NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-13041

ROBERT LeSAGE, petitioner.

Suffolk. February 5, 2021. - August 10, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Sex Offender. Constitutional Law, Sex offender, Trial by jury, Speedy trial. Due Process of Law, Sex offender, Commitment. Practice, Civil, Sex offender, Jury trial, Civil commitment.

Petition filed in the Superior Court Department on July 9, 2015.

A motion for a jury-waived trial or release pending a jury trial, filed on July 13, 2020, was heard by Beverly J. Cannone, J.

A proceeding for interlocutory review was heard in the Appeals Court by Sabita Singh, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Mary P. Murray for the Commonwealth.
John S. Day for the petitioner.

CYPHER, J. The issue before us is whether, in proceedings pursuant to G. L. c. 123A, § 9 (§ 9), for discharge from civil

commitment as a sexually dangerous person, the Commonwealth's exercise of its statutory right to demand a jury trial constitutes a substantive due process violation in light of the suspension on jury trials because of the COVID-19 pandemic. The Commonwealth appeals from a Superior Court judge's order concluding that the Commonwealth's exercise of its statutory right to demand a jury trial violated the petitioner's substantive due process rights and allowing the petitioner's motion for a bench trial over the Commonwealth's objection. We conclude that the Commonwealth's exercise of its statutory right to demand a jury trial is narrowly tailored to its legitimate and compelling interest of protecting the public from sexually dangerous persons and that the delay resulting from the COVID-19 pandemic has not yet transformed the Commonwealth's exercise of this right into conduct that shocks the conscience. Accordingly, the judge erred in concluding that the petitioner's substantive due process rights were violated. We reverse.[1]

Background. Over a period of decades, the petitioner, Robert LeSage, sexually assaulted at least thirty children. In 1975, the petitioner repeatedly sexually assaulted a fourteen year old boy (victim). In 1976, he killed the victim after the victim threatened to reveal the sexual assaults to police. The

[1] Because we reverse, we need not address whether a virtual jury-waived trial would be lawful.

petitioner subsequently fled to Iowa and changed his name. There, he sexually assaulted several boys, including his stepson. He was arrested in Iowa in 1983, at which time he admitted to killing the victim.

The petitioner was returned to Massachusetts, where he pleaded guilty to offenses relating to the victim. The petitioner pleaded guilty to three counts of rape of a child under sixteen years of age and one count of manslaughter, reduced from a charge of murder in the first degree. He served concurrent sentences of from eighteen to twenty years. Near the end of the petitioner's prison sentence in March 2001, the Commonwealth moved to commit the petitioner as a sexually dangerous person. A jury unanimously found the petitioner to be a sexually dangerous person, and he was committed to the Massachusetts Treatment Center (treatment center). The petitioner previously has filed three petitions for discharge pursuant to § 9. In April 2006, the first petition was tried before a jury. The jury found that the petitioner remained sexually dangerous. Following the petitioner's appeal, the judgment was reversed and remanded for a new trial. See LeSage, petitioner, 76 Mass. App. Ct. 566, 572-573 (2010) (reversing judgment and remanding for new trial on ground that record failed to establish that testifying psychologist met statutory requirements for designation as qualified examiner). In 2011,

on retrial, a jury found that the petitioner remained sexually dangerous. See LeSage, petitioner, 88 Mass. App. Ct. 1116 (2015) (affirming after retrial). The petitioner withdrew a second petition before trial. He subsequently filed a third petition in 2012, after which a jury found that he remained sexually dangerous in May 2015.

On July 9, 2015, the petitioner filed the § 9 petition at issue in this proceeding. A jury trial in August 2018 resulted in a mistrial because the jury could not reach a verdict. The matter was scheduled for retrial in March 2020, but was continued indefinitely because of the COVID-19 pandemic and the resulting suspension of jury trials in Massachusetts.

The petitioner subsequently filed a motion for a bench trial or, in the alternative, release pending a jury trial. The Commonwealth opposed this motion. After a nonevidentiary hearing via video conferencing, a Superior Court judge granted the petitioner's motion to proceed with a bench trial over the Commonwealth's objection, holding that it was unconstitutional for the Commonwealth to exercise its right to demand a jury trial.

In January 2020, before the scheduled date of the retrial, the petitioner was evaluated by two qualified examiners pursuant to § 9. One of those examiners opined that the petitioner no longer is sexually dangerous, while the other opined that he

remains sexually dangerous. A community access board[2] (CAB), comprised of five licensed psychologists, unanimously opined that the petitioner remains sexually dangerous. The petitioner is eighty years old and suffers from serious health problems. He is unable to ambulate and uses a wheelchair.

The Commonwealth filed a petition in the Appeals Court pursuant to G. L. c. 231, § 118, appealing from the order and requesting that a single justice report this matter and stay the proceedings in the Superior Court or, in the alternative, vacate the Superior Court judge's order granting the petitioner's motion for a bench trial. The single justice granted the Commonwealth leave to file an interlocutory appeal from the Superior Court judge's order, ordered an expedited appeal, and stayed the Superior Court judge's order. The Commonwealth filed its notice of appeal, and we transferred the case to this court on our own motion.

Discussion. 1. Standard of review. On appeal, we review any conclusions of law de novo. See Kitras v. Aquinnah, 474 Mass. 132, 139, cert. denied, 137 S. Ct. 506 (2016). The motion

[2] Under G. L. c. 123A, § 6A, the community access board (CAB) must "conduct annual reviews of and prepare reports on the current sexual dangerousness of all persons at the treatment center, including those whose criminal sentences have not expired." The CAB consists of a panel of three Department of Correction employees and two psychologists appointed by the Commissioner of Correction. Id. See G. L. c. 123A, § 1; Johnstone, petitioner, 453 Mass. 544, 547-548 (2009).

judge's decision that it was unconstitutional for the Commonwealth to exercise its right to a jury trial in a § 9 proceeding during the COVID-19 pandemic is a conclusion of law, and accordingly, we review the decision de novo. See id.

2. The statute. We begin by providing background on the relevant statutory scheme. "Where the Commonwealth contends that a prisoner who was previously convicted of a qualifying sexual offense is a sexually dangerous person as defined in G. L. c. 123A, § 1, it may file a petition seeking to civilly commit the individual following his or her release from custody."[3] Chapman, petitioner, 482 Mass. 293, 299-300 (2019), citing G. L. c. 123A, § 12 (a)-(b). "The Legislature enacted G. L. c. 123A to protect the public from sex offenders who have

[3] Under G. L. c. 123A, § 1, a sexually dangerous person is defined as "any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of [sixteen] years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires."

a mental disease or defect and who, following expiration of their criminal sentences, may still pose a danger to the public and therefore may require commitment to the treatment center, where they may avail themselves of treatment for their disorders." Commonwealth v. Pariseau, 466 Mass. 805, 811 (2014). See Commonwealth v. Knapp, 441 Mass. 157, 159 (2004) (in enacting G. L. c. 123A, Legislature found "the danger of recidivism posed by sex offenders . . . to be grave and that the protection of the public from these sex offenders is of paramount interest to the government" [citation omitted]). Cf. Noe, Sex Offender Registry Bd. No. 5340 v. Sex Offender Registry Bd., 480 Mass. 195, 196 (2018) (sex offender registration law is "designed to protect the public from the danger of recidivism posed by sex offenders" [quotation and citation omitted]).

"The [sexually dangerous person] statute balances this public safety concern with specific provisions designed to protect a defendant's liberty interests." Pariseau, 466 Mass. at 811. The "primary objective" of G. L. c. 123A is "to care for, treat, and, it is hoped, rehabilitate the sexually dangerous person, while at the same time protecting society from this person's violent, aggressive, and compulsive behaviors." Sheridan, petitioner, 412 Mass. 599, 604 (1992). Commitment under G. L. c. 123A "is civil and rehabilitative in nature rather than criminal and punitive." Commonwealth v. Travis, 372

Mass. 238, 248 (1977). See Commonwealth v. Bruno, 432 Mass. 489, 500-501 (2000) (Legislature intended to establish remedial scheme, and scheme has not been shown to be so punitive as to negate Legislature's intent). See also Kansas v. Hendricks, 521 U.S. 346, 363 (1997) (indefinite detention is not punitive where it is done to further legitimate nonpunitive government objective, such as protecting public).

After the Commonwealth files a petition under G. L. c. 123A, § 12, seeking to commit an individual civilly following his or her release from custody, a judge must then determine whether probable cause exists to believe that the individual is sexually dangerous. See G. L. c. 123A, § 12 (c). After hearing, if a judge finds probable cause to believe that the individual is sexually dangerous, the individual shall be committed temporarily to the treatment center for examination and diagnosis by two qualified examiners[4] for a period not exceeding sixty days. See G. L. c. 123A, § 13 (a). Within forty-five days, the examiners must provide the judge with a written report opining whether the individual is sexually dangerous and should be committed to the treatment center. Id. The Commonwealth then has fourteen days to file a petition for

[4] A qualified examiner must be a licensed psychiatrist or psychologist who "has had two years of experience with diagnosis or treatment of sexually aggressive offenders and is designated by the commissioner of correction." G. L. c. 123A, § 1.

trial to determine whether the petitioner indeed is sexually dangerous.[5] See G. L. c. 123A, § 14 (a). Either party may demand that the case be tried by a jury. Id.

The individual remains confined to the treatment center through the duration of the trial. See id. If the jury unanimously find beyond a reasonable doubt that the individual is sexually dangerous, the person is committed to the treatment center for an indefinite term of between one day and the remainder of the person's natural life "until discharged pursuant to the provisions of [§] 9." G. L. c. 123A, § 14 (d).

At issue in this case is the application of § 9. Section 9 entitles any person who has been committed to the treatment center as a sexually dangerous person to file a petition for examination and discharge once every year. The Department of Correction also may file a petition at any time if it believes that a committed individual no longer is sexually dangerous. See G. L. c. 123A, § 9. A petitioner has a right to a speedy hearing. Id. Prior to the discharge hearing, the petitioner is again examined by two qualified examiners, who conduct

---

[5] A trial must be held within sixty days of the Commonwealth's filing of the petition for trial, unless good cause for delay is shown or justice so requires. See G. L. c. 123A, § 14 (a). In practice, it is rare that a trial takes place within sixty days. In many cases, a year or more may elapse before a trial is scheduled. See Chapman, petitioner, 482 Mass. 293, 301 (2019).

evaluations and report whether the petitioner remains sexually dangerous. See id. In the hearing, "either the petitioner or the commonwealth may demand that the issue be tried by a jury." Id. See Johnstone, petitioner, 453 Mass. 544, 548 (2009). For the Commonwealth to proceed to trial in a discharge proceeding under § 9, at least one of the two qualified examiners must opine that the petitioner remains sexually dangerous. See Johnstone, petitioner, supra at 553. See also G. L. c. 123A, § 9. If both qualified examiners recommend discharge, then the petitioner must be released. See Chapman, petitioner, 482 Mass. at 294; Johnstone, petitioner, supra at 545.

Unlike with the initial trial after a finding of probable cause, the statute provides no specific timeline under which a hearing or a discharge trial must be held. See Chapman, petitioner, 482 Mass. at 302 ("Although [§ 9] calls for a 'speedy hearing' on discharge petitions, it does not set a deadline to hold such a hearing"). In practice, it often takes years for a discharge petition to be scheduled for trial, "during which time the petitioner must remain civilly committed." Id. See Trimmer, petitioner, 375 Mass. 588, 590 (1978) (§ 9 "clearly does not set an express time limitation within which the court must hold a reexamination hearing"; rather, "[t]he one-year period . . . fixes a limitation on the

number of hearings which [a sexually dangerous person] may request").

The qualified examiners' reports, as well as the annual reviews by the CAB, are admissible at trial on the petition for discharge. G. L. c. 123A, § 9. Unless the trier of fact determines that the petitioner remains sexually dangerous, the petitioner must be discharged. See id.; Commonwealth v. Fay, 467 Mass. 574, 585 n.13, cert. denied, 574 U.S. 858 (2014) (on petition for discharge "Commonwealth must again prove [the petitioner's] dangerousness"); Commonwealth v. Nieves, 446 Mass. 583, 595 (2006) (on judicial review of petitioner's status, "Commonwealth must prove that [petitioner] continues to be a sexually dangerous person").

3. Substantive due process rights. "Substantive due process prohibits governmental conduct that 'shocks the conscience' or infringes on rights 'implicit in the concept of ordered liberty'" (citation omitted). Commonwealth v. G.F., 479 Mass. 180, 191 (2018). The right to be free from physical restraint is a "paradigmatic fundamental right." Knapp, 441 Mass. at 164. Civil confinement "implicates a liberty interest, and therefore, due process protections apply." Pariseau, 466 Mass. at 808, quoting Commonwealth v. Blake, 454 Mass. 267, 276-277 (2009) (Ireland, J., concurring). Accordingly, we "must examine carefully the importance of the governmental interests

advanced and the extent to which they are served by the challenged regulation." Bruno, 432 Mass. at 503, quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

Government conduct that infringes on a fundamental right is subject to strict scrutiny. See Bruno, 432 Mass. at 503. To comply with the requirements of substantive due process and satisfy strict scrutiny, government conduct that infringes on a fundamental right must be narrowly tailored to further a compelling and legitimate government interest. See Matter of E.C., 479 Mass. 113, 119 (2018); Aime v. Commonwealth, 414 Mass. 667, 673 (1993). "[W]e . . . go beyond the language of the statute to determine whether its apparent intent is constrained by the requirements of due process under the State or Federal Constitutions." Sheridan, petitioner, 422 Mass. 776, 778 (1996).

"Civil commitment of people who potentially pose a threat to public safety does not violate substantive due process, as long as that commitment takes place according to proper procedures and evidentiary standards." G.F., 479 Mass. at 196. Here, we conclude that the government's exercise of its statutory right to a jury trial, even in the context of the COVID-19 pandemic, has not infringed upon the petitioner's fundamental right to be free from restraint. The delay caused by the pause on jury trials has not yet transformed the

Commonwealth's exercise of this statutory right into conduct that shocks the conscience.

a. Legitimate government interest. It is well settled that the government has both a legitimate and compelling interest at stake in "protect[ing] the public from harm by persons likely to be sexually dangerous." Knapp, 441 Mass. at 164. See G.F., 479 Mass. at 192 ("[I]t is beyond question that [the Commonwealth] has a compelling interest in protecting the public from sexually dangerous persons" [citation omitted]); Bruno, 432 Mass. at 504 (requirements of G. L. c. 123A "reflect the Legislature's concern with protecting the public from harm by persons who are soon to be released and who are likely to be sexually dangerous"). We now consider whether the Commonwealth's exercise of its statutory right to demand a jury trial is narrowly tailored to furthering this interest given the delay in jury trials caused by the COVID-19 pandemic. We conclude that it is.

b. Extent to which jury trial furthers government interest. The motion judge concluded that the Commonwealth's interest in a jury trial does not sufficiently outweigh the petitioner's interest in a swift trial and possible release. The motion judge further concluded that it is the Commonwealth, not the public, that has an interest in the case being heard by a jury. On appeal, the Commonwealth contends that juries play

an important function in deciding whether individuals continue to pose a danger to the public and whether confinement for treatment is required. The Commonwealth further argues that the Legislature recognized as much when it amended G. L. c. 123A to include a statutory right to a jury trial after this court held that a petitioner has no constitutional right to a jury trial in the context of a civil commitment. See Gagnon, petitioner, 416 Mass. 775, 778 (1994).

The petitioner argues that although the Commonwealth has a compelling interest in maintaining public safety, the Commonwealth's insistence on a jury trial does not serve this interest. Specifically, he reiterates the motion judge's reasoning that a jury trial would not serve the public's interest in accurate outcomes because a bench trial would be equally fair and accurate. The petitioner further argues that if a jury trial were necessary to protect the public, the Legislature would have mandated jury trials in this context, as it did for capital cases.[6]

---

[6] Under G. L. c. 263, § 6, the Legislature has excepted capital cases from those in which a defendant may opt to waive a jury trial: "Any defendant in a criminal case other than a capital case . . . may . . . waive his right to trial by jury . . . ." We have concluded that it is reasonable for the Legislature to treat defendants in capital cases differently from other defendants because a conviction of murder in the first degree carries a uniquely severe penalty. See Commonwealth v. Francis, 450 Mass. 132, 135 (2007), S.C., 477 Mass. 582 (2017). See also Commonwealth v. Waweru, 480 Mass.

We agree with the Commonwealth that juries play an important function in deciding whether individuals previously found to be sexually dangerous continue to pose a danger to the public and whether confinement for treatment is required. Indeed, the role juries play in c. 123A proceedings is similar to the role that juries play in criminal proceedings. See Pariseau, 466 Mass. at 812 (judge may look to criminal context, although not controlling, for guidance in civil commitment cases). Both this court and the United States Supreme Court have recognized the important role juries play in our criminal justice system.

"[T]he public has an interest in having a criminal case heard by a jury, an interest distinct from the defendant's interest in being tried by a jury of his [or her] peers." Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979). The Supreme Court has long recognized society's interest in a jury trial. Patton v. United States, 281 U.S. 276, 311 (1930). "[T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment."

173, 193 (2018) (prohibiting defendants in capital cases from waiving their right to jury trial is policy matter suitable for legislative consideration).

Humphrey v. Cady, 405 U.S. 504, 509 (1972). We similarly have recognized that juries act as the "repository of the community's conscience." Commonwealth v. Connolly, 356 Mass. 617, 628, cert. denied, 400 U.S. 843 (1970). See Commonwealth v. Howard, 469 Mass. 721, 750 (2014), S.C., 479 Mass. 52 (2018), quoting Commonwealth v. McDermott, 393 Mass. 451, 458 (1984) ("[t]he jury should reflect the community's conscience in determining what constitutes an extremely cruel or atrocious killing").

A defendant in a Federal criminal case does not have a constitutional right to a bench trial. See Singer v. United States, 380 U.S. 24, 36 (1965). Similarly, a defendant in a capital case under Massachusetts law has no right to a bench trial. See G. L. c. 263, § 6. This court has upheld G. L. c. 263, § 6, on equal protection and due process challenges, reasoning that the Legislature reasonably concluded that a jury, as the "conscience of the community, rather than one person," should make decisions when a person's life is at stake. See Commonwealth v. Francis, 450 Mass. 132, 135-136 (2007), S.C., 477 Mass. 582 (2017).

We recognize that, unlike defendants in capital cases, a petitioner in a § 9 proceeding does not have a constitutional right to a jury trial. See Gagnon, petitioner, 416 Mass. at 778. This is because a sexually dangerous person's commitment is not criminal or penal in nature. See id. Instead, the

statute "was enacted 'with the dual aims of protecting the public against future antisocial behavior by the offender, and of doing all that can be done to rehabilitate him [or her].'" Commonwealth v. Barboza, 387 Mass. 105, 111, cert. denied, 459 U.S. 1020 (1982), quoting Commonwealth v. Knowlton, 378 Mass. 479, 483 (1979).

Although a petitioner does not have a constitutional right to a jury trial, both parties, as discussed supra, have a statutory right to demand a jury trial pursuant to § 9. This is because many of the concerns that exist in a criminal proceeding exist in the civil commitment context. Relevant here is the jury's role in protecting the public interest by acting as the community's conscience. The public's interest in jury trials is protected only by the government's ability to demand a jury trial over the petitioner's objection. We therefore conclude that the Commonwealth's exercise of its statutory right to a jury trial advances the Commonwealth's legitimate and compelling interest of protecting the public.

We are not persuaded by the petitioner's argument that a bench trial is required in the current circumstances because the Legislature has not mandated jury trials. Although the statute allows for bench trials, this is by no means "an implied exclusion" of jury trials where the statute also explicitly gives both parties the right to demand a jury trial. Skawski v.

Greenfield Investors Prop. Dev. LLC, 473 Mass. 580, 588 (2016), quoting Bank of Am., N.A. v. Rosa, 466 Mass. 613, 619 (2013). See Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 124 (2006) ("Statutory language should be given effect consistent with its plain meaning. Where, as here, that language is clear and unambiguous, it is conclusive as to the intent of the Legislature").

Moreover, a lack of a constitutional right to a jury trial does not foreclose a statutory right to a jury trial. In Barboza, 387 Mass. at 113 n.6, although we concluded that the petitioner did not have a constitutional right to a jury trial, we did not examine whether he had a statutory right to a jury trial. That a jury trial is not required constitutionally in a § 9 proceeding does not diminish the Commonwealth's statutory right to demand a jury trial nor does it have any impact on our analysis whether the Commonwealth's exercise of this right violates due process in these circumstances. To the contrary, the Legislature's act of amending the statute in 1994 to give both the Commonwealth and the petitioner the right to demand a jury trial suggests its recognition of the critical role a jury plays in § 9 discharge petitions, despite the lack of a constitutional requirement. See G. L. c. 123A, § 9. Indeed, the day after we decided the Gagnon case, in which we held that

a petitioner has no constitutional right to a jury trial in a § 9 discharge proceeding, the Legislature amended the statute to allow the Commonwealth and the petitioner to demand a jury trial. See G. L. c. 123A, § 9, as appearing in St. 1993, c. 489, § 7 (approved January 14, 1994, and effective April 14, 1994).

c. Extent to which the Commonwealth's exercise of its right to a jury trial is narrowly tailored. We now consider whether the Commonwealth's exercise of its statutory right to a jury trial, when COVID-19 has temporarily paused all jury trials in Massachusetts, is narrowly tailored to furthering the government's compelling and legitimate interest in protecting the public. The motion judge concluded that, given the delay, the Commonwealth's invocation of its statutory right was not narrowly tailored to further its interests. The judge reasoned that the Commonwealth "holds all the cards" in terms of prolonging the delay in light of the petitioner's waiver of a jury trial. This, the judge concluded, shocks the conscience, such that the petitioner's substantive due process rights have been violated.

The Commonwealth argues that the judge erred because, where the Commonwealth is not at fault for the delay and where its insistence on a jury trial is guaranteed by statute and reflects public safety interests recognized by the Legislature, its

exercise of the right to demand a jury trial is not "egregiously unacceptable, outrageous, or conscience-shocking." Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991). The petitioner counters that the Commonwealth's exercise of its right to demand a jury trial is not narrowly tailored to protect the petitioner's fundamental liberty interest in timely adjudication of his petition because of the COVID-19 pause on jury trials.

First, we note that in making this argument, the petitioner conflates the interests at stake in the strict scrutiny test. The Commonwealth's exercise of its right to demand a jury trial must be narrowly tailored to its legitimate interest of protecting the public, not to the petitioner's right to a timely adjudication of his petition. We balance the delay, and the resulting liberty deprivation to the petitioner, against these government interests. The length of the delay, although important, is only part of the due process consideration.

There is no question that absent the circumstance of the COVID-19 pandemic, the Commonwealth's exercise of its statutory right to demand a jury trial is narrowly tailored to furthering its legitimate interest in protecting the public. The petitioner has been found to be sexually dangerous beyond a reasonable doubt three times, most recently in May 2015. The Commonwealth has a strong interest in retrying the petitioner

and doing so in front of jurors that serve as the conscience of the community. We "shall not override the legislative mandate without a compelling constitutional basis." Sheridan, petitioner, 422 Mass. at 780.

Accordingly, we focus our analysis on whether the length of the delay caused by the pandemic has reached an extent that "shocks the conscience" such that the Commonwealth's exercise of its right to demand a jury trial is no longer narrowly tailored to its legitimate interest. See Fay, 467 Mass. at 583. We conclude that although some length of delay ultimately would shock the conscience, the delay resulting from the pandemic has not yet risen to the level of a due process violation. The petitioner filed the petition at issue in 2015. The Commonwealth demanded a jury trial, which ended in a mistrial as a result of a deadlocked jury in August 2018. The trial was rescheduled for March 2020, and on that date it was postponed due to the COVID-19 pandemic. On July 13, 2020, the petitioner filed a motion for a bench trial or, alternatively, release pending a jury trial. Although this petition had been filed in 2015, and the petitioner has been committed to the treatment center for approximately six years, the delay at issue is limited to the thirteen-month period from July 2020, when the petitioner asserted his due process rights and moved for a bench trial, until now. The petitioner did not contest the delay on

due process grounds before this. See Commonwealth v. DeBella, 442 Mass. 683, 690-691 (2004) (petitioner cannot claim prejudice suffered from delays when he or she has caused or acquiesces in delays).

The government's conduct, in this case, is not "in and of itself . . . egregiously unacceptable, outrageous, or conscience-shocking." Amsden, 904 F.2d at 754. It is the COVID-19 pandemic that is responsible for the delay at issue here, not the Commonwealth. See Desrosiers v. Governor, 486 Mass. 369, 378 (2020) (COVID-19 is naturally caused). To date, this court has concluded that delays due to the pandemic uniformly are to be excluded from statutory time limits on pretrial detention under G. L. c. 276, §§ 58A and 58B,[7] as well as speedy trial computations under Mass. R. Crim. P. 36 (b) (2), 378 Mass. 909 (1979). See Commonwealth v. Lougee, 485 Mass. 70, 72-73 (2020) ("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

[7] A criminal defendant may be subject to pretrial detention under G. L. c. 276, § 58A (3), if a judge finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of the victim and the community. Similarly, under G. L. c. 276, § 58B, a defendant on pretrial release may have his or her release revoked if a judge finds that there is probable cause to believe the defendant committed a new crime, or clear and convincing evidence that the defendant violated the terms of release, and that no conditions of release will assure the safety of the community.

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"). In these circumstances, "trial continuances serve the ends of justice and outweigh the best interests of the public and the criminal defendant in a speedy trial." Id. at 71. This same reasoning applies to § 9 petitions.

In G.F., 479 Mass. at 181-182, we considered a substantive due process challenge from an individual who had been committed to the treatment center for nearly seven years, based only on a finding of probable cause under G. L. c. 123A, § 12 (c), after three mistrials. There, we concluded that it was not a substantive due process violation for the Commonwealth to pursue a fourth trial. See id. We reasoned that a mistrial does not indicate a failure of proof and that, given the possibility of the risk to public safety, the Commonwealth's decision to retry the individual for a fourth time was not an arbitrary use of government power. See id. at 192. However, we concluded that due process demanded that the individual be afforded an opportunity to seek supervised release before the fourth trial. Id. at 190. We reasoned that the individual's continued confinement, "without a finding of sexual dangerousness beyond a reasonable doubt," violated his substantive due process rights. Id.

Unlike in G.F., this petitioner has been found to be sexually dangerous beyond a reasonable doubt three times. Further, the relevant period of commitment in this case, thirteen months, is far less than the seven years that the individual was held in G.F. See id. at 181-182. One mistrial does not suggest that the petitioner is no longer sexually dangerous. See id. at 192. Compare Bruno, 432 Mass. at 504 (upholding temporary confinement of individual accused of being sexually dangerous prior to finding of probable cause). The rule we established in G.F. that "[i]n the event of a mistrial, an individual who is the subject of [a sexually dangerous person] petition may seek release under the supervision of the Department of Probation pending retrial" applies where a petitioner has been committed based only on a finding of probable cause. Id. at 197. In G.F., we specifically reasoned that "[w]hile substantive due process permits limited confinement after a probable cause determination, it does not permit the Commonwealth to hold an individual indefinitely while repeatedly seeking a finding of sexual dangerousness" (emphasis added). Id. at 196. Accordingly, continuing commitment after a single mistrial where the petitioner previously has been found sexually dangerous three times does not violate the petitioner's due process rights and does not require that the petitioner be given the opportunity to seek release pending trial.

Nonetheless, we acknowledge that the constitutionality of the ongoing civil commitment rests on the individual being currently sexually dangerous and having the opportunity periodically to seek release on the ground that the individual is no longer sexually dangerous. See Pariseau, 466 Mass. at 813; Trimmer, petitioner, 375 Mass. at 591 (purpose of permitting petitions for discharge is to provide periodic redetermination whether person is sexually dangerous and to ensure early release as soon as petitioner is no longer sexually dangerous). A "petitioner who suffers a significant delay in receiving a hearing may have an as-applied due process challenge to [§ 9], as such delay could conceivably stress the petitioner's right to avoid incarceration past the point of his or her dangerousness." Dutil v. Murphy, 550 F.3d 154, 162 n.7 (1st Cir. 2008), cert. denied, 556 U.S. 1213 (2009).

In the event that the petitioner's trial is delayed for a more significant period of time, our due process balancing may tilt in favor of the petitioner. At a certain point, as in G.F., due process would require that the petitioner be given the opportunity to seek supervised release while waiting for trial.[8]

[8] At this time, the Superior Court judge would be obligated "to conduct a hearing to determine, by clear and convincing evidence, whether there are conditions under which [the petitioner] may be released pending his retrial. He must be released unless the Superior Court judge determines, by clear and convincing evidence, that no conditions can reasonably

We have not yet reached that point. We are guided by our decision in Lougee, 485 Mass. at 83-84, that hearings were not required, as a matter of due process, to determine whether pretrial detainees could be released under supervision or other conditions. Compare G.F., 479 Mass. at 197 (due process required hearing for person civilly committed for seven years pending finding of sexual dangerousness beyond reasonable doubt).

There, we concluded that "[b]efore 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." Lougee, 485 Mass. at 83. The same is true here, in the case of a § 9 discharge proceeding. As discussed supra, "in practice it often takes years for a § 9 petition for discharge to be scheduled for trial, during which time the petitioner must remain civilly committed." Chapman, petitioner, 482 Mass. at 302. The length of the delay in this case is not out of the ordinary, and the petitioner is not entitled to a hearing simply

---

ensure public safety." Commonwealth v. G.F., 479 Mass. 180, 203 (2018).

because the delay arises from a continuance ordered by this court for reasons of public health.

When Lougee was decided in June 2020, jury trials were scheduled to resume in the fall of that year. We reasoned that unless jury trials were extended for "a far greater period of time," it would not be necessary to address the due process implications of the delay. See Lougee, 485 Mass. at 84. Subsequently, jury trials were delayed further. On May 1, 2021, however, the resumption of jury trials, including with juries of six and twelve, commenced, and as of this opinion, there are no further restrictions related to COVID-19 on where and how such trials are conducted. Our most recent order regarding court operations under the exigent circumstances created by the COVID-19 pandemic specified that "priority should continue to be given to trials in criminal and youthful offender cases and sexually dangerous person cases under G. L. c. 123A where, as applicable, the defendant, the juvenile, the person who filed the petition pursuant to [§ 9] or the person named in the petition filed pursuant to [G. L. c. 123A, § 12,] is in custody," and indeed, a jury trial in this case has now been scheduled for September 20, 2021. It has not yet been "a far greater period of time," and we need not revisit our conclusions in Lougee at this time.[9]

[9] We recently revisited our holding in Commonwealth v. Lougee, 485 Mass. 70, 84 (2020), in the context of a defendant

Given our most recent order and the progress of vaccination in the Commonwealth, we have good reason to believe that the delay in this case will not reach the point at which due process requires a hearing.

Conclusion. The Commonwealth's exercise of its statutory right to demand a jury trial, although a cause of delay in light of the pandemic, is narrowly tailored to further its compelling interest of protecting the public. Accordingly, we reverse the judge's order allowing the petitioner's motion for a bench trial

---

appealing from various orders regarding his pretrial detention status. See Mushwaalakbar v. Commonwealth, 487 Mass. 627, 632 (2021). In Mushwaalakbar, we recognized that "[a]lthough delays due to the COVID-19 pandemic constitute excludable delay under [G. L. c. 276,] § 58A, see Lougee, [supra] at 72, the prolonged length of the delay may, in some cases, upset the careful balancing prescribed by the Legislature in § 58A." Id. We remanded the case for a determination whether the defendant's continued pretrial confinement violates due process. Id. at 634. We further recognized that "[t]here is no bright-line limit to the permissible length of a pretrial detention, and thus judges must assess the permissible length of detention on a case-by-case basis." Id. at 633. The facts in Mushwaalakbar are distinguishable from the facts here. There, the defendant had been held past his parole eligibility date if he were to be convicted and receive concurrent maximum sentences. Id. at 628, 629. Further, the Commonwealth answered not ready for trial and filed a motion for the alleged victim's medical records at the last court date. Id. 637. Here, the thirteen-month delay is solely a result of the COVID-19 pandemic. The petitioner is not held only on a finding of probable cause but rather has already been found sexually dangerous three times. Additionally, jury trials have now resumed, both parties are ready for trial, and the Superior Court has ordered that § 9 trials take priority over other civil cases. After a fact-specific analysis, we conclude that the petitioner's due process rights have not been violated.

over the Commonwealth's objection and remand the case for further proceedings consistent with this opinion.

So ordered.