COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

SUFFOLK, ss. NO. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES &
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Petitioners

v.

CHIEF JUSTICE OF THE TRIAL COURT,
Respondent

RESPONSE OF THE DISTRICT ATTORNEYS FOR THE BRISTOL, CAPE & ISLANDS, ESSEX, HAMPDEN, MIDDLE, NORFOLK, & PLYMOUTH DISTRICTS TO THE PETITIONERS' MOTION FOR RECONSIDERATION

By their April 17, 2020 "Motion For Reconsideration Or Modification Of Decision" under Mass. R. App. P. 27, the Petitioners seek to "correct" what they deem are "misapprehensions of law and fact" in this Court's decision in Committee for Public Counsel Services & another v. Chief Justice of the Trial Court & others, 484 Mass. 431 (2020) ("CPCS"). The petitioners decry the remedial measures ordered as "not nearly enough" and seek various new and additional relief particularly as to sentenced defendants. The District Attorneys for the Bristol, Cape and Islands, Essex, Hampden, Middle, Norfolk, and Plymouth Districts ["seven district attorneys"] respond to specifically address the petitioners' requests: 1) to vacate the Court's opinion, and settled law, concerning stays of sentences; and 2) that confirmedly infected inmates be considered for release.[1] In short, the Court did not "bury[] its head in the sand," Motion at 6, but instituted robust measures to reduce, where consistent with public health and safety, the incarcerated population, while respecting limits on its superintendence powers under G.L. c. 211, § 3 and avoiding unconstitutional encroachment on legislative and executive functions per Article 30. In two weeks, these measures have resulted in hundreds of releases;

[1] Other claims and requests are more properly answered, if necessary, by the parole board, the carceral authorities, or the trial court.

hearings, and implementation of other measures the Court has ordered, continue. The petitioners' motion -- which does not allege, much less establish, any constitutional violation -- should be DENIED.

The CPCS and Christie decisions

As to pre-trial detainees, among other measures, the Court in CPCS: 1) established categories entitled to presumptive release and articulated the burden the Commonwealth must overcome in such cases, id. at 447;[2] 2) ordered the defense bar and custodial authorities to work together to facilitate prompt attorney-client video or teleconferences, id. at 448; 3) ordered hearings within 48 hours on motions for reconsideration of bail and release, id.; 4) urged district attorneys to make "every effort" to inform victims, as required by G.L. c. 258B, on this compressed timeframe, id. at 449;[3] 5) enumerated factors for judges to consider at such hearings, id. at 448; 6) created designated sessions to hear such motions, id. at 449; 7) mandated "prompt[]" decisions, id. at 449; 8) provided for review by a single justice of the county court, id. at 449; and 9) mandated daily and weekly census reporting, id. at 435, 456, Appendix B. Where release is ordered, the Court provided that conditions of release may be imposed while acknowledging "current limitations on probation supervision and [GPS] monitoring restrictions."[4] Id. at 435 & n.6. Further, to "reduce as far as possible" the influx of new arrestees, the Court mandated consideration, in setting bail, of the arrestees' age and health, and the risk of infection that they may face while incarcerated or pose to other detainees. Id. at 449. It also mandated consideration of these factors when determining whether to hold a defendant pending a probation revocation hearing. Id.

[2] At the same time, it did not preclude others not in a presumptive category (e.g., those held on serious excluded offenses) from also moving for release. Id. at 447 & n.18.

[3] It ordered that the "inability" to provide such notice "shall not be grounds" for the continued detention of those otherwise entitled to release under its decision. Id. at 449.

[4] New orders requiring modification of probation conditions and supervision to be consistent with social distancing eliminate or severely limit conditions such as GPS monitoring and home visits. See Mass. Probation Service Supervision Practices in Response to COVID-19 (March 18, 2020) and Supreme Judicial Court Order concerning the imposition of global positioning system (GPS) monitoring as condition of release or of probation (March 24, 2020).

As to sentenced individuals, the Court recognized that its power is "limited." CPCS at 435-436, citing inter alia, Sheehan, petitioner, 254 Mass. 342, 345 (1926)("The execution of sentences according to standing laws is an attribute of the executive department of government."). It re-affirmed that "[t]hose who have been serving sentences for less than sixty days may move to have their sentences revised or revoked under Mass. R. Crim. P. 29 . . . [and] [t]hose who are pursuing appellate proceedings or a motion for a new trial may seek a stay of execution of sentence pursuant to [Mass. R. Crim. P. 31 and] Mass. R. A. P. 6[]." Id., citing Commonwealth v. Charles, 466 Mass. 63, 83 (2013). It declined the petitioners' request to remove time limits on Rule 29 motions, as this would "usurp" the parole function entrusted to the executive branch in violation of Art. 30. Id. at 452. The unanimous Court held:

> Our broad power of superintendence over the courts **does not grant us the authority** to authorize courts to revise or revoke defendants' custodial sentences, **to stay the execution of sentence**, or to order their temporary release **unless** a defendant (1) has moved under Mass. R. Crim. P. 29, within sixty days after imposition of sentence or the issuance of a decision on all pending appeals, to revise or revoke his or her sentence, (**2) has appealed the conviction or sentence and the appeal remains pending, or (3) has moved for a new trial under Mass. R. Crim. P. 30.**

Id. at 450 (emphasis added).

At the same time, the Court highlighted numerous "mechanisms to allow various forms of relief . . . within the executive branch," id. at 452, and "urge[d]" the parole board to expedite release of those previously-approved, and to expedite use of other identified mechanisms to speed release of eligible inmates. Id. at 452; see id. at 436.[5] "Absent a violation of constitutional rights, **which the petitioners agree has not been established on this record,** we

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[5] Id. at 452, citing, e.g., G. L. c. 127, § 133 (parole board authority to release those eligible for parole because they have reached their "minimum term of sentence."); 120 Code Mass. Regs. § 200.10 (house of correction inmates may receive early parole consideration and be released up to sixty days prior to the minimum term based on "any … reason that the Parole Board determines is sufficiently compelling."); G.L. c. 127, § 133A; 120 Code Mass. Regs. § 301.01 (2017) (requiring parole hearing when inmate reaches eligibility); G.L. c. 127, § 134 (allowing employees other than parole board members to conduct hearings at houses of correction); G.L. c. 127, § 133A; 120 Code Mass. Regs. § 301.01 (if denied parole, board may at its discretion hold an earlier rehearing that the usual 1 to 5 year set back).

also do not have authority under G.L. c. 211, § 3, to exercise supervision over parole, furlough, or clemency decisions by the DOC, the parole board, the sheriffs, and other members of the executive branch." Id. at 446 (emphasis added).

Three days before CPCS, the court issued Christie v. Commonwealth, No. SJC-12927, 2020 WL 1545877 at *2–3 (Slip Op. Apr. 1, 2020), making clear that judges considering otherwise valid stay motions must consider the health risk to the defendant from incarceration, including both "the general risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the specific risk to the defendant, in view of his or her age and existing medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus." Id. at *2–3 (emphasis omitted). The Court also mandated consideration of "the circumstances under which the defendant would quarantine if he were to be released" and "the actual availability of such a residence where he might be safely quarantined and the suitability of such a residence if it were available." Id. at *3. It added that "because of the pandemic, and because time is of the essence, it may not be realistic to conduct the usual due diligence to provide assurances of availability and suitability, but that should not prevent the judge from relying on the information that reasonably can be provided under the circumstances." Id. at *3.

The Court should reject the proposed substantial revision of the law concerning stays

The petitioners seek reconsideration of the Court's "needless[]" "pronouncement[]" that stay motions require a predicate appeal or new trial motion. Motion at 2. They ask this Court to suspend this requirement,[6] Motion at 7-9, and further request that this Court "establish a

[6] The petitioners seek this specific relief for the first time. See EMERGENCY PETITION FOR RELIEF PURSUANT TO G. L. c. 211, § 3 filed March 24, 2020 at pp. 16-17, 30 (seeking release of "Any other individuals for whom a release or stay is appropriate. See Commonwealth v. Charles, 466 Mass. 63 (2013).") and REPLY BRIEF OF THE PETITIONERS ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY filed March 30, 2020 at pp. 21-22 (same).

rebuttable presumption of a stay for certain individuals."[7] Motion at 10. This Court correctly found that motions for stays of execution of sentence were limited to cases where, through appeal or motion for new trial, a defendant was challenging his conviction. Neither Mass. R. Crim. P. 31, nor this Court's inherent authority, allows for an expansion into motions based on independent grounds not affecting the legality or propriety of the conviction. Stays of execution of sentence under Mass. R. Crim. P. 31 are grounded on the raising of a meritorious legal issue. See Commonwealth v. Hodge (No. 1), 378 Mass. 851, 855 (1980) (consideration given of request for stay to potential danger to any person or the community and the possibility of further criminal acts during the pendency of the appeal, as well as the likelihood of success on appeal). Rule 31 does not authorize a judge to stay an execution of sentence when an appeal is not pending. Commonwealth v. McLaughlin, 431 Mass. 506, 517 (2000). In McLaughlin, in reviewing the history of Rule 31 and prior statutes concerning stays of sentences, this Court found the authority of judges to grant stays was largely unchanged; "[t]hat is a strong indication that trial judges lack authority to stay execution of sentence 'on independent grounds not affecting the legality or propriety of the conviction.'" Id. at 517-518, quoting Commonwealth v. O'Brien, 175 Mass. 37, 39 (1899). [8] Medical condition, an independent ground from the validity of the inmate's conviction and sentence, is not a basis for a stay of execution of sentence. See McLaughlin, 431 Mass. at 516 (noting in Commonwealth v. Hayes, 170 Mass. 16 (1897), the

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[7] They also request that the carceral authorities issue further reports concerning those who meet these categories, provide access to medical records within 24 hours, and seek hearings with 48 hours. Motion 7-11.

[8] Nor is the practice of allowing a defendant to arrange his affairs prior to the imposition of the sentence (Mot. Recon. 8-9) relevant to the determination of the ability of a judge to pause a sentence during its execution for reasons unrelated to the legality of the conviction. See McLaughlin, 431 Mass. at 518-519, quoting Commonwealth v. Gilnes, 40 Mass. App. Ct. 95, 97 n.2 (1996) ("Ordinarily, a judge would employ a stay only to allow a convicted person to arrange his or her affairs, or . . . pending determination of an appeal").

Court, under early version of G.L. c. 279, § 4, found trial judge lacked authority to grant stay of execution of sentence on grounds of defendant's poor health). [9]

The language in Commonwealth v. Charles, 466 Mass. 63, 72 (2013), that a judge has the inherent power to stay sentences for "exceptional reasons permitted by law", id. at 72, quoting McLaughlin, 431 Mass. at 520, quoting Mariano v. Judge of Dist. Court of Cent. Berkshire, 243 Mass. 90, 92 (1922), does not assist the petitioners' argument. In Charles, the defendants' challenge to the validity of their convictions was based on the misconduct of the analyst who tested the drugs that formed the basis for their conviction. A successful claim was based on the validity of the conviction and if successful would have permitted the reprieve of the sentence based on the conviction. Cf. Stewart v. Commonwealth, 413 Mass. 664, 667-668 (1992) (inappropriate to release defendant on bail under Mass. R. Crim. P. 30(c)(8) where success would only increase parole eligibility; judge's decision "effectively usurped the decision-making authority constitutionally allocated to the executive branch"), quoting Commonwealth v. Gordon, 410 Mass. 498, 501 (1991)). This Court in Stewart distinguished stays of execution of sentence as in Commonwealth v. Levin, 7 Mass. App. Ct. 501 (1979), finding Levin "focused on the importance of persons' not being forced to spend time in prison on a conviction that may be reversed. Levin did not address the issue of bail for a defendant who would not be released if successful on appeal." Id.at 667 n.7.

The motion to intervene by Prisoner Legal Services, or, as represented by petitioners, Prisoner Legal Services' lawsuit under G.L. c. 214, §1 filed with the single justice on April 17, 2020, does not change the analysis. The motion to intervene concerns this case, in which this Court has already rendered a decision, and does not challenge the validity of individual defendants' convictions, such that success on the merits that would potentially lead to a reprieve of the sentence. To the extent there is a civil lawsuit, not part of this record, which seeks civil

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[9] Christie, where this Court found that COVID-19 was an appropriate factor to consider on a motion to reconsider the denial of a motion to stay, is not to the contrary. Christie, 484 Mass. at *3. In Christie, the defendant had appealed the order revoking his probation; accordingly, his motion to stay execution of his sentence was valid under Rule 31.

relief for alleged violations of rights, such relief would not affect the validity of the inmates' convictions. Additionally, as stated in the Seven District Attorneys' response to the petition under G.L. c. 211, § 3, remedies of claims of violations of rights related to the conditions of confinement would generally be the injunction of the conduct causing the harm, a claim not entitling any specific individual incarcerated due to a criminal conviction to release. See Seven District Attorneys' Response at 20; see, e.g., Glaus v. Anderson, 408 F.3d 382 (7th Cir. 2005) ("If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option").

Nor does this Court's inherent power extend to pausing a properly executed sentence for reasons independent of the validity of the conviction. "The ability to defer the imposition of sentence, although a valuable feature in our legal system, is not necessary to the very existence of a court, and, as such, is not an inherent power beyond statutory limitation." Commonwealth v. Jackson, 369 Mass. 904, 922 (1976) (discussing validity of mandatory minimum sentences). "Although it is the court's function to impose sentences upon conviction, it is for the Legislature to establish criminal sanctions. . . . If we were to conclude that the judiciary could exercise its discretion to suspend imposition or execution of sentence despite statutory proscription, a serious question concerning the separation of powers would arise, for, taking this proposition to its logical extreme, it would mean that the judiciary impliedly possesses the power to nullify the Legislature's authority." Id. at 922-923.

The petitioners' recommendation that categories of inmates be presumptively entitled to stays (Mot. Recon. 10-11) reinforces that the requested relief would encroach on executive functions. The first four proposed categories concern: individuals eligible for parole and incarcerated for an offense not listed in Appendix A, CPCS, 484 Mass. 454-455; individuals serving time in a house of correction for a non-excluded offense; individuals completing their sentences within six months; and individuals incarcerated for a parole or probation violation where the violation is not a new criminal offense. All four categories involve the conditions and

length of time an inmate is serving, a function, as noted by this Court in its decision, squarely within the power of the Executive Branch and Parole Board. CPCS, 484 Mass. at 446-452. [10] The proposal for a rebuttable presumption and expedited release also effectively abrogates the statutory notice and response period concerning petitions for commitment as sexually dangerous persons. See, e.g., G.L. c. 123A, § 12. The fifth and sixth categories concern those who are vulnerable to COVID-19 due to age or medical condition, or medically qualified for parole, but medical condition would be an independent ground from the validity of the inmate's conviction and sentence, and not a ground for a stay of execution of sentence. See McLaughlin, 431 Mass. at 516, citing Commonwealth v. Hayes, 170 Mass. 16 (1897). Additionally, if the petitioners' category of those who are "medically qualified" for medical parole excludes any consideration of whether the individual presents a public safety risk, they are creating a category the Legislature did not include in setting out who was eligible for medical parole. See G.L. c. 127, § 119A (definitions of permanent incapacitation and terminal illness both include that the condition, "is so debilitating that the prisoner does not pose a public safety risk"). This request for a rebuttable presumption also infringes upon the careful balancing set out by the Legislature as to the grant of medical parole. See, e.g., Buckman v. Commissioner of Correction, 484 Mass. 14, 19 (2020) (medical parole available where determined that inmate is terminally ill or permanently incapacitated, would live and remain in society without violating the law, and whose release is not incompatible with the welfare of society).

Finally, the petitioners do not address the clear legislative grant of broad power to the governor to act to protect the health and safety of inmates from the pandemic. By his March 10, 2020 declaration of a State of Emergency to respond to COVID-19, Executive Order No. 591, the governor invoked powers granted under the Civil Defense Act. See Acts of 1950 c. 639 and G.L. c. 17, § 2A; Executive Order No. 591, paragraph 13. The Act explicitly grants plenary

[10] Defendants have a due process right to serve sentences promptly and continuously. See Commonwealth v. Ly, 450 Mass. 16, 22 (2007). Absent waiver by the defendant, pausing a sentence raises due process concerns.

powers to the governor regarding the health or safety of inmates. Acts of 1950, c. 639, § 7 (providing the governor "**any and all authority** over persons and property necessary or expedient for meeting said state of emergency," and providing that he "shall have and may exercise such authority relative to any or all of the following: - - - a. **Health or Safety of inmates of all institutions**.") (emphasis added). In his emergency declaration the Governor invoked the powers of Section 7 and declared that he would "from time to time issue recommendations, directives, and orders as circumstances may require." Executive Order No. 591, paragraph 13.[11] These powers are in addition to others granted to the executive, independent of a state of emergency, to provide for the health and safety of inmates relative to disease outbreaks. See, e.g., G.L. c. 111, § 108 (removal of sick prisoners).[12]

The Court should not authorize release of infected or quarantined inmates

In CPCS, this Court held that "[o]f course, those individuals who have tested positive or are symptomatic for COVID-19, or who are in quarantine due to having been in close contact with someone else who has tested positive, must remain in isolation or quarantine and would not be eligible for release during those periods." 484 Mass. at 448 & n.19. The petitioners argue this rests on the "incorrect" view "that keeping those individuals incarcerated will protect public health" and seek "individualized release decisions," i.e., potential release, of confirmedly infected and contagious inmates who "have a place to self-quarantine in a private setting." Motion at 13-14. The proposal evinces a striking disregard for the realities of the pandemic and

[11] Pursuant to G.L. c. 17, § 2A, the governor's emergency order also thereby invoked the powers provided by the legislature to the Commissioner of the Department of Public Health. Executive Order No. 591, paragraph 13. G.L. c. 17, § 2A ("Upon declaration by the governor that an emergency exists which is detrimental to the public health, the commissioner may, with the approval of the governor and the public health council, during such period of emergency, take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease . . . .").

[12] The clear legislative grant of authority to the governor would of course not preclude further remedial action by the legislature itself. See e.g., Commonwealth v. Galvin, 466 Mass. 286, 290–291 (2013) (giving effect to legislative intent to provide retroactive relief to those convicted of certain crimes carrying mandatory minimum sentences).

the risk to vulnerable communities on the outside. It ignores the current uncertainty about how long infected persons, even if deemed "recovered," nonetheless remain contagious.[13] It also ignores that, owing to the pandemic, authorities will be unable to meaningfully verify a defendant's representations about the availability of "a place to self-quarantine in a private setting" or to monitor and enforce compliance with quarantine. This Court has acknowledged as much. CPCS, 484 Mass. at 435 & n 6; Christie, 2020 WL 1545877 at *3. If such defendants are released to, or later move to, congregate residential settings full of vulnerable individuals -- elderly housing, rooming houses, trailer parks, homeless shelters -- this could have dire public health consequences.[14] The Court should leave in place its sensible approach.

Conclusion

For the foregoing reasons, the motion should be DENIED.

THOMAS M. QUINN, III
DISTRICT ATTORNEY FOR THE BRISTOL DISTRICT
218 South Main Street,
Fall River, MA 02721
Tel. (508) 821-4028
BBO NO. 553179
Thomas.m.quinn@state.ma.us

[13] https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission (Last visited April 19, 2020)("The onset and duration of viral shedding and the period of infectiousness for COVID-19 are not yet known. . . .").

[14] This has already occurred. A detainee charged with fentanyl distribution showed symptoms on April 2, was confirmed positive on April 4, and deemed "recovered" on April 10. He moved for release to live with his mother; release was granted, and probation suspended GPS monitoring for the 14-day quarantine period. The defendant had not disclosed to the Court or Commonwealth that his mother lived in housing for low income residents over 62 and persons with disabilities. Authorities were alerted only after residents alerted management to the defendant's failure to abide by house arrest. https://www.salemnews.com/news/local_news/released-inmate-with-covid-19-was-sent-to-elderly-housing/article_56e7a321-4f62-5d23-bafc-fefaab04aae9.html (Last visited April 19, 2020).

MICHAEL D. O'KEEFE
DISTRICT ATTORNEY FOR THE
CAPE AND ISLANDS DISTRICT
3231 Main Street, P.O. Box 455
Barnstable, MA 02630
Tel. (508) 362-8113
BBO NO. 378145
Michael.okeefe@state.ma.us

JONATHAN BLODGETT
DISTRICT ATTORNEY FOR THE EASTERN DISTRICT
Ten Federal Street
Salem, Massachusetts 01970
(978) 745-6610
BBO NO. 544467
Jonathan.blodgett@state.ma.us

ANTHONY D. GULLUNI
DISTRICT ATTORNEY FOR THE HAMPDEN DISTRICT
Roderick L. Ireland Courthouse, 3rd Floor
50 State Street
Springfield, MA 01102
Tel. (413) 747-1000
BBO NO. 674246
Anthony.gulluni@state.ma.us

JOSEPH D. EARLY
DISTRICT ATTORNEY FOR THE MIDDLE DISTRICT
Worcester Trial Court, Room G301
225 Main Street
Worcester, MA 01608
Tel. (508) 755-8601
BBO NO. 545809
Joseph.early@state.ma.us

MICHAEL W. MORRISSEY
DISTRICT ATTORNEY FOR THE NORFOLK DISTRICT
45 Shawmut Road
Canton, MA 02021
Tel. (781) 830-4800
BBO NO. 546756
Michael.w.morrissey@state.ma.us

TIMOTHY J. CRUZ
DISTRICT ATTORNEY FOR THE PLYMOUTH DISTRICT
166 Main Street
Brockton, MA 02301
Tel. (508) 584-8120
BBO NO. 545068
Timothy.j.cruz@state.ma.us