

May 24, 2019

Christine P. Burak, Esq.
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Comments on Draft Order Governing Appeals from Convictions
of Murder in the First Degree

Dear Ms. Burak:

The undersigned four attorneys were invited by the Court to provide the perspective of the criminal appellate defense bar at the January 17, 2019 meeting with Chief Justice Gants, Justice Gaziano, retired Justice Botsford, Clerk Kenneally, and four representatives of the Commonwealth, as to the Court's concerns about delays in the disposition of first degree murder appeals. We are now jointly submitting these comments on the Draft Order.

At the outset, we reiterate the point we made at the January 17 meeting: we do not believe that any formal order needs to be issued by the Court at this time. The process that has been in place for the past year under the leadership of Justice Botsford and Clerk Kenneally has been largely fair and effective. Since the Draft Order envisions that there will continue to be a special master or single justice overseeing this process, we do not see a need for any additional formality. We therefore urge the Court not to issue any order at this time. But if there is to be an order, we suggest the following revisions.

Introduction, paragraph 3

The Draft Order refers to "the timely filing and adjudication of new trial motions," but nowhere in the Order is the adjudication of the motion discussed, nor are there any timeframes for such adjudication. We suggest that either "adjudication" be deleted or timeframes for the Commonwealth's response to the motion for new trial and disposition by the trial court be addressed in the Order.

(a) Special master or single justice.

Designating a sitting Justice to serve as the special master is problematic if counsel is expected to divulge confidential matters. There are three options: someone who is not a sitting Justice should be designated; or it should be stated that confidential matters are not expected to be disclosed; or the designated Justice should not sit on the panel assigned to hear the appeal. If the latter option is chosen, the assignment of a Justice should be on a rotating basis so that no one Justice is excluded from hearing all murder appeals.

(b) Time for filing motions for a new trial.

At the January 17 meeting, we suggested that 24 months would be a reasonable time in which a motion for new trial would normally be expected to be filed. Considering all the factors that can result in delays outside the control of defense counsel, such as the need for experts and investigators to complete their work or delays by the Commonwealth in complying with discovery requests, we believe that filing the motion within 18 months will too often be unachievable.

We also object to the standard for the special master to grant extensions being "based on a compelling showing of need." This is an unfamiliar standard, unlike "good cause," which appears later in the Order. If the intent is to establish a more stringent standard than "good cause," there is no justification for it. We urge substitution of "good cause" so as to avoid confusion and inconsistency.

(c) Status conferences.

As we stated at the January 17, 2019 meeting, we believe that the first reporting date should be at the six-month mark, not at four months. In few cases will there be sufficient information to report after four months, considering the time it will take to review the transcripts, which are usually very lengthy, visit with and confer with the defendant and trial counsel, conduct preliminary research, and give thoughtful consideration to whether there may be grounds for a motion for new trial.

We also believe that the initial report, whether at six months or four months, should be in the form of a written status report rather than an in-person conference. It does not seem likely in most cases that there will be enough information available to counsel at this first check-in date to warrant the expense and time it will take for defense counsel and counsel for the Commonwealth, many of whom would need to travel considerable distances, to attend a conference in person. In the alternative, a telephone conference should be sufficient.

(1) We do not believe that counsel for the defendant should be required to report at the four-month status conference "whether the defendant intends to file a motion for new trial." It will often be the case at that conference that counsel has not decided whether a new trial motion will be filed. In fact, under (c)(3), that decision is not expected until 12 months. We suggest substituting "whether the defendant is exploring possible grounds for a motion for new trial."

(2) If counsel for the Commonwealth will be attending the conference, this provision is very problematic. Counsel for the defendant should not be expected to divulge matters of strategy to counsel for the Commonwealth. Either such matters should be excluded from the conference or this part of the conference should be ex parte.

(3) The word "definitively" should be deleted. At 12 months, counsel should be able to report whether a motion for new trial is likely to be filed. But there are often matters outside counsel's control (e.g., missing discovery, incomplete work from experts and/or investigators) that will make it impossible to report this "definitively." We suggest substituting "shall report whether a motion for new trial is likely to be filed."

(d) Action on motions.

The Draft Order provides that the Court "ordinarily will not require briefs to be filed for the direct appeal until the motion has been decided in the Superior Court." We urge that the word "ordinarily" be deleted. We cannot foresee circumstances that would warrant ordering that the brief in the direct appeal be filed before litigation of the new trial motion is concluded if the motion was timely filed.

Thank you for providing us with this opportunity to bring our concerns to the Court's attention.

Very truly yours,



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