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BY ELECTRONIC FILING AND EMAIL

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

Re: *Committee for Public Counsel Services, et al. v. Chief Justice of the Trial Court, et al.*, No. SJC-12926

Dear Mr. Kenneally:

Pursuant to the Chief Justice's invitation at oral argument in the above-referenced case, I write to offer supplemental authority regarding the possibility of an emergency amendment to Mass. R. Crim. P. 29 ("Rule 29"), and related separation-of-powers issues. The Attorney General's Office is generally in agreement with the letter filed yesterday by the Middlesex, Berkshire, and Northwestern District Attorneys in this matter, and I write in further support of this Court's authority to amend Rule 29 to address circumstances arising out of the COVID-19 pandemic.[1]

Ample authority exists for treating the authority to alter sentences as judicial rather than executive in nature, even once the execution of sentence has begun.[2] The United States Supreme Court explained in *United States v. Benz*, 282 U.S. 304 (1931), that "[t]o render judgment is a judicial function. To carry the judgment into effect is an executive function." *Id.* at 311. Thus, the Supreme Court held that "[t]o cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it *qua* judgment. To reduce a sentence by amendment alters the terms of the judgment itself, and is a judicial act as much as the imposition of the sentence in the first instance." *Id.* This Court cited that passage of *Benz* with approval in a case concerning the authority of a judge to revise a sentence once execution of the sentence had begun. *See Dist. Att'y for the N. Dist. v. Superior Court*, 342 Mass. 119, 126-28 (1961).

Relatedly, while this Court has often noted that post-sentencing events should not be

[1] This letter is filed only on behalf of the Attorney General.

[2] Revision of a sentence to be more severe than originally pronounced may implicate the prohibition against double jeopardy. *See generally Commonwealth v. Selavka*, 469 Mass. 502 (2014).

considered in assessing a Rule 29 motion, those observations have generally been in the context of post-sentencing conduct *by the defendant*. *See, e.g.*, *Commonwealth v. Tejeda*, 481 Mass. 794, 797 (2019) (Lowy, J.) ("[O]ur cases emphasizing that facts not in existence at the time of sentencing cannot serve as the basis for an altered sentence have focused on the conduct of the defendant or a denial of parole…. [A] defendant's actions postsentencing are best considered by a parole board."); *Commonwealth v. Barclay*, 424 Mass. 377, 380 (1997) ("[A] judge [considering a Rule 29 motion] may not take into account conduct of the defendant that occurs subsequent to the original sentencing."); *Commonwealth v. McGuinness*, 421 Mass. 472, 476 n.4 (1995) ("A judge may not interfere with the executive function of the parole board by using postconviction evidence in an order to revise and revoke."). But the situation is different when the judge considers only post-sentencing emergency circumstances beyond anyone's control, as is the case here. As this Court held in *Tejeda*, "[t]he underlying principles governing rule 29 motions are fairness and justice," 481 Mass. at 797, and those principles apply when unforeseen and emergency circumstances call the fairness and justice of a previously-imposed sentence into question.

With respect to timeliness, this Court has described the 60-day limit in Rule 29 as "jurisdictional." *E.g.*, *Commonwealth v. DeJesus*, 440 Mass. 147, 150-51 (2003). However, in a case under Rule 29's statutory predecessor, former G.L. c. 278, § 29C (repealed, St. 1979, c. 344, § 48),[3] this Court treated a virtually identical 60-day period as waivable. *See Commonwealth v. L'Italien*, 352 Mass. 424, 425 n.1 (1967) ("We note that the defendant filed his motions long after the expiration of sixty days. The Commonwealth, however, did not raise this issue."). This Court has also allowed the 60-day period to be tolled. *See Commonwealth v. Sitko*, 372 Mass. 305, 312 (1977) (holding that defendant's unauthorized 7-month absence from Massachusetts following sentencing "in effect tolled the time period in Section 29C for the period of that absence"). Conversely, in *Commonwealth v. Layne*, 386 Mass. 291 (1982), this Court "assume[d] for the purposes of this case that the defendant technically complied with the requirement" of filing a Rule 29 motion within 60 days of the appellate court's rescript, but nonetheless held that the motion was "filed long after any reasonable time for the prosecution of an appeal has passed," and thus was untimely. *Id.* at 294-95. Thus, despite the apparently plain language of the 60-day time limit in Rule 29 and its statutory predecessor, there is precedent both for entertaining motions to revise and revoke outside the 60-day limit, and for refusing to consider them even though technically timely, based on "the policy underlying the rule." *Id.* at 295; *see also Sitko*, 372 Mass. at 312 (holding that tolling the 60-day period in the circumstances "permits the statute to operate as the Legislature intended").[4]

As stated at oral argument in this case, our office does not know of any Massachusetts precedent directly addressing the judiciary's authority to revise and revoke sentences in circumstances like the extraordinary ones in which we find ourselves. But, for the reasons explained herein, at oral argument, and in our response to the petition, it remains the Attorney General's view

[3] Former § 29C read: "If it appears to the superior court that justice has not been done or cannot be done, it may within sixty days after a sentence has been imposed, upon such terms and conditions as it shall order, revise or revoke any sentence imposed: if such sentence was imposed without trial after a plea of guilty or nolo contendere the court may in the event of such revocation permit the withdrawal of the plea upon which the sentence was imposed." *Commonwealth v. L'Italien*, 352 Mass. 424, 425 n.1 (1967) (quoting St. 1962, c. 310, § 2).

[4] In *Tejeda*, the Rule 29 motion was timely, having been filed within 60 days of this Court's rescript on direct review of the defendant's conviction (although long after he was sentenced). *See* Brief for the Commonwealth in No. SJC-12593, at 8.

that, in light of those circumstances, the separation of powers would not be offended by an amendment to Rule 29 along the lines set forth in the Special Master's Report and Recommendation.

I would appreciate your circulating this letter to the Justices. Thank you for your assistance.

Yours sincerely,

/s/ David C. Kravitz

David C. Kravitz
Deputy State Solicitor

cc: All counsel of record (by efile and email)