



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF THE TRIAL COURT
LEGAL DEPARTMENT
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Daniel P. Sullivan
General Counsel

April 8, 2020

Francis V. Kenneally, Clerk
Supreme Judicial Court for the Commonwealth
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

RE: **CPCS et al. v. Chief Justice of the Trial Court et al., No. SJC-12926**

Dear Clerk Kenneally:

Recognizing that the Court ruled in the above-referenced matter on April 3, 2020, the Trial Court submits this letter to the Justices in response to Attorney Rebecca Jacobstein of the Committee for Public Counsel Services' April 2, 2020 letter to this Court ("Petitioners' Letter"). The Petitioners' Letter was filed pursuant to Mass. R. App. P. 22(c). In the interest of the accuracy of the record, the Trial Court here provides relevant background on Trial Court Counsel's statements at oral argument that Petitioners' Letter seeks to discredit. Those statements concerned the Trial Court departments' belief that timely disposition of motions for bail reconsideration or for release based on other grounds was occurring during this crisis.

Missed Opportunities

In footnote 1 of Petitioners' Letter, Ms. Jacobstein quotes undersigned counsel's following statement: "I don't think it's accurate that there's been delay as far as I know in the hearing of any of these motions." Ms. Jacobstein further quotes undersigned counsel's statement that "What the chief justices of both the district and the superior court have told me is that these motions are being promptly heard." Both quoted statements arose as a result of Ms. Jacobstein's client, CPCS, having failed to provide any example of a delayed motion hearing in response to direct requests for such information from Trial Court Chief Justices.

Chief Justice Paula Carey and Chief Justice Paul Dawley directly and separately requested that two highly placed leaders at CPCS inform them if CPCS attorneys experienced any delay in the hearing of motions for release (*i.e.*, motions for bail review or any other motion

citing the pandemic as a basis or factor supporting release).¹ Chief Justice Dawley made that same request on more than one occasion. Neither CPCS leader provided a single example to Chief Justice Carey or Chief Justice Dawley of such a motion hearing's having been delayed. Nevertheless, within 48 hours of the close of the March 31, 2020 oral argument in this matter, Ms. Jacobstein produced a detailed and apparently exhaustive list of motions that, according to CPCS, the Trial Court has not promptly heard. CPCS does not state the source of this information. The facts reported below, and in the attached chart of the identified District Court matters, cast doubt upon the reliability of specific information in CPCS's chart.

If CPCS had undertaken this survey of its attorneys or their clients for allegations of delay before filing its petition, the Trial Court Chief Justices would have exercised their authority to ensure that the courts promptly scheduled hearings of those motions. The efficient and constructive resolution of these matters lay in mutually respectful cooperation and the painstaking work of examining specific administrative and scheduling issues and resolving them. The Trial Court Chief Justices explicitly conveyed their readiness to engage in that process to the CPCS leaders but were left in the dark with respect to the claimed delays that CPCS now presents simultaneously to this Court and the Trial Court.

Purportedly Delayed Motions Not Filed as "Emergency"

First, only 6 of the 39 motions on CPCS's chart were denominated "emergency" motions. (Five other motions were styled "for immediate release.") Nevertheless, with respect to the remaining 28 motions for which the courts had no notice of an emergency, clerks could not reasonably be expected to parse whether motions for bail reconsideration or review of a dangerousness finding relied upon COVID -19 grounds.² Further, while CPCS lists 7 motions as having been delayed for 3 or 4 days, only 1 of the 7 was denominated an emergency. A court's scheduling a hearing within 3 or 4 days of the filing of a non-emergency motion hardly constitutes delay.

Limited Review

A recitation of the details of each of the cases in which CPCS claims there has been delay is not practicable in the permissible time for this response. In addition to noting some of the factual inaccuracies in CPCS's chart, the examples below demonstrate that the affected Trial Court Chief Justices had no practicable way to know of the scheduling complexities affecting specific cases.

The checking of CPCS's examples of delay that undersigned counsel has conducted has revealed that some of the information in the chart is questionable. In some cases, court closures have certainly affected scheduling. In other cases, the CPCS chart does not include relevant background such as clarifying facts and procedural issues. The further examples of CPCS's omission (or possibly unawareness) of pertinent factual and procedural details, provided below, may prove informative.

¹ The Trial Court does not name the referenced CPCS leaders to avoid unnecessarily personalizing this organizational dispute.

² In light of the changes being implemented under this Court's April 3, 2020 decision in the instant matter, clerks' staffs likely will be more alert in the months ahead than they otherwise might have been to motions' salient reference to the COVID-19 crisis.

Superior Court Examples

In Worcester Superior Court, CPCS describes the case of *Commonwealth v. Yang*, 1385CR01137, as “emblematic of our experiences, which demonstrate repeated instances of hearing delays.” Petitioners’ Letter at 1. In response, the Worcester District Attorney’s Office promptly filed a letter with this Court explaining that the Superior Court Clerk’s Office contacted the Assistant District Attorney and defense counsel to arrange a video hearing of the motion in *Yang* on the same day that the court received the opposition by email. The Worcester Trial Court complex’s having been closed to all persons, including employees, from Tuesday, March 24, 2020 until Monday, March 30, 2020 due to potential contamination from the COVID-19 virus, further complicated scheduling.

In *Yang*, CPCS further claims that the court advised an attorney with a respiratory condition that he must appear in person. No one in the Clerk’s Office corroborates that report, and that has never been the court’s practice. When that motion was filed (CPCS states: March 26; MassCourts records: March 30), the court’s practice was to advise defense counsel to speak to the District Attorney and attempt to agree upon a date. The court would then schedule a date upon which counsel had agreed. The court would offer counsel the option to appear personally. If either attorney chose not to appear, the court would conduct the hearing by telephone or video link.

Given this practice, the court cannot corroborate that a member of its staff required an attorney with chronic respiratory illness to appear in person. If a motion for an emergency stay of sentence, which was based on COVID-19 concerns and filed on March 30, was not scheduled for hearing until April 8, the Administrative Office of the Superior Court was not aware of that scheduling on the day of oral argument in this case. In any case, CPCS’s chart does not address whether the availability of counsel affected that scheduling.

In another Worcester Superior Court case (1985CR00180), the CPCS chart reports an 8-day delay between filing of a motion and its disposition but MassCourts records neither the filing of the motion nor its disposition. Similarly, for two other Worcester Superior Court cases (1885CR00443 & 1985CR00396) (same defendant) MassCourts records no motion filed although the CPCS chart asserts filing and indefinite delay.³

Concerning a Middlesex Superior Court case (1781CR00548), the CPCS chart reports that a motion was filed on March 30 and not scheduled for hearing until April 3. MassCourts records that the motion was filed on April 2 and heard and decided the next day on April 3.

The CPCS chart identifies a Hampden Superior Court case as docket no. 1923CR04101. The docket number is incorrect and, therefore, the Trial Court cannot access any information on the case. However, the CPCS chart states that defense counsel received a telephone call from the judge that he or she was “on the record with the ADA and the ADA agreed to release.” That conversation reportedly occurred on the fifth day after defense counsel filed the motion. A judge

³ MassCourts, upon which the current review necessarily relies under the current crisis, contains no record of a number of the motions listed on CPCS’s chart. In at least some of these instances, docketing in MassCourts could have been delayed by a court closure or by the significant reduction in on-site court staff that the crisis necessitated. These events undercut CPCS’s implication that the Trial Court either deliberately or negligently understated delays of these motions during the SJC oral argument. Especially if docketing in MassCourts was delayed as a result of the developing crisis, court leaders may not have immediately become aware of the kinds of delays that CPCS asserts the Trial Court understated during oral argument.

calling defense counsel while he or she is on the record with opposing counsel to report the prosecution's agreement to a defense motion cannot be fairly cast as delaying disposition of the motion.

As a practice in Hampden County, the Superior and District Court Clerks' Offices and individual defense counsel schedule hearings on motions for release, such as bail reconsideration motions, by agreement. The District Attorney's Office agrees to any hearing date upon which the Clerk and defense counsel agree. The duty-day Assistant District Attorney in each of Hampden County's criminal courts then appears for each hearing. Thus, the courts schedule the hearings based largely on the schedules of individual defense counsel. If defense counsel is not available until a given date, CPCS cannot fairly allege that the court has delayed the hearing.

The broader point is that, with respect to the 28 motions on the CPCS chart that were not denominated emergencies or "motions for immediate release" (71.8%), scheduling could well have depended on the schedules of defense counsel, who had not identified the motions as emergencies or requiring immediate action. None of those motions would have registered as delayed in the Administrative Office of the Superior Court even if such case-specific data could have been analyzed.

Incomplete or Inaccurate District Court Data

The Administrative Office of the District Court has provided the attached chart. See appended Exhibit A. It shows, among other facts, that the filing of 10 of the 17 purportedly delayed District Court motions⁴ was not docketed in MassCourts. Candidly, in several such instances, the MassCourts docket did not appear to be current. In one of those cases, the motion was not docketed in MassCourts even though CPCS reports that the motion was scheduled and heard and bail was set. Court closures may also have unavoidably delayed the docketing of some of the listed motions. In any event, the Chief Justices would have had no way to know of such case-specific docketing delays in reporting on prevailing conditions to this Court at oral argument.

In a Pittsfield District Court case (1927CR002192), the CPCS chart reports: "[t]his attorney filed a motion on April 1 that has **not yet been scheduled**" (bold in original). The chart therefore reports the delay as "Indefinite." Although the filing date is correct, the court heard and allowed the motion two days later on April 3. That timely hearing and disposition vitiated CPCS's anticipatory April 2 claim of delay.

The sole Peabody District Court case on the CPCS chart (1857CR001114) is identified by docket no. 1857CR001114. As that is not the correct docket number, the Trial Court could access no information on whatever case the CPCS chart describes.

Boston Municipal Court and Juvenile Court

As the CPCS chart includes only a single example of purported delay in the Boston Municipal Court and the Juvenile Court, those matters can be individually addressed.

⁴ Where the CPCS chart lists two or more docket numbers for a single motion, the docket numbers are associated with a single defendant for whom defense counsel would have filed a single motion.

The Sole BMC Case Cited

The CPCS chart includes a single case in the Brighton Division of Boston Municipal Court, docket number 2020CR76. Following that entry, the chart notes:

Client needed to be arraigned on warrant. His attorney filed a motion to vacate warrant and arraignment on March 19. It was not heard until March 30, at which a bail was set and he posted it.

The chart then attributes 11 days of delay to this series of events.

A search of MassCourts reveals that docket number 2020CR76 is not a Brighton Division case. Docket number 2008CR76 in the Brighton Division of the BMC was last heard in February 2020 and involves motor vehicle violations for which no bail was imposed.

In response to an inquiry, Attorney Jacobstein subsequently told BMC Counsel that the intended case is docket number 2002CR000767 in the Roxbury Division of the BMC; however, MassCourts includes no reference to any motion being filed in that case on March 19, 2020, nor does it record a hearing occurring on March 30, 2020. In brief, after a MassCourts search, BMC Counsel could find no case matching the docket numbers provided in either the Roxbury or Brighton Division that fits CPCS's description.

The Sole Juvenile Court Cited

Based on a review of the Springfield Juvenile Court's file, Clerk Donald Whitney reports that defense counsel has misstated the course of events in the allegedly delayed hearing of a motion for bail review in CPCS's chart. (The chart provides no docket number but the Clerk was apparently able to identify the case described.)

The court ruled on the defendant's first motion on March 24, 2020 within 24 hours of its filing. Defense counsel did not file a motion for reconsideration until 6 days later on March 30, 2020. Until that submission, defense counsel had consistently communicated directly with, and received communications from, Clerk Whitney's email. In this instance, defense counsel unexpectedly sent her motion for reconsideration to the Juvenile Court's general mailbox, which currently receives hundreds of emails each week. As a result of that unanticipated means of *ad hoc* electronic filing, the court did not recognize that it had received the defendant's motion for reconsideration for 4 days.⁵ In addition to that time, defense counsel had taken 6 days to draft the motion for reconsideration. The courthouse that houses the Springfield Juvenile Court (80 State Street) is now closed until April 9, 2020.⁶ Petitioners cannot fairly attribute that sequence of delays and miscommunication to the Juvenile Court.

⁵ In contrast, Patrick Sparks, the Attorney-in-Charge of the Springfield Youth Advocacy Division, has communicated concerning emergency matters directly to Clerk Whitney's email throughout the shutdown. The Juvenile Court has responded to most, if not all, of those matters within 24 hours.

⁶ The Trial Court recognizes the need for closed courthouses to designate or establish email addresses that the affected Clerks' Offices will monitor to schedule hearings of emergency motions for release by telephone or video link. The departmental administrative offices are overseeing that work.

Conclusion

The Trial Court submits this letter to clarify for the Court that Trial Court counsel Daniel Sullivan's above-quoted statements during oral argument of this matter accurately reflected his clients, and therefore his, understanding of the prompt processing of motions for release based upon COVID-19 concerns in the Trial Court. To the extent that there were exceptions to that expedited docketing and processing in specific cases, those exceptions may have resulted from defense counsel's not designating their clients' motions as emergencies; courthouses' temporarily closing; or moving parties' improvising methods of electronic filing. In addition, examination of the cases that CPCS has belatedly identified as delayed shows that some of the listed motions were not associated with correct docket numbers or court divisions or lacked other relevant facts or clarifying procedural descriptions. While such errors and oversights may be understandable in the apparently hurried preparation of the CPCS chart, such unreliable, erroneous or incomplete data cannot support an implication that Trial Court counsel misrepresented the Trial Court's perception of its court departments' diligence in hearing COVID-related emergency motions. Undersigned counsel reported in good faith and with appropriate qualification ("as far as I know") on his clients' best (though admittedly not granular) information on the prevailing conditions and practices in the affected Trial Court departments when he addressed this Court. Although afforded multiple opportunities, CPCS leadership did not report the more detailed information on delayed hearings that it now purports to have to the Trial Court. In light of the foregoing, CPCS's characterization of Trial Court counsel's above-quoted statements to conjure the specter of disingenuousness is unjustified.

Very truly yours,

/s/ *Daniel P. Sullivan*

Daniel P. Sullivan

Enclosures

cc: Hon. Paul M. Carey, Chief Justice of the Trial Court
Hon. Paul C. Dawley, Chief Justice of the District Court
Hon. Roberto Ronquillo, Jr., Chief Justice of the Boston Municipal Court
Hon. Amy L. Nechtem, Chief Justice of the Juvenile Court
Edward J. Dolan, Commissioner of Probation
Counsel of record

Exhibit A

Court	Docket	Observations
Chelsea	1914CR002659 2014CR000207	Defendant ordered held without bail on 3/5; 3/25, emergency assented-to motion to vacate bail revocation docketed and denied.
Springfield	1923CR7502	Bail set at \$25,000 on 2/19. Filing date of motion to revise/revoke bail not docketed. Bail reduction denied on 3/31. MassCourts shows that mittimus issued on 3/31
Springfield	1923CR2994 1923CR7293 1923CR7469	Emergency motion to reconsider dangerousness and bail "filed and denied" on 4/2. No motion filing docketed in MassCourts on 3/19 as asserted. Emergency motion to reconsider probation due to COVID-19 allowed on 4/3; defendant committed in lieu of \$500 bail.
Lynn	1813CR002753	No motion docketed in MassCourts
Holyoke	1917CR002235	No motion filing docketed in MassCourts despite commitment order on 4/1.
Pittsfield	1927CR2203	Motion for immediate release filed and DENIED on 3/24; case brought forward on 3/26 and motion for release ALLOWED based on COVID- 19
Pittsfield	1927CR2192 1927CR2561	Motion for release based on COVID=19 docketed on 4/2; heard and allowed on 4/3
Springfield	2023CR00494	Bail set on 3/23 at \$100,000 No motion docketed in MassCourts
Lynn	1613CR1838	Motion for immediate release filed and denied on 3/24.
Hingham	1958CR000766 1958CR001748 1958CR001810	Bail revoked on 3/5. No motion to reconsider docketed in MassCourts; bail revisited on 3/31. Defendant held on dangerousness 58A on 3/31.

Marlborough	1921CR1301	Emergency motion for bail reduction heard and denied on 3/27; no separate filing date docketed
Milford	1666CR000653	No motion docketed in MassCourts.
Dedham	2054CR0170	Motion to review bail filed 3/23; pending
Peabody	1857CR001114	Incorrect docket; no information
Springfield	2023CR1616	Held without bail on dangerousness. No motion docketed in MassCourts.
Lynn	2013CR000549	Held without bail on dangerousness; No motion docketed in MassCourts.
Lynn	2013CR000641	Bail set on 3/31 at \$2,000 No motion docketed.