



The Commonwealth of Massachusetts

OFFICE OF THE DISTRICT ATTORNEY FOR THE NORFOLK DISTRICT

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May 29, 2020

Francis V. Kenneally, Clerk
Supreme Judicial Court for the Commonwealth
John Adams Courthouse
One Pemberton Square, Suite 1400
Boston, MA 02108

Re: Amicus Letter for Commonwealth v. Cameron Lougee, SJC-12949
Commonwealth v. Shamus Horton, SJC-12950

Dear Clerk Kenneally:

The District Attorney for the Norfolk District submits this amicus letter in support of petitioners/appellants. The District Attorney is the elected advocate of the people and chief law enforcement officer in the Norfolk District. See G.L. c. 12, §§12, 13, 27; District Attorney for the Norfolk District v. Flatley, 419 Mass. 507, 509 n.3 (1995). The District Attorney represents "a broad spectrum of societal interests—from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection." Commonwealth v. Gordon, 410 Mass. 498, 500 (1991). The Norfolk District Attorney's Office also filed petitions for relief under G.L. c. 211, §3, before the Supreme Judicial Court for the County of Suffolk in Commonwealth v. Dennis Baker, Jr., SJ-2020-0375 and Commonwealth v. Koenraad Morteale, SJ-2020-0406, which were held pending resolution of Lougee and Horton; the single justice (Elsbeth B. Cypher, J.) permitted the parties to file amicus brief or letters in these cases. See SJ-2020-375 (Docket #3) and SJ-2020-0406 (Docket #5).

On the question of whether "delays occasioned by our standing order are to be excluded from the §58A detention period," see Reservation and Reports, SJ-2020-0347 & SJC-0348, this Court

should find that either through continuances under Mass. R. Crim. P. 36 or through the good cause provision of G.L. c. 276, §58A, the delays occasioned by this Court's standing orders are excluded from the detention period of G.L. 276, §58A. Specifically, the Norfolk District Attorney's Office writes to draw attention to delays occasioned by the cessation of the grand jury and the effects that COVID-19 has had on the grand jury process.

The grand jury is an institution preserved by the Massachusetts Constitution and has "long been regarded as an important part of our criminal procedure." Lataille v. Dist. Court of E. Hampden, 366 Mass. 525, 531-532 (1974). "[I]t is the constitutional prerogative of the grand jury to act as 'an informing and accusing body.'" Id. at 532, quoting Commonwealth v. Geagan, 339 Mass. 487, 497 (1959). The grand jury have the dual function of determining whether there is probable cause to believe a crime was committed and to protect citizens against unfounded criminal prosecutions. Id. The grand jury's role as an investigative body is paramount. There may be additional victims, witnesses, or charges that arise from a grand jury investigation. DNA, medical records, jail records, or telephone records, among other documentary evidence, may be gathered through grand jury subpoena. Both inculpatory and exculpatory information may be developed during such an investigation.

In its superintendence power governing courts of inferior jurisdiction, beginning in March 2020 this Court has issued specific orders currently applicable to all cases concerning the effects of the COVID-19 pandemic on court operations. See Committee for Public Counsel Services v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 447 (2020) (Court's general superintendence power of courts of inferior jurisdiction permits issuance of "writs, summonses and other process and such orders, directions and rules as may be necessary or desirable for the furtherance of justice"), quoting G.L. c. 211, §3. Through this Court's most recent order regarding court operations, no new grand jury will be empaneled prior to September 8, 2020 unless ordered by this Court. Grand juries whose terms expire before the empanelment of a new grand jury are extended until the new empanelment; however, no sitting grand jury may be convened without the Superior Court Regional Administrative Justice's approval, who must consult with the Chief Justice of the Superior Court, and set such conditions as may be necessary to minimize risk to members of the grand jury, court personnel, and witnesses. The RAJ or the Chief Justice of the Superior Court may also consult with the Jury Commissioner regarding such conditions. Second Updated Order Regarding Court

Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, OE-144 (Effective June 1, 2020) ("Second Updated Order").¹ The Superior Court Standing Order 7-20: Second Updated Protocol Governing Superior Court Operations During the Coronavirus (COVID-19) Pandemic, paragraph (III)(D) echoes these requirements. At least in the Norfolk District, due to the COVID-19 pandemic, grand jurors have not been sitting since mid-March 2020.

There were very good reasons relating to the COVID-19 pandemic for the grand jury, like much of court business, not to convene. Apart from the concerns faced by every member of society, there are a host of practical and public health concerns around the sitting of a grand jury in the current times including the need of thirteen to twenty-three grand jurors to enter and leave the courthouse or grand jury building, not including court officers, assistant district attorneys, witnesses and support staff; the grand jury's need to deliberate; and its need to handle evidence. This is apart from the great personal burden on grand jurors, who having been summonsed and sworn as part of their duties as citizens, would have their own concerns about personal safety and health. Further, grand jurors who were diagnosed with, in contact with, or experience symptoms of coronavirus; had been asked to self-quarantine; or had traveled to or had close contact with someone who had traveled to certain countries within the previous 14 days were banned from state courthouses and other state court facilities. See Order Regarding Access to State Courthouses & Court Facilities (March 13, 2020).

Cognizant of the delay, this Court found that the continuances occasioned by the orders on court operations "serve the ends of justice and outweigh the best interests of the public and criminal defendants in a speedy trial" and were therefore excluded from a speedy trial computations under Mass. R. Crim. P. 36. See e.g., Second Updated Order, at para. 10 & n.1. The orders on court operations also tolled deadlines set forth in statutes, court rules, and orders. See e.g., Second Updated Order at para. 12 & 13.

¹ Previous orders of this Court had barred new empanelment, without provision to order from this Court. See Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, OE-144 (effective May 4, 2020), which replaced the original order (effective April 6, 2020) which replaced this Court's Order Limiting Empanelment of Juries (issued March 13, 2020).

The statute permitting pre-trial detention based on dangerousness, G.L. c. 276, §58A, provides that a person so detained shall go to trial as soon as reasonably possible, "but in absence of good cause, the person so held shall not be detained for a period exceeding 120 days by the district court or for a period exceeding 180 days by the superior court excluding any period of delay as defined in Massachusetts Rules of Criminal Procedure Rule 36(b)(2)." G.L. c. 276, §58A(3). Mass. R. Crim. P. 36(b)(2) contains a number of intervals of time that are excluded under a speedy trial calculation, including Mass. R. Crim. P. 36(b)(2)(F), which encompasses any period of delay resulting from a continuance by a judge where the judge makes findings that "the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial."

By its reference to Rule 36, G.L. c. 276, §58A, explicitly creates a mechanism for creating a time standard within its period of detention. Cf. Commonwealth v. Lauria, 411 Mass. 63, 68 (1991). (Mass. R. Crim. P. 36 "primarily designed to assist in the administration of trial court dockets"). Further, the use of the language "absence of good cause" indicates that the 120 or 180 day period of detention was not absolute. See In re: G.P., 473 Mass. 112, 120 n.12 (2015), abrogated on other grounds by Matter of Minor, 484 Mass. 295 (2000) ("Pretrial detentions on the basis of dangerousness may be for 120 days, in the absence of good cause for an extension"). Delays occasioned by the inability of the grand jury to sit safely during the COVID-19 pandemic, thereby preventing expedient indictment should constitute good cause. Cf. Commonwealth v. Perkins, 464 Mass. 92, 103-104 (2013) (good cause for continuance of a probable cause hearing weighed specific reasons for request, including whether there was an ongoing grand jury investigation, the amount of time the defendant is in custody and the amount of time since arraignment). This is not a circumstance where the Commonwealth is proceeding "at whatever pace it might choose." Cf. Perkins, 464 Mass. at 103.

Rather, the Commonwealth is constrained in both the ability to both access the grand jury and delays in obtaining evidence to present to the grand jury, and to safely call witnesses. Not that progress is not in sight. As recognized in this Court's latest order, there may be a time where a new grand jury can be called. Preparations on how to safely recall a sitting grand jury are

ongoing. It is unknown; however, whether current grand jurors would have hardships over continued service and whether that would affect the ability of the grand jury to expediently sit.

By a finding of dangerousness under G.L. c. 276, §58A, a defendant has received the due process protections that not only go into an initial hold, but at a hearing where he was found dangerous and in need of detention by clear and convincing evidence. See Mendonza v. Commonwealth, 423 Mass. 771, 783 (1996). Defendants in district court also have a right to a Superior Court review. See G.L. c. 276, §58A(7). To find that this Court's standing orders do not apply to §58A hearings could ultimately mean the release of every individual held on dangerousness for crimes with no final district court jurisdiction.² This Court should find that delays occasioned by this Court's orders are either excludable under G.L. c. 276, §58A's incorporation of Rule 36 or constitute good cause for an extension.

Respectfully submitted

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For the Norfolk District

/s/ Pamela Alford

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² A representative sample of such charges includes mayhem, in violation of G.L. c. 265, §14; armed robbery, in violation of G.L. c. 265, §17; armed assault with the intent to rob or murder, in violation of G.L. c. 265, §18; and home invasion, in violation of G.L. c. 265, §18C; and rape, in violation of G.L. c. 265, §22.

Cc: Shoshana E. Stern
Patrick Levin
Catherine Langevin Semel
Andrew Zeiberg
Brian J. Anderson
Alexandra Meghan Brunelle
Keren Goldenberg

Certificate of Service

I, Pamela Alford, certify that on May 29, 2020, I served the above document: on SJC-12949, on counsel for the Commonwealth, Shoshana E. Stern, and counsel for the defendant, Patrick Levin, through E-filing; on SJC-12950, on counsel for the Commonwealth, Catherine Langevin Semel, through Tyler E-filing system; and counsel for the defendant, Andrew Zeiberg andy.zeiberg@gmail.com and Brian J. Anderson brian@bjandersonlaw.com through email.

/s/Pamela Alford
