

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJ-2020-

COMMITTEE FOR PUBLIC COUNSEL SERVICES and
MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,
Petitioners,

v.

CHIEF JUSTICE OF THE TRIAL COURT,
Respondent.

EMERGENCY PETITION FOR RELIEF PURSUANT TO G. L. c. 211, § 3

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INTRODUCTION

This petition seeks extraordinary relief for extraordinary circumstances. To mitigate the mortal harm that the COVID-19 pandemic will inflict upon incarcerated people, on corrections staff, and on all of our communities, this petition asks the Court to exercise its superintendence powers under G. L. c. 211, § 3, to reduce the numbers of people who are now in or who will enter Massachusetts jails, prisons, and houses of correction.

The novel coronavirus that causes COVID-19 is spreading exponentially across the country and across this Commonwealth. There is no vaccine, and no uninfected person is immune. This Court and the Trial Court have already recognized that this pandemic poses dire threats not only to everyone in the Commonwealth, but also to its legal system. The courts have issued a flurry of orders designed to slow the spread of COVID-19 by limiting the numbers of people who come to court.¹ And Chief Justice Gants has observed that this crisis will require us to “find new ways to protect the most vulnerable, preserve individual rights, resolve disputes, and somehow keep the wheels of justice turning in the midst of this frightening pandemic.”²

¹ See generally Court System Response to COVID-19, <https://www.mass.gov/guides/court-system-response-to-covid-19>.

² Letter to the Bar from Chief Justice Ralph D. Gants (Mar. 20, 2020).

Protection is now needed for the roughly 16,500 vulnerable people incarcerated in Massachusetts. Over the weekend, the first confirmed COVID-19 cases—three prisoners and one officer—were reportedly diagnosed inside the Massachusetts prison system.³ This does not bode well. Correctional facilities, where physical distancing and vigilant hygiene are impossible, can be petri dishes for the rapid spread of infectious disease. Outbreaks in our prisons will, of course, imperil the lives of incarcerated people, but they will also endanger correctional officers and medical staff, their families, and their communities as staff cycle through the facilities. The more people who contract the virus, the more treatment they will need, and the more precious resources their treatment will require. Prison outbreaks imperil us all.⁴

Confronted with this reality, at least eight state and local court systems—in Alabama, Maine, Montana, New Jersey, Ohio, South Carolina, Texas and Washington—as well as the District of Columbia, have already taken steps to limit incarceration during this crisis. See *infra* at nn. 27-30. As explained by Montana Chief Justice Mike McGrath, releasing prisoners is warranted for a simple and

³ See John Hilliard, *Mass. DOC Putting Prisoners' Lives at Risk Amid Coronavirus Outbreak, Advocates Say*, Bos. Globe (Mar. 22, 2020), <https://www.bostonglobe.com/2020/03/22/metro/mass-doc-putting-prisoners-lives-risk-amid-coronavirus-outbreak-advocates-say/>.

⁴ See attached, Ex. A, Affidavit of Danielle C. Ompad, PhD, regarding SARS-CoV-2 infection (otherwise known as COVID-19) in correctional settings [hereinafter Ompad Affidavit] at ¶ 6(e).

terrifying reason: “Due to the confines of [correctional] facilities, it will be virtually impossible to contain the spread of the virus.” See *infra* at n.28.

For the reasons explained below, petitioners the Committee for Public Counsel Services (CPCS) and the Massachusetts Association of Criminal Defense Lawyers (MACDL) respectfully ask this Court to join these other courts and take immediate steps to reduce the number of incarcerated people in Massachusetts in a manner that is consonant with both public safety and public health. Specifically, the petition asks this Court to:

- 1) reduce the volume of those entering Massachusetts jails and prisons by, among other steps, requiring trial courts to account for the threat of COVID-19 in jails and prisons when they analyze the need for pretrial detention;
- 2) order the release of those held prior to the disposition of their case who are not detained because they pose a danger to public safety; and
- 3) deem served the sentences of incarcerated individuals who are vulnerable to COVID-19, near the end of their sentence, or who do not pose a threat to the public, and release on parole those eligible for parole (including medical parole).

If taken immediately, these emergency measures will mitigate the spread of COVID-19 among and beyond the incarcerated population. They will keep the wheels of justice turning, and will save lives.⁵

⁵ See Siobhan Roberts, *The Exponential Power of Now*, N.Y. Times (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/science/coronavirus-math-mitigation-distancing.html> (explaining how, assuming a constant 30% growth rate, stopping even

FACTUAL BACKGROUND

The coronavirus pandemic has caused states of emergency in both this Commonwealth and the nation.⁶ Millions across the country are now sheltered in place. As of March 23, 2020, Massachusetts has 777 confirmed diagnoses.⁷ Given the limitation of testing capacity, there may be many times more people infected than are presently diagnosed.⁸

COVID-19 is a tragic combination of infectious and deadly. The disease spreads “easily and sustainably” from person-to-person.⁹ Both symptomatic and asymptomatic people can spread COVID-19,¹⁰ and scientists estimate that the

a *single* infection today averts “four times as many infections in the next month: roughly 2,400 averted infections, versus just 600 if you wait one week”).

⁶ See Mass. Exec. Order No. 591 (Mar. 20, 2020), <https://www.mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19> (Declaration of a State of Emergency to Respond to COVID-19); Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

⁷ Mass. Dep’t of Pub. Health, COVID-19 Cases, Quarantine and Monitoring, <https://www.mass.gov/info-details/covid-19-cases-quarantine-and-monitoring>.

⁸ According to a professor of epidemiology at Harvard’s School of Public Health, we are “essentially blind to the state of this epidemic within our own state.” Andrew Ryan, John Hilliard & Tony Alanez, *State Figures on Testing Raise Questions About Efforts to Contain Outbreak*, Bos. Globe (Mar. 14, 2020), <https://www.bostonglobe.com/2020/03/14/metro/baker-sets-up-virus-command-center/>

⁹ See Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), How it Spreads, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

¹⁰ See Ompad Affidavit, *supra* n.4, at ¶ 5(a).

average infected person then spreads the disease to between two and four others.¹¹ Indeed, under certain conditions, a single person can infect hundreds more.¹² Given this exponential spread, time is of the essence.

COVID-19 can cause “severe respiratory illness, as well as damage to other major organs.¹³ Treating serious cases therefore “requires significant advanced support, including ventilator assistance for respiration and intensive care support.”¹⁴ For high-risk patients who survive, the effect of contracting this virus can be permanent and debilitating, and can include “profound deconditioning, loss of digits, neurologic damage, and loss of respiratory capacity.”¹⁵

COVID-19 is also highly fatal. At present, the World Health Organization estimates that the overall case fatality rate is 3.4%.¹⁶ The fatality rate increases with age and for those with conditions that make them particularly susceptible to the

¹¹ See Jenny Gross and Mariel Padilla, *From Flattening the Curve to Pandemic: A Coronavirus Glossary*, N.Y. Times (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-terms-glossary.html>.

¹² See, e.g., *The Korean Clusters*, Reuters Graphics (Updated Mar. 20, 2020) (explaining how a single patient in South Korea infected 1,160 people), <https://graphics.reuters.com/CHINA-HEALTH-SOUTHKOREA-CLUSTERS/0100B5G33SB/index.html>.

¹³ Declaration of Dr. Marc Stern, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>, at ¶ 6.

¹⁴ *Id.*

¹⁵ Declaration of Dr. Jonathan Golob, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob>, at ¶ 4.

¹⁶ See Ompad Affidavit, *supra* n.4, at ¶ 5(c).

virus, as explained *infra*. But this disease “can kill healthy adults in addition to elderly people with existing health problems.”¹⁷ Recent reports suggest that 40% of hospitalized COVID-19 cases were under the age of sixty.¹⁸

Because there is no vaccine, there are only two ways to prevent the spread of COVID-19: physical social distancing (i.e., remaining at least six feet away from other people) and hygiene (i.e., hand washing and regular cleaning of surfaces).¹⁹ This makes jails and prisons especially ill-suited to the prevention of outbreaks.

[B]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible. Separating sick people from well people to prevent the disease from spreading can be nearly impossible in prison, since prisoners are already grouped according to security and other logistical considerations. Even so-called social distancing can prove impossible. People in prisons and jails live every minute of the day in close proximity to each other.²⁰

Almost 8,000 people are incarcerated in Department of Correction (DOC) facilities, and another 8,500 are in county jails and houses of correction.²¹ Physical distancing is impossible in these facilities, and the problem is particularly dire in the nine DOC facilities and seven county facilities that, according to the most updated

¹⁷ Bill Gates, *Responding to Covid-19 - A Once-in-a-Century Pandemic?*, New Eng. J. of Med. (Feb. 28, 2020), [nejm.org/doi/full/10.1056/NEJMp2003762](https://www.nejm.org/doi/full/10.1056/NEJMp2003762).

¹⁸ See Ompad Affidavit, *supra* n.4, at ¶ 5(d).

¹⁹ See Ompad Affidavit, *supra* n.4, at ¶ 5(e).

²⁰ The Justice Collaborative, *Explainer: Prisons and Jails are Particularly Vulnerable to COVID-19 Outbreaks*, (emphasis removed) <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>.

²¹ See Mass. Dep’t of Corr., *Weekly Count Sheet* (Mar. 16, 2020), <https://www.mass.gov/doc/weekly-inmate-count-3162020/download>.

numbers available, are straining beyond 100% capacity, such as the Bristol Dartmouth facility, which is operating at 278% capacity.²² The level of hygiene necessary to prevent the spread of the virus is also impossible in Massachusetts correctional facilities. According to client reports from nine Massachusetts correctional facilities, two facilities do not allow access to soap at all and only three allow access to free soap; in four facilities, there is no access to hand sanitizer.²³

It is therefore no surprise that several Massachusetts prisoners and corrections officers have already been diagnosed with COVID-19.²⁴ More cases are doubtless soon to follow. The ripple effects of this outbreak endanger everyone in the Commonwealth; it could exceed the capacity of the DOC's medical services and require the hospitalization of incarcerated people in already-strapped community hospitals.²⁵ The outbreak will also spill over into community, as staff enter and exit correctional facilities on a daily basis.

²² See Mass. Dep't of Corr., Quarterly Report on the Status of Prison Capacity, Third Quarter 2019 (Oct. 2019), <https://www.mass.gov/doc/prison-capacity-third-quarter-2019/download>.

²³ See Ompad Affidavit, *supra* n.4, at ¶ 6(d).

²⁴ See Deborah Becker, *3 Mass. Prisoners, 1 Corrections Officer Now Diagnosed With COVID-19*, WBUR (Mar. 23, 2020), <https://www.wbur.org/commonhealth/2020/03/23/coronavirus-massachusetts-prisoner>; Jeremy C. Fox, *Plymouth Sheriff's Department Employee Tests Positive for COVID-19*, Bos. Globe (Mar. 23, 2020), <https://www.bostonglobe.com/2020/03/23/nation/plymouth-sheriffs-department-employee-tests-positive-covid-19/>.

²⁵ Cf. Laura Crimaldi and John Hilliard, *Second Mass. Person Dies of Coronavirus, State Says*, Bos. Globe (Mar. 21, 2020) (noting Governor Baker was discussing sites that could be repurposed as medical facilities to treat the expected surge of patients),

Given this reality, many state and local officials have recognized the need for drastic action to reduce the risk of a massive outbreak. Thirty-one elected prosecutors—including four in Massachusetts—recently signed on to a letter calling for leaders in the criminal justice system “to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks” of COVID-19 in prisons.²⁶ Similarly, the Chief Justice of the Montana Supreme Court recently urged judges to “review your jail rosters and *release, without bond, as many prisoners as you are able*, especially those being held for non-violent offenses.”²⁷ The Chief Justice of the South Carolina Supreme Court ordered that everyone held on bond in a non-capital case be released, unless there exists an “unreasonable danger” or “extreme flight risk.”²⁸ And in New Jersey, after the Supreme Court ordered briefing and argument on why it should not order the immediate release of individuals serving county jail sentences, the Attorney General and County Prosecutors agreed

<https://www.bostonglobe.com/2020/03/21/metro/bridgewater-prison-inmate-tests-positive-coronavirus-officials-say/>.

²⁶ Fair and Just Prosecution, *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody* (Mar. 2020) [hereinafter Fair and Just Letter], <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

²⁷ Letter from Mike McGrath, Chief Justice of Montana Supreme Court, to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333> (emphasis added).

²⁸ Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020) [hereinafter Chief Justice Beatty Memorandum], <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

to create an immediate presumption of release for every person serving a county jail sentence in New Jersey.²⁹ Many other courts and other government officials have taken similar steps, recognizing that public safety means ensuring the public's health.³⁰

²⁹ See *In re Request to Commute or Suspend County Jail Sentences*, No. 084230, Consent Order (S. Ct. N.J. Mar. 22 2020) https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf; see also *In re Request to Commute or Suspend Certain County Jail Sentences*, No. 084230, Order to Show Cause, (S. Ct. N.J. Mar. 20, 2020). <https://www.njcourts.gov/public/assets/COVIDproposedOTSC.pdf?c=PkD>.

³⁰ For example, New York City jails released some vulnerable inmates. See *US jails Begin Releasing Prisoners to Stem Covid-19 Infections*, BBC News (Mar. 19, 2020), <https://www.bbc.com/news/world-us-canada-51947802>. The Harris County District Court ordered the immediate release of people arrested and charged with certain non-violent state jail felony offenses. See General Order Bond For Certain Offenses, Harris Cty. Crim. Dist. Ct. Trial Div. (Mar. 21 2020), <https://twitter.com/theappeal/status/1242135268179628033/photo/2>. The Chief Justice of the Ohio Supreme Court pressed for the release of vulnerable incarcerated individuals. See *Release Ohio Jail Inmates Vulnerable to Coronavirus, Chief Justice Urges*, WLMT (Mar. 19, 2020). The Sacramento Superior Court entered a standing order authorizing their sheriff to release those individuals within 30 days of release, regardless of crime. See Standing Order of the Sacramento Superior Court (Mar. 17, 2020), <https://www.saccourt.ca.gov/general/standing-orders/docs/ssc-20-5.pdf>. the Spokane Municipal Court in Washington state issued an emergency order which resulted in the release of some pretrial detainees and “some individuals who were serving sentences for misdemeanor crimes.” See Chad Sokol, *Dozens Released from Spokane County Custody Following Municipal Court Emergency Order*, (Mar. 17, 2020), <http://www.courts.wa.gov/content/publicupload/eclips/2020%2003%2018%20Dozens%20released%20from%20Spokane%20County%20custody%20following%20Municipal%20Court%20emergency%20order.pdf>. In Volusia County, Florida, the correctional facility released 88 individuals held in jail on nonviolent charges. See Frank Fernandez, *Coronavirus Preparation Prompts Volusia Jail to Release Some Non-Violent Offenders*, The Daytona Beach News-Journal (Mar. 20, 2020), <https://www.news-journalonline.com/news/20200320/coronavirus-preparation->

REASONS RELIEF IS APPROPRIATE PURSUANT TO G. L. C. 211, § 3

In response to this crisis, this Court has closed courthouses, canceled trials, and ordered hearings by videoconference in order to protect court staff and the public. In response to the same pandemic, incarcerated people in Massachusetts deserve similar protection.

prompts-volusia-jail-to-release-some-non-violent-offenders. The chief judges of Maine's trial courts immediately vacated all outstanding warrants for unpaid fines, restitution, fees, and failures to appear. See Emergency Order Vacating Warrants for Unpaid Fines, Unpaid Restitution, Unpaid Court-Appointed Counsel Fees, and Other Criminal Fees (Mar. 17, 2020), <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>. A Circuit Court Judge in Alabama issued an administrative order to release pretrial, non-violent offenders held on \$5,000 bond or less, subject approval from a sheriff. See WBRC Staff, *19th Circuit Judge Issues Order to Release Some Non-Violent Offenders, Held on Low Bonds, With Sheriff Approval*, WBRC (Mar. 22, 2020), <https://www.wbrc.com/2020/03/19/th-circuit-judge-issues-order-release-some-non-violent-offenders-held-low-bonds-with-sheriff-approval/>. Sheriffs in two Iowa counties are releasing all individuals with pre-existing conditions or who are serving time for certain low-level crimes. See Sarah Beckman, *Some County Sheriffs Working with Courts to Release Some Iowa Inmates Earlier Amid COVID-19 Concerns, We Are Iowa* (Mar. 19, 2020), <https://www.weareiowa.com/article/news/local/some-county-sheriffs-working-with-courts-to-release-some-iowa-inmates-earlier-amid-covid-19-concerns/524-05eacd11-1e25-4b32-b744-87f633ee873d>. In Cincinnati, a court order authorized the county sheriff to release low-risk, nonviolent incarcerated individuals at his discretion. See Kevin Grasha, *Order to Authorize Hamilton County Sheriff to Release Low-Risk, Nonviolent Jail Inmates*, Cincinnati Enquirer (Mar. 16, 2020), <https://www.cincinnati.com/story/news/crime/crime-and-courts/2020/03/16/coronavirus-hamilton-county-sheriff-release-low-risk-inmates/5062700002/>. Internationally, Iran has released at least 85,000 detained people. See *Hard-Hit Iran Frees More Prisoners Amid Coronavirus Outbreak*, Al Jazeera (Mar. 17, 2020), <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html>.

Petitioners do not seek this Court’s review “lightly.” *Commonwealth v. Richardson*, 454 Mass. 1005, 1006 (2009). Relief is sought in this Court because, given the exponential growth of an ongoing pandemic, there is no other timely and effective remedy. COVID-19 not only poses a deadly threat to every single incarcerated person’s life; any outbreak can cascade into the community. Under these extraordinary circumstances, “G. L. c. 211, § 3, is the only . . . remedy available” that has any conceivable hope of effectively avoiding or mitigating outbreaks of this deadly, infectious virus in Massachusetts correctional facilities. *Commonwealth v. DeJesus*, 440 Mass. 147, 150 (2003).

CONSTITUTIONAL BASES FOR RELIEF

The exercise of this Court’s supervisory powers here is “necessary to protect substantive rights.” *Barber v. Commonwealth*, 353 Mass. 236, 239 (1967).

Continuing to detain individuals without any modification in the face of the current crisis raises significant Eighth Amendment, article 26, and due process concerns.

I. Subjecting non-dangerous prisoners to a likely outbreak of COVID-19 raises significant Eighth Amendment and article 26 concerns.

Conditions that pose an unreasonable risk of future harm violate the constitutional protections of the Eighth Amendment and article 26. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition”); *Good v. Comm’r of Corr.*, 417 Mass. 329, 336 (1994) (“An inmate need not wait until he suffers actual harm . . . a

claim is made out if there is a substantial risk that the inmate will suffer serious harm as a result of the conditions of his confinement”). The Eighth Amendment requires that “inmates be furnished with . . . reasonable safety,” and the Supreme Court has explicitly recognized that the risk of contracting “serious contagious diseases” may constitute such an “unsafe, life-threatening condition” that it threatens “reasonable safety.” *McKinney*, 509 U.S. at 33-34 (cleaned up);³¹ see also *Hutto v. Finney*, 437 U.S. 678, 682-685 (1978) (recognizing the need for a remedy where prisoners were crowded into cells and some had infectious diseases).

In the past, courts have found claims of future harms cognizable under the Eighth Amendment that involved the risks posed by second-hand smoke,³² contaminated water,³³ use of chemical toilets,³⁴ and paint toxins.³⁵ A potential COVID-19 outbreak poses at least such a substantial risk of serious harm to every incarcerated person in the Commonwealth.

II. Continuing customary detention during this crisis raises serious due process concerns under the Fourteenth Amendment and article 12.

Inaction under the current circumstances would also run afoul of the Due Process Clause of the Fourteenth Amendment and article 12. Because detention

³¹ This petition uses (cleaned up) to indicate that internal quotation marks, alterations or citations have been omitted from quotations. See Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017).

³² *McKinney*, 509 U.S. at 35.

³³ *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001).

³⁴ *Masonoff v. DuBois*, 899 F. Supp. 782, 797 (D. Mass. 1995).

³⁵ *Crawford v. Coughlin*, 43 F. Supp. 2d 319, 325-325 (W.D.N.Y. 1999).

always burdens the fundamental right to liberty, this Court has long recognized that it must comport with substantive and procedural due process of law. See *Commonwealth v. Knapp*, 441 Mass. 157, 164 (2004). Due process demands a balancing of the liberty interest at stake, the risk of erroneous deprivation, and the government’s asserted interest. See *Doe v. Att’y Gen.*, 426 Mass. 136, 140 (1997), citing *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) (“[d]eprivation of greater individual liberty interests requires greater procedures and stronger countervailing State interests”).

In light of the pandemic, detention now not only deprives individuals of their freedom, but also subjects them to a serious risk of loss of life or permanent injury. These additional burdens, not accounted for in the traditional analysis, implicate substantive and procedural due process concerns that demand action.

PETITIONERS

CPCS was created by G. L. c. 211D, §§ 1 et. seq., “to plan, oversee, and coordinate the delivery of criminal . . . legal services by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis.” CPCS provides constitutionally required representation to over eighty percent of all pretrial and post-conviction defendants throughout the Commonwealth and, as such, “has a compelling interest in advocating for uniform practices and solutions that will ensure consistent treatment for all of those

defendants.” *Bridgeman v. Dist. Atty. for the Suffolk Dist.*, 471 Mass. 465, 486 (2015). The issues raised in this petition are directly connected to CPCS’s ability to ensure that all defendants across the Commonwealth are receiving the same treatment and to provide representation for all defendants during a time of required physical distancing. CPCS also has a strong interest in safeguarding the constitutional rights of its clients.

MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system.

REQUESTS FOR RELIEF

As described in more detail below, to mitigate the harm that the COVID-19 pandemic will inflict upon incarcerated people, corrections staff, and Massachusetts communities, this petition asks this Court to order the Trial Court to:

- 1) consider the serious health risks posed by detention to the defendant, other incarcerated individuals, and the community in probation detention hearings, bail determination and reconsideration hearings, and dangerousness hearings;
- 2) vacate all bench warrants, and cease issuing new bench warrants, for failures to appear or failures to pay outstanding fees and fines;
- 3) vacate all provisions of probation orders, and cease issuing new provisions in probation orders, that require the immediate instigation of probation violation proceedings upon an alleged probation violation;

- 4) suspend all probation or pretrial conditions—including drug testing, employment requirements and education requirements—whose adherence would require the individual to violate the World Health Organization’s physical isolation instructions;
- 5) order the relevant custodians to immediately release, with or without conditions, the following categories of individuals currently held pretrial:
 - a. individuals held on unaffordable bail under G. L. c. 276, § 58;
 - b. individuals held on a bail revocation for a technical violation of their conditions of release;
 - c. individuals over the age of 60 and thus at increased risk of severe COVID-19 complications and death; and
 - d. individuals who have a condition or disease that puts them at increased risk of severe COVID-19 complications and death, including cardiovascular and respiratory disease, diabetes, and liver disease.
- 6) order the relevant custodians to immediately release, with or without conditions, the following categories of individuals serving sentences of incarceration:
 - a. individuals who are eligible for parole as a matter of law under G. L. c. 127, § 133, and who are incarcerated solely for an offense or offenses not appearing in G. L. c. 265;
 - b. individuals who will complete their sentences and be entitled to release within six months;
 - c. individuals who are incarcerated as a result of a finding of a violation of probation or parole that does not include the allegation of a new criminal offense;
 - d. individuals who are over the age of 60 and thus at increased risk of severe COVID-19 complications and death, and are incarcerated solely for an offense or offenses not appearing in G. L. c. 265 (crimes against the person);

- e. individuals who have been diagnosed with a condition or disease that puts them at increased risk of severe COVID-19 complications and death, including cardiovascular and respiratory disease, diabetes, and liver disease;
- f. individuals who qualify for medical parole under G. L. c. 127, § 119A;
- g. individuals serving a sentence in a house of correction for an offense not appearing in G.L. c. 265; and
- h. any other individual for whom a release or stay is appropriate. See *Commonwealth v. Charles*, 466 Mass. 63 (2013).

This petition also asks this Court to urge prosecutors to exercise their sound discretion to reduce substantially the number of defendants in the Commonwealth, and to encourage police departments to forgo custodial arrests when possible during this state of emergency.

I. This Court should take immediate steps to limit the number of individuals taken into custody.

This Court should take immediate steps to limit the number of people who are taken into custody during the COVID-19 pandemic. Adding new incarcerated individuals exacerbates the risks of transmission that already exist in jails, prisons, and lockups. This is because each new detained person crowds those facilities—and thus undermines physical distancing—and presents a risk of introducing COVID-19 to, or getting COVID-19 from, a facility, and then spreading it further. To mitigate

that risk, this Court should exercise its superintendence authority to implement three types of measures to limit the number of individuals entering state custody.

A. Issue guidance for the trial courts’ detention analysis.

This Court should instruct trial courts that, when making probation and pretrial detention decisions, they should consider the dangers posed by incarceration during this public health crisis.

(i) *Violations of probation*

Typically, a judge may choose between custodial or non-custodial responses pending a probation violation hearing. See Rule 5, Dist. Ct. and Mun. Ct. R. Prob. Violation Hearings. The current rules instruct judges that “the decision whether to order such custody shall include, but not necessarily be limited to” several factors. *Id.* Given the current state of emergency, this Court should instruct trial courts that the risk that a probationer, if detained, may either contract COVID-19 or infect others, constitutes an additional factor that weighs against detention. Under this interpretation, technical violations of probation—i.e., violations other than an allegation of a new criminal offense—can *never* outweigh the public health risk of incarceration to justify detention. And any other probation violation could result in incarceration in only *limited* circumstances.³⁶

³⁶ The Trial Court Emergency Administrative Order 20-2 seems to suspend final revocation hearings. See <https://www.mass.gov/trial-court-rules/trial-court-emergency-administrative-order-20-2-order-concerning-probation> [hereinafter Trial Court Order

(ii) *Pretrial detention*

This Court should also make clear that the pandemic must impact the trial courts' analysis of pretrial detention.

Under ordinary circumstances, this Court has authorized pretrial detention in two instances. The first is for failure to pay bail where “neither alternative nonfinancial conditions nor a bail amount the defendant can afford will adequately assure his appearance for trial.” *Brangan v. Commonwealth*, 477 Mass. 691, 693 (2017); see also *Querubin v. Commonwealth*, 440 Mass. 108, 116 (2003). The second is where the individual is charged with certain enumerated offenses and personal recognizance “will not reasonably assure the presence of the arrested person at trial or the safety of any other person.” *Mendonza v. Commonwealth*, 423 Mass. 771, 774 (1996). In authorizing detention in those circumstances, this Court's consideration of the defendants' countervailing interest was focused solely on their loss of freedom.

In light of the current pandemic, however, substantive due process now mandates consideration of the serious risk of death or permanent injury that faces anyone taken into pretrial detention. To comport with substantive due process, the governmental interest in pretrial detention must outweigh its curtailment of an

20-2]. To the extent such hearings are still occurring at the Superior Court or are resumed at the District Court during the pandemic, this Court should ensure that judges consider the health risks of incarceration as a “mitigating factor” in revocation analyses. See Rule 8(D), C. Ct. and Mun. Ct. R. Probation Violation Hearings.

individual's fundamental rights. See *United States v. Salerno*, 481 U.S. 739, 748, 750 (1987). Although this Court has said that the government's interest in community safety or assuring an individual's presence at trial can, under certain circumstances, outweigh that individual's *liberty* interest, the scale must move differently when weighted with the individual's right to avoid the serious risk of death or substantial permanent injury. Quite simply, the government's interest in assuring the defendant's presence in court can never overcome this recalibrated individual interest. As a result, this Court should instruct the trial courts that individuals cannot be incarcerated for inability to pay bail during this public health emergency.³⁷ This Court should also indicate that the government's interest in ensuring community safety can outweigh the defendant's risk of death only when that individual presents the most serious danger to the community.

The current public health crisis similarly implicates procedural due process concerns. A constitutionally adequate process "must balance the interests of the individual affected, the risk of erroneous deprivation of those interests and the government's interest in the efficient and economic administration of its affair." *Querubin*, 440 Mass. at 117 (quoting *Commonwealth v. Barboza*, 387 Mass. 105, 112 (1982), cert denied, 459 U.S. 1020 (1982)). As noted above, the risk of potential exposure to COVID-19 has significantly altered the relevant interests. Procedural

³⁷ And, as noted *infra*, all people currently held on an unaffordable bail should be released immediately.

due process demands that any process for pretrial detention must account for this shift. Thus, this Court should instruct trial courts that their analysis during bail and dangerousness hearings must consider the serious health risks posed by detention to the defendant, other incarcerated individuals, and the community.³⁸

B. Require Trial Courts to suspend practices that detain criminal defendants for minor infractions.

As long as Massachusetts remains in a state of emergency due to the COVID-19 pandemic, this Court should also order the trial courts to halt or vacate several practices that require criminal defendants to be taken into custody for minor infractions, or that require defendants to take actions that are incompatible with the physical distancing necessary to safeguard public health.

First, this Court should instruct trial courts to vacate all bench warrants, and to cease issuing new bench warrants, for failures to appear or failures to pay outstanding fees and fines. At least two court systems have already taken similar actions. Last week, Maine trial courts vacated more than 12,000 warrants in these exact

³⁸ This Court should also order the Chief Justice of the District Court Department to vacate so much of Amended Standing Order 2-20 as permits a judge to *indefinitely* continue a § 58A hearing where a “witness is unavailable or unable to participate by videoconference or telephonic conference” and requires that the defendant remain in custody during that time. See attached, Ex. B, Memorandum from Paul C. Dawley, Chief Justice of the District Court., to District Court Judges, Clerk-Magistrates, Assistant Clerk-Magistrates, and Chief Probation Officers, Re: Amendment and Guidance on District Court Standing Order 2-20 (Mar. 18, 2020). Indefinite pretrial detention is constitutionally impermissible in ordinary times. See *Mendoza*, 423 Mass. at 783 (holding that § 58A is constitutional in part because it is *not* indefinite). It must not be permitted during this pandemic.

categories,³⁹ and the Supreme Court of South Carolina directed that “bench warrants for failure to appear shall not be issued at this time.”⁴⁰ This Court can and should issue a similar order as an exercise of its superintendence authority under G. L. c. 211, § 3.

Second, this Court should instruct trial courts to vacate all provisions in probation orders, and to cease issuing new provisions in probation orders, requiring the immediate instigation of probation violation proceedings upon an alleged probation violation. Judges typically can choose whether to include in their probation orders a condition that proceedings must occur for any allegation of probation. Cf. Rule 4, D. Ct. and Mun. Ct. R. Prob. Violation Hearings. Eliminating automatic hearings could decrease the number of individuals brought into court on technical probation violations, which during this pandemic exposes both the probationer and court officers to serious, and needless, risk.

Third, this Court should instruct trial courts to suspend all probation or pretrial conditions, including drug testing, employment requirements, and education

³⁹ Judy Harrison, *Maine Courts Vacate Warrants for Unpaid Fines and Fees*, Bangor Daily News (Mar. 16, 2020), <https://bangordailynews.com/2020/03/16/news/state/maine-courts-vacate-warrants-for-unpaid-fines-and-fees>; see also Emergency Order Vacating Warrants for Unpaid Fines, Unpaid Restitution, Unpaid Court-Appointed Counsel Fees, and Other Criminal Fees (Me. Super. Ct. & Me. Dt. Ct. Mar. 16 2020), <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>.

⁴⁰ Chief Justice Beatty Memorandum, *supra* n.28.

requirements, whose adherence requires violating the World Health Organization’s physical isolation instructions. The Trial Court Emergency Administrative Order 20-2 curtailed some probation conditions, but more limits are necessary to protect the health of both defendants and the broader community. For instance, Order 20-2 suspended drug testing by probation employees but specifically ordered testing by outside vendors to continue, noting that individuals “remain subject to sanctions for violation of probation or conditions of pretrial release for non-compliance.”⁴¹ These outside entities pose no less risk of exposure to the defendant or their employees than the testing administered by probation officers. Indeed, petitioners have learned that at least one outside vendor, Averhealth in Lawrence, temporarily closed for COVID-19 exposure, though it has since re-opened. Accordingly, this Court should order the trial courts to extend the drug testing suspension to *all* defendants—whether it is a condition of probation or bail, and regardless of vendor—and to end any other conditions that cannot comport with physical distancing practices.

C. Encourage prosecutors and police to exercise discretion to decrease the number of people taken into custody.

Finally, this Court can and should exercise its superintendence authority to inform the exercise of discretion by prosecutors and police departments during the COVID-19 pandemic. Alongside the trial courts, these actors have significant power

⁴¹ Trial Court Order 20-2, *supra* n.36.

to decrease the number of individuals entering the criminal system. This Court should encourage them to do so.

Sadly, the availability of court personnel, prosecutors, and defense counsel may soon be more restricted, and not just by the need to work remotely. Schools are closed. People are getting sick. And visiting clients—even when the visit is “non-contact” as between attorney and client—may be unsafe. Under these dire and unprecedented circumstances, it may be challenging to ensure that defendants are afforded the assistance of counsel guaranteed by the Sixth Amendment to the U.S. Constitution and article 12 of the Massachusetts Declaration of Rights. Cf. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006). Simply put, as Chief Justice Gants has already recognized, due to the COVID-19 pandemic courts have “little choice but to ration justice.”⁴² Potential cases, accordingly, may need to be triaged.

This Court can guide that process. In an analogous context, where the numbers of relevant cases exceeded the numbers of available lawyers, this Court previously urged prosecutors to dismiss “large numbers” of cases. *Bridgeman v. Dist. Att’y for the Suffolk Dist.*, 476 Mass. 298, 325 (2017) (addressing the Hinton Lab crisis). Here, too, this Court should urge prosecutors to exercise their “sound discretion to reduce substantially” the number of defendants in the Commonwealth.

⁴² Letter to the Bar from Chief Justice Ralph D. Gants, (Mar. 20, 2020).

Indeed, reducing the number of criminal cases may soon be *necessary* in order to conserve legal resources and assure the availability of counsel in cases that, in the Commonwealth's view, involve a direct physical threat to public safety.

This Court should likewise urge police departments to exercise their sound discretion to limit the numbers of custodial arrests during the COVID-19 pandemic. Arrests themselves may threaten public safety, because they require physical interaction at arrest, at booking, and during procedures that are simply incompatible with physical distancing. Each of these interactions could risk the health of arrestees, law enforcement officers, and the community. Presumably for these reasons, the Superior Court for the District of Columbia has issued an order enabling law enforcement to release an individual not otherwise eligible for release under D.C. law, upon approval of the prosecuting authority.⁴³ This Court should likewise encourage Massachusetts police departments to forego custodial arrests when possible during this state of emergency.

II. This Court should exercise its superintendence powers to significantly reduce the pretrial detained population.

For reasons similar to those discussed in the previous section, this Court should instruct the trial courts that the danger of COVID-19 must be considered as a significant mitigating factor in any bail reconsideration analysis. In addition, under its

⁴³ See Order, D. C. Sup. Ct. (Mar. 16, 2020), https://www.dccourts.gov/sites/default/files/Order_3-16-20.pdf.

superintendence powers pursuant to G. L. c. 211 § 3, and its authority under G. L. c. 248, § 25, this Court should grant a writ of habeas corpus for the immediate release of the following categories of individuals⁴⁴ currently held pretrial:

- Individuals held on unaffordable bail under G. L. c. 276, § 58;
- Individuals held on a bail revocation for a technical violation of their conditions of release.
- Individuals over the age of 60 and thus at increased risk of severe COVID-19 complications and death;⁴⁵ and
- Individuals who have a condition or disease that puts them at increased risk of severe COVID-19 complications and death, including cardiovascular and respiratory disease, diabetes, and liver disease.⁴⁶

This release would mirror similar actions undertaken by the Supreme Court of South Carolina,⁴⁷ be consistent with the statements of four elected prosecutors in Massachusetts,⁴⁸ and comport with constitutional due process requirements.

“Under the due process clause, a pretrial detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.” *Richardson v. Sheriff of Middlesex Cty.*, 407 Mass. 455, 461 (1990) (cleaned up). As a result,

⁴⁴ Of course, should an individual, knowing the risks, wish to remain incarcerated, they should be permitted to do so.

⁴⁵ The World Health Organization identifies people over sixty as being at increased risk for severe COVID-19. See World Health Organization, *Coronavirus Disease 2019 (COVID-19) Situation Report - 51* (Mar. 11, 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf>, at 2.

⁴⁶ See Ompad Affidavit, *supra* n.4, at ¶ 5(b).

⁴⁷ Chief Justice Beatty Memorandum, *supra* n.28.

⁴⁸ Fair and Just Letter, *supra* n.26.

confining pretrial detainees “in such a manner as to cause them to endure genuine privations and hardship over an extended period of time” violates constitutional protections when such conditions are “not reasonably related to a legitimate governmental objective.” *Id.* (cleaned up). Continuing to detain the categories of individuals listed above during this pandemic raises exactly these concerns.

First, this Court has previously held that requiring pretrial detainees to “sleep on floors without any mattresses,” share inadequate toilet access, or double bunk in crowded areas, each constitutes a “genuine privation[] and hardship” that triggers constitutional analysis. *Id.* at 462-465. Forcing every pretrial detainee to risk serious illness or death during a public health emergency is, of course, worse. Pretrial detention should not be a death sentence.

Second, pretrial detention for the categories of individuals listed above, under the current circumstances, is not reasonably related to any legitimate government interest. As this Court has made clear, dangerousness cannot be a consideration in setting bail under G. L. c. 276, § 58. See *Brangan*, 477 Mass. at 706-707.

Accordingly, safety considerations play no role in holding pretrial detainees on an unaffordable bail under § 58. Similarly, there is no indication of dangerousness for people held on a bail revocation for a technical violation of their conditions of release. Finally, the letter signed by the four Massachusetts District Attorneys advocates for the immediate release of two groups whose continued detention also

cannot reasonably be justified on dangerousness grounds under the current circumstances, namely (a) individuals who are elderly, and (b) individuals classified as vulnerable by the CDC due to underlying medical conditions.⁴⁹

III. This Court should exercise its superintendence powers to reduce the sentenced prisoner population.

Finally, this Court should exercise its authority under G. L. c. 211, § 3, to drastically reduce the number of individuals now confined in Massachusetts prisons and jails pursuant to a sentence imposed by a judge.

Failure to reduce the density of Massachusetts correctional facilities will result in cruel and unusual punishment in violation of the Eighth Amendment and article 26. “[I]t is cruel and unusual punishment to hold convicted criminals in unsafe conditions.” *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982). Supreme Court precedent makes clear that, pursuant to this principle, the Eighth Amendment does not tolerate “exposure of inmates to a serious, communicable disease.” *McKinney*, 509 U.S. at 33. Given the impossibility of physical distancing, the lack of adequate hygiene, and the reported cases of COVID-19 in Massachusetts correctional facilities, everyone incarcerated in Massachusetts is currently exposed to a serious, communicable disease, in violation of the Eighth Amendment and article 26.

Confining incarcerated people to a setting where they will likely contract a deadly disease also violates due process. A valid criminal conviction may extinguish

⁴⁹ See Fair and Just Letter, *supra* n.26.

due process concerns with respect to a lawfully imposed sentence, but the criminal process does not authorize deprivations “qualitatively different from the punishment characteristically suffered by a person convicted of crime.” *Vitek v. Jones*, 445 U.S. 480, 493 (1980). Incarcerated people have a constitutionally-protected liberty interest in avoiding “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995); see also *id.* (a hardship may “exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force”). “Whether a particular restraint imposes an ‘atypical and significant hardship’ depends, in turn, on its ‘duration and degree.’” *Torres v. Comm’r of Corr.*, 427 Mass. 611, 618 (1998), cert denied, 525 U.S. 1017, (quoting *Sandin*, 515 U.S. at 486).

This situation is far from typical. A serious threat of contracting a severe, life-threatening illness is “a dramatic departure from the basic conditions” of prison life. *Sandin*, 515 U.S. at 485. Contraction of COVID-19 was not “within the sentence imposed upon” these men and women by Massachusetts trial courts prior to the pandemic. *Montanye v. Haymes*, 427 U.S. 236, 242 (1976). People confined in our jails and prisons therefore face permanent injury or loss of life that was not imposed pursuant to due process of law.

Therefore, to accomplish a reduction in the number of incarcerated persons, and at the very least ensure there is no double bunking or large numbers of sleeping

people in the same room, this Court should issue orders (or amend existing rules)⁵⁰ directing the Trial Court and relevant custodians to release individuals, with or without conditions, who fall into one or more of the following categories:

- Individuals who are eligible for parole as a matter of law under G. L. c. 127, § 133, and who are incarcerated solely for an offense or offenses not appearing in G. L. c. 265;
- Individuals who will complete their sentence and be entitled to release within six months;
- Individuals incarcerated as a result of a finding of a violation of probation or parole that does not include the allegation of a new criminal offense;
- Individuals who are over the age of 60 and thus at increased risk of severe COVID-19 complications and death, and are incarcerated solely for an offense or offenses not appearing in G. L. c. 265 (crimes against the person);
- Individuals who have been diagnosed with a condition or disease that puts them at increased risk of severe COVID-19 complications and death, including cardiovascular and respiratory disease, diabetes, and liver disease;
- Individuals who qualify for medical parole under G. L. c. 127, § 119A;
- Individuals serving a sentence in a house of correction for an offense not appearing in G.L. c. 265; and
- Any other individuals for whom a release or stay is appropriate. See *Commonwealth v. Charles*, 466 Mass. 63 (2013).

⁵⁰ For example, this Court could immediately amend Rule 29 of the Massachusetts Rule of Criminal Procedure to permit, in cases of pandemic and where a state of emergency has been declared, the revision of sentences by judges other than the trial judges and could waive the usual sixty-day time frame for such revisions.

As the Supreme Court has emphasized, “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.” *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Under the current circumstances, releasing people in the categories listed above is necessary “to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks.”⁵¹

CONCLUSION

There are about 16,500 human beings in our prisons and jails.⁵² None of them have been sentenced to death. Yet, without aggressive and immediate intervention, COVID-19 will likely kill many of them. This is intolerable. This Court should reduce the number of deaths by ordering the release of individuals whose continued incarceration cannot be justified under these life-or-death circumstances. Time is of the essence. This Court is the only entity that can act in time to mitigate the coming catastrophe in our jails and prisons. It should do so.

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⁵¹ Fair and Just Letter, *supra* n. 26.

⁵² See Mass. Dep’t of Corr., Weekly Count Sheet (Mar. 16, 2020), <https://www.mass.gov/doc/weekly-inmate-count-3162020/download>.

Respectfully submitted,

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