only trial date stays in place. Serious constitutional questions would arise from a rule that effectively imposes a penalty on a defendant for exercising his or her constitutional right to defend against the charges (by filing motions, requesting hearings or even requesting continuances that do not affect the trial date) without serving any public purpose. See, e.g. Letters v. Commonwealth, 346 Mass. 403, 405 (1963) ("[P]lainly, a defendant . . . may not be punished for exercising his right to trial and, therefore, the fact that he has done so should be given no weight in determining his sentence."). Commonwealth v. Coleman, 390 Mass. 797, 807-808 (1984) (a trial judge may not increase a sentence because a defendant lied while exercising his constitutional right to testify at trial), citing Art. 30 of the Mass. Decl. of Rights. Cf. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (due process generally).[13] This case illustrates the point. On January 11, 2017, the Court heard defendant Golden's motion to dismiss. Defendant Graham did not file a corresponding motion. Resolution of Golden's motion

13 Mathews v. Eldridge, 424 U.S. 319, 335 (1976) said:

> Three factors must be weighted in determining procedural due process: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including . . . the fiscal and administrative burdens [involved].

did not affect the trial date. He and Graham are in the same position with respect to the June 12, 2017 trial date. Yet, excluding the time attributable to Golden's motion would penalize him merely for exercising his constitutional right to petition the court for relief. If there were any doubt, the Rule must be construed to avoid constitutional questions. See Commonwealth v. McGhee, 472 Mass. 405, 413 (2015) ("'Doubts as to a statute's constitutionality "should be avoided if reasonable principles of interpretation permit doing so."'") (citations omitted); Verocchi v. Commonwealth, 394 Mass. 633, 638 (1985) ("we must construe a statute so as to avoid "constitutional difficulties, if reasonable principles of interpretation permit it."), quoting School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79 (1982).

Third, the case-specific approach in the Reporters Notes appears to negate any automatic extension of the one-year period when the defendant acquiesces in a continuance that is not even remotely connected to delay of trial. See Reporters Notes to Rule 36(b)(2) (thorough examination of the record to "determine whether failure to object should be counted against the defendant."). The Court's examination must consider that, "[i]n deciding a rule 36 motion in such circumstances, it would be proper to assess counsel's respective degrees of interest and activity in assisting the court to provide a speedy trial." See Commonwealth v Lauria, 411 Mass. 63, 70 (1991)). Here, the defendants have pressed for trial, while the Commonwealth has sought to delay but still seeks to charge the defendants with acquiescence and waiver.

Fourth, the Commonwealth's approach leads to absurd results. See Flemings, 431 Mass. at 376 ("If a sensible construction is available, [the court] shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results."). Its bottom line conclusion – that 11 out of the total 12 months are excluded – is implausible in a case that has had only one trial date, because no events "result[ed] in delay" of that date. If accepted, the argument would

effectively double-count all the events subsumed within Rule 36's one year period,[14] nullifying the one year deadline.

The Commonwealth's treatment of individual docket entries makes no sense either. For instance, it seeks to exclude 21 days between May 11, 2017 and June 1, 2017, based on the following docket entry: "05/11/2017 Event Result: Defendant brought into court. Case has next date." [Emphasis added]. That "next date" was of long standing: the previously established June 1, 2017 final trial conference. Yet the Commonwealth applies Taylor to exclude these 21 days, apparently because the defendant failed to object (frivolously) to observing the previously-established June 1 date. Similarly, the Commonwealth seeks to exclude 5 days between June 1 and June 6, 2017, based on the following docket entry: "06/01/2017 Defendant brought into Court. After hearing, case continued to 6/6/17 for motions in limine. Case on track for trial on 6/12/17." Where the case was "on track for trial" on the original trial date, within the one-year Rule 36 deadline, there was no Rule 36 basis for a defense objection. Yet the Commonwealth excludes these 5 days under Taylor, because of a lack of a frivolous and purposeless defense objection. Other examples pervade the Commonwealth's approach.[15]

Finally the Commonwealth seizes upon the simple use of the word "continue" in the docket, but, in context, that word does not mean what the Commonwealth claims. As

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14 As this case illustrates, completing normal pretrial hearings, motions and conferences can and does take about a year in the ordinary course. If the Commonwealth is correct, then all that time is excluded, with the result that the one year deadline does not fully start to run until after excluding the time attributable to normal pre-trial events.

15 For instance, the Commonwealth excludes 75 days simply because, on September 29, 2016, the defendants did not object when the Court set a date for "filing of Motions," but offers no possible ground for objection to this normal aspect of pretrial proceedings, conducted within the original trial date. Indeed, it excludes time attributable to the most common types of "continuance" for matters subsumed within the original trial date – e.g. a routine pretrial conference, pretrial hearing or status conference (on July 14, 2016, February 16, 2017, March 23, 2017) – even though Standing Order 1-86 contemplates that such matters will occur within the time frame of the one-year trial date deadline. See esp. Superior Court Standing Order 1-86 VI (Absent agreement, at the pre-trial hearing, ". . . the judge shall thereafter establish dates for the filing of any disputed motions, hearing dates, a final pre-trial conference, and a trial date"). A theory that excludes all of these periods (and other periods that did not affect the trial date) cannot be correct.

Appendices A and B to this Memorandum show, numerous docket entries use the word "continue" merely to mean that the Court was setting a next date. The Commonwealth's effort to parlay the use of the word "continue" into acquiescence to all "next dates" is purely semantic. Taylor and Barry concern themselves with substance, not semantics. If Rule 36 means anything, the clerk's simple recognition of the case's next date cannot require a defense objection, on pain of loss of Rule 36 rights, even if that recognition comes in the form of a docket entry: "case continued to" the next date

c. Appellate Precedent

That brings us to the case law. Neither the parties nor the Court have found a reported Massachusetts appellate decision that addresses the Rule 36 implications when intermediate events are continued without any resulting impact on an existing trial date.

There are, admittedly, a number of very general statements, in contexts unlike those here, which might be read to support the Commonwealth. The Supreme Judicial Court has said that "a failure to object to a continuance or other delay constitutes acquiescence." Commonwealth v. Rogers, 448 Mass. 538, 539 (2007). See also Commonwealth v. Montgomery, 76 Mass. App. Ct. 500, 504-505 (2010). "A defendant must . . . explicitly and formally object, on the record, to each and every proposed continuance or delay." Commonwealth v. Taylor, 469 Mass. 516, 524 (2014). See Commonwealth v. Rogers, 448 Mass. 538, 539 (2007) ("a failure to object to a continuance or other delay constitutes acquiescence."). The purpose of that rule is to "notify[] both the prosecutor and the court that attendant delays may not be excluded from the operation of the rule." Taylor, 469 Mass. at 524-525, quoting Commonwealth v. Bourdon, 71 Mass. App. Ct. 420, 426 (2008). The Commonwealth reads these principles as though they refer to every continuance, delay or simple scheduling of any intermediate event during a proceeding, even if the so-called "continuance" has no effect at all on the trial date or preparation for the trial.

Given the contours of Rule 36 itself, it makes little sense to interpret the case law as excluding every continuance period, regardless of impact on the trial date. Even in the case law, the words "delay" or "continuance" require a reference point. The case law reinforces the gist of text and purpose of Rule 36, by making clear that the Court measures delay by reference to the trial date – and not by reference to intermediate events that have no effect on "the time within which the trial of any offense" will commence. See Commonwealth v. Montgomery, 76 Mass. App. Ct. 500, 504 (2010) ("Absent a trial date having been set in the first instance, there is no basis upon which this court can conclude that the defendant acquiesced in a delay **of that date**.") (emphasis added). Where "trial dates were scheduled[,] it [is] the continuance of the trial dates without objection that demonstrates that the defendant agreed to the delay." Commonwealth v. Fleenor, 39 Mass. App. Ct. 25, 27 n. 3 (1995), quoted in Montgomery, 76 Mass. App. Ct. at 505.[16]

Supreme Judicial Court authority confirms the general principles upon which the Appeals Court relied in Davis, Montgomery and Fleenor. Far from presuming acquiescence in extending the Rule 36 deadline from every lack of objection to the rescheduling of intermediate dates, the case law focuses upon the established trial date itself:

> . . . we have never held that rule 36 time does not begin to run until the defendant first makes an objection. Such a holding would upset the balance of obligations envisioned by the rule, under which the "primary responsibility for setting a date for trial lies with the district attorney."

Commonwealth v. Spaulding, 411 Mass. at 506, quoting from Barry v. Commonwealth, 411 Mass. at 296 n.13. See also Commonwealth v. Weed, 82 Mass. App. Ct. 123 (2012) (including time when the case was on a status list, without objection by defendant to the failure to set a trial

16 The Court recognizes the different procedural postures of the cases cited in this paragraph, which did not have a trial date scheduled. For purposes of identifying a reference point to measure "delay" or "continuance," however, the procedural distinctions do not call for a different definition here.

date). By this logic, the trial date is the reference point for determining "delay." Any other reference point would be hypertechnical and arbitrary, lacking any relationship to the purpose of Rule 36 to bring cases to trial within one year.

The Commonwealth relies heavily upon cases in which there was, in fact, a continuance of the trial date itself. In one case, the parties

> . . .jointly **requested to continue the trial date** from December 3, 2012, the date they had jointly proposed in the pretrial conference report, to April 1, 2013. The defendant thus had acquiesced to an additional period of delay of at least 120 days when, on March 5, 2013, he filed his motion to dismiss on speedy trial grounds. Other delays may also have been permitted, but **we need not address them here.**

Commonwealth v. Williams, 475 Mass. 705, 715 (2016) (emphasis added). In Commonwealth v. Roman, 470 Mass. 85, 92-93 (2014), the defendant was arraigned on March 2, 2010 and agreed to a trial date of September 12, 2011, having previously acquiesced in four continuances of the pretrial hearing date, resulting in no effort to fix a trial date until February 16, 2011.[17] These cases do not suggest that continuing an intermediate date having no effect on the trial date warrants exclusion from Rule 36 calculations.

In short, nothing in the Rule, Reporter's notes, case law or logic suggests any concern with delay in events that are not on the critical path – i.e. events that are rescheduled without delay or potential delay in the trial. The Court therefore applies what it believes to be the correct test – namely that waiver or acquiescence occurs when a continuance affects, or potentially affects, the trial date. That never happened here. Therefore no time is excludable on grounds of acquiescence or failure to object.

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17 Roman thus illustrates how acquiescence in delay of the pretrial hearing may result in delay of the trial – by acquiescence in delaying the event at which the Court sets the first trial date. The defendant could have objected to these delays, both under Standing Order 2-86 and Rule 36. Therefore, it is not surprising that the Supreme Judicial Court excluded these delays from Rule 36. That is a very different situation from this case, where a Rule 36 compliant date was set immediately at arraignment, as later confirmed at the pretrial hearing, and was never continued.

II.

The defendants have also moved to dismiss the indictments for failure to prosecute, i.e. the Commonwealth's failure to answer "ready" on the trial date of June 12, 2017.[18] The Court indeed has that discretion.

There are rules that inform this Court's exercise of discretion, including Mass. R. Crim. P. 10, entitled "Continuances." Mass. R. Crim. P. 10 (a)(1) provides that "[a]fter a case has been entered upon the trial calendar, a continuance shall be granted only when based upon cause and only when necessary to insure that the interests of justice are served." Mass. R. Crim. P. 10 (a)(2) sets forth three "factors, among others, which a judge shall consider in determining whether to grant a continuance in any case." The first enumerated factor that applies here is "[w]hether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice." Mass. R. Crim. P. 10 (a)(2)(A). This policy led the Court not to dismiss the case outright on June 12, even as it denied a continuance, because it was unclear whether "continuation of the proceeding would be impossible." Cf. Reporters Notes to Mass. R. Crim. P. 10(a) (denial of a continuance may be an abuse of discretion if a missing witness "may be expected to become available within a reasonable time."). The Court also had in mind the Commonwealth's statement that "we're asking for a short date, a two-week date in order to get this trial moving." Tr. 12 (June 12, 2017).

The second – and in this case crucial – factor that applies here is "whether there has been a failure by a party to use due diligence to obtain available witnesses." Mass. R. Crim. P. 10 (a)(2)(C). Superior Court Rule 4 elaborates on that due diligence requirement:

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18 Indeed, notwithstanding the Commonwealth's citation to Commonwealth v. Super, 431 Mass. 492 (2000). The Court could have empaneled a jury on June 12, 2017 over the Commonwealth's objection. In that case, unlike this one, there was inadequate notice of the trial date, making it an abuse of discretion to deny a continuance. The one-year notice in this case was plainly sufficient. The Court, however, declined to subject the Commonwealth to double jeopardy claims, in case the appellate courts take a different view of this case.

> The court need not entertain any motion for postponement, grounded on the want of material testimony, **unless supported by an affidavit**, which shall state (1) the name, and, if known, the residence, of the witness whose testimony is wanted, (2) the particular testimony which he is expected to give, with the grounds of such expectation, and (3) **the endeavors and means that have been used to procure his attendance** or deposition; to the end that the court may judge **whether due diligence has been used for that purpose**. . .. In all cases the granting or denial of a motion for postponement shall be discretionary, whether the foregoing provisions have been complied with or not. **The court will not ordinarily grant a motion for postponement grounded on the absence of a material witness whom it is in the power of the moving party to summon, unless such party has caused such witness to be regularly summoned** and to be paid or tendered his travel and one day's attendance. [Emphasis added].

The Court has already ruled that the Commonwealth failed to use "due diligence" and failed to "cause such witness to be regularly summoned." Those failures warrant dismissal, but the Court was not yet prepared to dismiss the indictments on June 12, preferring to see whether circumstances might change by the following week. They did not. Nor did due diligence occur.

Mass. R. Crim. P. 10 and Superior Court Rule 4 are not obscure rules. They codify common sense. A diligent prosecution would include compliance with them. While the Commonwealth has advanced some rationale for proceeding in a different way, it is not enough to cite its simple trust that a witness will show up, when that witness did not come forward promptly after the killing, appeared to require motivation, such as favorable sentencing treatment, was sometimes difficult to contact or locate, and was out of state. Given the Commonwealth's two motions to continue and failure to secure DNA analysis and summon a key witness, the likely explanation is that the Commonwealth did not want to go to trial on June 12, even with Mr. Garcia, where it had a weak case that would not get worse with time. The Court is convinced that, in this case, dismissal for failure to prosecute will not result in a miscarriage of justice, where the Commonwealth failed to exercise due diligence to bring this case to trial and its actions speak to its own view of its case's weaknesses.

Moreover, if the Court denied the Motions, there would be no end in sight. It seems unlikely that Mr. Garcia will suddenly appear voluntarily in Massachusetts. It is equally unlikely that the Commonwealth, without the pressure of June 12's imminent trial, will improve its lackluster efforts to date or exercise due diligence to produce an increasingly hostile witness. Of course, it could use the intervening time to obtain analysis of DNA evidence available since 2004, but two judges have already ruled against that approach, given the extreme lack of due diligence on that score. It would not be just to allow the Commonwealth to achieve this goal indirectly, through lack of diligent effort to secure testimony of a material witness. Rewarding the Commonwealth for its prejudicial delay is not in the interest of justice.

Were it not for the expiration of the Rule 36 period, the Court might have waited slightly longer before dismissing the case, if there were even a glimmer of hope that the Commonwealth might actually secure Mr. Garcia's testimony. Now that Rule 36 mandates dismissal, the Court no longer has discretion to wait. Moreover, it has been two weeks since the trial date (Tr. 12 (June 12, 2017)), which is what the Commonwealth originally requested for a continuance, and there has been no progress or adequate and thorough effort to secure Mr. Garcia's presence. At each occasion, beginning with June 12, the Commonwealth has stated that it is not ready for trial. If the Rule 36 period has not expired, such that the Court has discretion, the Court therefore grants the Motions on the ground of failure to prosecute these cases. But for the Rule 36 violation, this dismissal would have been without prejudice.

III.

Finally, the Commonwealth challenges Rule 36 itself on separation of powers grounds. See Mass. Decl. of Rts. Art. 30. An Article 30 challenge is an exception to the general rule that a government agency may not challenge the constitutionality of a statute. Compare Spence v. Boston Edison Co., 390 Mass. 604, 607-611 (1983) with, e.g. LaGrant v. Boston Hous. Auth.,

403 Mass. 328, 330 (1988) (potential violation of judiciary's powers). Because only an appellate court can resolve this constitutional issue definitively, this Court addresses it only briefly.

Ironically, the Commonwealth cites Barry, 390 Mass. at 295-96 for the proposition that Rule 36(b) is "primarily a management tool, designed to assist the trial courts in administering their dockets." This principle places Rule 36 squarely within the judiciary's powers to oversee cases brought in the courts. Rule 36 is not an Article 30 violation simply because "[i]t is wholly separate from the defendants' constitutional right to a speedy trial." See Commonwealth v Lauria, 411 Mass. 63, 71 (1991); Turner v. Commonwealth, 423 Mass. 1013 (1996). Consistent with Article 30, the Supreme Judicial Court has supervisory power over the lower courts, including the conduct of criminal litigation. See, e.g. Commonwealth v. Russell, 474 Mass. 464, 477 (2015); Commonwealth v. Gomes, 470 Mass. 352 (2015); Commonwealth v. Coleman, 390 Mass. 797, 807-808 (1984).

Moreover, the exclusions in Rule 36(b)(2) fully accommodate the executive branch's interest in avoiding dismissal when delays result from events not chargeable to the Commonwealth. Rule 36 also recognizes and accommodates the Prosecutor's sole power to decide what and when to prosecute, including the right to file a nolle prosequi in the event it determines that it cannot go forward at some point after indictment. See Mass. R. Crim. P. 36(b)(2)(D). Under that provision -- if (contrary to the Court's ruling) the Commonwealth's calculation in this case were correct -- almost 11 months would remain to prosecute this case if re-indicted.

To be sure, Rule 36 places obligations on the Commonwealth to fix a trial date and effectively to exercise due diligence in prosecution (including summoning witnesses). The Commonwealth has cited no authority for the proposition that Article 30 precludes the Courts from requiring the District Attorney to exercise due diligence in a prosecution that he has

brought, which has resulted in holding two people in custody without bail for more than a year. While separation of powers may authorize the District Attorney to act in this way, it does not compel the Courts to tolerate use of the judicial process in this manner.

This Court is bound by Mass. Crim. P. 36, which does not violate separation of powers principles.

CONCLUSION

For the above reasons:

1. The Motion to Dismiss filed by defendant Golden on June 22, 2017 is ALLOWED. All Indictments are dismissed with prejudice for Rule 36 violation and failure to prosecute.[19]
2. The Motion to Dismiss filed by defendant Graham on June 26, 2017 is ALLOWED. All indictments are is dismissed with prejudice for Rule 36 violation and failure to prosecute.
3. This order is stayed until July 6, 2017, to allow the Commonwealth an opportunity to obtain relief pending appeal, should it choose. The Court imposes the conditions for the defendants' release (bail) pending appeal set forth on the record on June 29, 2017, which the Court intends to continue during any period of any stay that an appellate court may grant For purposes of Mass. R. App. P. 6(a), the Court has considered whether it should itself stay this decision for the entire period of any appeal and declines to do so, because the Commonwealth will not suffer irreparable harm during appeal that outweighs the

19 The Commonwealth previously expressed an intention to nolle pross indictments 2 and 3, but has not done so in writing as required by Mass. R. Crim. P. 16(a).

harm to defendants of continuing to face charges that have been dismissed for violation of speedy trial rights; the policy of Rule 36 supports this result.

Date: June 30, 2017

Douglas H. Wilkins
Justice of the Superior Court

APPENDIX A
Commonwealth v. Graham: Rule 36 Chart

COMMONWEALTH CONTENTION			DOCKET ENTRIES [Emphasis added]	COURT'S RULING
Court Dates	**Include**	**Exclude**		
June 22, 2016 – July 14, 2016: The date of arraignment to the date of the pretrial conference.	21 days			**Included.**
July 14, 2016 – September 29, 2016: On July 14, 2016, the case was continued by agreement to September 29, 2016. By agreeing to the continuance, the defendant is held to have acquiesced in the delay. *See Barry v. Commonwealth*, 390 Mass. 285, 298 (1983).		77 days	07/14/2016 Event Result: The following event: Pre-Trial Conference scheduled for 07/14/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled Defendant not in Court Note* Presence excused, defendant serving sentence @ Bristol County House of Correction PTC held before Roach, RAJ Out of Court filing date scheduled for 9/6/16 Case continued by agreement to 9/29/16 re: Status Conference (Ctrm 906, defendant excused)	**Included.** (1) Scheduling the status date did not cause any delay in the 6/12/17 trial date; (2) A status conference and motion filing date are features of ordinary trial management realities within the time frame already set by the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to a status conference; (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
September 29, 2016 to December 13, 2016: On September 29, 2016, the case continued by agreement to November 3, 2016, for out of court filing of motions. *See Barry*, 390 Mass. at 298. The next court date was December 13, 2016, for a pretrial hearing.		75 days	09/29/2016 Deft Not in Court, Deft Excused Result: Held as Scheduled Continued by agreement to 11/3/16 for Out of Court Filing of Motions	**Included.** (1) Scheduling the date for filing motions did not cause any delay in the 6/12/17 trial date; (2) Scheduling a motion filing date is a feature of ordinary trial management realities within the time frame of the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to a status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
December 13, 2016 – January 11, 2017: A pretrial hearing was held on December 13, 2016, after which the case was continued by		29 days	12/13/2016 Defendant brought into Court, PTH held before Roach, RAJ -Continued by agreement to 1/11/17, Hearing Re: Bail/ Motion to Dismiss (9:30am, Criminal Session 6, CtRm 906)	**Included.** (1) Scheduling the hearing did not cause any delay in the 6/12/17 trial date; (2) "continuance" just means a next date here; (3) there was no ground to object to the hearing date;

agreement to January 11, 2017, for motion to dismiss. *See Barry*, 390 Mass. at 298.			. . .	(4) this entry reflects no express or implied acquiescence or waiver of R. 36.
January 11, 2017 – February 16, 2017: On January 11, 2017, the case was continued by agreement to February 16, 2017, for status conference. *See Barry*, 390 Mass. at 298.		36 days	01/11/2017 Event Result: The following event: Motion Hearing scheduled for 01/11/2017 09:30 AM has been resulted as follows: Result: Rescheduled Reason: Defense Attorney failed to appear, Deft not in Court (in Lockup) Cont to 2/16/17 by agree, Hr re: Status conf, VI, to be heard in CTRM 808	**Included.** (1) The Motion to dismiss and status conference did not cause any delay in the 6/12/17 trial date; (2) Scheduling a status conference is a feature of ordinary trial management realities within the time frame already set by the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to status conference; (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
February 16, 2017 – March 23, 2017: On February 16, 2017, the case was continued by agreement to March 23, 2017. *See Barry*, 390 Mass. at 298.		35 days	02/16/2017 Event Result: The following event: Conference to Review Status scheduled for 02/16/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled Defendant brought into court. Continued by agreement 3/23/2017 for PTH in 6th Criminal Session in Ctrm 808 at (2:00PM)	**Included.** (1) The pretrial hearing did not cause any delay in the 6/12/17 trial date; (2) Scheduling a PT hearing is a feature of ordinary trial management realities within the time frame already set by the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to pretrial hearing; (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
March 23, 2017 – April 25 2017: On March 23, 2017, the case was continued by agreement to April 25, 2017. *See Barry*, 390 Mass. at 298.		33 days	03/23/2017 Deft Brought into Court Hearing re: p#13 Continued by agreement to 4/25/17 for Hearing re: Status in 6th Session, Courtroom 906, 2:00PM, JAIL LIST Commonwealth to file Request by 4/18/17 . ..	**Included.** (1) Scheduling the status date did not cause any delay in the 6/12/17 trial date; (2) Scheduling status conference is a feature of ordinary trial management realities within the time frame already set by the 6/12/17, trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
April 25, 2017 – May 2,		7 days	The following event:	**Included.** (1) Scheduling

2017: On April 25, 2017, the case was continued to May 2, 2017, for hearing re discovery, without objection by the defendant. *See Taylor*, 469 Mass. at 524. In addition to not objecting, the continuances between April 25, 2017, and May 11, 2017, benefited the defendant. Indeed, he filed a motion for updated Rule 14 discovery on April 25, 2017, which the Court eventually allowed on May 11, 2017. *See Commonwealth v. Sigman*, 41 Mass. App. Ct. 574, 578 (1996).			Conference to Review Status scheduled for 04/25/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled. Continued to 5/2/17 at 2:00pm re discovery.	the discovery motion did not cause any delay in the 6/12/17 trial date; (2) Scheduling a status conference is a feature of ordinary trial management realities within the time frame already set by the 6/12/17, trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
May 2, 2017 – May 11 2017: On May 2, 207, the case was continued to May 11, 2017, for motion hearing, without objection by the defendant. *See Taylor*, 469 Mass. at 524; *Sigman*, 41 Mass. App. Ct. at 578.		9 days	05/02/2017 Defendant Not In Court Agreement on both parties for defendant to be excused. continued to 5/11/2017 at 2:00pm in 906 for motion hearing (defendants presence excused).	**Included.** (1) Scheduling the hearing did not cause any delay in the 6/12/17 trial date; (2) "continuance" just means a next date here; (3) there was no ground to object to status conference. (4) this entry reflects no express or implied acquiescence or waiver of R. 36. (5) The Motion hearing concerned the Commonwealth's failure to provide Required discovery and disclosures
May 11, 2017 – June 1, 2017: On May 11, 2017, a hearing was held on the defendant's motion for updated Rule 14 discovery, after which the case was continued without objection by the defendant. *See Taylor*, 469 Mass. at 524. The next court date was June 1, 2017, for a final		21 days	05/11/2017 Defendant not in Court, Motion hearing held before Sanders, J - Case has next date	**Included.** (1) There was no "continuance" according to the docket, (2) keeping the previously established "next date" required no action and gave no ground to object (3) this entry reflects no express or implied acquiescence or waiver of R. 36.

pretrial conference.				
June 1, 2017 – June 6, 2017: On June 1, 2017, the case was continued to June 6, 2017, for motions in limine, without objection by the defendant. *See Taylor*, 469 Mass. at 524.		5 days	06/01/2017 Defendant brought into Court. After hearing, case continued to 6/6/17 for motions in limine. Case on track for trial on 6/12/17.	**Included.** (1) Hearing motions in limine did not cause any delay in the 6/12/17 trial date - the entry specifically notes that the case was on track for trial; (2) "continuance" just means a next date here; (3) there was no ground to object (4) this entry reflects no express or implied acquiescence or waiver of R. 36.
June 6, 2017 – June 9, 2017: On June 6, 2017, the case was continued without objection, *see Taylor*, 469 Mass. at 524, and on June 9, 2017, the Commonwealth filed its motion to continue.		4 days	[Various Motions Filed; no hearing on docket]	**Included.** (1) There was no "continuance" according to the docket, (2) keeping the previously established trial date required no action and gave no ground to object (3) this entry reflects no express or implied acquiescence or waiver of R. 36.
June 9, 2017 – June 16, 2017 On June 9, 2017, the court denied the Commonwealth's motion to continue, and set a status date for June 19, 2017. Meanwhile, on June 16, 2017, the Commonwealth filed a second motion to continue. The Commonwealth will assume, for the sake of argument, that this time is included.	8 days			Included
[June 17, 2017 – June 26, 2017 (not addressed in Commonwealth's Chart)]	n/a	n/a		10 days included. Defendant objected to continuances of the trial and the status conference
Total:	**29 days**	**330 days**		**369 days**

APPENDIX B
Commonwealth v. Golden: Rule 36 Chart

COMMONWEALTH'S CONTENTIONS			DOCKET ENTRIES [Underlining Added]	COURT'S RULING
Court Dates	**Include**	**Exclude**		
June 20, 2016 – July 14, 2016: The date of arraignment to the date of the pretrial conference.	23 days			**Included.**
July 14, 2016 – September 29, 2016: On July 14, 2016, the case was continued by agreement to September 29, 2016. By agreeing to the continuance, the defendant is held to have acquiesced in the delay. *See Barry v. Commonwealth*, 390 Mass. 285, 298 (1983).		77 days	07/14/2016 Deft Brought into Court/ Result: Held as Scheduled before Roach, J Out of Court Filing Date Rescheduled for 9/6/16 Continued by agreement to 9/29/16 for Hearing re: Status Conference in 6th Session, Courtroom 906, DEFT EXCUSED	**Included.** (1) Scheduling the status date did not cause any delay in the 6/12/17 trial date; (2) Scheduling a status conference is a feature of ordinary trial management realities within the time frame already set by the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
September 29, 2016 – to December 13, 2016: On September 29, 2016, the case continued by agreement to November 3, 2016, for out of court filing of motions. *See Barry*, 390 Mass. at 298. The next court date was December 13, 2016, for a pretrial hearing.		75 days	09/29/2016 Deft Not in Court. Deft Excused Result: Held as Scheduled Continued by agreement to 11/3/16 for Out of Court Filing of Motions	**Included.** (1) Scheduling the date for Filing motions did not cause any delay in the 6/12/17 trial date; (2) Scheduling a motion filing date is a feature of ordinary trial management realities within the time frame of the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to a status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.

December 13, 2016 – January 11, 2017: A pretrial hearing was held on December 13, 2016, after which the case was continued by agreement to January 11, 2017, for motion to dismiss. *See Barry*, 390 Mass. at 298.		29 days	12/13/2016 Defendant brought into Court, PTH held before Roach, RAJ -Continued by agreement to 1/11/17, Hearing Re: Bail/ Motion to Dismiss (9:30am, Criminal Session 6, CtRm 906) . . .	**Included.** (1) Scheduling the hearing did not cause any delay in the 6/12/17 trial date; (2) "continuance" just means a next date here; (3) there was no ground to object to status conference. (4) this entry reflects no express or implied acquiescence or waiver of R. 36.
January 11, 2017 – February 16, 2017: On January 11, 2017, the case was continued by agreement to February 16, 2017, for status conference. *See Barry*, 390 Mass. at 298.		36 days	01/11/2017 The following event: Bail Hearing scheduled for 01/11/2017 09:30 AM has been resulted as follows: Result: Held as Scheduled, Deft Brought into court, Hr re P#6 Mtn to Dismiss held, After hr; TUA with Sealed GJ Minutes. Hr RE: bail, After hearing Deft's Oral Mtn to be admitted to Bail Denied w/o/Prejudice. Cont to 2/16/17 by Agreement, Re: Status Conf. 2Pm VI Ses to be held in ctrm 808,	**Included.** (1) The Motion to dismiss did not cause any delay in the 6/12/17 trial date; (2) Scheduling a status conference is a feature of ordinary trial management realities within the time frame already set by the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
February 16, 2017 – March 23, 2017: On February 16, 2017, the case was continued by agreement to March 23, 2017. *See Barry*, 390 Mass. at 298		35 days	02/16/2017 Brought into Court, -Continued by agreement to 3/23/17, Hearing RE: PTH (2pm, Criminal Session 6, CtRm 808)	**Included.** (1) The pretrial hearing did not cause any delay in the 6/12/17 trial date; (2) Scheduling a PT hearing is a feature of ordinary trial management realities within the time frame already set by the 6/12/17 trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to pretrial hearing. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
March 23, 2017 – April 25, 2017: On March 23, 2017, the case was continued by agreement to April		33 days	03/23/2017 Event Result: Deft. brought into court Status Hrg held Case continued by agreement to	**Included.** (1) Scheduling the status date did not cause any delay in the 6/12/17 trial date; (2) Scheduling status conference is a feature of ordinary trial management realities within the time frame already set by the 6/12/17, trial date; (3) "continuance" just means a next date

25, 2017. *See Barry*, 390 Mass. at 298.			4/25/2017 in 6th Criminal Session at 2PM for Status	here; (4) there was no ground to object to status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
April 25, 2017 – May 2, 2017: On April 25, 2017, the case was continued to May 2, 2017, for hearing re discovery, without objection by the defendant. *See Taylor*, 469 Mass. at 524.		7 days	The following event: Conference to Review Status scheduled for 04/25/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled. Continued to 5/2/17 at 2:00pm re discovery.	**Included.** (1) Scheduling the status date did not cause any delay in the 6/12/17 trial date; (2) Scheduling status conference is a feature of ordinary trial management realities within the time frame already set by the 6/12/17, trial date; (3) "continuance" just means a next date here; (4) there was no ground to object to status conference. (5) this entry reflects no express or implied acquiescence or waiver of R. 36.
May 2, 2017 – May 11, 2017: On May 2, 2017, the case was continued to May 11, 2017, for motion hearing, without objection by the defendant.		9 days	05/02/2017 Defendant Not In Court Agreement on both parties for defendant to be excused. continued to 5/11/2017 at 2:00pm 906 for motion hearing.	**Included.** (1) Scheduling the hearing did not cause any delay in the 6/12/17 trial date; (2) "continuance" just means a next date here; (3) there was no ground to object to status conference. (4) this entry reflects no express or implied acquiescence or waiver of R. 36. (5) The Motion hearing concerned the Commonwealth's failure to provide Required discovery and disclosures
May 11, 2017 – June 1, 2017: On May 11, 2017, the case was continued without objection by the defendant. *See Taylor*, 469 Mass. at 524. The next court date was June 1, 2017, for a final pretrial conference.		21 days	05/11/2017 Event Result: Defendant brought into court. Case has next date	**Included.** (1) There was no "continuance" according to the docket, (2) keeping the previously established "next date" required no action and gave no ground to object (3) this entry reflects no express or implied acquiescence or waiver of R. 36.
June 1, 2017 – June 6, 2017: On June 1, 2017, the case was continued to June 6, 2017, for motions in limine, without objection by the defendant *See Taylor*, 469 Mass. at 524.		5 days	06/01/2017 Defendant brought into Court. After hearing, case continued to 6/6/17 for motions in limine. Case on track for trial on 6/12/17.	**Included.** (1) Hearing motions in limine did not cause any delay in the 6/12/17 trial date - the entry specifically notes that the case was on track for trial; (2) "continuance" just means a next date here; (3) there was no ground to object (4) this entry reflects no express or implied acquiescence or waiver of R. 36.

June 6, 2017 – June 9, 2017: On June 6, 2017, the case was continued without objection, *see Taylor*, 469 Mass. at 524, and on June 9, 2017, the Commonwealth filed its motion to continue.		4 days	[Docket reflects motions filed, but no in court appearance]	**Included.** (1) There was no "continuance" according to the docket, (2) keeping the previously established trial date required no action and gave no ground to object (3) this entry reflects no express or implied acquiescence or waiver of R. 36.
June 9, 2017 – June 16, 2017: On June 9, 2017, the court denied the Commonwealth's motion to continue, and set a status date for June 19, 2017. Meanwhile, on June 16, 2017, the Commonwealth filed a second motion to continue. The Commonwealth will assume, for the sake of argument, that this time is included.	8 days			Included
[June 17, 2017 – June 22, 2017 (not addressed in Commonwealth's Chart)]	n/a	n/a		6 days included. Defendant objected to continuances of the trial and the status conference
Total:	**31 days**	**330 days**		**367 Included Days as of June 22, 2017**

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).

/s/Sarah Montgomery Lewis
SARAH MONTGOMERY LEWIS
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant through the electronic filing service provider Odyssey File & Serve to the following registered user:

Patrick Levin, Esq.
plevin@publiccounsel.net

Respectfully submitted
For the Commonwealth,

DANIEL F. CONLEY
District Attorney
For the Suffolk District

/s/Sarah Montgomery Lewis
SARAH MONTGOMERY LEWIS
Assistant District Attorney
BBO# 683156
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
sarah.lewis@state.ma.us

August 23, 2017

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

_____

No. 2017-P-0865

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COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

KEVIN GRAHAM, JR.,
Defendant-Appellee

_____

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

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SUFFOLK COUNTY