SJC-12976
SJC-12990

COMMONWEALTH vs. DANIEL A. NASH.
COMMONWEALTH vs. JOSEPH ELIBERT.

Plymouth. Suffolk. September 9, 2020. - December 14, 2020.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Practice, Criminal, Sentence, Execution of sentence, Stay of proceedings.

Indictments found and returned in the Superior Court Department on April 4, 2014.

A motion for a stay of execution of sentence, filed on April 9, 2020, was heard by Robert B. Gordon, J.; and a motion to revoke the stay of execution of sentence was heard in the Appeals Court by Gabrielle R. Wolohojian, J.

The Supreme Judicial Court granted an application for direct appellate review.

Indictments found and returned in the Superior Court Department on August 7, 2014.

A motion for a stay of execution of sentence, filed on April 6, 2020, and a motion for reconsideration were heard by Jeffrey A. Locke, J.; and a second motion for a stay of

[1] Justice Lenk participated in the deliberation on these cases prior to her retirement.

execution of sentence was heard in the Appeals Court by Sookyoung Shin, J.

The Supreme Judicial Court granted an application for direct appellate review.

Rosemary Curran Scapicchio for Daniel A. Nash.
David Rassoul Rangaviz, Committee for Public Counsel Services, for Joseph Elibert.
Jennifer L. Sprague & Erin D. Knight, Assistant District Attorneys, for the Commonwealth.

CYPHER, J. We have before us two cases in which the defendants have sought stays of execution of their sentences pending appeal. In Daniel Nash's case, the trial judge granted a stay, which a single justice of the Appeals Court, on the Commonwealth's request, then vacated. In Joseph Elibert's case, the trial judge granted a stay but later revoked it on his own initiative, and a single justice of the Appeals Court upheld the latter order. In each case, the defendant appealed to a panel of the Appeals Court from the single justice's ruling.

We transferred the cases here so that we could address a variety of issues concerning stays of sentences pending appeal, including, among others, the important and recurring question of how judges who are faced with requests for stays ought to weigh the COVID-19 pandemic as a factor in determining whether a stay is appropriate in any given case. Recently, in Christie v. Commonwealth, 484 Mass. 397, 401-402 (2020), we held that the pandemic is a factor for judges to consider when ruling on

requests for stays. In the cases now before us, we provide additional guidance as to how, specifically, that factor ought to be taken into account.

Background. We set forth the basic facts and the procedural background of each case, reserving additional details for the discussion section of the opinion.

1. Nash's case. Nash was convicted in December 2018 of two counts of rape (G. L. c. 265, § 22) and one count each of indecent assault and battery on a person age fourteen or older (G. L. c. 265, § 13H) and secretly recording a person who is nude or partially nude (G. L. c. 272, § 105 [b]). The victim was his future sister-in-law. He raped her vaginally and anally while she was intoxicated and unconscious and recorded the events with the camera on his cellular telephone (cell phone). He was sentenced to two concurrent terms of from five to seven years in State prison for the rapes; a term of two and one-half years in a house of correction for the indecent assault and battery, to run from and after the sentences for the rapes, suspended for two years; and a three-year term of straight probation, with various conditions, for the illegal recording, to run from and after the sentences for the rapes.

Nash appealed to the Appeals Court from his convictions, and in April 2020, soon after we issued our decision in Christie, 484 Mass. 397, he moved for a stay of his sentences

pending appeal. The trial judge issued a memorandum of decision analyzing all of the relevant factors, and he granted a stay. The Commonwealth sought review of that ruling by filing a petition in the county court pursuant to G. L. c. 211, § 3. The Commonwealth asserted in its petition that it had no other available appellate remedy and, therefore, that a petition under § 3 was its only recourse. A single justice of this court disagreed and denied the petition, stating:

> "Both defendants and the Commonwealth must seek relief from a trial judge's decision on a motion to stay from 'a single justice of the court that will hear the appeal.' See Mass. R. A. P. 6; Mass. R. Crim. P. 31 (a) & Reporters' Notes to Rule 31. See generally Commonwealth v. Hodge [(No. 1)], 380 Mass. 851, 853-854 (1980)."[2]

The Commonwealth then followed the single justice's lead by filing a motion in the Appeals Court, where Nash's direct appeal was pending, asking the Appeals Court to vacate the stay of the sentence that the trial judge had granted.[3] A single justice of the Appeals Court allowed the Commonwealth's motion, Nash

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[2] The Commonwealth's petition and the single justice's order predated this court's order regarding the transfer of certain single justice matters during the COVID-19 pandemic (effective June 8, 2020). Had this matter arisen in the county court after the order, it most likely would have been directed to the Appeals Court anyway under the terms of the order.

[3] The Commonwealth purported to file a G. L. c. 211, § 3, petition in the Appeals Court. The Appeals Court, recognizing that it does not have power to act under § 3, see McMenimen v. Passatempo, 452 Mass. 178, 191 (2008); Fadden v. Commonwealth, 376 Mass. 604, 608 (1978), cert. denied, 440 U.S. 961 (1979), treated the petition as a motion to vacate the stay.

appealed from that ruling to a panel of the Appeals Court, and we allowed Nash's application for direct appellate review.[4]

2. Elibert's case. Elibert was convicted in January 2020 of two counts of indecent assault and battery on a person under the age of fourteen (G. L. c. 265, § 13B).[5] The victim was the twelve year old grandchild of Elibert's then girlfriend, with whom Elibert lived. He was sentenced to a term of from four to six years in State prison for the first conviction and a consecutive term of five years' probation, with various conditions, for the second conviction.

Elibert appealed to the Appeals Court from his convictions and immediately moved, in the Superior Court, for a stay of his sentences pending appeal. The trial judge initially denied the request for a stay. In April 2020, shortly after we issued our decision in Christie, 484 Mass. 397, Elibert sought reconsideration of the denial of the stay, citing as a new factor the emergence of the COVID-19 pandemic and its potential effect on him. The trial judge, on reconsideration, granted a

[4] The Appeals Court single justice allowed a stay of the sentence for fourteen days while the defendant sought further review. We allowed the defendant's motion to further stay his sentence.

[5] He was tried on two counts of aggravated rape based on the difference in age between himself and the victim (G. L. c. 265, § 23A). He ultimately was convicted of the lesser included offenses of indecent assault and battery.

stay. The stay proved to be short lived, however, as the judge revoked it on his own initiative on June 30, 2020.

Elibert next filed a motion in the Appeals Court pursuant to Mass. R. A. P. 6, as appearing in 481 Mass. 1608 (2019), entitled "motion to stay sentence pending appeal," in which he stated that he was seeking "reinstatement" of the stay that had been revoked. The Appeals Court single justice denied his motion, Elibert appealed from that ruling to a panel of the Appeals Court, and we allowed his application for direct appellate review.

Discussion. We first address two threshold procedural issues concerning these cases: what appellate remedy is available to the Commonwealth when a trial judge grants a defendant's request for stay of execution of a sentence pending appeal; and what appellate remedy is available to a defendant when a judge revokes a stay that previously was granted. We then address the legal standards to be applied by trial judges, appellate court single justices, and appellate courts when considering stays in these circumstances. Finally, we turn to the rulings that are before us in each case.

1. Commonwealth's remedy when the trial judge grants a stay (Nash's case).[6] Nash takes the position that the Appeals

[6] Justice Lowy did not take part in the court's consideration of this issue.

Court single justice had no authority to act on the Commonwealth's motion to vacate the stay that the trial judge granted in his case.[7] He does not claim that the Commonwealth has no appellate recourse at all when a stay is granted; rather, he argues that the Commonwealth's only recourse is to petition a single justice of this court for relief pursuant to G. L. c. 211, § 3, even in those cases where, as here, the Appeals Court is the appellate court that will hear and decide the defendant's direct appeal. We disagree.

The Commonwealth did, of course, pursue exactly the route suggested by Nash when it initially petitioned for relief in the county court under G. L. c. 211, § 3. Its petition was denied, however, by a single justice of this court on the ground that the Commonwealth had an adequate alternative remedy and, therefore, that relief from this court pursuant to § 3 was not necessary. Significantly, the single justice identified as the Commonwealth's proper remedy precisely the course that Nash now claims was improper, namely, a motion in the Appeals Court to vacate the stay. We agree with our single justice that the Commonwealth was not entitled to review under § 3 and instead

[7] Nash makes this argument for the first time in his brief to this court. He did not take this position in his opposition to the Commonwealth's motion to vacate the stay when the matter was before the Appeals Court single justice.

could have, and should have, sought relief in the Appeals Court, as it eventually did. Some clarification is in order, however.

The single justice relied in part on the 2009 Reporters' Notes to Mass. R. Crim. P. 31, as appearing in 454 Mass. 1501 (2009), which state in relevant part:

> "Appellate Rule 6 establishes the procedure that is available after the trial judge acts on a motion for a stay. Either the defendant or the Commonwealth may seek relief from a single justice of the court that will hear the appeal concerning the trial judge's decision to deny, e.g., Commonwealth v. Aviles, 422 Mass. 1008 (1996), or grant, e.g., Commonwealth v. Hodge [(No. 1)], 380 Mass. 851 (1980), a stay. In the ordinary course of events, for all but first degree murder cases a single justice of the Appeals Court is the appropriate forum."

Reporters' Notes (2009) to Rule 31, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure (LexisNexis 2019). Similar language also appears in the 2009 Reporters' Notes to Mass. R. A. P. 6. See Reporters' Notes (2009) to Rule 6, Mass. Ann. Laws Court Rules, Rules of Appellate Procedure (LexisNexis 2019). Contrary to the two Reporters' Notes, however, neither rule 31 nor rule 6 prescribes a course for the Commonwealth to follow when a stay is granted in the trial court. Those rules set forth the procedure by which a defendant seeks a stay, the terms and conditions on which stays may be granted, the defendant's recourse when the trial judge denies a stay, the parties' remedies when a single justice of an appellate court grants or denies a stay, and the expiration of stays that have been

granted. The rules are wholly silent as to what the Commonwealth should, or may, do to obtain appellate review of a trial judge's granting of a stay.[8]

Although neither rule 31 nor rule 6 expressly governs this situation, the source of the Commonwealth's authority to obtain review of a trial judge's granting of a stay, and the source of an appellate court's authority to provide such review in these circumstances, is Mass. R. A. P. 15, as appearing in 481 Mass. 1627 (2019). That is the all-purpose rule governing motions in pending appeals. It allows parties in pending or impending appeals to request interim relief from the appellate court on a broad range of matters related to the case. It is broad enough to encompass a motion by the Commonwealth, in a criminal case, to vacate a stay of sentence pending appeal that has been granted by the trial judge. Nothing in rule 15 conflicts with either rule 31 or rule 6. Therefore, because neither rule 31 nor rule 6 contemplates this situation, we regard rule 15 as the

[8] There is one subsection of Mass. R. A. P. 6, as appearing in 481 Mass. 1608 (2019), that governs the revocation of stays that have been granted. Rule 6 (b) (4) provides: "Revocation of Stay Pending Appeal. If a defendant fails at any time to take any measure necessary for the hearing of an appeal or report, a stay of execution of a sentence may, on motion of the Commonwealth, be revoked." That provision comes into play when a defendant fails to comply with his or her obligations as an appellant to prosecute the underlying appeal. It has no application where, as here, the Commonwealth challenges the trial judge's initial granting of a stay.

basis for the Commonwealth's motion, and for the Appeals Court's authority to act, in these circumstances.[9,10]

We note further that the appellate rules were amended in 2009 specifically to eliminate the obsolete, and very convoluted, process by which even the most routine stay requests could be evaluated by as many as eleven appellate judges, including a single justice of the Appeals Court, a panel of the Appeals, a single justice of this court pursuant to G. L. c. 211, § 3, and the full court. See, e.g., Sang Hoa Duong v. Commonwealth, 434 Mass. 1006, 1008 n.5 (2001); Commonwealth v. Allen, 378 Mass. 489, 496-499 (1979); and id. at 500 (Quirico, J., concurring). As a consequence of the amendment, questions concerning stays of execution of sentences are now generally confined to the appellate court that will hear the appeal, and there is no longer routine consideration by our single justices

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[9] Motions under Mass. R. A. P. 15, as appearing in 481 Mass. 1627 (2019), are brought in the appellate court where the underlying appeal is (or will be) pending, which in this case was the Appeals Court. The rule also expressly allows the appellate court's single justices to act on such matters, as happened here, subject to review by the appellate court. See Mass. R. A. P. 15 (c); Kordis v. Appeals Court, 434 Mass. 662, 664-665 (2001).

[10] To provide further clarity, we invite this court's rules committee to consider an appropriate amendment to Mass. R. A. P. 6 that would explicitly recognize the Commonwealth's right to file a motion, in the appellate court that is to hear and decide the underlying appeal, to challenge a trial judge's granting of a stay.

(or the full court) of issues concerning stays in cases that are pending in the Appeals Court. See Mass. R. A. P. 6.[11] See also 2009 Reporters' Notes to Mass. R. A. P. 6, fourth par. It would be a step backward were we to accept Nash's contention in this case that stays granted by a trial judge could only be reviewed by single justices of this court under G. L. c. 211, § 3.[12]

We thus reject Nash's argument and agree with the ruling of our single justice. The Commonwealth is not entitled as of right to review in this court under § 3 when it wishes to challenge a trial judge's granting of a stay. It has an

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[11] Rule 6 was amended again in 2019 as part of the overhaul of the Massachusetts Rules of Appellate Procedure. The changes made in 2019 are not relevant here.

[12] Indeed, if we were to accept Nash's position, we would have an anomalous system: when a trial judge denies a motion to stay execution of a sentence pending appeal, the defendant would seek relief in the appellate court that is to hear the underlying appeal, which is almost always the Appeals Court; but when a trial judge allows a stay of execution, the Commonwealth would always be required to seek relief before a single justice of this court on a petition pursuant to G. L. c. 211, § 3, to be followed, conceivably, by an appeal to the full court from the single justice's ruling by whichever side is aggrieved, all regardless of whether the defendant's underlying appeal from his or her conviction is to occur in the Appeals Court. That would not only run counter to the spirit of one of the core aspects of the 2009 amendments to rule 6 as described above -- i.e., the elimination of the routine involvement of our single justices in stay issues in Appeals Court cases -- but it also would place an unnecessary burden on this court, by requiring our single justices (and thereafter the full court) to become involved in all orders of trial judges granting stays of execution pending appeal, even in cases where the Appeals Court is the court that would ultimately hear the underlying appeal.

adequate alternative means of obtaining review of the judge's order, namely, a motion to be filed in the appellate court that ultimately will hear and decide the defendant's appeal to vacate the stay.[13]

2. Defendant's remedy when the trial judge revokes a stay previously granted (Elibert's case). Neither Elibert nor the Commonwealth expressly addresses the question whether Elibert's rule 6 motion in the Appeals Court, after the trial judge revoked the stay he previously had granted, was proper procedurally. Nevertheless, a short discussion of the point may be helpful for litigants, counsel, and judges who find themselves in this position in the future. As we explain, Elibert's motion was within the spirit of the rule.

Rule 6 allows a defendant whose motion for a stay of sentence has been denied by a trial judge to apply a second

[13] The case of Commonwealth v. Hodge (No. 1), 380 Mass. 851 (1980), cited in the Reporters' Notes to both Mass. R. Crim. P. 31 and Mass. R. A. P. 6, which also was cited by the single justice of this court when he denied the Commonwealth's G. L. c. 211, § 3, petition, is a good example of the Commonwealth properly seeking review of a trial judge's order granting a stay of sentence pending appeal by way of a motion filed in the appellate court that will hear the underlying appeal, which in that particular case was this court. See Hodge (No. 1), supra at 853-857 (affirming single justice's denial of Commonwealth's motion to revoke stay granted by trial judge). See also Commonwealth v. Hodge (No. 2), 380 Mass. 858 (1980) (defendant's direct appeal). The Hodge (No. 1) case supports our single justice's conclusion that the Commonwealth should have sought relief from the stay in the Appeals Court in this case.

time, to a single justice of the appropriate appellate court, for a stay. See Mass. R. A. P. 6 (b) (1) (requiring generally that stays of sentences be sought in trial court in first instance; "A motion for such relief may be made to the single justice of the appellate court to which the appeal is being taken, but the motion shall show . . . that the lower court has previously denied an application for a stay or has failed to afford the relief which the applicant requested . . ."). The rule does not speak to the precise fact pattern in this case, where a trial judge revokes a stay that he or she previously has granted.[14] Nevertheless, a trial judge's revocation of a stay in these circumstances is the functional equivalent of the denial of a stay. The consequence in either scenario is the same, i.e., the defendant would be required to serve the sentence, in custody, while his or her appeal is being adjudicated. We see no reason why a defendant in that situation cannot avail himself or herself of the option set forth in rule 6 (b) (1) of applying to a single justice of the Appeals Court for a stay, as if the

[14] As stated in note 8, supra, rule 6 (b) (4) authorizes a judge, on motion of the Commonwealth, to revoke a stay when a defendant fails to satisfy his or her obligations as an appellant to prosecute the underlying appeal. That is not what happened here. The judge in this case revoked Elibert's stay because he received new information suggesting that the facility where Elibert would be incarcerated pending appeal did not pose a COVID-19 risk.

request for a stay in the trial court initially had been denied.[15]

3. Applicable legal standards. There is no shortage of appellate decisions that purport to state the various legal standards that apply when a trial judge acts on a motion to stay a sentence pending appeal, when a single justice of an appellate court considers a stay after the trial judge has declined to grant a stay, and when an appellate court reviews its single justice's ruling. The difficulty often lies not in stating the standards but in applying them. We therefore turn to a discussion of the applicable standards and attempt to shed some light on what may be areas of difficulty and possible confusion for attorneys and for judges who deal with such matters.

a. Standard to be applied by trial judges. Neither Mass. R. Crim. P. 31 nor Mass. R. A. P. 6 indicates what specific factors a judge should consider when faced with a defendant's motion to stay a sentence pending appeal. The factors are set forth in our decisional law, most notably Commonwealth v. Hodge

[15] Likewise, a defendant in this situation might file a motion in the appellate court to vacate the trial judge's order revoking the stay, which, if successful, effectively would reinstate the stay. Although that conceptually is different from asking an appellate single justice to grant a stay, there does not appear to be any tactical advantage to proceeding in that fashion. Elibert's motion in fact had aspects of both of these types of requests. He asked the Appeals Court single justice to reinstate the stay that had been revoked; he also asked her to grant a stay.

(No. 1), 380 Mass. 851, 855-857 (1980); Commonwealth v. Allen, 378 Mass. 489, 498 (1979); and Commonwealth v. Levin, 7 Mass. App. Ct. 501, 505-507 (1979), and more recently, for the duration of the COVID-19 pandemic, Christie, 484 Mass. at 398. These cases require a judge faced with a defendant's request for a stay to evaluate (1) the defendant's likelihood of success on appeal, (2) certain security factors, and (3) certain risks associated with the pandemic.

i. First factor. The classic definition of the first factor, which this court has cited with approval many times, comes from the Appeals Court's opinion in Levin, 7 Mass. App. Ct. at 503-504:

> "It has been customary, on the criminal side of the court, to employ the words 'reasonable likelihood of success,' but on the civil side of the court to employ the words 'meritorious issue' or 'meritorious claim' in analogous situations. A 'meritorious claim,' or 'meritorious appeal,' has been held to mean 'one which is worthy of judicial inquiry because raising a question of law deserving some investigation and discussion,' Lovell v. Lovell, 276 Mass. 10, 11-12 (1931); Russell v. Foley, 278 Mass. 145, 148 (1932), 'one that is worthy of presentation to a court, not one which is sure of success,' General Motors Corp., petitioner, 344 Mass. 481, 482 (1962). Despite the difference in terminology, the concepts are, in our view, substantially identical. Although our cases have not discussed the relationship between the terms, we can assert, on the basis of some familiarity, that . . . the concept that our judges have in mind when they apply the standard of 'reasonable likelihood of success on appeal' is not one of substantial certainty of success, but rather is one equivalent to the civil concept of 'meritorious appeal'; that is, an appeal which presents an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision

> in the appeal. Both the civil and criminal terms import the contradictory of the word 'frivolous'; for how can it be said that an appeal which has no reasonable likelihood of success, which presents no meritorious issue to be determined on appeal, is other than 'frivolous'?" (Emphasis added.)

While it likely is impossible to formulate a perfect definition of what constitutes "some reasonable possibility of a successful decision in the appeal," the decisional law provides a measure of guidance as to how that term ought to be understood and applied. The cases are clear in saying that success on appeal does not need to be certain or even more likely than not. The cases also are clear in saying that frivolous appeals will not qualify. See Hodge (No. 1), 380 Mass. at 857; Allen, 378 Mass. at 499; Levin, 7 Mass. App. Ct. at 504, 507. What is perhaps less clear, and what likely defies precise calculation, is just how far along the spectrum between "frivolous" and "more likely than not" the appeal must be in order that it can be said to present "some reasonable possibility of success." If we were to endeavor to draw out a common theme from the language and the results of the many decisions in this area, it would be this: the burden on the defendant to establish the requisite possibility of success is not onerous; yet the defendant must show that there is at least one appellate issue of sufficient heft that would give an appellate court pause -- in other words, one or more issues that require a legitimate evaluation, that

would engender a dialectical discussion among an appellate panel where both sides find some substantive support, and that would, if successful, lead to a favorable outcome for the defendant.[16]

Experience shows that trial judges strive to make this preliminary, very practical assessment of the claims that the defendant indicates he or she intends to raise on appeal in light of what transpired at the trial. Judges do not, nor are they required to, determine how they themselves would decide the appellate claims. The claims are not fully developed at that juncture, and in most cases a trial transcript is not yet available. Rather, the judges try to gauge, without attempting to decide the claims, whether the asserted claims are legally plausible, are supported by the facts of the case, and have the

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[16] We disagree with the defendants' suggestion that every nonfrivolous appeal necessarily will satisfy the first factor. That position is rooted in the final sentence of the passage quoted above from Commonwealth v. Levin, 7 Mass. App. Ct. 501, 503-504 (1979). If read literally, it would mean that any appeal that is even a smidgen above frivolous would have a "reasonable possibility of a successful decision." But we know that is not true. There are many appeals that are not frivolous that are nevertheless so weak and highly unlikely to succeed that they will not rise to the level of having a reasonable possibility of success.

The sentence relied on by Nash and Elibert appears to be a rhetorical musing of the court that decided the case and, further, dicta in the sense that it was not essential to the court's holding. Moreover, it does not accurately represent the standard as it has evolved throughout the years or how trial and appellate judges currently apply the standard in practice. In current practice, only the most extreme cases -- those that are completely devoid of merit -- are called "frivolous."

requisite heft. Judges should be mindful, on one hand, that not every claim that rises above the "frivolous" barrier will qualify; but at the same time a judge should not deny a stay simply because he or she predicts that the defendant is likely to lose on appeal.

Significantly, this first factor involves "a pure question of law or legal judgment," Allen, 378 Mass. at 498, citing Levin, 7 Mass. App. Ct. at 505, and the judge's determination on that factor therefore receives no deference from an appellate court on appeal. The appellate court instead ascertains in its own view whether the first factor is satisfied. See Allen, supra; Levin, supra at 505-507.

ii. Second factor. Next, the judge must consider the so-called security factors, such as "the possibility of flight to avoid punishment; potential danger to any other person or to the community; and the likelihood of further criminal acts during the pendency of the appeal." Hodge (No. 1), 380 Mass. at 855. Here, the judge takes into account some of the same general considerations a judge would consider pretrial when deciding an appropriate amount of bail, including a defendant's family connections, community roots, employment status, and prior criminal record. Id. The judge also may consider the seriousness of the crime of which the defendant was convicted,

the strength of the evidence presented at trial, and the severity of the sentence that the judge imposed.

Unlike the first factor, which presents a "pure question[] of law," the security factors "involve determinations of fact." Levin, 7 Mass. App. Ct. at 505. They require the judge to employ his or her "sound, practical judgment and common sense," id., to decide based on the available information whether the defendant will be a danger or a flight risk if at liberty during the pendency of the appeal. The judge has considerable leeway in making that determination.

iii. Third factor. The third factor, which derives from our decision in the Christie case, is the COVID-19 factor. In Christie, in order to address the unique, potentially deadly consequences that COVID-19 presents for individuals in our prisons and jails, we added another variable for judges to consider when deciding whether to stay a defendant's sentence pending appeal. We instructed judges henceforth to consider the health and safety of those individuals who are serving their sentences while pursuing their appeals, in addition to the ever-present concern of keeping our communities safe if convicted defendants are released while their appeals are pending.

Our objective in Christie was to reduce temporarily the prison and jail populations, in a safe and responsible manner,

through the judicious use of stays of execution of sentences pending appeal. We said:

> "In ordinary times, in considering the second factor, a judge should focus on the danger to other persons and the community arising from the defendant's risk of reoffense. . . . In 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. In evaluating this risk, a judge should consider both the general risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the specific risk to the defendant, in view of his or her age and existing medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus."

Christie, 484 Mass. at 401-402. Recognizing that this directive has become a source of confusion and disagreement among litigants, attorneys, and judges, as these cases illustrate, we offer the following additional guidance.

Under the traditional, pre-pandemic standard for determining motions to stay, as we have described, a defendant bears the burden of proving two factors -- likelihood of success on appeal and security -- in order to prevail. By introducing a third variable into the equation for such motions, the COVID-19 factor, we did not say or imply in any way that a defendant must now also prove a third factor. It is not incumbent on a defendant seeking a stay to prove that COVID-19 is present, let alone rampant, at the facility where he or she is incarcerated,

or that the defendant is at an especially high personal risk because of his or her age or medical condition. If that were the case, some defendants who otherwise would qualify for stays under the traditional, two-factor analysis would now, ironically, find it more difficult to obtain a stay. That is not how the COVID-19 factor was intended to work.

The COVID-19 factor comes into play in those cases in which a defendant would not qualify for a stay under the traditional, two-factor test. In those cases, a judge might nevertheless decide to grant a stay in light of the pandemic and the risks it poses for an incarcerated defendant. A judge might find, for example, that a defendant poses little or no risk of flight or danger to the community if released pending appeal, and thus satisfies the second (security) factor, but has at best only a very marginal claim on appeal, one that ordinarily would not satisfy the first (likelihood of success on appeal) factor. Under the traditional two-factor test, the judge would not grant a stay in that situation. But taking into account the COVID-19 factor, and with an eye toward achieving the objective of our Christie holding -- to safely and responsibly reduce the population of prisons and jails in the face of the pandemic --

the judge might appropriately determine that this defendant ought to have his or her sentence stayed pending appeal.[17]

As the number of COVID-19 cases rises in a facility where a defendant is incarcerated pending appeal, the risk of course increases that the defendant might become infected despite the best efforts of the facility's administration to control the spread of the disease. Similarly, if a particular defendant is especially vulnerable to the effects of infection as a result of his or her age or health, the risk to that individual of very severe illness or even death increases. In other words, the "general risk" that we spoke of in Christie increases as the number of cases in a facility increases, and the "specific risk" increases when for personal reasons an individual is especially vulnerable. Those are therefore suitable considerations for a judge to take into account.

A judge should not, however, use the absence of or a reduction in the number of outbreaks of the virus when

[17] We use this example to illustrate how the COVID-19 factor might make a difference in a judge's assessment of whether to grant a stay. We do not suggest that it is the only way a judge may weigh the COVID-19 factor in the mix of considerations. It suffices to say that a judge might consider the factor in other ways as well, as part of the totality of the circumstances when ruling on a request for a stay. Each case will turn on its own particular circumstances. The guiding principle will be for the judge to use the factor as appropriate in each case in order to accomplish the ultimate objective of safely and responsibly managing confinements pending appeal for the duration of the pandemic.

determining the general risk to a defendant. When we issued our decision in Christie, for example, many facilities had low COVID-19 case counts. Since then, we have seen that the COVID-19 virus spreads rapidly, and that a few cases, or even no reported cases, on any given day or in any given place can quickly change to many cases. That has proved to be especially true when large numbers of people live in close quarters -- e.g., cruise ships, college campuses, nursing homes, and prisons.[18] Even a low general risk at any given point in time, or a low specific risk, does not mean "no risk"; a risk exists for all incarcerated individuals, all the time, regardless of whether they are young, healthy, or in facilities that at some particular moment in time have few or no cases.

The fact that a facility has no cases or a relatively low number of cases should never be taken to mean that a defendant

[18] With respect to prisons, see this court's recent decisions in Foster v. Commissioner of Correction (No. 1), 484 Mass. 698, 718, S.C., 484 Mass. 1059 (2020) ("there can be no real dispute that the increased risk of contracting COVID-19 in prisons, where physical distancing may be infeasible to maintain, has been recognized by the [Centers for Disease Control] and by courts across the country"), and Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 436, S.C., 484 Mass. 1029 (2020) ("All parties agree that, for several reasons, correctional institutions face unique difficulties in keeping their populations safe during this pandemic").

is at no risk, and it should never be taken as being determinative in and of itself of the COVID-19 factor.[19]

Our decision in Christie was not intended to add to the burden that defendants face in seeking a stay of execution of sentence pending resolution of their appeals. To the contrary, when we appointed a special master to collect data and to report to this court weekly on COVID-19 cases in State correctional facilities, we did so "in order to facilitate any further response necessary as a result of this rapidly-evolving situation." Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 453, S.C., 484 Mass. 1029 (2020). The purpose of this critical monitoring, in other words, was to provide information and guideposts to the judiciary, as well as to the legislative and executive branches, during this unprecedented period, to allow informed decision-making to best protect incarcerated individuals and staff within the various facilities, and to help identify and contain any outbreaks as quickly as possible. The intent was not to furnish

[19] The same can be said about evidence regarding the configuration of a particular facility, how many inmates are housed in single-person or multiple-person cells, how many share a shower at one time, how much time they are permitted to spend outdoors, or the efforts that are taken to reduce the risk within a facility. The evidence may be considered in appropriate cases, but must be used with great caution. The risk of infection, illness, and even death exists even when strict precautions are undertaken.

evidence claimed to be determinative to disprove assertions of heightened risk from COVID-19 by incarcerated individuals, or to construct additional hurdles to overcome in order to obtain a stay. A judge should not purport to rely on Christie to deny a defendant's motion for a stay on the basis of low COVID-19 case counts in a particular prison at a specific moment in time; we all have seen how rapidly these numbers can change.

Moreover, that an individual defendant is not known to be at particularly high risk from the dangers of COVID-19 should not be taken as a reason to deny a stay. Everyone in a prison setting is at increased risk due to the difficulty in maintaining physical distance from others and in spending time outdoors, practices which have met with some success in civilian environments.[20] Recognizing the constitutional limitations on our authority, we must take such steps as are open to us to reduce the number of incarcerated individuals, and to protect those who remain incarcerated from the dangers of COVID-19,

[20] See, e.g., Adams, Park, Schaub, Brindis, & Irwin, Medical Vulnerability of Young Adults to Severe COVID-19 Illness -- Data from the National Health Interview Survey, 67 J. Adolescent Health 362 (2020); Cunningham, Vaduganathan, Claggett, Jering, Bhatt, Rosenthal, & Solomon, Research Letter, Clinical Outcomes in Young US Adults Hospitalized with COVID-19, JAMA Internal Med. (Sept. 9, 2020); Oxley, Mocco, Majidi, Kellner, Shoirah, Singh, De Leacy, Shigematsu, Ladner, Yaeger, Skliut, Weinberger, Dangayach, Bederson, Tuhrim, & Fifi, Correspondence, Large-Vessel Stroke as a Presenting Feature of Covid-19 in the Young, New Eng. J. Med. (Apr. 28, 2020).

while at the same time protecting the safety of the public, the families of those who are released, and the individuals themselves.

We do not mean to suggest that every incarcerated individual faces the same danger from COVID-19. Each defendant's risk should be evaluated under the criteria we have outlined. Some inmates face greater risk than others. Even healthy individuals incarcerated in facilities with little or no COVID-19 outbreaks at a given moment still remain at risk, and such evidence should never be used against a defendant.

b. Standard to be applied by appellate single justices. If a trial judge denies a defendant's motion for a stay of his or her sentence pending appeal, Mass. R. A. P. 6 (b) (1) expressly gives the defendant a second bite at the apple, i.e., an opportunity to renew his or her request before a single justice of the appellate court that will hear the underlying appeal. And as explained in part 1, supra, when a trial judge grants a stay, the Commonwealth may file a motion to vacate the stay in the appellate court that will hear the appeal.

When a trial judge has denied a stay and the defendant renews his or her request with a single justice, the single justice can proceed in either of two ways. The first option is for the single justice to conduct his or her own independent assessment of the defendant's motion. See Allen, 378 Mass. at

496 (describing single justice's "power to consider the matter anew, taking into account facts newly presented [if any], and to exercise his [or her] own judgment and discretion"). Under this option, the single justice rules on the matter as if ruling on the request for a stay in the first instance, and the defendant thus truly has a second bite at the apple. The second option is for the single justice to review the matter only to determine if the trial judge made an error of law or abused his or her discretion when denying the defendant's motion. Commonwealth v. Cohen (No. 2), 456 Mass. 128, 132-133 (2010) (discussing Allen among other cases; concluding that "a single justice may undertake an independent review and independent exercise of discretion on the question whether a stay should be granted or denied, but is not in any way obligated to do so, and may choose simply to review the determination of a trial judge for any abuse of discretion" [emphasis in original]). A single justice who follows this second course is operating in what might be described as an "appellate" mode, searching only for error of law or abuse of discretion in the trial judge's ruling, while a single justice who follows the first course is operating in what might be called an "independent" or "de novo" mode. But see Allen, supra at 497 (suggesting single justice has no option to operate in appellate review mode; "single justice of the Appeals Court does not review the decision of the sentencing judge, but

considers the matter anew, exercising his [or her] own judgment and discretion").

Experience shows that single justices sometimes employ both standards in an effort to cover all the bases; they say that the trial judge did not commit an abuse of discretion when he or she denied the stay and, further, that they have also considered the matter anew and likewise decline to grant a stay. Or the single justice uses aspects of both standards, measuring the different factors in different ways. See, e.g., Cohen (No. 2), 456 Mass. at 133 n.7 ("Of the two considerations relative to a stay pending appeal, a single justice will be more likely to decline to exercise his [or her] own, independent discretion on the issue of security, which involves factual determinations, sound judgment, and common sense. The second consideration, likelihood of success on the merits of the appeal, presents 'a pure question of law or legal judgment'").

There is little or no case law, however, that closely examines the role of the single justice when the trial judge has granted a stay and the Commonwealth moves to vacate. The current state of the law has been that a single justice has the same two options as if the trial judge had denied a stay; the few cases that even mention the point suggest that the single justice can choose either to conduct his or her own independent review or to conduct a more limited appellate review of the

trial judge's ruling, or can use some combination of the two. In Cohen (No. 2), for example, after mentioning that a single justice has the option of entertaining a stay request independently, the court went on to quote Commonwealth v. Aviles, 422 Mass. 1008, 1009 (1996), which in turn quoted the language in Allen, 378 Mass. at 496, stating: "This principle applies at the appellate court level to situations in which a stay has been allowed as well as to situation in which a stay has been denied." See Cohen (No. 2), 456 Mass. at 133. See also Hodge (No. 1), 380 Mass. at 854.

Nash argues in his brief that a single justice faced with a trial judge's order granting a stay should be limited to reviewing the order only for error of law or abuse of discretion, and should not independently assess the request for a stay. Given the result we reach in our analysis of Nash's appeal, infra, we need not address the issue here.

c. Standard to be applied by appellate courts. Finally, Mass. R. A. P. 6 (b) (3) provides that whichever side is aggrieved by the single justice's ruling may appeal from the single justice's order to the appropriate appellate court ("the appellate court in which the appeal is pending"), in other words, the court on which the single justice sits.[21] That is

[21] The rule further states that the "order by the appellate court . . . , allowing or denying an application for a stay,

what occurred in these cases. Nash and Elibert appealed to the Appeals Court from the adverse rulings of the Appeals Court single justices, and, as stated, we then transferred their appeals to this court.

The appellate court's role is to review the single justice's ruling for error of law or abuse of discretion. See Hodge (No. 1), 380 Mass. at 853. The appellate court does not exercise its own independent discretion to evaluate the request for a stay; rather, it reviews the correctness of the single justice's ruling. We use this standard of appellate review regardless of whether the single justice conducted an independent assessment of the motion to stay or confined himself or herself to reviewing the trial judge's ruling for legal error or abuse of discretion.

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shall be final." Mass. R. A. P. 6 (b) (3). However, the appeal to the appellate court is from the single justice's ruling; the appellate court affirms, reverses, or vacates that ruling. The appellate court does not actually issue any "order . . . allowing or denying [the] application for a stay." Id.

As explained in part 1, supra, the 2009 amendment to the rule, which introduced the language that the appellate court's decision "shall be final," was intended to change the practice by which litigants would shop for stays between the two appellate courts and their single justices. See 2009 Reporters' Notes to Mass. R. A. P. 6, fourth par. See also Polk v. Commonwealth, 461 Mass. 251, 254 (2012).

4. Nash's appeal.[22] The single justice of the Appeals Court in Nash's case had before her the Commonwealth's motion to vacate a stay pending appeal that the trial judge had granted. Citing Hodge (No. 1), 380 Mass. at 854, she stated that she would decide the question of a stay anew. See Cohen (No. 2), 456 Mass. at 133, and cases cited. She indicated that she was opting to exercise that power. She did not limit herself to evaluating the trial judge's ruling for error of law or abuse of discretion.

With respect to the first factor, the likelihood of success on appeal, the single justice stated that she had reviewed the parties' submissions, as well as the defendant's brief and record appendix in his underlying appeal, which by that time had been entered in the Appeals Court. Nash raised six points in his appeal. Among other things, he challenged the denial of his motions to suppress the cell phone recording of his offenses and certain statements he made to the police during a recorded interview, certain evidentiary rulings, and alleged errors in the judge's instructions to the jury. The single justice stated: "I have considered the decisions on the motions to

[22] The Appeals Court affirmed the defendant's conviction in an unpublished memorandum and order. Commonwealth v. Nash, 98 Mass. App. Ct. 1120 (2020). We allowed the defendant's motion to continue the stay in order to pursue further appellate review and a motion for a new trial.

suppress, the decision on the defendant's motion to admit evidence of the victim's conduct, and the proceedings and evidence below as reflected in the trial transcripts. . . . Without intending to prejudge the outcome of the appeal, in light of the strength of the evidence, the suppression judge's findings, and the judge's decision on the motion in limine, I conclude that the defendant has not shown a reasonable possibility of success on appeal."

While the single justice cited the correct standard for evaluating the first factor, it appears that she may have applied the standard too stringently. The key, in our view, was Nash's challenge to the denial of his motion to suppress the cell phone recording. The cell phone recording was not the only evidence against him, but it was powerful incriminating evidence, and without it the Commonwealth's case would have been substantially weaker. We have now had the benefit of the Appeals Court's decision on the merits of the defendant's appeal. Although the defendant ultimately did not prevail, it appears from our review of the unpublished opinion that the claims were worthy of presentation to an appellate court and required the Appeals Court to engage in a discussion of the issues. This is not to say that the claims were compelling or, as we have seen, even likely to succeed. Indeed, the claims ultimately failed. But for the purposes of this analysis, his

arguments were enough to satisfy the first factor, even if barely so, under the standard we have described.

The single justice may have been in a better position than the trial judge when she made her assessment on the first factor because she had the benefit of Nash's appellate brief, the record appendix, and the trial transcripts. Indeed, it appears from her statements in her order that she engaged in a thorough consideration of the case by considering each of those things, and by holding a hearing on the matter. Notwithstanding her disclaimer that she was not prejudging the case, however, it is difficult for us not to think in the circumstances that she was too exacting in her application of the first factor. In any event, as we have said, the first factor presents a question of law for which no special deference is owed by us to the judgment of the single justice, and we have therefore made our own determination of this factor.

With respect to the second factor, the security concerns, the single justice also assessed this factor independently and anew. As explained in part 3.b, supra, it was within her power to do so. In making her assessment of the security factors, the single justice relied very heavily on the serious and abhorrent nature of Nash's crimes. She was entitled to do so. But she appears not to have given much weight to several other facts that go into the mix of security factors. For example, it

appears in the record that the defendant had no prior criminal history and no other sexual impropriety of any kind; his offenses were out of character and completely inconsistent with his personal history; he had deep roots in his community and the continued support of his wife (the victim's sister), with whom he was living, and numerous friends and family members; and he was released on bail before trial, appeared on all of his scheduled court dates, and abided by all of the terms of his release. These considerations are what led the trial judge to conclude that Nash's crimes, "though odious," were nevertheless "idiosyncratic" and "one-off"; that he appeared to "pose no danger to the community if released"; and that there was "little reason to believe that [he would] flee the jurisdiction." Yet these additional considerations do not feature significantly, if at all, in the independent assessment on the second factor. Instead, as stated, the emphasis is primarily on the severity of the crimes. In these circumstances, we conclude that the single justice's assessment of the security factors appears to be underinclusive and that she abused her discretion in making her assessment.

Because we conclude that the single justice's order vacating the stay granted by the trial judge would have been reversed because of her determinations on the first and second factors, we mention only briefly her consideration of the COVID-

19 factor. It is clear that she considered the type of negative evidence described in part 3.a.iii. First, she considered the fact that Nash "presented nothing to suggest (let alone show) that -- whether because of age or medical condition -- he is at a heightened risk of serious illness or death should he contract COVID-19." Second, she considered that, as of approximately two weeks before she issued her order, "virtually the entire inmate population at [the facility where Nash would be incarcerated] has been tested for COVID-19, with no positive test results." Nash argues that the single justice used this evidence improperly against him. We agree.

As we have discussed, such negative evidence should not be used against a defendant in these circumstances. As stated in part 3.a.iii, negative evidence of this type is not relevant because the COVID-19 situation changes so quickly, and because all inmates, even those who are young, healthy, and incarcerated at facilities that are relatively free of COVID-19, are subject to the general risk of infection that comes with their incarceration.

5. Elibert's appeal. This case presents an example of how negative evidence of COVID-19 cases in a specific facility at a specific point in time can be misinterpreted or misused. As stated, shortly after we issued our decision in the Christie case, Elibert renewed his request for a stay of his sentence

pending appeal in light of the emergence of the COVID-19 pandemic, and the trial judge granted a stay.[23] The judge attached several conditions to the stay to assure that Elibert would not be a danger to the community or a flight risk, e.g., that Elibert reside at a specific address and remain there twenty-four hours a day except for medical appointments, that he be subject to global positioning system monitoring, and that he have no direct or indirect contact with the victim, her family, or any of the witnesses in his case.

The judge's order was brief and did not contain any discussion of Elibert's likelihood of success on appeal, his potential danger to the community, or his potential risk of flight. It safely can be assumed, however, that in keeping with our holding in Christie and taking into account the general and specific risks of COVID-19 infection if Elibert were to remain incarcerated, the judge was satisfied that a stay of Elibert's sentence was merited and that Elibert safely and responsibly could be at liberty (subject to the indicated terms and restrictions) pending appeal. The judge issued his order on April 28, 2020. He revoked the stay on his own initiative,

[23] In addition to the general risk of COVID-19 infection for Elibert if he were to remain incarcerated, there was evidence before the judge that Elibert was sixty-four years old and suffers from type 2 diabetes, factors that created a specific risk for him.

however, on June 30, 2020, following a video conference with the parties.

There apparently is no record of the video conference, and the judge did not issue a written order explaining his reasons for revoking the stay. Elibert's counsel represents that the judge based his ruling on his belief, which apparently was based on our special master's reports, see Committee for Pub. Counsel Servs., 484 Mass. 431, that the COVID-19 risk to Elibert had subsided because, as of late May and early June 2020, no new COVID-19 cases were reported at the facility where Elibert had been serving his sentence. The Commonwealth does not dispute that this was the basis for the judge's revoking the stay. In short, the judge believed it was safe to return Elibert to prison to resume serving his sentence pending appeal.

The single justice of the Appeals Court concluded that the trial judge did not abuse his discretion in revoking the stay.[24] That was incorrect because, as we shall explain, the judge's reliance on the negative evidence -- that the number of reported COVID-19 cases at the prison where Elibert would resume serving

[24] Citing Cohen (No. 2), 456 Mass. at 133, the single justice expressly stated that, "given the limited record" before her, she declined to "undertake an independent review and independent exercise of discretion on the question whether a stay should be granted or denied." Instead, as was her prerogative, see part 3.b, supra, she reviewed the judge's order only for an abuse of discretion.

his sentence had decreased in the month since the stay was granted -- was error.

Our intention in the Christie case was not that inmates be moved in and out of prisons and jails on a weekly, monthly, or other periodic basis as COVID-19 rates in the specific facilities fluctuate over time. The judge here did not determine that Elibert posed any greater risk of flight or danger to the community than when he stayed Elibert's sentence at the end of April 2020. Nor was there any evidence that Elibert had violated any of the terms of the previously granted stay. The only apparent reason for revoking the stay and ordering Elibert back to prison was the decrease, over a relatively short period of time, of reported COVID-19 occurrences at that particular prison.[25] There being no evidence that Elibert could not remain safely at liberty temporarily, subject to the terms and restrictions imposed by the judge, during the pendency of his appeal, and there being no evidence that he was not diligently pursuing his appeal,[26] the negative

[25] Moreover, there is no indication that Elibert's health has improved since the stay was granted to a point that he is no longer at a heightened specific risk of harm from COVID-19.

[26] See notes 8 and 13, supra. The Commonwealth has a remedy if Elibert or any other defendant whose sentence has been stayed pending appeal fails diligently to pursue the appeal. The Commonwealth also has recourse, of course, if a defendant violates the terms of a stay.

evidence relied on by the judge should not have been used to justify revoking the stay and ordering Elibert back to prison while his appeal is pending.

It is true that the single justice of the Appeals Court considered Elibert's likelihood of success on appeal and concluded that Elibert did not satisfy the first factor in the stay analysis. Although reasonable minds might differ as to whether she applied the first factor too strictly, we do not necessarily disagree with her assessment. That said, as we have stated, the single justice did not undertake to conduct an independent assessment of the motion for a stay, and only reviewed the trial judge's ruling for error or abuse of discretion. It was therefore for the trial judge and not the single justice (or us) to decide how to weigh the COVID-19 factor against the other factors in the totality of the circumstances. Clearly, the judge did not think Elibert qualified for a stay under the traditional, two-factor analysis because he denied Elibert's initial (pre-Christie) motion for a stay. He must have found that one or both of the two traditional factors were missing; perhaps, like the single justice, he did not think the first factor was satisfied. Equally clear, however, is that the judge determined that the COVID-19 factor gave Elibert enough of a boost to merit a stay because he granted Elibert's renewed (post-Christie) motion.

That weighing of the COVID-19 factor against the other two factors was entitled to deference and should not be upset absent an abuse of discretion. But for the judge's error in subsequently considering the negative evidence, and his revoking the stay on his own motion based on that evidence, the stay that previously was granted (which no one denies was well within the judge's discretion) would have been in place.

Conclusion. For these reasons, in Nash's case, the order of the Appeals Court single justice vacating the stay granted by the trial judge is reversed, and the stay granted by the trial judge on May 18, 2020, shall be reinstated until further order of this court.

In Elibert's case, the order of the single justice of the Appeals Court is also reversed. The trial judge's order on June 30, 2020, revoking the stay he previously granted shall be vacated, the result being that the judge's order on April 28, 2020, staying Elibert's sentence pending appeal will be reinstated.

So ordered.