COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. SJC-11408
SJC-11409
SJC-11410

COMMONWEALTH OF MASSACHUSETTS

V.

SHUBAR CHARLES (& two companion cases)

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

BRIEF OF DISTRICT ATTORNEY FOR THE BRISTOL DISTRICT AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT DISTRICT ATTORNEY FOR THE EASTERN DISTRICT'S 211, §3 PETITIONS FOR RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes and Other Authorities

ISSUES PRESENTED

I. Where no statute or Court Rule confers on either a Special Magistrate or Superior Court judge the power to stay the execution of a defendant's sentence with no appeal pending and prior to a ruling on defendant's new trial motion, and where such power is beyond the scope of a Superior Court Judge's inherent authority, does neither a Special Magistrate nor a Superior Court Judge have the power to stay the execution of a defendant's sentence in such circumstances?

II. Where a Special Magistrate's authority is inherently inferior to that of a Superior Court Justice, and where a Superior Court Justice has already denied a defendant's motion to stay execution of his sentence, is it beyond the Special Magistrate's authority to reconsider and allow defendant's motion to stay?

III. Where the Special Magistrate in Bristol County has already conducted seventeen bifurcated plea colloquies, and where the proper administration of justice requires specificity from this Court on the constitutionality of the process, is it necessary for

this Court to determine whether the Special Magistrate has the authority under Mass. R. Crim. P. 47 to conduct such colloquies?

STATEMENT OF THE INTEREST OF THE AMICUS CURAE

On April 8, 2013, in response to the Commonwealth's Petitions in *Commonwealth v. Shubar Charles* (& two companion cases), SJC-11408, -11409, -11410, and those submitted on behalf of the defendants and other interested parties, the Supreme Judicial Court, invited amicus submissions regarding the nature and extent of the authority of Special Magistrate and Superior Court judges in the Hinton Drug Lab cases.

Specifically, Justice Margot Botsford reported the following questions to the full bench: (1) Does a special magistrate appointed by the Chief Justice of the Superior Court pursuant to Mass. R. Crim. P. 47, or a judge of the Superior Court, have the authority to allow a defendant's motion to stay execution of his sentence, then being served, pending disposition of the defendant's motion for 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? And, (3)(a) Should the Court consider the question of the authority of a Special Magistrate to conduct bifurcated plea colloquies where neither party can be required to submit to such a colloquy, and where, because of the Commonwealth's objections, all colloquies in Essex County have been conducted by judges and not special magistrates? (b) If the court answers 3(a) in the affirmative, does 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 for the Bristol District has an interest in the outcome of these cases as the chief law enforcement officer for his district, charged with enforcing public rights where the Commonwealth is a party or interested and upholding constitutional provisions. *See* G. L. c. 12, §§ 12, 13, 27; G. L. c. 218, § 27A; *Town of Burlington v. District Attorney*, 381 Mass. 717, 718 720 (1980); *District Attorney v. Magraw*, 34 Mass. App.

Ct. 713, 715 (1993), *aff'd*, 417 Mass. 169 (1994); *Lodge v. District Attorney*, 21 Mass. App. Ct. 277, 281-82 (1995), *rev. denied*, 396 Mass. 1106 (1986).

Additionally, the Bristol County District Attorney also has a specific interest in this Court's holdings relating to the nature and extent of the authority of the Special Magistrates assigned to the Hinton State Laboratory cases where the Special Magistrate assigned to Bristol County has already heard, or scheduled for a hearing, approximately 49 motions by defendants seeking post-conviction relief as a result of the alleged Hinton State Lab misconduct, and where this office continues to receive motions directed to the authority of the Special Magistrate.

Furthermore, Superior Court Judges have allowed 12 Motions for Stay of Execution Sentence over the Commonwealth's objection in Bristol County, while the Special Magistrate has allowed 1 Stay of Execution of Sentence.

Finally, although no bifurcated plea colloquies have been conducted in Essex County, 17 such colloquies have been conducted in Bristol County.

ARGUMENT

I. NEITHER THE SPECIAL MAGISTRATE NOR A JUDGE OF THE SUPERIOR COURT HAS THE DIRECT OR INHERENT AUTHORITY TO ALLOW A DEFENDANT'S MOTION TO STAY EXECUTION OF HIS SENTENCE, ALREADY BEING SERVED, PENDING THE DISPOSITION OF HIS MOTION FOR A NEW TRIAL WITH NO APPEAL PENDING.

The Bristol County District Attorney fully concurs with Essex County's argument that neither a Special Magistrate nor a Superior Court Judge has either direct or inherent authority to stay the execution of a defendant's sentence with *no appeal pending* or *prior* to a ruling on defendant's motion for a new trial. [CBC.22-33][1]

With regard to any direct authority to stay execution of a sentence, there is no statute or court rule which permits a Special Magistrate or Superior Court Judge to do so.

First, the Special Magistrate's authority is limited to that proscribed in the Order of Assignment and Rule 47 of the Massachusetts Rules of Criminal Procedure. [R.A.10-11]; Mass. R. Crim. P. 47. Under

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[1] References to Commonwealth's brief in *Charles* case will be cited as [CBC.(page]; references to Commonwealth's record appendix for that case will be cited as [R.A.(page)]; references to Commonwealth's brief in *Milette* case will be cited as [CBM.(page)]; references to Commonwealth's brief in *Superior Court* case will be cited as [CBS.(page)]

Rule 47, that authority is "administrative rather than adjudicatory" and is limited to the following:

> To preside at arraignments, to set bail, to assign counsel, to supervise pretrial conferences, to mark up pretrial motions for hearings, to make findings and to report those findings and other issues to the presiding justice or Administrative Justice.

Mass. R. Crim. P. 47 and Reporter's Notes.

Under the Order of Assignment, the Special Magistrate also has the power to, "conduct hearings on post-conviction motions, and to issue orders regarding discovery, and other matters."

It follows that neither Rule 47 nor the Order of Assignment confer upon the Special Magistrate the power to rule on motions to stay the execution of a sentence. Moreover, because the Special Magistrate's powers are inherently administrative rather than adjudicatory, Ruling on *any* motion is necessarily beyond the scope of the Magistrate's powers.

Second, no Rule or statute confers the power on *any* Judge to stay the execution of a sentence *prior* to ruling on a new trial motion or when the case *is not pending appeal*. Three rules govern a judge's power to stay the execution of a sentence: Rule 31, Rule 6 and Rule 30.

Rule 31 of the Massachusetts Rules of Criminal Procedure confers discretionary power to stay the execution of a sentence but *only pending appeal*. *Commonwealth v. Allen*, 378 Mass. 489, 496 (1979); Mass. R. Crim. P. 31, Reporter's Notes (The Rule does not address stays of execution of a sentence when an appeal is not pending); *Commonwealth v. McLaughlin*, 431 Mass. 506, 518 (2000)("The language of the rule is plain on its face. The rule does not authorize a judge to stay execution of a penal sentence when an appeal is not pending.").

Rule 6 of the Rules of Appellate Procedure establishes the procedure available after a trial judge acts on a motion to stay, but as a rule of *appellate* procedure, it, by its very terms, applies *only* when an appeal is pending. See Mass. R. App. P. 6(b)(1).

Finally, Rule 30 fails to provide direct authority for such a stay since the Rule specifically grants a judge discretion to admit a defendant to bail only *pending decision of the appeal on the ruling on the motion for a new trial*. As the Commonwealth points out in its brief, where there has been no ruling on a

new trial motion, Rule 30(8)(A) is not triggered. [CWC.22-33]; See Mass. R. Crim. P. 30(8)(A).

Under normal rules of statutory construction, the withholding of a stay power, where it is expressly granted in other circumstances, must be interpreted as an intentional determination that there is no power to stay a sentence prior to the motion hearing. See *Middleborough Gas & Electric Dept. v. Town of Middleborough*, 48 Mass. App. Ct. 427, 433 (2000)(Expressio unius est exclusion alterius is a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative).

Moreover, there is no precedent establishing the *inherent* authority of a Superior Court Judge to stay execution of a sentence prior to a ruling on a new trial motion where no appeal is pending. While this Court has recognized the inherent authority of judges to stay the execution of a sentence generally, it has also stated that such power is extremely limited. The Court has found that at a minimum, the power should be exercised only with the defendant's consent and for short periods of time. *McLaughlin*, 431 at 518-520. Although the defendant's consent is not at issue here,

the stay in the *Charles* case, as with any Hinton Drug Lab case pending in Bristol County, is open-ended since such stays would pend until the completion of the Inspector General's investigation into the alleged misconduct, or final resolution of defendant's motion, both of which could take months or longer.

(a) If this Court finds a Superior Court Judge has inherent authority to stay the execution of a sentence prior to a ruling on a new trial motion where no appeal is pending, this Office urges the Court to find that such a power does not exist where a defendant's sentence has been partially executed.

In addition to limiting the inherent power of a Court to stay the execution of a sentence to circumstances in which the defendant consents and the stay is for a short period of time, this Court has held that the inherent power to stay applies only to cases in which the sentence is unexecuted in whole or in part. See *Fine v. Commonwealth*, 312 Mass. 252, 255-256 (1942)(". . .from early times the importance of the fact that a sentence has not been executed in whole or in party has been recognized in cases where the power of the court to amend or set aside and impose a new sentence has been involved.").

In the case at bar, as in all of the Hinton Drug Lab cases in Bristol County where a judge or

Magistrate has stayed the execution of sentences, such stays have been imposed *after* the defendant has begun to serve his or her sentence. If this Court permits such practices to continue, *any* defendant serving a sentence who files a Rule 30 motion could be entitled to a virtually open-ended stay of execution of that sentence.

(b) If This Court Finds a Judge Has Inherent Authority to Stay the Execution of a Sentence Where Defendant's Sentence Has Been Partially Executed, This Office Urges the Court to Address the Showing Standard a Defendant Must Meet in Order to Receive Such a Stay, Where the Rule 31 Standard Does Not Suffice.

If the Court were to determine that there is inherent authority to stay execution of a sentence that is being served, prior to resolution of a motion for a new trial, the Court will eventually need to address the showing standard a defendant must meet in order to receive such a stay. This Office argues that the standard under Rule 31 does not suffice.

First, the Rule 31 standard is inappropriate on its face because it addresses stays pending appeals, not pending rulings on new trial motions. See Mass. R. Crim. P. 31. Second, the Rule 31 standard requires an exceptionally low showing by the defendant. Specifically, it requires only that the defendant

demonstrate: (1) the likelihood of establishing on appeal that the conviction will be overturned. (This requirement does not demand that the defendant establish that an appeal is more likely than not to be successful, only that it presents "an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal." *Commonwealth v. Hodge*, 380 Mass. 851, 855 (1980); *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979); see also *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979)(the "reasonable likelihood of success on appeal" standard is not one of substantial certainty of success, but rather is equivalent to the civil concept of "meritorious appeal.")); and (2) that he or she is not a danger to the community or a flight risk. See *Hodge*, 380 Mass. at 855.

Such a standard is inappropriately low, where -- as in all of the cases in which stays have been granted over the District Attorney's objection in Bristol thus far -- those defendants, having pled guilty to drug-related offenses, are already serving sentences, and where, in their motions for stay of execution of their sentences, they cannot not

establish a prima facie showing that (1) they relied upon the drug certifications at issue to the exclusion of all other evidence, and (2) there is any basis to conclude that the substances they pled guilty to possessing, distributing, or trafficking, were not what they admitted they were. Instead, in their motions for new trials, defendants in Bristol County have asserted only that the general allegations of misconduct entitle them to new trials.

If this Court fails to require that defendants meet a substantially higher burden than that required by Rule 31 to be granted stays of execution, *any* defendant whose drugs were tested at the Hinton Lab during Annie Dookhan's tenure could be entitled to a stay. The subsequent application of an erroneous standard to any motion brought pursuant to Rule 30 would forever make available to an incarcerated defendant the potential of a stay of sentence on the mere showing that the issue raised is something more than frivolous.

II. THE SPECIAL MAGISTRATE DOES NOT HAVE THE AUTHORITY TO RECONSIDER AND ALLOW A MOTION TO STAY WHERE A SUPERIOR COURT JUDGE ALREADY DENIED THE SAME MOTION BECAUSE A SPECIAL MAGISTRATE'S AUTHORITY IS INFERIOR TO THAT OF A SUPERIOR COURT JUDGE.

First, as detailed above, neither a Special Magistrate nor a Superior Court judge has the power to stay the execution of a sentence prior to a ruling on defendant's motion for a new trial where no appeal is pending. Moreover, the Special Magistrate's grant of authority is more circumscribed than that of a Superior Court judge and his or her duties are limited to those enumerated in Rule 47 and by the Order of Assignment, which are inherently administrative or quasi-adjudicatory rather than adjudicatory. Mass. R. Crim. P. 47 and Reporter's Notes;[R.A.10-11].

The authority of a Superior Court Justice derives from an express grant. *E.g.*, G.L. c. 212 § 1 et. seq. A Special Magistrate's authority derives from a limited, express grant pursuant to a Court Rule. Mass. R. Crim. P. 47. As the Rule and the Reporter's Notes make clear, the Special Magistrate's authority is inherently inferior to that of a Superior Court Justice.

It follows that a Special Magistrate certainly does not have the power to reconsider and ultimately overrule a decision by a Superior Court judge. *Cf.*

Commonwealth v. Colon, 52 Mass. App. Ct. 725, 730 n. 1 (2001)(the appellate court is bound by the decisions of the Supreme Judicial Court). Thus, the proper avenue for a defendant aggrieved by an adverse ruling of a Superior Court Justice must be appeal pursuant to Rule 30 or, where appropriate 211 § 3 Petition.

Permitting the Special Magistrate to overrule decisions by the Superior Court necessarily inverts the power structure clearly proscribed by the Rules.

III. IT IS NECESSARY FOR THIS COURT TO DETERMINE WHETHER THE SPECIAL MAGISTRATE HAS THE AUTHORITY UNDER MASS. R. CRIM. P. 47 TO CONDUCT BIFURCATED PLEA COLLOQUIES WHERE AT LEAST 17 SUCH COLLOQUIES HAVE BEEN CONDUCTED IN BRISTOL COUNTY, AND WHERE THE PROPER ADMINISTRATION OF JUSTICE REQUIRES SPECIFICITY FROM THIS COURT ON THE CONSTITUTIONALITY OF THE PROCESS.

In announcing her Reservation and Report with regard to the Commonwealth's petitions in these matters, Justice Botsford questioned the appropriateness for the Court to consider the Commonwealth's challenge to the bifurcated plea colloquy process before the Special Magistrate, where she noted, because of the Commonwealth's objections no such colloquy had taken place before a Magistrate in Essex. She then remarked that the Petition addressing

the issues, "appears to be challenging a hypothetical situation where the Commonwealth may, some day, be required over its objection to proceed before the special magistrate." As noted above, Bristol County has a particular interest in the outcome of the Court's decision on this matter since the Special Magistrate assigned to Bristol *has* conducted 17 such colloquies. This Office, therefore, strenuously encourages this Court to consider and rule on the extent of the Special Magistrate's authority to conduct such colloquies.

As demonstrated by the fact that this Office has resolved 17 cases in accordance with the bifurcated plea process, we stress our willingness to engage in whatever procedure this Court devises to accomplish the resolution of renegotiated cases in the wake of the alleged misconduct at the Hinton Lab. However we are conscious that without a ruling by this Court on this specific process, questions about the constitutional adequacy of the process will inevitably linger. Our Office does not wish to continue engaging in a procedure which may be defective at its inception and may therefore be challenged at a later date by

defendants who have submitted to it. *C.f., North v. Russell, et. al.*, 427 U.S. 328 (1976).

In the bifurcated plea colloquies conducted by the Special Magistrate in Bristol County, the Magistrate presides over the colloquy up to and including the Commonwealth's sentencing recommendation. The Magistrate then submits her findings as to the voluntariness and intelligence of the plea, along with a sentence recommendation to an available Superior Court judge who then accepts the recommendations without further hearing and sentences the defendant.

We note, as does Essex in its brief, that there is no precedent or authority for the bifurcated plea process, including in Rule 12, which governs the plea process. [CBS.16-22]; See Mass. R. Crim. P. 12. However, a transparent and constitutional plea process is essential to the administration of justice. As the Supreme Court has acknowledged, "the guilty plea and the often concomitant plea bargain are important components of the country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Rule 12 is intended to guarantee the proper

administration of the guilty plea and plea bargaining process. Mass. R. Crim. P. 12, Reporter's Notes. When a defendant pleads guilty, he waives important constitutional rights, including his right to be convicted by proof beyond a reasonable doubt, his right to trial by jury, his right to confront his accusers, and his Fifth Amendment privilege against self incrimination. *Commonwealth v. DeVerde*, 398 Mass. 288, 292 (1986).

It is, therefore, well-established and essential that a guilty plea may not be accepted without an affirmative showing that the defendant acts voluntarily and understands the consequences of his plea. Rule 12(c)(3) specifically requires the judge to ensure that the defendant is informed, on the record in open court that in submitting to the process, he is waiving the aforementioned constitutional rights. *Commonwealth v. Duquette*, 386 Mass. 834, 841 (1982). Thus, "as a matter of constitutional due process, a guilty plea should not be accepted, and if accepted must be later set aside, unless the record shows affirmatively that the defendant entered the plea freely and understandingly." *Commonwealth v. Colon*, 439 Mass. 519, 526 (2003). It follows that "guilty

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).

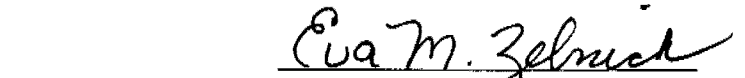
Beyond the lack of precedent or authority establishing the Special Magistrate's power to conduct bifurcated plea colloquies, this Office is concerned that the performance of such procedures is undoubtedly adjudicative in nature and therefore specifically beyond the scope of the Special Magistrate's Rule 47 enumerated powers. Moreover, the process is subject to at least the possibility of constitutional scrutiny, which may be heightened where the Special Magistrate is not required by the Rule or by the Order of Assignment to be either a lawyer or a judge.

Therefore, a clear ruling from this Court on the authority of the Special Magistrate to conduct these bifurcated plea colloquies is essential to insuring the finality of the sentences imposed, in protecting defendants' constitutional due process rights, and in furthering the interest of justice.

CONCLUSION

For the foregoing reasons, the Bristol County District Attorney's Office, as Amicus Curiae, respectfully requests that this Court grant the Commonwealth's petitions for relief.

Respectfully Submitted
For the Commonwealth
C. Samuel Sutter
District Attorney



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Dated: April 22, 2013

CERTIFICATION

As counsel for the Commonwealth, I certify that this brief complies with the rules of the court pertaining to the filing of briefs, including Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass R.A.P.16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h)(length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

COMMONWEALTH OF MASSACHUSETTS

Eva Zelnick

Eva Zelnick
Assistant District Attorney

April 19, 2013

Mass. General Laws, Chapter 12 § 12

§ 12. District Attorneys.

There shall be a district attorney for each district set forth in the following section, who shall be a resident therein and a member of the bar of the commonwealth and shall be elected as provided by section one hundred and fifty-four of chapter fifty-four. He shall serve for four years beginning with the first Wednesday of January after his election and until his successor is qualified.

The district attorney shall appear for a county constituting such district in all civil actions in which such county is a party under the provisions of chapter two hundred and fifty-eight

Mass. General Laws, Chapter 12 § 13

§ 13. Districts for Administration of Criminal Law and Civil Actions.

For the administration of the criminal law, or for the defense of civil actions brought pursuant to chapter two hundred and fifty-eight, Suffolk county shall constitute the Suffolk district; Middlesex county, the northern district; Essex county, the eastern district; Norfolk county, the Norfolk district; Plymouth county, the Plymouth district; Bristol county, the Bristol district; Barnstable, Nantucket and Dukes counties, the Cape and Islands district; Worcester county, excluding the town of Athol, the middle district; Berkshire county, the Berkshire district; Hampden county, the Hampden district; and Franklin county, including the town of Athol, and Hampshire county, the northwestern district.

Mass. General Laws, Chapter 12 § 27

§ 27. General Duties of District Attorneys.

District attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge, shall aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally; but the attorney general, when present, shall have the control of such cases. They may interchange official duties.

Mass. General Laws, Chapter 218 § 27A

§ 27A. Trial by Jury Sessions.

(a) **Every division of the district court department is authorized to hold jury sessions for the purpose of conducting jury trials of cases commenced in the several courts of criminal offenses over which the district courts have original jurisdiction under the provisions of**

section twenty-six. The Boston municipal court department shall also be authorized for the purpose of conducting jury trials in cases commenced in said department and for the purpose of conducting jury trials of cases commenced in the divisions of the district court department in Suffolk county.

(b) **The chief justice for the district court department shall designate at least one division in each county or an adjoining county for the purpose of conducting jury trials; provided, however, that jury trials in cases commenced in the courts within Suffolk county shall be held in the Boston municipal court department or district courts in Suffolk county or with the approval of the chief justice, may be held in such divisions of the district court department the judicial districts of which adjoin Suffolk county as are designated by said chief justice; and jury trials in cases commenced in the divisions for Dukes county and Nantucket county may be held in Barnstable county or Bristol county; and provided further that, with the approval of the chief justice for the superior court department, facilities of said superior court may be designated by the chief justice for administration and management of the trial court for jury trials in cases commenced in the district court department or in the Boston municipal court department. Jurors shall be drawn from the county in which trial is held.**

The chief justice of the district court department may also designate one or more divisions in each county for the purpose of conducting jury-waived trials of cases commenced in any court of said county consistent with the requirements of the proper administration of justice.

(c) **A defendant in any division of the district court who waives his right to jury trial as provided in section twenty-six A shall be provided a jury-waived trial in the same division.**

A defendant in any division of the district court who does not waive his right to jury trial as provided in section twenty-six A shall be provided a jury trial in a jury session in the same division if such has been established in said division. If such session has not been so established, the defendant shall be provided a jury trial in a jury session as hereinbefore designated. In cases where the defendant declines to waive the right to jury trial, the clerk shall forthwith transfer the case for trial in the appropriate jury session. Such transfer shall be governed by procedures to be established by the chief justice for the district court department.

(d) **The justice presiding over a jury session shall have and exercise all the powers and duties which a justice sitting in the superior court department has and may exercise in the trial and disposition of criminal cases including the power to report questions of law to the appeals court, but in no case may he impose a sentence to the state prison. No justice so sitting shall act in a case in which he has sat or held an inquest or otherwise taken part in any proceeding therein.**

(e) **Trials by juries of six persons shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all the defendants in the case entitled.**

(f) **For the jury sessions, jurors shall be provided by the office of the jury commissioner in accordance with the provisions of chapter two hundred and thirty-four A.**

(g) **The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in the trial of all cases in which the right to jury trial has not been waived and may appear in any other case. The chief justices for the district court department and the Boston municipal court department shall arrange for the sittings of the jury sessions of their respective departments and shall assign justices thereto, to the end that speedy trials may be provided. Review may be had directly by the appeals court, by appeals, report or otherwise in the same manner provided for trials of criminal cases in the superior court.**

(h) **The justice presiding at such jury session in the Boston municipal court department or district court department shall, upon the request of the defendant, appoint a stenographer; provided, however, that where the defendant claims indigency, such appointment is determined to be reasonably necessary in accordance with the provisions of chapter two hundred and sixty-one. Such stenographer shall be sworn, and shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice for the department where the case is tried; and provided, further, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and services of stenographers appointed for sessions in his department and any other matter relative to stenographers. The compensation and expenses of a stenographer shall be paid by the commonwealth.**

The request for the appointment of a stenographer to preserve the testimony at a trial shall be given to the clerk of the court by the defendant in writing no later than forty-eight hours prior to the proceeding for which the stenographer has been requested. In the Boston municipal court department or the district court department, the defendant shall file with such request an affidavit of indigency and request for payment by the commonwealth of the cost of the transcript and the court shall hold a hearing on such request prior to appointing a stenographer, in those cases where the defendant alleges that he will be unable to pay said cost. Said hearing shall be governed by the provisions of sections twenty-seven A to twenty-seven G, inclusive, of chapter two hundred and sixty-one, and the

cost of such transcript shall be considered an extra cost as provided therein. If the court is unable, for any reason, to provide a stenographer, the proceedings may be recorded by electronic means. The original recording of proceedings in the Boston municipal court department or the district court department made with a recording device under the exclusive control of the court shall be the official record of such proceedings. Said record or a copy of all or a part thereof, certified by the chief justices for the Boston municipal court department or the district court department, or his designee, to be an accurate electronic reproduction of said record or part thereof, or a typewritten transcript of all or a part of said record or copy thereof, certified to be accurate by the court or by the preparer of said transcript, or stipulated to by the parties, shall be admissible in any court as evidence of testimony given whenever proof of such testimony is otherwise competent. The defendant may request payment by the commonwealth of the cost of said transcript subject to the same provisions regarding a transcript of a stenographer as provided hereinbefore.

(i) **In any case heard in a jury session where a defendant is found guilty and placed on probation, he shall thereafter be supervised by the probation officer of the court in which the case originated, unless the trial justice shall order otherwise and unless the regulations of the commissioner of probation provide otherwise**

Mass. R. App. P. 6(b)(1)
Rule 6. Stay or Injunction Pending Appeal

(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

Mass. Rules Of Criminal Procedure Rule 12.

Rule 12. Pleas and Withdrawals of Pleas

(a) Entry of Pleas.

(1) Pleas Which May Be Entered and by Whom. A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18. Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) Admission to Sufficient Facts. In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts. 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.

(b) Plea Conditioned Upon an Agreement.

(1) Formation of Agreement; Substance. The defendant and defense counsel or the defendant when acting pro se may engage in discussions with the prosecutor as to any recommendation to be made to a judge or any other action to be taken by the prosecutor upon the tender of a plea of guilty or nolo contendere to a charged offense or to a lesser included offense. The agreement of the prosecutor may include:

(A) Charge Concessions.

(B) Recommendation of a particular sentence or type of punishment with the specific understanding that the recommendation shall not be binding upon the court.

(C) Recommendation of a particular sentence or type of punishment which may also include the specific understanding that the defendant shall reserve the right to request a lesser sentence or different type of punishment.

(D) A general recommendation of incarceration without regard to a specific term or institution.

(E) Recommendation of a particular disposition other than incarceration.

(F) Agreement not to oppose the request of the defendant for a particular sentence or other disposition.

(G) Agreement to make no recommendation or to take no action.

(H) Any other type of agreement involving recommendations or actions.

(2) Notice of Agreement. If defense counsel or the prosecutor has knowledge of any agreement that was made contingent upon the defendant's plea, he or she shall inform the judge thereof prior to the tender of the plea.

(c) Guilty Plea Procedure. After being informed that the defendant intends to plead guilty or nolo contendere:

(1) Inquiry. The judge shall inquire of the defendant or defense counsel as to the existence of and shall be informed of the substance of any agreements that are made which are contingent upon the plea.

(2) Recommendation as to Sentence or Disposition.

(A) Contingent Pleas. If there were sentence recommendations contingent upon the tender of the plea, the judge shall inform the defendant that the court will not impose a sentence that exceeds the terms of the recommendation without first giving the defendant to right to withdraw the plea.

(B) Disposition Requested by Defendant. In a District Court, if the plea is not conditioned on a sentence recommendation by the prosecutor, the defendant may request that the judge dispose of the case on any terms within the court's jurisdiction. The judge shall inform the defendant that the court will not impose a disposition that exceeds the terms of the defendant's request without first giving the defendant the right to withdraw the plea.

(3) Notice of Consequences of Plea. The judge shall inform the defendant on the record in open court:

(A) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(B) where appropriate, of the maximum possible sentence on the charge, and where appropriate, the possibility of community parole supervision for life; of any different or additional punishment based upon subsequent offense or sexually dangerous persons provisions of the General Laws, if applicable; where applicable, that the defendant may be required to register as a sex offender; and of the mandatory minimum sentence, if any, on the charge;

(C) that if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

(4) Tender of Plea. The defendant's plea or admission shall then be tendered to the court.

(5) Hearing on Plea; Acceptance. The judge shall conduct a hearing to determine the voluntariness of the plea or admission and the factual basis of the charge.

(A) Factual Basis for Charge. A judge shall not accept a plea of guilty unless the judge is satisfied that there is a factual basis for the charge. The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Upon a showing of cause the tender of the guilty plea and the acknowledgement of the factual basis of the charge may be made on the record at the bench.

(B) Acceptance. At the conclusion of the hearing the judge shall state the court's acceptance or rejection of the plea or admission.

(C) Sentencing. After acceptance of a plea of guilty or nolo contendere or an admission, the judge may proceed with sentencing.

(6) Refusal to Accept an Agreed Sentence Recommendation. If the judge determines that the court will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b)(1)(C) of this rule, an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), or a request for disposition in a District Court by the defendant under subdivision (c)(2)(B), after having informed the defendant as provided in subdivision (c)(2) that the court would not do so, the judge shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that the judge intends to exceed the terms of the plea recommendation or request for disposition and shall afford the defendant the opportunity to then withdraw the plea or admission. The judge may indicate to the parties what sentence the judge would impose.

(d) Deleted.

(e) Availability of Criminal Record and Presentence Report. The criminal record of the defendant shall be made available. Upon the written motion of either party made at the tender of a plea of guilty or nolo contendere, the presentence report as described in subdivision (d)(2) of Rule 28 shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation,

sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence

Mass. Rules Of Criminal Procedure Rule 30
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.

(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.

Mass. Rules Of Criminal Procedure Rule 31.

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.

Mass. Rules Of Criminal Procedure Rule 47.

Rule 47. Special Magistrates

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.