IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN RE: 38th JUDICIAL DISTRICT – REQUEST FOR EMERGENCY ORDER	**No. 29 MM 220**

THE DEFENDER ASSOCIATION OF PHILADELPHIA'S OBJECTION AND REQUEST FOR RECONSIDERATION AND CLARIFICATION OF THIS COURT'S MARCH 12, 2020 ORDER

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I. **Background and Interest of the Party.**

On March 12, 2020, the President Judge of the 38th Judicial District requested that this Court authorize it to declare "a judicial emergency" along with a request to "suspend or modify" the Rules of Criminal Procedure in three ways:

> [1(b)(1)] Suspend the time calculations for the purpose of computation within this judicial district for the filing of documents with the court or taking other judicially mandate action. Beginning date March 13, 2020, ending date March 27, 2020.
>
> [1(b)(2)] Authorize the expanded use of advanced communication technology to conduct court proceedings;
>
> [1(b)(3)] Suspend the application of Pa.R.Crim.P. 600. Beginning date March 13, 2020, ending date March 27, 2020.

Application of the President Judge of the 38th Judicial District.

On March 13, 2020, this Court by order granted the application with respect to "1(a), 1(b)(1) and 1(b)(2)." It held under advisement the request under 1(b)(3) until March 16, 2020. Order, March 12, 2020. This Court further ordered that "interested parties may object to this order" by March 16th.

The Defender Association of Philadelphia (hereinafter "the Association") is a non-profit criminal defense firm which formally represents a large majority of the tens of thousands of people charged with criminal offenses in Philadelphia each year. The Association has an interest in the current matter because it is likely that as this is a developing and expanding emergency**.** Many more counties, including Philadelphia, may request similar orders from this Court. It is also likely that any

future orders pertaining to these issues applying to other judicial districts will be consistent with this Court's initial determination here. Moreover, it is unlikely that the emergency will be over by March 27, 2020; and therefore, the Association believes additional thought and attention should be paid to this initial order, what it says, and what consequences may result.

II. Specific Objections.

The Association **supports** this Court's order granting request 1(b)(1) and will not discuss that further. The Association **requests reconsideration and clarification** of 1(b)(2) because**,** on its face, it lacks clarity and may unintentionally result in the abridgment of a defendant's state and federal right to be present. Finally, the Association **objects** to request 1(b)(3) as it is unnecessary, will cause more problems than it solves, and**,** in part**,** limits a defendant's right to pre-trial release from jail, a practice that should be encouraged where appropriate during this pandemic.

1. This Court should reconsider and clarify the order granting 1(b)(2).

The Association believes that it is desirable to use every technological tool at our disposal to maintain the timely and effective operation of our criminal justice system during this emergency. However, the Association is concerned that the current order lacks sufficient clarity for three reasons.

First, is unclear what is meant by "court proceedings," as that term is not defined. None of this Court's Rules define the term "court proceeding." However, the Rules of Criminal Procedure define "criminal proceedings" to "include all actions for the enforcement of the penal laws." Pa.R.Crim.P. 103. Moreover, the lack of clarity fails to account for the concern that this Rule should probably apply differently to civil and criminal "proceedings." For example, criminal rules and civil rules implicate different constitutional interests and rights, such that abridgement of Rules of Civil Procedure might not affect parties' interests in the same manner as they might on the criminal side. Many of the criminal rules are structured to elaborate on constitutional requirements. The current Order potentially supersedes both rule-based and constitutional requirements for how legal proceedings of all kinds are required to operate. This gives the judicial district the right to make alterations to those Rules unilaterally; and in some instances could result in abrogating constitutional rights. While flexibility is desirable during an emergency, ambiguity in an order providing that much unilateral authority is dangerous.

Second, although the Order does not mention Rule of Criminal Procedure 119, it is possible the 38th Judicial District or other courts could misconstrue the Order as suspending the Rule. Rule 119 limits the use of two-way simultaneous audio-visual communication in certain settings, but allows its use in nearly all

proceedings when the defendant consents to ensure the protection of a defendant's state and federal constitutional right to be present. U.S. Const. Amends. V, VI, XIV; Pa. Const. Art. 1, §§ 6, 9; Commonwealth v. Hunsberger, 58 A.3d 32 (Pa. 2012) (discussing the right's foundation). While this Court could suspend the Rule and permit a jurisdiction to use more varied forms of communication to address court business, it cannot not do so on a sweeping basis where a defendant's constitutional rights are at stake. This is especially true because in many instances, a continuance will accomplish the needed goal without sacrificing the defendant's rights.

Third, separate and distinct from the possible confusion regarding Rule 119, without clarification, it could be interpreted as **expressly** abrogating a defendant's state and federal constitutional rights to be present and the defendant's right to a public trial. U.S. Const. Amend VI[1]; Pa. Const. Art. 1 § 9. These rights cannot be abrogated by Rule, and a sweeping order having this effect would violate federal law. Rather, other than by making an extraordinary showing of immediate need, (see infra discussion)**[,]** constitutional rights may only give way if the defendant voluntarily waives these rights or forfeits them through his conduct. See, e.g., Commonwealth v. Vega, 719 A.2d 227, 230 (Pa. 1998) (permitting the waiver of

[1] "Although the United States Supreme Court has not held whether the right to a public trial extends to sentencing proceedings, there is little doubt that it does." Wayne LaFave, Isreal, King, & Kerr, § 24.1(a) Nature of the right, 6 Crim. Proc. § 24.1(a) (4th ed.) (citing this conclusion from nearly every circuit).

the right to be present either expressly or implicitly); Illinois v. Allen, 397 U.S. 337, 343 (1970) (allowing for forfeiture).[2]

None of these reasons, of course, should prevent this Court from authorizing judicial districts to expand the use of technology to create social distancing and minimize contagion while keeping its courts operational to address urgent matters. However, judicial districts need **clarity** that this emergency order, and those similar to it, does not permit the complete obliteration of our citizens' constitutional rights. In that light, the Association suggests that the order granting request 1(b)(2) be reconsidered and clarified as follows:

> Upon consideration of objections received, the relief requested under 1(b)(2) is granted in part as follows: The 38th Judicial District is authorized to expand use of advanced communication technology to conduct civil proceedings. The 38th Judicial District is authorized to expand use of advanced communication technology in criminal proceedings except where the defendant has a state or federal Constitutional right to be physically present. In such cases, the defendant may consent to any proceeding being conducted by the use of any advanced communication technology. See U.S. Const. Amends. V, VI, XIV; Pa. Const. Art. 1, §§ 6, 9.

[2] Further, although not a concern for the Association, this Order more broadly affects the First Amendment right of the public to be present, and again, while that right can be overcome, the denial of public access must "serve[] an important governmental interest, and [be the least] . . . restrictive means to serve that interest . . . ." (1) the denial of public access serves an important governmental interest, and (2) no less restrictive means to serve that interest exists." In re J.B., 39 A.3d 421, 430 (Pa. Super. 2012) (discussing numerous cases). It simply means that this Court should counsel local jurisdictions to consider these interests in amending local practice.

2. **<u>This Court Should Deny Request 1(b)(3)</u>**

This Court should deny the request to suspend Pennsylvania Rule of Criminal Procedure 600 for two significant reasons: (1) it is unnecessary and will cause much more confusion and harm in the long run; and (2), this Court should not suspend Rule 600(B) which is essentially a bail rule, and could result in a large number of people being indefinitely detained without sufficient basis.

First, suspension is unnecessary because Rule 600(A) already provides several mechanisms to protect against dismissal when a continuance is granted due to a judicial emergency. First, this Court made clear in <u>Commonwealth v. Mills</u>, 162 A.3d 323 (Pa. 2017), that courts of original jurisdiction have discretion "to differentiate between time necessary to ordinary trial preparation and judicial delay arising out of the court's own scheduling concerns. Accordingly, where a trial-ready prosecutor must wait several months due to a court calendar, the time should be treated as 'delay' for which the Commonwealth is not accountable." <u>Id.</u> at 325. Under the current emergency, courts will be continuing cases for various reasons, from absence of staff and lack of jurors, to concerns about the health of those participating in the case. If a defendant were to bring a motion at some point, none of this time would be counted against the clock.

Nor would any Commonwealth request for a continuance even remotely connected to the current COVID-19 crisis count as time against the

Commonwealth. The Rule provides that "for purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of time . . . ." Pa.R.Crim.P. 600(C)(1). It has long been law that when a necessary witness becomes unavailable toward the end of speedy trial time period due to illness or other reason not within Commonwealth's control, and trial cannot commence during the proscribed time frame, the Commonwealth cannot be held at fault and the time is excludable. Commonwealth v. Corbin, 568 A.2d 635 (Pa. Super. 1990). Although there are obviously no cases addressing a national emergency pandemic, a sick prosecutor or a District Attorney's office shuttered because of quarantine orders, school closures, or merely avoiding contagion will all likely be ruled excusable delay. Assuming that the Commonwealth has been otherwise diligent, prior to the continuance and subsequent to the termination of the emergency, the time will be excluded. Frankly, most defense counsel will likely not even bring a motion.

In contrast, the current order is confusing. It asks to "suspend the **application** of" the Rule for a two week date. Application 1(b)(3). It is entirely unclear what "application" means. Does it mean that the 365 day time limit does not apply to any case for which the 365th day is from March 13 to March 27th, but if the 365th day is March 28th, then the Rule would apply normally? Or, does it

mean that the Rule's requirements are inapplicable to any action taken during that two week date regardless of when the natural run date might occur, i.e., it does not count one way or the other and acts like short tolling period? Or, does it mean that a court cannot either grant or deny a motion under Rule 600 if it was filed during that time frame because no motion may be made under a suspended rule? The Association has no idea which is correct. Especially concerning is that because it is likely that any emergency will last longer than March 27th, 2020, this lack of clarity will reign havoc on cases and demand significant appellate intervention down the road.

Our courts are currently well equipped once this emergency passes to address delays caused by circumstances outside the Commonwealth's control. If and when motions are brought after this crisis, our courts already have the tools with which to quickly address them.

A second serious concern is that suspending Rule 600 also suspends Rule 600(B). Unlike Rule 600(A), which serves as our state's speedy trial rule, Rule 600(B) is essentially a bail rule and does not have the same time counting limitations as does 600(A). See, e.g., Commonwealth v Murray, 879 A.2d 309, 313-14 (Pa. Super. 2005) (discussing the purpose served by the 180 nominal bail portion of the rule and the remedy available for its violation). As long as courts remain open for business for adjudicating urgent matters, people in jail who have

not been ordered held without bail, and who would not otherwise be ordered held without bail, should not be held indefinitely until the eventual reopening of our court system. But, that is what this this Order would permit.

According to more than 800 national public health experts and organizations: "People residing in close living quarters are especially vulnerable to COVID-19" such as those living in "nursing homes or long-term care facilities, as well as those who are incarcerated or homeless [. . .]. These individuals may also be less able to participate in proactive measures to keep themselves safe, and infection control is challenging in these settings."[3] We should not prolong the unnecessary detention of those who would other be released.

To suspend Rule 600(B) while the courts remain open to adjudicate emergency motions may also subject a large number of people to dangerous and extended indefinite detention without good cause. A court can easily rule, and rule quickly, on whether under the circumstances a defendant is so dangerous to justify revocation of bail or whether release plus conditions are warranted. To grant this request, and potentially set up a framework to indefinitely suspend the Rule if this crisis worsens, not only jeopardizes the right to pre-trial liberty, but more

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[3] Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States; March 2, 2020.
https://law.yale.edu/sites/default/files/area/center/ghjp/documents/march6_2020_final_covid-19_letter_from_public_health_and_legal_experts_2.pdf

importantly, the health of our incarcerated citizens and those who work with them. Again, there is no need to suspend the Rule. In fact, this is precisely the time when 600(B) motions should be granted, where delay is uncertain and prison conditions may deteriorate quickly. As long a judge is available to issue orders, counsel can file a motion, address the issue via advanced communication technology, and a judge may grant or deny the motion for release.

The 38th Judicial District has simply provided no basis upon which it believes it is necessary to suspend this Rule. It has not identified a harm that will come to the county court or its staff if this Court does not grant its requested relief. It has not shown why suspension of Rule 600 is necessary.

This Court Should treat requests to suspend laws that have long served to protect liberty with great caution. In constitutional terms, the United States Supreme Court has required that before constitutional rights may be abridged in an emergency, the government must show that the "deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger." Korematsu v. United States, 323 U.S. 214, 234 (1944) (Murphy, J. Dissenting) (quoting and citing United States v. Russell, 13 Wall. 623, 627, 628, (1871); Mitchell v. Harmony, 13 How. 115, 134, 135 (1851); Raymond v. Thomas, 91 U.S. 712, 716 (1875)) (cleaned up). Not only has the 38th Judicial

District failed to satisfy this standard, which the Association acknowledges is likely higher than that required for this Court to suspend a Rule, it has failed to make any showing of need at all.

The Coronavirus epidemic is serious, and will cause major life disruptions. However it is in times of crisis that our courts must be the most vigilant in protecting the rights upon which our society is based. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting) ("Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."). See also Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times."); Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 426, (1934) ("even the war power does not remove constitutional limitations safeguarding essential liberties"); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

There is no need to suspend these Rules. No imminent crisis will result if this Court does not grant all of the relief requested. The Association asks this Court to tread with caution moving forward. Where the abridgement of rights is requested, this Court should require clear and detailed explanations regarding why

those actions are imminent and necessary. We are in uncharted waters. This Court must remain committed to the rule of law and steady the ship.

III. **CONCLUSION**

WHEREFORE, this Court is respectfully requested to reconsider and grant in part requested relief 1(b)(2) and deny requested Relief 1(b)(3).

Respectfully Submitted,

/S/

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March 16, 2020

VERIFICATIONS & CERTIFICATIONS

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing of confidential information and documents differently than non-confidential information and documents.

I further certify that facts set forth in the foregoing motion are true and correct to the best of the undersigned's knowledge, information and belief, and are verified subject to the penalties for unsworn falsification to authorities under 18 Pa. C.S. § 4904 of the Pennsylvania Crimes Code.

Respectfully Submitted,

/S/

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