COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-11410

ESSEX, SS.

COMMONWEALTH,
Appellant

V.

SUPERIOR COURT,
Appellee

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

BRIEF AND RECORD APPENDIX FOR THE COMMONWEALTH

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ISSUES PRESENTED

A single justice of the Supreme Judicial Court for Suffolk County, (Botsford, J.), has reserved and reported the following two-part question to this Court:[1]

> I(a). Is it appropriate for this Court to answer the question set forth in I(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?
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> I(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 single justice also reserved and reported questions arising from two other petitions filed by

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[1] This is one of three cases reported to the Full Court by a Single Justice of the Supreme Judicial Court for Suffolk County (Botsford, J.) after the Commonwealth filed petitions for extraordinary relief pursuant to G.L. c. 211, § 3 raising issues related to the special Drug Lab session of the Superior Court. See Commonwealth v. Shubar Charles, (No. SJC-11408) and Commonwealth v. Hector Milette (No. SJC-11409).

the Commonwealth related to proceedings in the Drug Lab session of the Superior Court: Commonwealth v. Shubar Charles, (No. SJC-11408) (as to the authority of a special magistrate or a judge to consider and allow a motion for stay of execution of sentence pending disposition of the defendant's motion for new trial) and 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).

STATEMENT OF THE CASE[2]

Introduction[3]

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. 1-7).

Initially, in Essex County, then-Regional Administrative Justice David Lowy was assigned to the session (R.A. 1-7, 8). Before any hearings were held, he issued an administrative order setting forth the requirements for cases to be heard in the session,

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[2] Record references are: record appendix (R.A. _).

[3] In support of the petition addressing the two-part plea proceeding, the Commonwealth filed an affidavit from assistant district attorney Gerald P. Shea (R.A. 1-7); in its answer to the petition, the Superior Court filed an affidavit from its general counsel, Maria Peña (R.A. 20-29), but neither the Superior Court nor the other defendants disputed the facts in the Shea affidavit. At a hearing on March 13, 2013, the Commonwealth sought an opportunity to dispute claims in the Pena 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, none was 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.

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. 8).

During October and November 2012, Judge Lowy ruled on more than fifty motions for stays of execution of sentences (R.A. 1-7). At each hearing, the Commonwealth filed a written opposition to the motion on grounds that the Court lacked authority to stay the execution of a sentence *while a new trial motion was pending* (R.A. 3 ¶ 9). At the first hearing in the session, Judge Lowy found that the Court had the inherent authority to stay sentences, pending disposition of a new trial motion in the Drug Lab session, relying on Commonwealth v. McLaughlin, 431 Mass. 506 (2000) (R.A. 3 ¶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 Appointment to preside over the Drug Lab sessions (R.A. 9-10). Retired Superior Court Justice John Cratsley was appointed to the Essex session (R.A. 10-11). The court also proposed a two-part plea

procedure to take place in the Drug Lab session for guilty pleas after a motion for new trial was allowed (either by agreement or after a hearing) (R.A. 7, 11-19).

Thereafter, the Commonwealth filed petitions pursuant to G.L. c. 211, § 3 as to: 1) the authority of the special magistrate and a Superior Court judge to consider and allow motions to stay execution of sentence pending disposition of a new trial motion, Commonwealth v. Charles, No. SJ-2013-0066; 2) the authority of the special magistrate to reconsider a stay of execution motion that had been denied by a judge, Commonwealth v. Hector Milette (No. SJ-2013-0083); and 3) the validity of pleas conducted in accordance with the two-part plea proceeding proposed by the Superior Court. The reservation and report was issued on March 22, 2013.

STATEMENT OF THE FACTS

On September 27, 2012, the Chief Justice of the Superior Court "convened a meeting with [attorney] David Meier,[4] representatives of the Suffolk County

[4] Mr. Meier was appointed by the Governor to "oversee the review of criminal cases potentially impacted by failures at the Department of Public Health Drug Lab." Press Release, Governor Deval Patrick, Governor

District Attorney's Office, the Committee for Public Counsel Services (CPCS), Suffolk County bar advocates, Superior Court administrative staff, and the Hon. Jeffrey A. Locke, Regional Administrative Justice for Criminal Business in Suffolk County" (R.A. 19). The "[p]articipants discussed the best ways to handle the anticipated avalanche of hundreds, possibly thousands, of cases potentially affected by Dookhan's actions" (R.A. 19). It is alleged in Peña's affidavit that "[t]he meeting participants agreed" that a motion to stay the execution of sentence "was the appropriate pleading to address the liberty interests" of incarcerated defendants affected by the Hinton Drug Lab investigation (R.A. 22, ¶ 5).

On October 2, 2012, then Essex Superior Court Regional Administrative Justice David Lowy convened a meeting with representatives from the Essex District Attorney's Office, defense bar, clerk's office and

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Patrick Announces Attorney David Meier to Lead Drug Lab Central Office (September 20, 2012) http://www.mass.gov/governor/pressoffice/pressreleases/2012/2012920-david-meier-leads-drug-lab-office.html (last viewed April 12, 2013). Thus, he was not appointed to "lead a team of law enforcement officials and defense lawyers to investigate the allegations of widespread tampering at the Hinton Laboratory," as asserted in the Peña affidavit (R.A. 21, ¶4).

probation department to announce[5] the creation of a special Drug Lab session in Essex Superior Court in response to the Hinton Drug Lab investigation (R.A. 2). At this meeting, Judge Lowy stated that the session would hear motions to stay execution of sentences and bail requests for defendants serving sentences (R.A. 2). The judge explained that to be heard in the session, defendants were required to file both a motion for new trial and a motion to stay the execution of sentence (R.A. 2).

After this meeting, Judge Lowy had an assistant clerk-magistrate issue an email to the district attorney's office and the defense bar setting forth the procedure for the session (R.A. 2, 8). The email defined "Essex County 'Drug Lab' cases" as those in which "the defendant is currently incarcerated on a lead drug charge where Annie Dookhan was the chemist or where she supervised the analysis" (R.A. 8). To obtain a hearing in the session, defendants were required to file 1) a motion for new trial; 2) a motion for a stay of execution of sentence; and 3) a copy of the drug certificate (R.A. 8). The

[5] Contrast Peña Affidavit at R.A. 22, ¶ 6 ("In every county, a procedure similar to the one adopted in Suffolk County was *endorsed.*")(emphasis added).

Commonwealth was required to file a written response in every case (R.A. 8). At the time, according to the email, new trial motions were to be ruled on by the sentencing judge or the Regional Administrative Justice if the sentencing judge was retired[6] (R.A. 8).

Judge Lowy conducted hearings in the stay session on October 24 and 29, and November 2, 5, 7, 9, 13, 15, and 16 (R.A. 2-3 ¶ 8). At the first hearing in the stay session, the Commonwealth filed a written objection and argued that the Court lacked authority to stay the execution of a sentence if no appeal was pending and if the new trial motion had not been allowed (R.A. 3 ¶ 9). Judge Lowy overruled the Commonwealth's objection, ruling that the Court had inherent authority to stay the execution of a sentence pursuant to Commonwealth v. McLaughlin, 431 Mass. 506, 514-520 (2000) (R.A. 3).

During Judge Lowy's tenure in the session, hearings were scheduled in more than fifty cases: twenty-five stay motions were denied, fifteen were

[6] On November 9, 2012, this Court issued an order "authorizing Chief Justice Rouse to assign to any judge the disposition of any post conviction motion" (R.A. 21).

allowed, and ten were withdrawn[7] (R.A. 3 ¶ 9). No defendant whose motion was denied appealed the ruling to a single justice of the Appeals Court pursuant to Mass. R. App. P. 6 (R.A. 3-4 ¶ 10). Most motions were based largely on media reports of the Hinton Drug Lab investigation and affidavits from defense counsel (R.A. 2-3 ¶ 7). Some defendants attached police reports of interview summaries generated by the Attorney General Office's investigation (R.A. 3 ¶ 7). No defendant filed his own affidavit or an affidavit from any other witness, stating, for example, that the substance was not the narcotic to which the defendant admitted guilt during the plea proceeding (R.A. 3 ¶ 7). As the number of cases meeting the criteria for the session began to dwindle, Judge Lowy announced that another special session had been created, that he would not preside over the session, and that more information would be issued by the Superior Court (R.A. 4 ¶ 12).

On November 26, 2012, the Chief Justice of the Superior Court issued an Order of Assignment,

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[7] The motions were likely withdrawn for strategic reasons (for example, if a defendant had an immigration detainer to which he did not wish to be released) (R.A. 3).

appointing retired Superior Court Justice John Cratsley, and other retired Superior Court judges, as special magistrates under Rule 47 of the Massachusetts Rules of Criminal Procedure[8] (R.A. 4 ¶ 13, 9-10). The Superior Court turned to Rule 47 Special Magistrates in an anticipation of an expected increase in litigation resulting from the Hinton Drug Lab investigation and after determining the use of recall judges was not feasible due to a lack of interest of retired judges (R.A. 22-24 ¶ 12-13). The decision to appoint retired judges was guided by the "prefer[ence]" stated in the Reporter's Notes to Rule 47 (R.A. 24 ¶ 14).

Special Magistrate Cratsley was assigned to the Essex County Drug Lab Session (R.A. 4 ¶ 13, 9-10).

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[8] Rule 47 of the Massachusetts Rules of Criminal Procedure provides: "The Justices of the Superior Court may appoint special magistrates to preside over criminal proceedings in the Superior Court. S uch 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 Order of Assignment tracked Rule 47 (R.A. 9-10), stating, in relevant part:

> [T]he Special Judicial Magistrate[9] 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 Judicial 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 Judicial Magistrate, it must notify the Special Judicial 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. If no objection to the proposed findings and rulings of the Special Judicial Magistrate is filed within three court days of when the Special Judicial Magistrate makes said findings and rulings, they shall be acted upon by the Regional Administrative Justice without further hearing.
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> Further, the Special Judicial Magistrate shall perform such other duties as may be authorized by order of the Superior Court

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[9] Without comment or explanation, the Order of Assignment inserted the word "Judicial" in the title of those assigned as special magistrates. The Reporter's Notes to Rule 47 express a preference for retired judges, but the rule itself does not require that special magistrates be judges and does not include any such designation in the title of those appointed.

(R.A. 9-10). The Order of Assignment provides for objections, but does not describe the procedure to be followed when an Objection is filed (R.A. 9-10).

Special Magistrate Cratsley began presiding over the Essex session on December 5 (R.A. 4 ¶ 13). By this time all the stay motions that had been filed while Judge Lowy was presiding had been heard and those cases had been continued for both status dates and discovery hearing dates (R.A. 4 ¶ 11). No cases had been scheduled for hearings on new trial motions, presumably because "there was a lot of uncertainty about the process" and discovery in the cases was ongoing due to the ongoing investigation by the Inspector General (R.A. 4 ¶ 11, 25). As to the uncertainty as to the procedure to be followed, the special magistrate "has inquired of counsel for both parties as to how [the hearings on the new trial motions will] proceed, i.e., by stipulation, oral argument, written memoranda, or evidentiary hearing, without having made a preliminary ruling under Rule 30 as to whether the defendant has raised a substantial claim supported by a substantial evidentiary showing" so as to warrant an evidentiary hearing (R.A 5-6 ¶ 17).

On February 14, S.M. Cratsley heard the first new trial motion, in the case of Commonwealth v. Angel Rodriguez[10] (R.A. 6 ¶ 17). At the time of the hearing, the Inspector General's investigation was still ongoing and therefore, neither the defendant nor the Commonwealth had access to the lab file in the case (R.A. 6 ¶ 19). After a non-evidentiary hearing based on stipulated exhibits, S.M. Cratsley *allowed* the motion in a written memorandum of decision on March 28[11] (rather than making proposed findings and rulings as provided in the Order of Assignment) (R.A. 32-36) (emphasis added).

As for stay motions filed after S.M. Cratsley began presiding in the session, the Commonwealth objected that he "lacked authority, under the Order of Assignment or otherwise, to hear" such motions (R.A. 4 ¶ 14). The first case in which he allowed the stay motion was Commonwealth v. Kauppinen[12] (R.A. 4 ¶ 14). When the Commonwealth announced its intention to file its Objection, the defendant chose to resolve the case

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[10] Docket No. ESCR2007-00875 (R.A. 6).

[11] The Commonwealth has filed an Objection in accordance with the Order of Assignment, which is pending at the time of the filing of this brief.

[12] Docket No. ESCR2009-0715 (R.A. 4).

by a guilty plea, the new trial motion having been allowed by agreement (R.A. 4 ¶ 14).

The next case in which S.M. Cratsley allowed a stay was Commonwealth v. Shubar Charles, as to which the Commonwealth filed a petition pursuant to G.L. c. 211, § 3 (No. SJC-11408) (R.A. 4 ¶ 14). As of March 1, 2013 (just before the underlying petition in this case was filed), no defendant whose stay motion was denied by the special magistrate had filed an Objection as provided in the Order of Assignment (R.A. 4 ¶ 14).

With regard to the plea hearings in the Drug Lab session after a new trial motion is allowed (whether by agreement or otherwise), the Superior Court established a two-step procedure involving both the special magistrate and a Superior Court judge (R.A. 6 ¶ 18, 11-17). Pursuant to this procedure, so long as the defendant consents, the special magistrate is to conduct the entire plea colloquy, make proposed findings about the intelligence and voluntariness of the defendant's decision to plea, and then send the case to the Regional Administrative Justice for the adoption of the special magistrate's findings after a brief confirmatory hearing (R.A. 6 ¶ 18, 11-19). The

Superior Court judge would then impose the sentence recommended by the special magistrate (R.A. 6 ¶ 18, 11-19). The Superior Court issued forms to be completed by the special magistrate for both the plea colloquy (R.A. 11-16) and his proposed findings and rulings (R.A. 17-19).

In Essex County, the District Attorney's Office has declined to participate in these two-part plea proceedings, "insist[ing]" instead that the entire plea proceeding take place before a Superior Court judge in order to assure the validity of the plea, and as of March 1, 2013 (again, just before the underlying petition was filed), all the pleas in Drug Lab cases in Essex County have been conducted by a Superior Court judge (R.A. 7 ¶ 22). The two-part plea proceeding has been used in other counties (R.A. 28 ¶ 21).

ARGUMENT

I(a). THE COURT SHOULD ANSWER THE QUESTION IN 1(b) BECAUSE NOTHING IN RULE 47 OR THE ORDER OF ASSIGNMENT REQUIRES A JUDGE TO CONDUCT THE GUILTY PLEA COLLOQUY IF ONE PARTY OBJECTS.

Although a plea has not yet been conducted by a special magistrate in Essex County, this Court should answer the question posed Section 1(b) because nothing in the Order of Assignment, or Rule 47,[13] or the form designed by the Superior Court for the special magistrate's proposed findings and rulings (R.A. 17-19) prohibits the special magistrate from conducting the two-part plea over the Commonwealth's objection. According to the Peña affidavit, "a hybrid plea colloquy has been utilized, but *only when agreed upon [by the parties]*" (R.A. 28 ¶ 21), but this requirement is not otherwise memorialized anywhere and certainly, the affidavit has no force of law. Thus, as the rule and the Order stand now, the special magistrate could conduct a plea colloquy and send the case to a judge for the adoption of his findings as to the intelligence and voluntariness of the plea, even if the Commonwealth objects. The two-part procedure is

[13] The Reporter's Notes to Rule 47 explicitly state that *a defendant* must consent to proceeding before the special magistrate, but the rule and notes are silent as to the Commonwealth's consent.

being used in other counties (R.A. 28 ¶ 21). To assure that such pleas are unassailable, whether they are conducted over the Commonwealth's objection, or not, this Court should determine that it is appropriate to answer the question set forth in I.b.

"When a criminal defendant pleads guilty, he waives his right to be convicted by proof beyond a reasonable doubt, his Fifth Amendment privilege against self-incrimination, his right to stand trial by jury, and his right to confront his accusers." Commonwealth v. DelVerde, 398 Mass. 288, 292 (1986) (citations omitted). "Because a plea of guilty involves these constitutional rights, [a] plea is valid only when the defendant offers it voluntarily, with sufficient awareness of the relevant circumstances and with the advice of competent counsel." Id. at 292-293 (quotations omitted). In view of the vital rights a defendant waives when he pleads guilty, one of the most important judicial functions in criminal cases is ensuring the plea is intelligent and voluntary. See Commonwealth v. Correa, 43 Mass. App. Ct. 714, 717 (1997) (A "judge must determine by means of an adequate colloquy that the plea tendered is both intelligently and

voluntarily made."). The probe of the defendant's mind must be meaningful: "A brief colloquy that does not probe the defendant's mind will not do." Commonwealth v. Quinones, 414 Mass. 423, 434 (1993).

A guilty "plea proceeding is a formal and solemn occasion." Commonwealth v. Williams, 71 Mass. App. Ct. 348, 355 (2008). See also United States v. Marsh, 486 F.Supp.2d 150, 159 (D.Mass. 2007), aff'd, 561 F.3d 81 (1st Cir.), cert. denied, 129 U.S. 2784 (2009) ("A felony conviction is, and ought to be, a profoundly significant event. Its importance goes well beyond its immediate consequences . . . Felony convictions should neither be imposed nor overturned lightly, and under no circumstances should they be treated like a Las Vegas marriage, to be annulled when they become burdensome or inconvenient."). In short, "[g]uilty pleas are too important to the defendant, *to the Commonwealth*, and to the proper administration of justice for judges to 'wing' it or to adopt idiosyncratic practices that only result in confusion and further appeals." Commonwealth v. Lamrini, 27 Mass. App. Ct. 662, 665-666 (1989) (emphasis added).

In other words, the goal must be an unassailable guilty plea proceeding, in order to provide certainty

for a defendant and finality for victims, and to maintain public confidence in the judicial system. See Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."). The task is simply too important to leave to an unprecedented procedure, with dubious legal underpinnings, created in the crisis of the moment. Guidance from this Court on the validity of a plea conducted pursuant to the two-part proceeding is necessary to the fair administration of the criminal justice system.

Moreover, the decision whether it is appropriate to answer the question in I.b. should be assessed in light of the general uncertainty about the proceedings before the special magistrates. The Commonwealth is unaware of any case discussing the role of Rule 47 Special Magistrates. At present, the only guidance as to the rule can be found in the Reporter's Notes.

The dearth of law regarding special magistrates has created confusion. For instance, in the Milette case, SJC-11409, the special magistrate would not allow the Commonwealth time to file its Objection to

the allowance of the motion to stay of execution of sentence, even though the Order of Assignment provides a 48-hour window for objections (R.A. 9-10). But after the special magistrate spoke with J. Lu, it was decided that such orders would be stayed during the window (R.A. 5 ¶ 16). Likewise, at the hearing on the Objection in the Charles case, J. Lu said the proceeding was a bail hearing (Tr. II 3), and said he would hear from whomever wished to go first, as if there was no governing procedure as to the burden or production and the burden of proof. And he said he would hear the defendant's stay motion de novo (Tr. II 12), although this does not appear to be contemplated by the Order of Assignment.

Additionally, the special magistrate has inquired of counsel as to how the hearings on the new trial motions should be handled (R.A. 5-6 ¶ 17), as if Rule 30 does not apply. And, of course, the question is made more complicated by the fact that discovery about the Drug Lab has been delayed or limited by the Attorney General's and Inspector General's investigations, the latter of which is on-going; the lack of access to the chemists' files; and the issues

pertaining to the availability of chemists to testify at new trial motion hearings (R.A. 6 ¶ 19).

And the title used by the special magistrates reflects confusion about their roles. Rule 47 specifically entitles those appointed under the rule as "Special Magistrates," but when the Superior Court appointed the special magistrates by the Order of Assignment, it provided the title "Special Judicial Magistrates" (R.A. 9-10), presumably, and understandably so, in deference to the special magistrates prior service as Justices of the Superior Court. Thus, Special Magistrate Cratsley has been referring to himself as "Special Judicial Magistrate" (R.A. 32-36). On the other hand, when Special Magistrate Chernoff ruled recently on a new trial motion (denying it, incidentally, rather than simply proposing findings and rulings),[14] he referred to himself as a "Judicial Magistrate" (R.A. 37-48).

The confusion is unsurprising, given that the procedure is unprecedented. Guidance from this Court is necessary.

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[14] The fact that S.M. Chernoff ruled on the merits of the motion is another example of the confusion resulting from the procedure.

I(b). THE TWO-PART PLEA PROCEDURE ESTABLISEHD BY THE SUPERIOR COURT CALLS FOR A SPECIAL MAGISTRATE TO ACT BEYOND THE SCOPE OF HIS AUTHORITY.

Before the establishment of the Drug Lab session there were no Rule 47 special magistrates in Essex County (apparently unlike Suffolk County) (R.A. 1-7). Under the unprecedented two-part plea procedure, those special magistrates may now preside at plea hearings with the defendant's consent, and then submit proposed findings as to the voluntariness and intelligence of a defendant's plea, along with a sentence recommendation, to the Regional Administrative Justice for adoption (R.A. 11-17). At a minimum, the authority of the special magistrate to participate in this way, and the validity of any guilty pleas accepted pursuant to the two-part procedure, stand on uncertain footing.

Under Mass. R. Crim. P. 2(b)(9), the term "judge" includes "a *special magistrate when in the performance of those duties imposed and authorized by these rules*" (emphasis added), but no rule, including Rule 47, "authorize[s]" or "impose[s]" the duty on a special magistrate to perform any portion of a guilty plea proceeding. Rather, Rule 12, governing the guilty plea procedure, is couched entirely in terms of the

duties of a "judge." See Mass. R. Crim. P. 12(a)(3) ("The *judge* shall not accept such a plea or admission without first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission.") (emphasis added).

The Order of Assignment, (R.A. 9-10), 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 [RAJ]. 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.
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> Further, the [Special magistrate] shall perform such other duties as may be authorized by order to the Superior Court.

It is a highly doubtful proposition that the Order could empower special magistrates to conduct any portion of a guilty plea proceeding absent authority to do so under a rule or statute. Unsurprisingly, then, the Order does not purport to grant such authority, including the power to determine the intelligence and voluntariness of a plea, or make sentence recommendations. See K.B. Smith, Criminal Practice and Procedure § 58.5 (3d ed. 2007 & Supp. 2012) ("exact dimension of [power to make findings] is left to definition by appropriate order of the Chief Justice of the Superior Court."). The Order does describe the authority to "conduct hearings on "post[-]conviction motions," but a guilty plea is not such a "motion." Thus, it appears that *any* participation by a special magistrate in a plea proceeding is beyond the scope of his authority.

Moreover, "a clerk-magistrate [under G.L. c. 221, § 62C] is not the same person as a [Rule 47] special magistrate," K.B. Smith, Criminal Practice and Procedure § 22.11 (3d ed. 2007 & Supp. 2012), even though the duties of the special magistrate listed in Rule 47 mimic those listed in G.L. c. 221, § 62C. Even if their duties are the same, however, the power

to preside over plea proceedings is noticeably absent from G.L. c. 221, § 62C.

The Reporter's Notes to Rule 47,[15] which provide further guidance on the authority of the special magistrate, also do not mention that any power to preside over plea hearings. See Commonwealth v. Santosuosso, 23 Mass. App. Ct. 310, 313 n.4 (1986) (courts may look to Reporter's Notes for guidance); see also Commonwealth v. Carney, 458 Mass. 418, 426 n.13 (2010) (noting that neither Rule 14 nor the Reporter's Notes provided guidance as to "whether rule 14(c)(1) permit[ed] the imposition of punitive monetary sanctions").

Rather, the Notes describe "some fact finding functions," the "exact dimension[s]" of which are "left to definition by appropriate order of the Administrative Justice of the Superior Court Department." And again, the Order does not provide the authority to conduct a plea proceeding, make the findings required for a guilty plea, or make a sentencing recommendation.

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[15] As the Commonwealth has found no case discussing the duties of Rule 47 special magistrates, the Reporter's Notes provide the only guidance as to the scope of their authority.

The Notes express an "inten[tion]" that special magistrates be "*at the least attorneys admitted to practice before the bar and preferably that they be retired judges*," because of their *quasi-judicial responsibilities*, but the rule, and Notes, do not *require* any judicial experience or even, for that matter, that special magistrates be attorneys. And, of course, the special magistrate's functions are "*administrative rather than adjudicatory.*" (emphasis added); cf. Grafton Bank v. Bickford, 13 Gray 564, 567 (1859) (characterizing a "special magistrate" in a bankruptcy case as "a ministerial officer").

By contrast, though, plea hearings are adjudicatory and not administrative. See Lamrini, 27 Mass. App. Ct. at 665 (a judge is required to "bring to a [plea] hearing . . . the same mental intensity, concentration and discipline that they regularly employ when presiding at a trial"). In short, the duties of a special magistrate, as defined by Rule 47, the Reporter's Notes, and even the Order of Assignment, cannot be reasonably read to encompass the duties of a judge during a plea hearing.

Additionally, even if special magistrates are "similar" to federal magistrates,[16] see 28 U.S.C. 636, federal magistrates' powers are defined, by statute, and the position of special magistrate does "not carry with it such broad powers." Reporter's Notes to Rule 47. Under the United States Magistrate Judges Act, Congress has expressly granted federal magistrates the authority to conduct trials for misdemeanors, 28 U.S.C. § 636(a)(3), and to sentence defendants for "petty offenses" and class A misdemeanors where the parties have consented, 28 U.S.C. § 636(a)(4) and (5).[17] See United States v. Raddatz, 447 U.S. 667, 681 n.8 (1980) (when enacting federal Magistrate Act, "Congress reasoned that permitting the *exercise of an adjudicatory function* by a magistrate, subject to ultimate review by the district court, would also pass constitutional muster")(emphasis added).

Federal magistrates may also "hear and determine any pretrial matter" except for, in criminal cases, a motion to dismiss or a motion to suppress. 28 U.S.C. §

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[16] Although federal magistrates hold the title of United States Magistrate Judge, for ease of reference this petition will use the term federal magistrate.

[17] A federal magistrate may also conduct civil jury trials if all parties consent. 28 U.S.C. § 636 (c)(1).

636 (b)(1)(A). However, similar to the language of Rule 47 and the order of assignment, a federal judge may "designate" a magistrate judge to conduct evidentiary hearings and make "proposed findings of fact and recommendations for disposition", which is then subject to adoption by a federal judge. 28 U.S.C. § 636(b)(1)(B); see id. at 677 (federal magistrates may constitutionally conduct evidentiary hearings on motions to suppress).[18]

Most importantly, for purposes of federal magistrates conducting plea hearings, unlike Rule 47, the statute includes a catch-all provision that federal magistrates "may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). It is under this provision and *not* the section allowing federal judges to designate a magistrate to make proposed findings -- i.e., the language in Rule 47 -- that the federal Courts of Appeal have held that federal magistrates may conduct plea colloquies, so long as the defendant consents.

[18] In Raddatz, the Court of Appeals ruled that the defendant was denied due process because a federal magistrate, and not a district court judge, heard the suppression testimony. United States v. Raddatz, 447 U.S. 667, 672 (1980).

See United States v. Williams, 23 F.3d 629, 633-634 (2nd Cir. 1994) (magistrates conducting plea hearings is both statutorily and constitutionally permissible so long as defendant consents); accord United States v. Ciapponi, 77 F.3d 1247, 1250-1252 (10th Cir. 1996), United States v. Osborne, 345 F.3d 281, 285-290 (4th Cir. 2003) and United States v. Underwood, 597 F.3d 661, 665-673 (5th Cir. 2010); cf. Peretz v. United States, 501 U.S. 923, 929-940 (1991) (permissible under both Magistrate Act and Constitution for federal magistrate to conduct jury selection voir dire at a felony trial so long as defendant consents). In other words, federal law permits federal magistrates to preside at plea hearings, but Massachusetts law does not.

Having special magistrates conduct plea hearings may raise significant constitutional questions as well. See United States v. Dees, 125 F.3d 261, 266 (1997) ("Article III confers upon defendants a personal right to have their case heard by an Article III judge.")[19]; North v. Russell, 427 U.S. 328, 339-340

[19] In Peretz v. United States, 501 U.S. 923, 940-956 (1991), Marshall, White and, separately, Scalia, JJ., dissented, concluding that Magistrates Act did not allow federal magistrates to conduct jury voir dire

(1976) (Stewart, J., dissenting) (trial before a lay judge "is constitutionally intolerable"); cf. Peretz, 501 U.S. at 936 ("it is arguable that a defendant in a criminal trial has a constitutional right to demand the presence of an Article III judge at voir dire"; Court did not answer question because defendant raised no objection on this ground at trial so it was deemed waived). So, too, a procedure by which a judge simply endorses the findings of a special magistrate, as to the intelligence and voluntariness of a guilty. See Raddatz, 447 U.S. at 681-683 (constitutional for a district court judge to decide motion to suppress on findings of fact and recommendations by a federal magistrate because judge made a "*de novo* determination" and "then exercises the ultimate authority to issue an appropriate order"). The adoption of the special magistrate's findings, without the constitutionally-required, "real probe of the defendant's mind," Commonwealth v. Fernandes, 390 Mass. 714, 716 (1984), would raise serious questions as to the validity of the plea.

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examinations in felony cases, which may be an unwaivable constitutional structural deficiency. Id.

Finally, a survey of other states reflects three categories of what a magistrate, or its equivalent, is permitted to do with regard to pleas. Some states do not allow magistrates to accept guilty pleas. See State v. Smalls, 48 So.3d 212, 218-219 (La. 2010) (finding state statute unconstitutional that sought to grant to "non-elected commissioner the same adjudicatory powers of the elected magistrate judge of the Criminal District Court": "the commissioners of the Magistrate Section of the Criminal District Court . . . may not exercise the adjudicatory power of the state to dispose of misdemeanor cases by accepting guilty pleas or conducting trials."). Other states allow magistrates to accept guilty pleas only for misdemeanors. See N.C.G.S.A §7A-273 (North Carolina); Shoemaker v. State, 375 A.2d 431, 439-440, 441 (Del. 1977) (trial in "Justice of the Peace Court," a court "of convenience instituted 'to provide (a) speedy and inexpensive means' of disposing of *minor criminal offenses*," presided over by a "non-lawyer judge," does not violate due process or equal protection because defendant may "bypass the Justice of the Peace Court and have his case" tried "in a Court presided over by a lawyer-judge," "without any strings attached"). And

other states allow magistrates to accept pleas for felonies and misdemeanors. See Tex. Gov't Code Ann. § 54.656 (magistrate judge may accept pleas to both misdemeanor and felony offenses); State v. Valladarez, 288 Kan. 671, 682-683 (2009) (by statute, a "district magistrate judge" may be assigned by the chief district judge to accept pleas to both felonies and misdemeanors). Whether by constitutional provision as in Delaware, or by statute, as in North Carolina, Texas and Kanasas, for example, there is in these states in fact, a source of authority for the magistrate to conduct a plea proceeding and not merely an announcement by the court creating a two-part plea proceeding and purportedly authorizing a non-judge to preside over it.

CONCLUSION

For the foregoing reasons the Commonwealth requests that this Court answer both questions.

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