COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss SUPREME JUDICIAL COURT
NO. SJ-2014-0387

DAVID SOUCY

v.

COMMONWEALTH

PETITIONER'S MEMORANDUM PURSUANT TO
S.J.C. Rule 2:21(2)

Now comes David Soucy, Petitioner in the above-captioned matter, and files this Memorandum in accordance with S.J.C. Rule 2:21(2).

On September 18, 2014, Soucy filed a Petition for Relief pursuant to G.L. c. 211, § 3, for review of a denial of a motion to dismiss so much of three indictments pending before the Superior Court Department, Essex county Division, as charge trafficking in opium, a Class B controlled substance. In particular, Soucy sought an order in the Superior Court Department dismissing so much of each trafficking indictment returned against him as alleged the gross weight of pharmaceutical tablets, including the weight of non-narcotic filler substances, rather than the net weight of the active narcotic ingredient contained in

the tablets. The net weight of the narcotic (oxycodone hydrochloride) contained in these tablets upon which each indictment is based does not sustain a trafficking charge under G.L. c. 94C, § 32E; instead, such weight would at most support a charge of possession with intent to distribute under G.L. c. 94C, § 32A(a). After hearing, the lower Court, Lu, J., denied the motion to dismiss with the following margin note: "9/9/14 The defendant, Mr. Soucy, raises legitimate concerns. However, these are issues for the legislature and Supreme Judicial Court. DENIED. /s John T. Lu" (App. 32).

On October 27, 2014, the Commonwealth filed its Opposition to Soucy's Petition. On October 29, 2014, the matter was taken under advisement by the Single Justice, Spina, J. On October 30, 2014, Justice Spina denied Soucy's Petition without a hearing.

On November 6, 2014, Soucy filed an appeal of the single justice's ruling to the full Supreme Judicial Court.

ARGUMENT

> Direct appellate review of the Superior Court's denial of Soucy's motion to dismiss so much of three indictments as charge trafficking in opium following a trial and conviction will not provide adequate

> appellate relief should Soucy prevail on his claim that controlled substance violations pertaining to pharmaceutical narcotics should be based on the net weight of the active narcotic ingredient excluding the weight of non-narcotic filler substances.

Soucy recognizes that "(a) denial of a motion to dismiss pursuant to Mass.R.Crim.P. 13(c)(1) ... may not be appealed until after trial, and relief under G.L. c. 211, § 3, is not available as a matter of right." Epps v. Commonwealth, 419 Mass. 97, 99 (1994). "To obtain review, a defendant must demonstrate both a substantial claim of violation of his substantive rights and irremediable error, such that he cannot be placed in status quo in the regular course of appeal." Morrissette v. Commonwealth, 380 Mass. 197, 198 (1980). "Review of the denial of relief under G.L. c. 211, § 3, is limited to the question whether the single justice committed an error of law or an abuse of discretion". In re Hines, 432 Mass. 1004 (2000).

Under S.J.C. Rule 2:21, the burden is upon Soucy to establish that "review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by any other available means." S.J.C. Rule 2:21(2).

Soucy asserts that placing him in jeopardy on

these three indictments as returned would cause him irreparable harm. The following depicts the weight of the drugs Soucy is charged with trafficking in which includes the weight of the inert ingredients and

oxycodone contained in the tablets:

Offense Date	Weight Charged	Weight of Oxycodone
05/22/12	25.80 grams	8.00 grams
06/06/12	40.46 grams	12.40 grams
10/19/12	22.27 grams	6.54 grams

The net weight of the oxycodone hydrochloride contained in these tablets upon which each indictment is based does not sustain a trafficking charge under G.L. c. 94C, § 32E; rather, such weight would support, at most, a charge of possession with intent to distribute under G.L. c. 94C, § 32A(a).

In its present posture, Soucy will be put to trial facing the specter of a mandatory minimum sentence of not less than three and half and not more than twenty years in State Prison on Indictment No. ESCR2012-01426-002, and mandatory minimum prison sentences of not less than two and not more than fifteen years on the remaining two trafficking indictments. This is a profoundly more burdensome risk than proceeding to trial

on charges of possession with the intent to distribute a controlled substance that do not carry a mandatory minimum committed prison sentence. In addition to three minimum mandatory prison terms, Soucy is confronted with one other quandary: By electing to proceed to trial in order to preserve the issue for a direct appeal, Soucy risks the imposition of consecutive mandatory minimum sentences that could be avoided by tendering a change of plea to the trafficking indictments.

In Ventresco v. Commonwealth, 409 Mass. 82, 83 (1991), this Court explained that "(t)he denial of a motion to dismiss . . . is not appealable by a defendant until after trial (footnote omitted). General Laws c. 211, § 3, may not be used to circumvent our rule. . . . Unless the single justice . . . either decides the issue or reports the matter to the full court, a defendant cannot receive review under that statute of the denial of a motion to dismiss". However, this Court has "recognized two very limited exceptions. In criminal cases, a defendant may seek interlocutory relief pursuant to G.L. c. 211, § 3, from the denial of a motion to dismiss on double jeopardy grounds. In that circumstance, because the double jeopardy right is a *right not to be tried,* we have held that 'appellate

review of [the denial of the motion to dismiss] after trial and conviction would not provide adequate relief if the defendant were to prevail... (Citation omitted)'." Flood v. Commonwealth, 465 Mass. 1015, 1016 (2013). [The second exception allows the target of a sexually dangerous person petition to seek interlocutory relief pursuant to G.L. c. 211, § 3, from the denial of a motion to dismiss the Commonwealth's petition for trial as untimely]. Id.

Soucy's predicament is akin to that confronted in the double jeopardy context. Although Soucy makes no claim of a right not to be tried for possession of oxycodone tablets, he does claim a right not to be tried for trafficking in those tablets. A direct appeal from a conviction for trafficking would not provide Soucy adequate and effective appellate relief. The benefit of a direct appeal could very well prove too costly.

Respectfully submitted,
DAVID SOUCY,
By His Attorney,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the Attorney of Record for each other party by Mail on November 14, 2014.

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