COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-11408

ESSEX, SS.

COMMONWEALTH,
Appellant

V.

SHUBAR CHARLES,
Appellee

ON RESERVATION AND REPORT
BY THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF AND RECORD APPENDIX FOR THE COMMONWEALTH

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ISSUE PRESENTED

A single justice of the Supreme Judicial Court for Suffolk County, (Botsford, J.), has reserved and reported the following question to this Court:

> Does a special magistrate appointed by the Chief Justice of the Superior Court pursuant to Mass. R. Crim. P. 47, or a judge of the Superior Court, have the authority to allow a defendant's motion to stay execution of his sentence, then being served, pending disposition of the defendant's motion for new trial?

The single justice also reserved and reported questions arising from two other petitions filed by the Commonwealth concerning proceedings in the special Drug Lab session of the Superior Court: Commonwealth v. Hector Milette, (No. SJC-11409) (as to the authority of a special magistrate to reconsider a motion for stay of execution of sentence that has been denied by a Superior Court judge) and Commonwealth v. Superior Court (No. SJC-11410) (as to the validity of a plea entered pursuant to the two-part plea proceeding established by the Chief Justice of the Superior Court for cases in the Drug Lab session).

STATEMENT OF THE CASE[1]

Introduction[2]

The special Drug Lab session of the Superior Court was established in September 2012 by the Chief Justice of the Superior Court to handle litigation in the counties affected by the Hinton Drug Lab investigation, which remains on-going (R.A. 74-83).

Initially, in Essex County, then-Regional Administrative Justice David Lowy was assigned to the session (R.A. 68-69). Before any hearings were held,

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[1] Record references are: record appendix (R.A. _); transcript of January 31, 2013 stay hearing (Tr. I _); transcript of February 8 stay hearing (Tr. II _); transcript of February 13 stay hearing (Tr. III _).

[2] In support of the petition addressing the two-part plea proceeding, Commonwealth v. Superior Court (No. SJC-11410), the Commonwealth filed an affidavit from assistant district attorney Gerald P. Shea (R.A. 67-73); in its answer to the petition, the Superior Court filed an affidavit from its general counsel, Maria Peña (R.A. 74-83), but neither the Superior Court nor the other defendants disputed the facts in the Shea affidavit. At a hearing before the single justice on March 13, 2013, the Commonwealth sought an opportunity to dispute claims in the Peña affidavit and the single justice acknowledged that such an opportunity should be provided. In the reservation and report, covering all three petitions, she suggested an agreed factual statement, but due to the press of the briefing schedule, an agreed statement was not reached. In this brief, the Commonwealth relies on the facts set forth in the Shea affidavit and the undisputed facts in the Peña affidavit, and reserves its right to file a supplemental addendum identifying those facts in the Peña affidavit that the Commonwealth disputes.

he issued an administrative order setting forth the requirements for cases to be heard in the session, including that the defendant file a motion for new trial, a motion for a stay of execution of sentence, and the certificate of analysis showing that chemist Annie Dookhan was "the chemist or . . . supervised the analysis" (R.A. 9).

During October and November, Judge Lowy ruled on more than fifty motions for stays of execution of sentence (R.A. 69 ¶ 8). At each hearing, the Commonwealth filed a written opposition to the stay motion on grounds that the court lacked authority to stay the execution of a sentence *while a new trial motion was pending* (R.A. 69 ¶ 9). At the first hearing in the Drug Lab Session, Judge Lowy found that the Court had the inherent authority to stay sentences, pending disposition of the new trial motion, relying on Commonwealth v. McLaughlin, 431 Mass. 506 (2000) (R.A. 69 ¶ 9).

In December 2012, pursuant to Mass. R. Crim. P. 47, the Chief Justice of the Superior Court appointed special magistrates pursuant to an Order of Assignment to preside over the Drug Lab sessions (R.A. 10-11). Retired Superior Court Justice John Cratsley was

appointed to the Essex session (R.A. 10-11). At every hearing on stay motions before S.M. Cratsley, the Commonwealth continued to assert its objection that no rule, statute, or case permitted consideration of a stay of execution motion, pending the disposition of a new trial motion (R.A. 70 ¶ 14).

Over the Commonwealth's objection, the special magistrate allowed the stay motion in this case. The Commonwealth then filed a petition pursuant to G.L. c. 211, § 3, seeking to clarify whether authority exists for a judge or a special magistrate to consider and allow such motions, and challenging the allowance of the motion in this case based on the factors applicable in Rule 31 proceedings (Tr. I 17).[3]

In Commonwealth v. Milette, SCJ-11409, the Commonwealth's petition raised a related issue, namely, whether the special magistrate has authority to reconsider a motion to stay of execution sentence that was denied by a Superior Court judge.

[3] Still pending before the single justice is the defendant's renewed motion for a stay of execution of sentence, which the Commonwealth has opposed.

Underlying Proceedings

On June 5, 2009, the defendant, Shubar Charles, was indicted for possession with intent to distribute a class B substance, subsequent offense (G.L. c. 94C, § 32A (b)); two counts of possession of a firearm without a firearms identification (FID) card (G.L. c. 269, § 10(h); and two counts of possessing a firearm with three prior violent offenses or serious drug crimes (felon-in-possession) (G.L. c. 269, § 10G(c)) (R.A. 1-7). As the primary chemist, Annie Dookhan performed the drug analysis, but was not involved in any way in the ballistics analysis (R.A. 15-16).

On October 18, 2010, the defendant pled guilty (Whitehead, J., presiding) to possession of a class B substance with intent to distribute (G.L. c. 94C, § 32A (a)), possession of ammunition (G.L. c. 269, 10(h)) and possession of ammunition after having been convicted of one prior serious drug offense (felon-in-possession) (G.L. c. 269, § 10G(a)) (No. ESCR-2009-00697) (R.A. 1-7). Nolle prosequis were entered on the other charges as part of the plea bargain (R.A. 1, 7). For the felon-in-possession and possession with intent to distribute convictions, he was sentenced to concurrent four to seven year state prison terms; for

the possession of ammunition charge, he was sentenced to a concurrent two-year house of correction term (R.A. 1-7). At the plea hearing he was represented by attorney Christopher Norris (R.A. 2).

On December 17, 2012, the defendant filed a motion for new trial raising claims related to the ongoing Hinton Drug Lab investigation (R.A. 12-16) and a motion to stay the execution of his sentences for all the charges (R.A. 17-18). The Commonwealth filed a written objection to the stay motion (R.A. 19-20).

On January 31, 2013, over the Commonwealth's objection, S.M. Cratsley allowed the motion, thereby granting a stay of execution of all the defendant's sentences, including the firearm and felon-in-possession sentences, subject to the following terms: $5000 cash bail and the defendant is to reside at a particular address in Lynn with his brother, abide by a 10 p.m. to 6 a.m. curfew, submit to GPS monitoring, and report weekly to probation (R.A. 5-6).

Pursuant to the procedure set out in the Order of Assignment, the Commonwealth filed its Objection[4] on

[4] The Objection was referred to during the hearings as an "appeal" to the Regional Administrative Justice. See, e.g., Tr. II 3. This brief will use the term

February 4, 2013 (R.A. 21-22). A justice of the Superior Court (Lu, J.) stayed the order of the special magistrate pending a hearing (R.A. 6). On February 8, 2012, Judge Lu heard the motion to stay, anew[5] (R.A. 6).

The Commonwealth objected that the court lacked authority to consider the motion and that it should be denied on the merits; the judge allowed it, ruling implicitly that there is authority for the motion, pending disposition of a new trial motion (R.A. 6). He added the following conditions, apart from those imposed by S.M. Cratsley: the defendant must submit to random alcohol and drug screens and home confinement (except for emergency medical care and court appearances), and must consent to searches of his person, home, bedroom, and motor vehicle by probation, police, or federal agents regardless "of whether or not the searchers know of his consent" (R.A. 6).

"Objection" in accordance with the Order of Assignment (R.A. 10-11).

[5] The Order of Assignment provides for an objection by either party, but does not describe the procedure to be followed thereafter by the Superior Court justice (R.A. 10-11). At the hearing, Judge Lu said he was considering the motion "de novo" (Tr. II 11-12).

On February 13, 2013, Judge Lu allowed the Commonwealth's motion to stay the order staying execution of the sentence,[6] but only until 2 p.m. on February 15, and the Commonwealth filed a notice of appeal (R.A. 6-7). The Commonwealth filed its petition on February 14 and on February 15, the single justice stayed J. Lu's order "pending further Order" (R.A. 7), and the reservation and report was issued on March 22, 2013 (R.A. 25-29).

STATEMENT OF FACTS

I. January 31, 2013 hearing on motion to stay execution before Special Magistrate Cratsley

The new trial motion and motion to stay execution of sentence were filed on December 13, 2012 (R.A. 6). The new trial motion was supported by the defense counsel's affidavit asserting general claims as to Dookhan and the Hinton Lab (R.A. 12-14), but not by an affidavit from the defendant that the substance found by the police on his person was not cocaine or that he did not know it to be cocaine.[7]

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[6] At the hearing, the defense counsel stated that the defendant had not yet posted bail (Tr. III 5-6).

[7] The Shea affidavit explains, without dispute, that none of the new trial motions filed in the Drug Lab session has been supported by an affidavit from a defendant that the substance at issue was not a

The stay motion asserted that the defendant was likely to succeed on his new trial motion because 1) his plea was not knowing and voluntary; 2) he was "deprived of due process by the failure of the Commonwealth to provide true and accurate discovery prior to his guilty plea"; and 3) the evidence related to the Hinton Drug Lab investigation was "newly discovered exculpatory evidence" (R.A. 17-18). He also claimed he was not a security risk if released (R.A. 18).

Special Magistrate Cratsley heard the stay motion on January 31, 2013 (R.A. 5). The Commonwealth filed a written opposition challenging the court's authority to stay the execution of the sentence before the disposition of the new trial motion (R.A. 19-20).

After reading the opposition, the special magistrate asked defense counsel some "[f]act questions"[8] about the defendant's "situation" (Tr. I 6)

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narcotic, or was not known to the defendant to be a narcotic (R.A. 68-69 ¶ 7).

[8] The prosecutor assigned to handle the case in the Drug Lab session was not the plea prosecutor; when S.M. Cratsley asked these "fact questions," the assigned prosecutor was not present in the courtroom because she handling a plea hearing in another session so a different prosecutor stood in (Tr. I 5-6). The special magistrate explained that he was trying to "make a little progress" by asking about questions

and about the charges to which the defendant pled guilty, as compared to the charges for which he was indicted (Tr. I 7-8), particularly, the felon-in-possession conviction (Tr. I 7-8). The defense counsel clarified that the defendant pled guilty to being a felon-in-possession of ammunition and that a nolle prosequi was entered on the charge of being a felon in possession of a firearm as part of the plea deal (Tr. I 7-8). The special magistrate noted that the docket confirmed this and confirmed with the clerk that the defendant had received 463 days of credit for time served (Tr. I 8-9). Finally, the defense counsel affirmed that the defendant later pled guilty to charges in Bristol County that were pending when he pled guilty in Essex county (Tr. I 7-8; R.A. 56-66).

When the assigned prosecutor appeared in the session (having completed a guilty plea in another session), the hearing on the defendant's stay motion proceeded (Tr. I 10). Pointing out that Dookhan was the primary chemist, according to the drug certificate (Tr. I 10), the defendant argued that he met both the reasonable likelihood of success and security prongs

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that were "either factually accurate or factually inaccurate" and as to which the answers would not "prejudice" the Commonwealth (Tr. I 6).

of the test under Rule 31, which he said "governed"[9] (Tr. I 11). As for the likelihood of success of the new trial motion, he claimed to have pled guilty to the felon-in-possession and other non-drug charges "because of the drug indictment" (Tr. I 11).[10]

The defense counsel then summarized the facts underlying the plea, noting that the cocaine was found in the defendant's pants pocket during a search a when he was arrested but the firearm was not found until a later search of the apartment, and the ammunition was not found in the defendant's jacket until he was at the police station[11] (Tr. I 12). The defense counsel contended that his discussions with the defendant

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[9] The two Rule 31 factors are: 1) the likelihood of the success of the defendant's claims on appeal and 2) the security risk presented by the defendant. Commonwealth v. Levin, 7 Mass. App. Ct. 504, 505-506 (1978).

[10] When the Commonwealth later filed the petition, it provided an affidavit from the plea prosecutor disputing the defense counsel's contention that the defendant pled guilty to the charges, "because of the drug indictment" (Tr. I 11). Rather, as the plea prosecutor pointed out, the driving factor in the plea negotiations was the felon-in-possession charge because it carried a fifteen-year minimum mandatory term (R.A. 23).

[11] According to the police reports, filed with the petition, after the apartment's tenant told police the defendant had been waving around a gun, they found the firearm hidden in a chair in the same room where the defendant was found (R.A. 38).

about the case "center[ed] around the fact that the drug indictment was by far the strongest indictment" and he "would have a very difficult time contesting that at trial" because it was found in the defendant's pocket during the initial search (Tr. I 12). According to the defense counsel, "but for the drug indictment," the defendant would have tried the felon-in-possession of ammunition indictment because the Commonwealth's proof was weak given that the police did not find the bullet in the defendant's jacket right away[12] (Tr. I 12).

The defense counsel also argued that the plea was not "knowing, intelligent and voluntary" because the defendant "relied on the work of" Dookhan (Tr. I 12), and there was a "great likelihood of success on a motion for new trial" because Dookhan's work in general "has [been] determined to be fraudulent" (Tr. I 13). He did not argue that he had shown that Dookhan's misconduct had directly affected the drug analysis in the defendant's case.

As to the security prong, the defendant acknowledged that he had "a criminal history" that

[12] The judge asked about a motion to suppress; the defense counsel said it had been denied (Tr. I 15).

included "some defaults," but argued he was "a much different person" now (Tr. I 13). He also outlined the steps he would take if released (Tr. I 13-14).

The prosecutor responded by providing more factual details about the defendant's convictions. She explained that the Essex case had started in New Bedford where the defendant "held a firearm to his ex-girlfriend's face" (Tr. I 16). The girlfriend reported the incident to the police and obtained a restraining order against the defendant (Tr. I 16). The New Bedford police then contacted the Lynn police to serve the defendant with the order (Tr. I 16). The Lynn police went to an apartment where they thought he would be and found him there (Tr. I 16). The tenants of the apartment, a male and female, told the officers the defendant had run into a back bedroom when the police arrived, and the male tenant said the defendant had "been waving a gun around" before the police arrived (Tr. I 16-17). The police found the defendant in the bedroom; they also found twenty individual baggies of what they believed to be cocaine on him and

a firearm hidden in the bedroom[13] (Tr. I 17). The ammunition found on him "was consistent with" the firearm found by the police (Tr. I 17).

As to the likelihood of success of the new trial motion, the prosecutor argued that while Dookhan was the primary chemist for the drug case, this was not "simply a drug [case]" because there were firearm charges, and that none of Dookhan's misconduct would have affected the non-drug charges (Tr. I 17).

She also argued that the defendant was a security risk because the New Bedford incident was an extremely violent crime as to which he had pled guilty (Tr. I 17-18; R.A. 56-66). She pointed out that restraining orders had been issued against him by both his ex-girlfriend and his father, and that he has been convicted of other narcotics offenses, including possession with intent to distribute (Tr. I 18). Finally, she argued that his failure to appear at prior court dates suggested he was a flight risk (Tr. I 18).

The defendant responded by 1) disputing the allegations that he ran into the bedroom when the

[13] According to the police report filed with the petition, the gun was found stuffed in the cushion of a chair in the room (R.A. 38).

police arrived;[14] 2) pointing out the apartment was not his; and 3) noting that a nolle prosequi was entered on the firearm possession charge in the New Bedford case (Tr. I 19).

The special magistrate took note the New Bedford convictions (for assault and battery by means of a dangerous weapon, intimidation and assault and battery) and sentences (two-year concurrent terms, to be served concurrently with the Essex sentences) (Tr. I 19-20). He then mentioned a recent ruling by Special Magistrate Paul Chernoff (in another county) on a new trial motion in "a very similar situation" where the special magistrate allowed the motion for new trial as to a drug charge but denied it as to a separate conviction for assault and battery on a public employee, and remanded the case to the sentencing judge for resentencing (Tr. I 20-21). According to S.M. Cratsely, Special Magistrate Chernoff found that the defendant "never would have pled to such a substantial amount of time for [the assault and battery on a public employee charge] had there not been the drug case involved" (Tr. I 21).

[14] The defense counsel suggested there was conflicting evidence about this, to which he was privy because he was present at the suppression hearing (Tr. I 19).

Special Magistrate Cratsley then allowed the motion to stay execution of the sentence (Tr. I 22-23). The docket reflects the following findings:

> 1) Annie Dookhan was the primary chemist on both drug certs used in this case; 2) [the] Defendant has served Three (3) years Nine (9) months of [two] 4-7 [year] concurrent sentences; 3) defendant has family to live with in Lynn; 4) Defendant[']s guilty plea to felon in poss. was likely motivated by the deal on his drug case plea, and involved one bullet

(R.A. 5-6) (capitalization and abbreviations as in original). Additionally, when announcing the ruling, the special magistrate stated, "there is a question what might happen to [the defendant's] other sentence if you follow the reasoning of [Special Magistrate] Chernoff should a motion to vacate ever be allowed on the drug case, would the other sentence ever be reconsidered by the original sentencing judge" (Tr. I 22-23). He then imposed the aforementioned bail and conditions of release (Tr. I 21), without an express ruling as to his authority to stay the sentence.

II. February 8, 2013 hearing before Judge Lu

On February 4, 2013, the Commonwealth filed its Objection (as permitted in the Order of Assignment (R.A. 10-11)) (R.A. 21-22); a hearing took place on February 8 (Lu, J.) (R.A. 6). The judge started by

announcing his understanding that the matter was on for a "bail hearing" and said he would "hear from whoever wants to go first" (Tr. II 3).

The prosecutor explained that the Commonwealth was "moving to appeal" the special magistrate's ruling allowing the motion to stay execution of the sentence (Tr. II 3), arguing first that the court lacked authority to stay the execution of a sentence under the rules of criminal procedure, case law, or the Order of Assignment (Tr. II 4). She then argued that, assuming such authority existed, the defendant had not met the two-pronged test of Rule 31 and Rule 6 of the Rules of Appellate Procedure, which apply to stay motions, pending appeal (Tr. II 5). As for the security factors, she recounted the factual details underlying the New Bedford convictions (Tr. II 5-8), adding that after the defendant held the gun to the victim's face, he left several threatening voice messages on her phone while she was at the police station reporting the incident and that she played them for the officers (Tr. II 5-6). In one message, the defendant said there was a "shoot on si[ght] order" for the victim (Tr. II 5-6), and in another

message, he referred to an "all-out war" when he would "kill everyone" (Tr. II 6).

As to the bullet found in the defendant's jacket, the prosecutor explained that it was a .22 caliber hollow point round and matched the gun found by the police, which was loaded with other .22 caliber ammunition (Tr. II 7-8). She pointed out that were the new trial motion allowed, the defendant would again be facing a fifteen year minimum mandatory term for the felon-in-possession charge, making him a flight risk (Tr. II 10-11).

She emphasized that the new trial motion was unlikely to succeed because the felon-in-possession charge -- the lead charge in view of the sentence -- was unaffected by the Hinton Drug Lab investigation, unlike the drug charge (Tr. II 8). She had spoken to the plea prosecutor who had confirmed that the plea negotiations, as he remembered them, centered on the felon-in-possession of ammunition charge because "there was no way to get around" the ammunition in the defendant's pocket (Tr. II 10; R.A. 24). Because *that* charge motivated the plea, the new trial motion had little likelihood of success (Tr. II 9-10).

The defendant responded that the Commonwealth should be under a "heavy burden in upsetting" the special magistrate's ruling (Tr. 11-12). Judge Lu said he was hearing the defendant's stay motion "de novo," although this is not expressly contemplated by the Order of Assignment (Tr. II 11-12). The defense counsel then argued that, assuming Rule 31 applied, the "major concern" was the likelihood of success on the new trial motion, citing the Reporter's Notes (Tr. II 13). He claimed that the new trial motion was likely to succeed because the guilty plea was not "knowing and voluntary," was not an "intelligent choice," because:

> The second element of the drug charge here is that the substance in question is cocaine. Now, what we know presently relative to Ms. Dookhan's activity certainly casts that element into doubt, and at the time of [the defendant's] plea, we would have just checked that off and said, well, they have a drug cert so that's not even really in contest at all. We can cross-examine the chemist, but that's not -- you know, that likely wouldn't be persuasive to a jury. And so there is information that we know now that he didn't know at the time that certainly would have changed the mechanics of how he made his decision

(Tr. II 13-14). The defendant also made a newly discovered evidence claim, which was, he pointed out, the basis for the allowance of a similar new trial

motion by S.M. Chernoff (Tr. II 14-15). Finally, he suggested the drug charge "dr[ove] the disposition" because the police did not find the ammunition until the third search of the defendant (Tr. II 15-16).

As for the security prong, the "more minor concern," according to the defense counsel, the defendant had "done a lot of growing up" since his arraignment on this case in 2006 (Tr. II 17), had been disciplinary-report free in prison for the prior two years (Tr. II 18), had completed his GED and other programs while incarcerated (Tr. II 18), and the most recent defaults on his record were attributable to his custodial status (Tr. II 17). Finally, the defense counsel provided details about the defendant's proposed living and employment prospects in the event he was released (Tr. II 18).

Judge Lu "re-f[ound] all of the findings made" by S.M. Cratsley and allowed the stay motion, with additional conditions (see pp. 7-8) (Tr. II 20-21). He made no express ruling as to his authority to stay the sentence while the new trial motion was pending.

II. February 13 hearing before Judge Lu on the Commonwealth's motion to stay the stay of execution order

On February 13, 2013, the Commonwealth moved to stay J. Lu's order, pending its filing of a petition pursuant to G.L. c. 211, § 3 as to the authority of the court to stay the execution of a sentence before disposition of the motion for new trial (Tr. III 3). The defendant objected on the grounds that a stay of the order staying execution of the sentence "moot[ed]" everything that had been done to that point (Tr. III 4). He asserted that the court had already ruled it had authority to stay the sentence, as to which the judge responded that he was "not sure that [he] really decided that" (Tr. III 4-5). Judge Lu allowed the Commonwealth's motion, but for only two days, until February 15 at 2 p.m. (Tr. III 6). The Commonwealth filed the petition the next day, February 14, and the single justice allowed the request to stay the stay of execution of the sentence "until further Order" (R.A. 7).

ARGUMENT

NEITHER THE SPECIAL MAGISTRATE NOR THE TRIAL JUDGE HAVE AUTHORITY TO STAY THE EXECUTION OF A SENTENCE PENDING A RULING ON A MOTION FOR NEW TRIAL, AND EVEN IF SUCH AUTHORITY EXISTS, THE DEFENDANT DID NOT MEET HIS BURDEN UNDER THE STAY STANDARD

A. No authority exists to stay the execution of a sentence pending a ruling on a new trial motion

"Sentences are to be executed forthwith unless suspended or stayed for the exceptional reasons *permitted by law.*" Commonwealth v. McLaughlin, 431 Mass. 506, 520 (2000), quoting Mariano v. Judge of Dist. Court of Cent. Berkshire, 243 Mass. 90, 92 (1922) (emphasis added). Here, the allowance of the defendant's motion to stay execution of his sentence was error because no authority exists for the allowance of such a motion pending the disposition of a new trial motion.

First, the defendant does not dispute that no statute or court rule allows a court to stay the execution of a sentence absent a pending appeal or while a new trial motion is pending. Two court rules govern motions to stay the execution of sentences: both are triggered by a pending appeal, and neither is triggered upon the filing of a new trial motion. Rule 31 of the Massachusetts Rules of Criminal Procedure

"confers discretionary power to stay the execution of sentence pending appeal." Commonwealth v. Allen, 378 Mass. 489, 496 (1979). However, Rule 31 "*does not address stays of execution of a sentence when an appeal is not pending.*" Reporter's Notes to Rule 31 (emphasis added). Rule 6 of the Rules of Appellate Procedure "establishes the procedure that is available *after the trial judge acts on a motion for a stay* [pursuant to Rule 31]." Reporter's Notes (emphasis added). Like Rule 31, Rule 6 applies only if an appeal is pending. See Mass. R. App. P. 6(b)(1) (appeal of trial court ruling on stay motion to be filed in court where appeal is pending). Thus, neither Rule 31 nor Rule 6 governs the present situation -- a motion for a stay of execution where no appeal is pending.

"[T]he only other provisions of statutes or rules that authorize stay of execution *in any circumstances* are Mass. R. Crim. P. 43(b) [summary contempt] . . . and Rules 7(e) and 9(c) of the District Court Rules for Probation Violation Proceedings." McLaughlin, 431 Mass. at 518 n.12 (emphasis added). None of these provisions apply here.

Likewise, nothing in Rule 30 of the Rules of Criminal Procedure authorizes a stay of execution of sentence on a pending new trial motion. If a new trial motion is allowed, a judge may, in his discretion, "admit[] [a defendant] to bail *pending decision of the appeal [by the Commonwealth]*." (emphasis added). Mass. R. Crim. P. 30(c)(8)(A). In this case, this provision has not been triggered because there has been no ruling on the new trial motion. See K.B. Smith, Criminal Practice and Procedure (3d ed. 2007) § 42.4 ("A trial judge is not authorized to stay execution of a penal sentence when an appeal is not pending.").

This Court has recognized the possibility of a trial court's "inherent authority" to stay the execution of a sentence. McLaughlin, 431 at 518-520. "The inherent powers of the judiciary are those whose exercise is essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases. A court's inherent powers exist independently from statute because they directly affect the capacity of the judicial department to function. The very concept of inherent power carries with it the implication that its use is

for occasions not provided for by established methods." Commonwealth v. Bowe, 456 Mass. 337, 346 n.13 (2010) (quotations and citations omitted). But there is no need to invoke the inherent authority doctrine in this case, beyond the "short period[]" described in McLaughlin or otherwise, because the defendant is entitled to seek a stay of his sentence, *if he satisfies his burden under Rule 30.*[15] "The existence of statutory authority governing a particular matter negates the exercise of a court's inherent powers in that regard." Bowe, 456 Mass. at 346 n. 13; see Worcester v. Worcester Div. of the Juvenile Court Dep't, 410 Mass. 831, 834-835 (1991) ("Implied powers have been recognized as 'inherent' in courts where the power *is necessary to allow the court to function.*") (emphasis added) and Jake J. v. Commonwealth, 433 Mass. 70, 77-78 (2000) (finding

[15] To be sure, in view of the ongoing investigation into the Hinton Lab, the defendant faces a strategic choice: proceed with his new trial motion, or await the completion of the investigation which may provide information that strengthens his Rule 30 claim. The fact of this strategic choice, however, does not justify the suspension of the rules of criminal procedure, which are in place to "to secure . . . fairness in administration" to all parties in the criminal trial process. Mass. R. Crim. P. 2; see Commonwealth v. Silanskas, 433 Mass. 678, 696 (2001) (appellate court will not ignore strategy on which case was tried).

inherent authority to revoke defendant's bail because "[t]he Legislature would not rationally confer on the court such authority and, at the same time, withhold the authority to enforce those conditions or sanction their violation").

In any event, any such inherent authority "should" "normally" "be exercised *only* with the consent of the defendant and for *short periods of time*." McLaughlin, 431 Mass. at 519-520 (emphases added). In other words, a stay of execution of a sentence granted under the inherent powers of the court should not be open-ended. Here, consent of the defendant is not at issue, but the stay is impermissibly open-ended, presumably pending the ruling on the new trial motion after the completion of the investigation by the Inspector General into the issues at the Hinton Laboratory, which could take months, if not longer. See McLaughlin, 431 Mass. at 520 (judge acted beyond inherent authority where she stayed defendant's criminal sentence "until the date of his release from civil commitment").

In an apparent effort to respond anticipatorily to the Drug Lab crisis[16], the Superior Court established a new session, with new and unprecedented procedures, outside Rules 30 and 31, which unilaterally[17] and effectively suspended those rules in that session.[18] Despite the crisis, this should not be sanctioned: the rules are in place "'to provide for the just determination of every criminal proceeding.'" Commonwealth v. Mubdi, 456 Mass. 385, 390 n.6 (2010), quoting Mass. R. Crim. P. 2(a).

Under Rule 30(b), a judge may grant a motion to withdraw a plea only where "it appears that justice may not have been done." "Judges are to 'apply the standard set out in Mass. R. Crim. P. 30(b) rigorously,' [Commonwealth v. Demarco, 387 Mass. 481, 484-87 (1982)], and should 'only grant a post-sentence

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[16] See Peña Affidavit at R.A. 23-24 in Commonwealth v. Superior Court, (stating that Superior Court established the Drug Lab session in anticipation of 5,000 cases handled by Dookhan).

[17] See Shea affidavit at R.A. 68 ¶ 4, stating that the procedure for the session was "announced" by J. Lowy to the prosecutorial and defense bar at a meeting and followed by an email (R.A. 68).

[18] The Order of Assignment provides scant guidance, for example, as to the procedure when an Objection to the allowance of a stay of execution motion is filed, see, e.g., Tr. II 3, where the judge said it was a "bail hearing" and said he would "hear from whoever wants to go first" (Tr. II 3).

motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth.'" Commonwealth v. Hason, 27 Mass. App. Ct. 840, 843 (1989), quoting Demarco, 387 Mass. at 487. Rule 30 relief requires a defendant to establish that his convictions should be vacated. See Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986) ("A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt of the justice of the conviction.")(other authority omitted). Rule 30 also conditions his release on a stay of execution of sentence on the allowance of the new trial motion. Mass. R. Crim. P. 30(c)(8)(A).

The procedure established by the Superior Court of handling motions to stay execution of sentence abandons this process, applying, in effect, a presumption that cases in which Dookhan was the chemist are entitled to a hearing on a stay motion, even before the defendant has met his burden so as to warrant allowance of the new trial motion. The law establishes no such presumption. Cf. Commonwealth v. Stewart, 383 Mass. 253, 257 (1981) ("In determining

whether a 'substantial issue' meriting an evidentiary hearing under rule 30 has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised."). This is especially so because the investigation into the lab is ongoing, thus precluding access to vital information necessary to the new trial motion filed by this and other defendants.[19]

Similarly, the defendant here did not make specific factual showing as to any taint in his case, by reference to any of the discovery provided by the Commonwealth (R.A. 12-14), or otherwise. See Reporter's Notes to Rule 30(c)(3) ("The motion [for new trial] should specify the grounds for relief . . . and the affidavit should provide the factual support necessary to determine the issue."). He relied instead on general claims that Dookhan "has been identified by law enforcement officials as a person who intentionally contaminated drug evidence to ensure positive tests, inflated drug sample weights, falsified drug analysis findings, and fraudulently altered chain of custody documents during a time

[19] For instance, the parties do not have access to the lab file (R.A. 72 ¶ 19).

period relevant to this case" (R.A. 12). This did not amount to the "substantial showing" that the drug analysis *in his case* was in fact, or even might be, tainted. See Commonwealth v. Saarela, 15 Mass. App. Ct. 403, 407 n.5 (1983) ("If defense counsel desires to offer evidence on [any] ground at the hearing [on the new trial motion], he must submit an affidavit to support his contention."). After all, he admitted during his plea that the substance was, in fact, cocaine, and he did not submit any contrary affidavit in support of his new trial motion that it was not, or even that he thought it was not.[20]

In sum, but for the proceeding established by the Superior Court for adjudicating stay motions in the Drug Lab session, which is outside the requirements of Rules 30 and 31, the stay motion in this case would not have been considered.

B. Even if authority to consider a stay of execution motion exists, the special magistrate cannot consider it

Even should this Court hold that the authority to grant the stay exists, the special magistrate lacked

[20] In this regard, he is no different from any other defendant in Essex County: none has submitted an affidavit attesting that the substance at issue was not a narcotic, or was not known to the defendant to be a narcotic (R.A. 68-69 ¶ 7).

authority to consider the motion. Special Magistrate Cratsley was appointed pursuant to Rule 47 of the Massachusetts Rules of Criminal Procedure. See Order of Assignment (R.A. 10-11). Rule 47 provides:

> The justices of the Superior Court may appoint special magistrates to preside over criminal proceedings in the Superior Court. Such special magistrates shall have the powers to preside at arraignments, to set bail, to assign counsel, to supervise pretrial conferences, to mark up pretrial motions for hearing, to make findings and report those findings and other issues to the presiding justice or Administrative Justice, and to perform such other duties as may be authorized by order of the Superior Court. The doings of special magistrates shall be endorsed upon the record of the case. Special magistrates shall be compensated in the same manner as is provided by the General Laws for the compensation of masters in civil cases.

The Reporter's Notes to Rule 47 provide further guidance on the authority of the special magistrate,[21] including that he has "some fact finding functions" whose "exact dimension[s]" are "left to definition by appropriate order of the Administrative Justice of the Superior Court Department." The special magistrate's "responsibilities" are "quasi-judicial" and thus it is "preferabl[e]" that they "be retired judges." They are "similar" to federal magistrates, see 28 U.S.C.

[21] The Commonwealth has found no case discussing the role of Rule 47 Special Magistrates.

636, but they do "not carry" "such broad powers." Finally, the special magistrate's "functions" are "*administrative rather than adjudicatory*" (emphasis added).

The Chief Justice of the Superior Court has supplemented Rule 47 with an Order of Assignment. (R.A. 10-11). This Order provides, in relevant part:

> Pursuant to Mass. R. Crim. P. 47, the [Special Magistrate] shall have the powers, duties, and authority to preside at arraignments, to set bail, to assign counsel, to supervise pretrial conferences, and to mark up motions for hearing. The [Special Magistrate] shall also have the power and authority to conduct hearings on post[-]conviction motions, to issue orders regarding discovery, and other matters, and to make proposed findings and rulings to the Regional Administrative Justice. If any party objects to the findings or rulings of the Special Magistrate, it must notify the [Special Magistrate], opposing counsel and the [RAJ] in writing within 48 hours after receipt of the proposed findings and rulings stating the grounds for the objection. If no objection to the proposed findings and rulings of the [Special Magistrate] is filed within three court days of when the [Special Magistrate] makes said findings and rulings, they shall be acted upon by the [RAJ] without further hearing.
>
> Further, the [Special Magistrate] shall perform such other duties as may be authorized by order to the Superior Court.

Both the rule and the Order of Assignment allow the special magistrate "to set bail," but neither

expressly allows him to consider motions to stay the execution of a sentence, which involve more than just the consideration of simple bail factors. See Commonwealth v. Levin, 7 Mass. App. Ct. 501, 505 (1979) (when considering motion to stay court considers "security" factors and "the likelihood of success on the merits of the appeal"). Additionally, as there is no authority permitting consideration of a motion to stay execution of sentence pending a ruling on a new trial motion, see pp. 22-30 above, the language in the Order allowing the special magistrate to "conduct hearings on post-convictions motions" did not enable the special magistrate to stay the defendant's sentence. Said another way, it is not enough to say that the Chief Justice granted the special magistrate the authority to consider a stay of execution motion under the Order of Assignment if there is no rule, no statute, and no case that grants such power in the first place.

C. The special magistrate and the judge abused their discretion when allowing the stay motion

Should this Court determine that the special magistrate and the judge have the authority to stay the defendant's sentence, they abused their discretion

when they allowed the motion. Two factors govern the consideration of a motion for stay of execution of sentence pending appeal: 1) the security risk presented by the defendant, Commonwealth v. Levin, 7 Mass. App. 501, 505 (1979); and 2) the likelihood of the success of his claims on appeal. Id. at 504; see also Commonwealth v. Hodge, 380 Mass. 851, 855 (1980); Commonwealth v. Allen, 378 Mass. 489, 498 (1979). Because the new trial motion is pending, the pertinent inquiry as to the second prong would involve the likelihood of success of the claims in the new trial motion. The stay motion should have been denied because it failed on both security and likelihood-of-success grounds.

First, the length of time served by the defendant is not a recognized factor in assessing whether he poses a risk of harm and has no bearing on the likelihood of success of his new trial motion. The special magistrate should not have relied on this factor (R.A. 5-6), and neither should the judge when he "re-f[ound] all of the findings made" by S.M. Cratsley (Tr. II 20-21).

Second, there can be no reasonable claim that the drug charge was the lead offense guiding the plea

negotiations. Contrast Tr. I 11 where the defense counsel asserted it was and R.A. 5-6, where J. Lu ruled that it was. The drug charge -- possession with intent to distribute cocaine, subsequent offense -- carried only a *three-year* minimum mandatory term. By contrast, the indictments for being a felon-in-possession of ammunition and of the firearm, with three prior serious offenses, each carried a *fifteen-year* minimum mandatory term. In view of this, the defendant negotiated a highly favorable plea: one felon-in-possession count was nolle prossed and the other was reduced to include a charge of only one prior serious offense (R.A. 1-8, 23). And as importantly, the issues arising in the Hinton Drug Lab investigation would have had no impact on his decision to plead guilty to these charges. Since there is no recognized presumption that all cases in which Dookhan was the chemist, even the primary chemist, are tainted, and taint other non-drug convictions entered at the same time, the defendant did not satisfy his burden as to the first prong of the stay test.

The Texas cases that he cited before the single justice do not change the analysis. In those cases, the Texas Court of Criminal Appeals granted nearly

identical writs of habeas corpus to defendants convicted of drug offenses because of misconduct by a lab technician. See, e.g., Ex Parte Hinson, 2013 WL 831183 (March 6, 2013); Ex Parte Smith, 2013 WL 831359 (March 6, 2013); and Ex Parte Hobbs, 2013 WL 811534 (March 6, 2013). But those decisions do not describe the wrong-doing,[22] and, in any event, those cases relied on the fact that the lab technician who committed the misconduct "was solely responsible for testing the evidence in [the] case." Id. The Hinton Lab, by contrast, operated under a two chemist system in which a second chemist confirmed the results of the primary chemist.

As for the security prong, the stay motion should have been denied on this consideration alone. See Commonwealth v. Ferrara, 8 Mass. App. Ct. 948 (1979)

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[22] In a ruling that preceded these three cases, the court remanded a case to the trial court for three additional pieces of information: 1) a copy of the Department of Public Safety report on which the defendant relied; 2) a determination that the lab technician named in that report was the only scientist who worked on his sample; and 3) a finding as to whether the sample was destroyed or could be retested. Ex Parte Junius Sereal, 2012 WL 6055470 (2012). Subsequently, on February 27, 2013, the court issued a granted habeas relief, but then, ordered a rehearing, *sua sponte*. See online docket, No. AP-76,972, http://www.cca.courts.state.tx.us/opinions/printcase.asp?FilingID=293276.

(affirming single justice's denial of defendant's stay motion based solely on security risk), citing Levin, 7 Mass. App. Ct. at 505-506 ("when a denial by a single justice of a stay of execution pending appeal is predicated, in whole or in part, on reasons of security, the denial should not be disturbed on appeal unless the defendant can demonstrate abuse of discretion").

The security concerns are obvious: the Essex case began in New Bedford where the defendant took his former girlfriend into a basement and held a gun to her face (Tr. II 5; R.A. 32-33). Then, when she was reporting the incident to the police, he left messages on her phone, threatening her, including one message about a "shoot on sight" order against her (Tr. II 5-6). When the police found him to arrest him for these crimes, he had ammunition and crack cocaine on his person and had been seen holding a gun (Tr. II 6-7; R.A. 40-41).

His criminal record likewise demonstrated a significant risk to public safety (R.A. 55-65). He has multiple convictions for assault and battery, multiple convictions for distribution of narcotics, multiple a convictions for unlawful possession of a

firearm, and a history of restraining orders, including by his father and his former girlfriend (Tr. I 18; R.A. 39-40). As such, should this Court determine that that special magistrate or the judge had the authority to stay the execution of the defendant's sentence, the Court should nonetheless conclude that the allowance of the motion was an abuse of discretion under the two-prong stay test or, at a minimum, under the security prong.

CONCLUSION

For the reasons stated, the Commonwealth requests that this Court conclude that neither the special magistrate nor the judge had authority to consider and allow the motion to stay execution of the defendant's sentence, and enter further orders consistent with this determination, including the vacatur of the orders allowing the stay motion.

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