SJC-12949
SJC-12950
SJC-12955

COMMONWEALTH vs. CAMERON LOUGEE.
COMMONWEALTH vs. SHAMUS HORTON.
COMMONWEALTH vs. SCOTT SMITH.

Suffolk. June 3, 2020. - June 22, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Pretrial Detention. Due Process of Law, Pretrial detainees. Bail. Constitutional Law, Speedy trial. Practice, Criminal, Speedy trial.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on May 8, 2020.

The case was reported by Cypher, J.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on May 8, 2020.

The case was reported by Cypher, J.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on May 12, 2020.

The case was reported by Cypher, J.

Shoshana E. Stern & Catherine Langevin Semel, Assistant District Attorneys, & Andrea C. Harrington, District Attorney (Tara B. Ganguly, Assistant District Attorney, also present) for the Commonwealth.

Patrick Levin, Committee for Public Counsel Services, for Cameron Lougee.

Brian J. Anderson for Shamus Horton.

Joseph N. Schneiderman for Scott Smith.

Michael W. Morrissey, District Attorney, & Pamela Alford, Assistant District Attorney, for district attorney for the Norfolk district, amicus curiae, submitted a brief.

Reyna M. Ramirez & Christine Sunnerberg, pro se, amici curiae, submitted a brief.

GANTS, C.J. In response to the community spread of the COVID-19 pandemic in the Commonwealth, this court exercised its rule-making and superintendence authority to issue a series of emergency orders designed to protect the public health and reduce the spread of disease by minimizing the need for in-person proceedings at court houses. On March 13, 2020, we continued all criminal jury trials scheduled to commence in Massachusetts State courts to a date no earlier than April 21, and subsequent orders extended the continuance to a date no earlier than September 8, 2020.[1] We declared in each of these orders that the trial continuances serve the ends of justice and outweigh the best interests of the public and the criminal defendant in a speedy trial and that, therefore, the time

[1] On April 1, 2020, we also continued all criminal bench trials to a date no earlier than May 4, and subsequent orders extended the continuance to a date no earlier than July 1, unless the case could be tried virtually by agreement of the parties and the trial judge.

periods of such continuances shall be excluded from speedy trial computations under Mass. R. Crim. P. 36, 378 Mass. 909 (1979).

The issue presented in the three cases before us is whether the periods of delay resulting from continuances pursuant to our emergency orders should be excluded from the computation of statutory time limits on pretrial detention under G. L. c. 276, § 58A, which authorizes detention of a defendant found to be dangerous, or under G. L. c. 276, § 58B, which authorizes detention of a defendant who has violated a condition of pretrial release. In these three cases, judges in the trial court did not exclude such periods of delay from the computation of time limits under §§ 58A and 58B, and therefore concluded that these time limits had expired. As a result, defendant Cameron Lougee was released from pretrial detention under § 58A but held on bail; youthful offender Shamus Horton was released from pretrial detention under § 58A, subject to house arrest, a global positioning system (GPS) bracelet, and other conditions; and defendant Scott Smith was released from pretrial detention under § 58B. The Commonwealth challenged these rulings in petitions filed with a single justice of this court pursuant to G. L. c. 211, § 3, and the single justice reported the cases for consideration by the full court.

We hold that the periods of delay resulting from continuances in these cases, pursuant to our emergency orders,

should have been excluded from the computation of the time limits on pretrial detention under G. L. c. 276, §§ 58A and 58B. Both statutes provide that their respective time limits on pretrial detention must be computed "excluding any period of delay as defined in Massachusetts Rules of Criminal Procedure Rule 36(b)(2)." Rule 36 (b) (2), in turn, lists certain periods of delay that must be excluded from speedy trial computations under that rule, including "[a]ny period of delay resulting from a continuance granted by a judge . . . , if the judge granted the continuance on the basis of his [or her] findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial." Mass. R. Crim. P. 36 (b) (2) (F).

Ordinarily, it is a trial judge who orders a continuance, who determines whether the delay will be excluded from the speedy trial computation, and who makes the required findings under rule 36 (b) (2) (F). But here, immediate and uniform action across the entire court system was needed to prevent the spread of the coronavirus and to avoid the inefficiencies and inconsistencies that would have resulted if trial judges had to make a separate decision and findings in each case as to whether a trial should be continued due to the COVID-19 pandemic. It was therefore necessary and appropriate for this court to order that all trials be continued, to determine that the resulting

delay should be excluded from the speedy trial computation, and to make the required findings applicable to all cases. Because we determined that the time periods of these continuances are excludable for purposes of speedy trial computations under Mass. R. Crim. P. 36 (b) (2) (F), and because periods of delay that are excluded for purposes of speedy trial computations under Mass. R. Crim. P. 36 (b) (2) must also be excluded from the computation of time limits on pretrial detention under G. L. c. 276, §§ 58A and 58B, the time periods of these continuances must be excluded in computing the time limits on pretrial detention under §§ 58A and 58B.[2]

Background. 1. Supreme Judicial Court emergency orders. On March 13, 2020, this court issued an order regarding empanelment of juries (March 13 order) directing that, "to protect the public health by reducing the risk of exposure to the virus and slowing the spread of the disease . . . all jury trials, in both criminal and civil cases, scheduled to commence in Massachusetts state courts between the date of this order and April 17, 2020, are hereby continued to a date no earlier than April 21, 2020." The March 13 order further provided that "[t]he continuances occasioned by this Order serve the ends of

[2] We acknowledge the amicus letters submitted by the district attorney for the Norfolk district and by attorneys Reyna M. Ramirez and Christine Sunnerberg.

justice and outweigh the best interests of the public and the defendant in a speedy trial. Therefore, the time periods of such continuances shall be excluded from speedy trial computations under Mass. R. Crim. P. 36."

Since that March 13 order, we have issued three additional orders -- on April 1 (April 1 order), April 27 (April 27 order), and May 26 (May 26 order) -- that have further continued all criminal trials, including both jury and bench trials. Most recently, the May 26 order continued all criminal jury trials scheduled to commence at any time from March 14 through September 4, 2020, to a date no earlier than September 8, 2020, and continued all criminal bench trials scheduled to commence at any time from March 14 through June 30, 2020, to a date no earlier than July 1, 2020, unless the trial could be conducted virtually by agreement of the parties and the trial judge.

Like the March 13 order, the April 1 order, April 27 order, and May 26 order each stated that the continuances occasioned by these orders serve the ends of justice and outweigh the best interests of the public and criminal defendants in a speedy trial, and that, consequently, the time periods of these continuances should be excluded from speedy trial computations under Mass. R. Crim. P. 36.

2. Cameron Lougee. Cameron Lougee was arraigned in the District Court on March 27, 2019, on charges of forcible rape of

a child, in violation of G. L. c. 265, § 22A; rape of a child aggravated by a ten-year age difference, in violation of G. L. c. 265, § 23A; and indecent assault and battery on a child under the age of fourteen, in violation of G. L. c. 265, § 13B. The Commonwealth moved to have him held in pretrial detention due to dangerousness pursuant to G. L. c. 276, § 58A, and Lougee was held pending that hearing. After a § 58A hearing on April 18, 2019, a District Court judge found Lougee to be dangerous but determined that he could be released on $25,000 cash bail, with other conditions. Lougee was unable to post that amount and remained in pretrial detention.

Lougee was subsequently indicted for the same offenses by a grand jury on July 18, 2019, and arraigned in the Superior Court on September 5, 2019. After another § 58A hearing on September 9, 2019, a Superior Court judge found Lougee to be dangerous and ordered that he be held without bail.

Trial was scheduled for March 23, 2020. On March 6, 2020, Lougee filed a motion to continue the trial due to the unavailability of his expert witness. The motion was allowed over the Commonwealth's objection, and a new trial date was set for May 11, 2020.[3]

[3] The motion judge also ordered that the resulting period of delay should be excluded from the calculation of Lougee's speedy trial time under Mass. R. Crim. P. 36, 378 Mass. 909 (1979), and

On May 4, 2020, Lougee filed a "Motion to Release the Defendant from 58A Hold and Remit to Bail," which the Commonwealth opposed. At the hearing on this motion, which was conducted remotely, the judge calculated that the 180-day limit on Lougee's pretrial detention under G. L. c. 276, § 58A, would expire on May 15, 2020, unless the additional delay resulting from the continuance of Lougee's trial pursuant to this court's emergency orders was also excluded from that calculation. Following the hearing, the judge granted Lougee's motion, concluding that this court's emergency orders did not toll or extend the 180-day limit on Lougee's pretrial detention. The judge scheduled a bail hearing for May 15, when the pretrial detention under § 58A would end.

On May 8, 2020, the Commonwealth filed a petition with a single justice of this court pursuant to G. L. c. 211, § 3, seeking to vacate the Superior Court order. The single justice reserved and reported the case to the full court, but allowed the bail hearing to proceed. On May 15, a Superior Court judge set bail for Lougee at $75,000, with other conditions. Lougee was unable to post this amount, and he remains in pretrial detention.

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from the calculation of the 180-day limit on his pretrial detention under G. L. c. 276, § 58A (3).

3. Shamus Horton. Shamus Horton was indicted as a youthful offender for carrying a firearm without a license, G. L. c. 269, § 10 (a), and subsequently arraigned on the indicted charge on January 6, 2020. The Commonwealth moved for Horton to be held in pretrial detention under G. L. c. 276, § 58A, and after a § 58A hearing on January 9, he was found to be dangerous and ordered held without bail for 120 days.

On May 4, 2020, a Juvenile Court judge conducted a bail review hearing. The judge ruled that this court's emergency orders did not toll the time limits for pretrial detention under § 58A, and concluded that the 120-day limit on Horton's detention had expired. The judge then set bail in the amount of $500 and ordered other conditions of release, including house arrest and a GPS bracelet. On May 6, Horton was released after posting bail and being fitted with a GPS bracelet, and went to live with his grandfather under house arrest.

On May 8, 2020, the Commonwealth filed a petition with a single justice of this court under G. L. c. 211, § 3, claiming that the judge erred by finding that the emergency orders did not toll the time limits for pretrial detention. The single justice reserved and reported the case to the full court.

4. Scott Smith. On August 5, 2019, Scott Smith was arraigned in the District Court on charges of assault and battery on a household or family member, in violation of G. L.

c. 265, § 13M (a); and vandalism, in violation of G. L. c. 266, § 126A. After a hearing under G. L. c. 276, § 58A, he was found to be dangerous and ordered held without bail for 120 days. On December 2, 2019, after the period of pretrial detention had expired, Smith was released on conditions, including an order to stay away from the victim and her children and to wear a GPS bracelet.

On February 12, 2020, while Smith was awaiting trial, he was arraigned on a new charge that he allegedly committed while on bail release -- possession of a class B drug with intent to distribute, in violation of G. L. c. 94C, § 32A (a). Due to this new charge, the judge revoked Smith's bail on the pending assault and battery and vandalism charges, and trial on those charges was scheduled for April 27, 2020.

On May 11, 2020, a judge found that the ninety-day limit on Smith's pretrial detention under G. L. c. 276, § 58B, had expired, and the judge released Smith from custody. The following day, the Commonwealth filed a petition with a single justice of this court under G. L. c. 211, § 3, challenging the judge's finding that the ninety-day limit was not extended by the continuances arising from this court's emergency orders. The single justice reserved and reported the case to the full court.

Discussion. 1. Computation of time limits on pretrial detention under G. L. c. 276, § 58A. General Laws c. 276, § 58A, provides that, where a defendant has been charged with certain serious offenses, the Commonwealth may move to detain the defendant before trial due to his or her alleged dangerousness. G. L. c. 276, § 58A (1). If, after an evidentiary hearing, the judge finds by clear and convincing evidence that no conditions of release imposed on the defendant will reasonably assure the safety of any other person or the community, the judge must order the detention of the person prior to trial. G. L. c. 276, § 58A (3).

Section 58A (3) provides that a person detained under the statute "shall be brought to a trial as soon as reasonably possible, but in [the] absence of good cause, the person so held shall not be detained for a period exceeding 120 days by the district court or for a period exceeding 180 days by the superior court excluding any period of delay as defined in Massachusetts Rules of Criminal Procedure Rule 36(b)(2)." This single sentence makes four important statements that are the crux of these appeals. First, by stating in this sentence that persons held in pretrial detention "shall be brought to a trial as soon as reasonably possible," the Legislature declared its intent that pretrial detainees be given priority when there is a queue of criminal cases awaiting trial. See Abbott A. v.

Commonwealth, 458 Mass. 24, 36-37 (2010) ("Section 58A requires a speedy trial for a defendant or juvenile who is detained based on a finding of dangerousness . . ."). Second, this sentence sets a presumptive time limit for such cases to be brought to trial -- 120 days for cases in the District Court[4] and 180 days for cases in the Superior Court. Third, this sentence declares that the presumptive time limit may not necessarily be the actual time limit in any particular case, because the time limit excludes any period of delay listed in rule 36 (b) (2). Fourth, this sentence provides that, even when this time limit is reached, the Commonwealth still has the opportunity to forestall the defendant's release from pretrial detention if the Commonwealth can meet its burden of showing good cause for continued detention.

The periods of delay in Mass. R. Crim. P. 36, which § 58A (3) incorporates by reference, are the periods of delay

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[4] The 120-day limit on pretrial detention under G. L. c. 276, § 58A (3), in District Court cases also applies to cases in the Juvenile Court. See Abbott A. v. Commonwealth, 458 Mass. 24, 36-37 (2010) (applying former ninety-day limit for pretrial detention under § 58A in District Court cases to juvenile in Juvenile Court case); G. L. c. 218, § 59 ("Except as otherwise provided by law, the divisions of the juvenile court department shall have and exercise, within their respective jurisdictions, the same powers, duties, and procedure as the divisions of the district court department; and all laws relating to district courts or municipal courts in their respective counties or officials thereof or proceedings therein, shall, so far as applicable, apply to said divisions of the juvenile court department").

that are excluded from the computation of time by which a defendant must be brought to trial, known as our speedy trial rule. Rule 36 generally requires that a criminal defendant must be brought to trial within one year of arraignment. See Mass. R. Crim. P. 36 (b) (1) (C), (D); Commonwealth v. Graham, 480 Mass. 516, 522 (2018). But rule 36 (b) (2) lists certain periods of delay that "shall be excluded in computing the time within which the trial of any offense must commence." These periods of excludable delay include, among others, delay resulting from the physical examination of a defendant for mental competency or physical incapacity, delay arising from hearing and deciding pretrial motions or resolving interlocutory appeals, and delay arising from the absence or unavailability of the defendant or an essential witness. See Mass. R. Crim. P. 36 (b) (2) (A), (B), (C). The period of permissible delay most relevant to these appeals, set forth in rule 36 (b) (2) (F), provides for exclusion of "[a]ny period of delay resulting from a continuance granted by a judge on his [or her] own motion or at the request of the defendant or . . . the prosecutor, if the judge granted the continuance on the basis of his [or her] findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial."

Ordinarily, it is the trial judge who grants a continuance and who makes the findings required by rule 36 (b) (2) (F) to exclude the period of delay from the speedy trial computation and, where the defendant is detained awaiting trial, from the § 58A (3) computation. However, in our emergency orders, it was this court, not the trial judge, that ordered the continuance of trial under our superintendence authority, and it was we who made the global finding, applicable to all pending criminal cases in which defendants were awaiting trial, that the imperative need to protect the public health justified the continuances required by our emergency orders and outweighed the interests of the public and criminal defendants in a speedy trial. We therefore declared in our emergency orders that "the time periods of such continuances shall be excluded from speedy trial computations under Mass. R. Crim. P. 36." The reasons for these findings are set out in the prefatory language in our emergency orders, where we declared that we were acting "to protect the public health by reducing the risk of exposure to the virus and slowing the spread of the disease," March 13 order; "to reduce the number of people coming to Massachusetts State courthouses," April 1 order; and "[t]o safeguard the health and safety of the public and court personnel during the COVID-19 (coronavirus) pandemic," April 27 order and May 26 order.

Once we made these findings, it necessarily followed that the time periods of the continuances occasioned by our orders should also be excluded from the time limits on pretrial detention, because G. L. c. 276, § 58A (3), specifically provides that the time limits on pretrial detention are to be computed "excluding any period of delay as defined in [rule] 36(b)(2)." See Abbott A., 458 Mass. at 36-37 (where juvenile was incompetent to stand trial, and rule 36 [b] [2] excludes periods of delay resulting from defendant's incompetency from speedy trial computation, judge's ruling excluding that period of delay from computation of time limit on pretrial detention under § 58A [3] was "required by the language of the statute").

We are not persuaded by the contrary arguments of defense counsel. They point out that the relevant paragraphs in our emergency orders do not explicitly reference pretrial detention under § 58A, and that these paragraphs are labeled with the heading "Speedy Trial Computations" in our April 1, April 27, and May 26 orders. On that basis, they contend that our emergency orders were intended to exclude continuances required by these orders only for speedy trial computations under rule 36, but not for computations of the time limits on pretrial detention under § 58A. However, there was no need for us to reference § 58A specifically, because the statute automatically excludes periods of delay that are excluded from speedy trial

computations under rule 36 (b) (2). We did not intend to limit the exclusion of continuances under our emergency orders only to speedy trial computations.

Defense counsel also argue that the continuances occasioned by our emergency orders do not qualify as periods of delay as defined under Mass. R. Crim. P. 36 (b) (2) because rule 36 (b) (2) (F) requires the judge to "set[] forth in the record of the case, either orally or in writing, his [or her] reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial." They contend that this provision requires specific, individualized findings in each particular case.

We do not believe the language of rule 36 (b) (2) (F) compels such a narrow interpretation under the extraordinary circumstances presented here. Here, it was this court, not the trial judge, that ordered the trial continuances, and it was therefore this court that made the requisite speedy trial findings under rule 36 (b) (2) (F). Requiring each judge to make such findings in each individual case would have been inappropriate, where we, not the judge, ordered the continuance after having determined that "the ends of justice served by the granting of the continuance outweigh the best interests of the public and [every] defendant in a speedy trial." We conclude

that the findings requirement in rule 36 (b) (2) (F) has been adequately met by the statements of reasons in our emergency orders quoted supra, which are implicitly incorporated in each individual case where our emergency orders resulted in a trial continuance. See Graham, 480 Mass. at 528, quoting Commonwealth v. Davis, 91 Mass. App. Ct. 631, 637 n.11 (2017) (rule 32 [b] [2] [F] finding "need not be explicit, but may be implied from the record").[5]

We therefore conclude that periods of delay resulting from continuances in the cases of Lougee and Horton, due to our emergency orders, should have been excluded from the computation of the time limits on their pretrial detention under § 58A.[6]

2. Computation of time limits on pretrial detention under G. L. c. 276, § 58B. General Laws c. 276, § 58B, provides that

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[5] Defense counsel also cite Commonwealth v. Davis, 91 Mass. App. Ct. 631 (2017), in arguing that trial delays due to systemic problems should not be excluded under Mass. R. Crim. P. 36 (b) (2) (F), unless the judge makes specific findings in a particular case. But the trial delays in Davis were due to "court congestion," see id. at 633, and we have held that "normally court congestion is not a sufficient justification for the denial of the right to a speedy trial" unless the defendant has agreed to or acquiesced in the delay. Commonwealth v. Spaulding, 411 Mass. 503, 507 (1992).

[6] Because we conclude that the trial continuances mandated in our emergency orders constitute excludable delay, and that the time limits on pretrial detention under § 58A have therefore yet to expire for either Lougee or Horton, we need not address whether the exigencies arising from the COVID-19 pandemic would constitute good cause for their continued detention.

where a person on pretrial release has violated a condition of that release, e.g., by committing a new crime, the release may be revoked and the person may be subject to pretrial detention. Specifically, a defendant's release may be revoked where, after hearing, a judge makes two findings: (1) that there is probable cause to believe that a person on pretrial release has committed a new crime while on release, or clear and convincing evidence that the person has violated any other condition of release; and (2) that "there are no conditions of release that will reasonably assure the person will not pose a danger to the safety of any other person or the community" or "the person is unlikely to abide by any condition or combination of conditions of release." G. L. c. 276, § 58B. Section 58B further provides, "A person detained under this subsection . . . shall be brought to trial as soon as reasonably possible, but in the absence of good cause, a person so held shall not be detained for a period exceeding ninety days excluding any period of delay as defined in Massachusetts Rules of Criminal Procedure Rule 36(b)(2)." Except for the shorter, ninety-day time limit on pretrial detention under § 58B, this language is virtually identical to the provision that we have just reviewed in G. L. c. 276, § 58A (3). Our preceding analysis under § 58A (3) concerning the exclusion of periods of delay resulting from

continuances pursuant to our emergency orders is therefore equally applicable to § 58B.

Accordingly, we conclude that periods of delay resulting from continuances in Smith's case due to our emergency orders should have been excluded from the computation of the time limits on his pretrial detention under G. L. c. 276, § 58B.[7]

3. Requests for reconsideration. The extended length of pretrial detention arising from our emergency orders continuing all criminal and youthful offender trials, and from our declaration that the time periods of such continuances shall be deemed excludable delay, does not necessarily mean that all defendants will (or should) be detained for this extended time period. Our emergency orders specifically recognized that, where our orders resulted in the postponement of a trial, "where appropriate, a defendant may ask the court for reconsideration of bail or conditions of release."

Here, § 58A (4) specifically permits reconsideration of a prior detention order where there has been a material change in circumstances:

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[7] As we noted for the other cases supra, we need not address whether the exigencies arising from the COVID-19 pandemic would constitute good cause for Smith's continued detention, because we conclude that the trial continuances mandated in our emergency orders constitute excludable delay, and that the time limit on Smith's pretrial detention under § 58B has not yet expired.

> "The hearing may be reopened by the judge, at any time before trial, or upon a motion of the commonwealth or the person detained if the judge finds that: (i) information exists that was not known at the time of the hearing or that there has been a change in circumstances and (ii) that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community."

A substantial delay in the commencement of trial may constitute a change in circumstances, especially where the duration of pretrial confinement approaches or exceeds the length of sentence a defendant would be likely to receive if he or she were found guilty of the crimes charged. Cf. Brangan v. Commonwealth, 477 Mass. 691, 709-710 (2017) ("when a bail order comes before a judge for reconsideration or review and a defendant has been detained due to his [or her] inability to post bail, the judge must consider the length of the defendant's pretrial detention and the equities of the case").

A delay in trial may also result in other changed circumstances. For instance, the strength of the Commonwealth's case may have diminished if a key witness recanted his or her inculpatory statement, or if laboratory findings failed to confirm the defendant's participation in the crime, or if further investigation revealed exculpatory evidence or identified a potential third-party culprit. These changes in the strength of the evidence against the defendant are relevant to the nature and circumstances of the offense charged, another

factor to be considered in assessing whether a defendant may be safely released. See G. L. c. 276, § 58A (5).

Moreover, in Committee for Pub. Counsel Servs. (No. 1) v. Chief Justice of the Trial Court, 484 Mass. 431, 435 (2020) (CPCS v. Trial Court), we held that "the risks inherent in the COVID-19 pandemic constitute a changed circumstance within the meaning of G. L. c. 276, § 58, tenth par., and the provisions of G. L. c. 276, § 57." We recognized that "correctional institutions face unique difficulties in keeping their populations safe during this pandemic," because, among other reasons, "confined, enclosed environments increase transmissibility," and "[m]aintaining adequate physical distance . . . between oneself and others . . . may be nearly impossible," putting detainees at increased risk of death and serious illness while in custody. Id. at 436. Consequently, we concluded that all who were unable to make bail under §§ 57 and 58 could move for reconsideration. See id. at 447.

We did not state expressly that the risks inherent in the COVID-19 pandemic constitute a change in circumstances within the meaning of G. L. c. 276, § 58A (4), but we implicitly did so because we declared that pretrial detainees who had been found dangerous after a § 58A hearing were not entitled to the presumption of release given to those who were held on bail while awaiting trial on certain offenses. See id. at 435. Nor

were they entitled to the expedited hearing granted to those given a presumption of release. See id. at 447. By declaring that defendants detained under § 58A were entitled neither to the presumption of release nor to an expedited hearing, we implicitly recognized that they were equally entitled to move for reconsideration of their pretrial detention.

In Christie v. Commonwealth, 484 Mass. 397, 401 (2020), we concluded that it was error for a judge "not to reconsider the defendant's motion to stay execution of sentence in light of the rapidly changing situation arising from the COVID-19 pandemic." We also noted that, in deciding whether to grant a stay, a judge in ordinary times would consider the danger to other persons and the community arising from the defendant's risk of reoffense. Id. But "[i]n these extraordinary times, a judge deciding whether to grant a stay should consider not only the risk to others if the defendant were to be released and reoffend, but also the health risk to the defendant if the defendant were to remain in custody" (emphasis in original). Id. A judge ruling on a motion for reconsideration under § 58A (4) should similarly consider the health risks to the defendant in determining whether there are conditions of release that will reasonably assure the safety of any other person or the community.

Unlike § 58A, § 58B does not specifically authorize reconsideration. But neither does § 58B preclude

reconsideration, and therefore judges may exercise their inherent authority to reconsider pretrial detention orders under § 58B. See CPCS v. Trial Court, 484 Mass. at 450 ("As a general matter, Massachusetts courts have recognized that it is within the inherent authority of a trial judge to reconsider decisions made on the road to final judgment. While the Massachusetts Rules of Criminal Procedure do not expressly permit a judge to rehear a matter, no policy prohibits reconsideration of an order or judgment in appropriate circumstances" [quotations and citations omitted]). Compare Commonwealth v. Pagan, 445 Mass. 315, 317-322 & n.5, 324 (2005) (because G. L. c. 276, § 58, limits circumstances in which bail revocation order may be reviewed, District Court judge may not exercise inherent authority to vacate bail revocation entered by another judge under that statute).

4. Due process limitations. Defense counsel contend that, to the extent that the time limits on pretrial detention under G. L. c. 276, §§ 58A and 58B, are tolled indefinitely due to excludable delays under Mass. R. Crim. P. 36 (b) (2) arising from the COVID-19 pandemic, or whenever a defendant is held in custody beyond those time limits under the good cause exception, defendants are entitled to a hearing to consider whether their continued detention violates their constitutional rights to due process. Before the pandemic, and before this court took the

unprecedented step of continuing all trials because of the pandemic, we never declared an automatic entitlement to such a hearing where the time limits were extended due to excludable delay or the good cause exception. We see no reason to declare such an entitlement now, simply because the delay arises from a continuance ordered by this court for reasons of public health.

To be sure, we have recognized that due process imposes limitations on the length of time a person may be held awaiting trial. In upholding pretrial detention under § 58A in the face of a due process challenge, we emphasized that the detention is only "limited" and "temporary," Mendonza v. Commonwealth, 423 Mass. 771, 783, 790 (1996), and we have observed that this "justification for pretrial detention erodes the longer a defendant has been held," Brangan, 477 Mass. at 710.

We have also recognized in other contexts that when the period during which a defendant is held awaiting trial is indefinitely prolonged, due process may require a hearing to determine whether the length of pretrial detention has become unreasonable. For example, in Abbott A., 458 Mass. at 24-27, the juvenile's pretrial detention under § 58A, which had already lasted more than a year, was indefinitely prolonged due to his incompetency to stand trial. We held that, as a matter of due process, the juvenile was entitled to a hearing to determine whether there was a substantial probability that he would attain

competency in the foreseeable future, whether there was evidence that he was making progress, and whether the duration of his pretrial detention had become unreasonable, together with follow-up hearings every ninety days. Id. at 37-42. In Commonwealth v. G.F., 479 Mass. 180, 181-182 (2018), where the Commonwealth sought civilly to commit a convicted sex offender as a sexually dangerous person after his release from prison, the offender had been confined for nearly seven years awaiting final adjudication of the Commonwealth's petition because of three mistrials and other pretrial delay. We held that he was entitled as a matter of due process to a hearing to determine whether he could be released under supervision and other conditions that would reasonably protect public safety before his fourth sexually dangerous person trial. Id. at 196-201.[8]

We have not yet reached that point in the present cases, and there is good reason to believe we will not in the future. Recent data indicate continuing downward trends in the number of

[8] In an extreme case, where there is no reasonable prospect that the defendant's pretrial detention will come to an end, due process may require dismissal of the charges. See Sharris v. Commonwealth, 480 Mass. 586 (2018) (due process required dismissal of charges, including murder in first degree, where defendant had been held for more than twenty-three years awaiting trial because he was incompetent to stand trial, and there was no prospect that he would ever become competent).

new COVID-19 cases in the Commonwealth.[9] We have publicly declared that we hope to recommence jury trials in the fall of this year if we can do so safely in light of the pandemic. If we were to continue all jury trials for a far greater period of time, and extend the time limits for pretrial detention under §§ 58A and 58B by declaring the continuances to be excludable delay, we would certainly need to address the due process implications of such an extension. But we have yet to approach the length of delay that would trigger a due process analysis, and we fervently hope that we will not need to do so. Until that time comes, the remedy available to a defendant whose length of pretrial detention has been extended by our emergency orders is not a due process hearing but instead the individualized consideration provided by the trial court judge who decides a defendant's motion for reconsideration.

Conclusion. We declare that periods of delay resulting from trial continuances pursuant to our emergency orders should be excluded from the computation of the time limits on pretrial detention under G. L. c. 276, §§ 58A and 58B. We remand these cases to the single justice for entry of orders directing the lower courts to reconsider their prior orders releasing the

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[9] See Massachusetts Department of Public Health COVID-19 Dashboard, Dashboard of Public Health Indicators (June 17, 2020), https://www.mass.gov/doc/covid-19-dashboard-june-17-2020/download [https://perma.cc/Y2PA-HR7D].

defendants from detention under G. L. c. 276, §§ 58A and 58B, in light of this opinion.[10]

So ordered.

[10] Upon remand, the judges may return the defendants to pretrial detention under G. L. c. 276, § 58A (for Lougee and Horton) or 58B (for Smith), or reconsider the earlier detention orders.

LENK, J. (concurring). The court's understanding of the relevant paragraphs in our emergency orders is sensible, as is its explication of those paragraphs, and I agree with the court. Nonetheless, we should acknowledge with some humility that our orders were not as clear as they might have been, insofar as they did not explicitly reference pretrial detention under G. L. c. 276, §§ 58A and 58B. The court's analysis masterfully connects the dots between our emergency orders continuing certain trials, excluding the time periods of such continuances from speedy trial computations under Mass. R. Crim. P. 36, 378 Mass. 909 (1979), and excluding periods of delay resulting from such continuances from the computation of statutory time limits on pretrial detention. I had not previously considered this aspect of our orders, and I fully appreciate why three thoughtful trial court judicial colleagues concluded as they did. The court's clarification is welcome and necessary because, at least in my view, the result is not self-evident.