

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPREME JUDICIAL COURT
No.

APPEALS COURT
No. 2021-P-0101

COMMONWEALTH OF MASSACHUSETTS

V.

MARTIN CURRAN

**APPLICATION FOR DIRECT REVIEW TO THE MASSACHUSETTS SUPREME
JUDICIAL COURT**

Now comes the defendant in the above-entitled matter and applies, pursuant to Mass.R.App.P. 11, for leave to obtain direct appellate review to the Massachusetts Supreme Judicial Court of the defendant's conviction in Fitchburg District Court No. 2016CR000366.

Date: February 22, 2021

Respectfully submitted,

/s/ Robert Spavento
Robert J. Spavento
414 County Street
New Bedford, MA 02740
(508) 992-2122
BBO# 681523

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPREME JUDICIAL COURT
No.

APPEALS COURT
No. 2021-P-0101

COMMONWEALTH OF MASSACHUSETTS

V.

MARTIN CURRAN

**MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S APPLICATION FOR
DIRECT REVIEW TO THE MASSACHUSETTS SUPREME JUDICIAL COURT**

The defendant respectfully requests the Court for leave to obtain direct appellate review in the above-entitled case. The defendant is applying for direct appeal because there are questions of first impression or novel questions of law, which should be submitted for final determination to the Supreme Judicial Court; and questions of such public interest that justice requires a final determination by the full Supreme Judicial Court. Direct review is necessary to reaffirm the Court's commitment to constitutional rights of criminal defendants, and to issue definitive direction to the lower courts, regarding the preservation of those rights during the COVID-19 pandemic.

PROCEEDINGS BELOW

On March 10, 2020, Martin Curran was arraigned in the Fitchburg District Court on one count of Assault and Battery on a Family Member, (G.L. c 265, § 13M(a)); and one count of Strangulation or Suffocation (G.L. c 265, § 15D(b)). The Commonwealth moved to detain the defendant through a dangerousness hearing (G.L. c 276, § 58A). On March 30, 2020 the court allowed the Commonwealth's motion for dangerousness and held the defendant without bail.

A "Zoom" bench trial, before the Honorable Christopher Loconto commenced on August 24, 2020. The defendant was found guilty of assault and battery (a required finding of not guilty was entered as to the household/family member element) and was found not guilty of Strangulation or Suffocation (via a required finding of not guilty). Judge Loconto sentenced the defendant to one year at the House of Correction.

A timely notice of appeal was filed on September 8, 2020. The case was docketed in the Appeals Court on February 1, 2021.

COMMONWEALTH'S CASE

Statement of Facts

On August 24, 2020 the defendant was "present" on "Zoom", while his attorney was in the Fitchburg District Court, to have a bench trial. During the course of the trial, the Defendant was confined at the Worcester County House of Correction. The Court conducted a colloquy with the defendant regarding only the waiver of his constitutional right to be tried by a jury. (Tr. 1/3-5¹)

Lisa Lashua, (hereinafter "Lashua"), testifying via "Zoom", stated that the defendant lived with the alleged victim, Cindy Millette. (Tr. 1/10) Lashua is a neighbor of Ms. Millette. (Tr. 1/10) Lashua identified the defendant by a picture she was shown during the "Zoom" conference. (Tr. 1/11) She stated that on March 9, 2020, she observed the defendant choking Millette and ripping the hair out of her head. (Tr. 1/12) She stated that she then called the police. (Tr. 1/13) Upon cross-examination, Lashua estimated that her apartment is ten feet away from Ms.

¹ Citations to the Record Appendix will be made as (R. page). There is one volume of record transcript. Appellant will refer to the transcripts as follows: (Tr. 1/page number) for the defendant's trial on August 24, 2020.

Millette, and admitted that she had been drinking alcohol that day. (Tr. 1/14-15)

Fitchburg Police Officer Lampkin testified in person at the Fitchburg District Court. Lampkin testified he was dispatched to 10 Pleasant Street and spoke with Ms. Lashua. (Tr. 1/18) During this conversation, he observed Ms. Millette inside Lashua's apartment. (Tr. 1/19) He observed patches of missing hair on Millette's head. (Tr. 1/20) He stated that Millette appeared to be in shock and was shaking. (Tr.1/21) The Commonwealth rested. (Tr. 1/27) The judge allowed a motion for required finding of not guilty as it alleged a family or household member, but the assault and battery charge remained. (Tr. 1/27) The judge allowed a motion for required finding of not guilty as to strangulation or suffocation count. (Tr.1/29)

DEFENDANT'S CASE

The alleged victim, Cynthia Millette appeared in person at the Fitchburg District Court. (Tr.1/30) She testified that the defendant did not hit, push or strike her in any way. (Tr. 1/31)

The judge found the defendant guilty of one count of assault and battery and sentenced him to one year at the House of Correction. (Tr.1/40)

STATEMENT OF ISSUES

1. The trial court erred in not advising the defendant of his right to have his trial in person rather than through a "Zoom" videoconference. In the alternative, the trial court should have conducted a colloquy to discern whether the defendant understood and waived certain constitutional rights by agreeing to be tried remotely on "Zoom". The failure to inquire of the defendant regarding the rights he was waiving, deprived him of his constitutional and statutory rights, to wit:
 - a. The Sixth Amendment to the United States Constitution and Article Twelve of the Massachusetts Declaration of Rights guarantees a defendant's right to confront witnesses at a trial;
 - b. A "Zoom" trial violated the defendant's statutory right to be present at all critical stages of trial;
 - c. A "Zoom" trial violated the defendant's Sixth Amendment right and Article Twelve of the Massachusetts Declaration of Rights to a public trial and his First Amendment right of the public to attend the trial; and
 - d. A "Zoom" Trial violated the defendant's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article Twelve of the Massachusetts Declaration of Rights.

STANDARD OF REVIEW

The appropriate standard of review is whether the error deprived the defendant of his constitutional rights. Generally, there are "two classes" of constitutional error. First, there are "trial errors," which can be "quantitatively assessed in the context of other evidence," and which comprise "most constitutional errors." Commonwealth v. Francis, 485 Mass. 86,99-100 (2020), citing United States v. Gonzalez-Lopez, 548 U.S. 140,148 (2006), quoting Arizona v. Fulminante, 499 U.S. 279, 306-308 (1991). These errors are assessed for whether they are harmless beyond a reasonable doubt.

Second, there is a "very limited class of cases" presenting structural errors that require automatic reversal absent waiver (citation omitted). Neder v. United States, 527 U.S. 1, 8 (1999). See Gonzalez-Lopez, 548 U.S. at 148-149. Such errors include the denial of counsel or the right to public trial, the omission of an instruction on the standard of beyond a reasonable doubt, racial discrimination in the selection of a jury, or trial before a biased judge. See Gonzalez-Lopez, *supra* at 149. These errors contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in

the trial process itself." Neder, supra, quoting Fulminante, 499 U.S. at 310. They are "constitutional error[s] of the first magnitude." See Commonwealth v. Valentin, 470 Mass. 186,196 (2014), quoting United States v. Cronin, 466 U.S. 648, 659 (1984).

Most structural errors "deprive defendants of 'basic protections'" that are essential for a criminal trial to "reliably serve its function as a vehicle for determination of guilt or innocence" and ensure that a "criminal punishment may be regarded as fundamentally fair." Neder, 527 U.S. at 8-9, quoting Rose v. Clark, 478 U.S. 570, 577-578 (1986).

ARGUMENT

In evaluating this case, the court should consider whether the conduct of a "Zoom" trial deprives a criminal defendant of certain constitutional rights, and should the trial judge be required to conduct a colloquy similar to those given for the waiver of other constitutional rights.

Ordinarily, when a defendant waives his/her right to a jury trial, a judge must go over that waiver of certain constitutional rights before the trial may even begin. A valid (jury) waiver, in turn, requires both a signed waiver certificate; see G. L. c. 218, § 26A; G. L. c. 263, § 6; Mass.R.Crim.P. 19(a), 378 Mass. 888 (1979), and a colloquy designed to ensure that the waiver is voluntary. Ciummei v. Commonwealth, 378 Mass. 504, 509 (1979). "So long as a colloquy occurs, the sole focus of our review is whether the colloquy has provided an evidentiary record upon which the trial judge could find the waiver of a defendant was voluntary and intelligent." Commonwealth v. Abreu, 391 Mass. 777, 779 (1984).

The solemnity of the written (jury) waiver and the formality of the colloquy also furthers the purposes of "assur[ing] that the ultimate decision regarding waiver of the

jury be left to the defendant himself, not his counsel," Commonwealth v. Pavao, 423 Mass. 798, 803 (1996), The rule laid down in Ciummei supra, requiring an oral colloquy in addition to a written waiver, has been termed a "bright line rule." Commonwealth v. Pavao, supra @ 802 (failure to conduct colloquy at time defendant signed written jury trial waiver violates "bright line" rule in Ciummei; convictions reversed) Commonwealth v. Osborne, 445 Mass. 776, 781 (2006). That same "bright line" rule should apply in cases where a defendant is effectively waiving constitutional rights.

The current colloquy given for a jury trial waiver, during the COVID pandemic, is inadequate because it fails to fully apprise the criminal defendant of constitutional rights he is giving up by being tried remotely. Those rights include the right to be present during the trial, the right to a public trial, the right to confront and cross-examine the witnesses against him, and the right to effective assistance of counsel, which should, at a minimum, afford him the opportunity to sit with his counsel and confer with him during the trial. The defendant in this case was deprived of all of those rights, and the trial judge never made inquiry in that regard.

A defendant who has received a constitutionally inadequate plea colloquy is entitled to withdraw that plea. Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 639 (2007); See Commonwealth v. Colon, 439 Mass. 519, 529 (2003). In a guilty plea colloquy a judge must conduct "a real probe of the defendant's mind" to determine that the plea is intelligent and "is not being extracted from the defendant under undue pressure." Commonwealth v. Foster, 368 Mass. 100, 107 (1975).

When a defendant enters a guilty plea, the plea judge is required to conduct a colloquy to determine that the plea is knowing and voluntary. A defendant entering such a plea simultaneously waives constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Boykin v. Alabama, 395 US 238, 243 n.5 (1969)" quoting, Johnson v. Zerbst, 304 US 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea

is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Id., @ 466.

Additionally, when a criminal defendant enters into a guilty plea, judges are required to inform defendants of immigration consequences, and failure to adhere to those procedures entitles the defendant to a new trial. See, Commonwealth v. Ciampa, 51 Mass. App. Ct. 459, 462 (2001) ("defendant is entitled to have his conviction vacated if, at the time of his guilty plea, the judge fails to warn him of the three immigration consequences"); Commonwealth v. Desorbo, 49 Mass. App. Ct. 910, 911 (2000) (§ 29D "requires judges to give [warnings] to a defendant tendering a plea of guilty," and "the Legislature has set out and placed in quotation marks the exact text of what judges should say on such occasions") See also, Commonwealth v. Hilaire, 437 Mass. 809, 816-817 (2002).

I. THE TRIAL COURT ERRED IN NOT ADVISING THE DEFENDANT OF HIS RIGHT TO HAVE HIS TRIAL IN PERSON RATHER THAN THROUGH A "ZOOM" VIDEOCONFERENCE. THE FAILURE TO INQUIRE OF THE DEFENDANT REGARDING THE RIGHTS HE WAS WAIVING BY AGREEING TO BE TRIED BY "ZOOM", DEPRIVED HIM OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS.

Massachusetts Courts have not set forth appropriate procedures to the lower courts regarding how to proceed with

"Zoom" trials. The Supreme Judicial Court has implemented procedures during COVID-19 such as; which proceedings can be conducted in person, paragraph 3; who can enter a courthouse, paragraph 4; or when jury trials may commence, paragraph 9. The only guidance is in paragraph 11, which states, "Criminal bench trials shall be conducted in person, unless the parties and trial judge all agree to conduct the trial virtually." (See, [SJC fourth updated order regarding the COVID-19 pandemic](#).) (R.3-10) However, the Court has not addressed whether trial courts must conduct a colloquy when a defendant agrees to be tried remotely on "Zoom". Here it is clear that the judge never inquired to see if the defendant voluntarily agreed to waive his right to be in person, and the constitutional rights he was waiving by proceeding in that manner.

"The judge's task [in an oral colloquy] is to `satisfy himself that any waiver by the defendant is made voluntarily and intelligently.'" Commonwealth v. Pavao, 423 Mass. 798, 800-801 (1996), quoting from Ciummei v. Commonwealth, *supra* at 509.

As a result of the pandemic, District Court judges are required to advise defendants of certain rights at a change of plea hearing by videoconference. During a change of plea hearing

the judge must inquire and certify that; "All parties were able to see and hear one another. I certify that I advised the defendant of his right to be physically present for this hearing and that the defendant knowingly, intelligently, and voluntarily waived that right after being so advised." See, [Massachusetts Tender of Plea or Admission and Waiver of Rights Form](#). (R.11-12)

In this Commonwealth a defendant must be advised his rights and/or sign a written waiver regarding the following matters:

1. To waive a jury trial, see G.L. c. 263, § 6, Mass.R.Crim.P. 19(a), 378 Mass. 888 (1979); Dist./Mun. Cts.R.Crim.P. 4(e), as well as an oral colloquy. See Ciummei @ 509.
2. Waive his right to an attorney; to be effective, the waiver "must be voluntary" and must involve "an informed and intentional relinquishment of a known right." Commonwealth v. Anderson, 448 Mass. 548, 554 (2007), quoting Commonwealth v. Torres, 442 Mass. 554, 571 (2004), waiver of counsel may not be presumed from a silent record. Commonwealth v. Means, 454 Mass. 81, 90 (2009).
3. Change of plea, Mass.R.Crim.P. 12, (A judge may accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts only after first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission.)
4. Probation violations, Dist./Mun. Ct. Rules of Probation 6(g) (A waiver by the probationer of the right to counsel shall be accepted by the court only if the court determines that such waiver is being made knowingly and voluntarily.)

Therefore, a court must advise a defendant of his rights which are being waived if he chooses to have a "Zoom" trial.

A. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE TWELVE OF THE MASSACHUSETTS DECLARATION OF RIGHTS GUARANTEES A DEFENDANT'S RIGHTS TO CONFRONT WITNESSES AT A TRIAL.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to confront witnesses at trial, which is also guaranteed by Article 12 of the Massachusetts Declaration of Rights and by statute, G.L. c. 278, § 6.

Article 12 commands that "every subject shall have a right... to meet the witnesses against him face to face." In Commonwealth v. Bergstrom, 402 Mass. 534(1988), in response to an argument by the Commonwealth that "these words have 'no essential meaning,'" Id. @ 541, that "[c]onstitutional language more definitively guaranteeing the right to a direct confrontation between witness and accused is difficult to imagine." Id. @ 541-542. Nor did we think that we were saying anything new, for we quoted our decision in Commonwealth v. Gallo, 275 Mass. 320, 333 (1931), that the "'purpose [of art. 12] was to put beyond the possibility of alteration except by the people themselves the principle already established as a part of the common law *that the witness should confront the accused face to face*'" (emphasis supplied in Bergstrom). Commonwealth v. Amirault, 424 Mass. 618,628 (1997).

Here it is clear that the trial judge did not make any inquiry as to the defendant's rights to be physically present and confront his accuser face-to-face at the trial.

B. A "ZOOM" TRIAL VIOLATED THE DEFENDANT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF TRIAL.

Massachusetts Rules of Criminal Procedure provides that criminal defendants shall have the right to be present "at all critical stages of [court] proceedings." "This right to be present derives from the confrontation clause of the Sixth Amendment . . . , the due process clause of the Fourteenth Amendment to the United States Constitution, and art. 12..." Mass.R.Crim.P. 18; Robinson v. Commonwealth, 445 Mass. 280, 285 (2005). Although rule 18 does not identify what stages of court proceedings are "critical," "fairness demands that the defendant be present when his substantial rights are at stake."

The primary constitutional protection is afforded by the due process clause of the Fourteenth Amendment. "[T]he presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence...." Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934). Thus, the Constitution requires the presence of the

defendant at proceedings other than trial if his presence would be essential to preserve substantial rights.

Here, it is clear that the defendant has an absolute right to be in person at his trial. While the defendant could validly waive that right, the trial judge made no inquiry in that regard. The judge made no findings as to whether the defendant knew he was entitled to be physically present in court at his trial, and that he knowingly and voluntarily gave that right up.

C. A "ZOOM" TRIAL VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT AND ARTICLE TWELVE OF THE MASSACHUSETTS DECLARATION OF RIGHTS TO A PUBLIC TRIAL AND HIS FIRST AMENDMENT RIGHT OF THE PUBLIC TO ATTEND THE TRIAL.

"[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." Commonwealth v. Marshall, 356 Mass. 432, 435 (1969); In re Oliver, 333 U.S. 257, 271-272, n. 29 (1948).

The public has a right under the First Amendment to The public in general has a First Amendment right of access to criminal trials. Commonwealth v. Martin, 417 Mass. 187, 192 (1994); See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982). Criminal defendants have a right, provided expressly in the Sixth Amendment, to a public trial. Martin @ 192.

Here, although theoretically his friends, family and the public could have been "invited" to attend the trial remotely by "Zoom", there is nothing in the record which would demonstrate that the defendant was aware of that right, and/or that he validly waived it.

D. A "ZOOM" TRIAL VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE TWELVE OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

The right to counsel means the right to effective assistance of counsel. See Kimmelman v. Morrison, 477 U.S. 365, 377 (1986). Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 235 (2004). The right of effective assistance of counsel afforded a defendant by Article 12 "provides greater safeguards than the Bill of Rights to the United States Constitution". Commonwealth v. Hodge, 386 Mass. 165, 169 (1982).

Here, the defendant was denied effective assistance of counsel because it was impossible for him to confer with his attorney as they were in different locations in different cities. The defendant could not participate at all, could not discuss the trial with his attorney or even make the decision whether or not to testify on his own behalf.

STATEMENT OF REASONS WHY DIRECT APPEAL IS APPROPRIATE

Direct appeal to the Massachusetts Supreme Judicial Court is appropriate because this defendant, and other defendants who are similarly situated, are being deprived of certain constitutional rights without judicial inquiry into whether the defendant is aware of the rights being waived, and whether that waiver is voluntary. In conducting a trial by "Zoom", a criminal defendant is waiving his right to a public trial, to be present for the trial, to physically confront witnesses against him and to confer with his lawyer during the conduct of the trial. It is further appropriate because given the on-going COVID-19 pandemic; this issue will be repeatedly raised, thus mandating this Honorable Court to resolve these issues for the proper administration of justice.

CONCLUSION

For the foregoing reasons, direct appellate review should be granted.

Respectfully submitted
/s/ Robert Spavento
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414 County Street
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BBO# 681523

DATE: 2/22/2021

MASSACHUSETTS SUPREME JUDICIAL COURT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

APPEALS COURT NO. 2021-P-0101

Supreme Judicial Court No.

**COMMONWEALTH OF MASSACHUSETTS
APPELLEE**

V.

**MARTIN CURRAN
DEFENDANT / APPELLANT**

I, Robert J. Spavento, hereby certify that this brief has been prepared in compliance with all of the Massachusetts Rules of Appellate Procedure, including but not limited to, Rules 16, 18, 20 and 21; and that I used a monospaced typeface, specifically Courier New, Size 12 Font, and the characters do not exceed 10 ½ characters per inch.

EXCLUSIVE of the Statement of Facts, Statement of the Issues, Statement of Reasons, Certificate of Compliance and Certificate of Service, the brief contains 10 pages.

I understand that a material misrepresentation can result in the court striking the brief or imposing sanctions. If the court so directs, I will provide a copy of the word or line print out.

/s/ Robert Spavento

Robert J. Spavento

CERTIFICATE OF SERVICE

I, Robert J. Spavento, hereby certify that I have this 22nd day of February 2021 electronically filed the Appellant's Application for Direct Appellate Review, and have served a copy of the Appellant's attached Application, to A.D.A Jane A. Sullivan, A.D.A., 15 Commonwealth Ave Woburn, MA 01801

/s/ Robert Spavento

Robert J. Spavento

2016CR000366 Commonwealth vs. Curran, Martin P

- Case Type:
- Criminal
- Case Status:
- Closed
- File Date
- 03/10/2020
- DCM Track:
-
- Initiating Action:
- A&B ON FAMILY/HOUSEHOLD MEMBER SUBSEQUENT c265 §13M(b)
- Status Date:
- 08/24/2020
- Case Judge:
-
- Next Event:
-

[All Information](#)
[Party](#)
[Charge](#)
[Event](#)
[Docket](#)
[Disposition](#)

Party Information

Curran, Martin P
- Defendant

[Alias](#)

Party Attorney

- Attorney
- Spavento, Esq., Robert
- Bar Code
- 681523
- Address
- Phone Number
-

[More Party Information](#)

Party Charge Information

- **Curran, Martin P**
- - Defendant
- Charge # 1:
- [265/13M/D-0 - Felony](#) A&B ON FAMILY/HOUSEHOLD MEMBER SUBSEQUENT c265 §13M(b)

-
- Original Charge
- 265/13M/D-0 A&B ON FAMILY/HOUSEHOLD MEMBER SUBSEQUENT c265 §13M(b) (Felony)
- Amended Charge
-

Jurisdiction
 Fitchburg
 Date of Offense
 03/09/2020

Charge Disposition

Disposition Date
 Disposition
 08/24/2020
 Guilty - Bench Finding

- **Curran, Martin P**
- - Defendant
- Charge # 2:
- [265/15D/A-0 - Felony](#) STRANGULATION OR SUFFOCATION c265 §15D(b)

- Original Charge
- 265/15D/A-0 STRANGULATION OR SUFFOCATION c265 §15D(b) (Felony)
- Amended Charge

- Jurisdiction
- Fitchburg
- Date of Offense
- 03/09/2020

Charge Disposition

Disposition Date
 Disposition
 08/24/2020
 Not Guilty - Bench Finding

Events

| <u>Date</u> | <u>Session</u> | <u>Location</u> | <u>Type</u> | <u>Event Judge</u> | <u>Result</u> |
|------------------------|-------------------------------|-----------------|--------------------------------------|--------------------|-------------------------------------|
| 03/10/2020 09:00 AM | Administrative Review Session | | Arraignment | | Held-Arraignment/58A Danger Request |
| 03/17/2020 09:00 AM | Administrative Review Session | | Detention Hearing (276 s58A) | | Rescheduled-Covid-19 emergency |
| 03/24/2020 09:00 AM | Administrative Review Session | | Detention Hearing (276 s58A) | | Rescheduled-Covid-19 emergency |
| 03/30/2020 12:00 PM | Video Conference Session | | Detention Hearing (276 s58A) | | Held - 58A-Dang Hring held |
| 05/05/2020 09:00 AM | Administrative Review Session | | Pretrial Hearing | | Held |
| 05/22/2020 12:00 PM | Video Conference Session | | Motion Hearing (CR) | | Held - Motion allowed |
| 06/04/2020 12:00 PM | Video Conference Session | | Discovery Compliance & Jury Election | | Reschedule of Hearing |
| 06/11/2020 12:00 PM | Video Conference Session | | Discovery Compliance & Jury Election | | Rescheduled-Covid-19 emergency |
| 07/27/2020 12:00 PM | Video Conference Session | | Discovery Compliance & Jury Election | | Reschedule of Hearing |
| 07/27/2020 12:00 PM | Video Conference Session | | Hearing to Review Status | | Reschedule of Hearing |
| 07/31/2020 12:00 PM | Video Conference Session | | Hearing to Review Status | | Reschedule of Hearing |
| 08/05/2020 12:00 PM | Video Conference Session | | Hearing to Review Status | | Reschedule of Hearing |
| 08/19/2020 09:00 AM | Administrative Review Session | | Hearing to Review Status | | Reschedule of Hearing |
| 08/24/2020 12:00 PM | Video Conference Session | | Hearing to Review Status | | Review Completed |

Docket Information

| <u>Docket Date</u> | <u>Docket Text</u> | <u>Amount Owed</u> | <u>Image Avail.</u> |
|--------------------|---|--------------------|---------------------|
| 03/10/2020 | Criminal Complaint issued from Electronic Application: Originating Court: Fitchburg District Court Case Number: 2016AC000382-AW Receiving Court: Fitchburg District Court ; | | |
| 03/10/2020 | Complaint issued with arrest warrant. | | |

| <u>Docket Date</u> | <u>Docket Text</u> | <u>Amount Owed</u> | <u>Image Avail.</u> |
|--------------------|---|--------------------|-----------------------|
| 03/10/2020 | Statement of facts filed. | | Image |
| 03/10/2020 | Warrant Issued: Straight Warrant issued on 03/10/2020 for Curran, Martin P | | |
| 03/10/2020 | Served: Straight Warrant served on 03/10/2020 for Curran, Martin P | | |
| 03/10/2020 | Appearance filed On this date Alexander Bergo, Esq. added as Appointed - Indigent Defendant for Defendant Martin P Curran Appearance filed for the purpose of Case in Chief by Judge Hon. Christopher P. LoConto. | | |
| 03/10/2020 | Legal Counsel Fee Waived. Judge: LoConto, Hon. Christopher P. | | |
| 03/10/2020 | Defendant is ordered committed without bail because FINAL HEARING ON DANGEROUSNESS PENDING (278 S.58) to Worcester County House of Correction returnable for 03/17/2020 09:00 AM Detention Hearing (276 s58A); mittimus issued. Court location of next event (if not this court): Fitchburg District Court Further Orders: Judge: LoConto, Hon. Christopher P. | | |
| 03/10/2020 | Event Resulted: Arraignment scheduled on: 03/10/2020 09:00 AM Has been: Held-Arraignment/58A Danger Request Hon. Christopher P. LoConto, Presiding | | |
| 03/10/2020 | Defendant arraigned before Court, advised of right to counsel. Judge: LoConto, Hon. Christopher P. | | |
| 03/10/2020 | Court inquires of Commonwealth if abuse defined by C209A §1 occurred in connection with charged offense. Judge: LoConto, Hon. Christopher P. | | |
| 03/10/2020 | Commonwealth's request for finding under C276 §56A filed. Judge: LoConto, Hon. Christopher P. | | |
| 03/10/2020 | Court finds abuse is alleged in connection with the charged offense. C276 §56A. Judge: LoConto, Hon. Christopher P. | | |
| 03/10/2020 | Commonwealth files written motion based on dangerousness for order of pre-trial detention or release with conditions under C276§58A. Judge: LoConto, Hon. Christopher P. | | Image |
| 03/10/2020 | Defendant ordered detained pending completion of dangerous hearing Judge: LoConto, Hon. Christopher P. | | |
| 03/10/2020 | Plea of Not Guilty entered on all charges. Judge: LoConto, Hon. Christopher P. | | |
| 03/16/2020 | Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Detention Hearing (276 s58A) scheduled on: 03/17/2020 09:00 AM Has been: Rescheduled-Covid-19 emergency Hon. Christopher P. LoConto, Presiding | | |
| 03/16/2020 | Defendant is ordered committed without bail because FINAL HEARING ON DANGEROUSNESS PENDING (278 S.58) to Worcester County House of Correction returnable for 03/24/2020 09:00 AM Detention Hearing (276 s58A); mittimus issued. Court location of next event (if not this court): Fitchburg District Court Further Orders: Judge: LoConto, Hon. Christopher P. | | |
| 03/23/2020 | Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Detention Hearing (276 s58A) scheduled on: 03/24/2020 09:00 AM | | |

| Docket Date | Docket Text | Amount Owed | Image Avail. |
|-----------------------------|--|-----------------------------|------------------------------|
| | Has been: Rescheduled-Covid-19 emergency Hon. Christopher P. LoConto, Presiding | | |
| 03/23/2020 | Defendant is ordered committed without bail because FINAL HEARING ON DANGEROUSNESS PENDING (278 S.58) to Worcester County House of Correction returnable for 03/30/2020 09:00 AM Detention Hearing (276 s58A); mittimus issued. Court location of next event (if not this court): Fitchburg District Court Further Orders: VIDEO CONFERENCE 12:00 P.M. Judge: LoConto, Hon. Christopher P. | | |
| 03/30/2020 | Event Resulted: Detention Hearing (276 s58A) scheduled on: 03/30/2020 12:00 PM Has been: Held - 58A-Dang Hring held Hon. Christopher P. LoConto, Presiding | | |
| 03/30/2020 | Defendant ordered detained prior to trial for a period not to exceed 120 days pursuant to G.L. C.276 §58A. Judge: LoConto, Hon. Christopher P. | | |
| 03/30/2020 | Defendant is ordered committed without bail because DEFENDANT HELD ON DANGEROUSNESS (276 s. 58A) to Worcester County House of Correction returnable for 07/27/2020 09:00 AM Hearing to Review Status; mittimus issued. Court location of next event (if not this court): Fitchburg District Court Further Orders: | | |
| 03/30/2020 | Habeas Corpus for prosecution issued to Worcester County House of Correction returnable for 05/05/2020 09:00 AM Pretrial Hearing: Further Orders: | | |
| 03/30/2020 | Order and reasons for pretrial detention on finding of dangerousness (C276/58A) Judge: LoConto, Hon. Christopher P. | | Image |
| 05/05/2020 | Event Resulted: Pretrial Hearing scheduled on: 05/05/2020 09:00 AM Has been: Held Hon. Christopher P. LoConto, Presiding | | |
| 05/05/2020 | Habeas Corpus for prosecution issued to Worcester County House of Correction returnable for 06/04/2020 09:00 AM Discovery Compliance & Jury Election: Further Orders: | | |
| 05/19/2020 | Defendant's motion to withdraw Attorney filed with the following, if any, supporting documents: | | Image |
| 05/19/2020 | Habeas Corpus for prosecution issued to Worcester County House of Correction returnable for 05/22/2020 12:00 PM Motion Hearing (CR): Further Orders: Judge: LoConto, Hon. Christopher P. | | |
| 05/19/2020 | Defendant's motion to Motion to Withdraw filed by Attorney Bergo filed with the following, if any, supporting documents: Judge: LoConto, Hon. Christopher P. | | Image |
| 05/22/2020 | Appearance filed On this date Alexander Bergo, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Martin P Curran | | |
| 05/22/2020 | Event Resulted: Motion Hearing (CR) scheduled on: 05/22/2020 12:00 PM Has been: Held - Motion allowed Hon. Christopher P. LoConto, Presiding | | |
| 05/22/2020 | Defendant's motion to withdraw as attorney filed and ALLOWED. | | Image |
| 05/22/2020 | | | |

| <u>Docket Date</u> | <u>Docket Text</u> | <u>Amount Owed</u> | <u>Image Avail.</u> |
|--------------------|--|--------------------|---------------------|
| | Appearance filed On this date James F Connors, Esq. added as Appointed - Indigent Defendant for Defendant Martin P Curran | | |
| 05/22/2020 | Appearance filed for the purpose of Case in Chief by Judge Hon. Christopher P. LoConto. | | |
| 06/04/2020 | Event Resulted: Motion Hearing (CR) scheduled on: 06/04/2020 09:00 AM Has been: Held - Motion allowed Hon. Christopher P. LoConto, Presiding | | |
| 06/04/2020 | Event Resulted: Discovery Compliance & Jury Election scheduled on: 06/04/2020 12:00 PM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Christopher P. LoConto, Presiding | | |
| 06/04/2020 | Habeas Corpus for prosecution issued to Worcester County House of Correction returnable for 06/11/2020 12:00 PM Discovery Compliance & Jury Election: Further Orders: ****VIDEO CONFERENCE**** Judge: LoConto, Hon. Christopher P. | | |
| 06/11/2020 | Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Discovery Compliance & Jury Election scheduled on: 06/11/2020 12:00 PM Has been: Rescheduled-Covid-19 emergency Hon. Christopher P. LoConto, Presiding | | |
| 06/11/2020 | Habeas Corpus for prosecution issued to Worcester County House of Correction returnable for 07/27/2020 12:00 PM Discovery Compliance & Jury Election: Further Orders: ****Video Conference**** | | |
| 07/27/2020 | Court hearing scheduled on 07/27/2020 12:00 PM Hearing to Review Status conducted by Video Conference WHC. Judge: LoConto, Hon. Christopher P. | | |
| 07/27/2020 | Event Resulted: Hearing to Review Status scheduled on: 07/27/2020 12:00 PM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Christopher P. LoConto, Presiding | | |
| 07/27/2020 | Event Resulted: Discovery Compliance & Jury Election scheduled on: 07/27/2020 12:00 PM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Christopher P. LoConto, Presiding | | |
| 07/27/2020 | Defendant is ordered committed without bail because DEFENDANT HELD ON DANGEROUSNESS (276 s. 58A) to Worcester County House of Correction returnable for 07/31/2020 12:00 PM Hearing to Review Status; mittimus issued. Court location of next event (if not this court): Fitchburg District Court Further Orders: | | |
| 07/31/2020 | Defendant is ordered committed without bail because DEFENDANT HELD ON DANGEROUSNESS (276 s. 58A) to Worcester County House of Correction returnable for 08/05/2020 12:00 PM Hearing to Review Status; mittimus issued. Court location of next event (if not this court): Fitchburg District Court Further Orders: ***VIDEO CONFERENCE 12:00*** Judge: LoConto, Hon. Christopher P. | | |
| 07/31/2020 | Event Resulted: Hearing to Review Status scheduled on: 07/31/2020 12:00 PM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Christopher P. LoConto, Presiding | | |

| Docket Date | Docket Text | Amount Owed | Image Avail. |
|-----------------------------|---|-----------------------------|------------------------------|
| 07/31/2020 | Affidavit of Cyntia Millett in support of defendant's petition for release filed. | | Image |
| 08/05/2020 | Event Resulted: Hearing to Review Status scheduled on: 08/05/2020 12:00 PM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Christopher P LoConto, Presiding | | |
| 08/05/2020 | Defendant is ordered committed without bail because DEFENDANT HELD ON DANGEROUSNESS (276 s. 58A) to Worcester County House of Correction returnable for 08/19/2020 09:00 AM Hearing to Review Status; mittimus issued. Court location of next event (if not this court): Fitchburg District Court Further Orders: ***TO BE TRANSPORTED TO FITCHBURG DISTRICT COURT *** | | |
| 08/18/2020 | Event Resulted: Hearing to Review Status scheduled on: 08/19/2020 09:00 AM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Christopher P. LoConto, Presiding | | |
| 08/18/2020 | Defendant is ordered committed without bail because DEFENDANT HELD ON DANGEROUSNESS (276 s. 58A) to Worcester County House of Correction returnable for 08/24/2020 12:00 PM Hearing to Review Status; mittimus issued. Court location of next event (if not this court): Further Orders: | | |
| 08/24/2020 | Event Resulted: Hearing to Review Status scheduled on: 08/24/2020 12:00 PM Has been: Review Completed Hon. Christopher P. LoConto, Presiding | | |
| 08/24/2020 | Charges Disposed:: Charge # 1 A&B ON FAMILY/HOUSEHOLD MEMBER SUBSEQUENT c265 §13M(b) On: 08/24/2020 Judge: Hon. Christopher P. LoConto Guilty - Bench Finding Charge # 2 STRANGULATION OR SUFFOCATION c265 §15D(b) On: 08/24/2020 Judge: Hon. Christopher P. LoConto Not Guilty - Bench Finding | | |
| 08/24/2020 | Sentence Imposed:: Sentence Date: 08/24/2020 Judge: Hon. Christopher P. LoConto Charge #: 1 A&B ON FAMILY/HOUSEHOLD MEMBER SUBSEQUENT c265 §13M(b) Committed to HOC Term: 1 Years, 0 Months, 0 Days To Serve: 1 Years, 0 Months, 0 Days Committed to Worcester County House of Correction Credits 169 Days | | |
| 08/24/2020 | All Charges disposed - Defendant committed on sentence. | | |
| 08/24/2020 | Court hearing scheduled on 08/24/2020 12:00 PM Hearing to Review Status conducted by Video Conference . Judge: LoConto, Hon. Christopher P. | | |
| 08/24/2020 | Waiver of Jury Trial found after colloquy Judge: LoConto, Hon. Christopher P. | | Image |
| 08/25/2020 | Docket report of court proceedings to date | | Image |
| 09/04/2020 | Appearance filed On this date James F Connors, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Martin P Curran | | |
| 09/08/2020 | Notice of appeal to the Appeals Court filed by the Defendant | | Image |
| 11/20/2020 | Appearance filed On this date Robert Spavento, Esq. added as Appointed - Indigent Defendant for | | Image |

| <u>Docket Date</u> | <u>Docket Text</u> | <u>Amount Owed</u> | <u>Image Avail.</u> |
|--------------------|---|--------------------|-----------------------|
| | Defendant Martin P Curran Appearance filed for the purpose of Case in Chief by Judge Hon. Christopher P. LoConto. Appointed Appellate Counsel for the Defendant | | |
| 11/20/2020 | Legal Counsel Fee Waived. Judge: LoConto, Hon. Christopher P. | | |
| 01/26/2021 | Transcripts of August 24, 2020 received. | | |
| 01/29/2021 | Notice of assembly of the record sent to the Appeals Court | | |
| 01/29/2021 | Notice of assembly of Record of Appeal | | <i>Image</i> |
| 01/29/2021 | Notice of the Assembly of the Record on Appeal Appellate Court Entry Statement | | <i>Image</i> |
| 01/29/2021 | Docket report of court proceedings to date | | Image |
| 02/01/2021 | Notice of Entry of appeal to The Appeals Court filed. | | <i>Image</i> |
| | | | |

Case Disposition

| <u>Disposition</u> | <u>Date</u> | <u>Case Judge</u> |
|-------------------------|-------------|-------------------|
| Disposed by Bench Trial | 08/24/2020 | |
| | | |

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPREME JUDICIAL COURT
No.

APPEALS COURT
No. 2021-P-0101

COMMONWEALTH OF MASSACHUSETTS

V.

MARTIN CURRAN
DEFENDANT / APPELLANT

On Appeal From The Fitchburg District Court

**Appellant's Record Appendix for Direct Appellate Review to the
Massachusetts Supreme Judicial Court**

Date: February 22, 2021

Respectfully submitted



Robert J. Spavento
414 County Street
New Bedford, MA 02740
(508) 992-2122
BBO# 681523

Record Appendix Table of Contents

Fourth Updated Order Regarding Court Operations Under the Exigent
Circumstances Created by the COVID-19 (Coronavirus) Pandemic 3-10

District Court Tender of Plea or Admission and Waiver of Rights
Form 11-12

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.

OE-144

In Re: COVID-19 (Coronavirus) Pandemic

FOURTH UPDATED ORDER
REGARDING COURT OPERATIONS UNDER THE EXIGENT
CIRCUMSTANCES CREATED BY THE COVID-19 (CORONAVIRUS) PANDEMIC

To safeguard the health and safety of the public and court personnel during the COVID-19 (coronavirus) pandemic while continuing to increase the business being conducted by the courts, the Supreme Judicial Court (SJC), pursuant to its superintendence and rule-making authority, issues the following ORDER:

1. Prior order. Effective September 17, 2020, this Order shall repeal and replace the Third Updated Order Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic, which was issued on June 24, 2020, and took effect on July 1, 2020 (July 1 Order).

2. Conduct of court business and access to courthouses. Courthouses will continue to be physically open to the public for certain purposes, as generally outlined in this Order, and operated with diligent regard for the health and safety of court users and personnel, in accordance with protocols established by the Trial Court or the relevant appellate court, as applicable. To limit the number of persons entering courthouses, all courts will continue to conduct most court business virtually (i.e., by telephone, videoconference, email, or comparable means, or through the electronic filing system), in both civil and criminal cases. In cases with one or more self-represented litigants (SRLs) where a court is scheduling a videoconference, courts will recognize the possibility that SRLs may have limited access to the technology needed to conduct videoconferences or limited experience with it, and will either assist the SRL in being able to conduct a videoconference or offer an alternative to videoconferencing for the virtual hearing.

3. Certain proceedings conducted in person. Trial Court departments shall continue to conduct in-person proceedings in emergency and non-emergency matters that either can be handled more effectively or efficiently in person, or cannot be handled virtually because a virtual proceeding is not practicable or would be inconsistent with the protection of constitutional rights. Each Trial Court department shall post notices to the "Court System Response to COVID-19" webpage (<https://www.mass.gov/guides/court-system-response-to-covid-19>) (COVID-19 webpage) (see paragraph 16) that provide clear department-wide guidance to the public and members of the bar identifying the categories of matters that it will address in person. Courts will conduct all other emergency and non-emergency matters virtually, except as provided in paragraph 7 below.

The Chief Justice of a Trial Court department, after consultation with the Chief Justice of the Trial Court, for reasons of public health and safety may order that a court division or location conduct all business virtually and/or may transfer some or all in-person matters to specified courts within the department. If any such action is taken, the applicable Trial Court department shall post notices to the COVID-19 webpage (see paragraph 16) that provide clear guidance to the public and members of the bar.

4. Who can enter courthouses. Entry into a courthouse is limited to personnel who work in the courthouse and persons who are present for one or more of the following purposes: attending in-person court proceedings (see paragraph 5); conducting in-person business with a clerk's, register's, or recorder's office (see paragraph 6); reporting for jury service (see paragraphs 9 and 13); meeting with a probation officer or probation staff person; or conducting business at other offices that are open to the public and housed in the courthouse.

All court users and personnel shall be subject to appropriate screening before they are allowed to enter a courthouse for purposes of preventing the spread of COVID-19, as more fully addressed in the Third Order Regarding Access to State Courthouses & Court Facilities, which was issued on July 29, 2020, and became effective on August 3, 2020, and any amendments to or successors of that Order that may be issued.

For purposes of preventing the spread of COVID-19, courthouse staff may monitor the number of people entering and leaving a courthouse to ensure that the number within the courthouse does not exceed the occupancy limits established to protect public health and permit physical distancing. To limit the number of people in a courthouse at any given time, all departments and offices within a courthouse shall coordinate with each other and schedule proceedings in a staggered fashion throughout the day. If the number of court users entering a courthouse needs to be limited to avoid exceeding occupancy limits, the following court users shall be given priority to enter, in the following order of priority: (i) persons seeking to address emergencies; (ii) persons participating in a scheduled in-person proceeding, including, without limitation, a trial, jury service or empanelment, grand jury sitting, hearing, or conference; (iii) persons with scheduled or otherwise required meetings between probationers and probation officers or staff for purposes of supervision, including but not limited to GPS, DNA or case supervision matters; (iv) persons having a scheduled appointment within the courthouse; and, then, (v) all others.

5. Physical presence in a courtroom. Court personnel, attorneys, parties, potential or empaneled trial or grand jurors, witnesses, and other necessary persons as determined by the presiding judge can be physically present in a courtroom for in-person proceedings. The presiding judge shall also determine the method by which members of the public, including the "news media" as defined in Supreme Judicial Court Rule 1:19(2), may access the proceeding, which may include allowing them to sit in the courtroom, provided there is sufficient space for them to maintain appropriate physical distance. Where a virtual hearing is scheduled, no one other than court personnel may be physically present in the courtroom during the virtual hearing without the approval of the judge or clerk-magistrate conducting the hearing. In the absence of exceptional circumstances, as determined by the judge or clerk-magistrate conducting the

hearing, no party (or attorney for a party) may be physically present in the courtroom for a scheduled virtual hearing. Where an in-person hearing is scheduled, a party may move that the hearing be conducted virtually, and the judge or clerk-magistrate scheduled to preside at the hearing will rule on the motion. Alternatively, a judge, upon request, may authorize a participant (an attorney, party, or witness) to appear virtually while other participants appear in person, so long as it is consistent with the protection of constitutional rights. A participant who requests to appear virtually for an otherwise in-person proceeding shall have no grounds to object to other participants appearing in person.

6. Clerks', Registers', and Recorder's Offices. All court clerks', registers', and recorder's offices will be physically open to the public to conduct court business. To continue to limit the number of persons entering courthouses, clerks', registers', and recorder's offices will still endeavor to conduct business virtually to the extent possible. Clerks', registers', and recorder's offices may provide a drop-box in a secure and accessible location at the courthouse for the benefit of those persons who wish to hand-deliver pleadings or other documents for filing. Each Trial Court department shall provide department-wide guidance on the COVID-19 webpage (see paragraph 16) as to how, in addition to by mail and, when available, electronic filing, pleadings and other documents can be filed without coming to the office of a court clerk, register, or recorder. Each clerk, register, or recorder is authorized to require the physical presence of such staff as may be necessary to address court business, provided that any increase in staff presence will be conducted in accordance with health and safety protocols established by the Trial Court or the relevant appellate court.

7. Excluded matters. If a Trial Court department determines that it is not practicable to address certain categories of non-emergency matters virtually or in person in view of (a) limited court staffing, (b) technological constraints, (c) the need to prioritize emergency or other matters, or (d) legal constraints, such as any State or Federal moratoriums on evictions or foreclosures, it shall post notices to the COVID-19 webpage (see paragraph 16) that provide clear department-wide guidance to the public and members of the bar identifying any categories of non-emergency matters that the department will not be addressing.

8. Cell phones and other personal electronic devices in courthouses. Because of the increased reliance during the pandemic on cell phones and other personal electronic devices (PEDs)¹ to communicate with courts and facilitate court proceedings, cell phones and other PEDs shall not be banned from any courthouse. Cell phones and other PEDs must be used in compliance with the rules set forth in Trial Court Emergency Administrative Order 20-10 (Order Concerning Trial Court Policy on Possession & Use of Cameras & Personal Electronic Devices), which was issued on June 24, 2020, became effective on July 13, 2020, and is posted on the COVID-19 webpage (see paragraph 16) and at the entrance to each courthouse.

9. Jury Trials. No jury trials, in either criminal or civil cases, shall be conducted in Massachusetts state courts until on or after October 23, 2020, at which time courts shall resume

¹ A "personal electronic device" or "PED" is any device capable of communicating, transmitting, receiving, or recording messages, images, sounds, data, or other information by any means, including but not limited to a computer, tablet, cell phone, camera, or Bluetooth device.

in-person trials on a limited basis, in general accordance with the recommendations for Phase 1 contained in the report issued by the Jury Management Advisory Committee (JMAC) on July 31, 2020,² as clarified by the memorandum issued by the JMAC on September 1, 2020.³ As recommended by the JMAC, Phase 1 will be limited to trials to juries of six (with alternates) conducted in a small number of locations, with no more than one trial at a time conducted in each location. As recognized by the JMAC, the resumption of jury trials will require close consultation and coordination among Trial Court Departments throughout the process, including in evaluating and selecting appropriate locations for trials. As further recognized by the JMAC, scheduling trials will be a collaborative process involving court leaders in each location and department, bar leaders, and counsel in each case. Ultimately, the case types and specific cases that will be tried to juries during Phase 1, as well as the locations thereof, shall be determined by the Chief Justice of the applicable Trial Court department, in consultation with the Chief Justice of the Trial Court.

The following provisions shall apply to trials conducted during Phase 1, notwithstanding any rule to the contrary:

(a) civil cases in the Superior Court and Housing Court that typically would be tried to juries of twelve, except sexually dangerous person cases under G.L. c. 123A, shall be tried to juries of six and each party will be limited to four peremptory challenges, regardless of whether additional jurors are empaneled;

(b) criminal cases in the Superior Court and youthful offender cases in Juvenile Court that typically would be tried to juries of twelve may be tried to juries of six only with the consent of the defendant(s) or juvenile(s), in which case each defendant or juvenile will be limited to four peremptory challenges and the Commonwealth to as many challenges as equal the whole number to which all the defendants or juveniles in the case are entitled, regardless of whether additional jurors are empaneled;

(c) sexually dangerous person cases under G.L. c. 123A that typically would be tried to juries of twelve may be tried to juries of six only with the consent of all parties, in which case each party will be limited to four peremptory challenges, regardless of whether additional jurors are empaneled;⁴

² Report and Recommendations to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials in the Context of the COVID-19 Pandemic.

³ Response to Public Comments on the Report of the Jury Management Advisory Committee to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials in the Context of the COVID-19 Pandemic.

⁴ See G.L. c. 123A, § 9 (petitioner or Commonwealth may demand jury trial) and § 14 (person named in petition or petitioning party may demand jury trial).

(d) in civil cases in the District Court and Boston Municipal Court, each party will be limited to two peremptory challenges, regardless of whether additional jurors are empaneled; and

(e) in criminal cases in the District Court and Boston Municipal Court and delinquency cases in the Juvenile Court, each defendant or juvenile will be limited to two peremptory challenges and the Commonwealth to as many challenges as equal the whole number to which all the defendants or juveniles in the case are entitled.

The SJC shall issue direction regarding the second phase of the resumption of jury trials (Phase 2) after reviewing the JMAC's evaluation of Phase 1 as described in the JMAC's report. In order to prepare for Phase 2, however, cases to be tried in Phase 2 in accordance with the JMAC's recommendations may be scheduled in anticipation of Phase 2 commencing in February 2021, with such jury trial dates subject to revision after the SJC's review of the JMAC's evaluation of Phase 1.

As recommended by the JMAC, the Jury Commissioner is hereby authorized, until further order of the SJC, to exercise discretion to excuse persons summoned for trial or grand jury duty upon request based on an identified vulnerability of the potential juror or a household member to COVID-19, or other circumstances related to COVID-19.

All plans and expectations regarding the resumption of jury trials may be adjusted if there is a significant change in the rate of COVID-19 transmission in the Commonwealth.

10. Continuances and Speedy Trial Computations. Pursuant to Prior SJC Orders,⁵ all jury trials scheduled to commence in Massachusetts state courts at any time from March 14, 2020, through September 4, 2020, were continued to a date no earlier than September 8, 2020. As the number of jury trials conducted during Phase 1 necessarily will be greatly limited due to the measures to be taken to reduce the risk of the spread of COVID-19, this court concludes that, except as otherwise provided in this paragraph, it is necessary and appropriate to hereby order that all jury trials in all cases in Massachusetts state courts are further continued from September 5, 2020, until a date no earlier than the date of the commencement of Phase 2. Regarding the cases scheduled for trial during Phase 1 (see paragraph 9), the further general continuance effectuated by this Order shall apply until the scheduled date for the trial. The continuances occasioned by this Order and the Prior SJC Orders serve the ends of justice and outweigh the best interests of the public and criminal defendants in a speedy trial. Therefore, the time periods

⁵ "Prior SJC Orders" means the March 13, 2020 Order Regarding Empanelment Of Juries, the March 17, 2020 Order Limiting In-Person Appearances In State Courthouses To Emergency Matters That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing, and the prior Orders Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic issued on April 1, 2020 (effective April 6, 2020), April 27, 2020 (updated order effective May 4, 2020), May 26, 2020 (second updated order effective June 1, 2020), and June 24, 2020 (third updated order effective July 1, 2020).

of such continuances shall be excluded from speedy trial computations under Mass. R. Crim. P. 36.⁶

11. Bench trials. Judges in Trial Court departments shall continue to schedule criminal and civil bench trials. Criminal bench trials shall be conducted in person, unless the parties and trial judge all agree to conduct the trial virtually. Civil bench trials may be conducted virtually in the discretion of the trial judge. In-person bench trials may be conducted only if bench trials are identified by the applicable Trial Court department as among the categories of matters that it will address in person, pursuant to paragraph 3. In any event, priority should be given to scheduling bench trials in criminal cases where the defendant is in custody, with the highest priority given to those defendants who have been in custody the longest.

12. Application for conference. A party who has had a trial or other non-emergency hearing postponed as a result of this Order or the Prior SJC Orders may apply for a conference with the court where the trial or other non-emergency hearing was to occur to address matters arising from the postponement. In criminal cases, where appropriate, a defendant may ask the court for reconsideration of bail or conditions of release. Nothing in this Order addresses the disposition of such requests for reconsideration.

13. Grand jury. No new grand jury shall be empaneled without the approval of the Superior Court Regional Administrative Justice (RAJ) who, after consultation with the Chief Justice of the Superior Court, shall set such conditions as may be necessary to minimize risk to members of the grand jury, court personnel, and witnesses. The RAJ or the Chief Justice of the Superior Court may consult with the Jury Commissioner regarding such conditions. As permitted by Rule 5 of the Massachusetts Rules of Criminal Procedure, which provides that "the court shall select not more than twenty-three grand jurors to serve," a grand jury of fewer than 23 grand jurors may be empaneled. Regardless of the number empaneled, a grand jury may sit only where there is a quorum of at least thirteen grand jurors, and may return an indictment only if at least twelve of the sitting grand jurors vote to indict.

14. Statutes of limitation. All criminal statutes of limitation are tolled from March 17, 2020, through October 23, 2020, because of the limited availability of grand juries. The new date for the expiration of a statute of limitation is calculated as follows: determine how many days remained as of March 17, 2020, until the statute of limitation would have expired, and that

⁶ "Ordinarily, it is a trial judge who orders a continuance, who determines whether the delay will be excluded from the speedy trial computation, and who makes the required findings under rule 36 (b) (2) (F). But here, immediate and uniform action across the entire court system was needed to prevent the spread of the coronavirus and to avoid the inefficiencies and inconsistencies that would have resulted if trial judges had to make a separate decision and findings in each case as to whether a trial should be continued due to the COVID-19 pandemic. It was therefore necessary and appropriate for this court to order that all trials be continued, to determine that the resulting delay should be excluded from the speedy trial computation, and to make the required findings applicable to all cases." *Commonwealth v. Lougee*, 485 Mass. 70, 72 (2020).

same number of days will remain as of October 24, 2020. For example, if twenty (20) days remained as of March 17 before the statute of limitation would have expired, then twenty (20) days will continue to remain as of October 24, before the statute of limitation expires (i.e., November 13).⁷

15. Expiring injunctions and similar orders. Unless otherwise ordered by the applicable court, all orders in a particular case that were issued prior to March 17, 2020, after an adversarial hearing (or the opportunity for an adversarial hearing), that enjoined or otherwise restrained or prohibited a party from taking some act or engaging in some conduct until a date at any time from March 17, 2020, through August 31, 2020, shall remain in effect until the matter is rescheduled and heard on a date on or before October 13, 2020. To the extent they are not already doing so, Trial Court departments shall reschedule and hear these matters virtually, whenever practicable, or in person, pursuant to paragraph 3 above. Orders issued on or after March 17, 2020, after a virtual or in-person adversarial hearing (or the opportunity for an adversarial hearing), may issue for the full period allowed by the applicable statute.

16. Publication of COVID-19 orders. All orders, standing orders, guidelines, and notices issued by any court department or appellate court in response to this Order or the pandemic, as well as all amendments, modifications, and supplements thereto, or the equivalent, shall be posted upon issuance on the judiciary's COVID-19 webpage. Links to each document may be found on that webpage.

[end of page]

⁷ Prior SJC Orders provided for the tolling of (1) civil statutes of limitation from March 17, 2020, through June 30, 2020, (2) deadlines set forth in statutes or court rules, standing orders, tracking orders, or guidelines, that expired at any time from March 17, 2020, through June 30, 2020, and (3) deadlines established by a court in a particular case prior to March 17, 2020, that expired at any time from March 17, 2020, through June 30, 2020. The new deadline or new date for the expiration of the statute of limitation, as applicable, is calculated as follows: determine how many days remained as of March 17, 2020, until the original deadline would have been reached or the statute of limitation would have expired, and that same number of days remained as of July 1, 2020, until the new deadline is (or was) reached or the statute of limitation expires (or expired). For example, if fourteen (14) days remained as of March 17 before the original deadline would have been reached or the statute of limitation would have expired, then fourteen (14) days continued to remain as of July 1, before the new deadline was reached or the statute of limitation expired (i.e., July 15).

17. The SJC may issue further Orders as necessary to address the circumstances arising from this pandemic.

This Order is effective on September 17, 2020, and shall remain in effect until further order of the court.

| | | |
|--------------------------|---|----------------------------|
| <u>RALPH D. GANTS</u> |) | |
| |) | Chief Justice ⁸ |
| |) | |
| <u>BARBARA A. LENK</u> |) | |
| |) | Justices |
| |) | |
| <u>FRANK M. GAZIANO</u> |) | |
| |) | |
| |) | |
| <u>DAVID A. LOWY</u> |) | |
| |) | |
| |) | |
| <u>KIMBERLY S. BUDD</u> |) | |
| |) | |
| |) | |
| <u>ELSPETH B. CYPHER</u> |) | |
| |) | |
| |) | |
| <u>SCOTT L. KAFKER</u> |) | |

Entered: September 17, 2020
Effective: September 17, 2020

⁸ Chief Justice Gants approved this order prior to his death.

**TENDER OF PLEA OR ADMISSION
AND WAIVER OF RIGHTS**

DOCKET NO.

Trial Court of Massachusetts
District Court Department

NAME OF DEFENDANT

COURT DIVISION

SECTION I **CONDITIONAL TENDER OF PLEA OR ADMISSION**☐ Guilty Plea ☐ Admission to Facts Sufficient for a Finding of Guilty ☐ Binding Plea with Charge Concession Under Rule 12(b)(5)(A)

| Count No. | Defendant's Recommendation(s) (include all fees, costs, and conditions of probation) | Prosecutor's Recommendation(s) (required when Prosecutor disagrees with Defendant's recommendation(s)) | Judge's Disposition Upon rejecting a binding plea or non-binding recommendation |
|-----------|--|--|---|
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| | | | |

SUSPENDED SENTENCES MAY BE IMPOSED FROM AND AFTER UPON A PROBATION VIOLATION UNLESS OTHERWISE NOTED

ANY COUNT PLACED ON FILE may be removed from the file at any time and have a sentence imposed (or be scheduled for trial if no guilty finding has been made): (1) at the defendant's request, or (2) if a related conviction or sentence is reversed or vacated, or (3) if it is shown by a preponderance of evidence that the defendant committed a new criminal offense, or (4) if it is shown by a preponderance of evidence that:

The prosecutor may not request that the charge be removed from the file after: _____ (date).

DIST. / MUN. CTS. R. CRIM P. 4(c) REQUIRES COUNSEL TO CONSULT WITH THE PROBATION DEPARTMENT REGARDING PROBATIONARY TERMS

Signature of Defense Counsel or Pro Se Defendant

Date

Signature of Prosecutor

Date

X

X

SECTION II **JUDGE'S CERTIFICATION**

- ☐ The Court **ACCEPTS** the Defendant's tender.
- ☐ The Court **REJECTS** the Defendant's tender. The defendant was informed on the record that if the court were to exceed the defendant's recommendation, the defendant would have the opportunity to withdraw the plea or admission. After having had an opportunity to consult with counsel the Defendant: ☐ **WITHDRAWS** the tendered plea or admission ☐ **ACCEPTS** judge's disposition
- ☐ Plea/admission taken by videoconference. All parties were able to see and hear one another. I certify that I advised the defendant of his right to be physically present for this hearing and that the defendant knowingly, intelligently, and voluntarily waived that right after being so advised.
- ☐ An interpreter was used during the colloquy and confirmed on the record that the Notice of Rights in Section III was translated to the defendant.
- ☐ I addressed the defendant directly. I inquired into the defendant's education and background and am satisfied the defendant fully understands all of the rights set forth in Section III, and that the defendant is not under the influence of any substance that would impair the defendant's ability to fully understand those rights. I advised the defendant of the notices contained in Section III pursuant to G.L. c. 278, § 29D and Mass. R. Crim. P. 12. I find that the defendant has knowingly, intelligently, and voluntarily waived all the rights explained on the record and set forth in this form.

Signature of Judge

Date

X

R11

SECTION III DEFENDANT'S RIGHTS AND NOTICES (Mass. R. Crim. P. 12 & G.L. c. 278, § 29D)

A criminal defendant has the right to be tried by a jury, or by a judge without a jury, on these charges. The jury would consist of six jurors chosen at random from the community, and the defendant may participate in selecting those jurors, who would determine whether the defendant was guilty or not guilty. The decision must be unanimous. By entering a plea of guilty or admission, the defendant waives the right to confront, cross-examine, and compel the attendance of witnesses; to present evidence in their defense; to remain silent and refuse to testify or provide evidence against themselves, all with the assistance of a defense attorney; and to be presumed innocent until proven guilty by the prosecution beyond a reasonable doubt.

A criminal defendant has the right to be aware of (1) the nature and elements of the charge(s) to which they are entering a guilty plea or admission; (2) the range of the possible sentence(s); (3) that sentences can be imposed one after the other.

A plea of guilty or admission to the charges could trigger the provisions of the sex offender registration statute or commitment as a sexually dangerous person under G.L. c. 123A, §12.

If the defendant is not a citizen of the United States, the acceptance by the Court of a plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from or admission to the United States, or denial of naturalization, pursuant to the laws of the United States. If the offense to which the plea of guilty, nolo contendere, or admission to sufficient facts is, under federal law, one that presumptively mandates removal from the United States and federal officials decide to seek removal, it is practically inevitable that this disposition would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States.

If any charge is being placed on file, the defendant must freely and voluntarily consent to the filing of that charge on the conditions listed on the front of this form. A defendant has the right at any time to have the court remove it from the file and impose sentence (or schedule it for trial if no guilty finding has been made). The prosecutor may request the Court to remove it from the file and impose sentence (or schedule it for trial if no guilty finding has been made) if a related conviction or sentence is reversed or vacated, or if the prosecutor proves by a preponderance of evidence either that the defendant committed a new criminal offense or that any other condition listed on this front of this form has occurred. The prosecutor may do so at any time (or, if a time limit is listed on the front of this form, at any time until that date). If the charge is removed from the file and the defendant sentenced, it may result in additional punishment in this case.

SECTION IV DEFENSE COUNSEL'S CERTIFICATION

I certify that I have explained to the defendant the legal rights and consequences referred to in the above Section III.

Signature of Defense Counsel

BBO#

Date

R12