COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, ss. No. SJC-11410

DISTRICT ATTORNEY FOR THE EASTERN DISTRICT,
Petitioner-Appellant,

v.

SUPERIOR COURT,
Respondent-Appellee.

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

BRIEF OF THE JUSTICES OF THE SUPERIOR COURT

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QUESTIONS PRESENTED

A single justice of this Court (Botsford, J.,) reserved and reported three questions arising out of three separate petitions filed by the District Attorney for the Eastern District ("District Attorney") pursuant to G.L. c. 211, § 3. All three questions related, directly or indirectly, to the Superior Court's authority to efficiently manage post conviction matters in the thousands of cases potentially affected by the alleged misconduct of Annie Dookhan, a former chemist at the William A. Hinton State Laboratory ("Hinton Lab"). The questions reported are:

1. Does a judge of the Superior Court, or a special magistrate appointed by the Chief Justice of the Superior Court pursuant to Mass. R. Crim. P 47, 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 a new trial?
2. Does a special magistrate have the authority to reconsider and allow a motion to stay execution of a criminal defendant's sentence where a judge of the Superior Court has previously denied a

motion to stay execution filed by the same defendant?

3. a) Is it appropriate for this court to answer the question set forth in 3(b) below, regarding the validity of plea colloquies conducted by special magistrates, where, under the terms of the protocol established by the Superior Court, neither side can be required to submit over its objection to a plea colloquy conducted by a special magistrate, and where, to date, because of the Commonwealth's objections, all colloquies in Essex County have been conducted by judges and not by special magistrates?

b) If the court answers the question in 3(a) in the affirmative, does such a special magistrate have the authority under Mass. R. Crim. P. 47 to conduct a guilty plea colloquy and to report findings concerning such issues as the voluntariness of the proposed plea and the factual basis for the plea to a presiding justice of the Superior Court?

The District Attorney filed three separate briefs with this Court, addressing one of the reported questions in each brief. While this is understandable

from an organizational point of view, it does not prevent the Superior Court - which is a respondent to only one of the petitions - from addressing the other reported questions. As the single justice put it, the petition filed against the Superior Court "seeks in more general terms a 'clarification' of the authority of a special magistrate to preside over certain aspects" of the special "drug lab" sessions created to address the so-called Dookhan cases. Supplemental Record Appendix ("S.R.A.") 126.[1] Therefore, the Superior Court will address all three reported questions to the extent that they are relevant to the court's authority.[2]

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[1] The Superior Court is submitting a Supplemental Record Appendix because the one submitted by the District Attorney was incomplete. For example, it did not include the exhibits to the Affidavit of Maria Peña. For the convenience of the Court, therefore, the Superior Court has included complete versions of the relevant documents filed in the single justice session.

[2] The Superior Court will not, however, comment on the validity of specific actions by the Special Magistrate and Regional Administrative Justice who heard the Charles and Milette cases. Those issues should be addressed through resolution of the Charles and Milette petitions, according to the usual adversarial process.

STATEMENT OF THE CASE

A. STATEMENT OF THE PROCEEDINGS BELOW

Over the course of several weeks in February and March 2013, the District Attorney for the Eastern District ("District Attorney") filed three separate petitions in the Supreme Judicial Court for Suffolk County pursuant to G.L. c. 211, § 3. The first two – Commonwealth v. Charles, SJ-2013-0066 and Commonwealth v. Milette, SJ-2013-0083 – arose out of criminal cases pending in the special "drug lab" session in Essex County. S.R.A. 125. Both sought relief from specific orders of the Special Magistrate and Regional Administrative Justice handling the cases, but also raised more general questions about the scope of those individuals' authority. S.R.A. 125.

For example, in Charles, the District Attorney argued that neither a judge nor a Special Magistrate had the authority to stay execution of sentence pending the disposition of a new trial motion. S.R.A. 125. In Milette, the District Attorney questioned whether a Special Magistrate could reconsider motions to stay sentence already considered and decided by a Superior Court judge. S.R.A. 125.

The third petition - the one directly relevant here - was somewhat different. See District Attorney for the Eastern District v. The Superior Court, SJ-2013-0092. It did not arise from a pending criminal case and did not seek relief from a specific order. Rather, it was brought directly against the Superior Court and challenged the court's authority to manage the flood of post conviction activity following the disclosure of Dookhan's alleged misconduct. S.R.A. 1-13, 125-126. The petition sought "clarification" of the more general issues raised in Charles and Milette, but also challenged the partial plea colloquy procedure established by the Superior Court for Dookhan-related cases. S.R.A. 126.

The single justice (Botsford, J.) conducted a hearing with respect to all three petitions on March 13, 2013, asking the parties to comment on whether the cases - or some aspect of them - should be reserved and reported to this Court for resolution. On March 22, 2013, the single justice issued a reservation and report, identifying the three questions recited above for consideration by this Court. S.R.A. 125-129; supra, at 1-2.

B. FACTUAL BACKGROUND

In August 2012, news broke of Dookhan's alleged misconduct, and the entire criminal justice system scrambled to respond. S.R.A. 16, 92-93. For example, on September 20, 2012, Governor Deval Patrick appointed attorney David Meier to lead a team of law enforcement officials and defense lawyers to investigate the allegations of widespread tampering at the Hinton Lab. S.R.A. 93. On November 5, 2012, the Governor announced that Inspector General Glenn Cunha would investigate overall operations at the Lab.[3]

1. The Superior Court's Response to the Dookhan Crisis

The Superior Court responded to the crisis as well. On September 27, 2012, Chief Justice Barbara J. Rouse convened a meeting with stakeholders from Suffolk County, which had the highest number of Dookhan-related cases and would likely be most affected by the ongoing scandal. S.R.A. 93. That meeting included David Meier, representatives of the Suffolk County District Attorney's Office, the Committee for Public Counsel Services ("CPCS"), Suffolk County bar

[3] Press release from the Office of Governor Deval Patrick, Nov. 5, 2012 (available at http://www.mass.gov/governor/pressoffice/pressreleases/2012/20121105-cunha-takes-over-drug-lab-review.html).

advocates, Superior Court administrative staff, and Hon. Jeffrey A. Locke, Regional Administrative Justice for Criminal Business in Suffolk County. S.R.A. 93.

The focus of the meeting was to determine how best to manage the anticipated avalanche of cases affected by Dookhan's actions. S.R.A. 93. There were several points of agreement, and no disagreement. To begin with, participants agreed that Dookhan's alleged actions likely represented an injustice. S.R.A. 93. They also agreed on the necessity of establishing an efficient and expeditious way to proceed with affected cases to ensure prompt attention by the Superior Court. S.R.A. 93. In addition, the group agreed that priority had to be given to a particular group of affected defendants: those who were currently incarcerated on cases where a violation of G.L. c. 94C, the controlled substances law, was the lead offense and where Dookhan was either the primary or confirmatory chemist.[4] S.R.A. 93. Critically, all agreed that the most appropriate way to proceed - and to address any injustice done to affected defendants - was by motion to stay execution of sentence. S.R.A. 94.

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[4] Of the 1,141 incarcerated defendants in that group, 75% were serving Superior Court sentences. S.R.A. 93-94. The remaining 25% were serving District Court or Boston Municipal Court sentences.

To efficiently manage this new influx of post conviction activity, the group recommended special sessions with a dedicated judge and clerk. S.R.A. 94. A procedure was developed. CPCS representatives committed to notifying defense counsel who would decide, after consultation with their client, whether to file a motion to stay. S.R.A. 94. Dates were set for filings and hearings on the stay motions. S.R.A. 94.

Having developed a process with stakeholders in the most affected county, the Superior Court Chief Justice moved to implement that process across the Commonwealth. Shortly after the Suffolk County meeting, the Regional Administrative Justices of the other counties convened meetings with representatives from the relevant District Attorneys, CPCS, bar advocates, and other members of the defense bar. S.R.A. 94. In every county, a procedure similar to the one adopted in Suffolk County was endorsed.[5] S.R.A. 94. As in Suffolk County, dates for filings and hearings were set. S.R.A. 94.

[5] The District Attorney quibbles with the word "endorsed," used in the affidavit of Maria Peña, General Counsel and Associate Court Administrator to the Justices of the Superior Court, and incorporated here. D.A. Br. at 7 & n. 5. The District Attorney prefers the word "announced," which eliminates any implication that he agreed with the procedure adopted at the meeting. D.A. Br. at 7 & n. 5. The record does not state that the District Attorney raised any (footnote continued)

In early October 2012, Chief Justice Rouse designated judges in each of the affected counties to sit in what were commonly referred to as the "drug lab" sessions:[6] Judge Christine McEvoy in Suffolk, Judge Maureen Hogan in Middlesex, Judge David Lowy in Essex, Judge Kenneth Fishman and Judge Robert Cosgrove in Norfolk, Judge Robert Rufo in Barnstable, Judge Frank Gaziano in Plymouth, and Judge Robert Kane in Bristol.[7] S.R.A. 94-95. Assistant Clerks were also designated in each county to staff the sessions. S.R.A. 94-95.

Session hearings began on October 15, 2012, with Superior Court judges presiding. S.R.A. 95. By November 28, 2012, those judges had held a total of 589 drug lab hearings statewide. S.R.A. 96. The hearings focused on the prioritized group: incarcerated defendants who had filed a motion to

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(footnote continued)
objection to the proposed procedure at the meeting. See D.A. Br. at 7 & n. 5. His objection became clear later, at the first hearing held in the new "drug lab" session. D.A. Br. at 8.

[6] To facilitate the handling of drug lab cases, this Court, on November 9, 2012, issued an order authorizing Chief Justice Rouse to assign to any judge the disposition of any post conviction motion. S.R.A. 95.

[7] After some investigation and review of statistical data, it appeared that Berkshire, Dukes, Franklin, Hampden, Hampshire, Nantucket and Worcester Counties were not significantly affected - or, in most cases, affected at all - by the alleged misconduct at the Hinton Laboratory. S.R.A. 95.

stay, where a violation of the controlled substance law was the lead offense, and where Dookhan was the first or confirmatory chemist. S.R.A. 96.

While this first round of hearings was burdensome on the court and taxed already strained resources, it represented only the beginning of the potential litigation. Over the course of Dookhan's career at the Lab - which stretched from 2003 to 2012 - more than 10,000 defendants had been convicted in Superior Court in cases where violation of the controlled substances law was the lead offense. S.R.A. 96. The first round of hearings focused on the approximately 835 cases where the defendant was incarcerated. S.R.A. 96. The roughly 9,000 remaining cases involved defendants who were no longer incarcerated, but who could suffer collateral consequences as a result of the prior conviction (assuming Dookhan was either the primary or confirmatory chemist). S.R.A. 96. Such consequences could include ongoing probation, payment of fines or fees, child custody restrictions, and deportation issues. S.R.A. 96. In some instances, the prior conviction had served as a predicate for an enhanced sentence in state or federal court.[8] S.R.A. 96.

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[8] As of October 3, 2012, another 1,936 cases where violations of G.L. c. 94C was the lead offense were (footnote continued)

Faced with a docket of more than 10,000 past and pending drug cases, the Superior Court Chief Justice estimated that approximately half of the cases were affected by Dookhan's alleged misconduct and could eventually involve the filing of post conviction motions. S.R.A. 96. That estimate was based, in part, on information from the State Police that the Hinton Lab had conducted approximately 50% of the drug testing in the Commonwealth. S.R.A. 96-97.

Over the past five years, the Superior Court has averaged 5,585 criminal cases annually. S.R.A. 97. Logically, re-entry of another 5,000 cases would greatly challenge the Superior Court's ability to handle its normal caseload. S.R.A. 97. As a result, Chief Justice Rouse concluded that the court could not divert existing judicial resources to the drug lab cases on an on-going basis. S.R.A. 97.

2. Appointment of Special Magistrates

After conducting a survey of recently retired Superior Court judges, their current engagements, and their eligibility and willingness to be recalled, Chief Justice Rouse concluded that staffing future

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(footnote continued)
pending. S.R.A. 96. It is not known how many of those cases were so-called Dookhan cases.

drug lab sessions with recall justices was not feasible.[9] S.R.A. 97.

However, Rule 47 of the Massachusetts Rules of Criminal Procedure empowers the Justices of the Superior Court to appoint special magistrates to "preside over criminal proceedings in the criminal court." The rule makes clear that such special magistrates "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." R. Crim. P. 47. And it also permits special magistrates "to perform such other duties as may be authorized by order of the Superior Court." R. Crim. P. 47.

Chief Justice Rouse concluded that the appointment of special magistrates would allow sitting judges to meet the Superior Court's responsibilities with respect to the existing caseload while special magistrates, in the first instance, could help address the extraordinary demands of the drug lab cases. S.R.A. 97.

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[9] See, e.g., G.L. c. 32, § 65G (d)("[a] retired justice eligible to perform judicial duties shall not engage in the practice of law directly or indirectly, and shall not hold any office which is incompatible with holding the office of a justice of the trial court").

On November 26, 2012, Chief Justice Rouse issued five identical Orders of Assignment ("Orders"), appointing five retired Superior Court judges, all of whom had also served as Regional Administrative Justices, as Special Magistrates.[10] S.R.A. 98, 107-116. The five Special Magistrates appointed were: Hon. Paul Chernoff, Hon. John Cratsley, Hon. Elizabeth Donovan, Hon. Margaret Hinkle and Hon. Wendie Gershengorn. S.R.A. 98, 107-116.

The Orders generally authorized the Special Magistrates "to preside over criminal proceedings" related to the Hinton Lab, commencing November 26, 2012. S.R.A. 98, 107-116. They explicitly gave the Special Magistrates the "powers, duties and authority" to perform all the functions specifically mentioned in Rule 47, i.e., preside at arraignments, set bail, assign counsel, supervise pretrial conferences and mark up motions for hearings, and to make proposed findings and rulings. S.R.A. 98, 107-116.

As contemplated by Rule 47, the Orders also gave the Special Magistrates powers tailored to the specific challenge they were appointed to address: that is, the resolution of scores of post conviction

[10] While the title used in the orders is slightly different from Rule 47 to acknowledge the appointees' status as retired Superior Court judges, it does not alter the scope of their duties.

motions brought by defendants claiming to be wrongfully incarcerated due to Dookhan's alleged misconduct. Thus, the Orders permitted the Special Magistrates to "conduct hearings" on post conviction motions and to "issue orders" regarding discovery, "and other matters." S.R.A. 98, 107-116.

While the language of the Orders invested the Special Magistrates with authority to address the specific challenges of the Dookhan-related cases, they also recognized a limitation on those powers: supervision by the Regional Administrative Justices. The Orders provided that "[i]f any party objects to the findings or rulings of the Special Magistrate, it must notify the Special Magistrate, opposing counsel and the Regional Administrative Justice in writing within 48 hours after receipt of the proposed findings and rulings stating the grounds for the objection." S.R.A. 98, 107-116. But if no objection were filed "within three court days of when the Special Magistrate makes said findings and rulings, they shall be acted upon by the Regional Administrative Justice without further hearing." S.R.A. 98, 107-116. That is, the "order" of a Special Magistrate does not become effective until a Regional Administrative Justice has had an opportunity to review and approve it. And where either party objects to the validity of the underlying hearing, or the recommendations of the

Special Magistrate based on that hearing, the Regional Administrative Justice is required to hold a new hearing. See S.R.A. 98, 107-16.

3. Motions to Stay

Once in place, the Special Magistrates began to conduct appropriate "drug lab" hearings under the supervision of the Regional Administrative Justices. As of March 6, 2013, the Special Magistrates had conducted more than 900 such hearings. S.R.A. 99. Those hearings have involved a variety of topics, including motions for a new trial, motions to stay sentence, bail and discovery matters. S.R.A. 99.

Hearings on new trial motions, however, have often been delayed at the request of both prosecutors and defense counsel. S.R.A. 99. This has been due primarily to discovery issues. S.R.A. 99. Although prosecutors have made thousands of pages of discovery available to defendants, hundreds of discovery requests remain outstanding. S.R.A. 99. This is due to a variety of factors. To begin with, a series of Hinton Lab investigations are ongoing, including Inspector General Cunha's review of general conditions at the Lab. S.R.A. 99. It has also been difficult to determine whether drugs in a particular case are still available to be retested and, if so, to determine the chain of custody. S.R.A. 99. It has been similarly

difficult to resolve chain of custody issues with respect to those drugs. S.R.A. 99.

With hearings on new trial motions delayed, and no resolution in sight for incarcerated defendants, the Special Magistrates held hearings on motions to stay execution of sentence and recommended that they be granted in appropriate cases. S.R.A. 100. When granted, motions to stay have been conditioned on GPS monitoring, curfews, and other bail requirements. S.R.A. 99. As of February 2013, Superior Court judges and Special Magistrates had conducted 375 hearings on motions to stay. S.R.A. 100.

4. Partial Plea Colloquies

In a number of drug lab cases where sentences have been stayed, the parties have entered into plea agreements. S.R.A. 100. To facilitate those agreements, Special Magistrates have engaged in partial plea colloquies using a procedure developed by the Superior Court and supervised by the Regional Administrative Justices. S.R.A. 100-101. Partial plea colloquies have been held only where all parties agree. S.R.A. 100. Due to the District Attorney's objection, *no* partial plea colloquies have ever been

conducted by a Special Magistrate in Essex County.[11] D.A. Br. at 15.

Where colloquies have been conducted, they have essentially followed a procedure outlined in suggested forms created by the Superior Court for the Special Magistrates' use.[12] S.R.A. 100-101. Under that procedure, if a special session defendant wished to plead guilty, he or she would initially appear before a Special Magistrate. S.R.A. 100-101, 118-124. The Special Magistrate would inform the defendant that he or she had a right to appear before a Superior Court judge to engage in a colloquy to determine if the defendant's decision to plead guilty was voluntary, and to make sure that the defendant understood the consequences of the plea. S.R.A. 100-101, 118-124. The Special Magistrate would then explain that he or she was also empowered to conduct the plea colloquy and make findings regarding the defendant's decision to plead guilty, which would then be reported to a

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[11] At the March 13, 2013 hearing before the single justice, a representative from the Suffolk County District Attorney's Office indicated District Attorney Conley would also begin objecting to the partial plea colloquy procedure. To the best of the Superior Court's knowledge, there has been no occasion for the Suffolk County District Attorney to object because all pleas in Suffolk County drug lab cases have been taken by Superior Court judges.

[12] Of course, the Special Magistrates could, and did, tailor the colloquy to the individual defendant and the individual case. S.R.A. 100-101, 118-124.

Superior Court judge. S.R.A. 100-101, 118-124. The Special Magistrate would continue beyond this point only if the defendant consented in writing. S.R.A. 100-101.

If the defendant consented, the Special Magistrate would conduct the colloquy. S.R.A. 100-101, 118-124. He or she would ask a series of questions to determine if the defendant's plea was knowing, intelligent and voluntary. S.R.A. 118-124. Once the colloquy was completed, the Special Magistrate would report his or her findings and recommendation on the guilty plea to the responsible Regional Administrative Justice. S.R.A. 118-124. The defendant would then appear before the Regional Administrative Justice, who would review the findings and recommendation, ask any relevant additional questions, accept the plea and impose sentence. S.R.A. 118-124.

SUMMARY OF THE ARGUMENT

In the wake of Dookhan's reported misconduct at the Hinton Lab, the Superior Court appropriately exercised its administrative and judicial powers to develop a standard process to review and resolve the affected cases, and stretched its already limited resources to implement that process fairly and efficiently. Specifically, the Superior Court created

special sessions dedicated to Dookhan-related cases, and appointed Special Magistrates pursuant to R. Crim. P. 47 to preside over those sessions with appropriate supervision by the Regional Administrative Justices.

What the District Attorney's various arguments fail to acknowledge is that some administrative response by the Superior Court to the crisis was imperative. There is widespread agreement that Dookhan's alleged misconduct may have worked an injustice in thousands of criminal cases. To avoid that potential injustice, the Superior Court had to act. But it did so in a measured way, developing even-handed procedures with appropriate opportunities for review, thus protecting the interests of both prosecutors and defendants. And it did so in an efficient way, tapping new resources to address defendants' claims in a timely way but without affecting the progress of the thousands of other cases that are filed in Superior Court every year. This measured response to a unique - and uniquely challenging - set of circumstances was well-within the Superior Court's inherent authority to control its own docket and to issue orders in the interests of justice.

ARGUMENT

I. TO AVOID MANIFEST INJUSTICE, BOTH SUPERIOR COURT JUDGES AND SPECIAL MAGISTRATES ARE AUTHORIZED TO STAY SENTENCE PENDING A RULING ON A NEW TRIAL MOTION.

The District Attorney objects to the practice, by either Superior Court judges or Special Magistrates sitting in the drug lab sessions, of granting motions to stay execution of sentence while the defendant's new trial motion is still pending. D.A. Br. at 22. He asserts that "no authority exists for the allowance of such a motion." D.A. Br. at 22. This argument ignores, however, the judiciary's inherent powers to address manifest injustice. See Commonwealth v. McLaughlin, 431 Mass. 506, 520 (2000) (recognizing at least a limited inherent power to stay sentence, particularly where there are "exceptional reasons"); see also Commonwealth v. Pagan, 445 Mass. 315, 324 (2005) ("manifest injustice" permits reconsideration of bail revocation order, despite statutory language prohibiting it); King v. Commonwealth, 246 Mass. 57, 58-59 (1923) (acknowledging both common law and statutory power "to stay the execution of sentence after it has been pronounced").

A. To Avoid Manifest Injustice, Sentences in Dookhan-Related Cases May Be Stayed Pending Resolution of a New Trial Motion.

In cases where a stay is relevant, the defendants are either incarcerated or on probation based on drug convictions that may be affected by Dookhan's alleged misconduct at the Hinton Lab. S.R.A. 96-97. Thus, the validity of their convictions is arguably in doubt. The usual way of addressing that doubt is for the defendant to file a new trial motion pursuant to Rule 30. See R. Crim. P. 30(b) (trial judge "may grant a new trial at any time if it appears that justice may not have been done"). And the defendant would usually remain incarcerated or on probation while that motion is pending and during any appeal. R. Crim. P. 30(c)(8)(A) ("If an appeal is taken, the defendant shall not be discharged from custody, pending final decision upon the appeal"); see also McLaughlin, 431 Mass. at 517 (noting "strong indication" that trial judges "lack authority to stay execution of sentence on independent grounds not affecting the legality or propriety of the conviction"). In Dookhan-related cases, however,

exceptional circumstances make the usual approach unjust.[13]

As the District Attorney acknowledges, resolution of new trial motions in the drug lab sessions is "complicated" by a series of facts. S.R.A. 7, 21. For example, "discovery about the Drug Lab has been delayed or limited by the AG's and Inspector General's investigations, the latter of which is ongoing." S.R.A. 7. The District Attorney also acknowledges a "lack of access to the chemists' files," as well as issues "pertaining to availability of chemists to testify at new trial motion hearings." S.R.A. 7; see also S.R.A. 99 (citing delay due to discovery issues, including availability of drugs for retesting and chain of custody questions). The District Attorney cites no evidence that any of these issues will be resolved in the near future.

And yet, the publicly available information concerning Dookhan's practices at the Lab provides

[13] To be clear, the just approach is one tailored to the individual case. Contrary to the District Attorney's assertion, the Superior Court is not arguing in favor of a blanket approach to all Dookhan-related cases, such as the presumption in favor of a stay of execution suggested by defendants in the related Charles and Milette matters. See D.A. Br. in Charles at 28 (charging that stay procedure creates "presumption").

cause to believe that the drug certificates supporting some unknown number of drug offense convictions may be tainted. S.R.A. 92-93. This in itself represents a potential miscarriage of justice, depending on the individual facts of the underlying case. S.R.A. 93-94 (at Suffolk County stakeholder meeting, "there was unanimity that an injustice appeared to have been done"). That injustice would be compounded if defendants waited months or years for their new trial motions to be resolved due to appropriate, if lengthy, investigations into that *same* wrongdoing.

Because these are extraordinary circumstances, the usual methods cannot apply. See, e.g., D.A. Br. at 25 n. 15 (characterizing affected defendants' circumstances as presenting merely a "strategic choice"). The Superior Court had to develop a fair and adequate means of addressing the underlying potential injustice in individual affected cases. Brach v. Chief Justice of the District Court, 386 Mass. 528, 535 (1982), 386 Mass. at 536 (inherent powers to be used on "occasions not provided for by established methods," particularly where "an emergency arises which the established methods cannot or do not instantly meet"). The Superior Court did so by

allowing defendants to file, and by granting in appropriate cases, motions to stay while new trial motions were pending.[14] S.R.A. 94 (Suffolk stakeholders agreed motion to stay was "the appropriate pleading to address the liberty interests of the affected defendants"). This was well-within the court's inherent power to prevent manifest injustice. See McLaughlin, 431 Mass. at 520; Pagan, 415 Mass. at 324.

As the District Attorney acknowledges, D.A. Br. at 24, 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." Querubin v. Commonwealth, 440 Mass. 108, 114 (2003), quoting Gray v. Commissioner of Revenue, 422 Mass. 666, 672 (1996); see also Jake J. v. Commonwealth, 433 Mass. 70, 77 (2000) (court has inherent authority to exercise own legitimate powers). Inherent judicial authority is "not limited to adjudication, but

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[14] The Superior Court's use of the stay in these exceptional circumstances is also consistent with the underlying purposes of Rules 30 and 31, which permit stays of execution pending appeal in the interests of justice. R. Crim P. 31 (a); see also R. App. P. 6(b) and 6(b)(1) (same).

includes certain ancillary functions, such as rule-making and judicial administration, which are essential if the courts are to carry out their constitutional mandate." O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510 (1972).

Although inherent powers may be recognized by statute, they exist independently, because they "directly affect . . . the capacity of the judicial department to function" and cannot be "nullified by the Legislature" without violating art. 30 of the Massachusetts Declaration of Rights. First Justice of the Bristol Div. of the Juvenile Court Dep't v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep't, 438 Mass. 387, 397 (2003), quoting Opinion of the Justices, 279 Mass. 607, 613 (1932). Because a court's inherent powers "have their basis in the Constitution, regardless of any statute, every judge must exercise his inherent powers as necessary *to secure the full and effective administration of justice*." O'Coin's, 362 Mass. at 514 (emphasis added).

Here, no statutory or rule-based mechanism squarely addressed the mounting challenge represented

by the drug lab cases.[15] See Brach, 386 Mass. at 535 (where there is legitimate exercise of inherent judicial power, lack of statutory authorization "is immaterial"). But available information indicated that an unknown number of defendants could potentially demonstrate a reasonable likelihood of success on their new trial motions. That is, they were likely to prove that, in their individual circumstances, they had been convicted of drug offenses based on falsified evidence. Assuming that defendants could also prove that they were an acceptable security risk, the Superior Court concluded that the interests of justice required that they should be provided with at least an opportunity to be released on bail while their new trial motions were pending, subject to appropriate

[15] The District Attorney seems to argue that the existence of Rules 30 and 31 *precludes* the use of stays while new trial motions are pending. D.A. Br. in Charles at 23, 25. But as the rules themselves recognize, they are simply inapplicable to the unique circumstances here, where the interests of justice may require a stay while new trial motions are indefinitely stalled. See, e.g., R. Crim. P. 31, Reporter's Notes ("This Rule does not address stays of execution of a sentence when an appeal is not pending"); see also Brach, 386 Mass. at 536 (inherent powers to be used on "occasions not provided for by established methods").

conditions.[16] Given the real risk of manifest injustice if defendants remained incarcerated while their new trial motions were stalled by the various ongoing investigations, the Superior Court was entirely within its inherent authority to tailor an existing procedure to address these extraordinary circumstances. See Jake J., 433 Mass. at 77 (lack of any established statutory procedure should not "render the court impotent"). Otherwise, the court would be unable to perform one of its most fundamental functions: "to secure the full and effective administration of justice." O'Coin's, 362 Mass. at 514.

McLaughlin, heavily relied upon by the District Attorney in the Charles and Milette petitions, is not to the contrary, despite its recognition of the "basic rule" that "sentences are to be executed forthwith."[17]

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[16] The same standard applicable to stay motions under Rules 30 and 31 is applicable in this special context. See Commonwealth v. Hodge, 380 Mass. 851, 855 (1980) (reciting standard).

[17] Even the basic rule has exceptions, such as the common practice of placing an indictment on file. See Commonwealth v. Simmons, 448 Mass. 687 (2007). That long-standing practice is appropriate with the consent of the parties and "when the court is satisfied that, by reason of extenuating circumstances . . . *public justice does not require an immediate sentence.*" Id.,

(footnote continued)

McLaughlin, 431 Mass. at 520. To begin with, McLaughlin arises in a markedly different context: a challenge to the trial court's authority to effectively *extend* the defendant's sentence to include the period during which he was civilly committed. McLaughlin, 431 Mass. at 518 (counseling against "an expansive reading of judicial powers that would allow stays of execution of sentence for *punitive purposes*") (emphasis added). Here, by contrast, the stay functions as a "true reprieve," to permit the potential reduction or elimination of a sentence based on tainted evidence. Id. at 518 (noting history of English courts granting stays as a form of "true reprieve").

Despite the context, the court nonetheless recognized that the judiciary retained inherent, if limited, authority to stay execution of sentence for "exceptional reasons."[18] Id. at 520. The court also

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(footnote continued)
quoting Commonwealth v. Dowdican's Bail, 115 Mass. 133, 136 (1974) (emphasis added).

[18] The District Attorney makes much of a statement in McLaughlin that stays should be "short." D.A. Br. in Charles at 25-26. Of course, the McLaughlin court also recognized that the limitation is only "normally" applicable. McLaughlin, 431 Mass. at 518. Again, the circumstances here are not "normal," where the delays

(footnote continued)

carved out an exception from the "basic rule" for reasons "affecting the legality or propriety of the conviction." Id. at 517 (power of court "does not extend so far as to permit a further stay of the sentence on independent grounds *not affecting the legality or propriety of the conviction*") (emphasis added). Thus, McLaughlin actually supports the authority of the Superior Court to issue stays in the circumstances here, where the Superior Court's actions are premised on "exceptional" concerns about the "legality or propriety" of thousands of drug convictions. See also Pagan, 259 n.5 and 324 (despite statutory language prohibiting reconsideration of bail revocation, court recognized that "special circumstances" might arise where reconsideration would be proper to avoid "manifest injustice"); Commonwealth v. Yameen, 401 Mass. 331, 333-334 (1988).

B. The Special Magistrates Play an Appropriate Role in Hearing Motions to Stay Sentence.

Arguing in the alternative, the District Attorney contends that the Special Magistrates lack authority to participate in the stay procedure developed by the

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(footnote continued)
in resolving defendants' new trial motions are largely beyond defendants' control. S.R.A. 99.

Superior Court under its inherent powers. D.A. Br. in Charles at 30-33. Essentially, the District Attorney relies on the fact that neither Rule 47 nor the Orders of Assignment "expressly allows" Special Magistrates to consider motions to stay.[19] D.A. Br. in Charles at 32-33. But this interpretation is overly narrow and contradicts the purpose and broad language of both Rule 47 and the Orders.

To begin with, both Rule 47 and the Orders share a similar purpose: to provide assistance to the Superior Court in efficiently handling its criminal caseload. To state the obvious, it would frustrate that purpose to read either of them too narrowly. See R. Crim. P. 2 (rules should be construed "to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay").

It would also frustrate the plain language of Rule 47. The rule specifically permits special

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[19] The District Attorney seems to have retreated somewhat from the primary argument he made before the single justice: that the Special Magistrates are barred from performing any function that can be described as "adjudicatory." S.R.A. 6. Obviously, the plain language of Rule 47 permits special magistrates to perform a number of "adjudicatory" acts, such as setting bail. See R. Crim. P. 47, Reporter's Notes (describing special magistrate's responsibilities as "quasi-judicial").

magistrates - without limitation as to subject matter - to "make findings and report those findings and other issues to the presiding justice or Regional Administrative Justice." R. Crim. P. 47. That is precisely what the Special Magistrates do in the drug lab cases. They hold hearings on motions to stay, make findings as to the appropriateness of a stay, and recommend an outcome to the Regional Administrative Justice. S.R.A. 108. If neither party objects to the findings or recommendation within three court days, then "they shall be acted upon by the Regional Administrative Justice without further hearing." S.R.A. 108. That is, the "order" of a Special Magistrate does not become effective until a Regional Administrative Justice has had an opportunity to review and approve it. See Rule Crim. P 47, Reporter's Notes (special magistrates will "differ little from masters as appointed by the Supreme Judicial Court"); S.J.C. Rule 2:13 ("The acts of any special master . . ., when confirmed or approved, shall have all the force and effect of a decision by a single justice or by the full court."). Thus, the Special Magistrates' role in the stay procedure is well-within that contemplated by Rule 47.

In addition, Rule 47 expressly permits special magistrates to perform "such other duties as may be authorized by order of the Superior Court." R. Crim. P. 47. The rule does not limit those duties to a specific list of approved acts. In fact, it contains no limiting language whatsoever. Rather, it grants the Superior Court the discretion to tailor appropriate duties to meet the needs of the court. See First Justice of the Bristol Div. of the Juvenile Court Dep't, 438 Mass. at 397-398 ("perhaps the least controversial" inherent power is to "control and supervise personnel within the judicial system").

In the wake of the Dookhan crisis, the Superior Court determined that the Special Magistrates should "preside over criminal proceedings" related to the Hinton Lab. S.R.A. 107-116. In the context of those proceedings, the Orders of Assignment specifically permitted the Special Magistrates to "conduct hearings on post conviction motions." See, e.g., S.R.A. 107. The Orders do not define "post conviction motions," presumably to allow maximum flexibility. See, e.g., S.R.A. 107-108. But that general context certainly includes motions to stay sentence, which are only filed post conviction. Thus, the Superior Court

appropriately exercised its discretion in permitting Special Magistrates to conduct stay hearings.

Obviously, the Superior Court's discretion is not unfettered. Special magistrates are not judges. But the broad language of Rule 47 contemplates that special magistrates - with appropriate review and approval by the Regional Administrative Justices - will engage in precisely the kind of decision-making that is occurring in the drug lab sessions. See R. Crim. P. 47, Reporter's Notes (likening special magistrates to special masters appointed by this Court, who are generally permitted to "deal with" all matters assigned to them and whose determinations carry the weight of Court decisions when approved).

II. SPECIAL MAGISTRATES MAY CONDUCT RECONSIDERATION HEARINGS BUT ONLY AT THE DIRECTION OF THE ISSUING JUDGE AND WITH THE PARTIES' CONSENT.

As stated above, the function of the Special Magistrates in the drug lab sessions is to expedite post conviction matters brought in the wake of the Dookhan crisis, without diverting existing resources from the press of the Superior Court's other work. Given this function, there is a role for Special Magistrates to play with respect to motions for reconsideration, but it is a limited one.

If the issuing Superior Court judge determines that his or her original order in a drug lab case should be reconsidered, and the parties consent, then the judge may refer the motion to a Special Magistrate as a means of resolving it efficiently. Following such a referral, the Special Magistrate could properly conduct a hearing, find appropriate facts and make a recommendation to the issuing judge, who would ultimately decide whether the motion should be granted. That limited but useful role would be consistent with Rule 47 and the Orders of Assignment, which permit Special Magistrates to "conduct hearings on post conviction motions" and to "make proposed findings and rulings." See, e.g., S.R.A. 107.

It would not, however, be consistent with the scope of authority granted by the Orders for a Special Magistrate to reconsider a Superior Court judge's prior order on his or her own initiative. Thus, motions to reconsider should be submitted directly to the issuing judge, who can then determine if a hearing before a Special Magistrate would be appropriate.[20]

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[20] By stating its view of the Orders' scope, the Superior Court is not taking a position on the validity of the Special Magistrate's specific actions in the Milette case. That question should be resolved

(footnote continued)

III. SPECIAL MAGISTRATES ARE AUTHORIZED TO CONDUCT PARTIAL PLEA COLLOQUIES.

A. There is No Actual Controversy.

The first obstacle to the District Attorney's challenge to the Superior Court's partial plea colloquy procedure is jurisdictional: there simply have been no partial plea colloquies conducted by Special Magistrates in Essex County because the District Attorney has objected to the procedure from the start. D.A. Br. at 15; S.R.A. 100. Thus, there is no actual controversy to resolve, and no particularized injury to cure. See Bunker Hill Distrib., Inc. v. District Attorney for the Suffolk Dist., 376 Mass. 142, 145 (1978) ('[p]arties are not entitled to decisions upon abstract propositions of law unrelated to some live controversy"), quoting Cole v. Chief of Police of Fall River, 312 Mass. 523, 526 (1942).

An "actual controversy" exists only where there is a "real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such

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(footnote continued)
based on the record in that case, according to the usual adversarial process.

assertion by another party also having a definite interest in the subject matter . . . ." School Comm. of Cambridge v. Superintendent of Schools of Cambridge, 320 Mass. 516, 518 (1946). A mere disagreement among parties on some point of law does not constitute a justiciable controversy. See Bonan v. City of Boston, 398 Mass. 315, 320 (1986).

The "actual controversy" requirement is particularly exacting in cases like this one, brought under G.L. c. 211, § 3. A party seeking relief under that statute must demonstrate "a *substantial* claim of violation of his substantive rights." Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990) (emphasis added), quoting Dunbrack v. Commonwealth, 398 Mass. 502, 504 (1986). This is true even in cases brought under the second paragraph of G.L. c. 211, § 3, which provides for "general superintendence of all courts of inferior jurisdiction." Sullivan v. Chief Justice for Administration and Management of the Trial Court, 448 Mass. 15, 40 (2006) (discussing requirements for relief under second paragraph). In the rare cases in which this Court has exercised its "general superintendence" power under the second paragraph of

G.L. c. 211, § 3, it has done so only when presented with a concrete claim of injury by specific, identified individuals. See, e.g., Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't., 448 Mass. 57, 61 (2006), and cited cases.

Here, the District Attorney has not been injured by the partial plea colloquy procedure because it has never been conducted in Essex County. In every instance, plea colloquies in Essex County drug lab cases have been conducted, and sentence has been imposed, by a Superior Court judge. D.A. Br. at 15; S.R.A. 100. Moreover, the Superior Court's partial plea colloquy procedure requires all parties' consent. S.R.A. 100. It will not be conducted before a Special Magistrate if any party objects. Therefore, there will never be an occasion where the District Attorney will be required to proceed with a partial plea colloquy over his objection. Given that the issue is a purely hypothetical one in Essex County,[21] it is non-justiciable.

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[21] That is not to say that Special Magistrates have never conducted a partial plea colloquy. They have, in other counties. S.R.A. 100. As of March 11, 2013, Special Magistrates had conducted partial plea colloquies in 35 cases. S.R.A. 100; see Amicus Brief of the District Attorney for Bristol County at 4 (footnote continued)

B. Special Magistrates are Authorized to Conduct Partial Plea Colloquies and Report Their Findings and Recommendations on the Sufficiency of the Pleas to the Regional Administrative Justice.

The District Attorney asserts that the plea process is "too important" to permit *any* involvement by Special Magistrates. D.A. Br. at 17-19. The plea process is undeniably important: it represents a waiver of a defendants' constitutionally-guaranteed right to trial. However, the District Attorney's description of the Special Magistrate's role in that process does not accurately portray the carefully constructed procedure established by the Superior Court. See D.A. Br. at 14-15. To assess the validity of the Superior Court's plea procedure, the first task must be to define precisely how the process actually works. Simply put, the procedure requires consent of all the parties, limits Special Magistrates to a preliminary fact-finding role, requires the actual sentencing to be performed by a Regional Administrative Justice, and permits any party dissatisfied with the Special Magistrate's proposed

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(footnote continued)
(Special Magistrates in Bristol County have conducted 17 partial plea colloquies).

finding and rulings to obtain a re-hearing before the Regional Administrative Justice.[22]

1. The Plea Procedure Requires Consent of All Parties.

To begin with, no partial plea colloquy occurs before a Special Magistrate without the consent of all the parties. S.R.A. 100; see, supra, at 37. Moreover, because the right to trial is being waived, the defendant must specifically consent to the plea procedure, in writing. See S.R.A. 118 (consent form). Contrary to the District Attorney's concerns, documented agreement to the plea process blunts any future claim that participation was involuntary or the result of ineffective counsel.

2. The Plea Procedure Appropriately Vests Final Adjudicatory Authority in a Regional Administrative Justice of the Superior Court.

In each of the special session cases, as in every Superior Court criminal case, only a Justice of the Superior Court wields the legal authority to

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[22] The District Attorney does not raise specific objections to the process, aside from objecting to the allegedly "adjudicatory" role played by the Special Magistrates. Rather, he simply raises the spectre of unspecified constitutional objections raised in potential future challenges to drug lab sentences. See D.A. Br. at 29-30. This, of course, reinforces the hypothetical nature of his claim. See, supra, at 35-38.

adjudicate the case by accepting a plea and imposing a sentence. In criminal cases, the sentence is the court's judgment, and is the adjudicatory aspect of the resolution of a case. See Whitney v. Commonwealth, 337 Mass. 722 (1958)(citing Commonwealth v. Dascalakis, 246 Mass. 12, 19 (1923); Cherry v. Cherry, 253 Mass. 172, 176 (1925); Commonwealth v. Millen, 290 Mass. 406, 411 (1935)). The plea procedure established by the Superior Court for the drug lab cases does not vest adjudicatory authority -- the power to accept pleas and sentence defendants -- in the Special Magistrates. Rather, it reserves that power, exclusively, for the Regional Administrative Justice (or other Superior Court judge designated by the Regional Administrative Justice). See S.R.A. 98, 100-01, 118-24.

By contrast, the Special Magistrate's involvement in the partial plea colloquy is limited to preliminary fact-finding. See R. Crim. P. 47, Reporter's Notes (rule is broad enough to permit "assignment of some fact finding functions," as defined in the Superior Court's sound discretion). The plea procedure allows Special Magistrates to hold hearings to determine whether the defendant is knowingly and voluntarily

attempting to waive his or her rights, and whether the alleged facts are sufficient to support a finding of guilt on each of the various charges. See S.R.A. 98, 100-01, 118-24. After doing so, the Special Magistrate simply reports his or her findings on these issues to the Regional Administrative Justice. See S.R.A. 98, 100-01, 118-24. The plea procedure does not give the Special Magistrates authority to accept (or reject) pleas, find defendants guilty (or acquit them), or pass sentences on guilty defendants.[23] See S.R.A. 98, 100-01, 118-24. Instead, the Special Magistrate's findings and rulings are simply recommendations, which have no legal consequence or adjudicatory effect on their own, and to which the Regional Administrative Justice is not bound. See, e.g., S.R.A. 122 (suggested colloquy includes statement: "Do you understand that the sentencing judge is not bound by the sentence they are recommending, or by my recommendation, the sentencing

[23] Indeed, the distinction between the powers of the Special Magistrate and the Regional Administrative Justice are spelled out in the recommended colloquy itself. See, e.g., S.R.A. 122 ("Do you understand that as a Special Judicial Magistrate, I will not be sentencing you on this case and I cannot make a commitment on the sentence").

judge is free to impose whatever sentence he/she deems appropriate within the limitations of the law?").

3. Any Party Dissatisfied by the Colloquy or by the Recommendations of A Special Magistrate May Obtain A New Hearing Before the Regional Administrative Justice.

The parties are not bound by any proposed findings or rulings of the Special Magistrate. Rather, the Orders establish a procedure for any dissatisfied party to challenge the recommendations of the Special Magistrates, by notifying the Special Magistrate, opposing counsel, and the relevant Regional Administrative Justice within 48 hours of receipt of the proposed findings and rulings. See S.R.A. 98, 107-16. Under the Orders, unless a Regional Administrative Justice receives an objection from one of the parties, in writing, within three days of the Special Magistrate's proposal, he or she may act on the proposed change of plea and sentence the defendant without holding a further hearing. See S.R.A. 98, 107-16. But where either party objects to the validity of the underlying hearing, or the recommendations of the Special Magistrate based on that hearing, the Regional Administrative Justice is required hold a new hearing. See S.R.A. 98, 107-16.

Because the parties can address any particularized injury or prejudice that might occur in a hearing before a Special Magistrate, simply by filing an objection and requesting a re-hearing before a Regional Administrative Justice, any deficiencies apparent from the plea colloquy or the Special Magistrate's recommendations may be immediately redressed. This opportunity for immediate review is more than adequate to address the District Attorney's generalized expressions of concern.

4. The Separation of the Defendant's Plea Colloquy from the Imposition of Sentence Is Not Unusual and Has No Bearing on the Validity of the Process.

The District Attorney appears to claim that the mere separation of the plea colloquy hearing from the moment of sentencing is "unprecedented," and he questions the constitutionality of such a "bifurcated" procedure. D.A. Br. at 22, 29-30. The District Attorney, however, has pointed to no authority requiring the plea colloquy and sentencing to be held during the same session, on the same day, or even by the same judge.

In any event, Massachusetts trial judges often separate the plea colloquy from the time of sentencing. Under G.L. c. 279, § 3A, for example, a

prosecutor must move for sentencing within seven days after a plea of guilty or a verdict of guilty. However, once the prosecutor's motion for sentencing is made, the timing of sentencing and its imposition are in the judge's discretion. Commonwealth v. Burkett, 3 Mass. App. Ct. 744, 744-45 (1975)(once prosecutor moved for sentencing, "[t]he time for imposition of sentence was thereafter within the discretion of the court")(citations omitted).[24]

Additionally, Rule 28 specifically envisions and accounts for such a separation between the plea colloquy and sentencing by providing judges the ability to admit defendants to bail in the interim. See R. Crim. P. 28(b). Under Rule 28, judges can continue bail, change bail, or otherwise impose restrictions on a defendant's liberty, in accordance with the bail statutes, after a guilty plea, pending sentencing or imposition of sentence. Id.

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[24] There are number of conceivable instances where a judge might desire to delay or otherwise separate the moment of sentencing from a plea of guilty or a verdict of guilt: e.g., Commonwealth v. Lammi, 310 Mass. 159 (1941)(while a co-defendant's trial is pending and the defendant has agreed to testify against the co-defendant); e.g, G.L. c. 123, § 15(e) (to allow time for preparation of aid-in-sentencing memoranda or to facilitate pre-sentence investigations on the mental health of the defendant).

No doubt, the two-step plea process established by the Superior Court deviates from the normal course in a criminal case. But the simple fact that the plea and the sentencing take place at different times under the procedure cannot be said to be extraordinary, given the broad discretion vested in the courts to control the timing of sentencing and its imposition. Consequentially, the mere separation between the timing of the two has no bearing on the validity of the procedure.

5. The Use of Special Magistrates in Plea Proceedings Is A Necessary and Measured Approach to Dealing with the Challenges Presented by the Dookhan Crisis.

The crisis in the criminal justice system created by Dookhan's misconduct is virtually unprecedented in scope and gravity. While Essex County courts have not yet been overwhelmed by the need to conduct plea colloquies in Dookhan-related cases, other jurisdictions have faced greater challenges. S.R.A. 99-100. And those challenges are likely to increase when the Inspector General's investigation concludes and more discovery from the Hinton Lab becomes available. See S.R.A. 99-100.

Given its resources, the Superior Court cannot absorb the additional strains the Dookhan crisis has

wrought by proceeding in the normal course. See S.R.A. 96-97(describing the steps the Superior Court has already had to take to deal with the challenge). Absent the additional resources provided by the Special Magistrates and the special procedures addressed above, it is possible that the Superior Court will not be able to address the drug lab cases in a timeframe that comports with the defendants' constitutional rights. The Superior Court established the partial plea procedure for the drug lab sessions specifically to address this unprecedented challenge, and avoid further infringement on the rights of the defendants. See S.R.A. 100-01.

CONCLUSION

The procedures developed by the Superior Court for use in the special sessions are supported by the Rules of Criminal Procedures and the Superior Court's inherent powers, exercised in the interests of justice. Therefore, the Court should answer the first and third reported questions - assuming it reaches the merits of the third question - in the affirmative.

Respectfully submitted,

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Date: May 2, 2013

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, , hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

Jennifer Grace Miller
Assistant Attorney General

A D D E N D U M

Mass. R. App. P. 6
Mass. R. Crim. P. 30
Mass. R. Crim. P. 31
Mass. R. Crim. P. 47
S.J.C. Rule 2:13

***5182 Massachusetts Rules of Appellate Procedure (Mass.R.A.P.), Rule 6**

MASSACHUSETTS GENERAL LAWS ANNOTATED MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Current with amendments received through 2/1/2012

Rule 6. Stay or Injunction Pending Appeal

(a) Civil Cases.

(1) Stay Must Ordinarily be Sought in the First Instance in Lower Court; Motion for Stay in Appellate Court. In civil cases, an application for a stay of the judgment or order of a lower court pending appeal, or for approval of a bond under subsection (a) (2) of this rule, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the lower court. A motion for such relief may be made to the appellate court or to a single justice, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other statements signed under the penalties of perjury or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court to which the appeal is being taken (provided that if the court be the Supreme Judicial Court, the motion shall be filed with the clerk of the Supreme Judicial Court for Suffolk County).

(2) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or other appropriate security in the lower court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety thereby shall submit to the jurisdiction of the lower court and irrevocably appoint the clerk of the lower court as an authorized agent upon whom any papers affecting liability on the bond or undertaking may be served. A surety's liability may be entered against the surety on motion in the lower court without the necessity of an independent action. The motion and such notice of the motion as the lower court prescribes may be served on the clerk of the lower court, who shall forthwith mail copies to the sureties if their addresses are known.

***5183** (3) Terms. Relief available in the appellate court under this rule, or denial of such relief, may be conditioned on such reasonable terms as the appellate court or single justice may impose. For failure to observe such terms, the appellate court or single justice may make such further order as it or he deems just and appropriate.

(b) Criminal Cases. A motion for a stay of execution of a sentence shall be governed by paragraph (b) of this rule and by Massachusetts Rules of Criminal Procedure 31

(1) Stay Must Ordinarily be Sought in the First Instance in Lower Court; Motion for Stay in Appellate Court. In criminal cases, an application for a stay of execution of a sentence pending appeal must ordinarily be made in the first instance in the lower court. A motion for such relief may be made to the single justice of the appellate court to which the appeal is being taken, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has previously denied an application for a stay or has failed to afford the relief which the applicant requested with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other statements signed under the penalties of perjury or copies thereof. With the motion shall be filed such parts of the

record as are relevant The motion shall be filed with the clerk of the appellate court to which the appeal is being taken (provided that if the court be the Supreme Judicial Court, the motion shall be filed with the clerk of the Supreme Judicial Court for Suffolk County).

(2) Reasonable Notice. Reasonable notice of the motion for a stay shall be given to the Commonwealth. If the motion is filed at least 30 days prior to the date the appellant's brief is due, the time for a response shall be governed by Rule 15. If the motion is filed at any other time, the Commonwealth shall have 30 days to respond. A single justice may shorten or extend the time for responding to any motion authorized by this Rule.

(3) Appealability of Single Justice Order. Finality. An order by the single justice allowing or denying an application for a stay may be appealed to the appellate court in which the appeal is pending. An order by the appellate court in which the appeal is pending, allowing or denying an application for a stay, shall be final.

(4) Revocation of Stay Pending Appeal. If a defendant fails at any time to take any measure necessary for the hearing of an appeal or report, a stay of execution of a sentence may, on motion of the Commonwealth, be revoked.

*5184 (5) Expiration of Stay. Upon the release of the rescript by the appellate court of a judgment affirming the conviction, the stay of execution of sentence automatically expires, unless extended by the appellate court.

(6) Notice of Expiration of Stay. Upon release of a rescript affirming the conviction, the clerk of the appellate court shall notify the clerk of the trial court and the parties that the conviction has been affirmed and that therefore, the stay of execution of sentence has automatically expired.

CREDIT(S)

Amended December 14, 1976, effective January 1, 1977; May 15, 1979, effective July 1, 1979; June 24, 2009, effective October 1, 2009.

HISTORICAL NOTES

REPORTER'S NOTES--1973

Appellate Rule 6, patterned on F.R.A.P. 8, allows the court (first the lower court, then the appellate court) to grant such relief as may be necessary to preserve the rights of the parties during the pendency of an appeal. Appellate Rule 6 does not substantially alter the powers of the court under existing practice. See G.L. c. 214, § 19. City of Boston v. Santosuosso, 308 Mass. 202, 210, 31 N.E.2d 572, 578 (1941); G.L. c. 231, § 116. Appellate Rule 6(c), which is new, codifies existing federal practice. See also Mass.R.Civ.P. 62(c). Prior Massachusetts practice will, however continue to control stays in criminal cases. G.L. c. 278, § 28B, c. 279, §§ 4, 49A.

HISTORICAL NOTES

REPORTER'S NOTES--1979

Subdivision (a) of Rule 6, requiring applications or motions for stays to be ordinarily filed in the lower court in the first instance, is expanded to cover both civil and criminal cases.

Subdivisions (b) and (c) of former Rule 6 are made (b)(1) and (b)(2) of the amended rule, and are applicable only to civil cases.

A new subdivision (c), relative to motions for stays of execution of sentence in criminal cases, incorporates by reference Mass.R.Crim.P. 31 (1979).

The Appeals Court in Commonwealth v. Levin, Mass.App.Ct.Adv.Sh. (1979) 857 further app. rev. denied Mass.Adv.Sh. (1979) 1610 and the Supreme Judicial Court in Commonwealth v. Allen, Mass.Adv.Sh. (1979) 1819 established the criteria for determining whether a stay of sentence pending appellate review ought to be granted. These cases establish that the same judgment and discretion as used by the lower courts in bail applications can properly be considered on questions on motions for stay. These cases acknowledge that considerations such as whether the defendant was likely to be a danger to any other person or to the community and as to the likelihood of further criminal conduct during the pendency of the appeal were appropriate.

***4637 Massachusetts Rules of Criminal Procedure (Mass.R.Crim.P.), Rule 30**

MASSACHUSETTS GENERAL LAWS ANNOTATED MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Current with amendments received through 2/1/2012

Rule 30. Post Conviction Relief

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

*4638 (5) Counsel. The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place and Time of Hearing. All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal under G.L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

CREDIT(S)

Amended effective April 14, 1995; amended September 6, 2001, effective October 1, 2001. ***4639**

HISTORICAL NOTES

REPORTER'S NOTES

This rule, which marks a significant departure from prior Massachusetts practice, is derived from a number of sources. See Fed.R.Crim.P., Rules 33, 35; ABA Standards Relating to Post-Conviction Remedies (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) Rule 632 (1974).

The moving party is to seek post conviction relief from the trial judge presiding at the initial trial. See Commonwealth v. Sullivan, 385 Mass. 497, 498 n. 1 (1981) (the judge who presided at a defendant's trial normally should hear that defendant's motion for a new trial). The trial judge is familiar with the case which 'may make for more efficient handling.' ABAStandards, supra, § 1.4, comment at 30. See McCastle, Petitioner, 401 Mass. 105, 107 (1987) (Rule 30 'assigns the motion to the trial judge who heard the case, on the theory that [the judge's] familiarity with the case can assist in its effective handling.') However, for this same reason the trial judge may bring to the hearing a prejudice that another judge would not have. Recusal of the trial judge should thus be liberally exercised, particularly where it is requested by the moving party. See ABA Standards, supra, § 1.4(c). A second advantage to be gained from giving the trial court original jurisdiction to hear post conviction motions is that the necessary witnesses, if any, are likely to be convenient to the court.

Subdivision (a). When originally adopted in 1979, this subdivision consolidated the previously distinct procedures of habeas corpus and writ of error. The purpose of the revision was to simplify post conviction procedure, while maintaining the full scope of relief previously available. See ABA Standards Relating to Post-Conviction Remedies § 1.1 (Approved Draft, 1968). However, the writ of habeas corpus still has limited application in cases contending that the term of a lawfully imposed sentence has expired and basing a claim for relief on grounds distinct from issues arising at the indictment, trial, conviction or sentencing stages. See e.g., Averett, Petitioner, 404 Mass. 28, 30 (1988) (forfeiture of good time credits). A petition for a writ of habeas corpus is appropriate only where the petition alleges that the petitioner is entitled to immediate release. See Stewart, Petitioner, 411 Mass. 566, 568 (1991). On the other hand, a rule 30(a) motion is not available to contest the legality of a sentence that the defendant has already completed. Cf. Commonwealth v. Lupo, 394 Mass. 644, 646 (1985) ('Rule 30 [a] is intended primarily to provide relief for defendants incarcerated in violation of Federal law or of the laws of the Commonwealth.')

***4872 Massachusetts Rules of Criminal Procedure (Mass.R.Crim.P.), Rule 31**

MASSACHUSETTS GENERAL LAWS ANNOTATED MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Current with amendments received through 2/1/2012

Rule 31. Stay of Execution; Relief Pending Review; Automatic Expiration of Stay

(a) Imprisonment. If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or, pursuant to Mass. R. App. P. 6, a single justice of the court that will hear the appeal, determines in the exercise of discretion that execution of said sentence shall be stayed pending the determination of the appeal. If execution of a sentence of imprisonment is stayed, the judge or justice may at that time make an order relative to the custody of the defendant or for admitting the defendant to bail.

(b) If the application for a stay of execution of sentence is allowed, the order allowing the stay may state the grounds upon which the stay may be revoked and, in any event, shall state that upon release by the appellate court of the rescript affirming the conviction, stay of execution automatically expires unless extended by the appellate court. Any defendant so released shall provide prompt written notice to the clerk of the trial court regarding the defendant's current address and promptly notify the clerk in writing of any change thereof. The clerk shall notify the appellate court that will hear the appeal that a stay of execution of sentence has been allowed. At any time after the stay expires, the Commonwealth may move in the trial court to execute the sentence. The court shall schedule a prompt hearing and issue notice thereof to the defendant unless the prosecutor requests, for good cause shown, that a warrant shall issue.

(c) Fine. If a reservation, filing, or entry of an appeal is made following a sentence to pay a fine or fine and costs, the sentence shall be stayed by the judge imposing it or by a single justice of the court that will hear the appeal if there is a diligent perfection of appeal.

(d) Probation or Suspended Sentence. An order placing a defendant on probation or suspending a sentence may be stayed if an appeal is taken.

CREDIT(S)

**4873 Amended June 24, 2009, effective October 1, 2009.*

HISTORICAL NOTES

REPORTER'S NOTES

Subdivision (a). The substance of this subdivision is drawn from G.L. c. 279, § 4 (as amended). The defendant convicted of a crime and sentenced to a term of imprisonment may petition the trial judge or a single justice of the Supreme Judicial or Appeals Court by motion that execution of his sentence be stayed pending appeal. The motion is directed to the discretion of the judge. DiPietro v. Commonwealth, 369 Mass. 964, 339 N.E.2d 924 (1976) (Rescript); Stranad v. Commonwealth, 366 Mass. 847, 318 N.E.2d 617 (1974) (Rescript); Commonwealth v. Allen, Mass.App.Adv.Sh. (1979) 147, 385 N.E.2d 532 (Rescript).

There are few cases construing G.L. c. 279, § 4 and while all are concerned with the element of discretion, in no one is an abuse of that discretion found. Commonwealth v. Allen, supra; Commonwealth v. Roberts, Mass.Adv.Sh. (1977) 927, 362 N.E.2d 904 (Rescript); DiPietro v. Commonwealth, supra; Stranad v. Commonwealth, supra; Fine v. Commonwealth, 312 Mass. 252, 261, 44 N.E.2d 659, 145 A.L.R. 392 (1942); Lebowitch, Petitioner, 235 Mass. 357, 363, 126 N.E. 831 (1920); Commonwealth v. Drohan, 210 Mass. 445, 448, 97 N.E. 89 (1912); Commonwealth v. Brown, 167 Mass. 144, 146, 45 N.E. 1 (1896).

The sine qua non for finding an abuse of discretion in the denial of a motion for a stay is that the movant must have established on the record 'a reasonable likelihood of success on appeal.' DiPietro v. Commonwealth, supra. Accord Commonwealth v. Roberts, supra. But see Commonwealth v. Allen, S.J.C. No. 79-100 Civ. (Mem., March 20, 1979) (single justice decision overturningCommonwealth v. Allen, supra: '[T]he standard is one of sound discretion and may be exercised if the circumstances warrant without a requirement that there be a finding made of a reasonable likelihood of success on appeal.').

The amendment of G.L. c. 276, § 87 by St.1974, c. 614, allows the judge to place the convicted defendant, with his consent, on probation for such term and upon such conditions as the judge deems proper. This provides the judge with a flexible alternative to traditional bail procedures

pending appeal which may be used at his discretion for defendants convicted of all but those offenses enumerated in the statute.

***5107 Massachusetts Rules of Criminal Procedure (Mass.R.Crim.P.), Rule 47**

MASSACHUSETTS GENERAL LAWS ANNOTATED MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Current with amendments received through 2/1/2012

Rule 47. Special Magistrates

(Applicable to Superior Court)

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.

HISTORICAL NOTES

REPORTER'S NOTES

Under prior law, magistrates served primarily as bail commissioners. G.L. c. 262, §§ 23-24. Sections 62B and 62C of chapter 221 of the General Laws, inserted by St.1978, c. 478, § 250, established the office of Magistrate in all Departments of the Trial Court and gave to that official certain quasi-judicial powers. This rule is not intended to expand the powers which such statutory Trial Court Magistrates may exercise, but to create the new and separate position of Special Magistrate in the Superior Court Department.

Special Magistrates in criminal cases shall have the authority to assign counsel (Mass.R.Crim.P. 8), set bail, and preside at arraignment (Mass.R.Crim.P. 7), and their duties shall include the supervision of pretrial conferences (Mass.R.Crim.P. 11) and the marking up of pretrial motions for hearing (Mass.R.Crim.P. 13). The rule is broad enough to permit assignment of some fact finding functions to Special Magistrates, although the exact dimension of those functions is left to definition by appropriate order of the Administrative Justice of the Superior Court Department. In this respect the Special Magistrate will differ little from masters as appointed by the Supreme Judicial Court under longstanding practice, especially in habeas corpus proceedings.

***5108** It is intended that Special Magistrates under this rule, because of the nature of their quasi-judicial responsibilities, be at the least attorneys admitted to practice before the bar and preferably that they be retired judges. Special Magistrates are to be compensated as are masters in civil practice. G.L. c. 221, § 55 (as amended, St.1978, c. 478, § 247); Mass.R.Civ.P. 53(a), Superior Court Rule 49 (3) (1974).

While similar to federal magistrates, the office of Special Magistrate under this rule does not carry with it such broad powers. The federal officer can conduct trials for minor offenses and sentence those who are found guilty. 18 U.S.C. §§ 3401-02. Before a federal magistrate can conduct a trial, however, the defendant must consent in writing and specifically waive both a trial before a District Court judge and the right to trial by jury, subject to enumerated qualifications. Under this rule the defendant is to have no objection to proceeding before a Special Magistrate since the functions to be performed by the office of Special Magistrate are administrative rather than adjudicatory.

REFERENCES

CROSS REFERENCES

Arraignment, see R.Crim.P. Rule 7.
Assignment of counsel, see R.Crim.P. Rule 8.
Compensation of masters, see c. 221, §§ 55, 61, 62A.
Magistrates, fees, see c. 262, §§ 23, 24.
Pretrial conference, see R.Crim.P. Rule 11.
Pretrial motions, see R.Crim.P. Rule 13.
Trial court magistrates, see c. 221, §§ 62B, 62C.

REFERENCES

LAW REVIEW AND JOURNAL COMMENTARIES

Justice in the distribution of jury service. Mary R. Rose, 39 Law & Soc'y Rev. 601 (September, 2005).

REFERENCES

LIBRARY REFERENCES

Justices of the Peace 3, 14.
Westlaw Topic No. 231.
C.J.S. Justices of the Peace §§ 12 to 13, 28 to 31, 60.

*5666 S.J.C. Rule 2:13

MASSACHUSETTS GENERAL LAWS ANNOTATED RULES OF THE SUPREME JUDICIAL COURT CHAPTER TWO. RULES FOR THE REGULATION OF PRACTICE BEFORE THE SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT

Current with amendments received through 2/1/2012

Rule 2:13. Special Masters and Commissioners

(Applicable to all cases.)

The full court may designate special masters and commissioners to deal with specified cases or with such matters as may be referred to them by a written order of a single justice or of the full court. The acts of any such special master and commissioner, when confirmed or approved, by a single justice or by the full court, as the case may be, shall have all the force and effect of a decision by a single justice or by the full court.

REFERENCES

RESEARCH REFERENCES

Treatises and Practice Aids

6 Mass. Prac. Series R 13, Counterclaim and Cross-Claim.

9A Mass. Prac. Series § 42.2, Cases in Which Reference to Master May be Made.

9A Mass. Prac. Series § 42.15, Saving of Rights to a Review of the Report--In General.

31 Mass. Prac. Series § 8.14, Trial--Before a Master.

41 Mass. Prac. Series § 5:19, Table of Court Rules.

41 Mass. Prac. Series § 6:1, General Provisions.

ANNOTATIONS

NOTES OF DECISIONS

Error 1

1. Error

Single justice of the Supreme Judicial Court who reinstated, in superior court, claims against an estate on bill of equity, did not commit reversible error by not ordering an evidentiary hearing or appointing a commissioner or special master, where defendants did not request either an evidentiary hearing or the appointment of a special master. Gates v. Reilly (2009) 902 N.E.2d 934, 453 Mass. 460. Executors and Administrators 256(6)