No. SJC-12949

Commonwealth of Massachusetts

Supreme Judicial Court

COMMONWEALTH

vs.

CAMERON LOUGEE

ON RESERVATION AND REPORT FROM A JUSTICE OF
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF FOR RESPONDENT CAMERON LOUGEE

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ISSUES PRESENTED

1. Whether the motion judge correctly held that G.L. c.276, §58A, does not require every defendant previously found dangerous and held without bail to continue being incarcerated indefinitely for the duration of the pandemic.

2. Whether a construction of §58A that did require indefinite detention of presumptively innocent people during a pandemic when they cannot be brought to trial should be avoided because it would raise serious doubts under the substantive due process provisions of both the State and Federal Constitutions.

3. Whether procedural due process requires safeguards beyond those provided by §58A before a person who has been convicted of no crime may be ordered indefinitely detained and unable to protect himself from a dangerous pandemic until an indeterminate time in the future when it is possible to bring him to trial.

BACKGROUND[1]

On March 26, 2019, an arrest warrant issued in the Taunton District Court, along with a complaint charging Cameron Lougee with forcible rape of a child, aggravated statutory rape, and indecent assault and battery on a child. Mr. Lougee was arrested on the warrant and arraigned the following day. The Commonwealth filed a motion for pretrial detention under G.L. c.276, §58A, and Mr. Lougee was held pending a hearing on the motion. The District Court dangerousness hearing was held on April 18, 2019, on which date the judge (Brennan, J.) found Mr. Lougee dangerous but determined

[1] This recitation is drawn from the parties' agreed statement of facts, which appears at page 54 of the Commonwealth's record appendix.

that he could be released on conditions pursuant to §58A(2). One of the conditions set by Judge Brennan was cash bail in the amount of $25,000. Mr. Lougee was unable to post the bail, and remained held.

On July 18, 2019, a Bristol County grand jury returned indictments charging Mr. Lougee with the same offenses listed in the District Court complaint. Mr. Lougee was arraigned in the Bristol County Superior Court on September 5, 2019, and a new dangerousness hearing was conducted on September 9 (McGuire, J.). On September 19, 2019, Judge McGuire ordered Mr. Lougee held without bail pursuant to §58A(3).

Trial was scheduled for March 23, 2020. On March 6, Mr. Lougee filed a motion to continue the trial due to the unavailability of his expert witness on the scheduled date. The motion was allowed (Pasquale, J.) over the Commonwealth's objection, and a new trial date was set for May 11. Judge Pasquale ordered the resulting period of delay to be excluded both from the calculation of Mr. Lougee's speedy trial time under MASS. R. CRIM. P. 36(b), and from the maximum period of his pretrial detention under §58A(3).

On April 24, 2020, this Court issued an Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, OE-144 (Standing Order), effective May 4, providing that jury trials scheduled to begin between March 13, 2020, and July 1, 2020, were continued to a date no earlier than July 1. As a result of that order, Mr. Lougee's trial was canceled; a new trial date has not been set.

On May 4, 2020, Mr. Lougee filed a motion for release from his §58A detention and for admission to bail. The Commonwealth filed

an opposition, and a hearing was held on May 6 before the Honorable Brian Davis. At the hearing, Judge Davis calculated that, after accounting for the excluded time resulting from the motion to continue the trial, Mr. Lougee's 180-day detention would expire on May 15, 2020, unless this Court's Standing Order operated to toll the time permitted for detention under §58A. The Commonwealth declared itself satisfied with the judge's calculation. Following the hearing, the judge made the following endorsement on Mr. Lougee's motion:

> After a hearing by video (Defendant) and telephone (counsel), this motion is ALLOWED. Under ordinary circumstances, Defendant's 180 day detention under G.L. c.276, §58A, would end on May 15, 2020. This Court does not read the SJC's updated Standing Order, effective May 4, 2020, as tolling or extending the end date for Defendant's detention. It is not a "deadline" for purposes of ¶12 of the Standing Order, nor is it a "Speedy Trial Computation" for the purposes of ¶9 of the Standing Order. Accordingly, Defendant is entitled to a bail hearing, which will take place by teleconference on May 15, 2020, at 2:00 P.M.

The Commonwealth filed a petition in the county court pursuant to G.L. c.211, §3, challenging Judge Davis's order. On May 14, a single justice (Cypher, J.) ordered the bail hearing to go forward as scheduled, but reserved and reported the petition to the full court for determination of the legal issue.

At the May 15 bail hearing, Judge McGuire set bail at $75,000 with conditions, finding that, in light of Mr. Lougee's history and the seriousness of the charges, this amount was required to ensure his appearance for trial notwithstanding his indigency. Mr. Lougee again was unable to post bail, and presently remains incarcerated at the Bristol County Jail in North Dartmouth.

SUMMARY OF THE ARGUMENT

General Laws c.276, §58A, permits the preventive pretrial detention of defendants feared to be "dangerous." This provision was held constitutional in spite of our society's longstanding presumption of pretrial liberty only because of the strict time limit it imposed on preventive detention—ninety days, at the time. Since then, that limit has become considerably less strict: potentially up to 300 days for a defendant who is indicted for a felony. And that time limit is further extended by excluding periods of delay "as defined in" rule 36(b)(2) of the Rules of Criminal Procedure. *Infra*, at 14–20.

Through orders issued pursuant to its superintendence power, this Court has postponed all trials in the Commonwealth for at least six months due to the COVID-19 pandemic. To prevent unjust dismissals of cases on speedy trial grounds, the Court ordered that period of delay excluded from defendants' rule 36 calculations. But the Court did not similarly order those delays excluded from the time limit for pretrial detention under §58A. As the motion judge correctly held, the indefinite delay of Mr. Lougee's trial resulting from the pandemic is not a delay "defined in" rule 36; it is defined instead by this Court's Standing Order. It therefore does not toll the time of Mr. Lougee's pretrial detention. *Infra*, at 20–26.

This result is required by principles of lenity and constitutional avoidance. As to the latter, serious doubts would be raised as to the constitutionality of a provision that required a presumptively innocent person to be detained indefinitely during a pandemic. Even if preventive detention without any fixed end date could *ever* be constitutional, the pandemic itself likely would render unconstitutional

a statute that required every defendant previously held dangerous to be detained without bail for its full duration. Either county sheriffs' inability to protect detainees from exposure to the virus, or the harsh lockdown measures they have instituted in their attempts to do so, likely constitute unconstitutional punishment without trial in the absence of an opportunity to seek release on bail. *Infra*, at 26–35.

Therefore, rather than construing §58A to require indefinite detention of everyone previously held dangerous, this Court should defer to the Legislature's judgment as to the point at which pretrial detention generally becomes unreasonable: after 120 days in the District Court, or 180 days in the Superior Court. Once that time has run, a defendant is entitled to a bail hearing unless the Commonwealth demonstrates "good cause" to continue the detention, based on factors particular to that individual defendant. *Infra*, at 35–38.

Moreover, given the fundamental liberty interests at stake and the absence of any prospect for a speedy trial, courts must provide defendants with heightened procedural protections before concluding that "good cause" exists for indefinite detention. Their determinations must take the pandemic itself into account, and so long as no trial dates are set, periodic review is required to ensure that defendants do not continue to be held unnecessarily in violation of their constitutional rights. And under the present extraordinary circumstances, "good cause" cannot exist for indefinite detention absent proof beyond a reasonable doubt that no conditions of release could suffice to protect the public, as well as a showing that the Commonwealth possesses sufficient admissible evidence to prove its case once trials resume. *Infra*, at 38–45.

Argument

For decades, this Court has consistently held that "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Brangan v. Commonwealth*, 477 Mass. 691, 705 (2017), *quoting Aime v. Commonwealth*, 414 Mass. 667, 677 (1993). But this Court's repeated invocations of that fundamental principle have not halted a steady erosion of the "careful limitations" placed on pretrial detention since the days when a Federal judge remarked with consternation upon "the backlog of criminal cases pending in the Massachusetts Superior Court for Suffolk County, causing delays of several weeks to several months before a defendant unable to make bail receives a trial." *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 685 (D. Mass. 1973). Almost fifty years later, a delay of "several months" surely would pass unremarked. And "several weeks" is no longer a sufficient delay even to require an incarcerated defendant to be brought into court for a status update following his arraignment. *Compare* G.L. c.276, §35, *as appearing in* St.1931, c.145, §2 (permitting adjournment "not exceeding ten days at any one time against the objection of the defendant"), *with id.*, *as amended through* St.1996, c.211 ("While the defendant remains committed, no adjournment shall exceed thirty days at any one time against the objection of the defendant").

Those intervening years have also seen the advent and expansion of preventive detention of accused (but presumptively innocent) persons before trial on account of their perceived dangerousness. *See Mendonza v. Commonwealth*, 423 Mass. 771 (1996) (holding such detention under G.L. c.276, §58A, to be constitutional). In en-

dorsing the constitutionality of the Federal Bail Reform Act, on which §58A was modeled, *see id.* at 773, the United States Supreme Court stressed the procedural protections provided by the Act, as well as the fact that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *United States v. Salerno*, 481 U.S. 739, 747 (1987), *citing* 18 U.S.C. §3161 *et seq.* (requiring trial to occur within seventy days of indictment). This Court did likewise in upholding §58A when it was originally enacted. *See Mendonza*, 423 Mass. at 783, 786. But in the ensuing years, the authorized length of pretrial detention under §58A has steadily increased,[2] and the procedural protections guaranteed to defendants thereunder have steadily deteriorated.[3] Simultaneously, the number

[2] Originally, the statute authorized detention for ninety days—a period reasonably comparable to the seventy days permitted under Federal law. *Compare* §58A(3), *as appearing in* St.1995, c.39, §13, *with* 18 U.S.C. §3161(c)(1). But in 2014 the detention period increased to 120 days, *see* St.2014, c.260, §33, and in 2018 the total permissible detention for felonies was further extended, potentially permitting an indicted defendant to be held for up to 300 days (120 by the District Court and 180 by the Superior Court). §58A(3), *as amended through* St.2018, c.69, §176. And of course, as discussed further below, those time limits are not hard deadlines, but instead are extended by excluding certain delays enumerated in MASS. R. CRIM. P. 36(b)(2).

[3] The 2014 amendments to §58A, for example, mandated that "the judge *shall* consider hearsay contained in a police report or the statement of an alleged victim or witness" (emphasis added), and restricted a defendant's ability to summons an alleged victim or a member of their family to appear at the hearing. St.2014, c.260, §§34–35. And the right "to cross-examine witnesses who appear at the hearing," §58A(4), rings hollow when most hearings go forward on the papers, as permitted by *Abbott A. v. Commonwealth*, 458 Mass. 24, 33–36 (2010).

of presumptively innocent people incarcerated under that statute has expanded dramatically.[4]

Cameron Lougee is one such presumptively innocent person. Since March 27, 2019—429 days as of this writing—he has been incarcerated at the Bristol County Jail awaiting his day in court. That day was finally supposed to arrive on Monday, May 11. But like every other defendant in the Commonwealth, Mr. Lougee has seen his trial indefinitely postponed due to the COVID-19 pandemic. And like every other prisoner in the Commonwealth, Mr. Lougee has also been subjected to inhumane conditions as his jailers attempt to prevent COVID-19 from exploding unchecked throughout their facility's population, and deprived of any ability to protect himself from such an outbreak should those draconian measures fail.

According to the Commonwealth, the pandemic requires not only that Mr. Lougee's potential judicial vindication be postponed indefinitely, but also that he be jailed indefinitely, without a chance even to *seek* admission to bail. This Court must reject that "baleful conclusion." *Mendonza*, 423 Mass. at 780 (referring to possibility that "any and all loss of liberty [could] be justified by a prediction of dangerousness with only generalized due process safeguards"). The

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[4] *See* Hanson, *A rise in dangerousness hearings could limit presumption of innocence*, MASSLIVE, *https://www.masslive.com/boston/2019/11/a-rise-in-dangerousness-hearings-which-can-hold-a-defendant-180-days-before-trial-could-limit-presumption-of-innocence.html* (Nov. 24, 2019) (discussing steady rise in number of §58A petitions filed by prosecutors since mid-2017, particularly in Essex and Bristol Counties). *See also* MASSACHUSETTS TRIAL COURT, DANGEROUSNESS HEARINGS, *https://public.tableau.com/profile/drap4687#!/vizhome/MassachusettsTrialCourtDangerousnessHearings/MainDashboard* (interactive dashboard showing continuation of this trend through March 2020).

language of §58A does not compel it. And even if it did, our Commonwealth's Constitution would not permit it. *See id.*, *citing* articles 1, 10, and 12 of the Massachusetts Declaration of Rights.

I. Judge Davis correctly held that Mr. Lougee's period of pretrial detention under §58A has expired.

The Commonwealth's contention rests upon the interplay between §58A, MASS. R. CRIM. P. 36, and this Court's Standing Order regarding court operations during the pandemic. Rule 36 establishes time standards for the trial courts, giving content to a defendant's constitutional right to a speedy trial: if the trial does not commence within a year of arraignment, the defendant is entitled to dismissal of his case. However, the rule enumerates certain events in the life of a criminal case that cause inevitable delays in bringing the case to trial, and declares that such delays will not count toward its one-year deadline. Section 58A, in turn, incorporates those enumerated delays and provides that they also do not count toward its pretrial detention deadline. And the Standing Order provides that delays occasioned by pandemic-related court closures "shall be excluded from speedy trial computations under" rule 36. According to the Commonwealth, the Standing Order therefore requires those delays also to be excluded from pretrial detention computations.

As Judge Davis recognized, the Commonwealth's syllogism is faulty. The Standing Order does not mention pretrial detention, and §58A's text does not require its already lengthy pretrial detention periods to be further extended merely because a defendant is not yet entitled to a dismissal of his case on speedy trial grounds.

A. *The calculation of pretrial detention time under §58A(3) does not exclude all days that are excluded from a speedy trial calculation, but only those specifically "defined in rule 36(b)(2)."*

As noted *supra*, rule 36 "provides that, if a criminal defendant is not tried 'within twelve months' after arraignment, 'he shall be entitled upon motion to a dismissal of the charges.'" *Commonwealth v. Graham*, 480 Mass. 516, 517 (2018), *quoting* MASS. R. CRIM. P. 36(b)(1). Failure to abide by the rule's time standards has drastic consequences: "Dismissal under rule 36 is with prejudice." *Id.* at 523. When a defendant files a rule 36 motion to dismiss, the Commonwealth bears the burden of justifying any delay in excess of the one-year limit. *Id.* at 522–523.

"There are two separate ways in which the Commonwealth can meet its burden of justifying a delay, thereby excluding it from the calculation of time under rule 36." *Id.* at 523. "The first way to justify a delay is to show that the delay falls within one of the 'excluded periods' specifically enumerated under rule 36(b)(2)." *Id.* "The second way that the Commonwealth can justify a delay is provided not by any provision in rule 36 but by the common law." *Id.* at 529. "Under the common law, a defendant is not entitled to dismissal if he or she acquiesced in, was responsible for, or benefited from the delay." *Id.* Thus, for example, when a scheduled trial date passes without objection from the defendant, he will be deemed to have acquiesced in the delay and the time will be excluded from the rule 36 calculation, even though that event is not one of the enumerated exclusions in rule 36(b)(2). *Commonwealth v. Farris*, 390 Mass. 300, 305–306 (1983).

The issue before the Court today turns in part upon the difference between these two types of "exclusions" of time from a speedy trial calculation. The relevant portion of §58A provides:

> A person detained under this subsection shall be brought 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) (emphasis added). The plain text of this statute is clear and unambiguous: only periods of delay "as defined in … Rule 36(b)(2)" are to be excluded. In other words, the statute incorporates only the first of the two types of exclusions discussed in *Graham*. *Compare* 480 Mass. at 523 (exclusions "specifically enumerated" in rule 36(b)(2)), *with id.* at 529 (exclusions "provided *not by any provision in rule 36* but by the common law" [emphasis added]).

In Mr. Lougee's view, this statutory text admits of no contrary construction. "When statutory language is clear and unambiguous it must be construed as written." *LeClair v. Norwell*, 430 Mass. 328, 335 (1999). Even if this Court perceives some ambiguity, the rule of lenity, which "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should,'" requires it to be resolved in favor of liberty. *United States v. Bass*, 404 U.S. 336, 348 (1971), *quoting* Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209 (1967). *See Commonwealth v. Dayton*, 477 Mass. 224, 226 n.2 (2017) (rule of lenity applies to §58A).

This construction also makes sense. The common law rule is simply that "a defendant is not entitled to dismissal"—with preju-

dice!—if he fails "to 'press [his] case through the criminal justice system.'" *Graham*, 480 Mass. at 529–530, *quoting Commonwealth v. Lauria*, 411 Mass. 63 (1991). This is a reasonable holding: "dismissal is a remedy which infringes drastically on the public interest in bringing guilty persons to trial," and under a contrary rule, that "public interest [could] be thwarted by those defense counsel who decide that delay is the best defense tactic." *Barry v. Commonwealth*, 390 Mass. 285, 297 (1983). This concern is not present under §58A. The expiration of the pretrial detention period leads not to dismissal of the charges, but merely to the opportunity for a bail hearing and *potential* release of the defendant on conditions while he continues to await his trial. And there is far less reason to worry that a defendant will view "delay [as] the best defense tactic," *id.*, if he is incarcerated than if he is at liberty. It was eminently reasonable for the Legislature, in view of the substantial liberty interest at stake for a presumptively innocent defendant, to conclude that only the delays specifically enumerated in rule 36 should automatically extend the permitted pretrial detention period.

B. *The delay in Mr. Lougee's trial due to the pandemic is not "defined in rule 36(b)(2)," but in a Standing Order issued by this Court pursuant to its superintendence power.*

Thus, in order to prevail on its argument that Mr. Lougee's 180 day detention period has not yet run, the Commonwealth must show that the delay in his trial resulting from the COVID-19 pandemic falls within one of the categories specifically enumerated in rule 36(b)(2). The only such category to which the Commonwealth points is rule 36(b)(2)(F), which excludes:

> Any period of delay resulting from a continuance granted by a judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecutor, if the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial. No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subdivision unless the judge sets forth in the record of the case, either orally or in writing, his reasons for finding 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.

Although this Court's order indefinitely postponing all trials in the Commonwealth was made for the same *reasons* as a continuance under rule 36(b)(2)(F)—namely, that it "serve[d] the ends of justice and outweigh[ed] the best interests of the public and criminal defendants in a speedy trial"—that does not automatically render it a rule 36(b)(2)(F) continuance. The language of this subsection plainly contemplates a continuance granted by "a judge" who has a particular defendant before him, and explicitly requires that judge to set forth his findings "in the record of the case." This shows that in order to qualify under rule 36(b)(2)(F), a continuance must be based on findings that are *specific to a particular defendant's case*, rather than on systemic issues affecting every defendant in the Commonwealth. An example of what this looks like can be found in Judge Pasquale's order in this very case, allowing Mr. Lougee's motion to reschedule the trial based on the availability of his expert witness. Contemporaneously with his allowance of the motion, Judge Pasquale made findings "in the record of the case" regarding the ends of justice

served by the continuance, and a notation was made on the docket that the resulting delay was to be excluded under rule 36 (RA8).

That is not the situation here. This Court's order was an acknowledgment that no trials presently can be held, and incorporated a reasonable conclusion that defendants' cases need not be dismissed with prejudice as a result. But the order was issued "pursuant to [this Court's] superintendence and rule making authority," Standing Order at 1, not pursuant to rule 36(b)(2)(F). Unlike the continuance ordered by Judge Pasquale, the cancellation of Mr. Lougee's trial was not accompanied by any findings "in the record of [Mr. Lougee's] case" under rule 36(b)(2)(F). Thus, the delay resulting from the pandemic is not "excludable under [that] subdivision." MASS. R. CRIM. P. 36(b)(2)(F). *See Commonwealth v. Davis*, 91 Mass. App. Ct. 631, 637–638 (2017) (delays caused by systemic issues such as court congestion not excludable under rule 36(b)(2)(F) unless judge makes findings specific to defendant that amount to more than just explaining why trial cannot be held that day). Although those delays are excluded from speedy trial calculations as a result of this Court's order, and thus will not result in dismissals, they are not exclusions "defined in … Rule 36(b)(2)," §58A(3); they are instead exclusions defined by this Court's order pursuant to its superintendence authority. Judge Davis thus correctly ruled that they do not extend the authorized length of pretrial detention.

C. *This Court's order tolling procedural deadlines was not intended to deprive defendants of their substantive statutory liberty interests, nor would such a deprivation comport with the constitutional separation of powers*.

Nor does paragraph 12 of the Standing Order, which tolls "deadlines set forth in statutes or court rules," operate automatically to extend Mr. Lougee's pretrial detention.[5] That paragraph is plainly directed at *procedural* deadlines, *e.g.*, for the filing of a particular paper. There is no indication that the Court intended by this paragraph to affect substantive rights, particularly such fundamental rights as that of freedom from physical restraint. And the separate paragraphs dealing specifically with speedy trial rights (¶9), statutes of limitation (¶11), and injunctions or restraining orders (¶14), demonstrate that where this Court *did* intend to affect substantive rights, it said so explicitly. The absence of any mention of pretrial detention from the Standing Order is particularly instructive in this regard. *Cf. Phillips v. Equity Residential Mgmt., L.L.C.*, 478 Mass. 251, 259 (2017).

Moreover, as Judge Coven recently suggested in an order admitting another defendant to bail, any purported judicial suspension of a legislatively created liberty interest is constitutionally suspect. *See Commonwealth v. Baker*, Quincy Dist. Ct. No. 2056-CR-11, *post*, at A54 (May 21, 2020), *citing* art. 20 of the Massachusetts Decla-

[5] The Commonwealth did not raise this claim below (RA26–30). Nor, after Judge Davis raised and rejected it in his order, did the Commonwealth raise it in its petition before the single justice (RA32–41). It thus cannot serve as a basis for reversal of Judge Davis's order. *See Commonwealth v. Leslie*, 477 Mass. 48, 58 (2017), *citing Commonwealth v. Bettencourt*, 447 Mass. 631, 633 (2006). Mr. Lougee nevertheless addresses it here to assist the Court in providing guidance to other litigants. *Cf. Commonwealth v. Perkins*, 464 Mass. 92, 98 n.11 (2013).

ration of Rights ("The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for"). *See also* art. 30 ("the judicial shall never exercise the legislative or executive powers, or either of them: to the end it may be a government of laws and not of men"). As Judge Coven observed, there has been "no express delegation to [this] Court to suspend c.276 during a pandemic." *Baker*, *post*, at A55. While this Court may have inherent authority to toll procedural deadlines, its authority to contravene specific legislative directives safeguarding the liberty of presumptively innocent persons is not equally apparent. *See Commonwealth v. Teixeira*, 475 Mass. 482, 490 n.15 (2016) ("a court's inherent powers are strongest with respect to matters of procedure"). *See generally Carrasquillo v. Hampden County District Courts*, 484 Mass. 367, 393–394 (2020).

D. *Because §58A(3) permits detention to be extended for "good cause," a holding that the statute does not now require the indefinite detention of every defendant previously found dangerous will not result in the indiscriminate release of genuinely dangerous individuals.*

Mr. Lougee's construction of §58A is further supported by the fact that the Legislature provided a safety valve to prevent a truly dangerous individual from being released if his trial were delayed past the period provided in the statute: that period may be exceeded for "good cause." §58A(3). The "good cause" provision obviates the Commonwealth's concern that truly dangerous defendants may "abruptly revert to the status of regular bail applicants" (CB11) and be released without regard to any prior findings of dangerousness.

The precise meaning of "good cause" under ordinary circumstances is not perfectly clear. But viewed in context with the rest of the statute, it must require something more than that a defendant has previously been found dangerous, has still not been tried, but is not yet entitled to a rule 36 dismissal; plainly, the Legislature anticipated that at least *some* defendants initially detained without bail would be released from confinement before their trials. At the very least, "good cause" must entail not only specific findings regarding the reasons for the delay of trial, but also a new determination that the defendant presently *remains* dangerous and that there are still no conditions of release that could suffice to protect the public.

Regardless of its meaning in ordinary times, under the extraordinary circumstances presented by the pandemic, this Court must give some additional content to the "good cause" requirement. First, the pandemic and concomitant inability to bring the case to trial cannot *by itself* be deemed "good cause" to continue commitment indefinitely. As Judge Coven correctly observed, "[g]ood cause, as contemplated by the legislative language, requires an individualized determination concerning the particularized facts of an individual case." *Baker*, *post*, at A55. For the same reasons outlined *supra* regarding this Court's Standing Order, as well as the further constitutional concerns discussed *infra*, a systemic inability to bring cases to trial cannot *alone* justify the indefinite detention of every defendant who previously has been found dangerous in a preliminary hearing with limited procedural protections. *Cf. Bridgeman v. District Attorney for the Suffolk Dist.*, 476 Mass. 298, 324 (2017), *quoting Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 246 (2004) ("the burden of

a systemic lapse is not to be borne by defendants"). Instead, a searching inquiry is required into the necessity of detention for a particular defendant before that presumptively innocent person may be detained indefinitely for the duration of the pandemic. The necessary form of that inquiry under the due process provisions of the State and Federal Constitutions is discussed further *infra*.

The Commonwealth has made no argument at any point in this case (including in its brief to this Court) based upon the "good cause" provision. *See Commonwealth v. Leslie*, 477 Mass. 48, 58 (2017) (judge's ruling will not be reversed on grounds not raised below); MASS. R.A.P. 16(a)(9)(A). And Judge Davis's order terminating Mr. Lougee's detention under §58A(3) necessarily incorporates an implicit finding that no such good cause exists. This Court has no basis to second-guess that finding on this record, particularly given that at Mr. Lougee's initial arraignment, Judge Brennan also concluded that Mr. Lougee safely could be released on conditions. Judge Davis's order terminating Mr. Lougee's detention must be affirmed.

II. A construction of §58A and this Court's Standing Order that would require indefinite preventive detention for the duration of the pandemic should be avoided, as it would raise serious constitutional doubts.

In addition to the statute's plain text and the rule of lenity, another venerable principle of statutory construction strongly counsels against reading §58A and this Court's Standing Order together to require indefinite preventive detention during the ongoing pandemic: the canon of constitutional avoidance. That canon provides that "a statute is to be construed where fairly possible so as to avoid constitutional questions." *Commonwealth v. Jones*, 471 Mass. 138, 143

(2015), *quoting United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994). *See also, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), *quoting Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'").

Here, a number of serious doubts are presented as to the constitutionality of a construction of §58A that would require Mr. Lougee to remain detained indefinitely without an opportunity to seek bail for the duration of this pandemic. First, there is a threshold question whether it is *ever* constitutional for preventive detention based on a determination of "dangerousness" made at a preliminary hearing with limited procedural protections to be extended indefinitely without any clear prospect for a trial. Even if indefinite preventive detention were *ever* constitutionally permissible, pretrial detainees' present conditions of confinement, including their inability to protect themselves from exposure to a dangerous virus, combined with harsh lockdown measures instituted by sheriffs attempting to forestall such exposure, likely render indefinite detention unconstitutionally punitive under both the State and Federal Constitutions.[6]

[6] Although Mr. Lougee did not press his constitutional arguments in precisely this form below, his Superior Court motion cited *Mendonza* (RA23) and his opposition in the county court argued that indefinite pretrial detention violates art. 12 (RA45). In any event, this Court "may affirm a lower court ruling on any ground supported by the record, including legal theories not argued by the [appellee] or considered by the judge in the proceedings below." *Brangan v. Commonwealth*, 477 Mass. 691, 698 n.12 (2017).

A. *An indefinite extension of preventive detention based on a preliminary finding of dangerousness does not comport with the due process of law.*

"Unlike convicted prisoners, who may be punished as long as the punishment is not 'cruel and unusual' ..., pretrial detainees may not be punished at all." *Richardson v. Sheriff of Middlesex County*, 407 Mass. 455, 461 (1990), *citing Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). In *Salerno*, the Supreme Court held preventive pretrial detention permissible because it was deemed regulatory rather than punitive in character. 481 U.S. at 746–747. But the Court also stressed the strict temporal limitation on such detention (seventy days), and expressly noted that at some point, pretrial detention "might become excessively prolonged, and therefore punitive, in relation to Congress's regulatory goal." *Id.* at 747 n.4.

As noted *supra*, §58A now permits a far greater detention period than the statutes endorsed by the Supreme Court in *Salerno* and by this Court in *Mendonza*—potentially up to 300 days (plus rule 36 exclusions) for defendants detained first by the District Court and then by the Superior Court. Should this Court now conclude that §58A requires the full duration of a global pandemic to be added to that already substantial period, a serious question would be presented regarding whether such "excessively prolonged" detention amounts to punishment before trial. *Salerno*, *supra*.

Mr. Lougee has referred to the postponement of his trial as "indefinite" advisedly. It is far from clear when trials may recommence. In a May 14 letter, the Chief Justices of the Commonwealth's courts expressed hope that jury trials might resume this fall if the public schools reopen. Letter from the Chief Justices to Members of the

Bar, *post*, at A57 (May 14, 2020). *See also* Second Updated Standing Order, OE-144 (May 26, 2020) (continuing jury trials to a date no earlier than September 8, 2020). As yet, it is far from clear whether that will happen.[7] Even under an absolute best case scenario, the "tolling" contemplated by the Commonwealth would *itself* equal the 180 day maximum detention otherwise permitted in the Superior Court.[8] And even under the highly optimistic assumption that jury trials *are* able to resume during this calendar year, the volume of such trials able to be handled by our trial courts will surely be substantially reduced, further delaying most defendants' trials.[9] In

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[7] The Secretary of Education recently told the Legislature that "[r]emote learning will be a much larger factor in planning for school next year," and that "[e]ven if we start school in a quasi-normal fashion, we have to be prepared for the possibility in-person education will be interrupted again." Schoenberg, *Peyser: Remote learning could continue in fall*, COMMONWEALTH MAGAZINE, *https://commonwealthmagazine.org/education/peyser-remote-learning-could-continue-in-fall/* (May 13, 2020).

[8] From March 16, 2020 (the day the courts closed) to September 8, 2020 (the absolute earliest date any defendant may receive a trial under this Court's most recent order) is a delay of 176 days.

[9] The Chief Justices' letter recognized that "the challenges of conducting jury trials with social distancing during a pandemic are formidable, and will require us to reimagine how juries are empaneled, where they will sit during trial, and where they will deliberate so that jurors can both be safe and feel safe." *Post*, at A57. Indeed, jury trials, particularly empanelment, present unique challenges during a pandemic. *See generally* Resnick, *6 feet away isn't enough. COVID-19 risk involves other dimensions*, VOX, *https://www.vox.com/science-and-health/2020/5/22/21265180/cdc-coronavirus-surfaces-social-distancing-guidelines-covid-19-risks* (May 22, 2020) (collecting research showing that a "crowded indoor place … with poor ventilation, filled with people talking … for hours on end will be the riskiest scenario"). In

short, the additional delay occasioned by the pandemic has no fixed end date, is near-certain to exceed six months, and may well last more than a year. When added to the 120–300 days, *plus* rule 36 exclusions, already authorized by §58A, a serious doubt exists whether it would render the total duration of pretrial detention "excessively prolonged, and therefore punitive." *Salerno*, *supra*.

Even if such lengthy preventive detention could pass muster under Federal law, it would not do so under the State Constitution. In *Mendonza*, this Court confronted a challenge under the Declaration of Rights "to the use of a prediction of dangerousness as a predicate for a deprivation of liberty at all"—a challenge which, this Court noted, "has a firmer textual footing in arts. 1 and 10 than in the Fourteenth Amendment." 423 Mass. at 778. This Court ultimately "reject[ed] the claim that a person accused of crime may *never* be detained on grounds of dangerousness prior to his adjudication of guilt in a criminal trial." *Id.* at 782 (emphasis added). But it did so not because it viewed the claim as "frivolous or far-fetched but because, in spite of [its] considerable force, [it was] too absolute." *Id.* at 790. Although "[t]he preventive regime of §58A has a particularly heavy burden to overcome because it is explicitly 'predictive,'" in contravention of general principles of criminal justice, *id.* at 780, this Court's careful balancing of the competing interests at stake ultimately concluded that the statute's strict time limits and procedural safeguards rendered it consonant with the Declaration of Rights.

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light of these challenges, at least one Federal court has acknowledged that "criminal jury trials are not likely to resume prior to 2021." Letter to Counsel (paper #184), *United States v. Fanyo-Patchou*, No. 2:19-CR-00146-JCC (W.D. Wash. May 26, 2020), *post*, at A58.

The circumstances presented by this case upset that careful balance. Mr. Lougee's preventive detention has already spanned more than fourteen months, and the Commonwealth now seeks to extend it into the future without any clear end date. "[T]he text and structure of our own more emphatic guarantees in arts. 1, 10, and 12 do not permit" indefinite preventive detention based on an amorphous prediction of future "dangerousness." *Mendonza*, 423 Mass. at 780. *See Abbott A. v. Commonwealth*, 458 Mass. 24, 40–41 (2010) (due process forbids pretrial detention that is "unreasonable in duration"). *See generally Brangan*, 477 Mass. at 710 ("In upholding pretrial detention ..., we have emphasized [its] temporary nature"); *Abbott A.*, *supra*, at 40 ("Pretrial detention under §58A was intended to be short lived, ending on the conclusion of a speedy trial"). *Cf. also Commonwealth v. G.F.*, 479 Mass. 180, 196 (2018) ("confinement pending an SDP trial is constitutional, only because that commitment is temporary, and the SDP statute requires an expedited timeline for trial").

B. *Mr. Lougee's present conditions of confinement, if extended indefinitely without opportunity for bail, would constitute punishment without trial in violation of due process.*

Moreover, the pandemic itself, along with the measures taken by county sheriffs to stem its tide in their facilities, intensifies the "serious doubt," *Zadvydas*, 533 U.S. at 689, whether indefinite detention under present circumstances comports with the due process of law. "Prevention of COVID-19 is highly dependent on physical social distancing." *Christie v. Commonwealth*, 484 Mass. 397, 399 (2020). As a result, the people of the Commonwealth have been admonished to stay at home except for essential activities, and to minimize interactions with others as much as possible. And most of us have done so,

in an effort to protect ourselves and others from this dangerous virus. But Mr. Lougee cannot; he is forced to live in a congregate setting with numerous other inmates, and to come into regular contact both with those inmates and with the jail's staff. *See CPCS v. Chief Justice of the Trial Court*, 484 Mass. 431, 436 (2020) ("correctional institutions face unique difficulties in keeping their populations safe during this pandemic"). Should the sheriff's efforts to control the virus fail, Mr. Lougee cannot protect himself; he has no recourse.

It is well settled that "when the State ... so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, ... medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989). And unlike a convict, who must show that his punishment is "cruel and unusual," a pretrial detainee—who may not constitutionally be punished at all—need not meet the demanding "deliberate indifference" test that applies to Eighth Amendment claims. *See Banks v. Booth*, 2020 WL 1914896, at *5 (D.D.C. April 19, 2020) (collecting cases). *But cf. Savino v. Souza*, 2020 WL 2404923, at *8 n.16 (D. Mass. May 12, 2020) (noting circuit split and applying "deliberate indifference" standard). And the explicit, "more emphatic guarantees" in the Declaration of Rights, *Mendonza*, 423 Mass. at 780,[10] certainly preclude application of the "deliberate indifference"

[10] *See* art. 1 ("All people ... have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; ... in fine, that of seeking and

standard in this context. Instead, a jailer violates the due process rights of his pretrial detainees if he should know "that the jail conditions pose[] an excessive risk to their health." *Banks*, *supra*, at *6.

Locking presumptively innocent people in congregate settings while a dangerous pandemic ravages the community presents grave doubts on this score. *See generally id.* at *6–*8 (holding pretrial detainees held by the District of Columbia Department of Corrections likely to succeed on the merits of their due process claim). In fact, a Federal judge recently held that immigration detainees held at the Bristol County Jail—the very same facility at which Mr. Lougee is incarcerated—likely would succeed in proving that their due process rights were violated by the threat of exposure to the virus at that facility even under the considerably more demanding "deliberate indifference" standard. *Savino*, *supra*, at *7–*10 (noting lack of sufficient testing and contact tracing protocols and ruling that "[k]eeping individuals confined closely together in the presence of a potentially lethal virus, while neither knowing who is carrying it nor taking effective measures to find out, likely displays deliberate indifference to a substantial risk of serious harm"). A construction of §58A that requires Mr. Lougee to be held indefinitely in such conditions thus would likely deprive him of liberty without due process of law under the Fourteenth Amendment and art. 12, and of his "unalienable rights" to "defend[his] li[fe]," to "seek[his] safety," and generally to "be protected by [society]," under arts. 1 and 10.

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obtaining their safety and happiness"); art. 10 ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property").

Finally, those sheriffs who do take effective measures to contain the virus run a serious risk that those measures will themselves function as "punishment" that, while it may not be cruel or unusual, still violates the due process rights of pretrial detainees. Measures taken by some Massachusetts authorities include the total shut-down of all outside visits and rehabilitative programming, as well as severe restrictions on recreation and sometimes lockdowns that confine inmates to their cells for more than 22 hours per day. *See* Findings of Fact, *Foster v. Mici*, No. SJC-12935, at 8–13 (May 1, 2020) (describing measures taken by Department of Correction).[11]

Even if they do succeed in containing potential outbreaks, the imposition of such conditions on pretrial detainees raises serious questions as to the constitutionality of indefinite confinement under §58A without an opportunity for admission to bail. *Cf., e.g.*, *Glossip v. Gross*, 135 S.Ct. 2726, 2765 (2015) (Breyer, J., dissenting), *and authorities cited* (describing psychological effects of solitary confinement); *Haverty v. Commissioner of Correction*, 437 Mass. 737, 752–753 (2002) (same); *Richardson*, 407 Mass. at 465 n.11, *citing Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981) (confinement of pretrial detainees in small cells

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[11] At least some of the county sheriffs are imposing similar measures. *See, e.g.*, Barry, *Inmates slated for 24/7 lockdown as 8 coronavirus cases emerge at Hampden county jail in Ludlow*, MASSLIVE, *https://www.masslive.com/coronavirus/2020/05/inmates-slated-for-247-lockdown-as-8-coronavirus-cases-emerge-at-at-hampden-county-jail-in-ludlow.html* (May 27, 2020); Manganis, *COVID-19 cases spike at Middleton Jail*, SALEM NEWS, *https://www.salemnews.com/news/local_news/covid-19-cases-spike-at-middleton-jail/article_7d9e1876-5263-5985-b9d3-365844cb40a9.html* (April 10, 2020); Spillane, *Virus puts Barnstable County Jail on lockdown*, CAPE COD TIMES, *https://www.capecodtimes.com/news/20200317/virus-puts-barnstable-county-jail-on-lockdown* (March 18, 2020).

for 22 hours per day is impermissible punishment). *Contrast Bell v. Wolfish*, 441 U.S. at 543 (not punitive to require detainees to share facilities "for generally a maximum period of 60 days").

In sum, indefinite preventive detention during a pandemic "'shocks the conscience,' [and] interferes with 'rights implicit in the concept of ordered liberty,'" *G.F.*, 479 Mass. at 195, *quoting Commonwealth v. Fay*, 467 Mass. 574, 583 (2014)—if not under Federal law, then certainly under the "more emphatic guarantees in arts. 1, 10, and 12" of the Declaration of Rights. *Mendonza*, 423 Mass. at 780. *See Commonwealth v. Alvarez*, 413 Mass. 224, 228 n.4 (1992) ("Articles 1, 10 and 12 have always been considered as embodying due process protections *at least* parallel to those granted by the Fourteenth Amendment" [emphasis added]). *See also Abbott A.*, 458 Mass. at 37 n.14 (art. 12 provides more protection against lengthy preventive detention than Federal Constitution). If §58A does require such detention, it is unconstitutional as applied during this pandemic. *See id.* at 40–41. *Cf. G.F.*, 479 Mass. at 196 ("substantive due process ... does not permit the Commonwealth to hold an individual indefinitely while repeatedly seeking a finding of sexual dangerousness").

C. *Rather than construing §58A so as to predictably create serious constitutional problems and addressing those problems on an ad hoc basis, this Court should make every effort to construe the statute so as to avoid such problems*.

The Commonwealth's brief does not address the additional constitutional concerns occasioned by the pandemic itself. Nor does the Commonwealth actually appear to contend that indefinite preventive pretrial detention is constitutional. Nevertheless, the Commonwealth urges this Court to construe §58A to *require* such deten-

tion, and to address any "due process concerns occasioned" thereby on an *ad hoc* basis under the principles enumerated in *Abbott A. v. Commonwealth*, 458 Mass. at 36–42. CB13–17.[12]

But in *Abbott A.*, the Legislature had clearly and unambiguously provided that the juvenile was to be detained, potentially indefinitely, so long as he remained incompetent to stand trial. *See id.* at 37 (potentially indefinite detention "is required by the language of the statute"). As a result, this Court had no choice but to invoke the "rule of reasonableness" and institute an amorphous "totality of the circumstances" test to determine whether the length of that particular juvenile's pretrial detention had become unreasonably prolonged, rendering §58A unconstitutional as applied to him. *Id. See Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018), *quoting Warger v. Shauers*, 574 U.S. 40, 50 (2014) ("In the absence of more than one plausible construction [of a statute], the [constitutional avoidance] canon simply 'has no application'"). By contrast, here, as explained *supra*, this Court readily may interpret §58A *not* to require indefinite de-

[12] The Commonwealth optimistically asserts that "trials will resume as soon as reasonably possible, and that progress is *continually* being made toward that goal" (CB14, emphasis added). But the Governor's reopening plan specifically recognizes that *continual* forward progress is far from guaranteed, and that "[p]ublic health data trends indicating significant increases in viral transmission could result in returning to prior phases" of the plan. OFFICE OF GOVERNOR CHARLIE BAKER, REOPENING MASSACHUSETTS 5, *https://www.mass.gov/doc/reopening-massachusetts/download* (May 18, 2020). Mr. Lougee doubts that, were such unfortunate backsliding to occur, the Commonwealth would contend that the lapse in forward progress would require termination of detention. *Cf. Abbott A.*, 458 Mass. at 39, *quoting Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("continued commitment must be justified by progress toward that goal").

tention for the duration of the pandemic—a result that the Commonwealth appears to recognize would certainly be unconstitutional at least as applied to *some* detainees. Principles of lenity and constitutional avoidance therefore strongly counsel in favor of doing so. *See generally Clark v. Martinez*, 543 U.S. 371, 380–382 (2005) (construction that creates constitutional doubts as to *some* applications of statute should be avoided in *all* applications).

The *ad hoc* procedures of *Abbott A.* were fashioned to address an unusual situation where a statute that was valid in almost every application risked an unconstitutional result as to a particular juvenile. But this Court has recognized that "the scale and scope of [a more systemic] problem may very well present a different set of constitutional questions" than an idiosyncratic problem with the application of an otherwise constitutional statute to a particular individual. *Massachusetts Gen. Hosp. v. C.R.*, 484 Mass. 472, 490 (2020). This Court should not construe §58A as "a broad preventive detention scheme" requiring indefinite detention of everyone previously found dangerous, from which individual defendants must petition for an exception. *Aime*, 414 Mass. at 672. *See Mendonza*, 423 Mass. at 780, *quoting Opinion of the Justices*, 423 Mass. 1201, 1219 (1996) ("Our system of criminal justice is not predictive in the sense that it would seek systematically to identify those who may present a danger to society and to incapacitate them before that danger may be realized").

Instead, this Court should respect the Legislature's judgment as to the point at which pretrial detention of a presumptively innocent person *generally* becomes unreasonable: after 120 days in the District Court, or 180 days in the Superior Court. *See G.F.*, 479 Mass. at 196,

quoting Commonwealth v. Pariseau, 466 Mass. 805, 813 (2014) ("The balancing of interests contemplated by the statutory framework may be upset when an SDP determination is not made within established timeframes"). *Cf. Zadvydas*, 533 U.S. at 701 (deferring to legislative doubts as to constitutionality of civil immigration detention lasting longer than six months). Once a defendant's detention has exceeded those statutory guidelines, he should receive a bail hearing unless the Commonwealth is able to demonstrate "good cause," based on factors particular to that individual defendant, to continue holding him. *See G.F.*, *supra*, at 196–197, *citing Pariseau*, *supra*, at 812–814 (due process requires opportunity for supervised release once detention exceeds timeline envisioned by Legislature).

III. The procedural protections provided by §58A are constitutionally inadequate to justify continued preventive detention under present circumstances.

As to that "good cause" inquiry, due process requires this Court to provide some direction to judges and litigants as to its content under the present extraordinary circumstances. *See Aime*, 414 Mass. at 674–675, *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The absence of any prospect for a speedy trial, combined with the conditions of confinement imposed to contain the virus and detainees' inability to protect themselves from exposure should those measures fail, certainly upset the careful balancing conducted by this Court in *Mendonza* to hold the procedures established by §58A sufficient to satisfy the dictates of due process. *See* 423 Mass. at 782–792.

"In determining what process is due, this court must balance the interests of the individual affected, the risk of erroneous depri-

vation of those interests and the government's interest in the efficient and economic administration of its affairs." *Paquette v. Commonwealth*, 440 Mass. 121, 131 (2003), *quoting Commonwealth v. Barboza*, 387 Mass. 105, 112 (1982). *See generally Mathews v. Eldridge*, *supra*. For the reasons detailed above, the interest of a presumptively innocent person in not being held in jail—always compelling and fundamental—is considerably greater now than usual. Simultaneously, the limits on in-person court proceedings have rendered the procedural protections that §58A *does* provide considerably less effective than usual. Thus, due process now requires something more than usual to justify preventive detention.

A. *Pretrial detention decisions must take the pandemic into account.*

First, "[i]n these extraordinary times, a judge deciding whether to" indefinitely incarcerate someone who has been convicted of no crime, just like a judge "deciding whether to grant a stay" to a person who *has* been convicted, "should consider not only the risk *to others* if the defendant were to be released and reoffend, but also the health risk *to the defendant* if the defendant were to remain in custody." *Christie*, 484 Mass. at 401. As *Christie* requires, this consideration should include "both the *general* risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the *specific* risk to the defendant, in view of his or her age and existing medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus." *Id.* at 401–402.

Section 58A(4) already provides that the question of pretrial detention may be revisited "at any time before trial" based upon a "change in circumstances [that] has a material bearing" on the propriety of detention. Given that, during this pandemic, the factors outlined in *Christie* are material to the detention decision, the pandemic constitutes "a fundamental change in circumstances" for anyone who was found dangerous prior to its onset. *Christie*, 484 Mass. at 401.[13] On motion, such a defendant should be entitled to a timely hearing to ensure that all relevant factors have been considered and detention truly is necessary.

B. *Potentially indefinite preventive detention requires regular review to ensure its continued necessity*.

Moreover, so long as no trial dates are set and detention remains functionally indefinite, courts must be vigilant to ensure that presumptively innocent people are not unnecessarily detained in violation of their rights under the State and Federal Constitutions. This Court should therefore exercise its superintendence power under G.L. c.211, §3, to require that, until a trial date is set or a defendant is released from pretrial detention, a hearing be conducted no less than every thirty days to determine whether continued preventive detention is necessary. *See* G.L. c.276, §35 (case may not be adjourned for more than thirty days over objection of incarcerated defendant). *Cf. Abbott A.*, 458 Mass. at 41–42 (requiring review every ninety days to assess juvenile's progress toward competency). This will ensure that preventive detention remains focused on the *present*

[13] This includes defendants who, when they believed a speedy trial was a possibility, stipulated to their dangerousness and waived their right to a hearing.

dangerousness of the presumptively innocent individuals detained, and does not extend past the point where it is truly necessary to protect the public. *See, e.g.*, *Commonwealth v. Cory*, 454 Mass. 559, 566 (2009) (regulatory, as opposed to punitive, measures must focus on "present dangerousness"). *See also C.R.*, 484 Mass. at 489 ("important constitutional liberty interests at stake require that the involuntary restraint ..., including the time period allowed for that restraint, must be narrowly tailored to serve a compelling governmental interest"); *Matter of a Minor*, 484 Mass. 295, 310 (2020) (involuntary detention not justified unless "there are no appropriate, less restrictive alternatives that adequately would protect" the interests at issue).

C. *The pandemic and the absence of any prospect for a speedy trial shift the balance of interests so as to require stricter procedural protections before preventive detention may continue.*

At those new hearings, as well as at any review hearing conducted upon the expiration of an authorized detention period, a judge must carefully balance not only the *Christie* factors and those enumerated in §58A(5), but also "the length of the defendant's pretrial detention and the equities of the case." *Brangan*, 477 Mass. at 710. As this Court has repeatedly noted, the "justification for pretrial detention erodes the longer a defendant has been held." *Id.* And so long as there is no clear end in sight, more procedural protections are required to render preventive detention constitutional than those provided by §58A(4). Rather than probable cause to arrest (potentially based entirely on inadmissible hearsay) and clear and convincing evidence of dangerousness, indefinite detention during a pandemic can only be justified by proof beyond a reasonable doubt

that no conditions of release exist that could protect the public, along with a showing that the Commonwealth possesses sufficient admissible evidence to get its case to a jury once trials resume.

1. *Preventive detention may only be maintained during the pandemic based on proof beyond a reasonable doubt of its necessity to protect the public*.

"As a general matter, outside of criminal trial proceedings, the length of time that an involuntary commitment may last is key among the factors that may bear on the determination of what standard applies." *Matter of G.P.*, 473 Mass. 112, 119 (2015), *citing Abbott A.*, 458 Mass. at 40–41. This Court upheld the "clear and convincing evidence" standard for §58A detention only because such detention "is temporary and provisional." *Mendonza*, 423 Mass. at 790. And as noted *supra*, that analysis was based on an allowable length of detention less than a third the potential maximum permitted by the present version of the statute. Regardless of whether clear and convincing evidence suffices to permit up to 120 days of detention by the District Court, followed by up to 180 additional days if an indictment is returned,[14] it does not suffice to permit detention with-

[14] Notably, in rejecting Mendonza's argument that proof beyond reasonable doubt should be required, this Court said that a ninety day preventive detention pending trial was more properly analogized "not to confinement of the dangerously mentally ill ..., but to the various temporary confinements authorized by G.L. c.123 for observation or for emergency restraint," for which a lower standard of proof sufficed. 423 Mass. at 783. The temporary confinements to which the Court pointed involved durations of ten days (with a possible further fourteen day extension), and twenty days (with the potential for a further twenty day extension). *Id.* at 783 n.5. The duration of detention authorized by the *present* version of §58A, however, is much more analogous to the six-month initial commitment permitted by c.123, §8, which requires proof beyond reasonable doubt.

out *any* fixed end date. *See G.P.*, 473 Mass. at 119 & n.10, *citing, e.g.*, *Superintendent of Worcester State Hosp. v. Hagberg*, 374 Mass. 271, 272 (1978) (proof beyond reasonable doubt required for mental health commitment of six months, with potential for subsequent renewal).

Historically, this Court had "doubt[ed] the utility of employing three standards of proof when two seem quite enough." *Hagberg*, 374 Mass. at 276. A key reason why it changed course and embraced the intermediate "clear and convincing" standard in *Mendonza*, in addition to the "limited and preliminary" nature of pretrial detention, was that the dangerousness hearing was required to be conducted immediately after arraignment. 423 Mass. at 783. Under those circumstances, the Court feared that "to require proof beyond a reasonable doubt at [such a] very early stage of the proceedings … risks making this form of preliminary relief unavailable in practice." *Id.* at 784. But we are no longer at a very early stage of Mr. Lougee's case. As the Commonwealth itself appears to agree (CB16–17), it is perfectly fair at this juncture to require proof of the necessity for pretrial detention beyond a reasonable doubt.

2. *To justify continued detention, the Commonwealth must satisfy a judge that it possesses sufficient admissible evidence to prove the charge once trials resume*.

In addition, this Court has recognized that even in a first degree murder case, as the duration of pretrial detention increases, it is important to consider "the equities of the case," including "the strength of evidence upon which detention [is] based (especially if there have been any changes in the evidence since bail was previously denied, *e.g.*, as a result of a successful motion to suppress)." *Vasquez v. Commonwealth*, 481 Mass. 747, 760–761 (2019). This, too, is a function of

the due process balancing test; a defendant held pretrial who eventually is acquitted has been subject to an "erroneous deprivation" of liberty. *Mathews v. Eldridge*, 424 U.S. at 335. A detention decision that disregards the strength of the Commonwealth's *admissible* evidence is far more likely to result in such an erroneous deprivation.

Although a showing of probable cause to arrest—without regard to the admissibility at trial of the evidence used to make that showing—may be appropriate for "a flexible and reliable preliminary determination of dangerousness" at the very outset of a case, *Mendonza*, 423 Mass. at 786, it does not suffice for an indefinite extension of pretrial detention for a defendant who has already been held for many months. *See Myers v. Commonwealth*, 363 Mass. 843, 849 (1973) ("A judicial finding of probable cause to arrest validates only the initial decision to arrest the suspect, not the decision made later in the criminal process to hold the defendant for trial"). *See also Commonwealth v. Hanright*, 466 Mass. 303, 311 (2013) ("Probable cause to sustain an indictment is a decidedly low standard"). Instead, detention should be permitted only on a showing that the Commonwealth possesses sufficient admissible evidence to justify submitting the case to a jury once a trial can be had. *See Myers*, *supra*, at 850.

Pretrial hearings conducted under the directed verdict standard are not foreign to our jurisprudence. *See Commonwealth v. Perkins*, 464 Mass. 92, 101–102 (2013), *citing Myers*, *supra*, at 848–850 (discussing District Court bind-over hearings under G.L. c.276, §38). The bind-over hearing serves a similar purpose to the "good cause" hearing envisioned by Mr. Lougee: "sparing individuals from being held for trial" where the Commonwealth's case is not strong enough to

warrant it. *Perkins*, *supra*, at 101, *quoting Myers*, *supra*, at 847. It thus serves as a constructive model. To minimize the risk of an erroneous deprivation of liberty, the "good cause" hearing should incorporate a bind-over hearing's procedural protections to the maximum extent possible at the time it is held. *See Myers*, 363 Mass. at 850–854.

Thus, if it is possible to hold a live hearing with in-person testimony, that should be required; if all that can be managed is a hearing by videoconference, then such a conference should be arranged, with an opportunity for the defense to present evidence and cross-examine the witnesses remotely. If even remote testimony is genuinely impossible, a judge should think long and hard before indefinitely extending the incarceration of a presumptively innocent person, since his evaluation of the existence of "good cause" to do so will be hamstrung by his limited ability to assess the adequacy of the Commonwealth's case. In no event should a judge find "good cause" based on anything less than sworn statements by a witness with firsthand knowledge, *e.g.* grand jury minutes or affidavits. The representations (even sworn representations) of the prosecutor and non-percipient police witnesses should not suffice. This is a high standard, but not an unreasonably high one in light of the fundamental liberty interests at stake. By the time a defendant has reached the outer limit of the pretrial detention otherwise permitted by §58A(3), the Commonwealth will have had sufficient time "reasonably to marshal and present the quantity and quality of evidence that is necessary" to meet it. *Perkins*, *supra*, at 102.

Conclusion

For the foregoing reasons, this Court should affirm Judge Davis's order that Mr. Lougee's pretrial detention under G.L. c.276, §58A(3) has expired. In addition, this Court should clarify the procedural protections necessary for preventive detention to satisfy due process under the extraordinary circumstances presented by the COVID-19 pandemic, as follows:

1. A judge conducting a dangerousness hearing must consider the pandemic-related factors outlined in *Christie v. Commonwealth*, 484 Mass. 397, 401–402 (2020), in addition to the factors enumerated in §58A(5).
2. So long as no trials may be had, defendants held without bail are entitled to review of their status at least every thirty days to ensure that detention remains justified.
3. Preventive detention must be justified by a showing that the Commonwealth possesses sufficient admissible evidence to prove the charged crime beyond a reasonable doubt, and by proof beyond a reasonable doubt that no conditions of release would suffice to protect the public.

Respectfully submitted,

CAMERON LOUGEE

By his attorney,

/s/ Patrick Levin

Patrick Levin, BBO #682927
COMMITTEE FOR PUBLIC COUNSEL SERVICES
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May 29, 2020

ADDENDUM

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#17

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT DEPARMENT
INDICTMENT NO.: 1973 CR 0216

COMMONWEALTH

V.

CAMERON LOUGEE

BRISTOL, SS SUPERIOR COURT
FILED
MAY - 4 2020
MARC J SANTOS, ESQ.
CLERK/MAGISTRATE

MOTION TO RELEASE THE DEFENDANT FROM 58a HOLD AND REMIT TO BAIL

Now comes the defendant in the above captioned matter and respectfully request this Honorable court release the defendant from his 58a "held without bail as dangerous" hold and conduct a bail hearing and remit him to bail.

As reasons therefore the defendant asserts that he was arraigned in the Bristol Superior Court in September 5, 2019 and found to be dangerous on September 13, 2019 by the Court. His 180-day 58a clock started to run at that time. The expiration of that time would have been statutorily March 13, 2020. The defendant had this case marked up for trial on March 23 by the Court. The case was continued for a final pretrial date of March 6, 2020, and had a trial date of March 23, 2020 which would have put the defendant just a few days beyond his 180-expiration date had it gone to trial on March 23, 2020. At no point prior to March 6, 2020 did the defendant or the Commonwealth ask for any additional time. On March 6, 2020 due to a scheduling issue with an expert, the defendant asked for a new trial date of May 11, 2020 which was allowed by the Court. The period of time between March 6, 2020 and May 11 is excludable from the 58a calculations. The hold on the defendant would have expired on March 13 thus the defendant was

TYPED VERSION OF JUDGE DAVIS'S HANDWRITTEN ORDER

After a hearing by video (Defendant) and telephone (counsel), this motion is ALLOWED. Under ordinary circumstances, Defendant's 180 day detention under G.L. c.276, §58A, would end on May 15, 2020. This Court does not read the SJC's updated Standing Order, effective May 4, 2020, as tolling or extending the end date for Defendant's detention. It is not a "deadline" for purposes of ¶12 of the Standing Order, nor is it a "Speedy Trial Computation" for the purposes of ¶9 of the Standing Order. Accordingly, Defendant is entitled to a bail hearing, which will take place by teleconference on May 15, 2020, at 2:00 P.M.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. OE-144

In Re: COVID-19 (Coronavirus) Pandemic

UPDATED ORDER REGARDING COURT OPERATIONS UNDER THE EXIGENT CIRCUMSTANCES CREATED BY THE COVID-19 (CORONAVIRUS) PANDEMIC

To safeguard the health and safety of the public and court personnel during the COVID-19 (coronavirus) pandemic while continuing to conduct court business, the Supreme Judicial Court, pursuant to its superintendence and rule making authority, issues the following ORDER:

1. Prior orders. Effective May 4, 2020, this order shall repeal and replace the Order Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic issued by the court on April 1, 2020.

2. In-person emergency matters. Until at least June 1, 2020, all the courts of the Commonwealth will be open to conduct court business, but courthouses will continue to be closed to the general public, except where entry is required to address emergency matters that cannot be resolved virtually (i.e., by telephone, videoconference, email, or comparable means, or through the electronic filing system) because it is not practicable or would be inconsistent with the protection of constitutional rights. The Appeals Court and each of the Trial Court departments have issued standing orders or guidelines, specifying what constitutes an emergency matter in that particular court, and have posted all such orders and guidelines on the "Court System Response to COVID-19" webpage (https://www.mass.gov/guides/court-system-response-to-covid-19) (COVID-19 webpage) (see paragraph 15 below). The Chief Justice of a Trial Court department, after consultation with the Chief Justice of the Trial Court, may order that a court division or location conduct all business virtually and/or may transfer all in-person emergency matters to specified courts within the department.

3. Virtual non-emergency matters. a. Trial Court departments. Trial Court departments shall identify categories of non-emergency matters that they will attempt to address virtually, in whole or in part, where it is practicable to do so in view of skeletal court staffing, technological constraints, and the need to prioritize emergency matters, and where doing so is consistent with the protection of constitutional rights. Each Trial Court department shall provide clear guidance to the public and members of the bar regarding the categories of non-emergency matters that it will attempt to address virtually by posting periodic notices to the COVID-19 webpage (see paragraph 15 below).

b. SJC and Appeals Court. The Supreme Judicial Court and Appeals Court will continue to conduct oral arguments virtually in non-emergency matters.

4. Clerks', Registers', and Recorder's Offices. All court clerks', registers', and recorder's offices shall continue to conduct court business in all emergency matters and in non-emergency matters designated by their respective court department, including accepting the filing of pleadings and other documents, scheduling and facilitating hearings, and issuing orders. In addition, these offices shall continue to answer questions from attorneys, litigants, and the general public. All such business will be conducted virtually, except when the filing of pleadings and other documents in emergency matters cannot be accomplished virtually.

5. Who can enter courthouses for an emergency in-person proceeding. Entry into a courthouse for the purpose of an emergency in-person proceeding shall continue to be limited to attorneys, parties, witnesses, and other necessary persons as determined by the judge presiding over the proceeding, plus no more than three members of the "news media" as defined in Supreme Judicial Court Rule 1:19(2).

Further, in cases where a trial court judge has ordered electronic monitoring in the form of either GPS or remote alcohol monitoring or in cases where, pursuant to an earlier court order, previously installed electronic monitoring equipment requires maintenance or removal, all installations, maintenance, or removals of such equipment may occur in the courthouse to ensure security and access to personal protective equipment by probation personnel.

6. Jury and Bench Trials. All jury trials, in both criminal and civil cases, scheduled to commence in Massachusetts state courts between March 13, 2020, and July 1, 2020, are hereby continued to a date no earlier than July 1, 2020. All bench trials, in both criminal and civil cases, scheduled to commence in Massachusetts state courts between March 13, 2020, and June 1, 2020, are hereby continued to a date no earlier than June 1, 2020, unless they may be conducted virtually by agreement of the parties and of the court.

7. Application for exception. Upon a showing of exceptional circumstances, a party who had a trial or evidentiary hearing postponed as a result of this Order or the Prior SJC Orders[1] may apply for an exception from said order(s) by motion directed to the court where the trial or evidentiary hearing was to occur. No exception shall be granted except with the approval of the judge and the Chief Justice of the applicable Trial Court department and in no event shall a jury empanelment or jury trial occur during this time period due to the inherent risk involved in doing so.

8. Application for conference. A party who has had a trial or evidentiary hearing postponed as a result of this Order or the Prior SJC Orders may apply for a conference with the court where the trial or evidentiary hearing was to occur to address matters arising from the

[1] The April 1, 2020 order and the two orders it repealed and replaced, i.e., the March 13 Order Regarding Empanelment Of Juries and the March 17 Order Limiting In-Person Appearances In State Courthouses To Emergency Matters That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing, are collectively referred to as the "Prior SJC Orders."

postponement, which shall be conducted virtually. In criminal cases, where appropriate, a defendant may ask the court for reconsideration of bail or conditions of release. Nothing in this Order addresses the disposition of such requests for reconsideration.

9. Speedy Trial Computations. The continuances occasioned by this Order and the Prior SJC Orders serve the ends of justice and outweigh the best interests of the public and criminal defendants in a speedy trial. Therefore, the time periods of such continuances shall be excluded from speedy trial computations under Mass. R. Crim. P. 36.

10. Grand jury. No new grand jury shall be empaneled prior to July 6, 2020. Grand juries whose terms expire before the July 2020 empanelment of a new grand jury shall be extended until the date of that new empanelment.

11. Statutes of limitation. All statutes of limitation are tolled from March 17, 2020, through May 31, 2020.

12. Deadlines set forth in statutes or court rules, standing orders, or guidelines. Unless otherwise ordered by the applicable court, all deadlines set forth in statutes or court rules, standing orders, tracking orders, or guidelines that expired or will expire between March 16, 2020, and June 1, 2020, are tolled until June 1, 2020, and the new deadline in each instance is calculated as follows: determine how many days remained after March 16, 2020, until the original deadline, and that same number of days will remain as of June 1, 2020, until the new deadline. For example, if a rule set a thirty (30) day deadline and twelve (12) days remained after March 16 before that deadline was reached, then twelve (12) days will continue to remain as of June 1, before the new deadline is reached (i.e. June 15, because June 13 is a Saturday). If the thirty (30) day period commenced after March 16, then thirty (30) days remain as of June 1 before the new deadline is reached (i.e. July 1).

13. Court-ordered deadlines in particular cases. Unless otherwise specifically ordered by the applicable court, all deadlines established by a court in a particular case on or before March 16, 2020, that expire between March 16, 2020, and June 1, 2020, are tolled until June 1, 2020. To calculate the new deadline, see the guidance in paragraph 12. Probation termination dates are not tolled by this provision.

14. Expiring injunctions and similar orders. Unless otherwise ordered by the applicable court, all orders in a particular case that were issued prior to March 17, 2020, after an adversarial hearing (or the opportunity for an adversarial hearing), that enjoined or otherwise restrained or prohibited a party from taking some act or engaging in some conduct until a date between March 16, 2020, and June 1, 2020, shall remain in effect until the matter is rescheduled and heard.

15. Publication of COVID-19 orders. All orders, standing orders, guidelines, and notices under paragraph 3 issued by any court department or appellate court in response to the pandemic, as well as all amendments, modifications, and supplements thereto, or the equivalent, shall be posted upon issuance on the judiciary's COVID-19 webpage. Links to each document may be found on that webpage.

16. The Court may issue further Orders regarding this matter as necessary to address the circumstances arising from this pandemic.

This Order is effective May 4, 2020, and shall remain in effect until further order of the court.

RALPH D. GANTS)
) Chief Justice
)
BARBARA A. LENK)
)
)
FRANK M. GAZIANO) Justices
)
)
DAVID A. LOWY)
)
)
KIMBERLY S. BUDD)
)
)
ELSPETH B. CYPHER)
)
)
SCOTT L. KAFKER)

Entered: April 27, 2020
Effective: May 4, 2020

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

DISTRICT COURT DEPARTMENT
QUINCY DISTRICT COURT
DOCKET NO. 2056CR0011

COMMONWEALTH

V.

DENNIS BAKER

The issue in this case is whether the tolling of a judicially created rule by a Standing Order can be used to extinguish a criminal defendant's statutorily endowed liberty interest.

Mass. Rule of Criminal Procedure Rule 36 provides for specified time limits within which a criminal defendant must be tried, subject to excluded periods. It is designed to ensure that a defendant be brought to trial within these time frames.

C. 276:58A(3) states explicitly that, "A person detained under this subsection shall be brought to trial as soon as reasonably possible, but in the absence of good cause, the person so held shall not be detained for a period exceeding 120 days by the district court...excluding any period of delay as defined by Massachusetts Rule of Criminal Procedure Rule 36(b)(2)." The statute creates a liberty interest in a criminal defendant after the 120 day time limit.[1]

In the latest standing order, dated April 27, 2020 and effective May 4, 2020, time periods occasioned by the standing are to be excluded from speedy trial computations under Mass. R. Crim. P 36.

In this case, the defendant had been held as dangerous on January 8, 2020 and the 120 days under the statute was to run on May 8, 2020. The Commonwealth argues that the 120 time limit of G. 276 Section 58A (3) is tolled by the Standing Order and the defendant could be continued to be held without bail. Under this argument, there would be no limit to the time a defendant would be held without bail while the Standing Order remains in effect.

The question, then, is whether a liberty interest created by statute can be deprived by a Standing Order that tolls a judicially - made rule. By Standing Order, the right provided to the criminal defendant by the Legislature has essentially been suspended. Comm. v. Jones, 417 Mass. 661, 664 (1994).

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[1]The remedies provided for a violation of these two sections are fundamentally different. For a violation of Rule 36, the case is dismissed. Where the 120 days has expired under C. 276, Sec. 58A, the detention is ended and the Commonwealth may seek a cash bail, which is what occurred here, but the Commonwealth does not lose its right to prosecute its case. Comm. v. Dirico, 480 Mass. 491, 497 (2018).

Under Article xx of the Mass. Declaration of Rights, only the Legislature or an authority designated by the Legislature, can suspend laws. "The power of suspending the laws, or the execution of the laws, ought never be exercised but by the legislature, or by authority derived from it, to be exercised in such particular case only as the legislature shall expressly provide for." I am aware of no express delegation to the Supreme Judicial Court to suspend C. 276 during a pandemic.

Nor can the "good cause" exception contained in the statute be used to suspend the liberty interest guaranteed to all criminal defendants held as dangerousness. Good cause, as contemplated by the legislative language, requires an individualized determination concerning the particularized facts of an individual case. It was not a grant of general authority to the Supreme Judicial Court to deprive the liberty of all defendants held under the statute.

Finally, because the Legislature has clearly established a liberty interest at the end of the 120 day detention hearing, subject to the exclusions and subject to good cause, any attempt to vitiate that fundamental right to liberty would violate the substantive due process rights of a criminal defendant under the Fourteenth Amendment to the United States Constitution and arts. 1, 10, and 12 of the Massachusetts Declaration of Rights. Comm. v. Alvarez, 413 Mass. 224, 228 n.4 (1992); Comm. v. Mavredakis, 430 Mass. 848, 859 (2000).

This Court does not believe that the Supreme Judicial Court intended its Standing Order to infringe upon the liberty interest of the defendant as provided by M.G.L. c.278, sec. 58A (3). The defendant's request for bail is ALLOWED.

Dated: This 21st day of May, 2020

_____
Mark S. Coven
Associate Justice

May 14, 2020

Dear Bar Leaders and Members of the Bar,

With two months having passed since our courthouses were physically closed, we want to update the bar, self-represented litigants, and the public regarding the judiciary's tentative plans for the months ahead. We emphasize the word "tentative" because our plans remain a work in progress, and may vary depending on the data regarding the number of new COVID-19 cases and hospitalizations in Massachusetts, and on the Governor's orders regarding the State of Emergency. As we move forward, we must respect public health considerations and do all that we can to ensure the safety of our employees and the public we serve.

Today, the Supreme Judicial Court, the Appeals Court, and every Trial Court department are hearing and deciding cases virtually, relying on written submissions and telephonic or videoconference hearings. Before May 4, the Trial Court was focused mostly on emergency matters. Now every department, guided by new standing orders, is also hearing an increasing number of nonemergency matters where it is practicable to do so without an in-court hearing. We anticipate that our courthouses will likely remain physically closed in June, but that the number and range of nonemergency matters adjudicated virtually in the Trial Court will continue to grow, such that the Trial Court will endeavor to handle most matters that do not require an in-person court appearance. Therefore, we are considering whether to end the tolling of certain court deadlines sometime in June, so that most matters may be released from "litigation limbo" and move forward in courts that are increasingly able virtually to act on those cases.

We expect that courthouses will physically reopen this summer, but only in stages and only for certain matters that require in-person appearances. Even as courthouses reopen, we will still need to conduct most court business virtually to reduce the number of lawyers, litigants, and court personnel that come to the courthouse, so that those who must come can do so safely with the necessary social distancing. The days when our Trial Court welcomed approximately 40,000 persons a day into our courthouses are over, at least for the duration of the pandemic.

We have no reasonable alternative except to pursue this course for the immediate future. But necessity is the mother of invention, and we shall seize the opportunities arising from such invention. Long before the pandemic, we recognized that the civil courts of the future would need to resolve an increasing number and range of matters without burdening attorneys, litigants, and witnesses with the need to come to a courthouse. By doing so, we would enable attorneys to reduce the time (and therefore the cost) devoted to litigation, spare self-represented litigants from the need to miss work or find child or elder care, and allow civil disputes to be resolved equally thoughtfully but more efficiently. Before the pandemic, we expected that it would take years to

make substantial progress in this regard; with the pandemic, we have made substantial progress in just a few months. Therefore, even when this pandemic is behind us, we do not believe we will or should go back to doing things as we did in February. We are, more quickly than many thought we could and with some stumbles along the way, creating a more modern and efficient court system that will survive after the pandemic has passed.

To be sure, we recognize that there are many judicial matters that still must be conducted in person, and others that judges may determine are better conducted in person, so we do not envision a day in the foreseeable future when all disputes will be resolved without coming to a courthouse. We hope that, in September, if schools reopen, we will once again begin to conduct jury trials. But the challenges of conducting jury trials with social distancing during a pandemic are formidable, and will require us to reimagine how juries are empaneled, where they will sit during trial, and where they will deliberate so that jurors can both be safe and feel safe. We are hard at work trying to address those challenges, and it is premature to predict now what it will look like.

We recognize that the road we have travelled together in the last few months has often been rocky and at times riddled with unexpected potholes. But we also recognize that, if one had asked in February of this year whether we would be able in two months to transform our court system from one that almost invariably required in-person appearance to one that was almost invariably virtual, few would have imagined that it was possible or that we would be as far along as we are. The success we have achieved is the result of the remarkable dedication, imagination, resilience, and hard work of our judges, clerks, IT specialists, probation officers, facilities staff, and other court employees, aided by the equally remarkable advice, cooperation, and improvisations of the bar. In the coming months, we will need all of that, and more because, as challenging as it has been to close our courthouses, it will be even more challenging to reopen them. We thank you from the bottom of our hearts for all that you have done, and will continue to do, as we not only keep the wheels of justice spinning but also work to create a better spinning wheel.

Sincerely,

Ralph D. Gants	Mark V. Green	Paula M. Carey
Chief Justice	Chief Justice	Chief Justice
Supreme Judicial Court	Appeals Court	Trial Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98101
(206) 370-8800

JOHN C. COUGHENOUR
United States District Judge

May 26, 2020

Dear counsel,

As reflected in the General Orders recently issued by the Western District of Washington, the coronavirus pandemic has substantially affected the Court's ability to conduct in-person proceedings. It is the considered view of most judges in the Western District of Washington that criminal jury trials are not likely to resume prior to 2021. The Court cannot configure its courtroom for trial to comply with the social distancing guidelines promulgated by local and national health officials, and the Court is not confident that potential jurors will (or should) respond to subpoenas before they are convinced that it is safe to do so. Therefore, the Court will continue the trial dates in pending criminal matters consistent with future General Orders, which exclude the time of such continuances under the Speedy Trial Act.

However, the Court believes that it is important to maintain existing case schedules to the greatest extent possible under the current circumstances. Therefore, in granting future continuances of trial dates, the Court will keep case management dates the same absent a showing of good cause. This will ensure that trials are efficiently resolved once in-court proceedings are safe for the parties, counsel, and jurors.

Very truly yours,

John C. Coughenour
United States District Judge
Western District of Washington

UNITED STATES CONSTITUTION

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS DECLARATION OF RIGHTS

Article 1. All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 10. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. ...

Article 11. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article 12. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article 20. The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

Article 30. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASSACHUSETTS GENERAL LAWS

Chapter 276, §58A. Conditions for release of persons accused of certain offenses involving physical force or abuse; hearing; order; review.

(1) The commonwealth may move, based on dangerousness, for an order of pretrial detention or release on conditions ...

(2) Upon the appearance before a superior court or district court judge of an individual charged with an offense listed in subsection (1) and upon the motion of the commonwealth, the judicial officer shall hold a hearing pursuant to subsection (4) issue an order that, pending trial, the individual shall either be released on personal recognizance without surety; released on conditions of release as set forth herein; or detained under subsection (3).

If the judicial officer determines that personal recognizance will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

> **(A)** subject to the condition that the person not commit a federal, state or local crime during the period of release; and
>
> **(B)** subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community ...

The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

The judicial officer may at any time amend the order to impose additional or different conditions of release. ...

(3) If, after a hearing pursuant to the provisions of subsection (4), the district or superior court justice finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, said justice shall order the detention of the person prior to trial. A person detained under this subsection shall be brought to a 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). A justice may not impose a financial condition under this section that results in the pretrial detention of the person. Nothing in this section shall be interpreted as limiting the imposition of a financial condition upon the person to reasonably assure his appearance before the courts.

(4) When a person is held under arrest for an offense listed in subsection (1) and upon a motion by the commonwealth, the judge shall hold a hearing to determine whether conditions of release will reasonably assure the safety of any other person or the community.

The hearing shall be held immediately upon the person's first appearance before the court unless that person, or the attorney for the commonwealth, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed seven days, and a continuance on motion of the attorney for the commonwealth may not exceed three business days. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. At the hearing, such person shall have the right to be represented by counsel, and, if financially unable to retain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information. Prior to the summons of an alleged victim, or a member of the alleged victim's family, to appear as a witness at the hearing, the person shall demonstrate to the court a good faith basis for the person's reasonable belief that the testimony from the witness will be material and relevant to support a conclusion that there are conditions of release that will reasonably assure the safety of any other person or the community. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness. The facts the judge uses to support findings pursuant to subsection (3), that no conditions will reasonably assure the safety of any other person or the community, shall be supported by clear and convincing evidence.

...

The hearing may be reopened by the judge, at any time before trial, or upon a motion of the commonwealth or the person detained if the judge finds that: (i) information exists that was not known at the time of the hearing or that there has been a change in circumstances and (ii) that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community.

(5) In his determination as to whether there are conditions of release that will reasonably assure the safety of any other individual or the community, said justice, shall, on the basis of any information which he can reasonably obtain, take

into account the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse as defined in section one of chapter two hundred and nine A, or violation of a temporary or permanent order issued pursuant to section eighteen or thirty-four B of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, sections three, four or five of chapter two hundred and nine A, or sections fifteen or twenty of chapter two hundred and nine C, whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction; provided, however, that if the person who has attained the age of 18 years is held under arrest for a violation of an order issued pursuant to section 18 or 34B of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A or section 15 or 20 of chapter 209C or any act that would constitute abuse, as defined in section 1 of said chapter 209A, or a violation of sections 13M or 15D of chapter 265, said justice shall make a written determination as to the considerations required by this subsection which shall be filed in the domestic violence record keeping system.

(6) Nothing in this section shall be construed as modifying or limiting the presumption of innocence. ...

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 36. Case Management ...

(b) Standards of a Speedy Trial. ...

(1) *Time Limits.* A defendant, except as provided by subdivision (d)(3) of this rule, shall be brought to trial within the following time periods, as extended by subdivision (b)(2) of this rule:

...

(C) During the third and all successive such twelve-month periods, a defendant shall be tried within twelve months after the return day in the court in which the case is awaiting trial.

...

If a defendant is not brought to trial within the time limits of this subdivision, as extended by subdivision (b)(2), he shall be entitled upon motion to a dismissal of the charges.

(2) *Excluded Periods.* The following periods shall be excluded in computing the time within which the trial of any offense must commence:

...

> (F) Any period of delay resulting from a continuance granted by a judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecutor, if the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial. No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subdivision unless the judge sets forth in the record of the case, either orally or in writing, his reasons for finding 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. ...

Certificate of Compliance

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The brief is set in 14-point Athelas and contains 10,677 non-excluded words, as determined through use of the "Word Count" feature in Microsoft Word 2010.

/s/ Patrick Levin
Patrick Levin

Certificate of Service

I hereby certify that in the matter of Commonwealth *vs.* Cameron Lougee, Supreme Judicial Court No. SJC-12949, I have today served the Brief of Respondent Cameron Lougee on the Commonwealth by directing a copy through the electronic filing service provider to:

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