

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPREME JUDICIAL COURT  
DAR NO. \_\_\_\_\_

APPEALS COURT  
NO. 2021-P-0189

SINGLE JUSTICE  
NO. 2021-J-0058

COMMONWEALTH OF MASSACHUSETTS

v.

WILLIAM MCDERMOTT

**DEFENDANT'S APPLICATION FOR  
DIRECT APPELLATE REVIEW**

Now comes the defendant in the above-entitled case and requests  
direct appellate review of his appeal pursuant to Mass. R. App. P. 11.

**STATEMENT OF PRIOR PROCEEDINGS**

On July 1, 1982, after a jury trial, William McDermott was convicted  
of first-degree murder of Robert Kemp and acquitted of armed robbery.  
(Record Appendix (RA) 2429-2430). The killing occurred on November 20,  
1981 at the Cohasset Golf Club. (RA 669, 942, 1076). Mr. McDermott was  
17 years old at the time of the offense. (RA 1851; Impounded Record  
Appendix (IRA) 4). He has been in prison ever since. (RA 10-14).

On direct appeal, this Court declined to grant him a new trial but reduced his verdict to second-degree murder under G.L. c. 278, § 33E. Commonwealth v. McDermott, 393 Mass. 451, 459 (1984). (RA 2656). In 2004, McDermott through his counsel filed a motion for new trial<sup>1</sup> based solely on instructional errors that are different from those alleged in this motion for new trial. (RA 10, 2032-2043). The Superior Court denied the motion and its decision was affirmed by a panel of the Appeals Court in an unpublished opinion. See Commonwealth v. McDermott, 65 Mass. App. Ct. 1112 (2006). (RA 2805-2810).

On October 26, 2020, McDermott filed his motion for new trial and motion for resentencing along with a record appendix and impounded appendix and also his motion to stay the execution of his sentence. (RA 12-13, 20-55, 470-602). On November 13, 2020, the Commonwealth filed its motion to enlarge the time within to file its opposition to McDermott's motion to stay the execution of his sentence until January 27, 2021. (RA 68-70). The Superior Court (Cannone, J.) allowed the enlargement. (RA 13). On November 30, 2020, McDermott filed a motion to expedite the Commonwealth's opposition to a stay and the hearing, requesting a date on

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<sup>1</sup> In 1983, the Superior Court (Irwin, J.) allowed McDermott to withdraw a prior Rule 30(a) motion. (RA 358-359).

or about December 18, 2020 for the hearing. (RA 71-91). The Court (Cannone, J.) set a deadline of January 6, 2021, for the Commonwealth's opposition and scheduled the hearing for January 13, 2021. (RA 13). On January 6, the Commonwealth filed its opposition to McDermott's motion to stay and on January 11, McDermott filed his Reply. (RA 343-442). On January 13, the Court (Davis, J.) held a hearing on McDermott's motion to stay and at the end of the hearing, denied the motion. (RA 13, 18-19). The Court's order relied upon its statements at the hearing and the Court did not issue any written findings. (Id.)

On February 17, 2021, McDermott filed a motion to stay his sentence in the Single Justice session of the Appeals Court. See Docket No. 2021-J-0058 (attached). On February 22, 2021, the Single Justice (Milkey, J.) issued a Memorandum and Order denying his motion to stay. (Id.) Although unlike the Superior Court, the Single Justice found that McDermott had met the first prong as to a reasonable possibility of success on appeal, he agreed with the Superior Court as to the flight/security prong and the COVID-19 prong. (Id.) McDermott timely appealed the Single Justice's order. (Id.) On March 1, 2021, the Appeals Court entered his appeal and placed it under consideration on an expedited basis. See Docket No. 2021-P-0189 (attached).

## **SHORT STATEMENT OF RELEVANT FACTS**

McDermott, who is 56 years old, has spent 39 years of his life in prison and is currently incarcerated at NCCI-Gardner. (IRA 4; RA 60). He suffers from obesity, Type 2 diabetes, hypothyroidism, colitis disease, hyperlipidism (or high cholesterol), chronic ulcerative colitis, and ulcerative pancolitis. (IRA 4, 7, 10; RA 60 ¶ 2).

After COVID-19 arrived at NCCI-Gardner, it quickly infected 67 incarcerated men. (RA 163, 197). As a result, on November 30, 2020, McDermott moved to expedite the Commonwealth's response and the hearing, requesting a hearing date on or near December 18, 2020, in an effort to balance McDermott's urgent need to avoid this coronavirus outbreak with the Commonwealth's need for some additional time to respond to his motion to stay. (RA 71-91). Instead, the Superior Court scheduled the hearing for January 13, 2021 and McDermott received a positive coronavirus test on January 5, 2021. (RA 13, 451). The Court then used this fact as well as the upcoming vaccinations<sup>2</sup> as reason to dismiss the applicability of the COVID-19 prong to McDermott's circumstances. (RA 19).

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<sup>2</sup> McDermott has since received the first dose of the COVID-19 vaccine and will receive the second dose fairly soon. (RA 466).

McDermott's health continues to deteriorate due to the intermittent lockdowns, general prison conditions and the DOC's failure to provide prompt and adequate medical care. After his January 13<sup>th</sup> hearing, he developed diabetic nephropathy which "slowly damages [the] kidneys' delicate filtering system" and may progress to kidney failure. (IRA 90; RA 2813). He has had trouble breathing when walking up and down the hill, raising the concern of angina. (IRA 90; RA 90, 467). It is unclear if any lingering effects of COVID-19 has already worsened or will worsen his heart condition. For over two weeks, despite his complaints, McDermott did not receive his necessary daily medication to prevent a heart attack and only obtained it after counsel complained. (IRA 67, 72; RA 452, 459-460). Only recently have his semi-urgent heart test and hernia surgery been scheduled. (IRA 100; RA 467-468).

Nevertheless, the Single Justice found: "With regard to the risks posed by the COVID-19 pandemic, see Commonwealth v. Nash, 486 Mass. 394, 406-410 (2020), I agree with the judge that such concerns do not require a different result given that the defendant already now both has had COVID-19 and has been vaccinated." (Single Justice Docket No. 2021-J-0058, Memorandum and Order dated Feb. 22, 2021).

## **STATEMENT OF THE ISSUE AND PRESERVATION**

When weighing a defendant's motion to stay the execution of his/her sentence during this ongoing pandemic, should this Court direct lower courts to continue applying COVID-19 considerations to vaccinated and/or previously infected incarcerated defendants so long as it is plausible that they could still suffer serious harm, which encompasses potential long-term damage from COVID-19 infection?

Mr. McDermott through counsel argued that he met all three prongs for release on a stay of sentence pursuant to Commonwealth v. Nash, 486 Mass. 394 (2020) and other supporting case law.

## ARGUMENT

- I. Instead of dismissing COVID-19 considerations for those people vaccinated but trapped in congregate settings, this Court should apply the precautionary principle in their favor while uncertainty clouds the ongoing, deadly pandemic.**

“We may be done with the virus, but clearly the virus is not done with us.”  
Dr. Rochelle Walensky, Director of the Centers for Disease Control and Prevention (CDC)<sup>3</sup>

In Nash, this Court held that when weighing the COVID-19 prong, a court may not use it to “add to the burden that defendants face in seeking a stay of execution of sentence pending resolution of their appeals.” Nash, 486 Mass. at 408. Nor may a court preclude the defendant from favorable treatment under this prong if a general risk of COVID-19 infection exists for incarcerated people but a specific risk (such as advanced age or underlying conditions) to the defendant does not. Id. at 414-415. Yet the lower courts have treated the COVID-19 vaccine as the silver bullet for this ongoing pandemic and eliminated COVID-19 considerations for any incarcerated person who has received the vaccine. See also Commonwealth v. Jose Luis Rivera, No. 2019-P-1435 (Order on Feb. 26, 2021) (Single Justice (Milkey, J.) similarly finding that the defendant had made an insufficient showing

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<sup>3</sup> Ingram, David, CDC Director is ‘very concerned’ that Covid cases have stopped falling, NBC News (Feb. 26, 2021), available at: <https://www.nbcnews.com/science/science-news/cdc-concerned-covid-cases-stopped-falling-rcna319>.

under the third prong of Nash since he had received his second dose of the vaccine and there had been “no new confirmed cases” at NCCI-Gardner in the latest Special Master’s report). This Court should overrule the lower courts’ elimination of the third Nash prong and order the application of the precautionary principle.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) defines the precautionary principle as dictating that “when human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm.”<sup>4</sup> Dr. Anthony Fauci recently stated that “‘it is conceivable, maybe likely,’ that vaccinated people can get infected with the coronavirus and then spread it to someone else, and that more will be known about this likelihood ‘in some time, as we do some follow-up studies.’”<sup>5</sup> Continuing to safely release people in light of the pandemic reduces the spread of COVID-19 and thus serves the health of both incarcerated people and the general public

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<sup>4</sup> UNESCO, World Commission on the Ethics of Scientific Knowledge and Technology, The Precautionary Principle (COMEST, March 2005), available at: <https://unesdoc.unesco.org/ark:/48223/pf0000139578>.

<sup>5</sup> Hamblin, James, The False Dilemma of Post-Vaccination Risk, The Atlantic (Feb. 26, 2021), available at: <https://www.theatlantic.com/health/archive/2021/02/post-vaccination-risk-is-a-false-dilemma/618149/>



most of whom are not yet vaccinated. In this fast-developing and deadly pandemic, the courts' reliance upon vaccinations as reason to eschew COVID-19 considerations for incarcerated people may lead to the "morally unacceptable harm" of preventable suffering and death.

Since late 2020, COVID-19 variants have proliferated and spread across the United States.<sup>6</sup> Because of abysmally low genomic surveillance in the United States<sup>7</sup>, epidemiologists do not know how widespread these variants are and whether other variants capable of vaccine escape are on the horizon or already here. The CDC has reported its own uncertainty about the variants' prevalence and "[h]ow these variants may affect existing therapies, vaccines, and tests." (RA 2832).

Although current data shows that the Moderna and Pfizer vaccines are highly protective against severe illness and death from COVID-19, there are

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<sup>6</sup> Fox, Maggie, These coronavirus variants are keeping scientists awake at night, CNN (Jan. 30, 2021), available at: <https://www.cnn.com/2021/01/19/health/coronavirus-variants-what-we-know/index.html>

<sup>7</sup> McCormick, Erin, 'We were in the dark': why the US is far behind in tracking Covid-19 variants, The Guardian (Feb. 2, 2021), available at: <https://www.theguardian.com/world/2021/feb/02/us-covid-variants-tracking-cdc-research>

three significant caveats<sup>8</sup>: 1. The data only consists of vaccinated people who had had no prior COVID-19 infection (unlike McDermott); 2. The most recent vaccines are generally less effective against certain COVID-19 variants and the Pfizer and Moderna ones were not tested against the variants; and 3. Especially given the circulation of variants, a vaccinated person could still become infected with COVID-19 and suffer mild or moderate illness. Even with “mild or moderate” illness, McDermott could suffer “Long Covid” and/or long-term damage to his lungs or heart. Although the latter are apparently more uncommon features of the disease, the CDC has recognized that people have suffered these health outcomes<sup>9</sup>. If these plausible possibilities became realities for McDermott, who already suffers from possible angina, Type 2 diabetes and other conditions, it would lead to the morally unacceptable harm that McDermott suffer serious disability or death from COVID-19 reinfection.

Large-scale vaccinations provide our best hope to end this pandemic but have so far lagged. In Massachusetts, as of February 23, 2021, only 4.6%

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<sup>8</sup> Katella, Kathy, Comparing the COVID-19 Vaccines: How Are They Different?, Yale Medicine (Feb. 27, 2021), available at: <https://www.yalemedicine.org/news/covid-19-vaccine-comparison>

<sup>9</sup> CDC, Long-Term Effects of COVID-19 (updated Nov. 13, 2020), available at: <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>.

- 7.8% of residents are fully vaccinated.<sup>10</sup> Until there is herd immunity to COVID-19 and its variants, the coronavirus will spread and far more rapidly now that the U.K. variant (B.1.1.7) is widespread and will likely become the dominant strain in the coming weeks.<sup>11</sup> While the coronavirus spreads, it replicates. With replication come new mutations. Some new mutation could provide the key to total vaccine escape and form a variant that destroys or significantly setbacks any progress vaccinations had achieved.

There are already worrying signs that the coronavirus is following this trajectory given its success in becoming more highly transmissible (U.K. variant, B.1.1.7, and the New York variant, B.1.526) and reducing efficacy of current vaccines (South Africa variant, B.1.351, Brazil variants, P.1 and P.2 and likely also the New York variant, B.1.526).<sup>12</sup> In particular, the

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<sup>10</sup> Massachusetts Department of Public Health COVID-19 Dashboard, Weekly COVID-19 Vaccination Report (Feb. 25, 2021), available at: <https://www.mass.gov/doc/weekly-covid-19-vaccination-report-february-25-2021/download>

<sup>11</sup> See Mundell, Ernie & Foster, Robin, U.K. COVID Variant May Be More Lethal, and Become Dominant U.S. Strain by March, U.S. News & World Report (Feb. 15, 2021), available at: <https://www.usnews.com/news/health-news/articles/2021-02-15/uk-covid-variant-may-be-more-lethal-and-could-become-dominant-us-strain-by-march>.

<sup>12</sup> See Wibmer, Constantinos Kurt, et. al., SARS-CoV-2 501Y.V2 escapes neutralization by South African COVID-19 donor plasma, Nature Medicine (March 2, 2021), available at: <https://www.nature.com/articles/s41591-021-01285-x> (study concluding that “sera from the Moderna and Pfizer-

E484K mutation (known as “Eeeek”) found in three variants has proven adept at undermining immune protection conferred by prior infection and vaccines. “The [‘Eeeek’] mutation may help the virus to elude detection and make neutralization by the human immune system less efficient. In effect, it makes the virus stealthier, a great concern to vaccine developers, who seek to train antibodies to zero in on recognizable invaders and destroy them.” (RA 2834, see also RA 2818-2829). And without urgent vaccination throughout the world, “...hot spots themselves will facilitate rapid evolution, giving rise to even more variants that could make the vaccinated populations susceptible to disease once again. In a recursive loop, the virus could come

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BioNTech vaccinees show significantly reduced neutralization of 501Y.V2” spike protein of the South African variant); Annavajhala, Medini, et. al, A Novel SARS-CoV-2 Variant of Concern, B.1.526, Identified in New York, Columbia University (Feb. 25, 2021), available at: <https://www.medrxiv.org/content/10.1101/2021.02.23.21252259v1> (non-peer reviewed study concluding that “E484K, plays a crucial role in the loss of neutralizing activity of some monoclonal antibodies as well as most convalescent and vaccinee sera against variant B.1.351”); and Zimmer, Carl, Virus Variant in Brazil Infected Many Who Had Already Recovered From Covid-19, New York Times (March 1, 2021), available at: [https://www.nytimes.com/2021/03/01/health/covid-19-coronavirus-brazil-variant.html?fbclid=IwAR0vllrFbnMYeidvorjA1SN9yaq4\\_L0-m\\_KscIXMzZaKxp9xiev1ezTo8SQ](https://www.nytimes.com/2021/03/01/health/covid-19-coronavirus-brazil-variant.html?fbclid=IwAR0vllrFbnMYeidvorjA1SN9yaq4_L0-m_KscIXMzZaKxp9xiev1ezTo8SQ) (The P.1 variant “gained the ability to infect some people [in Brazil] who had immunity from previous bouts of Covid-19.”)

back to haunt the vaccinated, leading to new surges and lockdowns in coming years.”<sup>13</sup>

If the government were instituting strong public health measures and most people were taking serious precautions, perhaps concern over these variants and potential total vaccine escape would appear overblown. But Department of Correction (DOC) guards and officials are not mandated to vaccinate themselves<sup>14</sup> and as of March 1, 2021, Massachusetts has eliminated any capacity limits for indoor restaurants and opened Fenway Park for Red Sox games on March 22.<sup>15</sup> Although cases and hospitalizations

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<sup>13</sup> Hamblin, James, The Brazil Variant Is Exposing the World’s Vulnerability, The Atlantic (Feb. 1, 2021), available at: <https://www.theatlantic.com/health/archive/2021/02/coronavirus-pandemic-brazil-variant/617891/>

<sup>14</sup> McKim, Jenifer, More Than Half of Mass. Corrections Have Refused COVID Vaccine, GBH News (Feb. 8, 2021), available at: <https://www.wgbh.org/news/local-news/2021/02/08/more-than-half-of-mass-corrections-workers-have-refused-covid-vaccine>

<sup>15</sup> Baker-Polito Administration Announces Plans for Continued Reopening (Feb. 25, 2021), available at: <https://www.mass.gov/news/baker-polito-administration-announces-plans-for-continued-reopening>. See also Chen, Caroline, Why Opening Restaurants Is Exactly What the Coronavirus Wants Us to Do, ProPublica (Feb. 6, 2021), available at: <https://www.propublica.org/article/why-opening-restaurants-is-exactly-what-the-coronavirus-wants-us-to-do> and Hilliard, John & Phillips, Lucas, ‘Charlie, you’re making a big mistake’: Experts criticize state’s Monday reopening, Boston Globe (Feb. 28, 2021), available at: <https://www.bostonglobe.com/2021/03/01/metro/charlie-youre-making-big-mistake-experts-criticize-states-monday-reopening/>

finally declined after millions of Americans traveled over the Thanksgiving and Christmas holidays<sup>16</sup>, they have plateaued and then slightly increased recently, prompting a stark warning from CDC Director Rochelle Walensky:

With these new statistics, I am really worried about reports that more states are rolling back the exact public health measures we have recommended to protect people from COVID-19. I understand the temptation to do this. 70,000 cases a day seemed good compared to where we were just a few months ago. But we cannot be resigned to 70,000 cases a day, 2,000 daily deaths. Please hear me clearly. At this level of cases with variants spreading, we stand to completely lose the hard-earned ground we have gained. These variants are a very real threat to our people and our progress. Now is not the time to relax the critical safeguards that we know can stop the spread of COVID-19 in our communities. Not when we are so close.

White House Covid-19 Response Team Briefing, C-Span (dated March 1, 2021), available at: <https://www.c-span.org/video/?509426-1/white-house-covid-19-response-team-briefing> (Audio at 00:1:25 - 00:2:16). Hope is here but so is uncertainty. To protect all of us, the courts must protect incarcerated people and restore COVID-19 considerations when weighing their efforts at release.

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<sup>16</sup> Muntean, Pete, Nearly a million people flew in America on Christmas Eve, CNN (Dec. 25, 2020), available at: <https://www.cnn.com/2020/12/25/business/tsa-air-travel/index.html>

## **STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE**

This is a case of first impression of such public interest that justice requires its final determination by this Court. This Court has not yet confronted whether the vaccination of incarcerated people sufficiently eliminates the danger to them such that they can no longer benefit from COVID-19 considerations on motions to stay their sentences. This Court should reject the understandable but imprudent inclination to treat the vaccine as a silver bullet where, as the CDC has warned, the coronavirus continues to successfully exploit our desire to lead a normal life again. With every loosened restriction or precaution, the coronavirus will take that opportunity to rapidly mutate and widely spread. The courts must overcome their very human but very dangerous instinct towards premature declaration of victory. This Court should return them to their overriding duty to provide justice with vigilance, using the precautionary principle as their guide so long as the pandemic threatens incarcerated people and the public.

## CONCLUSION

This Court should grant Direct Appellate Review.

Respectfully Submitted,  
WILLIAM MCDERMOTT  
By his attorney,

/s/ K. Hayne Barnwell

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Dated: March 2, 2021



## **CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2021, I served one copy of the foregoing Application for Direct Appellate Review by e-mail to:

ADA Michael McGee  
Norfolk District Attorney's Office  
45 Shawmut Road  
Canton, MA 02021  
Tel: 781-830-4956  
E-mail: [michael.p.mcgee@state.ma.us](mailto:michael.p.mcgee@state.ma.us)

/s/ Kathryn Hayne Barnwell  
Kathryn Hayne Barnwell

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this Application for Direct Appellate Review complies with Rule 20(a) of the Massachusetts Rules of Appellate Procedure. The Application was produced, using Microsoft Word for Mac Version 16.16.7, in proportional font and the Argument section consists of 1,663 words (or less than the maximum of 2,000 words) in compliance with Rules 16(k) and 20(a)&(b).

/s/ Kathryn Hayne Barnwell  
Kathryn Hayne Barnwell

**APPEALS COURT**  
**Full Court Panel Case**  
**Case Docket**

**COMMONWEALTH vs. WILLIAM MCDERMOTT**  
**2021-P-0189**

**CASE HEADER**

<b>Case Status</b>	Under Panel consideration	<b>Status Date</b>	03/01/2021
<b>Nature</b>	Murder, second degree	<b>Entry Date</b>	03/01/2021
<b>Appellant</b>	Defendant	<b>SJ Number</b>	
<b>Brief Status</b>	Awaiting blue brief	<b>Case Type</b>	Criminal
<b>Panel</b>	Henry, Sacks, Englander, JJ.	<b>Brief Due</b>	04/12/2021
<b>Citation</b>		<b>Argued/Submitted</b>	03/01/2021
<b>Lower Court</b>	Appeals Court	<b>Decision Date</b>	
<b>Lower Ct Judge</b>	Brian A. Davis, J.	<b>TC Entry Date</b>	02/17/2021
<b>FAR Number</b>		<b>SJC Number</b>	

**INVOLVED PARTY**

**Commonwealth**  
Plaintiff/Appellee  
Awaiting red brief  
Due 05/12/2021

**William McDermott**  
Defendant/Appellant  
Awaiting blue brief  
Due 04/12/2021

**ATTORNEY APPEARANCE**

[Pamela Alford, A.D.A.](#)  
[Michael McGee, A.D.A.](#)

[Kathryn Hayne Barnwell, Esquire](#)

**DOCKET ENTRIES**

Entry Date	Paper	Entry Text
03/01/2021	#1	Lower Court Assembly of the Record Package
03/01/2021	#2	Notice of entry sent.
03/01/2021	#4	Entry fee waived per 2021-J-0058
03/01/2021	#5	Copy of Memorandum of Law in Support (transferred from 2021-J-0058)
03/01/2021	#6	Copy of Appendix (IMPOUNDED) (transferred from 2021-J-0058)
03/01/2021	#7	Copy of Appendix (transferred from 2021-J-0058)
03/01/2021	#8	Copy of Lower Court Docket Sheets (transferred from 2021-J-0058)
03/01/2021	#9	Copy of Appendix (transferred from 2021-J-0058)
03/01/2021	#10	Copy of Letter with Attached Audio CD (transferred from 2021-J-0058)
03/01/2021		ORDER: The defendant has filed a notice of appeal from an order of the single justice (Milkey, J.) denying the defendant's motion to stay execution of sentence brought, in part, based on the COVID-19 pandemic. Pursuant to Appeals Court Administrative Order 20-3(III)(3)(c) the appeal is ordered expedited and is assigned to the panel of Henry, Sacks, & Englander JJ. The appeal shall be placed under consideration by this panel forthwith. The appeal is to be decided on the record before the single justice without further briefing from the parties or oral argument unless otherwise ordered by the panel. *Notice.
03/01/2021		Under consideration by Panel. (Henry, J., Sacks, J., Englander, J).

As of 03/01/2021 5:15pm

**APPEALS COURT**  
**Single Justice**  
**Case Docket**

**COMMONWEALTH vs. WILLIAM MCDERMOTT**  
**THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID**  
**2021-J-0058**

**CASE HEADER**

<b>Case Status</b>	Disposed: Case Closed	<b>Status Date</b>	02/22/2021
<b>Nature</b>	Motion for MRAP 6(b) stay	<b>Entry Date</b>	02/17/2021
<b>Pet Role Below</b>	Defendant	<b>Single Justice</b>	Milkey, J.
<b>Brief Status</b>		<b>Brief Due</b>	
<b>Case Type</b>	Criminal	<b>Lower Ct Number</b>	
<b>Lower Court</b>	Norfolk Superior Court	<b>Lower Court Judge</b>	Brian A. Davis, J.

**INVOLVED PARTY**

**Commonwealth**  
Plaintiff/Respondent

**William McDermott**  
Defendant/Petitioner

**ATTORNEY APPEARANCE**

[Pamela Alford, Assistant District Attorney](#)  
[Michael McGee, Assistant District Attorney](#)  
[Kathryn Hayne Barnwell, Esquire](#)

**DOCKET ENTRIES**

Entry Date	Paper	Entry Text
02/17/2021	#1	Motion for stay under M.R.A.P. 6(b) filed for William McDermott by Attorney Kathryn Hayne Barnwell.
02/17/2021	#2	Memorandum of law in support filed for William McDermott by Attorney Kathryn Hayne Barnwell.
02/17/2021	#3	Appendix (IMPOUNDED) filed for William McDermott by Attorney Kathryn Hayne Barnwell.
02/17/2021	#4	Appendix filed for William McDermott by Attorney Kathryn Hayne Barnwell.
02/17/2021	#5	Motion to Waive entry fee filed by William McDermott. The Motion to Waive entry fee is allowed conditionally, subject to review and further order. See G.L. c. 261, § 27C (1), (2) & (3).
02/17/2021	#6	Copy of Lower Court Docket Sheets, received from Norfolk Superior Court.
02/17/2021	#7	Appendix filed for William McDermott by Attorney Kathryn Hayne Barnwell.
02/17/2021		ORDER RE#5: Counsel's affidavit indicates that the petitioner is indigent. The court hereby allows the Motion to Waive entry fee. (Milkey, J.). Notice
02/18/2021	#8	Letter from Attorney Kathryn Hayne Barnwell re: Audio of virtual hearing in the Norfolk Superior Court on 1/13/21 submitted on attached CD.
02/22/2021	#9	MEMORANDUM AND ORDER: A Superior Court jury convicted the defendant of murder in the first degree. The conviction was for a killing that occurred in 1981, while the defendant was only seventeen years-old. On direct appeal, the Supreme Judicial Court, engaged in plenary review pursuant to G. L. c. 278, § 33E, and reduced the defendant's conviction to one for murder in the second degree (while otherwise affirming). Commonwealth v. McDermott, 393 Mass. 451, 459 (1984). Now, some four decades later, the defendant remains incarcerated.  In October of 2020, the defendant filed a motion for new trial (his second) and simultaneously filed a motion for a stay of execution of his sentence. The motion for a stay sought the defendant's release in part based on concerns related to COVID-19. After a Superior Court judge denied the motion for a stay on January 13, 2021, the defendant filed a motion requesting that I review that denial and order that he be released.

The defendant's motion is not, strictly speaking, a motion for a stay of execution pending appeal. See Mass. R. App. P. 6 (b). That is, with the defendant's motion for new trial still unresolved, there currently is no appeal pending. That said, the Supreme Judicial Court has held that a single justice of the Appeals Court may entertain review of whether a defendant is entitled to a stay pending a decision on his motion for new trial (at least in special circumstances). See *Commonwealth v. Charles*, 466 Mass. 63, 77 n.16 (2013). I therefore proceed to the merits of the defendant's motion seeking his release pending a decision on his motion for new trial.

The Superior Court judge held a hearing by Zoom, and he set forth his findings and rulings orally on the record. I have listened to an audio recording of that hearing. The judge found that the defendant posed a serious flight risk because he was still facing a life sentence and because his multiple efforts over the ensuing decades to secure his release through parole have been unsuccessful. In addition, the judge noted that there was evidence in the record of at least one attempted escape. [1] I agree with the judge's reasoning that such security concerns justify the denial of the defendant's motion for a stay of execution of his sentence. With regard to the risks posed by the COVID-19 pandemic, see *Commonwealth v. Nash*, 486 Mass. 394, 406-410 (2020), I agree with the judge that such concerns do not require a different result given that the defendant already now both has had COVID-19 and has been vaccinated.

Lest my statements be misinterpreted, I note that I respectfully disagree with the judge's conclusion that the defendant did not make a showing under the first Nash factor (whether the defendant raised at least one issue worthy of appellate review). The defendant's lead argument is that the prosecution of his case was tainted by homophobia. [2] See *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 284-289 (2009); see also *Commonwealth v. Mazza*, 484 Mass. 539, 544 n.11 (2020). The judge concluded that this argument unlikely had appreciable merit because the defendant did not press it for almost four decades, and because the Supreme Judicial Court did not address it when it conducted plenary review in the 1983 appeal. [3] In fact, the judge appears to have concluded that the Supreme Judicial Court's having conducted § 33E review, as a matter of law, precludes the defendant from raising the argument now. As the court in the interim has confirmed, § 33E review does not per se preclude a defendant from raising additional arguments in a motion for new trial. *Commonwealth v. Watkins* (No. 1), SJC- 12799, 2021 Mass. LEXIS 93 at \*7 (Feb. 11, 2021). As the court reasoned, "[n]otwithstanding the public's weighty interest in the finality of criminal convictions, we must maintain a means of addressing 'the possibility of error and of grave and lingering injustice.'" *Id.*, quoting *Commonwealth v. Randolph*, 438 Mass. 290, 294 (2002) (other citations omitted). [4]

Of course, even if the defendant's arguments are not per se precluded, one could assert that they must not have much force if they lay unappreciated until now. However, the particular nature of the defendant's argument provides a potential reason why such arguments might be said to have been hiding in plain sight. Specifically, the defendant suggests that only with changing societal norms has the full import of any latent homophobia on the fairness of his trial become apparent. In other words, the defendant is arguing that this is one of those rare circumstances where a potential defense argument actually became stronger over time as the justice system became more attuned to the subtle but pernicious effects of this sort of bias. In my view, such arguments have sufficient force to allow the defendant to meet the relatively low bar that applies to the first Nash factor. Whether the merits of his argument are sufficiently strong to entitle him to new trial is a different question. That issue is currently before the judge, and I express no opinion on it. The motion for stay of execution of sentence is denied. (Milkey, J.) \*Notice/attest/Davis, J.

Footnotes:

1. The judge discounted evidence of a second attempted escape given that, after investigating the allegation that the defendant attempted an escape, prison officials determined that no discipline was warranted.

2. The principal defense was that the older male victim, the teenage defendant's boss, demanded sex as a condition of employment, and plied the defendant with drugs and alcohol. The defendant maintained that the victim anally had raped him, and that he used the victim's own gun to shoot the victim when he began to rape him a second time. Another young employee of the victim's testified as a defense witness that the victim also had demanded sex from him. The Commonwealth rebutted the defense in great part by maintaining that the victim was not in fact gay but instead an "Air Force veteran" who was "a totally nonviolent family man." During his closing argument, the prosecutor urged the jury not to credit the testimony of the other employee, referring to that witness as "apparently a male prostitute [who] is very proud of the fact that he is gay."

3. According to the judge, the defendant made allusions to homophobia in the footnotes to his original appellate brief but did not separately raise the issue as grounds for his appeal.

4. As the defendant argues, they might be even less reason to find preclusive effect based on § 33E review where, as here, the court reduced the defendant's conviction to murder in the second degree. See Commonwealth v. Lennon, 399 Mass. 443, 450 n.7 (1987) ("[o]nce we have directed the entry of a lesser verdict, our duty to consider the record under § 33E probably no longer exists").

03/01/2021 #10 Notice of appeal filed for William McDermott by Attorney Kathryn Hayne Barnwell.

03/01/2021 Copy of paper #10 to counsel.

03/01/2021 #11 Notice of Assembly of the Record to counsel.

As of 03/01/2021 12:15pm

**8182CR78169 Commonwealth vs. McDermott, William F**

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 11/30/1981
- DCM Track:
- I - Inventory
- Initiating Action:
- MURDER c265 §1
- Status Date:
- 11/30/1981
- Case Judge:
- 
- Next Event:
- 04/02/2021

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

**Party Information**

**Commonwealth**  
- Prosecutor

[Alias](#)

**Party Attorney**

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**McDermott, William F**  
- Defendant

[Alias](#)

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[More Party Information](#)

### Party Charge Information

- McDermott, William F

- - Defendant

Charge # 1:

**265/1-0 - Felony** MURDER c265 §1

- Original Charge
- 265/1-0 MURDER c265 §1 (Felony)
- Indicted Charge
- 
- Amended Charge
- 

#### Charge Disposition

Disposition Date

Disposition

07/26/1982

Guilty Verdict

### Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
01/13/2021 03:00 PM	Criminal 1		Motion Hearing	Davis, Hon. Brian A	Held as Scheduled
04/02/2021 09:15 AM	Criminal 1		Motion Hearing	Davis, Hon. Brian A	

### Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/30/1981	Indictment returned	1	
12/01/1981	Summons returned of service	2	
02/24/1984	ORDER for preparation of transcripts re: motions heard 11/17/82 before (Irwin, J) in Boston - Caryle Ledger reporter	39	
03/06/1984	Transcript filed - re: motions heard 11/17/82		
03/09/1984	Supplemental record forwarded to S.J.C.	40	
01/11/1985	Rescript received from SJC; "Ordered-remanded to the superior court where the previous verdict and sentence are to be vacated; a verdict of guilty of murder in the second degree is to be entered, and sentence imposed thereon" dated Dec. 11, 1984-1/15/85 n/s D.A., M. Atton, D.A. Office, Atty. Finnerty and Probation		
02/05/1985	Habeas corpus for Deft at Cedar Junction MCI (Walpole) for 2/11/85	42	
02/11/1985	Continued to 3/5/85 for disposition (Dwyer, J)		
02/11/1985	Habeas corpus for Deft at Cedar Junction MCI (Walpole) for 3/5/85	43	
03/05/1985	Previous verdict of murder in first degree vacated by order of S.J.C. 3204 dated 12/11/04 - Verdict of murder in the second degree entered 3/5/85 sentenced M.C.I. Walpole - Life - Credit for time spent awaiting trial and for time spent served on natural life sentence dated 7/26/82 (Dwyer, J) Mittimus 1196 days 3/12/85 n/s M.C.I.		



	Walpole, Atty. and Deft.	
03/23/2004	Appointment of Counsel David Keighley, pursuant to Rule 53 (CPCS)	44
04/05/2004	Appearance of Deft's Atty: David Keighley for limited purpose of screening & Certificate of Service	45
07/12/2004	Status at conversion to computer July 12, 2004 (see docket book for other entries)	
07/12/2004	Appointment of Counsel David Keighley, pursuant to Rule 53	46
07/13/2004	Appearance of Deft's Atty: David Keighley	47
08/03/2004	Deft files new trial motion. affdt & memo.	48
12/13/2004	# 48 - Defendant's motion for a new trial- Comm to responsd within 45 days & motion & response to be forwarded to First Session for further handling.(Dortch-O'Kara,J) c/s R.Cosgrove.	49
01/20/2005	Motion by Commonwealth: for enlargement of Time to file Response to Defendant's Motion for a New Trial & Certificate of Service	50
01/25/2005	Motion (P#50) allowed (Barbara A. Dortch-Okara, Associate Justice)	
01/31/2005	Commonwealth files Oppositin to Defendant's New Trial Motion, Certificate of Service w/attachments - original w/Judge Dortch-Okara	51
03/25/2005	MEMORANDUM & ORDER: ON DEFENDANT'S MOTION FOR A NEW TRIAL - it is hereby ORDEREDthat defendant William McDermott's motion for a new trial is DENIED March 25, 2005 (Dortch-Okara, J) c/s D.A. & Atty.	52
03/30/2005	NOTICE of APPEAL FILED by William F McDermott - denial of his motion for a new trial	53
03/30/2005	Copy of notice of appeal mailed to Judge Dortch-Okara and Robert Cosgrove, ADA	
04/06/2005	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant.	
04/20/2005	Second copy - Notice of completion of assembly of record sent to clerk of Appeals Court	
04/29/2005	4/25/05 - Notice of Entry of appeal received from the Appeals Court 4/25/05	54
10/24/2005	Motion by Deft: for Appointment of counsel - Denied as defendant is not entitled to court appointed counsel for a parole hearing (Dortch-Okara, J) c/s Deft.	55
03/08/2006	1/12/06 - ORDER denying Motion for new trial affirmed (Greenberg, Berry & Graham, JJ.)	56
09/02/2015	Defendant 's Motion to Review, Correct, and/or Modify Sentence - Refer to CPCS for Screening (Fishman, J) J. McDermott, a.c. c/s CPCS (9/1/15)	57
09/02/2015	General correspondence regarding Certificate of Service	58
09/02/2015	Defendant 's Motion to appoint counsel c/s CPCS	59
08/14/2017	Defendant 's EX PARTE Motion for funds for a psychiatrist for proceedings before the Massachusetts Parole Board	60
08/14/2017	Affidavit filed by Defendant William F McDermott in support of ex parte motion for funds for a psychiatrist for proceedings before the Massachusetts Parole Board	61
08/24/2017	Endorsement on Motion for Funds For A Psychiatrist For Proceedings Before The Massachusetts Parole Board, (#60.0): ALLOWED at the approved CPCS rates (Cosgrove, J.) - Attest; B. Roche, Asst.Clerk - copy sent to attorney	
08/24/2017	Attorney appearance On this date Brian E Murphy, Esq. added for Defendant William F McDermott	
11/17/2017	Defendant 's EX PARTE Motion For Funds For A Psychiatrist For Proceedings Before The Massachusetts Parole Board (2nd ExParte)	62
11/17/2017	Affidavit of In Support Of Ex Parte Motion For Funds For A Psychiatrist For Proceedings Before the	63

Massachusetts Parole Board		
11/22/2017	Endorsement on Motion , (#62.0): ALLOWED The Motion is Allowed, see Diatchenko v. District Attorney for The Suffolk District, 471 Mass. 12/27/18 (2015) - dated 11/12/17 - copies sent to ada & attorney  Judge: Krupp, Hon. Peter B	
05/06/2020	Attorney appearance On this date Brian E Murphy, Esq. dismissed/withdrawn for Defendant William F McDermott	
05/06/2020	Attorney appearance On this date David Keighley, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant William F McDermott	
05/06/2020	Attorney appearance On this date Thomas E Finnerty, Jr., Esq. added for Defendant William F McDermott	
05/06/2020	Attorney appearance On this date Thomas E Finnerty, Esq. added for Defendant William F McDermott	
05/06/2020	Attorney appearance On this date Thomas E Finnerty, Jr., Esq. added for Defendant William F McDermott	
08/03/2020	Attorney appearance On this date Thomas E Finnerty, Jr., Esq. dismissed/withdrawn for Defendant William F McDermott	
08/04/2020	Attorney appearance On this date Kathryn Hayne Barnwell, Esq. added for Defendant William F McDermott	
08/04/2020	Defendant 's EMERGENCY Motion for Funds for Social Services Expert (COVID-19 Release Plan) - forwarded to Krupp, J.	64
08/04/2020	Affidavit of Kathryn Hayne Barnwell, Esq. in Support of Defendant's Emergency Motion for Funds for Social Services Expert	65
08/04/2020	Endorsement on Motion for Funds, (#64.0): ALLOWED in an amount up to \$5,000.00. See CPCS v. Chief Justice, 484 Mass. 1029, 1032 (2020).  Judge: Krupp, Hon. Peter B	
08/05/2020	Commonwealth 's Motion to Reconsider Allowance of Defendant's Post-Conviction Motion for Funds for Social Worker with Attachment (10-20-20) After review, Denied for the reasons stated in the opposition. (Docket #68) Judge Peter B. Krupp	66 <a href="#">Image</a>
08/05/2020	Affidavit of Assistant District Attorney Marguerite T. Grant in Support of Commonwealth's Motion to Reconsider Allowance of Defendant's Post-Conviction Motion for Funds for Social Worker	67
08/07/2020	Opposition to the Commonwealth's Motion to Reconsider this Court's Allowance of Funds for a Social Services Expert filed by William F McDermott with Exhibits A & B	68 <a href="#">Image</a>
08/12/2020	ORDER: Defendant shall respond in writing to Commonwealth's Motion to Reconsider Allowance of Defendant's Post-Conviction Motion for Funds by 8/21/2020. (Parties notified via email).  Judge: Krupp, Hon. Peter B	69
10/26/2020	Endorsement on Motion to reconsider allowance of Defendant's post-conviction motion for funds for social worker, (#66.0): DENIED After review, DENIED for the reasons stated in the opposition (Docket #68) dated 10/20/20  Judge: Krupp, Hon. Peter B	
10/27/2020	Defendant 's Motion for New Trial and/or Resentencing and Immediate Release as Rule 30 and/or Habeas Corpus Relief (rec'd 10/26/2020)	70 <a href="#">Image</a>
10/27/2020	William F McDermott's Memorandum in support of Defendant's Motion for a New Trial, Resentencing and Immediate Release, as Rule 30 and/or Habeas Corpus Relief (rec'd 10/26/2020)	71
10/27/2020	Defendant 's Motion to Impound his Medical Records, as Filed in his Impounded Record Appendix (rec'd 10/26/2020)	72

10/27/2020	Defendant 's Submission of Appendix in Support of Motion for a New Trial	73	
10/27/2020	Defendant 's EMERGENCY Motion for Stay of Sentence & Memorandum of Law in Support Thereof (rec'd 10/26/2020)	74	
10/29/2020	ORDER: The Commonwealth shall file its response to the Defendant's Motion for New Trial and/or Resentencing and Immediate Release as Rule 30 and/or Habeas Corpus Relief within 30 days. Cannone, RAJ. (Attorney Barnwell and ADA McGee notified via email).		
10/29/2020	ORDER: The Commonwealth shall file its response to the Defendant's Emergency Motion for Stay within 30 days. Cannone, RAJ. (ADA McGee and Atty Barnwell notified via email).		
10/29/2020	Endorsement on Motion to Impound His Medical Records, as Filed in His Impounded Record Appendix, (#72.0): ALLOWED Parties notified via email.		
11/16/2020	Commonwealth 's Motion to Enlarge and Certificate of Service-Filed on 11/16/20	75	<a href="#">Image</a>
11/18/2020	Endorsement on Motion to enlarge, (#75.0): ALLOWED dated 11/18/20 Copies mailed  Judge: Cannone, Hon. Beverly J		<a href="#">Image</a>
12/01/2020	Defendant 's EMERGENCY Motion to expedite the Commonwealth's Response and the Court's Hearing on his Motion to Stay Sentence and Supplemental Motion to Stay Sentence (with Counsel's Affidavit)	76	<a href="#">Image</a>
12/01/2020	General correspondence regarding Special Master's Weekly Report dated November 25,2020 (CPCS v. Chief Justice of the Trial Court; SJC-12926)	77	<a href="#">Image</a>
12/01/2020	General correspondence regarding Department of Correction (DOC) Covid-19 Inmate Data by Facility Report dated November 27, 2020	78	<a href="#">Image</a>
12/01/2020	General correspondence regarding DOC Covid-19 Data by Facility Staff Data Covid-19 Positives Report dated November 27, 2020	79	<a href="#">Image</a>
12/08/2020	ORDER: The Commonwealth must respond to Defendant's Emergency Motion to Expedite the Commonwealth's Response and the Court's Hearing on His Motion to Stay Sentence and Supplemental Motion to Stay Sentence (Paper #76) by January 6, 2021. Hearing on the motion scheduled for January 13, 2021 at 3:00 p.m. Cannone, RAJ. (Parties notified via email).		
12/14/2020	Defendant 's Motion to Impound His Supplemental Medical Records In Support Of His Motion For New Trial And ReSentencing As Well As His Motion To Stay His Sentence	80	<a href="#">Image</a>
12/14/2020	Defendant 's Certificate of Service	81	<a href="#">Image</a>
12/14/2020	Medical Records received from Lemuel Shattuck Hospital	82	
12/28/2020	Defendant 's Certificate of Service - Special Master's Report dated 12/24/2020.	82.1	
01/04/2021	Defendant 's Certificate of Service - Special Master's Report dated 12/31/2020).	83	
01/06/2021	Habeas Corpus for defendant issued to North Central Correctional Center returnable for 01/13/2021 03:00 PM Motion Hearing. <a href="https://www.zoomgov.com/j/1603867810">https://www.zoomgov.com/j/1603867810</a> Meeting ID: 160 386 7810 Dial by your location: 646 828 7666	84	
01/06/2021	Opposition to to motion to stay sentence and supplemental motion to stay sentence and certificate of service filed by Commonwealth filed 1/6/21	85	
01/13/2021	Event Result:: Motion Hearing scheduled on: 01/13/2021 03:00 PM Has been: Held as Scheduled Hon. Brian A Davis, Presiding		
01/15/2021	Endorsement on Emergency motion for stay of sentence & memorandum of law in support thereof-After a virtual hearing, this motion is DENIED for the reasons stated on the record of the hearing. Judge Davis on 1/13/21, (#74.0): DENIED		<a href="#">Image</a>
01/15/2021	Habeas Corpus for defendant issued to North Central Correctional Center returnable for 04/02/2021 09:15 AM Motion Hearing. Via ZOOM	86	
01/20/2021	Defendant 's Motion to obtain copy of audio recording of virtual hearing on defendant's motion to stay execution of his sentence-Filed on 1/20/21	87	

01/20/2021	Endorsement on Defendant's motion to obtain copy of audio recording of virtual hearing on defendant's motion to stay the execution of his sentence-ALLOWED by Judge Cosgrove, attest: S. Irwin, Clerk, on 1/20/21, (#87.0): ALLOWED		<a href="#">Image</a>
02/02/2021	Docket Note: CD of proceedings held on January 13, 2021 in courtroom 1-Sent to Defense Attorney on 2/2/21		
02/24/2021	Notice of docket entry received from Supreme Judicial Court RE: 2021-J-0058  Motion to stay under M.R.A.P. 6(b) filed for William McDermott by Attorney Kathryn Hayne Barnwell.	88	<a href="#">Image</a>
02/24/2021	MEMORANDUM & ORDER:  RE: 2021-J-0058  The motion for stay of Execution of Sentence is DENIED by J. Milkey on 2/22/21  Judge: Cannone, Hon. Beverly J	89	<a href="#">Image</a>
02/24/2021	Defendant 's Motion Copy of All documents sent APPEALS Court: ON CD (IMPOUNDED)  to Stay the execution of his sentence with Addendum, supporting Memorandum of Law, IMPOUNDED Record Appendix; and Public Record Appendix-on CD sent by Defense Attorney K. Hayne Barnwell on 2/21/21.	90	<a href="#">Image</a>

### Case Disposition

<a href="#">Disposition</a>	<a href="#">Date</a>	<a href="#">Case Judge</a>
Disposed by Jury Verdict	07/26/1982	