

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT

Docket No. CR86-0010-CR86-0013

COMMONWEALTH OF MASSACHUSETTS

v.

WILLIAM CASCONI

**COMMONWEALTH’S RESPONSE TO DEFENDANT’S MOTION FOR STAY OF
EXECUTION OF SENTENCE PENDING MOTION FOR NEW TRIAL
AND MOTION FOR EXTENSION OF TIME TO RESPOND TO
MOTION FOR NEW TRIAL**

The Commonwealth does not oppose the defendant’s motion as the defendant has met the legal standard for a stay of execution of sentence by establishing that his motion for new trial has a “reasonable possibility of success” and has outlined a Re-Entry Plan that is consistent with public safety. The Commonwealth’s ongoing obligation to ensure that convictions are based on competent evidence drives the Commonwealth’s position on this motion as the defendant has presented new evidence concerning the legal scientific “standard of care” for fire investigations that has evolved since the defendant was convicted in 1987 and is explained more fully below.

In addition, the Commonwealth requests additional time that is necessary to continue its investigation into the numerous and complicated issues raised in the defendant’s motion for new trial and to file its response by August 1, 2022.

1. Relevant Background:

The defendant was convicted in 1987 of arson and three counts of second-degree felony murder. He was sentenced to three concurrent life sentences for the felony murder counts and 18-20 years for the arson count. Following his conviction, he sought an appeal and his convictions were affirmed in 1990. *Commonwealth v. Cascone*, 28 Mass. App. Ct. 1112 (1990) (a copy of this Rule 1:28 decision is included as Exhibit 1 to Defendant's Motion for New Trial).

Referencing the findings from the Appeals Court, the evidence at trial showed that in the early morning hours of October 27, 1984, the defendant, then 17 years old, was at a party with a group of people who "drank to excess at an all-night party on the top floor apartment of a multi-family house in North Adams." *Id.* After a "humiliating altercation with the tenant" the defendant was ordered to leave the party. *Id.* As he "reluctantly" left the party, he was "muttering threats to get even." He went outside and remained close to the building. *Id.* In the early morning hours, the old building was enveloped in flames that blocked the stairwells. *Id.* Many of the party-goers were able to jump to safety. *Id.* There were two young children (of the tenant) and one of the party-goers, who had fallen asleep, that perished in the fire. *Id.*

On July 1, 2021, the defendant filed his motion for new trial, pursuant to Mass. R. Crim. P. 30(b), asserting three main claims: (1) newly developed arson science casts doubt on the justice of his conviction; (2) the prosecutor misstated evidence in her closing regarding the defense expert's testimony; and (3) trial counsel was constitutionally ineffective for a variety of reasons. These issues were not directly raised as part of the defendant's direct appeal.

2. Conviction Integrity Review Process:

Through the filing of this motion for new trial and this corresponding motion for stay, the defendant is challenging the integrity of his conviction, based primarily on newly discovered

evidence alleging that he was “wrongfully convicted of arson and murder based on outdated and faulty fire science.” *See* Defendant’s Motion for New Trial, at p.2. He claims that because fire science has changed since his trial that “much of the forensic evidence used to convict [him] is indisputably false.” *Id.* In cases, such as this, when the integrity of a conviction is challenged, it is the obligation and ethical duty of the prosecutor to reexamine the case and investigate these claims and to ensure that the conviction is based on sound evidence and proper legal standards. The Berkshire District Attorney’s Office does not have a formal Conviction Integrity Review Unit, but is reviewing this matter with those guidelines and standards in mind.¹

Also in its assessment of this case, the Commonwealth must take into consideration that the Supreme Judicial Court abolished the crime of “second-degree felony murder” in *Commonwealth v. Brown*, 477 Mass. 805, 825 (2017). Under *Brown*, the SJC held, prospectively, that felony-murder is no longer an independent theory of liability for murder. *Id.* The Court concluded that “a defendant may not be convicted of murder without proof of one of the three prongs of malice.” *Id.* at 807-808. As was further clarified in Justice Gants’ concurring opinion, the Court determined that going forward “felony-murder will require a finding of actual malice, not merely constructive malice.” *Id.* at 825.

Here, the defendant was indicted on first-degree murder and the judge instructed the jury on the crimes of first and second degree murder; felony-murder by reason of arson; and involuntary manslaughter.² As to second-degree murder, the jury was instructed that malice

¹ See, e.g., Massachusetts Conviction Integrity Working Group’s “A Guide to Best Practices for Prosecutorial Offices” issued in March 2021.

² The Appeals Court found that the judge “erred in instructing that voluntary intoxication is irrelevant in considering malice element of second degree murder,” but that the error had “no effect on the verdicts, which specifically found the defendant guilty of second-degree murder on a felony-murder basis.” *Cascone*, 28 Mass. App. Ct. 1112 (1990) (See Exhibit 1 attached to the motion for new trial). The court further stated that “any error in drawing the line between second degree murder and involuntary manslaughter was irrelevant in view of the verdicts returned.” *Id.*

could be inferred for second-degree murder, but not for first-degree murder. The jury was then instructed that they could also find the defendant guilty of felony-murder in the second degree and the elements were given. Then, in explaining the verdict slip, the judge explained to the jury there were two options for second-degree murder: (a) felony- murder and (b) inferred malice.³ The judge then told the jury they could find the defendant guilty of second degree murder “by either one of them, by both of them.” As stated, the jury returned guilty verdicts on three counts of second-degree murder by reason of felony (arson) murder and one count of arson. There are two issues for the Commonwealth to consider in assessing this case: (1) if the arson conviction is no longer supported by sound evidence, the Commonwealth would not have the required felony to uphold convictions for second-degree murder by reason of felony; and (2) because the rule in *Brown* applies prospectively, the Commonwealth is precluded from proceeding on a theory of “inferred malice” for second-degree felony murder should there be a retrial.

As part of this conviction integrity review process, members of the Berkshire District Attorney’s Office have had multiple conversations with the numerous victims in this case. They have been advised of the Commonwealth’s position on this motion for stay and they have expressed an interest in providing the Court with a statement of their views on this matter. The Victim Bill of Rights allows for victims to be heard at sentencing, disposition, and “at any other time deemed appropriate by the court.” See G. L. c. 258B, §3(p). If the Court is amenable, the Commonwealth seeks submit these statements prior to the hearing on this motion for stay, which would give the victims a meaningful right to be heard during this unique process.

³ The verdict slips appear at Exhibit 50 attached to the Motion for New Trial.

3. The Motion for Stay:

The defendant has filed this motion for stay of execution of his sentence during the pendency of his motion for new trial. This Court has the inherent power to stay the execution of a sentence for “exceptional reasons permitted by law.” *Commonwealth v. Charles*, 466 Mass. 63, 72 (2013), quoting *Commonwealth v. McLaughlin*, 431 Mass. 506, 520 (2000). This includes during the pendency of a motion for new trial. *Charles*, 466 Mass. at 79. The Court considers the same factors that apply to a request for stay pending appeal under Mass. R. Crim. P. 31(a). The two critical issues on a motion for a stay are: (1) whether the motion for new trial “offers some reasonable possibility of a successful decision” and (2) whether the defendant poses a public safety risk.⁴ See *Commonwealth v. Mattier*, 474 Mass. 227, 229 (2016); see also *Charles*, 466 Mass. at 77.

a. Reasonable Possibility of Success:

As stated above, the three claims raised by the defendant in his motion new trial include: (1) newly developed arson science casts doubt on the justice of his conviction; (2) the prosecutor misstated evidence in her closing; and (3) trial counsel was constitutionally ineffective. The Commonwealth requires additional time to appropriately investigate all these claims, however, for the purposes of timely responding to the defendant’s motion to stay, the Commonwealth agrees that the defendant has met the legal standard for a stay and has presented a reasonable possibility of success in arguing that the newly developed arson science undermines the integrity of his conviction.

⁴ And recently, the Supreme Judicial Court added a third-factor related to the risks associated with the COVID-19 pandemic. See *Christie v. Commonwealth*, 484 Mass. 397, 401-402 (2020); *Commonwealth v. Nash*, 486 Mass. 394, 403 (2020). However, given that Massachusetts has recently lifted most restrictions and is currently in a “low-risk” status, COVID-19 does not impact this analysis.

In order to respond to this motion to stay, the Commonwealth consulted with the Massachusetts State Police, Fire and Explosion Investigation Unit, who reviewed the report and analysis offered by defense expert, Dr. Craig Beylor.⁵ The State Police stated that an arson scene investigation needs to stand on its own and apart from any confession or any circumstantial evidence that is presented at trial. Here, the defendant had motive, means, and opportunity to set this fire, and he placed himself near the origin of the fire, but there was no full confession or admission of guilt. As will be seen, in light of the newly developed fire-science standards and investigative procedures, the integrity of the arson scene in this case is problematic because the circumstantial evidence relied upon at trial may not be scientifically sound.

The initial review by the State Police arson investigator has led the Commonwealth to acknowledge that the defendant's motion for new trial "offers some reasonable possibility of success" based on the newly developed "standard of care" for fire investigation and the modern fire science that is relevant to this case. The State Police informs that the arson investigation was done in good faith at the time but that there are deficiencies in the investigation that are not in accordance with present day scientifically acceptable standards and procedures pertaining to the point of origin and cause of the fire. These deficiencies call into question the reliability of the evidence presented at trial, and in turn, the overall integrity of this conviction.

The Commonwealth is constrained to agree that for the purposes of this motion for stay, that the defendant raises a substantial issue, in particular the claims related to the development of fire/arson investigation practices and standards that have occurred in the years following his trial.

⁵ Dr. Beylor's report appears at Exhibit 41 attached to the Motion for New Trial. Dr. Beylor's report is based on his review of: the investigation performed after the fire, witness interviews, trial testimony, a timeline of events, and fire-related theories.

Dr. Beylor's opinion is based on information and guidelines set forth in the Guide for Fire and Explosion Investigations by the National Fire Protection Association, or the "NFPA 921" which was published in 1992. The NFPA 921 was developed to counter fire investigation myths and instead introduce scientific methods and standards to be used in fire investigations. For example, fire investigations should include data collection, the formulation of a hypothesis, and then testing of that hypothesis. This scientific method should be the same whether the investigator suspects an accidental or intentional start to the fire. The implementation of NFPA 921 guidelines into arson investigations also ensures fair convictions and prevents injustice based on unreliable "junk" science. After the Commonwealth's consultation with the State Police, it agrees that the NFPA 921 sets the current standard of care for fire investigations, but was not in place in 1984. Because these standards were not used in this case, the investigative theories and evidence relied on to determine point of origin and cause of this fire need to be more fully investigated as part of the conviction integrity review process.

Based on the State Police's cursory review, the fire-scene investigators did not conduct a thorough enough examination to eliminate all potential accidental causes, especially in light of the newer standards under NFPA 921. Accidental causes could include such things as: chemical, cooking, trash or combustibles close to a heat source, electrical, gas or heating appliances, lightening or other natural causes, children, spontaneous combustion or smoking. The State Police inform that the investigation should have included a more thorough and lengthy examination at the scene, including layering the area of origin for evidence of incendiarism or to show the lack of an accidental cause. Investigators should have more thoroughly examined: the electrical panel, electrical wiring, possible natural gas issues, improper disposal of smoking materials, possible causes of spontaneous combustion, including discarded floor-sanding debris

near the origin of the fire. There was equipment on the scene that could have been used to clear safety hazards to allow for better access to examine the suspected area of origin for evidence of the cause of the fire. Because this investigation was deficient, these potential accidental causes of this fire cannot reasonably be eliminated.

In addition, some of the analysis and evidence that were relied on at trial, including such things as: area of lowest burn; area of the most fire damage; V-patterns; and drop-down burn, are not necessarily reliable evidentiary sources for origin and cause analysis under NFPA 921 standards. These were not specifically addressed by the State Police as they pertain to this case, but since they are addressed by the NFPA 921 and addressed by the defense expert, they warrant further evaluation by the Commonwealth as it assesses the integrity of this conviction before fully responding to the motion for new trial.

b. Public Safety Risk:

This Court must also consider whether the defendant poses a public safety risk. *See Mattier*, 474 Mass. at 229; *Charles*, 466 Mass. at 77. The Court looks at “familial status, roots in the community, employment, prior criminal record, and general attitude and demeanor.” *Charles*, 466 Mass. at 77. These factors inform “the possibility of the defendant’s flight to avoid punishment, the potential danger posed by the defendant to any person or to the community, and the likelihood that the defendant will commit additional criminal acts.” *Id.*

The defendant has provided a Re-Entry Plan that he prepared in conjunction with the Boston College Law School Clinics and the Boston College Innocence Program. This plan is attached to his Motion to Stay as Exhibit 2 and includes plans for family support, housing, employment, healthcare and counseling, and community support should he be released.

The defendant was 17 years old at the time of the incident and has no other criminal record outside of this case. While incarcerated, he has not presented as a danger or disciplinary threat. He had some disciplinary reports, with the majority of them happening in the first half of his incarceration. Since transferring to Norfolk in 1995, his incarceration has been uneventful. He has attended minimum group training and education programming while incarcerated.

Also because the defendant was a juvenile at the time of the offense, he is eligible for annual classification and potential placement in a minimum security facility pursuant to *Commonwealth v. Deal*, 478 Mass. 332, 334, 336-337 (2017) citing *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013). From a review of his Department of Corrections records, it appears that he did not participate in the reclassification process from 2018-2020 to a minimum security facility and has remained at Norfolk. Because the defendant was convicted of second-degree felony murder he became parole eligible after serving a 15 year minimum sentence. He waived his right to seek parole in 2002, 2007, and 2017 because he disagreed with the official version of the incident and maintained his innocence.

Any risks of flight pending resolution of defendant's motion for new trial can be mitigated by conditions that may be ordered by this court, such as: ordering him to comply with the terms of his Re-Entry Plan; that he must reside with his mother; restriction curfews; GPS monitoring; and reporting to Probation on a set schedule, and any other conditions deemed appropriate under the circumstances.

4. Request for Additional Time to Respond to Motion for New Trial:

This Court ordered the Commonwealth to respond to both the motion for stay of execution of sentence and the motion for new trial by April 1, 2022. The Commonwealth has begun its investigation into the allegations raised by the defendant, and states that it intends to

fully investigate whether this conviction is fair in light of the claims raised by the defendant. At minimum, the Commonwealth will need to hire an independent arson-investigation expert to perform a full analysis of the reports and trial transcripts, and to interview the witnesses identified by the defendant in his lengthy motion for new trial. This type of conviction integrity review process and investigation is complicated and will take additional time in order for the Commonwealth to fully and properly respond to the motion for new trial.

5. Conclusion:

The Commonwealth does not oppose the Defendant William Cascone's Motion for Stay of Execution of Sentence pending the resolution of his motion for new trial, with his release being subject to the conditions outlined in the Re-Entry Plan, as well as any additional conditions deemed reasonable by this Court.

In addition, the Commonwealth requests additional time to continue its investigation into the numerous and complicated issues raised in the defendant's motion for new and to file its response by August 1, 2022.

Respectfully submitted,

ANDREA C. HARRINGTON
DISTRICT ATTORNEY FOR
THE BERKSHIRE DISTRICT

/s/ Jennifer K. Zalnasky

JENNIFER K. ZALNASKY
Chief of Appeals
Berkshire County District Attorney's Office
7 North Street
Pittsfield, MA 01201
Tel. 413-443-5951 X137
jennifer.k.zalnasky2@mass.gov
BBO# 650762

Date: March 22, 2022

CERTIFICATE OF SERVICE

I, Jennifer K. Zalnasky, Assistant District Attorney, hereby certify that on this day a copy of the *Commonwealth's Response to Defendant's Motion for Stay of Execution of Sentence Pending Motion for New Trial and Motion for Extension of Time to Respond to Motion for New Trial*, by email upon the attorneys for the defendant:

Charlotte Whitmore: charlotte.whitmore@bc.edu

David J. Grimaldi: david@attorneygrimaldi.com

/s/ Jennifer K. Zalnasky
Jennifer K. Zalnasky
Assistant District Attorney

Date: March 22, 2022