COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES & ANOTHER,
Petitioners

v.

CHIEF JUSTICE OF THE TRIAL COURT & OTHERS,
Respondents

SUFFOLK COUNTY DISTRICT ATTORNEY RACHAEL ROLLINS RESPONSE TO THE MOTION TO RECONSIDER

Suffolk County District Attorney Rachael Rollins has continued to work expeditiously to protect the people of Suffolk County -- outside and inside the prison walls -- in response to the global health crisis presented by COVID-19. To that end, as of last Friday, our staff reviewed more than 630 cases, 563 of which were pre-trial. Of the 503 pre-trial dockets reviewed, we assented to 200 motions, representing 127 individuals.[1] As of the same date, we have received only 60 post-conviction motions. Based on these motions and the extraordinary challenges presented by this pandemic we will continue to work as quickly as possible but ask the Court to address three issues we

[1] Despite the Commonwealth's assent to 200 motions, only 50 individuals have been released.

see escalating daily: 1) the lack of public access to hearings on emergency matters in the trial court; 2) the lack of widespread testing inside prisons; and 3) the need to implement a process whereby those individuals that remain incarcerated can effectively social distance.

Turning now to the petitioners' arguments, they urge the Court to allow for presumptive release of a category of post-conviction defendants and to permit the allowance of a stay where there is no pending appeal or motion for new trial. We respectfully request that those suggestions be rejected.

First, though the petitioners treat pre-trial detainees and post-conviction detainees as the same, under the law they are not. Pre-trial detainees are merely accused of a crime; a post-conviction detainee has been proven beyond a reasonable doubt to have committed a crime. Additionally, many times a grand jury and a trial jury have heard the facts presented against the defendant and found that the Commonwealth has met its burden. Legal standards concerning their release, even in light of extraordinary circumstances, should reflect that significant difference.

Second, the ability of a judge to allow a stay in the absence of a pending post-conviction motion or appeal is constrained. In Massachusetts, a sentence once imposed must be executed forthwith. *See* G.L. c. 279, § 4. The rules of criminal and appellate procedure codify that a judge may stay the execution of a sentence. Mass. R. Crim. P. 31; M.R.A.P. 6. A judge also has an inherent authority to issue a stay. *See Commonwealth v. Charles*, 466 Mass. 63, 72 (2013). However, inherent authority to stay is limited in that the exercise must be lawful, *see Commonwealth v. McLaughlin*, 431 Mass. 506, 520 (2000), and the defendant must "satisfy the necessary criteria for a stay in the execution" of his or her sentence, *Charles*, 466 Mass. at 75. The necessary criteria, even where a judge issues a stay under his or her inherent power, "are the same as those relating to a stay of execution of sentence pending appeal." *Id*. at 77. The inherent authority of a judge to stay "'does not extend so far as to permit a further stay of the sentence on independent grounds not affecting the legality or propriety of the conviction.'" *McLaughlin*, 431 Mass. at 517 (quoting *Commonwealth v. Hayes*, 170

Mass. 16, 17 (1897)). Because of that, an appeal or post-conviction motion which challenges the propriety or legality of a conviction or sentence must be pending for a stay to be entered lawfully.

Any standard governing whether or not it is appropriate to grant a stay must include not only a consideration of whether a defendant has presented a colorable appellate or post-conviction claim but also a weighing of the general and specific health risks posed by the COVID 19 pandemic alongside the risk that the defendant will flee and the danger posed by the defendant's release. *See Christie v. Commonwealth*, 484 Mass. 397, 398 (2020). Absent from the petitioners proposal in its motion to reconsider is any real consideration of those necessary factors.

Charles is instructive on this point. Two years after pleading guilty to reduced charges related to controlled substances and unlawful possession of ammunition, Charles moved to stay execution of his sentence when he learned of the misconduct in the state's Hinton Drug Laboratory. He then filed a motion for a new trial, raising claims pertaining to the alleged misconduct at Hinton. The "magnitude of the

serious allegations of serious and far-reaching misconduct" constituted "exceptional circumstances" that warranted the judge's exercise of his inherent power to stay the execution of Charles's sentences pending the disposition of his motion for a new trial. In *Charles*, the inherent power to stay execution of sentence was thus extended: a judge could do so not just pending an appeal, but also pending a motion for new trial. However, even in *Charles*, this Court expressly held that even in exceptional circumstances a defendant must still show that he or she has a colorable post-conviction or appellate claim and that he or she does not pose a danger if released. *See Charles*, 466 Mass. at 75. That holding echoes *McLaughlin* and all the way back to the 1800s in *Hayes* and contemplates that to be a lawful exercise of a stay there must be a challenge to the conviction or sentence itself.

In part, trial courts have not granted stays allowing post-conviction individuals to be released because such stays have not been requested. In the over two weeks since this Court issued its decision, the Suffolk County District Attorney's Office has only

received 60 motions to stay, reflecting just 3.3% of the approximately 1,819 individuals serving sentences for convictions arising out Suffolk County cases.[2] This data suggests that the number of individuals who have been released is low because the number of motions seeking to stay their sentences is low.

Going forward, in order to facilitate expeditious review of such motions, the Suffolk County District Attorney's Office asks that this Court give guidance about motions to stay and explain that such motions must contain, in Suffolk County at the very least:

1. the defendant's name;
2. the docket number(s);
3. the crime(s) for which the defendant was sentenced;
4. the sentence received;
5. where the defendant is housed;
6. the basis for relief;
7. information about which of the CDC's 20 listed underlying medical conditions the defendant has been diagnosed with rendering them more susceptible to contracting COVID-19.[3]

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[2] Of these individuals, 400 are in the custody of the Suffolk Sherriff and the remainder are in the custody of the Department of Corrections.

[3] Based on what is known now, the CDC states that those at high-risk for severe illness from COVID-19 are: people 65 years and older; people who live in a nursing home or long-term care facility. See *Committee for Pub. Counsel Servs. & Another v. Chief Justice of the Trial Court & Others*, 484 Mass. 431, at *10, 19 n.16 (2020); https://www.cdc.gov/coronavirus/ 2019-ncov/need-extra-precautions/people-at-higher-risk.html

8. include medical records (or a statement that medical records were requested on a certain date); and
9. a plan for the defendant's release.

It is extremely difficult to quickly respond to motions that do not contain this basic information.[4]

The Suffolk County District Attorney's Office also requests a reasonable amount of time to respond to such motions. As noted above we have received 60 post-conviction motions to stay, 15 (25%) of which were filed in the past week alone. We have already

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(last visited April 22, 2020). Additionally, people of all ages may be high-risk if they have underlying medical conditions, particularly if not well controlled, including those with chronic lung disease or moderate to severe asthma, those with serious heart conditions, and people who are immunocompromised. Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications. Also at risk are people with severe obesity (body mass index of 40 or higher); people with diabetes; people with chronic kidney disease undergoing dialysis; and people with liver disease.

[4] The efforts to move expeditiously have been significantly hampered by the inability to access critical data from our law enforcement partners, including real time information about those individuals who have actually been released. Enacted in 2018, G.L. c. 6A, § 18 ¾ mandates the sharing of information. This simply is not happening. District Attorney Rollins again specifically asks this Court to highlight the urgency of this real need and to order the sharing of information in full compliance of the law.

responded to 24 (40%) of these motions and do so typically within four business days, despite the fourteen day timeframe set forth in the standing orders. However, time is required to pull the necessary trial files, to run records, to obtain disciplinary reports, to try to get medical records, and to file a written response to each defendant's motion. Without the review of those documents, all of which are necessary to assess the claims, Assistant District Attorneys would be unable to reasonably, intelligently, and ethically respond to the filed motion. Indeed, 22 of the 50 Superior Court post-conviction COVID motions in Suffolk County are homicide convictions. Each requires significant time to carefully examine the voluminous trial record, to ensure that victim's families are properly contacted as required by G.L. c. 258B, to respond in writing to the motion, and to have a hearing. None of that can reasonably, intelligently, effectively or ethically happen in 48 hours as the petitioners suggest.

The Suffolk County District Attorney's Office has also recognized two distinct problems that have arisen since the issuance of the opinion in this case. The

first is that obtaining medical records has been a stumbling block for both defense counsel and the Commonwealth. For example, the Commonwealth assisted counsel in one stay request in an effort to obtain the defendant's medical records to confirm for the trial court the claims made in the motion to stay. *Commonwealth v. Watson*, Docket No. 8084CR28954. Even with the assistance of the Department of Correction, the parties did not receive the medical records for ten days.[5] The bar needs guidance as to how to efficiently address that problem going forward as these records are vital and necessary for the resolution of the motions presented.

The second problem not yet contemplated by this Court is that many hearings on emergency matters in the trial courts are being held in contravention to the First and Sixth Amendment right to a public courtroom and G.L. c. 258B(b), the Victim's Bill of Rights. Most troubling is that G.L. c. 258B(b)

[5] In order to comply with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), institutions are constrained from providing access to medical records without the inmate's signature. At times, these signatures are challenging to obtain because of the lockdown of carceral facilities due to COVID-19.

explicitly states that a victim not only has a right to be notified about a hearing but a right to be *present*. However, that is not routinely happening in Suffolk County. Just last week alone, in *Commonwealth v. Rodriguez*, Suffolk Superior Court No. 1984CR00134, we requested that the victim's mother in a child rape case be permitted to call into the conference line to hear argument in a bail reduction hearing. The judge refused to let the victim's mother call in and said that the victim and her mother could listen but only in the presence of the Commonwealth. To try and comply with the court's order, when the court called the ADA assigned, she made a three way call to the victim witness advocate, who then made a three way call to the victim's mother, who initially missed the call. The VWA was then dropped from the call. The victim's mother shortly thereafter called back the VWA. Unfortunately, the hearing was underway the ADA was still on the phone arguing the bail motion and could not answer the VWA's calls or texts into her phone.[6]

[6] As recently, as this past Friday, an Assistant District Attorney was precluded from using a speakerphone to allow others to listen to a bail reconsideration hearing in a first degree murder case,

Because the mother was not physically with the Commonwealth, she and her daughter did not participate in the process. The defendant's bail was reduced to $5,000 and he was released. The victim was not "present" during the process in any way, shape or form.

Similarly, in *Commonwealth v. Anthony Kelley*, Boston Municipal Court Dorchester Division No. 2007-CR-01044, an arraignment of a eighteen year old for the murder of a seventeen year old girl, though the victim's family was able to listen to the hearing, the defendant's family was having difficulty making arrangements to hear the arraignment of their loved one. Of course their loved one has a right under the Sixth Amendment for the courtroom to be public and for his family to be present. *See Commonwealth v. Cohen*, 456 Mass. 94, 105-106 (2010) (citing *Waller v. Georgia*, 467 U.S. 39, 46 (1984)). Through previous acquaintance with the office, the defendant's brother was able to obtain the number of the assigned homicide prosecutor and she patched in the defendant's family

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0884CR10354, because she was told speakerphone use deteriorates the recording of the hearing.

to the call so that they could hear the arraignment. Constitutional rights should never be guaranteed only through acts of kindness.

Pre COVID-19, these proceedings would have happened in open court. Anyone could have walked into any of these courtrooms and listened to the proceedings. Now, due to the trial court's inability or refusal to adapt or evolve technologically, our victims and family members of victims, the public, and defendants are being excluded from the process. This amounts to a significant constitutional violation.[7] Given the above, any reconsideration in this case must include meaningful and concrete steps for these emergency hearings in the trial court to be open to the public including most critically victims and defendant's families.[8]

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[7] For example, organizations such as CourtWatch and members of the media have likewise been excluded, an exclusion that may come to the detriment of "the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *See Cohen*, 456 Mass. at 106 (quoting *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984)).

[8] Indeed, throughout this crisis, this Court's arguments and the arguments of the Appeals Court have been streamed over the internet. It is impossible to fathom that the trial courts do not have the same

Finally, the Suffolk County District Attorney's Office questions whether the categorical presumptive release of individuals without an individualized determination as to the risk of flight or dangerousness posed, as the petitioners recommend, is the best or only mechanism which could be used to effectively quell the risk of harm posed by COVID 19. Over a month ago, Chief Justice Gants invited the Massachusetts Bar to work together to "somehow keep the wheels of justice turning in the midst of this frightening pandemic." Chief Justice Ralph D. Gants, Letter to the Bar (Mar. 19, 2020), https://www.mass.gov/news/letter-to-the-bar-from-supreme-judicial-court-chief-justice-ralph-d-gants. The response now must make meaningful and urgent steps to flatten the curve inside carceral facilities, just as public health professionals are doing for those of us with our freedom. Most importantly, the lack of testing provided to the incarcerated must be

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ability especially where nine years ago there was a pilot program in the Quincy District Court to livestream court proceedings. See https://www.govtech.com/e-government/Massachusetts-Camera-Court-Proceedings-.html (last accessed April 20, 2020).

addressed. Testing and contact tracking is critical to slowing the spread of coronavirus, yet to date, only 704 tests have been conducted of detainees, inmates, and staff.[9] *See* https://data.aclum.org/sjc-12926-tracker/ (last visited April 20, 2020). Of those tested, 47.6% have tested positive. *Id*. Without mandating testing, implementing contact tracking, and ensuring the ability to social distance, this Court's efforts to expedite motions to stay may be futile. These extraordinary times require an extraordinary response within the courts, jails, and prisons that provide for legal and public health relief.

Respectfully Submitted,
FOR THE COMMONWEALTH

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_/S/ Cailin Campbell____
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[9] The number may not reflect actual tests because DOC does not report on staff members who are tested. Additionally, Suffolk Sherriff and DOC staff have the option of external COVID-19 testing and the Commonwealth is unsure whether staff are mandated to report to facilities that they were tested or the results.

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April 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was to the parties in this case, both those who filed and those added by the Interim Order of Mar. 27, 2020. Those emails are:

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April 22, 2020