

No.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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DOMINGO PALMA,  
*Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS,  
*Respondent.*

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On A Petition For A Writ Of Certiorari To  
The Massachusetts Appeals Court

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**PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

This case presents a question of significant importance calling for summary reversal. A trial court's authority to declare a mistrial implicates some of the most fundamental rights a criminal defendant has: the right to a fair trial under the Sixth Amendment, see *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006) ("the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial"), and to due process under the Fourteenth Amendment, see *Strickland v. Washington*, 466 U.S. 668, 684-685 (1985) ("The Constitution guarantees a fair trial through the Due Process Clauses"). And yet, reviewing courts in Massachusetts have adopted a standard so deferential as to grant unlimited discretion to trial judges who deny motions for mistrial that ought to be allowed.

This case epitomizes the danger of such a jurisprudence. Here, in a prosecution for rape, a prosecution witness non-responsively testified to groundless, irrelevant, and inflammatory bad act evidence in utter disregard of an agreed-to *in limine* ruling, and the prosecutor's corresponding instructions to the witness (and even in disregard of the court's direct admonition to properly answer yes-or-no questions). Among other things, this witness made uncorroborated claims that the defendant possessed a gun, asserted that threats were made to the complainant (her daughter) with that same non-

existent gun, and speculated that threats were made to the complainant with the gun (a claim that the complainant *herself* did not substantiate). Defense counsel raised immediate objections and moved for a mistrial. The trial court denied the motion. Now in an impossible strategic situation, counsel sought to lessen the blow by further cross-examination, only to have the witness give another non-responsive, and more inflammatory, answer – to the effect that the defendant’s gun ownership was spawned by his hatred of “people of color.” Trial counsel again contended that a fair trial was impossible. The prosecutor asked the court not to mistry the case, and the court pushed forward without providing a curative instruction until the following day. The trial ended in the defendant’s conviction.

It cannot be consonant with constitutional principles that this sequence of events withstands meaningful appellate review. But in Massachusetts, reviewing courts seem to take a certain pride in their refusal to reverse a trial judge’s decision to deny a motion for mistrial. See, e.g., *Commonwealth v. Silva*, 93 Mass. App. Ct. 609, 615-616 (2018) (“the defendant has not pointed to a single Massachusetts case, and we have found none, where an appellate court has concluded that a mistrial was required because the jury would not be able to disregard evidence they were instructed to disregard”). Such a stance

trenches upon Constitutional rights and the Federal law that flows from it.

The question presented is:

Are the Sixth and Fourteenth Amendments violated by a trial court's refusal to grant a mistrial where a prosecution witness injects groundless, irrelevant, and inflammatory bad act testimony, and the resulting prejudice was neither cured nor curable?

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PETITION FOR A WRIT OF CERTIORARI

Domingo Palma respectfully petitions this Court for a writ of certiorari to review the judgment of the Massachusetts Appeals Court in this case.

OPINION AND ORDER BELOW

The opinion of the Massachusetts Appeals Court can be found among the unpublished opinions of that Court at 99 Mass. App. Ct. 1129 (2021) and is attached in the petitioner's Appendix (App. 19).<sup>1</sup> Mr. Palma filed a timely application for further appellate review to the Supreme Judicial Court, which that Court denied. See *Commonwealth v. Palma*, 488 Mass. 1102 (2021). The docket entry showing the denial is also attached in the Appendix (App. 26).

JURISDICTION

The judgment of the Appeals Court was entered on June 16, 2021. A timely application for further review by the Supreme Judicial Court was sought and denied. This Court has jurisdiction under 28 U.S.C. § 1257(a) where a final judgment

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<sup>1</sup> The attached Appendix will hereinafter be referred to as "App. \*" and the trial transcripts will be referred to by volume and page number as "\*:\*" where each volume will be cited chronologically. The defendant's Record Appendix below will be cited as "R.A. \*."

has been rendered by the highest Court in the Commonwealth of Massachusetts.

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees that a criminal defendant has the right to a fair and impartial trial. The Fourteenth Amendment provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

#### STATEMENT OF THE CASE

##### **I. Factual Background.**

On December 12, 2013, a Suffolk County grand jury returned seven indictments against the defendant, Domingo Palma: two counts of aggravated rape of a child, in violation of G.L. c. 265, § 23, and five counts of indecent assault and battery on a person under fourteen years old, in violation of G.L. c. 265, § 13B (R.A. 20-26).

Domingo was involved in a romantic relationship with Sylvette Lopez, the mother of the complainant, C.B. The relationship lasted for several months in the summer of 2013. During this period, Sylvette sometimes picked up C.B.'s brother from his job; C.B. usually accompanied her mother on these trips, but was sometimes left home with Domingo (III:102). It

was at these times that C.B. alleged that Domingo committed various sexual assaults (III:104-110, 117).

The Commonwealth introduced evidence of a phone call that Sylvette overheard (or instructed C.B. to make so that she could listen in); C.B., either before or after this call, allegedly disclosed that Domingo had touched her inappropriately. The Commonwealth also introduced "thumbnails" of the defendant and C.B. together in a bed and a short voicemail that C.B. left on Domingo's phone (V:182, VI:22).

There was no forensic evidence to corroborate C.B.'s allegations. Investigators sought to collect C.B.'s bedding as potential evidence but Sylvette threw it out before they could do so; to the extent that forensic testing was performed, however, it did not reveal the presence of semen in C.B.'s room, nor did an evidence collection kit from C.B.'s person yield any connection to Domingo (V:121, 147-156).

The defendant testified in his own defense. He explained that he had made an attempt to break up with Sylvette just before the allegations arose and that she had threatened him, saying, "You will have a lot of trouble . . . you don't know exactly what is going to happen" (VI:89-91). He provided a statement to police after his arrest and permitted them to search his phone and his car (VI:94-95, 101). He categorically denied touching C.B. in an inappropriate way (VI:102, 112).

## **II. Trial Proceedings.**

Prior to trial, the court addressed the defendant's motion *in limine* regarding prior bad acts, specifically, to exclude allegations from Sylvette that Domingo owned a gun and made threats to Sylvette (I:9-10). Both the defense and the Commonwealth believed that this testimony was inadmissible; the court agreed (I:13). The prosecutor asserted that she instructed Sylvette not to testify about these acts both at the *in limine* stage and before Sylvette's testimony (I:14, IV:81).

At one point during Sylvette's cross-examination, counsel asked about a conversation where C.B. teased Sylvette, saying that she and Domingo were "boyfriend and girlfriend"; specifically, counsel asked Sylvette whether Domingo "appear[ed] surprised" that C.B. was saying this (V:74). At first Sylvette gave no response, so defense counsel asked again, "Did he appear surprised?"; to which Sylvette replied, "I believe that he had [C.B.] frightened because he used to threaten me with a revolver" (V:74). Defense counsel moved to strike, and Sylvette began to say, "No, it's the truth. He threatened me with --" before indiscernible crosstalk occurred; the court struck the answer as it attempted to restore order and asked the parties to approach the bench (V:74-75).

A lengthy sidebar conference followed. Defense counsel moved for a mistrial (V:75). The court said that it would "remind [the jury] of things that are not evidence" (V:75). Defense counsel replied,

I don't see how a jury instruction, Judge, can do anything. She's making this allegation. I have no option but to explore it. . . . I'm between a rock and hard place because I wasn't going to ask anything of that -- to elicit that testimony and she just blurted it out in response to the question, 'Did Mr. Palma appear surprised?'

(V:75). The court responded, "I struck the testimony. I'm going to remind the jury at the end that I struck the testimony and I'll give them additional encouragement as to -- if you can, if you want, you can explore it if you want, I guess. *Even though it's stricken, I think it's fair to ask some follow-up questions*" (V:76 [emphasis added]). The court considered potential curative instructions; defense counsel maintained that "[o]nce it's stricken, it's highlighted, whether they discuss it or not. It's still in the back of their minds. It's essentially known once it's heard by the jury. I have no alternative but to explore it . . . ." (V:77-78). Counsel ultimately stated that his client "cannot get a fair trial now that she's brought this up" (V:80). The court moved on, telling Sylvette she needed to listen carefully to the questions and to do her best to answer yes or no to questions calling for such an answer (V:81).

The cross-examination continued. Sylvette testified that Domingo kept a gun in his car and threatened her with it there; that she never told her children of these threats; and that she never called the police (V:82-83, 85). When asked if the threats occurred "in the early part of the summer," Sylvette replied, "Yes, and he would always carrying a gun [sic]. He would say that he had to be safe in case anything happened. *He hates people of color* and that in case anyone of color approach him" (V:85 [emphasis added]).

The jury was excused and another sidebar was convened (V:86). The court noted that Sylvette testified contrary to the court's order despite a sufficient instruction by the prosecutor (R.A. 19). Counsel expressed concern that, with three African-American members of the jury, Sylvette's non-responsive statement that the gun was carried out of a specific fear of "people of color" further eroded the defendant's right to a fair trial. He stated, "I don't know how much more prejudicial a situation he can have at this point" (V:91-94).

After a break for lunch, the Commonwealth asked the court to deny the ongoing motion for mistrial (V:95). The court stated again that the decision to cross-examine further on the topic of firearms was a strategic one made by defense counsel and that the court would not permit any rehabilitation from the

Commonwealth on that topic (V:98). At no time that day did the court provide a curative instruction.

The following day, in its final charge, the court instructed the jury that "this case is not about any threats or any other conduct by the defendant directed at Ms. Lopez and this case also does not in any way concern any firearm. Testimony from Ms. Lopez on those matters do not bear in [sic] the issue you need to decide in this case which concerns alleged conduct alleging the defendant and [C.B.]" (VI:250). The allowance of the motion to strike Sylvette's testimony was never explicitly reversed, either during Sylvette's cross-examination or in the court's final instructions.

### **III. Decision of the Massachusetts Appeals Court.**

The defendant filed a timely notice of appeal and the case was entered in the Appeals Court on May 28, 2020. While the appeal was pending in that Court, the trial judge allowed the defendant's motion to stay his sentence in an order dated February 9, 2021, finding that the defendant had raised issues "worthy of appellate attention" (App. 29).

The case was argued on May 4, 2021. A panel of the Massachusetts Appeals Court (Vuono, Desmond & Massing, JJ.) affirmed the defendant's convictions in an unpublished decision on June 16 (App. 19). The defendant moved to extend his stay of

sentence pursuant to Mass. R. A. P. 6(b) (5) so that he could pursue further appellate review; this motion was allowed on June 22.

The defendant applied to the Supreme Judicial Court for further appellate review. His application was denied on August 2 (App. 26). The defendant's stay expired by the terms of the previous order. He reported to the Suffolk Superior Court to resume his sentence without incident.

#### REASONS FOR GRANTING THE PETITION

A trial court has inherent authority to grant a mistrial in order to bring a trial to an end, without a determination on the merits, because of a prejudicial error that cannot be corrected. It is an indispensable tool for trial courts confronted with proceedings that have become fundamentally unfair, thereby ensuring that a defendant's constitutional rights to due process and a fair trial are preserved. No appellate decision in Massachusetts, however, has ever reversed a trial judge's denial of a motion for a mistrial. That ruling is reviewed for an abuse of discretion, a standard that, in practice, appears to give unlimited leeway to the trial judge.

Here, the jury heard improper testimony that the defendant carried a gun, that he threatened a witness with a gun, that this witness speculated he threatened the complainant with a

gun, and -- if that was not bad enough -- that he obtained the gun because "he hates of people of color." Not only had the parties agreed to exclude this very testimony before the trial began (an agreement adopted by the trial judge), but it all came in the form of non-responsive answers to the questions put to the witness. The defendant moved for a mistrial in response. The trial court denied the motion and the trial resulted in the defendant's conviction. After exhausting state appellate review, the conviction was upheld.

The effect of this jurisprudence is to dissuade trial courts from mstrying cases where it is necessary to do so. A judge, already facing immense institutional pressure to complete a trial once it has begun, is further disincentivized from mstrying a case where he or she knows that the denial of such a motion will invariably be upheld on appeal. Instead of fostering judicial economy by finishing trials once they have started, this practice leads to suspect verdicts obtained in the face of incurable trial errors. It thus erodes defendants' constitutional rights to due process and a fair and impartial trial.

This case presents errors so manifestly and unduly prejudicial that a fair trial became impossible. The errors compounded on one another, multiplying until the prejudicial effect could not be cured. But the parties cannot be faulted for

their reactions in real time when the original error was attributable solely to the witness herself, a witness bent on poisoning the proceedings with forbidden, unreliable and irrelevant testimony. For this reason, a mistrial was the only option and the trial court abused its discretion in denying the defendant's motion.

This Court should take the opportunity presented here to affirm the propriety of mistrials under such circumstances, not only to cure a grave injustice to the defendant, but to bring Massachusetts law into alignment with the protections provided under federal law. In doing so, this Court should stress the necessity of using mistrials to avoid suspect verdicts and, correspondingly, of a meaningful standard of review that comports with the constitutional rights to a fair trial and due process.

THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR THAT MOTIONS FOR MISTRIAL, A FUNDAMENTAL TOOL FOR THE PRESERVATION OF A DEFENDANT'S CONSTITUTIONAL RIGHTS, MUST BE ALLOWED IN CASES LIKE THE INSTANT ONE WHERE THE PREJUDICE CREATED BY IMPROPER TESTIMONY BECOMES INCURABLE.

Sylvette's testimony about the defendant's supposed gun ownership and threats with a gun, her speculation that he made similar threats to C.B., and, certainly, her allegations that he carried a gun because "[h]e hates people of color," were not statements that the jury could disregard. Moreover, the trial

court's instructions did not ask the jury to disregard them, leaving them in evidence for an indeterminate purpose. This caused profound and incurable prejudice requiring reversal.

The mistrial is a time-honored mechanism for halting a proceeding that has become fundamentally unfair. In *United States v. Perez*, 9 Wheat. 579 (1824) (Story, J.), this Court stated that "the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." In other words, where "the ends of substantial justice cannot be attained without discontinuing the trial[,]" a mistrial is warranted.

*Gori v. United States*, 367 U.S. 364, 368 (1961). Thus, "[a] mistrial is defined as a trial which has been terminated prior to its normal conclusion because of . . . prejudicial error that cannot be corrected at trial[.]" *Malinovsky v. Ct. of Com. Pleas of Lorain County*, 7 F.3d 1263, 1269 (6th Cir. 1993), quoting Black's Law Dictionary 1002 (6th ed. 1990).

Trial judges are granted wide discretion in determining whether a mistrial is appropriate and any decision denying a motion for mistrial is reviewed for an abuse of that discretion. See, e.g., *United States v. Apicelli*, 839 F.3d 75, 86 (1st Cir. 2016). Although that grant appears to be a wide one, see *Gori*,

367 U.S. at 368. (Supreme Court has "consistently declined to scrutinize with sharp surveillance the exercise of that discretion"), it is not an unlimited one. In describing *Perez's* "manifest necessity" standard, this Court has held that "the key word 'necessity' cannot be interpreted literally; instead . . . we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Arizona v. Washington*, 434 U.S. 497, 506 (1978).

Massachusetts is just one of many states who have adopted a similarly lenient standard toward trial judges' determinations of when a mistrial is appropriate. See, e.g., *Commonwealth v. Amran*, 471 Mass. 354, 359 (2015) (trial court has "broad discretion" regarding motions for mistrial and a reviewing court owes deference to such rulings). But Massachusetts has taken this approach to an unconstitutional extreme. Recently, its Appeals Court noted that it could not find "a single Massachusetts case . . . where an appellate court has concluded that a mistrial was required because the jury would not be able to disregard evidence [as instructed.]" *Commonwealth v. Silva*, 93 Mass. App. Ct. 609, 615-616 (2018). Surely, it is not impossible for a trial judge's assessment to be incorrect. But absent a single reversal -- ever, in the history of the reviewing courts in Massachusetts -- that appears to be the view underlying the cases on this issue.

Federal case law lays out the following approach in determining whether a motion for mistrial was appropriate: a reviewing court must look to the totality of the circumstances, considering in particular "1) whether an appropriate curative instruction was issued, 2) whether the judicial response was timely, and 3) whether appellants successfully rebutted the presumption that the jury followed the judge's instructions."

*United States v. Pagán-Ferrer*, 736 F.3d 573, 586 (1st Cir. 2013). The existence of a curative instruction matters in this context; if a curative instruction is "promptly given, a mistrial is only warranted in rare circumstances implying extreme prejudice." *United States v. Torres*, 162 F.3d 6, 12 (1st Cir. 1998). Applying the approach noted above, the denial of the mistrial was constitutional error in this case.

As outlined above, Sylvette's improper testimony was grossly prejudicial, and the prejudice was neither cured nor curable. The trial court did not give a prompt curative instruction, see *Torres*, *supra*, but waited instead until the end of the trial. And at that time, he told the jury only that Sylvette's erroneous testimony "do[es] not bear in [sic] the issue you need to decide in this case" (VI:250). The court did not withdraw the evidence from the jury's consideration, and thus left it before the jury for some indefinite purpose.

This case perfectly illustrates why the mistrial is so

crucial to fair trial practice. The errors here -- Sylvette's unresponsive comments, volunteered to unfairly disparage the defendant in blatant violation of the court's orders -- caused extreme prejudice. Because the prejudice multiplied as the parties reacted in real time, the errors were not readily remediable. They were caused in the first place by the witness's flagrant disregard of the *in limine* ruling (and even of the court's contemporaneous admonition to properly answer yes-or-no questions, see V:81). They were then highlighted by the court's initial allowance of the motion to strike and the lengthy ensuing sidebar. The court's subsequent resistance to granting a mistrial and, instead, its encouragement to pursue cross-examination on ostensibly stricken testimony (V:74-76), further exacerbated the prejudice. Defense counsel, now in an impossible strategic situation, sought to lessen the blow of Sylvette's accusations by further cross-examination in accordance with the court's ruling, only to have Sylvette give yet another unresponsive answer, to the effect that the defendant's gun ownership was spawned by his hatred of "people of color" (V:85). Trial counsel asserted again that a fair trial was impossible (V:87-88, 93-94). But the Commonwealth asked the court not to dismiss the case (V:95) and the court pushed forward without providing a curative instruction until the following day.

Both the trial court and defense counsel were in difficult

situations, and both tried, in their own way, to mitigate the errors. But these attempts, well-intentioned as they were, only caused the trial to spin further out of control, multiplying the prejudicial effect of Sylvette's testimony beyond a point where it could be cured. *A mistrial was the only option.* The trial needed to be "discontinu[ed]" in order for any resulting verdict to comport with "substantial justice." *Gori*, 367 U.S. at 368.

A jurisprudence that discourages the use of this mechanism is contrary to the basic constitutional guarantees of a fair trial and due process. A grant of discretion so wide that no appellate court will meaningfully review, or ever reverse, a lower court's decision is not a sufficient bulwark against unfair trials. Herein lies a valuable lesson for our trial courts: there is a point when a trial becomes so unfair that no instruction can rescue it. That point was reached in this case. The denial of the mistrial was constitutional error. This Court should grant certiorari in this case to make clear to courts in Massachusetts, and elsewhere, that their discretion in ruling on motions for mistrials is not, in fact, unlimited.

#### CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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**APPENDIX**

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NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-597

COMMONWEALTH

vs.

DOMINGO PALMA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant, Domingo Palma, of two counts of rape of a child in violation of G. L. c. 265, § 23, and four counts of indecent assault and battery on a child under the age of fourteen in violation of G. L. c. 265, § 13B. The victim, whom we shall call Sally, is the daughter of the defendant's former girlfriend (mother). On appeal, the defendant argues that the judge erred by failing to grant a mistrial after the mother testified that the defendant had threatened her with a firearm despite having been informed that the judge had excluded that evidence. We affirm.

Background. Prior to trial, defense counsel filed a motion in limine that sought to prevent the mother from testifying, as she had stated in a previous interview, that the defendant had threatened her with a firearm. At the hearing on the motion,

the prosecutor agreed that such testimony was not admissible, and the motion was allowed without objection. At trial, however, despite having been advised by the prosecutor not to reveal anything about the alleged threat or the defendant's use of a firearm, the mother testified in response to a question posed by defense counsel that she believed Sally was frightened of the defendant "because [the defendant] used to threaten me with a revolver." Defense counsel immediately moved to strike the answer, which the judge did. Defense counsel then requested a mistrial, which the judge denied. The judge offered to instruct the jury that the stricken testimony was not evidence in the case; however, because defense counsel believed that a curative instruction was not adequate in the circumstances, he elected instead to explore the issue through further questioning to undermine the mother's credibility.<sup>1</sup> Thereafter, in response to defense counsel's questions on cross-examination, the mother testified that (1) the defendant threatened her on three occasions by showing her a revolver; (2) she never told her children about the threats because she did not want to scare them; (3) the defendant always carried the gun "in case anyone

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<sup>1</sup> We note that the decision of defense counsel to pursue the issue on cross-examination was a conscious strategic decision that was not unreasonable at the time it was made. The mother was hostile toward the defendant, and defense counsel's decision to exploit that hostility effectively demonstrated her bias which, in turn, significantly diminished her credibility.

of color approach[ed] him" because "[h]e hates people of color"; and (4) he carried the gun in the glove compartment of his truck or underneath the seat of his car.<sup>2</sup> On the following day, before the trial recommenced, the judge offered to strike all the testimony regarding the firearm and threats in its entirety, but defense counsel declined.

In his closing argument, defense counsel relied on the mother's testimony regarding the alleged threats with a firearm to support his theory that she was not credible. He argued that it was unlikely that the mother would not have told her older sons about the defendant threatening her with a gun and that her allegation that he carried the gun because he hated people of color was an attempt to impugn his character in front of the jury. By contrast, in her closing remarks the prosecutor told the jury to ignore the testimony altogether. She argued:

"The testimony you heard about gun possession and threats are a distraction. The defendant is not charged with those things. It is not your job to determine whether he's guilty or not guilty of those things. Completely put it out of your mind. Do not be distracted by it. Focus on what is important. Focus on the charges in this case. Focus on the allegations of what the defendant did to [Sally]."

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<sup>2</sup> The defendant testified that he did not own a firearm. He also testified that a few days before he was arrested, he had attempted to end his relationship with the mother, and that the mother responded by threatening him, stating that he would have "a lot of trouble."

In his final charge to the jury, the judge specifically addressed the testimony about the defendant's alleged threats and use of a firearm and instructed the jury as follows:

"Let me say a word about certain testimony you heard in this case. Recall that during [the mother's] testimony, at one point she testified in certain terms [threats] allegedly made against her by the defendant involving a gun. I initially struck that testimony from that point, which means you must disregard. However, upon further questioning by defense counsel [the mother] testified further about those alleged threats and about the alleged firearm. That testimony was not stricken but I want to provide this instruction now after close of the evidence.

"First, this case is not about any threats or any other conduct by the defendant directed at [the mother] and this case also does not in any way concern any firearm. Testimony from [the mother] on those matters do not bear in the issue you need to decide in this case which concerns alleged conduct alleging the defendant and [Sally].

"Second, I'll advise the jury that no charges are pending now and no charges have ever been brought against Mr. Palma related to any threats or other conduct directed at [the mother], or related to any firearms."

Discussion. The defendant argues that the mother's initial disclosure that he had threatened her with a firearm required the judge to declare a mistrial and that no curative instruction was adequate to cure the prejudice that flowed from the improper testimony.<sup>3</sup> We disagree.

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<sup>3</sup> The parties do not agree on the applicable standard of review. The Commonwealth maintains that the only issue preserved on appeal is whether a mistrial should have been granted based on the mother's initial disclosure that the defendant had threatened her with a firearm. The defendant argues that because he was forced to elicit additional testimony from the mother, we should consider all of the mother's testimony in determining whether there was prejudicial error. We need not

We review the decision not to declare a mistrial for an abuse of discretion, affording deference "to that judge's determination of whether [there was] prejudicial error, how much any such error infected the trial, and whether it was possible to correct that error through instruction to the jury."

Commonwealth v. Amran, 471 Mass. 354, 359 (2015), quoting Commonwealth v. Thomas, 429 Mass. 146, 157 (1999). Here, there is no question that the testimony at issue was inadmissible and that the mother violated the pretrial ruling excluding evidence of the defendant's alleged prior bad acts. However, because the judge immediately struck the mother's initial response and clearly and forcefully instructed the jury in his final charge that they were to disregard the stricken answer and further instructed the jury that the additional testimony about the alleged threats and the reasons why the defendant allegedly had a firearm elicited by defense counsel was not relevant to the charged offenses, we are satisfied that any potential prejudice was sufficiently neutralized.

Furthermore, we do not agree with the defendant's assertion that the Commonwealth did not have a strong case. To the contrary, Sally's allegations of sexual abuse were corroborated

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resolve this disagreement because we assume without deciding that we should consider all the testimony in determining whether a mistrial was required and in evaluating the issue of prejudice.

by additional compelling evidence. Sally's brother testified that the defendant would visit Sally's room at night and that he saw them in bed together twice. The mother and Sally's other brother described a telephone call between Sally and the defendant that the brother claimed to have recorded. That same brother testified that the defendant referred to himself and Sally as a couple and mentioned that they had had sexual intercourse.<sup>4</sup> In addition, a voicemail that Sally left on the defendant's telephone telling the defendant "Baby[,] I miss you, can't wait . . . for us to be together again," was played for the jury. Sally testified that the defendant asked her to leave the voicemail for him. Finally, Sally testified that the defendant took photographs of himself and Sally together. The photographs, which were admitted in evidence, showed the defendant and Sally in Sally's room. The defendant was shirtless and kissing Sally, and Sally was kissing the defendant's nipples. Although the defendant testified at trial and denied that he had touched Sally inappropriately, he acknowledged that on one occasion he fell asleep in bed with Sally while they were watching a movie, and that Sally had once

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<sup>4</sup> For the most part, the brother summarized his interpretation of the defendant's statements. At one point, paraphrasing, the brother described the defendant as saying, "Oh, no, my love. We're going to go, we're going to leave this. After we leave this, we're going to talk about our future and our lives together."

kissed him and put her tongue in his mouth. With respect to the photographs depicting the defendant and Sally kissing, the defendant claimed that the mother had taken the photographs and told them to kiss. The defendant also admitted that Sally had left him the voicemail that was introduced in evidence; he testified that he had reported receiving the voicemail to the mother because he thought that it was inappropriate.

In sum, in light of the strength of the evidence, the strong jury instructions, and defense counsel's strategic decision to rely on the improper testimony to support his theory that the mother was not a credible witness, we discern no abuse of discretion in the judge's decision not to declare a mistrial.

Judgments affirmed.

By the Court (Vuono,  
Massing & Desmond, JJ.<sup>5</sup>),

  
Clerk

Entered: June 16, 2021.

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<sup>5</sup> The panelists are listed in order of seniority.

SUPREME JUDICIAL COURT  
for the Commonwealth  
Case Docket

COMMONWEALTH vs. DOMINGO PALMA  
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID  
FAR-28367

CASE HEADER

Case Status	FAR denied	Status Date	08/02/2021
Nature	Crime: Sexual Offense	Entry Date	07/02/2021
Appeals Ct Number	<a href="#">2020-P-0597</a>	Response Date	07/16/2021
Appellant	Defendant	Applicant	Defendant
Citation	488 Mass. 1102	Case Type	Criminal
Full Ct Number		TC Number	
Lower Court	Suffolk Superior Court	Lower Ct Judge	Christopher Barry-Smith, J.

INVOLVED PARTY

Commonwealth  
Plaintiff/Appellee  
Domingo Palma  
Defendant/Appellant

ATTORNEY APPEARANCE

[Cailin M. Campbell, A.D.A.](#)  
[Shane T. O'Sullivan, A.D.A.](#)  
[Thomas John Combs, Esquire](#)  
[Eric S. Brandt, Esquire](#)

DOCKET ENTRIES

Entry Date	Paper	Entry Text
07/02/2021		Docket opened.
07/02/2021	#1	FAR APPLICATION filed for Domingo Palma by Attorney Thomas Combs.
08/02/2021	#2	DENIAL of FAR application.

As of 08/12/2021 6:20pm

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
No. 1384CR11033

COMMONWEALTH

vs.

DOMINGO PALMA

**ORDER ON DEFENDANT'S MOTION FOR A STAY OF SENTENCE  
PENDING APPEAL**

On September 3, 2019, a jury found defendant, Domingo Palma, guilty of two counts of rape of a child and four counts of indecent assault and battery on a child. I sentenced Palma to ten years to ten years, one day in State Prison, the mandatory minimum sentence under G.L. c. 265, § 23A, to be followed by probation. For the last seventeen months, Palma has been serving that sentence, currently at MCI-Gardner. Palma's appeal is pending before the Appeals Court, where the parties have filed their briefs. On January 11, 2021, Palma filed a motion for a stay of his sentence pending appeal, and I held a hearing on February 5, 2021 after the Commonwealth filed its opposition. For the reasons discussed briefly below, Palma's motion for a stay of sentence pending appeal is **ALLOWED**.

Because his appeal is pending, Palma may seek a stay of his sentence pending appeal. Mass. R. App. P. 6(b); Mass. R. Crim. P. 31. The Supreme Judicial Court's decision in *Commonwealth v. Nash*, 486 Mass. 394 (2020) provides the standard for me to apply in reviewing Palma's motion. I must evaluate: (1) the defendant's likelihood of success on appeal, (2) certain security factors, and (3) certain risks associated with the pandemic. *Id.* at 403. With respect to the first factor, the defendant need not show he is likely to succeed on appeal. Instead,

the burden on the defendant to establish the requisite possibility of success is not onerous; . . . 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 dialectic 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.

*Id.* at 404. The second factor requires me to consider “security” factors including the possibility of flight to avoid punishment, the potential danger to any person or the community, the likelihood of criminal acts if defendant is released pending appeal, and bail-related considerations such as family connections, community roots, prior criminal record, seriousness of the crime and strength of the evidence. *Id.* at 405. Finally, so long as the COVID-19 pandemic continues, I am to consider the risks posed by incarceration during the pandemic, mindful of the judiciary’s continuing objective to reduce prison and jail populations, where that can be done in a “safe and responsible manner.” *Id.* at 406. If a defendant would qualify for a stay under the “traditional, two-factor test,” I need not consider the risks posed by the pandemic. *Id.* at 407. Rather, where a defendant does not satisfy the traditional criteria, but comes close, the pandemic-related risks may tip the scales in favor of a stay. *Id.*

Here, after hearing and careful consideration of the parties’ arguments, I find that Palma satisfies the two traditional criteria and is entitled to a stay pending appeal. With respect to the merits of Palma’s appeal, the Commonwealth argues that Palma’s appeal is unlikely to meet with ultimate success. The centerpiece of Palma’s appeal is that he was entitled to a mistrial because a witness—the victim’s mother—testified that Palma owned a gun, had previously threatened her with it, and kept it for protection from “people of color.” In addition to being irrelevant and prejudicial, testimony concerning the alleged gun was raised in limine before trial, excluded, and the prosecutor instructed the witness not to raise that issue. The Commonwealth argues that,

though this testimony plainly violated an evidentiary ruling, it will not support a successful appeal because: i) defense counsel at trial made the strategic decision to elicit further related testimony from the witness to undermine her credibility, rather than leave the testimony stricken; ii) I issued curative instructions; iii) the testimony was collateral to the main issues to be decided by the jury; and iv) the evidence of Palma's guilt was overwhelming. I find persuasive the Commonwealth's arguments that Palma is unlikely to succeed in his appeal. But the standard is not whether Palma will succeed, but whether the appeal presents an issue "worthy of presentation to an appellate court, one which offers some reasonable possibility of success." *Id.* at 403, quoting *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 503-504 (1979). Here, the witness's improper testimony and my denial of a mistrial in favor of a curative instruction, layered with defense counsel's strategic decision to elicit additional testimony, followed by additional jury instructions on the issue, raised a challenging trial issue. Even if I agree with the Commonwealth with respect to the collateral nature of the testimony and the overall strength of the evidence, the issues arising out of the witness' trial testimony and my response are worthy of appellate attention.

With respect to the security factors, Palma is uniquely positioned to argue that he poses no threat to the community or to flee, *notwithstanding* that he has already been sentenced to ten years for a serious crime. He is 67 years old. The charges on which he was indicted in 2013 and convicted in 2019 are the only entries on his criminal record. For six years between when these charges were commenced in district court and his trial, Palma was released on GPS. He attended all proceedings as required, and trial, and did not violate any condition of release. If released pending appeal, he proposes to return to his prior residence in Litchfield, New Hampshire, monitored by GPS, to live with his longtime girlfriend and his son, in the same place he lived for

many years while awaiting trial. On this factor, the Commonwealth's principal contentions are that Palma is now serving a ten year sentence after conviction, which increases his incentive to flee, and that the nature of his crime—exploiting his position of trust and sexually abusing an eleven year old girl—make him a risk to the community. I acknowledge, of course, the serious difference between *facing* a potentially long period of incarceration and actually *serving* such a sentence. I also acknowledge the serious nature of Palma's criminal conduct. On balance, however, I find that Palma has satisfied the security factor in favor of a stay. Notwithstanding that he is at the front end of a ten year sentence of incarceration, which reflects the seriousness of his criminal conduct, I find that, especially with the conditions of release I will impose, Palma is not likely to pose a danger to the community or to re-offend, or to flee, and that his release to home confinement at his residence, monitored by GPS, warrants a stay of his sentence while his appeal is pending.

Because I find Palma satisfies the traditional two-prong analysis for a stay, I am not obligated to consider the risks posed by the COVID-19 pandemic. Nonetheless, were I to determine that either of the two traditional criteria were *not* satisfied, the pandemic-related circumstances would provide an additional basis for a stay. MCI-Gardner has experienced a recent spike in COVID-19 infections. Indeed, although Palma received a COVID-19 vaccine in recent weeks, his lawyer reports that Palma tested positive for COVID-19 immediately before the February 5, 2021 hearing. The risks of COVID-19 while in prison have thus manifested for this defendant. To address this reported positive test, my conditions will require Palma as a condition of release to conform to any quarantine requirements as instructed by the DOC.

## ORDER

Defendant's motion for stay of sentence pending appeal is allowed. Defendant Domingo Palma shall be released pending appeal subject to the following conditions of release:

- Palma shall reside at 10 Steven Way in Litchfield, New Hampshire, and shall be subject to house arrest at that address, monitored by GPS bracelet, with windows only for legal appointments and medical appointments, with advance notice and approval from Probation Department. Palma shall not be released until affixed with GPS.
- Palma shall provide a signed waiver of extradition to Probation Department.
- Palma shall comply with quarantine requirements as instructed by the Department of Corrections in connection with his release.
- Palma shall have no contact, direct or indirect, with the victim in this case or her family.
- Palma shall turn over his passport to Probation, unless Probation still possesses it as a result of his previous pre-trial detention.

So ordered.

*Christopher K. Barry-Smith* Attested to by  
Christopher K. Barry-Smith  
Justice of the Superior Court 3/9/21

DATE: February 9, 2021