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April 1, 2020

Via Tylerhost
Supreme Judicial Court
Clerk's Office for the Commonwealth
Clerk Francis V. Kenneally
John Adams Courthouse,
1 Pemberton Square, Suite 1400
Boston, MA 02108

Re: **Committee for Public Counsel Services & another vs. Chief Justice of the Trial Court & others, SJC-12926**

Dear Clerk Kenneally:

We are writing pursuant to Mass. R. App. P. 16(l) and Mass. R. App. P. 22(c)(2) to provide additional authorities and reference points in response to the Justices' solicitations during the March 31, 2020 oral argument in the above-referenced case with respect to both the policies being pursued in our sister jurisdictions concerning convicted and sentenced inmates and the separation-of-powers implications of the Special Master's Report and Recommendation as it pertains to that same prisoner population.

Guidance from Other Jurisdictions

The COVID-19 pandemic presents an unprecedented challenge for custodial sentencing. While the pandemic is unprecedented, the Court is not without potentially helpful guidance from without its borders. For example, on March 22, 2020, the New Jersey Supreme Court issued a Consent Order that provided for, among other things, commutation and suspension of certain county jail sentences (while preserving an opportunity for prosecutors to object in individual cases).[1] Like the Special Master's Report and Recommendation here, the New Jersey Consent Order resulted from mediation involving multiple stakeholders in the criminal justice system.[2] It

[1] The full order is available at https://www.njcourts.gov/notices/2020/n200323a.pdf?c=cKC (last accessed March 31, 2020). It was amended by a supplemental order available at https://www.njcourts.gov/notices/2020/n200323b.pdf?c=t9V (last accessed March 31, 2020).

[2] The legal merits of the original petition for relief filed in New Jersey were not litigated because the parties instead came to an agreement akin to the one at issue here, but it appears that the request for relief was based on Article VI of the New Jersey Constitution, which grants to the New Jersey Supreme

was motivated, in part, by "the profound risk posed to people in correctional facilities arising from the spread of COVID-19."

Responses in other states are developing rapidly, sometimes featuring action on the part of the judiciary as well as executive branch initiatives. In California, Chief Justice Tani G. Cantil-Sakauye, citing "constitutional and due process rights of court users," "strongly encourage[d]" county superior court presiding judges and court executive officers to work with local justice system partners to identify inmates in county jail or juvenile hall custody who have fewer than 60 days remaining on their sentences for the purpose of modifying their sentences to permit early release.[3] Similarly, the California Department of Corrections and Rehabilitation is expediting the transition to parole for eligible inmates who have 60 days or less to serve on their sentences (and are not serving sentences for certain excluded crimes), estimating "that up to 3,500 incarcerated persons would be eligible for an expedited transition to parole."[4] At the same time, California's governor is reportedly opposing emergency court orders to release prisoners in litigation filed on behalf of inmates and still pending before a 3-judge panel in federal court.[5] This emergency motion, brought pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626, and alleging Eighth Amendment violations, will be heard on April 2, 2020.[6]

In Pennsylvania, "622 inmates ha[ve] been approved by the courts for release and physically discharged by the jail[.]"[7] Likewise, in Iowa, the courts are reviewing motions to reduce sentence on a case-by-case basis.[8] Other states, such as North Dakota and Oklahoma, have seen the executive branch take action to release inmates serving their sentences. In North Dakota, "[t]he state parole board approved during a special meeting Friday, March 20,

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Court superintendence of the administration of the lower courts. See NJ Const. Art. 6, § 2. The Chief Justice of the New Jersey Supreme Court, who issued the above-referenced Consent Order, is responsible for the administration of all courts in the state pursuant to the State Constitution. See NJ Const. Art. 6, § 7.

[3] The Chief Justice's advisory is available at https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures (last accessed March 31, 2020).

[4] See https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/ (last accessed March 31, 2020).

[5] THE SACRAMENTO BEE, *California granting early release to 3,500 inmates, says no order needed to force more over virus*, available at https://www.sacbee.com/news/local/crime/article241646781.html.

[6] See https://prisonlaw.com/wp-content/uploads/2020/03/Dkt-6522-3JC-Pls-Emergency-Mtn-to-Modify-Pop-Reduction-Order-MPA-ISO-03-25-20-0489-3.pdf (last accessed April 1, 2020)

[7] PITTSBURGH'S ACTION NEWS 4, *Over 600 inmates released from Allegheny County Jail due to coronavirus concerns*, available at https://www.wtae.com/article/inmates-released-from-allegheny-county-jail-due-to-coronavirus-concerns/31953103.

[8] DES MOINES REGISTER, *"Prisons and jails are literally petri dishes": Inmates released, arrests relaxed across Iowa amid fears of coronavirus*, available at https://www.desmoinesregister.com/story/news/crime-and-courts/2020/03/23/coronavirus-iowa-jail-prison-inmates-released-amid-fears-covid-19-virus-polk-county-des-moines/2891117001/.

the release of 56 prisoners as part of a population mitigation plan[.]"[9] In Oklahoma, "200 nonviolent, low-level offenders have been released from the Oklahoma County jail."[10] As these other states' experiences illustrate, the practices of other jurisdictions are an inherently imperfect guide given the distinct rules and procedures applicable[11] and the freedom of criminal justice stakeholders in those jurisdictions (including elected officials) to adopt divergent policy positions.

Separation of Powers & Stays of Execution of Sentences

The established criminal justice rules and procedures already in use in the Commonwealth offer further guidance and confirm that the judiciary's legitimate interests under art. 30 of the Massachusetts Declaration of Rights in the fate of sentenced defendants do not end at the pronouncement of sentence. The trial and appellate courts of the Commonwealth have an obvious and ongoing interest in the justness of all sentences imposed following criminal conviction. This much is clear from the Rules of Criminal Procedure concerning, inter alia, revision and revocation of sentence (Rule 29), release from unlawful restraint (Rule 30(a)), and stays of execution of sentence (Rule 31). See also Mass. R. App. P. 6(b). Indeed, while Mass. R. Crim. P. 29 ordinarily imposes temporal limits on a motion to revise and revoke, there is no such limitation for a Rule 30(a) motion, which can be brought "at any time." With respect to stays of execution, the Reporter's Notes (2009) to Rule 31 explain that "[t]he trial judge may entertain a motion for a stay either before or after the entry of an appeal" and, citing Commonwealth v. McLaughlin, 431 Mass. 506, 518 (2000), intimate that, while the rule "does not address stays of execution of a sentence when an appeal is not pending," a judge may have the inherent power to stay a sentence for other reasons. This Court later confirmed this inherent power to stay sentences. See Commonwealth v. Charles, 466 Mass. 63, 72 (2013), quoting McLaughlin, 431 Mass. at 520, quoting Mariano v. Judge of Dist. Court of Cent. Berkshire, 243 Mass. 90, 92 (1922) ("[A] judge has the inherent power to stay sentences for 'exceptional reasons permitted by law'").

The judiciary's routine, ongoing interest in ensuring that sentences being served by convicted defendants are consistent with the federal and state constitutions, the statutory and common law of the Commonwealth, and principles of justice more broadly does not violate the separation of powers. See Commonwealth v. Rodriguez, 461 Mass. 256, 262-266 (2012) (judge does not "'exercise the ... executive powers' and thereby violate art. 30 of the Massachusetts Declaration of Rights by revising or revoking a sentence under rule 29" where, after agreed recommendation in plea agreement, "judge timely determines, based on

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[9] THE DICKINSON PRESS, *North Dakota paroles 56 prisoners early amid pandemic, including 3 convicted of sexual assault*, available at https://www.thedickinsonpress.com/news/crime-and-courts/5009882-North-Dakota-paroles-56-prisoners-early-amid-pandemic-including-3-convicted-of-sexual-assault.

[10] THE OKLAHOMAN, *Coronavirus in Oklahoma: Over 200 nonviolent offenders released from Oklahoma County jail to limit COVID-19 spread*, available at https://oklahoman.com/article/5658504/coronavirus-in-oklahoma-over-200-non-violent-offenders-released-from-oklahoma-county-jail-to-limit-covid-19-spread?. Of note, "[n]o inmates with violent charges, including domestic violence, robbery or sex crimes, or charges related to possession of a firearm, were considered" for release.

[11] For example, according to the California Chief Justice's advisory (see note 3, supra), judicial authority in California is uniquely decentralized, with each of its 58 superior courts empowered to establish and maintain its own court operations.

new information or further deliberation, that the lesser sentence better serves the interest of justice" as "judge simply exercised a quintessential judicial power—the power to sentence—and ultimately concluded that the agreed recommendation was more severe than justice permitted").[12]

This Court has previously recognized the potentially overlapping interests of the judiciary, legislature, and executive branch in a case specifically involving sentencing. See Commonwealth v. Jackson, 369 Mass. 904, 921 (1976), quoting LaChapelle v. United Shoe Mach. Corp., 318 Mass. 166, 170 (1945) ("Although the separation of powers doctrine is fundamental to our form of government, and it must be maintained to its full extent, 'the exact line between judicial and executive or legislative powers has never been delineated with absolute precision'"). Sentencing, in particular, is an area where all three branches have proprietary interests. See Commonwealth v. Dascalakis, 246 Mass. 12, 20 (1923) ("Doubtless the court has power to enforce the execution of sentence by appropriate process, but execution of sentence is in its essence an executive or ministerial and not a judicial function").[13] While the Jackson Court concluded that "[t]he ability to defer the imposition of sentence, although a valuable feature in our legal system, is not necessary to the very existence of a court, and, as such, is not an inherent power beyond statutory limitation" by the legislature, 369 Mass. at 922, it assumed that these powers were of common law origin and its analysis based on that assumption, 369 Mass. at 920-924, indicates that overlapping sentencing prerogatives would not present constitutional concerns unless the judiciary were to seek to exercise common law sentencing powers in the face of a specific statute modifying or abrogating those powers.[14] No such concern is presented by case-by-case adjudication of the justness of individual sentences in the midst of a pandemic.

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[12] Ordinarily, of course, "a judge under rule 29 may 'reconsider the sentence he has imposed and determine, in light of the facts as they existed at the time of sentencing, whether the sentence was just.'" Rodriguez, 461 Mass. at 260, quoting Commonwealth v. McCulloch, 450 Mass. 483, 487 (2008) (emphasis added).

[13] More recently, this Court has recognized (i) that judges have "the authority to decide the length of a defendant's sentence, provided that it is within the limits set forth by the statute under which the defendant has been convicted" and that "in the exercise of her sentencing discretion, the judge may consider a variety of factors including the defendant's behavior, family life, employment history, and civic contributions, as well as societal goals of punishment, deterrence, protection of the public, and rehabilitation" but also that (ii) "[g]enerally, however, once a judge has sentenced a defendant, authority over the defendant passes from the judicial branch to the executive branch of government in that the defendant becomes subject to the sheriff's control." Commonwealth v. Donohue, 452 Mass. 256, 264 (2008) (quotations and citations omitted). In deciding the case on statutory grounds, however, the Donahue court avoided addressing the constitutional limits of a sheriff's "authority under art. 30 to set the conditions of an inmate's incarceration" when those conditions conflict with a sentencing judge's interpretation of her sentence.

[14] In some cases, the Legislature has endorsed the judicial power to suspend even parts of sentences. See G.L. c. 279, § 1 ("When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix"). But even where the Legislature has restricted judicial discretion to suspend sentences across a range of cases, e.g., G.L. c. 127, § 133, it has not, and constitutionally could not, seek to limit the courts' obligation to ensure that all sentences comport with due process.

The legal steps necessary to ensure the continuing justness of carceral sentences in the face of COVID-19 may not fit neatly into any pre-existing procedural mechanism or substantive doctrine. For example, the commendable efforts of the Department of Correction and Sheriffs' Offices across the Commonwealth to protect inmates preclude any suggestion of "deliberate indifference," and sentencing judges cannot have realistically been expected to revise and revoke sentences within Rule 29's sixty days based on a previously unfathomable public health crisis. But the courts can nonetheless provide the same individualized assessment of the justness of ongoing incarceration that they always have (under various mechanisms from Rule 29 to Rule 31 to G.L. c. 211, § 3) without violating art. 30.[15] Such assessments may reflect, inter alia, whether state prisons and houses of correction in which a deadly virus could spread with ease still comport with the legislative conceptions of such correctional institutions underlying the penalties established for various crimes (including, specifically, their rehabilitative objectives). See G.L. c. 125, § 1 (defining "correctional facility" as "any building, enclosure, space or structure used for the custody, control and rehabilitation of committed offenders and of such other persons as may be placed in custody therein in accordance with law"). It could also involve consideration of whether certain inmates (e.g., those scheduled for release in the very near future) are already entitled to the protection of state action designed to minimize the spread of the virus among the general, non-incarcerated public that they will soon be joining. At the very least, there can be no doubt that courts have the authority to stay the sentences of any defendants while the merits of any such claims are evaluated in the "exceptional circumstances" presented by COVID-19. See Charles, 466 Mass. at 72, 75.

Please bring this letter to the Court's attention. If you have any questions, please contact our offices. Thank you for your attention to this matter.

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[15] Along these lines, the Commonwealth proposes the following amendment to Rule 29, which would eliminate any separation-of-powers concerns and alleviate objections to both the timeliness and revision mechanism of any Rule 29 motion:

> ***Rule 29(f) - COVID-19 Emergency Release***
> ***The following provision shall be in effect for the duration of the COVID-19 State of Emergency declared by Governor Charlie Baker on March 10, 2020, and a judge's authority to entertain motions shall terminate when the State of Emergency is lifted. A trial judge, upon the written motion of the prosecutor or a qualifying defendant pursuant to the terms [outlined in Section III of the Special Master's Settlement Agreement], and after concluding by a preponderance of the evidence that any risks to public safety posed by the defendant's release can be effectively managed through the imposition of appropriate conditions, may temporarily stay the sentence of said defendant and order his or her release subject to appropriate conditions of release. A defendant released pursuant to this provision shall be ordered to return to custody within fourteen (14) calendar days after the COVID-19 State of Emergency is lifted in the Commonwealth unless otherwise ordered.***

Sincerely,

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cc: Service Contacts listed on Certificate of Service (via email)

CERTIFICATE OF SERVICE

Re: Committee for Public Counsel Services et al. vs. Chief Justice of the Trial Court et al., SJC-12926

I, ADA Thomas D. Ralph, hereby certify that on this day I served this Letter Pursuant to Mass. R. App. P. 16(l) and Mass. R. App. 22(c)(2) on the following individuals by sending an electronic PDF copy of the same to their listed electronic mail addresses:

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Dated: April 1, 2020