COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2018-P-1398

ESSEX, ss.
[Unified Session at Suffolk]

WAYNE W. CHAPMAN,
Petitioner-Appellee,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent-Appellant.

ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT

BRIEF AND ADDENDUM OF THE COMMONWEALTH OF MASSACHUSETTS RESPONDENT-APPELLANT

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OCTOBER 25, 2018

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STATEMENT OF THE ISSUE

Whether *In re Johnstone*, 453 Mass. 544 (2009), should be overruled to the extent it would prevent the Commonwealth from proceeding to trial in a G.L. c. 123A proceeding when it has expert opinion (other than the opinions of the designated qualified examiners) and other evidence to satisfy each element that the person is sexually dangerous.

STATEMENT OF THE CASE

A. Civil Commitments as a Sexually Dangerous Person

Following his convictions for multiple sexual offenses against children, described below, petitioner Wayne W. Chapman was adjudicated a sexually dangerous person (SDP) and committed to the Massachusetts Treatment Center (Treatment Center) for an indefinite term of one day to life in November 1977. *Commonwealth v. Chapman*, 444 Mass. 15, 16-17 (2005).[1]

In 1991, Chapman petitioned for release pursuant to G.L. c. 123A, § 9. *Chapman*, 444 Mass. at 17. At trial, the two appointed qualified examiners (QEs)

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[1] At that time, G.L. c. 123A permitted SDP commitment either at the time of conviction for an enumerated sexual offense or while a person was serving a prison sentence. See G.L. c. 123A, §§ 4-6 as appearing in St. 1958, c. 646, § 1. See also *Chapman*, 444 Mass. at 16 n. 1.

opined that Chapman remained sexually dangerous while two psychologists retained by Chapman opined that he was no longer sexually dangerous. *Id.* at 17-18. The trial judge adopted the opinions of Chapman's psychologists and concluded that the Commonwealth failed to prove that Chapman remained sexually dangerous at that time. *Id.* at 18.[2] Accordingly, the trial judge ordered Chapman to be released from his SDP commitment and returned to prison to serve the remainder of his criminal sentences. *Id.* at 18 & n. 5.

Shortly before Chapman was to complete these sentences, the District Attorney for Essex County filed a petition to commit him as an SDP. *Chapman*, 444 Mass. at 18. A Superior Court judge granted Chapman's motion to dismiss the commitment petition; the Commonwealth appealed and obtained a stay of

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[2] At that time, G.L. c. 123A did not provide either party with a right to demand a trial by jury. The statutory right to a jury trial did not become operative until 1994. See *Sheridan, petitioner,* 422 Mass. 776, 777 (1996); G.L. c. 123A, § 9, as appearing in St. 1993, c. 489, § 7, approved January 14, 1994, effective April 14, 1994; see also *Commonwealth v. Barboza*, 387 Mass. 105, 113, *cert. denied* 459 U.S. 1020 (1982)(no constitutional right to a jury trial in initial SDP commitment proceedings); *Gagnon, petitioner,* 416 Mass. 775, 778 (1994)(no constitutional right to jury trial in § 9 proceedings).

Chapman's discharge pending appeal. *Id.* at 20. The Supreme Judicial Court (SJC) took the case on its own motion, vacated the dismissal order and remanded the case to the Superior Court for further proceedings pursuant to G.L. c. 123A. *Id.* at 25.

After a jury-waived trial the Court, Whitehead, J., adjudicated Chapman to be an SDP in April 2007, and committed him to the Treatment Center for one day to life. R. I/339.[3] The Appeals Court affirmed the commitment order in an unpublished memorandum and order pursuant to its Rule 1:28 in 2009. *Commonwealth v. Chapman*, 75 Mass. App. Ct. 1113 (2009), *rev. denied*, 455 Mass. 1108, *cert. denied*, 560 U.S. 946 (2010). R. I/341.

B. Consolidated G.L. c. 123A, § 9 Petitions

Since his commitment as an SDP in 2007, Chapman has filed four § 9 petitions for discharge: 2007, 2009, 2012 and 2016. R. II/6, 14, 19, 24.[4] The 2012 and 2016 petitions are at issue here.

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[3] Citation format is as follows: to the Addendum: A.[page]; to the Record Appendix: R.:[volume/page].

[4] The 2007 § 9 petition was tried before a jury in the Superior Court in October 2009. R. II/8-9. After less than ninety minutes of deliberation, the jury returned a verdict that Chapman remained sexually dangerous. See R. II/8-9. The Appeals Court affirmed the commitment order in an unpublished memorandum and

At the January 2016 trial on the 2012 petition, a jury returned a verdict that Chapman remained sexually dangerous, from which Chapman appealed. R. II/21. Soon thereafter, the SJC decided *Green, petitioner*, 475 Mass. 624 (2016). Because the jury instruction required in *Green* had not been given at the January 2016 trial, Chapman was entitled to a new trial. R. II/33. The 2012 petition was consolidated with Chapman's 2016 petition, and the retrial was ultimately scheduled for July 23, 2018. R. II/33, 38.

As required by G.L. c. 123A, §§ 6A, 9, two QEs and the five-member Community Access Board (CAB) evaluated Chapman for the consolidated trial. R. I/57, 179; II/75. The designated QEs for the trial, Gregg Belle, Ph.D., and Katrin Rouse-Weir, Ed.D., each rendered the opinion that Chapman was no longer sexually dangerous. R. I/225; II/126. Three CAB psychologists – each of whom is also designated as a

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order pursuant to its Rule 1:28 in 2013. *Chapman, petitioner*, 83 Mass. App. Ct. 1105, *rev. denied*, 464 Mass. 1107 (2013). R. II/27. The 2009 § 9 petition was tried before a jury in the Superior Court in June 2012. R. II/15-16. The jury returned a verdict that Chapman remained sexually dangerous. R. II/16. Chapman filed a notice of appeal, but later moved to withdraw his appeal. R. II/29.

QE - opined that Chapman remained sexually dangerous. R. I/57-58; II/40-41, 51, 61.[5]

Following ancillary proceedings,[6] Chapman moved for discharge in July 2018. R. I/12. The Commonwealth opposed the motion for discharge and moved for trial or, alternatively, to stay Chapman's release and asked the Superior Court to report a question.[7] R. I/14, 16. On the ground that it was required to follow *In re Johnstone*, 453 Mass. 544 (2009), the Superior Court (Barry-Smith, J.) allowed Chapman's motion and denied the Commonwealth's motion, but stayed Chapman's discharge for twenty days to permit the Commonwealth to seek a further stay from the appellate courts. A. 1, 2.

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[5] The other two CAB psychologists opined that Chapman is no longer sexually dangerous. R. I/57-58.

[6] See *In the Matter of Wayne W. Chapman*, No. SJC-12537, docket ## 6-9, 11 (Chapman's victims, the Commonwealth, the Attorney General, and the Essex District Attorney each urged the Court to revisit *Johnstone*). The Court stated that the Commonwealth could challenge the continuing validity and effect of *Johnstone* through the § 9 petitions and a related appeal. See *id.*, docket # *13*.

[7] While the Superior Court order indicates that the Commonwealth requested that the Court report the question pursuant to Mass. R. Civ. P. 64, the Commonwealth made the request pursuant to G.L. c. 231, § 111, not Rule 64. The Massachusetts Rules of Civil Procedure do not apply to SDP proceedings. *See* Mass. R. Civ. P. 81(a)(1)(8).

The Commonwealth filed a notice of appeal, R. II/339, and also filed a motion to stay Chapman's discharge pending appeal. *Commonwealth v. Wayne W. Chapman*, Appeals Court No. 2018-J-0422. On October 4, 2018, the Single Justice of the Appeals Court (Ditkoff, J.), ordered the Commonwealth to (1) enter its appeal as soon as possible; (2) file its brief by October 25, 2018; and (3) by November 9, 2018, file a status report to inform the Appeals Court as to whether the Commonwealth has filed an application for direct appellate review and whether there have been any developments in pending criminal proceedings against Chapman, described below. R. II/341. The Single Justice continued the stay of Chapman's discharge pending further order of the Court. R. II/341.

The Commonwealth entered its appeal the next day. See Appeals Court No. 2018-P-1398. Because the Appeals Court cannot "alter, overrule or decline to follow the holdings of cases the Supreme Judicial Court has decided," *Commonwealth v. Dube*, 59 Mass. App. Ct. 476, 485 (2003), the Commonwealth filed an application for direct appellate review on October 19,

2018, which is pending. See *Wayne Chapman v. Commonwealth*, DAR-26429.

STATEMENT OF THE FACTS

A. THE PETITIONER'S SEXUAL MISCONDUCT

Chapman is a multiply convicted pedophile who has admitted to sexually abusing as many as 100 boys in eight states and Canada, beginning when he was seven years old. R. I/129, 149, 160, 222; II/86. He persisted until he was arrested in New York in 1976, since which time he has been held in custody.[8] See R. I/82-83, 108, 208.

Over the course of decades, Chapman offended against a broad array of victims ranging from his younger brother to his stepsons to acquaintances to strangers. See, e.g., R. I/129, 143, 149. Sometimes his offenses were planned; others were "'just a spontaneous action.'" R. I/92. He used a variety of mechanisms to gain access to victims, from marrying a woman with sons, to volunteering in an organization that gave him access to boys, to hunting for and luring boys to isolated locations. See, e.g., R. I/82, 95, 128, 188, 203, 204. Chapman would "`walk

[8] This arrest related to possession of a blank pistol and unlawful dealing in fireworks. R. I/187, 208.

around looking for blonde, blue eyed' children but 'would take anyone who looked vulnerable.'" R. I/149.

Chapman used a number of ruses to manipulate his victims. See R. I/129, 208; R. II/95. He asked for help finding his lost dog, promised a paper route, and impersonated a police officer with a fake police badge and phony identification. R. I/80, 129, 203-204; II/95. He lured boys with promises of gifts and candy. R. I/150. Chapman stated: "I played on their innocence, trust and curiosity." R. I/208. Chapman later used handcuffs and a "popgun to make noise." R. I/209.

1. Early Sexual Misconduct – Jamestown, NY

At the age of seven, Chapman removed his younger brother's clothes to "examine" his penis. R. I/149. As a juvenile, Chapman was arrested four times for indecent acts with small boys, including disrobing a small boy and burning the boy's clothes, showing the boy his genitals and playing with the boy's genitals. R. I/80, 144; II/95. Chapman was referred for psychiatric help. R. I/80, 144.

2. June 1967 – Oil City, PA

In June 1967, Chapman sexually assaulted a twelve-year-old boy whom he had met the day before and

told that he could get a job. R. I/102. Chapman took the boy into the woods, beat him, and gagged him with a t-shirt. R. I/102. The boy tried to run a number of times but Chapman would not let him. R. I/102. Chapman asked the boy if he "ever fucked girls" and if he "played with little boys or played with" himself. R. I/102; see R. I/315. Chapman pled guilty to and was convicted of assault and battery and corrupting the morals of a minor. R. I/313-314. He was sentenced to one to two years in the county workhouse. Id.

3. August 1971 – Kane, PA

Chapman took a ten-year-old boy into a wooded area where he anally raped the boy and took pictures of the boy in the nude. R. I/203-204. Chapman pled guilty to unlawfully corrupting the morals of a child under the age of eighteen and was placed on probation and directed to seek psychiatric help. R. I/330.

4. Uncharged Sexual Misconduct

After being given a *Miranda* warning, Chapman gave a signed statement to police in which he admitted to

numerous acts of uncharged sexual misconduct.[9] R. I/129. He has also made numerous statements to evaluators and therapists about his sexual abuse of children. See, e.g., R. I/96. These admissions include:

- 1967: Chapman sexually assaulted a ten-year-old boy in Virginia. R. I/128.
- 1968 or 1969: Chapman lured an eleven-year-old boy into the woods, forced him to undress, forced the boy to perform oral sex and, when the boy bit him, "`I got mad at him, and left him nude, gagged and tied to a tree.'" R. I/128.
- 1969 or 1970: He anally raped a ten-year old boy in New York. R. I/128.
- 1971: Chapman married a forty-three-year-old woman who had children. R. I/95. He sexually assaulted his eleven-year-old and fourteen-year-old stepsons. R. I/96, 188. He sexually assaulted one stepson while the boy was sleeping. R. I/96, 188.

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[9] Chapman's own statements are admissible in evidence. See *McHoul, petitioner*, 445 Mass. 143, 148 n. 3 (2005), *cert. denied*, 547 U.S. 1114 (2006).

- 1972: Chapman picked up a boy, age eight or nine, near Norwich, Connecticut, and "`us[ed] my dog story and took him into a wooded area and engaged in sex through the boy[']s ass.'" R. I/128.
- 1974: Chapman sexually abused two boys, around age eleven, in Brockton. R. I/128.
- 1974: Chapman took two boys, age eight or nine, into the woods near Concord. He stripped them but, upon learning that one boy was the son of a police officer, released the boys. R. I/128.
- 1975 (approximately): He anally raped a ten-year-old boy near some railroad tracks. R. I/128.
- 1976: He sexually abused two boys, approximately nine and eleven years old, one of whom Chapman said "`appeared to be retarded.'" R. I/128.
- Unspecified date: Chapman anally raped a twelve-year-old boy in Maine. R. I/128.
- Unspecified date: Chapman lured a boy who was eight or nine years old into a cemetery and orally and anally raped him. R. I/136-139; II/96. Even though the boy told him that it hurt, Chapman did not stop because he "'wanted to

come.'" R. I/139; see R. II/96. After anally penetrating the boy, Chapman saw blood on his own penis. R. I/139. He used the boy's t-shirt to wipe off the blood. R. I/140. He noticed that the boy was not moving but was unsure if the boy was unconscious or dead. R. I/142. He later feared that he had killed this boy. R. I/143; see R. II/97.

5. July 1974 – Dartmouth, MA

In July 1974, Chapman approached three boys, calling for his dog "Scott." R. I/124. He asked the boys if they would help him find his dog, a white poodle. R. I/124. Two boys left to ask their grandparents for permission to help. R. I/124. The other boy, age nine, agreed to accompany Chapman and rode his bicycle while Chapman held the boy by the arm. R. I/124. Chapman told the boy that he had two children and worked in a store where *Playboy* magazine was sold. R. I/124. While walking through the woods, Chapman told the boy to take off his clothes, but the boy refused. R. I/124. Chapman pushed the boy to the ground and removed the boy's shirt, pants, shoes and underwear. R. I/124-125.

Chapman then "played with [the boy's] private parts" while holding onto the boy. R. I/125. Chapman performed oral sex on the boy. R. I/125. Chapman took a small camera out of his shirt pocket and told the boy that he was going to take the boy's picture and put it in *Playboy*. R. I/125. Chapman then permitted the boy to get dressed, walked the boy out of the woods, and released him. R. I/125.

In August 1978, Chapman pled guilty to and was convicted of unnatural and lascivious acts with a child under the age of sixteen years, for which he was sentenced to three to five years to be served concurrently with sentences imposed on the sodomy offense in Fall River, discussed below. R. I/290-291, 296. He also pled guilty to indecent assault and battery on a child under fourteen years which was placed on file. R. I/297, 303.

6. November 1974 – Fall River, MA

Chapman sexually assaulted two boys. R. I/127. He pled guilty to and was convicted of sodomy, open and gross lewdness (two counts), indecent assault and battery on a child under fourteen and assault with intent to commit sodomy. R. I/247, 253, 260, 268, 275, 276. He was sentenced to six to ten years on the

sodomy conviction and three to five years on the conviction for indecent assault and battery on a child under fourteen. R. I/247, 253, 276. These sentences were to run concurrently with each other and the sentence imposed on the Lawrence offenses, discussed below. See R. I/253, 276. The convictions of assault with intent to commit sodomy and open and gross lewdness were placed on file after Chapman pled guilty. R. I/262, 268, 275.

7. January 1975 – August 1976 – Rhode Island

While living in Rhode Island, Chapman was a leader for a 4-H club. See R. I/71, II/86. He sexually assaulted boys involved in the club. R. I/82. He engaged one boy in oral and anal sex. R. I/106-107, 127-128. He "had sex" with another boy and took pictures of that boy. R. I/107. See R. I/107 (reporting four victims in Rhode Island).

Chapman was entered pleas of *nolo contendere* to charges of abominable and detestable crime against nature (fellatio) (two counts), indecent assault and battery on a child, and transport for immoral purposes. See R. 305. He was variously sentenced to prison on some charges, a portion of which was suspended with probation. R. I/305. Sentencing was

deferred on other charges. R. I/305. The sentences were to be served concurrently with the sentences imposed on the Lawrence offenses, described below. R. I/305.

8. August 1975 – Lawrence, MA

In August, 1975, Chapman traveled from his home in Rhode Island to Massachusetts. See R. I/122. He randomly selected an off-ramp in Lawrence and parked his car. R. I/122. He spotted two boys and determined that the boys were vulnerable and attractive. R. I/122. He became sexually aroused when he saw the boys, stating that there "`was a burning in my loins and maybe a flashback to pornography.'" R. I/122.

Chapman approached these two boys, ages ten and eleven. R. I/107. He offered them money to help find his lost poodle and asked for their names and addresses to send them the money. R. I/107. The boys went into the woods with Chapman who then forced them to undress and undressed himself. R. I/107. Chapman then performed oral sex on both boys, anally raped both boys and forced the boys to perform oral sex on him. R. I/114, 117-118. Each boy was afraid to run away for fear of what would happen to his friend. R.

I/108. The boys were crying. R. I/118-119. After threatening that he would "get them" if they told anyone, Chapman eventually released the boys who reported the rapes. R. I/107-108.

After a jury trial in September 1977, Chapman was convicted of two counts of rape of a child and sentenced to concurrent fifteen to thirty years at MCI-Walpole (now MCI-Cedar Junction). R. I/242, 245. See *Chapman*, 444 Mass. at 16.

B. EVIDENCE OF CHAPMAN'S PRESENT MENTAL CONDITIONS AND RISK TO REOFFEND SEXUALLY

In addition to being repetitive, Chapman's sexual misconduct has been compulsive: He repeatedly reoffended even after being identified, arrested and sanctioned for sex crimes. R. I/170, 220.

Chapman presents with a mental abnormality as statutorily defined. R. I/170-172, 218. Chapman also suffers from two paraphilic disorders: pedophilic disorder and sexual sadism disorder (in a controlled environment) as those terms are defined in the DSM-V.[10] R. I/172, 218-219.

With respect to sexual sadism disorder, Chapman "has displayed a long-standing deviant sadistic sexual

[10] Diagnostic and Statistical Manual of Mental Disorders (5th ed.).

interest" toward prepubescent and pubescent boys. R. I/223. He reported "enjoying the suffering" of a boy while he anally raped him. R. I/129. He had sexual fantasies about fondling a boy "'and then killing him, leaving him, so nobody would know.'" R. I/173.[11] He stated that "`I feel that if I hadn't started trying to treat myself in various ways that it could have led maybe one day to murder. . . .'" R. 87. He purchased handcuffs and a gun. R. I/87. He told the police that he killed children but would not "go as far as telling them how they died." R. I/125.

In addition to sexually attacking young boys, Chapman made and collected child pornography. R. I/101, 122. From the age of sixteen until his arrest in the 1970s, he bought pornography featuring young males. R. I/100-101; II/88-89. He masturbated to deviant fantasies and child pornography. R. I/101. When he was arrested in New York in 1976, police discovered several pornographic photographs of young boys on the dashboard and small caliber shell

[11] To release his anger when in the community, Chapman tortured cats, locked them in boxes, and left them in the woods to starve. R. I/173.

cartridges on the front floor of his van. R. I/83; II/95.

Chapman also used pornography to try to lure a boy into sexual activity by showing him pornography and exposing himself to the child. R. I/81. At times, he would go into the woods and spread pornography around in the hope that children would see it. R. II/117.

While in the community, Chapman followed a school bus and recorded a running commentary about his attraction to the boys who were riding on the bus or walking along the street and about what he wanted to do to the boys he saw. See R. I/171, 207, 219. He said that the tape contains "`my wishes that I could get in the pants of the boys on the bus.'" R. I/149. Many of Chapman's comments "also involved sexualized violence and clearly indicated that he was aroused to causing boys sexualized pain and fear." R. I/207-208. He later masturbated while listening to this tape. R. I/219.[12]

Chapman presents with numerous static and dynamic risk factors associated with an increased risk for

[12] A copy of this recording is being filed under separate cover with this Court. See R. II/203.

sexual recidivism including prior sex offenses, early age at onset of sex offending, child victims, multiple victims (more than two victims), male victims, unrelated victims, deviant sexual arousal to children, failing to complete and dropping out of treatment, an antisocial orientation, stranger victims, a history of non-sexual crimes, impulsivity, deviant sexual arousal and preference, negative emotionality, poor cognitive problem solving skills, emotional identification with children, an absence of stable adult relationships, cognitive distortions, not cooperating with supervision, and a high degree of sexual preoccupation in the past. R. I/175, 220-221.

Chapman's deviant sexual arousal has not been successfully treated. See R. I/221. Around 2012, Chapman refused to address his deviant arousal, stating "at one point that he is not worried about reoffending, but rather [] is worried about getting out" of custody. R. I/155. Between 2014 and 2015, his sex offender treatment providers noted that "'on at least two occasions when discussing his offending and his views of children, it has been unclear if Mr. Chapman was experiencing some level of arousal." R. I/160. Both times, Chapman "was observed to be

smiling and appeared elated when describing children as 'vulnerable . . . innocent . . . and easy to hurt,' and also when reporting that one of his victims 'aggressively came at [him]' and appeared 'eager to participate' in the offending behaviors." R. I/160. Both times, "his observable presentation was incongruent with his reported emotional experience of 'shame.'" R. I/160.

Chapman also suffers from antisocial personality disorder, which two CAB psychologists opined comports with the statutory definition of a personality disorder. R. I/172-173. In 2016, Chapman – then age 68 - kicked and shoved another inmate. R. I/161.

While he has certain physical medical conditions, his treating physician has indicated that they "are all 'manageable'" with medications. R. I/175.

C. RECENT SEXUAL MISCONDUCT AND NEW SEX OFFENSE CHARGES

Despite his age of 70, Chapman "continues to act out sexually" while confined in a medical unit at MCI-Shirley. R. I/175. Between 2015 and 2018, staff reported several instances of Chapman exposing himself. R. I/162, 164, 166, 175. Medical staff reported that he "will purposefully urinate in his

bed" or otherwise indicate that he needs assistance with his hygiene. R. I/174. When staff assist him, he "lays in bed on his back, and `with his hands behind his head with a grin like he's enjoying it.'" R. I/166; see R. I/167.

On June 3 and 4, 2018, Chapman engaged in additional sexual misconduct for which he is being criminally prosecuted. See R. II/182-185, 187-192.[13]

As recently as July 16, 2018, Chapman exposed himself to staff. R. II/205. As a female officer walked by conducting rounds, Chapman "`saw [her] walk by, took his hand out of his pants leaving his penis exposed outside of his pants.'" R. II/205. After three orders to "'put his penis back into his pants,'" Chapman complied. R. II/205.

SUMMARY OF THE ARGUMENT

Johnstone departs from extensive jurisprudence which holds that the task of deciding a case is for the judge or the jury, and not the experts who offer opinions in the particular case. This departure creates unintended consequences and warrants the

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[13] The Superior Court, Pierce, J., set cash bail in the amount of $25,000 on these charges. See R. I/194, 196. The trial is scheduled for December 11, 2018. R. II/344.

exercise of the Court's authority to revisit and overrule *Johnstone* to the extent that it prevents the Commonwealth from proceeding to trial when it has expert opinion and other evidence to satisfy each element that the person is sexually dangerous. (pp. 30-33)

When the two designated QEs opine that the offender is no longer sexually dangerous, *Johnstone* precludes evaluation of conflicting expert opinion through a robust adversarial process which is at odds with extensive jurisprudence about the weighing and crediting of expert opinion. Further, *Johnstone* creates anomalous results based on the capacity in which a particular evaluator is serving when conducting an evaluation. (pp. 34-40)

By removing the court and the jury from the adjudication process, *Johnstone* is in tension with extensive jurisprudence that expert opinion is not conclusive of any issue in a case in which it is offered. This assignment of preclusive effect to one form of expert opinion prevents any scrutiny of the opinions for sufficient basis, reliability or methodology. As this case shows, the inability to challenge expert opinion and offer contrary expert

opinion creates a risk of erroneous adjudication which threatens public safety. (pp. 40-50)

Because it bars any scrutiny of the QEs' opinions, *Johnstone* invites manipulation by offenders. The statutory requirements for QEs to conduct interviews and file their reports with the Superior Court are not an adequate substitute for the testing of expert opinion through the adversary process. (pp. 50-53)

Overruling *Johnstone* will enhance public safety and the integrity of the courts while fully protecting offenders' interests because the Commonwealth will still be required to offer expert opinion, along with other evidence, to meet its burden of proving beyond a reasonable doubt that the person is sexually dangerous. (pp. 53-56)

ARGUMENT

JOHNSTONE SHOULD BE OVERRULED BECAUSE IT CREATES UNINTENDED CONSEQUENCES THAT THREATEN PUBLIC SAFETY AND DIMINISH THE PUBLIC'S CONFIDENCE IN THE JUDICIARY.

No expert or set of experts should be considered infallible. Accordingly, this Court has made clear in numerous contexts that expert opinion, while extremely valuable, does not determine any issue; that task is

left to the judge or jury responsible for deciding the particular case in which expert opinion is offered. See, e.g., *Commonwealth v. Lamb*, 372 Mass. 17, 24 (1977) (The law does not give expert opinions the "'benefit of conclusiveness'" even if there are no contrary opinions introduced at trial) (citation omitted); *Meunier's Case*, 319 Mass. 421, 427-428 (1946) (workers' compensation statute making report of medical referees "binding" such that a party "cannot explain, contradict or refute it" violates due process because it "denie[s] [the party] a fair opportunity of introducing all available material evidence in support of or defense against the claim and to have it considered and weighed by the trier of fact"); *Commonwealth v. Bradway*, 62 Mass. App. Ct. 280, 291, *rev. denied*, 443 Mass. 1101 (2004) ("'Weighing and crediting the testimony are for the trier of fact, and [the court] will not substitute [its] judgment for that of the trier of fact'") (citation omitted) (Kafker, J.); see generally infra Part II.

Johnstone departs from that understanding in dramatic fashion. Under *Johnstone*, the QEs serve not only as one source of expert opinion, but as the ultimate arbiters of the facts and the law. Because

this unintended consequence creates a risk of erroneous adjudication that threatens public safety and the integrity of the courts, and because it is inconsistent with this Court's approach to the proper use of expert opinion in other contexts, *Johnstone* should be revisited and overruled.

To be clear from the outset, the Commonwealth does not suggest that it should be allowed to proceed without any expert evidence that the petitioner remains sexually dangerous: "expert evidence is required in order to commit a person to the treatment center or to keep a person confined there." *Johnstone*, 453 Mass. at 549-550. See, e.g., *Commonwealth v. Bruno*, 432 Mass. 489, 511 (2000) (same). Rather, the Commonwealth asks the Court to overrule *Johnstone* to the extent that that case prohibits further proceedings when the two QEs in the case opine that the offender is not sexually dangerous, so that the Commonwealth may proceed to trial in a G.L. c. 123A proceeding when it has expert opinion and other evidence to satisfy each element that the person is sexually dangerous.

Although a request that this Court overrule a prior case is unusual, it is not unprecedented.

Courts have the power to revisit and overrule prior decisions if doing so would benefit the public interest: "Adherence to the principle of stare decisis provides continuity and predictability in the law, but the principle is not absolute. No court is infallible, and this court is not barred from departing from previous pronouncements if the benefits of so doing outweigh the values underlying stare decisis." *Stonehill College v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 562, *cert. denied sub nom. Wilfert Bros. Realty Co. v. Massachusetts Comm'n Against Discrimination*, 543 U.S. 979 (2004). See *Commonwealth v. Ruiz*, 480 Mass. 683, 2018 WL 4924626 *6 (October 11, 2018) (overruling prior decision which held that the Commonwealth could not appeal as of right from dismissal of sentence enhancement portion of indictment brought under habitual offender statute); *Doe, Sex Offender Registry Board No. 380316 v. Sex Offender Registry Bd.*, 473 Mass. 297, 298-299 (2015) (overruling prior decision setting standard of proof applicable to SORB proceedings). See also *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (overruling prior cases which precluded state from introducing victim impact

evidence during penalty phase in capital cases on the ground that the earlier cases were "wrongly decided").

I. *Johnstone*'s Artificial Distinction between the QEs and the Other Experts Whose Opinions are Made Admissible by Statute Is at Odds with Extensive Jurisprudence and Leads to Anomalous Results.

Chapter 123A provides for the indefinite civil commitment and treatment of persons who, by reason of a mental condition, are likely to reoffend sexually. See *Bruno*, 432 Mass. at 494-497 (describing commitment process); *Dutil, petitioner*, 437 Mass. 9, 18 (2002) (statute requires proof of a mental condition that causes serious difficulty in controlling behavior). Chapter 123A "exists to protect the public from harm by persons likely to be sexually dangerous by striking a balance between the public interest and [an offender's] substantive due process rights." *Commonwealth v. Alvarado,* 452 Mass. 194, 195 (2008) (citations and internal quotations omitted).

At the initial commitment trial and at the trial of subsequent discharge petitions, the Commonwealth bears the burden of proving beyond a reasonable doubt that the person is, or remains, sexually dangerous.[14] The question of whether the person suffers from a

[14] At either party's request, the trial may proceed before a jury. See G.L. c. 123A, §§ 9, 14(a).

mental condition, "as well as the predictive behavioral question of the likelihood that a person suffering from such a condition will commit a sexual offense, are matters beyond the range of ordinary experience and require expert testimony." *Bruno*, 432 Mass. at 511. To that end, the legislature has made admissible in SDP trials several forms of expert opinion as well as many other categories of evidence. See G.L. c. 123A, §§ 6A, 9, 14(c); *McHoul, petitioner*, 445 Mass. 143, 146-147 (2005), *cert. denied*, 541 U.S. 1114 (2006).

One source of expert opinion is the QEs who evaluate offenders for initial commitment and discharge trials. See G.L. c. 123A, § 1 (definition of "qualified examiner"), § 9 (role of QEs in discharge proceeding), §§ 13, 14 (role of QEs in initial commitment proceeding). Other sources of expert opinion include (1) psychiatrists or psychologists retained by the Commonwealth or the offender; and (2) the majority and minority of the Community Access Board (CAB), which is required by statute to evaluate and prepare reports on the current sexual dangerousness of persons committed to the Treatment Center. See, e.g., G.L. c. 123A, §§ 1, 6A,

9, 13(d), 14(b); *Commonwealth v Cowen*, 452 Mass. 757, 762 (2008); *McHoul*, 445 Mass. at 147; *Commonwealth v. Dinardo*, 92 Mass. App. Ct. 715, 718-719, *rev. denied*, 480 Mass. 1101 (2018).

The statute itself does not require a QE's opinion that a person is sexually dangerous in order for the Commonwealth to prove that the person should be or remain committed. *Johnstone*, 453 Mass. at 550. *Johnstone*, however, interpreted Chapter 123A to elevate the QEs from one source of expert evidence - that along with many categories of evidence a trier of fact may consider – to that of a "gatekeeper, deciding whether a person warrants commitment as a sexually dangerous person." *Id.* at 552. "If neither qualified examiner forms the opinion that the petitioner remains a sexually dangerous person, the Commonwealth may not obtain the expert evidence it needs from the CAB or other sources and the petitioner is entitled to be discharged without trial," the Court held. *Id.* at 545.

Johnstone is in tension with extensive jurisprudence that expert evidence, properly admitted to the trier of fact, may be used to support a finding of sexual dangerousness, even if that evidence does

not come from a QE acting as such. See, e.g., *Commonwealth v. Blake*, 454 Mass. 267, 275 (2009) (Ireland, J., concurring); *Cowen*, 452 Mass. at 762.

In *Cowen*, decided in December 2008 – only four months before *Johnstone*, the Court concluded that the Commonwealth may call experts other than the designated QEs to testify at trial and rejected as "unpersuasive" the suggestion that the probable cause expert's testimony, "even though admissible, deserved very little or no weight." *Id.* Rather, the Court concluded:

> The matter of how much weight is to be given a witness, particularly an expert witness, is a matter for the trier of fact, not an appellate court. . . . This is particularly true of experts in the medical field, who regularly are permitted to testify on the basis of examination of records and other materials with respect to an issue in dispute.

Cowen, 452 Mass. at 762, citing *Hill, petitioner*, 422 Mass. 147, 156, *cert. denied*, 519 U.S. 867 (1996). In July 2009 - just three months after *Johnstone*, the Court decided *Blake* which reiterated this holding. 454 Mass. at 275 (Ireland, J., concurring).

Johnstone's artificial distinction between the evidence offered by the QEs and other sources of expert opinion is further called into question by the

fact that the QEs and the CAB share common features and functions under the statute. For example,

- Both the CAB and the QEs evaluate present sexual dangerousness for § 9 trials. G.L. c. 123A, § 6A (requiring the CAB to "conduct annual reviews of and prepare reports on the current sexual dangerousness" of sexually dangerous persons), § 1 (same), § 9 (requiring QEs to evaluate petitioner for trial).
- Both the CAB and the QEs "shall have access to all records" of the person being evaluated. G.L. c. 123A, §§ 6A, 9.
- Both the CAB's and the QEs' reports "shall be admissible" at the § 9 trial. G.L. c. 123A, §§ 6A, 9. See *Santos, petitioner*, 461 Mass. 565, 565-566 (2012).
- Both types of reports are available to and may be offered into evidence by either party at the § 9 trial. *McHoul*, 445 Mass. at 147.
- Both the CAB psychologists and the QEs may be called by either party to testify at the § 9 trial.

Indeed, the appellate courts have long recognized that CAB psychologists offer expert testimony at § 9 trials. See, e.g., *Santos*, 461 Mass. at 567 (CAB psychologist offered her own opinion and the entire CAB's opinion that the petitioner remained sexually dangerous); *Wyatt, petitioner*, 428 Mass. 347, 356 (1998) (identifying CAB psychologist as one of the Commonwealth's three expert witnesses); *Miller, petitioner*, 71 Mass. App. Ct. 625, 633 & n. 4, *rev. denied*, 452 Mass. 1004 (2008) (identifying CAB member as one of the Commonwealth's three expert witnesses).

Still further, the artificial distinction created by *Johnstone* leads to anomalous results. For example, here, each of the three expert CAB psychologists who opined that Chapman remains sexually dangerous is also designated as a QE. See R. I/57-58; II/40-41, 51, 61. Because they evaluated Chapman in their role as CAB psychologists, however, the Commonwealth cannot proceed to trial if *Johnstone* stands.

In contrast, Dr. Belle was the psychologist member of the CAB who testified at the trial in *Johnstone*. Because he was serving as a CAB member in that case, his expert opinion was deemed legally insufficient to support submission of the case to the

jury. Merely because he is wearing his QE hat in this case, and both he and Dr. Rouse-Weir (the other QE), formed the opinion that Chapman is no longer sexually dangerous, *Johnstone* shields his (and Dr. Rouse-Weir's) opinion from all review.

At bottom, the determination of whether a case may go forward should not depend on which hat a particular expert is wearing when conducting the evaluation. Overruling *Johnstone* will prevent such anomalies and ensure that conflicts in the expert evidence are resolved by a trier of fact. It is an expert's qualifications and the content of his or her opinion, and not merely the capacity in which he or she is testifying, that is relevant in determining the weight to be accorded to the opinion. See, e.g., *McLaughlin v. Board of Selectmen*, 422 Mass. 359, 363 (1996) (each expert should be qualified individually "with their relative qualifications going to the weight of their testimony").

II. By Delegating Ultimate Release Authority to the QEs, *Johnstone* Removes the Court and the Jury from the Adjudication Process and Creates a Risk of Erroneous Adjudication that Threatens Public Safety.

Under *Johnstone*, an offender can never be deemed sexually dangerous without the imprimatur of a QE.

When both QEs are of the view that an offender is not sexually dangerous, *Johnstone* casts the QEs into an adjudicative role. *Johnstone* can – and in Chapman's case actually threatens to – deprive the judge and jury of the opportunity to adjudicate his present sexual dangerousness, despite the existence of expert opinion and other evidence to support such a determination.

This delegation of ultimate release authority is at odds with the Court's longstanding position that "[p]sychiatric testimony may be probative" of the question of sexual dangerousness "but it is not conclusive." *Commonwealth v. McHoul*, 372 Mass. 11, 15-16 (1977). Rather, "[t]he determination of sexual dangerousness is a legal and not a psychiatric question" and "must rest with the [trier of fact], based on all the evidence, and not be delegated to experts." *McHoul*, 372 Mass. at 15-16 (emphasis added). In reaching this conclusion, the Court considered the Supreme Court's discussion, in an analogous context, of "`the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harms that justify

the State in confining a person for compulsory treatment.'" *Id.*, quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). See also *Meunier's Case*, 319 Mass. 421, 427-428 (1946) (workers' compensation statute making report of medical referees "binding" such that a party "cannot explain, contradict or refute it" violates due process because it "denie[s] [the party] a fair opportunity of introducing all available material evidence in support of or defense against the claim and to have it considered and weighed by the trier of fact").

By giving preclusive effect to a single type of expert opinion, *Johnstone* is an outlier that stands in stark contrast to extensive jurisprudence that expert opinion is not automatically entitled to be credited.[15] "Judicial experience with psychiatric testimony makes it abundantly clear that it would be unrealistic to treat an opinion . . . by an expert on either side of . . . . [an] issue as conclusive." *Commonwealth v. Lamb*, 372 Mass. 17, 24 (1977) (citation and internal

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[15] *Green, petitioner,* 475 Mass. 624 (2016), involved a challenge to a jury instruction. Because one of the QEs in that case opined that Green remained sexually dangerous, it did not present an opportunity to request that *Johnstone* be overruled.

quotation omitted); see *id.* (The law does not give expert opinions the "'benefit of conclusiveness'" even if there are no contrary opinions introduced at trial) (citation omitted). See also, e.g., *Wyatt*, 428 Mass. at 360 (same); *Commonwealth v. Bradway*, 62 Mass. App. Ct. 280, 291, *rev. denied*, 443 Mass. 1101 (2004) ("'Weighing and crediting the testimony are for the trier of fact, and [the court] will not substitute [its] judgment for that of the trier of fact'") (citation omitted); *Commonwealth v. Husband*, 82 Mass. App. Ct. 1, 6, *rev. denied*, 463 Mass. 1103 (2012) (same).

By barring a trial altogether, *Johnstone* requires that the QEs' opinions that an offender is not sexually dangerous must be accepted at face value and will never receive scrutiny for sufficient basis, reliability, or methodology. *Johnstone* stands alone in this regard. Contrast *Hosie, petitioner*, 54 Mass. App. Ct. 624, 625-627 (2002) (a QE opinion that failed to apply "proper legal standard" was not entitled to dispositive weight).

Johnstone, thus, departs from the well-established principle that the means to test the sufficiency and the validity of expert testimony is

through trial, particularly through cross examination: "A qualified examiner's testimony is, of course, subject to the test of rigorous cross-examination. 'If the opinions of the examining psychiatrist are based on incorrect information it would be open to a [respondent], . . . to refute it.'" *Bradway*, 62 Mass. App. Ct. at 289 (citation omitted). The QEs' opinions must stand up to the rigors of cross-examination to support or continue an SDP commitment but, under *Johnstone*, are entirely immune from the same probing scrutiny when they will lead to the release of a prolific sex offender who continues to present with chronic and enduring mental conditions, including pedophilic disorder and sexual sadism disorder. This disparity finds no support in the statute and should be reconsidered.

The ability to challenge the correctness of expert opinion is equally important to the Commonwealth as to the sex offender who is the subject of the proceeding. By insulating the QEs' opinions from the crucible of the adversarial process in this case, a dangerous sexual predator may be released even though the QEs' opinions lack persuasive force or

contain a misapprehension of the law or the facts or both.

This case presents a paradigmatic example of the unintended and dangerous results to which the rule of *Johnstone* can lead. The QEs' reports about Chapman are riddled with contradictions that could affect their authoritativeness in the eyes of a trier of fact. For example, Dr. Belle agreed with Chapman's medical providers that Chapman "absolutely cannot be in an environment with access to children" and "is likely exaggerating the extent of some of his physical and cognitive limitations" but also said he is "no longer a sexually dangerous person" because of his age and medical condition. R. I/126.[16] The self-

[16] Other staff members have noted that Chapman exaggerates his medical conditions. In 2012, treatment staff indicated that his hygiene was "only poor because it was calculated to increase his chances of getting out of the Treatment Center." R. I/156. In 2014, treatment staff indicated that "[t]here has been a consistent concern that Mr. Chapman exaggerates his existing medical problems." R. I/159. Likewise, the treatment team noted that Chapman reported that he has "trouble with his memory, but he has been able to recall things that have been said in group or said by officers." R. I/159. In 2015, his medical provider indicated that she "felt sometimes that his incontinence was goal directed as he would refuse to clean himself, instead preferring to watch others clean his area." R. II/113. In 2018, another medical provider stated "that his issues with incontinence at times appear[] volitional." R. II/114.

contradictory nature of this statement should be tested via the adversarial process before a trier of fact.

Dr. Rouse-Weir's report also contains assertions that raise questions that should be answered in a trial. For example, she indicated that Chapman will seek placement in a hospital and then a nursing home. R. I/202. She relied heavily on Chapman's age, "present medical status, and the degree of supervision required and available at an appropriate placement in the community" to "sufficiently mitigate his risk of re-offense." R. I/224. Chapman, however, told staff at MCI-Shirley that he wants to live in a place where he will have a lot of freedom and be able to come and go as he pleases. R. II/326.

Even if Chapman were in such a facility, that fact alone would not mean that he has no access to children or other potential victims. Indeed, his current medical provider, Maria Angeles, M.D., "expressed concern about his potential access to children in such a setting." R. II/114. See id. (another medical provider shared Dr. Angeles' concern in this regard).

Dr. Rouse-Weir noted that Chapman has been observed touching his genitals repeatedly in recent years and called this behavior both "sexualized" and "disrespectful." R. I/221. While she said it reflects Chapman's "irritability and hostility," she apparently discounted this recent sexualized misconduct because it did not involve sexual violence against boys. R. I/221.[17] This behavior, however, contradicts Chapman's statement to Dr. Rouse-Weir that he no longer experiences sexual arousal. R. I/207.[18] The existence of sexual arousal is important because, as Dr. Rouse-Weir noted, Chapman "continues to report a vulnerability to experiencing sexualized interest in prepubescent male children." R. I/224. Chapman "has not had a successful treatment experience." R. I/221.

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[17] The Commonwealth need not prove that Chapman has engaged in sexual misconduct during his civil commitment. *Hill*, 422 Mass. at 157. "Examples of recent conduct showing sexual dangerousness may often be lacking where the individual's dangerous disposition is of a sort that there will be no occasion for that disposition to manifest in a secure environment." *Hill*, 422 Mass. at 157. See *Bradway*, 62 Mass. App. Ct. at 282 n. 3 (because the offender had been incarcerated or held at the Treatment Center since 1991, his "notation that his last offense occurred 'over ten years ago' is of little persuasive value.").

[18] Chapman claimed decreased sexual arousal and a diminished ability to obtain an erection as long ago as 1977. R. II/87.

At the trial requested by the Commonwealth (but deemed by the judge to be precluded under *Johnstone*), the Commonwealth anticipates that the video recording of the June 2018 incidents, the incident reports from all of the recent sexually charged incidents, and the related testimony of the staff persons would severely undercut Chapman's claim that he has diminished sexual arousal. Chapman's recent behavior also undercuts the notion that his medical condition renders him unlikely to reoffend sexually.

The QEs' reports contain additional issues that should be subjected to the adversarial process before a trier of fact. Dr. Rouse-Weir suggested that Chapman would be unable to offend as he has in the past (*i.e.*, by luring boys into isolated areas). R. I/221-222. But as discussed above, Chapman used many methods to gain access to victims in order to sexually assault children in many situations. Even if Chapman is physically limited, it does not take much physical prowess to sexually assault a sleeping child.

Dr. Belle and Dr. Rouse-Weir also scored the Static-99R, a ten-item measure that estimates relative

risk of sexual recidivism, incorrectly.[19] While Dr. Rouse-Weir scored Chapman as having a conviction for a non-contact sex offense, R. I/217, Dr. Belle did not. R. II/123. Yet Chapman has been convicted of open and gross lewdness. R. I/262. While Dr. Belle scored Chapman as having a conviction for prior non-sexual violence, R. II/122, Dr. Rouse-Weir did not. R. II/217. Yet Chapman was previously convicted of assault and battery. R. I/313. A correct scoring of the Static-99R yields a score of six, which places Chapman in the "well above average risk" group.[20] R. I/217; II/123.

Unless it is overruled, *Johnstone* will prevent the Commonwealth from testing these and other deficiencies in the QEs' opinions, and will prevent a jury from evaluating the totality of evidence of Chapman's present sexual dangerousness. This result

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[19] See *Commonwealth v. George*, 477 Mass. 331, 340 (2016) (describing the Static-99R). This instrument does not measure a particular individual's risk to reoffend sexually. *George*, 477 Mass. at 340. See R. I/217; II/123.

[20] The estimated five-year recidivism rates (based on a new charge or conviction for a sexual offense) associated with a score of six are 20.5% for the "routine" correctional sample and 25.7% for the high-risk/need sample. *See Static-99R & Static-2002R Evaluators' Workbook*, Phenix, et al. (October 19, 2016), www.static99.org.

cannot be squared with the vast majority of this Court's jurisprudence regarding expert opinion, as explained above.

III. *Johnstone* Invites Manipulation While Simultaneously Rendering the Courts Powerless to Address It.

Because it bars *any* scrutiny of the QEs' opinions, *Johnstone* creates an obvious incentive for an offender to try to hoodwink the QEs into offering opinions that the offender is not sexually dangerous by, *e.g.*, exaggerating the effect of his medical conditions, feigning a lack of recollection about his own sexual crimes, giving false information about his plans upon discharge, or simply refusing to discuss any of the host of relevant matters. *Johnstone* then simultaneously prevents the Commonwealth from exposing such manipulation and deprives the Superior Court of the power to address it.[21] By precluding a public trial where there is a full opportunity for the parties to present evidence, and a jury to resolve

[21] While there may be collateral ways to address certain misconduct, any such ancillary response will not protect the public safety or the integrity of the court itself in the § 9 proceeding. Because *Johnstone* forecloses any assessment of the evaluations or data upon which the opinions are based, there likely will be little chance to expose such issues or address them in any forum. This undesirable outcome should be avoided.

conflicts in the evidence, *Johnstone* thus tends to diminish the public's confidence in the judiciary.[22] Such a result has little to recommend it.

The Court in *Johnstone* considered that, by statute, the QEs must interview the offender. See *Johnstone*, 453 Mass. at 551-552. But the automatic release triggered by *Johnstone* is not contingent on the offender's participation or cooperation in the interview process. In fact, the statute does not require the offender to participate in the interview. See G.L. c. 123A, § 9. While § 9 provides that a petition may be dismissed if the petitioner refuses without good cause to be personally interviewed by the QEs, the Court has interpreted this provision to mean only that the petitioner must appear in person to be informed of and to exercise his patient-psychotherapist privilege, not that he must submit to a substantive interview. *Sheridan, petitioner,* 412

[22] Some judges of the Superior Court have raised concerns about the effect of *Johnstone*. For example, in 2016, Superior Court Justice William F. Sullivan stated that, after review, he "was and is troubled" by the QEs' reports in a case involving another § 9 petitioner, but that he had no discretion under *Johnstone* but to allow the motion for release from civil commitment. *John McCabe v. Commonwealth*, SUCR2013-10579). R. II/207-208.

Mass. 599, 605 (1992).[23] See *Commonwealth v. Ferreira*, 67 Mass. App. Ct. 109, 116, *rev. denied*, 447 Mass. 1110 (2006) (in initial commitment case, offender "had a choice with respect to the interview process" which "included the right to refuse to speak with the examiners").[24]

This case reveals the limitations of the statutory requirement of an interview. Chapman did not answer all of the questions posed to him. See R. II/121. Instead, he referred Dr. Belle to his attorney for information about his sexual misconduct in the community, his recent acts of exposing himself, and "anything [he] didn't adequately answer." R.

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[23] A petitioner may, however, be precluded from offering at trial experts of his choosing who have had the benefit of a personal interview if he refuses to participate in an interview with the QEs. *Commonwealth v. Connors*, 447 Mass. 313, 318-319 (2006). This option is rarely invoked in practice. Petitioners typically request, and courts typically grant, motions for subsequent evaluations by the QEs. Thus, in most instances, the petitioner has nothing to lose – and much to gain – from gamesmanship during the QE interview process.

[24] An interview is not a prerequisite to the admissibility of expert opinion in SDP proceedings. See, e.g., *Tate, petitioner,* 417 Mass. 226, 231 (1994)(interviews are not indispensable to the conclusion that the petitioner remains an SDP); *Commonwealth v. Rodriguez*, 376 Mass. 632, 644 n. 16 (1978), *citing Commonwealth v. Childs*, 372 Mass. 25, 29-30 (1977) (same).

II/121-122.[25] Further, as discussed above, some of Chapman's answers contradicted his conduct and statements he has given to others.

Johnstone also noted that the QEs must file their reports with the Court. See *Johnstone*, 453 Mass. at 551-552. But the ministerial act of delivering the reports to the Superior Court does not in any sense ensure sufficient basis, reliability, or methodology of the opinions and conclusions expressed in the reports. In short, neither of these statutory requirements is an adequate substitute for the usual process of testing expert opinion via the adversary process.

IV. Overruling *Johnstone* Will Enhance Public Safety and the Integrity of the Courts while Fully Protecting the Interests of Offenders.

Revisiting and overruling *Johnstone* will enhance public safety and the integrity of the courts and will not deprive persons undergoing commitment proceedings of any right. "The question in *Johnstone* was purely one of statutory interpretation. . . . ." *McIntire*,

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[25] Because their interviews occurred in April and May 2018, the QEs could not ask Chapman about the June 2018 conduct for which he has been indicted. See R. I/180; II/77. Nothing an offender tells a QE may be used against him in a criminal prosecution. See *Sheridan*, 412 Mass. at 605.

petitioner, 458 Mass. 257, 261 (2010), *cert. denied*, 563 U.S. 1012 (2011). See also *Commonwealth v. Poissant*, 443 Mass. 558, 564 (2005) (*Bruno* "only requires that there be expert testimony; it does not prescribe the form that testimony will take or the extent of the examination of the [offender], if any, that precedes that testimony.").

Overruling *Johnstone* would not lessen the Commonwealth's burden of proof or change the requirement that the Commonwealth offer expert evidence in support of an SDP commitment. Rather, it will permit the jury – upon proper instructions of the law from the trial judge – to perform its classic functions of weighing the evidence and assessing credibility. See, e.g., *Commonwealth v. Walsh*, 376 Mass. 53, 60 (1978).

Indeed, triers of fact have rendered decisions that a person is sexually dangerous even when the experts sharply diverged. See, e.g., *McIntire*, 458 Mass. at 259 (four of five experts opined petitioner was not sexually dangerous); *Blake*, 454 Mass. at 270 (three of five experts opined that offender was not sexually dangerous); *Cowen*, 452 Mass. at 762 (three of five experts opined that offender was not sexually

dangerous). Unanimity of expert opinion is not required in SDP proceedings. See *Lamb*, 372 Mass. at 23-24.

Nor is there any concern that overruling *Johnstone* would lead to expert shopping to secure a favorable opinion. Nothing of the sort has happened here.[26] The Commonwealth seeks to go forward with opinions from expert CAB psychologists who evaluated Chapman as statutorily mandated.[27]

Resolution of conflicting expert evidence by a trier of fact enhances the integrity of the proceedings and thus the public's confidence in the judiciary. In addition to restoring the power of the Superior Court, overruling *Johnstone* offers another important advantage to the administration of justice:

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[26] Before being assigned as a QE for the 2018 evaluation, Dr. Rouse-Weir had twice opined that Chapman was no longer sexually dangerous, first for the § 9 trial held in 2009 and then again for the § 9 trial held in 2016.

[27] Nor does the Commonwealth seek to go forward with unqualified witnesses. Each of the three CAB psychologists who opined that Chapman remains sexually dangerous is designated as a QE. R. I/57-58; II/40-41, 51, 61. In any case, either party may challenge the qualifications of a proffered expert. Such matters are addressed to the trial judge's discretion. See *LeSage, petitioner*, 76 Mass. App. Ct. 566, 571 (2010) (addressing challenge to the qualifications of a QE).

it will permit appellate review of decisions. As the Court recently noted in another context, the availability of appellate review will enhance the "orderly development of a body of law" and the "proper administration of justice in individual cases." *Ruiz*, 2018 WL 4924626 *6 (addressing availability of appellate review of dismissal of habitual offender component of an indictment).

CONCLUSION

For the foregoing reasons, *Johnstone* should be revisited and overruled, the Superior Court's judgment should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted,

Respondent/Appellant
Commonwealth of Massachusetts

By its Attorneys,

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Dated: October 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that service is being made to Petitioner Wayne W. Chapman by e-filing to his counsel:

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/s/ Mary P. Murray
Mary P. Murray

Dated: October 25, 2018

CERTIFICATION

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs.

/s/ Mary P. Murray
Mary P. Murray

ADDENDUM

Order (Barry-Smith, J.)
(August30, 2018) 59

Order of Discharge (Barry-Smith, J.)
(September 4, 2018) 60

G.L. c. 123A, § 1 61

G.L. c. 123A, § 6A 64

G.L. c. 123A, § 9 65

G.L. c. 123A, § 13 67

G.L. c. 123A, § 14 68

G.L. c. 231, § 111 70

Wayne Chapman v. Commonwealth, Super. Ct. Consolidated Cases Nos. 2012-10678 & 1677cv 00345.

The precedent interpreting G.L. c. 123A is unambiguous: if both Qualified Examiners conclude that a petitioner is not presently sexually dangerous, the petitioner is entitled to discharge from his civil commitment without trial. In re Johnstone, 453 Mass. 544, 553 (2009); Com. v. Souza, 87 Mass. App. Ct. 162, 173 (2015) ("the Commonwealth cannot continue to pursue the confinement unless at least one of the two assigned QEs concludes that the person is an SDP"). The Commonwealth acknowledges that Johnstone and its progeny govern this proceeding, but also candidly acknowledges that the Commonwealth seeks to change that governing law, and intends to use Mr. Chapman's petition as the proposed vehicle for that change. To that end, after two Qualified Examiners opined that the petitioner is not sexually dangerous at present and petitioner moved for discharge from his civil commitment, the Commonwealth responded by requesting a trial, or alternatively to report this case to the appellate courts, and to stay petitioner's discharge pending any appeal by the Commonwealth. The court held a hearing on petitioner's motion for discharge, and the Commonwealth's response, on August 20, 2018.

As for the prospect of a trial in this case, at hearing the Commonwealth acknowledged it could not sustain its burden of proof in light of Johnstone, and made clear that its first choice is to have the court report this case to the Appeals Court under Rule 64, and in the meantime stay any judgment of discharge for petitioner. After careful consideration of the parties' pleadings and arguments, and after hearing, the court rules that: 1) in the absence of evidence from a Qualified Examiner testifying that petitioner is sexually dangerous, a trial would be futile because the Commonwealth cannot meet its burden of proof as a matter of law; 2) the court discerns no reason to report this case on an interlocutory basis or after judgment, where the governing law is well established and the Commonwealth has made clear its principal desire is to change that law, as contrasted to, for instance, a novel ruling by this court that impacts this proceeding on an ongoing basis. Accordingly, the Commonwealth's motion for trial and to report the case is **denied**; and the petitioner's motion for discharge is **allowed**. A separate judgment for discharge of petitioner will enter. The court notes that Petitioner's discharge will not result in his immediate release, as he is currently being held on $25,000 bail on recent charges, though the discharge will terminate his civil commitment pursuant to c. 123A.

Given the context identified above—namely, that the law governing this proceeding is clear but the Commonwealth desires to change that law through an appeal, and that petitioner presently is subject to detention on bail on new criminal charges—the court will stay the order of discharge for twenty days, to permit the Commonwealth an opportunity to seek a stay of the discharge from the appellate courts. The Commonwealth's motion for stay is **allowed** for twenty (20) days from entry of the judgment of discharge.

August 30, 2018

Christopher K. Barry-Smith

COMMONWEALTH OF MASSACHUSETTS

Essex, SS

SUPERIOR COURT DEPARTMENT
UNIFIED SESSION #2012-10678
ESSEX COUNTY # 2016-345

Wayne Chapman
Petitioner

v.

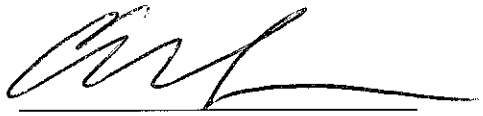
COMMONWEALTH
Respondent

ORDER OF DISCHARGE

After a hearing in the above entitled matter, because two qualified examiners concluded that the petitioner is not a sexually dangerous person the Commonwealth cannot meet its burden of showing that the Petitioner remains a sexually dangerous person pursuant to *Johnstone, petitioner*, 453 Mass. 544 (2009).

Therefore, it is **ORDERED** that the petitioner is to be discharged from his civil commitment under G.L. Ch 123A. By separate order, this order of discharge is stayed for 20 days.

By the court,
Barry-Smith, J



Justice of the Superior Court

Dated: September 4, 2018

G.L. c. 123A, Section 1: As used in this chapter the following words shall, except as otherwise provided, have the following meanings:

"Agency with jurisdiction", the agency with the authority to direct the release of a person presently incarcerated, confined or committed to the department of youth services, regardless of the reason for such incarceration, confinement or commitment, including, but not limited to a sheriff, keeper, master or superintendent of a jail, house of correction or prison, the director of a custodial facility in the department of youth services, the parole board and, where a person has been found incompetent to stand trial, a district attorney.

"Community access board", a board consisting of five members appointed by the commissioner of correction, whose function shall be to consider a person's placement within a community access program and conduct an annual review of a person's sexual dangerousness.

"Community Access Program", a program established pursuant to section six A that provides for a person's reintegration into the community.

"Conviction", a conviction of or adjudication as a delinquent juvenile or a youthful offender by reason of sexual offense, regardless of the date of offense or date of conviction or adjudication.

"Mental abnormality", a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

"Personality disorder", a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses.

"Qualified examiner", a physician who is licensed pursuant to section two of chapter one hundred and twelve who is either certified in psychiatry by the American Board of Psychiatry and Neurology or eligible to be so certified, or a psychologist who is licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one

hundred and twelve; provided, however, that the examiner has had two years of experience with diagnosis or treatment of sexually aggressive offenders and is designated by the commissioner of correction. A "qualified examiner" need not be an employee of the department of correction or of any facility or institution of the department.

"Sexual offense", includes any of the following crimes: indecent assault and battery on a child under fourteen under the provisions of section thirteen B of chapter two hundred and sixty-five; aggravated indecent assault and battery on a child under the age of 14 under section 13B1/2 of chapter 265; a repeat offense under section 13B3/4 of chapter 265; indecent assault and battery on a mentally retarded person under the provisions of section thirteen F of chapter two hundred and sixty-five; indecent assault and battery on a person who has obtained the age of fourteen under the provisions of section thirteen H of chapter two hundred and sixty-five; rape under the provisions of section twenty-two of chapter two hundred and sixty-five; rape of a child under sixteen with force under the provisions of section twenty-two A of chapter two hundred and sixty-five; aggravated rape of a child under 16 with force under section 22B of chapter 265; a repeat offense under section 22C of chapter 265; rape and abuse of a child under sixteen under the provisions of section twenty-three of chapter two hundred and sixty-five; aggravated rape and abuse of a child under section 23A of chapter 265; a repeat offense under section 23B of chapter 265; assault with intent to commit rape under the provisions of section twenty-four of chapter two hundred and sixty-five; assault on a child with intent to commit rape under section 24B of chapter 265; kidnapping under section 26 of said chapter 265 with intent to commit a violation of section 13B, 13B1/2, 13B3/4, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24 or 24B of said chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of chapter 272; inducing a person under 18 into prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; open and gross lewdness and lascivious behavior under section 16 of said chapter 272; incestuous intercourse

under section 17 of said chapter 272 involving a person under the age of 21; dissemination or possession with the intent to disseminate to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; purchase or possession of visual material of a child depicted in sexual conduct under section 29C of said chapter 272; dissemination of visual material of a child in the state of nudity or in sexual conduct under section 30D of chapter 272; unnatural and lascivious acts with a child under the age of sixteen under the provisions of section thirty-five A of chapter two hundred and seventy-two; accosting or annoying persons of the opposite sex and lewd, wanton and lascivious speech or behavior under section 53 of said chapter 272; and any attempt to commit any of the above listed crimes under the provisions of section six of chapter two hundred and seventy-four or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority; and any other offense, the facts of which, under the totality of the circumstances, manifest a sexual motivation or pattern of conduct or series of acts of sexually-motivated offenses.

"Sexually dangerous person", any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such

victims because of his uncontrolled or uncontrollable desires.

G.L. c. 123A, Section 6A: Any person committed as a sexually dangerous person to the treatment center or a branch thereof under the provisions of this chapter shall be held in the most appropriate level of security required to ensure protection of the public, correctional staff, himself and others. Any juvenile who is committed as a sexually dangerous person to the treatment center or a branch thereof under the provisions of this chapter shall be segregated from any adults held at such facility.

Only a person whose criminal sentence has expired or upon whom a criminal sentence was never imposed shall be entitled to apply for participation in a community access program once in every twelve months. Said program shall be administered pursuant to the rules and regulations promulgated by the department of correction. As part of its program of community access the department of correction shall establish a board known as the community access board which board shall consist of five members appointed by the commissioner of correction, consistent with the rules and regulations of the department. Membership shall include three department of correction employees and two persons who are not department of correction employees, but who may be independent contractors or consultants. The non-employee members shall consist of psychiatrists or psychologists licensed by the commonwealth. The board shall evaluate residents for participation in the community access program and establish conditions to ensure the safety of the general community. The board shall have access to all records of the person being evaluated and shall give a report of its findings including dissenting views, to the chief administrative officer of the center. Such report shall be admissible in any hearing under section nine of this chapter. The board shall also conduct annual reviews of and prepare reports on the current sexual dangerousness of all persons at the treatment center, including those whose criminal sentences have not expired. The reports shall be admissible in a hearing under section nine of this chapter.

Any person participating in a community access program under this section shall continue to reside within the secure confines of MCI-Bridgewater and be under daily evaluation by treatment center personnel to determine if he presents a danger to the community. Upon approval of a person for participation in a community access program, notice shall be given to the colonel of state police, to the attorney general, to the district attorney in the district from which the person's criminal commitment originated, to the police department of the city or town from which the commitment originated, the police department of the town of Bridgewater, the police department where such person's participation in the community access program will occur the employer of persons participating in the access program, and any victim of the sexual offense from which the commitment originated. If such victim is deceased at the time of such program participation, notice of the person's participation in a community access program shall be given to the parent, spouse or other member of the immediate family of such deceased victim.

G.L. c. 123A, Section 9: Any person committed to the treatment center shall be entitled to file a petition for examination and discharge once in every twelve months. Such petition may be filed by either the committed person, his parents, spouse, issue, next of kin or any friend. The department of correction may file a petition at any time if it believes a person is no longer a sexually dangerous person. A copy of any petition filed under this subsection shall be sent within fourteen days after the filing thereof to the department of the attorney general and to the district attorney for the district where the original proceedings were commenced. Said petition shall be filed in the district of the superior court department in which said person was committed. The petitioner shall have a right to a speedy hearing on a date set by the administrative justice of the superior court department. Upon the motion of the person or upon its own motion, the court shall appoint counsel for the person. The hearing may be held in any court or any place designated for such purpose by the administrative justice of the superior court department. In any hearing held pursuant to the provisions of this section, either the petitioner or the commonwealth may demand that the issue be tried by

a jury. If a jury trial is demanded, the matter shall proceed according to the practice of trial in civil cases in the superior court.

The court shall issue whatever process is necessary to assure the presence in court of the committed person. The court shall order the petitioner to be examined by two qualified examiners, who shall conduct examinations, including personal interviews, of the person on whose behalf such petition is filed and file with the court written reports of their examinations and diagnoses, and their recommendations for the disposition of such person. Said reports shall be admissible in a hearing pursuant to this section. If such person refuses, without good cause, to be personally interviewed by a qualified examiner appointed pursuant to this section, such person shall be deemed to have waived his right to a hearing on the petition and the petition shall be dismissed upon motion filed by the commonwealth. The qualified examiners shall have access to all records of the person being examined. Evidence of the person's juvenile and adult court and probation records, psychiatric and psychological records, the department of correction's updated annual progress report of the petition, including all relevant materials prepared in connection with the section six A process, and any other evidence that tends to indicate that he is a sexually dangerous person shall be admissible in a hearing under this section. The chief administrative officer of the treatment center or his designee may testify at the hearing regarding the annual report and his recommendations for the disposition of the petition. Unless the trier of fact finds that such person remains a sexually dangerous person, it shall order such person to be discharged from the treatment center. Upon such discharge, notice shall be given to the chief administrative officer, to the commissioner of correction and the colonel of state police, to the attorney general, to the district attorney in the district from which the commitment originated, to the police department of the city or town from which the commitment originated, the police department of the town of Bridgewater, the police department where such person is anticipated to take up residency, any employer of the resident, the department of criminal justice information services, and any victim of the sexual offense from which the commitment originated;

provided, however, that said victim has requested notification pursuant to section three of chapter two hundred and fifty-eight B. If such victim is deceased at the time of such discharge, notice of such discharge shall be given to the parent, spouse or other member of the immediate family of such deceased victim.

G.L. c. 123A, Section 13: (a) If the court is satisfied that probable cause exists to believe that the person named in the petition is a sexually dangerous person, the prisoner or youth shall be committed to the treatment center for a period not exceeding 60 days for the purpose of examination and diagnosis under the supervision of two qualified examiners who shall, no later than 15 days prior to the expiration of said period, file with the court a written report of the examination and diagnosis and their recommendation of the disposition of the person named in the petition.

(b) The court shall supply to the qualified examiners copies of any juvenile and adult court records which shall contain, if available, a history of previous juvenile and adult offenses, previous psychiatric and psychological examinations and such other information as may be pertinent or helpful to the examiners in making the diagnosis and recommendation. The district attorney or the attorney general shall provide a narrative or police reports for each sexual offense conviction or adjudication as well as any psychiatric, psychological, medical or social worker records of the person named in the petition in the district attorney's or the attorney general's possession. The agency with jurisdiction over the person named in the petition shall provide such examiners with copies of any incident reports arising out of the person's incarceration or custody.

(c) The person named in the petition shall be entitled to counsel and, if indigent, the court shall appoint an attorney. All written documentation submitted to the two qualified examiners shall also be provided to counsel for the person named in the petition and to the district attorney and attorney general.

(d) Any person subject to an examination pursuant to the provisions of this section may retain a psychologist or psychiatrist who meets the

requirements of a qualified examiner, as defined in section 1, to perform an examination on his behalf. If the person named in the petition is indigent, the court shall provide for such qualified examiner.

G.L. c. 123A, Section 14: (a) The district attorney, or the attorney general at the request of the district attorney, may petition the court for a trial. In any trial held pursuant to this section, either the person named in the petition or the petitioning party may demand, in writing, that the case be tried to a jury and, upon such demand, the case shall be tried to a jury. Such petition shall be made within 14 days of the filing of the report of the two qualified examiners. If such petition is timely filed within the allowed time, the court shall notify the person named in the petition and his attorney, the district attorney and the attorney general that a trial by jury will be held within 60 days to determine whether such person is a sexually dangerous person. The trial may be continued upon motion of either party for good cause shown or by the court on its own motion if the interests of justice so require, unless the person named in the petition will be substantially prejudiced thereby. The person named in the petition shall be confined to a secure facility for the duration of the trial.

(b) The person named in the petition shall be entitled to the assistance of counsel and shall be entitled to have counsel appointed if he is indigent in accordance with section 2 of chapter 211D. In addition, the person named in the petition may retain experts or professional persons to perform an examination on his behalf. Such experts or professional persons shall be permitted to have reasonable access to such person for the purpose of the examination as well as to all relevant medical and psychological records and reports of the person named in the petition. If the person named in the petition is indigent under said section 2 of said chapter 211D, the court shall, upon such person's request, determine whether the expert or professional services are necessary and shall determine reasonable compensation for such services. If the court so determines, the court shall assist the person named in the petition in obtaining an expert or professional person to perform an examination and

participate in the trial on such person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred and compensation received in the same case or for the same services from any other source. The court shall inform the person named in the petition of his rights under this section before the trial commences. The person named in the petition shall be entitled to have process issued from the court to compel the attendance of witnesses on his behalf. If such person intends to rely upon the testimony or report of his qualified examiner, the report must be filed with the court and a copy must be provided to the district attorney and attorney general no later than ten days prior to the scheduled trial.

(c) Juvenile and adult court probation records, psychiatric and psychological records and reports of the person named in the petition, including the report of any qualified examiner, as defined in section 1, and filed under this chapter, police reports relating to such person's prior sexual offenses, incident reports arising out of such person's incarceration or custody, oral or written statements prepared for and to be offered at the trial by the victims of the person who is the subject of the petition and any other evidence tending to show that such person is or is not a sexually dangerous person shall be admissible at the trial if such written information has been provided to opposing counsel reasonably in advance of trial.

(d) If after the trial, the jury finds unanimously and beyond a reasonable doubt that the person named in the petition is a sexually dangerous person, such person shall be committed to the treatment center or, if such person is a youth who has been adjudicated as a delinquent, to the department of youth services until he reaches his twenty-first birthday, and then to the treatment center for an indeterminate period of a minimum of one day and a maximum of such person's natural life until discharged pursuant to the provisions of section 9. The order of commitment, which shall be forwarded to the treatment center and to the appropriate agency with jurisdiction, shall become effective on the date of such person's parole

or in all other cases, including persons sentenced to community parole supervision for life pursuant to section 133C of chapter 127, on the date of discharge from jail, the house of correction, prison or facility of the department of youth services.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the final judgment, the court may temporarily commit such person to the treatment center pending disposition of the petition.

G.L. c. 231, Section 111: A justice of the superior or land court or the judge of the housing court of the city of Boston, the western division of the housing court department, the northeastern division of the housing court department, the southeastern division of the housing court depart mentor the housing court of the county of Worcester, after verdict or after a finding of the facts by the court, may report the case for determination by the appeals court.

If a justice of the superior court is of the opinion that an interlocutory finding or order made by him so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, he may report such matter to the appeals court, and may stay all further proceedings except such as are necessary to preserve the rights of the parties.

A justice of the superior court may, upon request of the parties, in any case where there is agreement as to all the material facts, report the case to the appeals court for determination without making any decision thereon.