



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL  
ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY  
ATTORNEY GENERAL

(617) 727-2200  
(617) 727-4765 TTY  
[www.mass.gov/ago](http://www.mass.gov/ago)

April 22, 2020

**BY ELECTRONIC FILING AND EMAIL**

Francis V. Kenneally, Clerk for the Commonwealth  
Supreme Judicial Court  
John Adams Courthouse  
Boston, MA 02108

Re: No. SJC-12926, *Committee for Public Counsel Services, et al. v. Chief Justice of the Trial Court, et al.*

Dear Mr. Kenneally:

I write on behalf of the Attorney General's Office ("AGO") in response to petitioners' Motion for Reconsideration or Modification of Decision, filed on April 17, 2020 (the "Motion").<sup>1</sup>

The AGO has previously argued in its brief filed March 28, 2020, and its post-argument letter filed April 2, 2020, that a change to the 60-day time limit in Mass. R. Crim. P. 29, such that presently-incarcerated individuals could seek to revise and revoke their sentences due to the COVID-19 pandemic along the lines set forth in the Special Master's Report and Recommendation, would not offend the separation of powers. However, this Court did not agree with that view. *See slip op.* at 34-37.<sup>2</sup> Petitioners now urge that courts could invoke their inherent authority to stay sentences of incarcerated persons for similar reasons, relying on *Commonwealth v. Charles*, 466 Mass. 63 (2013). *See Motion* at 7-8.

For two reasons, the AGO believes that courts' inherent authority does not allow a stay of sentence in these circumstances, and therefore that the relief sought in section I of the Motion is not available. First, this Court's opinion in this case appears already to have foreclosed the possibility that such a stay might be proper. *See slip op.* at 34 (holding that "[o]ur broad power of superintendence over the courts does not grant us the authority to authorize courts to revise or revoke defendants' custodial sentences, to stay the execution of sentence, or to order their temporary release unless" Rule 29's terms are met, or there is a pending appeal or new trial motion) (emphasis added). Second, *Charles* authorized a stay only "pending the disposition of [the defendant's] motion for a new trial." 466 Mass. at 74. The Court held that "the interest of justice is not served by the

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<sup>1</sup> This letter is filed only on behalf of the Attorney General.

<sup>2</sup> In light of the Court's decision, the AGO concurs with the Chief Justice of the Trial Court that guidance on the application to motions for relief under Mass. R. Crim. P. 29 of paragraph 12 of this Court's Order of April 1, 2020, regarding the tolling of certain deadlines until May 4, 2020, would assist courts and litigants.

continued imprisonment of a defendant who *may be entitled to a new trial*,” *id.* (emphasis added), but the authority recognized in *Charles* does not extend to situations where no appeal, new trial motion, or other proceeding calling into question the validity of the original conviction is pending.

Petitioners also argue that constitutional claims raised in the as-yet undecided motion to intervene in this case (No. SJC-12926, dkt. #50), and in a separate action (*Foster v. Mici*, No. SJ-2020-212), justify stays of sentence “while the above actions are adjudicated.” Motion at 9-10. But we know of no authority holding that the mere filing of a motion to intervene could justify a stay of sentence, and entitlement to any relief pursuant to the claims raised in *Foster v. Mici* should be addressed in that case, not this one.

The AGO agrees that the relief sought in sections II-1 and II-2 of the Motion (pages 13-15) is warranted to expedite appropriate reduction in populations within jails, houses of correction, and prisons, to the extent that such relief is consistent with the AGO’s previously-stated position. *See* AG Br. 21 (“A detainee who has tested positive, or been deemed presumptively positive, for COVID-19 should not be released into the community without adequate provision for quarantine and medical care.”).<sup>3</sup> The AGO takes no position on the relief sought in section II-3 (pages 16-18).

Finally, petitioners apparently fault state and county officials for “rarely testing anyone” and for “burying [their] head[s] in the sand.” Motion at 6. The AGO agrees that the lack of widespread testing of inmates and staff in Massachusetts jails, houses of correction, and prisons is a serious problem, but the responsibility for that problem may not lie primarily with the administrators of those institutions. It is the AGO’s understanding that sufficient testing supplies are simply not available to undertake comprehensive surveillance of staff, inmates, and potential releasees for infection. This regrettable situation reflects the larger problem of an insufficient supply of COVID-19 tests in Massachusetts and other states, as has been widely reported in the press. *See, e.g.*, Rick Rojas, “‘Delusional’: Governors Reject Pence’s Claim on Virus Testing,” *New York Times*, Apr. 19, 2020, <https://www.nytimes.com/2020/04/19/us/coronavirus-governors-trump-tests.html> (“Governors facing growing pressure to revive economies decimated by the coronavirus said on Sunday that a shortage of tests was among the most significant hurdles in the way of lifting restrictions in their states.”). It is not clear how this problem can be solved in this litigation, but one step this Court should consider is to require regular reporting of the “[a]vailability of COVID-19 test kits, nasal swabs, thermometers, masks and gloves” at Massachusetts jails, houses of correction, and prisons, as recommended at page 9 of the Special Master’s Report and Recommendation.

I would appreciate your circulating this response to the Justices. Thank you for your assistance.

Yours sincerely,

/s/ David C. Kravitz

David C. Kravitz  
Deputy State Solicitor

cc: All counsel of record

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<sup>3</sup> With respect to the relief sought in section II-2, the AGO suggests that the Court clarify that the Commonwealth should respond to Rule 29 motions within 48 hours of receipt, or on the next business day following receipt, whichever is later.