SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE
DISTRICT ATTORNEY RACHAEL ROLLINS

April 3, 2020

Francis Kenneally, Esq.
Clerk of the Supreme Judicial Court
Supreme Judicial Court
One Pemberton Square
Boston, MA 02108

Re: *CPCS & MACDL v. Chief Justice of the Trial Courts & others*, SJC-12926

Dear Clerk Kenneally:

I am writing pursuant to Mass. R. App. P. 16(*l*) to answer a question posed throughout oral argument as to the authority to revisit a lawful sentence once it is imposed. The ability of any court to revisit a sentence after it is imposed is circumscribed. In contrast, the Executive Branch holds many options with regards to sentencing – the Governor may pardon an offense or commute an offense, *see Commonwealth v. Arsenault*, 361 Mass. 287, 291-292 (1972); the Department of Corrections may furlough a defendant, see G.L c. 127, § 90A, and may remove a defendant from one institution from another in an instance of disease, see G. L. c. 126, § 26, and of course the Parole Board may grant defendants parole, *see* G.L. c. 27, § 5.

The judiciary is more limited with respect to sentences. Under the Massachusetts Rules of Criminal Procedure a judge has few options. Under Rule 29, within 60 days of the imposition of a sentence or issuance of a rescript, "the trial judge, upon the judge's own motion, or the written motion of the prosecutor . . . may revise or revoke a sentence if the judge determines that any part of the sentence was illegal," Rule 29(a)(1) or "if it appears that justice may not have been done," Rule 29(b)(2). The rationale behind the rule is that "[o]ccasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account." *Dist. Attorney for the N. Dist. v. Superior Court*, 342 Mass. 119, 128 (1961). "In such cases, 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.'" *Commonwealth v. Rodriguez*, 461 Mass. 256, 269 (2012) (quoting *Commonwealth v. McCulloch*, 450 Mass. 483, 487 (2008)) (emphasis added).[1] As Rule 29 must consider factors that existed at the time the sentence was imposed, it is not appropriate for revision as a legal mechanism to address the concerns here.

[1] The Suffolk County District Attorney's Office also does not think the revision as proposed is suitable to address the problem here. In a April 1, 2020 16L letter, the Middlesex,

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Under Rule 30(a), "Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts."

There are two rules Mass. R. Crim. P. 31 and Mass. R. A. P. 6, which allow for a stay in execution of a sentence. Rule 6 provides that a stay should be made in the first instance in the trial, then if denied to the single justice, and the "[t]he motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other statements signed under the penalties of perjury or copies thereof. With the motion shall be filed such parts of the record as are relevant. The motion shall be filed with the clerk of the appellate court to which the appeal is being taken. If the court is the Supreme Judicial Court, the motion shall be filed with the clerk of the Supreme Judicial Court for Suffolk County."

Berkshire, and Northwestern District Attorney's proposed that Rule 29 should be revised and provision added which states:

> "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.

The above standard is vague as written. There is no context or explanation as to what "effectively managed" means and offers little guidance to a judge who would be asked to impose the standard. Instead, though the Suffolk County District Attorney's Office does not think revision to Rule 29 is appropriate, if it is going to be revised the office asks that the following be adopted (variation from Middlesex underlined):

> 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. <u>A trial judge, upon the written motion of the prosecutor or a qualifying defendant pursuant to the terms of [SJC's Emergency Order], may temporarily stay the sentence of said defendant and order his or her release subject to appropriate conditions of release after finding, by a preponderance of the evidence, that the risk to the defendant's health by remaining in custody outweighs the risk to public in ordering his or her release</u>. 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.

Under Rule 31, "If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or, pursuant to Mass. R. App. P. 6, a single justice of the court that will hear the appeal, determines in the exercise of discretion that execution of said sentence shall be stayed pending the determination of the appeal. If execution of a sentence of imprisonment is stayed, the judge or justice may at that time make an order relative to the custody of the defendant or for admitting the defendant to bail." Just yesterday, the Court expanded case law concerning the factors that a judge should consider in light of the current pandemic and concluded that when deciding a motion to stay "a judge must give careful consideration not only to the risks posed by releasing the defendant –- flight, danger to others or to the community, and likelihood of further criminal acts -- but also, during this pandemic, to the risk that the defendant might die or become seriously ill if kept in custody." *Christie v. Commonwealth*, 2020 Mass. Lexis 190, *2 (April 1, 2020).

In addition to the above-cited rules, the Court has the inherent authority to stay the execution of a defendant's sentence for exceptional reasons. *See Commonwealth v. Charles*, 466 Mass. 63 (2013) (judge had inherent power to stay a sentence in Dookhan case). Further, when a judge uses inherent power to stay a sentence it must be with the defendant's consent and it should be for a short period of time. *See Commonwealth v. McLaughlin*, 431 Mass. 506 (2000). Contrary to representations made by counsel during the oral argument on Tuesday, a stay may be issued where the defendant has been sentenced pursuant to a mandatory minimum. *See Commonwealth v. Therriault*, 401 Mass. 237 (1987). Looking at the above, a stay seems to be the appropriate legal mechanism by which already sentenced individuals may try to obtain release from confinement in light of the COVID pandemic through the inherent authority of the court.

Thank you for your attention to this matter.

Sincerely,

RACHAEL ROLLINS
District Attorney
For The Suffolk District

/s/ Cailin M. Campbell
CAILIN M. CAMPBELL
Chief of Appeals
Assistant District Attorney
For The Suffolk District

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent 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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By: __/s/Cailin M. Campbell___
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