

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

SUFFOLK, ss.

NO. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES &
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Petitioners

v.

CHIEF JUSTICE OF THE TRIAL COURT,
Respondent

**RULE 16(I) LETTER BY THE DISTRICT ATTORNEYS FOR THE BRISTOL, CAPE &
ISLANDS, ESSEX, HAMPDEN, MIDDLE, NORFOLK, & PLYMOUTH DISTRICTS**

Pursuant to the comments at the oral argument in the above-referenced case, we write to offer supplemental authority as to the violation of separation of powers that would result from the proposed amendment to Mass. R. Crim. P. 29.

In response to the Court's inquiry about the powers of the courts under Rule 29, or to enter a stay of some sort, various theories have now been propounded about how the expansion of such powers under the common law or the rules would be lawful. In fact, if the rules permit such considerations and conduct then there is no need for extraordinary relief or supervisory orders at all. But the arguments now being proffered notably fail to mention that rules contemplating a stay of sentence also require evidence of a meritorious appeal based upon an error in the conduct of the trial. Here, there is no evidence, or even an attempt to suggest there is evidence, of meritorious appeals. They also fail to mention that motions to revise or revoke are prohibited from considering post-conviction events, because to do so would encroach on the constitutional role of the executive branch in granting pardons, commutations, and parole.

Proposed amendment to Mass. R. Crim. P. 29 would in practical effect allow the suspension of certain sentences until the conclusion of the COVID-19 State of Emergency. Suspension of a lawfully imposed sentence violates articles 20 and 30 of the Massachusetts Declaration of Rights, as the power to suspend laws lies only in the Legislature, and it is not for the Judiciary to infringe upon. To the extent amendments in Rule 29 may be termed a “stay,” there is no pending legal motion with an accordant legal issue tied to the conviction, as in *Commonwealth v. Charles*, 466 Mass. 63 (2013) to be resolved. Mass. R. Crim. P. 29 is designed to promote fairness in judicial decisions given the information at the time of imposition of sentence, and does not include post-conviction conduct. Considering post-conviction events would encroach on the constitutional role of the executive branch in granting pardons, commutations, and parole. Even in *Commonwealth v. Tejada*, 481 Mass. 794, 797 (2019), where this Court allowed a motion to revise and revoke based on a coventurer’s later-imposed sentence, this Court noted that the disparity of the culpability between defendants was known at the time of the sentencing. And the notion of a “nunc pro tunc” imposition of a sentence based on events that occurred post-sentencing is both a flawed post-hoc rationalization and an inappropriate use of the doctrine to rewrite history. See *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (“Put colorfully, ‘[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating ‘facts’ that never occurred in fact.’ . . . Put plainly, the court “cannot make the record what it is not.””) (cites omitted).¹

¹ The suggestion that other state courts (California, Pennsylvania, Oklahoma, and North Dakota) have exercised superintendence power to release prisoners under similar circumstances is an inapt comparison. First of all, it does not appear that those courts are issuing supervisory orders or edicts. Further, these state courts either elect judges or subject judges to recall by voters. Thus, any decision made by the courts can be checked by the voters at some level. Such is not the case in Massachusetts. Though judges in Massachusetts are not elected, our state

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constitution, through article 20, demands voter participation through elected representatives — only the legislature may suspend the execution of the laws.

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CERTIFICATE OF SERVICE

I hereby certify, that I today served the within 16(l) letter electronically to all parties on the following list:

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/s/ Pamela Alford

April 2, 2020

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