

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.

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.

[counsel signature block on next page]

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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Dated: March 24, 2020

**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

EXHIBITS

Exhibit A

Affidavit of Danielle C. Ompad, PhD regarding SARS-CoV-2 infection (otherwise known as COVID-19) in correctional settings

I, Dr. Danielle C. Ompad, state that the following is a true and accurate statement to the best of my knowledge and belief:

1. I am currently an Associate Professor of Epidemiology at the New York University School of Global Public Health. I have a BS in biology from Bowie State University, and an MHS and PhD in infectious disease epidemiology from the Johns Hopkins School of Public Health.
2. Classically trained as an infectious disease epidemiologist, I am an expert on social determinants of health associated with urban life. My research is focused on the health and wellbeing of people living in urban settings, especially communities that are highly marginalized and vulnerable. Many of these communities have high rates of heroin, crack, and/or cocaine use. My program of research is focused on individual- and structural-level risk and protective factors for the initiation, use, and cessation of specific drugs as well as risk for infectious diseases such as HIV, hepatitis B and C viruses (HBV and HCV), and sexually transmitted infections like herpes and human papillomavirus. Additional and related programs of research include (1) understanding sexual risk and (2) vaccine access among people who use drugs (PWUD) and other vulnerable populations.
3. I have been working with people who use drugs since 1997, many of whom have experience with the criminal justice system. I am providing this affidavit about the risk of SARS-CoV-2 infection, also known as COVID-19 or the novel coronavirus, because correctional settings may be particularly vulnerable to the effects of this pandemic.
4. I am the author of more than 125 peer-reviewed research articles, six book chapters, and two encyclopedia entries.
5. **Overview of the COVID-19 pandemic**
 - a. The first case of COVID-19 was diagnosed in Wuhan, China on 29 December 2019. The virus is transmitted through droplets and contaminated surfaces,¹ and possible airborne transmission.² Both symptomatic and asymptomatic people can transmit COVID-19.³ The average incubation period (i.e., time from infection to symptoms) for COVID-19 has generally been reported to be 5.1 days and 97.5% of those who develop symptoms will do so within 11.5 days.⁴
 - b. Older adults and people with underlying health conditions like cardiovascular diseases, respiratory diseases, diabetes, and liver disease are at increased risk for severe COVID-

¹ Adhikari SP, Meng S, Wu YJ, et al. Epidemiology, causes, clinical manifestation and diagnosis, prevention and control of coronavirus disease (COVID-19) during the early outbreak period: a scoping review. *Infect Dis Poverty*. 2020;9(1):29. Published 2020 Mar 17. doi:10.1186/s40249-020-00646-x

² van Doremalen N, Bushmaker T, Morris DH, et al. Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1 [published online ahead of print, 2020 Mar 17]. *N Engl J Med*. 2020; 10.1056/NEJMc2004973. doi:10.1056/NEJMc2004973

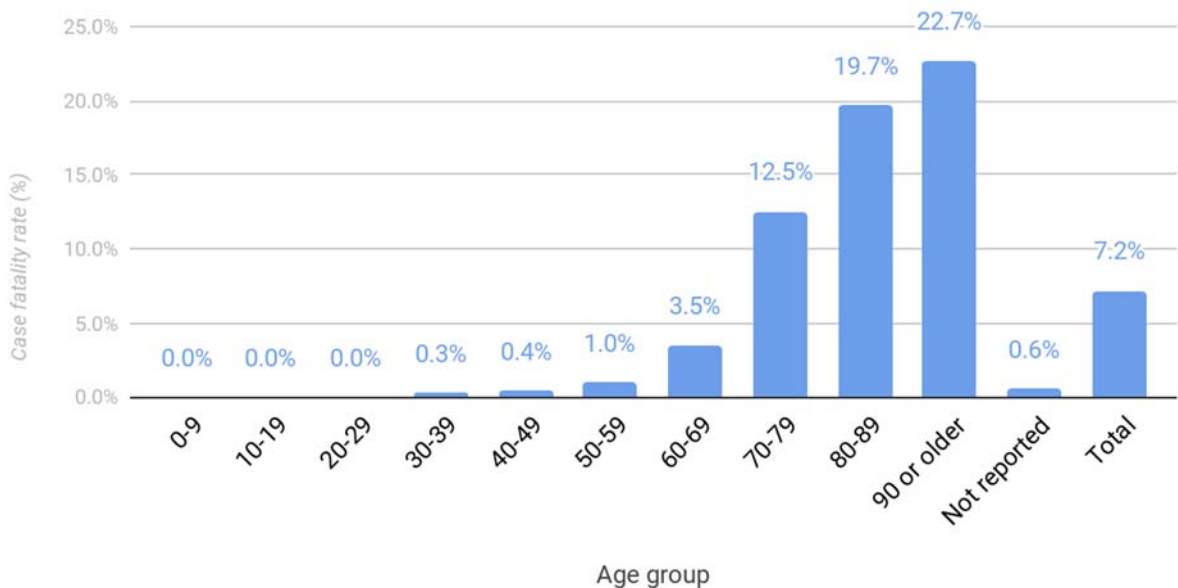
³ Tong ZD, Tang A, Li KF, et al. Potential Presymptomatic Transmission of SARS-CoV-2, Zhejiang Province, China, 2020 [published online ahead of print, 2020 May 17]. *Emerg Infect Dis*. 2020;26(5):10.3201/eid2605.200198. doi:10.3201/eid2605.200198

⁴ Lauer SA, Grantz KH, Bi Q, et al. The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application [published online ahead of print, 2020 Mar 10]. *Ann Intern Med*. 2020;10.7326/M20-0504. doi:10.7326/M20-0504

19 complications and death. Of note, risk for death appears to increase substantially with age although actual age-specific death rates should be considered in the context of a lack of widespread testing in most countries, including the U.S. In most countries testing is being conducted among hospitalized cases and health care workers. South Korea is the exception, where mild and severe cases have been tested with over 300,000 people have been tested.

- c. The case fatality rate (CFR) is the number of deaths divided by the number of people with COVID-19. Note that the denominator (i.e., number of people with COVID-19) is determined by the number of people tested as well as the testing criteria. Therefore, the CFR is likely inflated (i.e., an overestimate). The World Health Organization estimates that the overall case fatality rate is 3.4%.⁵ Table 1 provides case fatality rates from Italy by decade of age. You can see that risk of death starts increasing among people in their sixties and then increases dramatically for each decade of life thereafter.

Figure 1. COVID-19 case fatality rates by age group as of 15 March 2020, Italy



- d. Recent reporting revealed that young people are experiencing severe disease. The New York Times reported that approximately 40% of hospitalized COVID-19 cases were under the age of 60.⁶
- e. Prevention of COVID-19 transmission is highly dependent on physical social distancing (i.e., at least six feet from other people) as well as hand washing and sanitizing with an alcohol-based hand sanitizer. Surfaces should be cleaned and disinfected regularly. Confirmed COVID-19 cases (with or without symptoms) must be quarantined to prevent transmission. People who have been exposed to someone who has (or may have) COVID-19 are asked to self-isolate for at least two weeks. Many US jurisdictions are

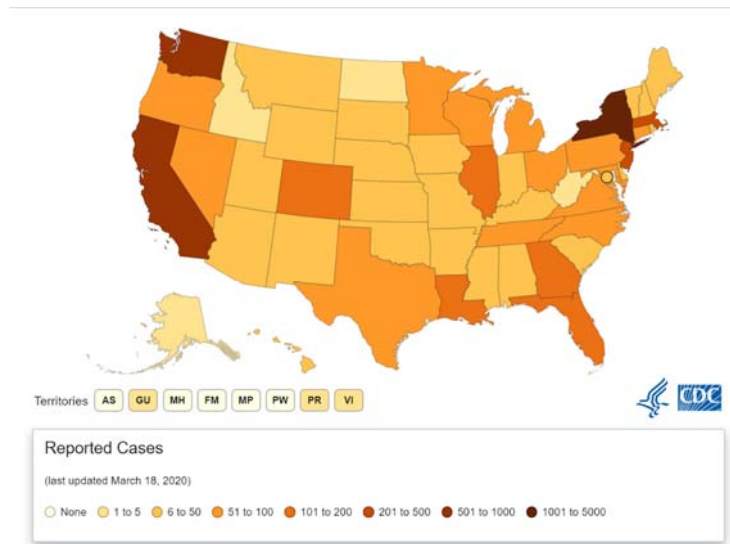
⁵ [WHO Director-General's opening remarks at the media briefing on COVID-19 - 3 March 2020](#) - World Health Organization, March 3, 2020

⁶ Belluck P. [Younger Adults Make Up Big Portion of Coronavirus Hospitalizations in U.S.](#) New York Times. 20 March 2020

beginning to ask residents to engage in physical social distancing and self-isolation. Non-essential workers and businesses are being asked to close.

- f. As 20 March 2020, the Johns Hopkins COVID-19 dashboard⁷ reports that there are 259,215 cases worldwide and 11,283 deaths. COVID-19 cases have been detected in all 50 states, the District of Columbia, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands (Figure 2). As of 20 March 2020, there are 17,303 reported cases and 215 deaths in the United States.⁸ Testing for COVID-19 infections has not been fully implemented and is mainly targeted to hospitalized people with COVID-19 symptoms (i.e., dry cough, fever, shortness of breath, acute respiratory distress syndrome), those with contact with a suspected or known cases, and health care workers with symptoms, known exposure to a case, or travel history to countries with cases; people with mild symptoms are not generally being tested because of the limited supply of tests. As a result, any case counts are an underestimate of the true number of cases.

Figure 2. Distribution of COVID-19 cases in the United States as of 18 March 2020 (U.S. Centers for Disease Control and Prevention)

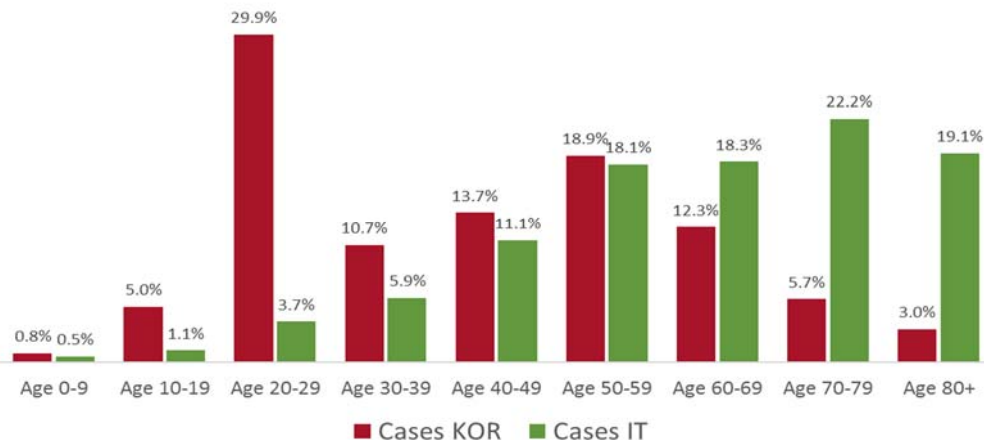


⁷ <https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>

⁸ Reported cases include both confirmed and presumptive positive cases of COVID-19 reported to CDC or tested at CDC since January 21, 2020, with the exception of testing results for persons repatriated to the United States from Wuhan, China and Japan.

- g. Data from South Korea, where testing is conducted for mild and severe cases (more than 300,000 tested so far),⁹ suggest that individuals in their 20s have the highest prevalence of COVID-19 infection (Figure 3).¹⁰

Figure 3. COVID-19 cases (%) in South Korea and Italy by age group



6. Transmission risk in correctional settings

- The risk of transmission of COVID-19 in correctional settings is high. Correctional facilities are often crowded and people who are incarcerated (PWI) are likely unable to maintain the requisite social distance of six feet. This is especially an issue within individual cells, where bunked beds make distancing of six feet impossible. Cafeteria areas and dormitory-type sleep quarters also create challenges to social distancing depending on how these spaces are organized and the number of people in the space at any one time.
- Correctional facilities have significant flows of people from the community into the facility and back out. Correctional staff, visitors, and attorneys come to and from the facility from their home communities. In addition, newly incarcerated individuals, who have been circulating in the community prior to entering the facility, are coming into facilities. As a result, current PWI are likely to be exposed to COVID-19 through their interactions with correctional staff, visitors, attorneys, and newly arrived PWI.
- Generally, there is a shortage of personal protective equipment (PPE) such as N95 masks in the U.S. Local jurisdictions are prioritizing health care facilities for scarce PPE, making access to such protective gear challenging for correctional facility staff.
- Client reports from nine Massachusetts correctional facilities revealed that PWI at two facilities did not have access to soap at all and only three had access to free soap. In four facilities, PWI did not have access to hand sanitizer.
- Thus, the risk for transmission in correctional facilities may be high. This will have implications for the general population from which correctional staff, visitors, and attorneys come and as a result, may place communities in which correctional facilities are located at enhanced risk of COVID-19 transmission as well as challenging the limited health care infrastructure and staff in local hospitals.

⁹ Zastrow M. [South Korea is reporting intimate details of COVID-19 cases: has it helped?](#) [news]. Nature 2020.

¹⁰ <https://medium.com/@andreasbackhausab/coronavirus-why-its-so-deadly-in-italy-c4200a15a7bf>

7. Risk for severe disease and death among incarcerated individuals

- a. If COVID-19 enters correctional facilities, the likelihood that there will be severe cases is high. According to the Massachusetts Department of Corrections, 983 PWI (11.2%) were aged 60 and over in 2019 among 8,784 total PWI. As previously mentioned, older adults are at increased risk for severe COVID-19 complications as well as death.
- b. According to data from the 2011-2012 National Inmate Survey,¹¹ there is a substantial burden of disease among correctional populations. Approximately half of state and federal prisoners and jail inmates have ever had a chronic medical condition (defined as cancer, high blood pressure, stroke-related problems, diabetes, heart-related problems, kidney-related problems, arthritis, asthma, and/or cirrhosis of the liver). Twenty-one percent of state and federal prisoners and 14% of jail inmates have ever had tuberculosis, hepatitis B or C, or sexually transmitted infections (excluding HIV or AIDS). Table 1 displays lifetime prevalence of specific chronic conditions with implications for COVID-19 severity and death among state and federal prisoners and jail inmates. Note that older prisoners were about three times more likely than younger persons to have had a chronic condition or infectious disease in their lifetime.

Table 1. Lifetime prevalence of specific chronic conditions and infectious diseases with implications for COVID-19 severity and death among state and federal prisoners and jail inmates, 2011-2012 National Inmate Survey

Condition	State and federal prisoners (%)	Jail inmates (%)
Cancer	3.5	3.6
Diabetes	9.0	7.2
Stroke-related problems	1.8	2.3
Heart-related problems	9.8	10.4
Kidney-related problems	6.1	6.7
Asthma	14.9	20.1
Cirrhosis of the liver	1.8	1.7
Tuberculosis	6.0	2.5
Hepatitis B	10.9	1.7
Hepatitis C	2.7	5.6
HIV/AIDS	9.8	1.3

¹¹ Maruschak LM, Berzofsky M, Unangst J. [Medical problems of state and federal prisoners and jail inmates, 2011-12](#). Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics; 2015 Feb.

- c. Collectively, these data suggest that there is a risk that a significant proportion of PWI will experience severe COVID-19 disease requiring hospitalization and many are at risk of dying from COVID-19.

8. Healthcare response and correctional settings

- a. Healthcare provision in correctional settings is limited and a rapid increase in COVID-19 cases may overwhelm the capacity of a jail or prison's healthcare facilities. Moreover, health care providers in correctional settings may not have the equipment (i.e., ventilators) or specialty skill set to support PWI with severe COVID-19 disease.
- b. There is already growing concern in the medical community that the need for intensive care unit beds and ventilators will outstrip the supply. We saw this in China, where new hospitals were built to treat the surge in patients. We are seeing this now in northern Italy, where unused wards are being retrofitted to serve as ICUs.
- c. Severe COVID-19 cases in correctional facilities may be transferred to local hospitals. An outbreak at a local correctional facility, where there is a high likelihood of rapid transmission to a large number of people, could quickly overwhelm local hospitals.

9. What would an outbreak look like in a correctional facility?

- a. There are no descriptions of a COVID-19 outbreak in a correctional facility to date. However, we can hypothesize what one may look like drawing on published reports of influenza and tuberculosis outbreaks – both respiratory infections – in correctional facilities.^{12,13}
- b. Introduction of the SAR-CoV-2 virus to the correctional facility could be from visitors, correctional staff, attorneys, and/or a newly incarcerated person. The person will likely be asymptomatic. As a result, the first facility-acquired COVID-19 case will not be detected until the that person is shows symptoms. This means that the person could have transmitting the infection from 2 to 14 days without knowing it.
- c. The opportunities for transmission in correctional facilities are myriad and there is limited ability for PWI to engage in social distancing or self-isolation. The minimum cell size in the U.S. is 80 square feet based on American Correctional Association standards.¹⁴ Some cells in Massachusetts are approximately 73 square feet. Beds can be bunked, ensuring that PWI are within six feet of each other in shared cells. Community meals in cafeteria/chow hall type settings as well as group recreation time in gyms and outdoor spaces also make social distancing challenging.
 - i. At the Hampshire House of Corrections and North Central Correctional Institution in Gardner, groups of inmates are still going to "chow" and sitting and eating together with no instructions regarding social distancing.
 - ii. At the Middleton House of Corrections, a whole unit has been quarantined in the gym.
- d. Given the crowded conditions as well as challenges with social distancing and access to PPE for staff, the infections could spread rapidly and by the time the first case is identified many will have already been infected.
- e. After the first symptomatic case is identified, the number of additional cases is likely to occur rapidly over the next days and weeks. The hospitalization rate is unknown at this

¹² Sosa LE, Lobato MN, Condren T, Williams MN, Hadler JL. Outbreak of tuberculosis in a correctional facility: consequences of missed opportunities. *Int J Tuberc Lung Dis.* 2008;12(6):689–691.

¹³ Awofeso N, Fennell M, Waliuzzaman Z, et al. Influenza outbreak in a correctional facility. *Aust N Z J Public Health.* 2001;25(5):443–446.

¹⁴ http://www.aca.org/ACA_Prod_IMIS/docs/Standards%20And%20Accreditation/RH%20-%20Proposed%20Standards%20.%2012.4.2015.pdf

- point, but given the high burden of high-risk conditions among PWI, we can anticipate the jail and prison health facilities will face shortages of beds, ventilators, PPE, testing supplies, and masks.
- f. When correctional facility health services are exhausted, or the type of care needed for a patient is beyond the capacity of the facility, PWI COVID-19 cases will need to be transferred to local hospitals.

10. Summary

- a. Incarcerating individuals who cannot make bail as well as current PWI that do not pose a danger to the community may increase the risk of COVID-19 outbreaks in correctional facilities when we consider the following issues:
 - i. COVID-19 transmission is possible even when people are asymptomatic and the average incubation period is five days.
 - ii. According to the Massachusetts Department of Corrections, 19.4% of PWI in 2019 were between the ages of 18 and 29. Some evidence suggests that this age group has the highest prevalence of COVID-19.
 - iii. There is high risk for transmission in correctional facilities.
 - iv. A substantial proportion of PWI aged 60 and older and/or with health conditions with implications for severe COVID-19 disease requiring hospitalization and possibly resulting in death
 - v. The implications of a correctional facility outbreak for local hospitals.
- b. By acting now and releasing a significant number of people who are currently detained you will save lives. You can prevent outbreaks in correctional facilities by reducing the number of people who are coming in from the community and reducing the number of people at risk within the facilities. This action would then protect correctional officers, attorneys, and PWI as well as the families of these groups.
- c. This would result in the courts contributing to “Flatten the Curve” efforts because it will increase the ability of PWI and correctional facility staff to engage in social distancing inside as well as allowing released criminal-justice involved people to engage in social distancing and/or self-isolation (as appropriate) in the community, thereby reducing the likelihood of transmission and disease.

Signed this 20th day of March, 2020,



Danielle C. Ompad, PhD¹⁵
Associate Professor of Epidemiology
New York University School of Global Public Health

¹⁵ This statement reflects my own views. I do not speak for New York University or any department therein.

Exhibit B



Trial Court of the Commonwealth District Court Department

Administrative Office
Edward W. Brooke Courthouse
24 New Chardon Street, 1st Floor
Boston, MA 02114-4703

Paul C. Dawley
Chief Justice

TRANSMITTAL NO.	1280
Last Transmittal No. to:	
First Justices	1279
Other Judges	1279
Clerk-Magistrates	1279
Assistant Clerk-Magistrates	1279
CPOs	1279

MEMORANDUM

TO: District Court Judges, Clerk-Magistrates, Assistant Clerk-Magistrates, and Chief Probation Officers
FROM: Hon. Paul C. Dawley, Chief Justice
DATE: March 18, 2020
SUBJECT: **Amendment and Guidance on District Court Standing Order 2-20**

As a result of many questions arising from the issuance of yesterday's District Court Standing Order, I am writing to amend the Order and to provide guidance on the following issues:

- Hearings to be held on G.L. c. 276, § 58A motions filed at arraignment
- Plaintiffs seeking an order of protection under G.L. c. 209A or G.L. c. 258E to enter courthouses as provided below
- Authorization of police to enter courthouses as provided below. This authorization for access continues to be subject to compliance with the Supreme Judicial Court Order, dated March 13, 2020, entitled "Order Regarding Access to State Courthouses and Court Facilities," as well as screening protocols issued to court officers by court security.

1. Ex Parte Protection Order Proceedings

Any person attempting to access the court for the filing of a protection order pursuant to G.L. c. 209A, G.L. c. 258E or G.L. c. 140, §§ 131S & T, may be heard by telephone. Alternatively, if the Court Officer determines the person is not precluded by the SJC Standing Order referenced above or the health screening protocol conducted by the Court Officer, individual courts may, allow the person to enter the building and direct them to an area designated by the Clerk-Magistrate. If possible, the designated area shall be located in the immediate vicinity of the entrance to the courthouse and have telephone access to the clerk's office. Within the designated area, the person will be provided with paperwork consisting of the application for the requested protective order. Once completed by the person, the clerk will provide the documents to the judge. If a telephone is available to the petitioner, the judge may conduct a telephonic ex parte hearing. Such proceeding shall be recorded. If necessary and ordered by the judge, the petitioner will be escorted to the courtroom for a hearing. The judge will consider all information and issue a decision, a copy of which will be provided to probation, the petitioner,

and faxed to police for service on the defendant as in the normal course. If the proceeding is held in a courtroom, the proceeding shall be conducted in a manner that permits appropriate spacing of all participants. All parties will be provided notice of the two party hearing to be conducted telephonically in 10 days which will include instructions on how to participate in the telephonic conference call.

- 2. 58A Hearings.** I am asking that Courts conduct § 58A hearings by telephone or videoconference when the Commonwealth files a motion on a § 58A eligible offense and suggest the following procedures:

Commonwealth and Defendant to Identify Witnesses and Documentary Evidence to be Offered

The court should inquire whether the parties will proceed on documentary evidence. To the extent either party seeks witness testimony, they should identify to the court what witnesses they seek to call with a proffer and the court should rule on such request. Additionally, the parties should submit any documentary evidence they wish to submit at the hearing by email or fax to the clerk prior to the hearing, cc'ing opposing counsel. (the Commonwealth and defense counsel should exchange emails and the clerk should provide the fax and/or email address for the submission of documentary evidence). The judge should determine which witnesses to allow to testify and can rule on the admissibility of such evidence during the hearing.

Defense Counsel

It is expected that defense counsel will either be at the police station or will be able to speak with the defendant directly by telephone. After having sufficient time to consult, the hearing can be conducted either by utilizing the Polycom system or a telephone conference call line.

Telephonic / Videoconference Hearing & Witnesses

All parties should be on the designated line at the designated time with the police department facilitating the defendant's presence by video or telephone. If the hearing was continued and the defendant held at the jail, arrangements should be made with the jail to facilitate the defendant's appearance by video. If defense counsel is not in the same location as the defendant, the police should provide the defendant an opportunity to privately speak to defense counsel on a separate unrecorded line as needed during the hearing.

If the Commonwealth seeks to present witnesses other than police witnesses, they will need to arrange their ability to access the video or telephonic conference, and verify their identity to the court's satisfaction.

If defense counsel seeks to present witnesses, they will need to arrange their ability to access the video or telephonic conference, and verify their identity to the court's satisfaction.

If the judge allows a request for a witness other than police witnesses and that witness is unavailable or unable to participate by videoconference or telephonic conference call, the hearing may be continued to hear from any additional witnesses the court determines would be relevant. During such continuance the defendant should remain in custody.

Witnesses and counsel should participate by telephonic or videoconferencing.

Court Record

The judge and clerk should be in the courtroom. The proceeding should be recorded by FTR, and the case should be docketed in MassCourts. If conducting the hearing by telephone, each person must identify themselves prior to talking.

Order Without Prejudice / Next Date

Any order of detention under § 58A after a hearing by videoconference or telephone is to be issued without prejudice to the defendant's right to request an in-person hearing to be held when the current health emergency is over.

Additionally, G.L. c. 276, § 58A provides that “[t]he hearing may be reopened by the judge, at any time before trial, or upon a motion of the commonwealth or the person detained if the judge finds that: (i) information exists that was not known at the time of the hearing or that there has been a change in circumstances and (ii) that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community.”

The case should be given a 30-day review date, and the Clerk-Magistrate should forthwith fax to the holding facility the required mittimus or writ of habeas corpus for the next review date.

Other General Considerations

- Standard

If the Commonwealth files a motion for detention under G.L. c. 276, § 58A for a defendant who has been charged with a § 58A eligible offense, the court can hold a hearing by videoconference or telephone conference at which the Commonwealth must prove, by clear and convincing evidence, “that no conditions of release will reasonably assure the safety of any other person or the community.” G.L. c. 276, § 58A. (Hearings that were scheduled prior to the issuance of Standing Order 2-20 should be held on their scheduled date consistent with the below procedures, unless there is good cause to reschedule the hearing).

- Conditions

Although § 58A sets forth a list of conditions that can be considered, due to the limited resources as a result of the pandemic, electronic monitoring is the only reliable supervised condition currently available. Release with set conditions that are not actively monitored, would only provide a basis to take action upon learning of violations (e.g., prosecutor or police aware of stay away condition and initiate action upon learning of a violation).

- Hearsay Admissible

“The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness.” G.L. 276, s. 58A.

- Hold on First Appearance if Possible / Continuance Only on Good Cause

The hearing must be held on the defendant’s first appearance unless the Commonwealth establishes good cause to continue the hearing or the defendant requests a continuance.

If there is good cause to continue the hearing, the court should make a finding that there is probable cause of an eligible offense which would require the defendant to continue be held pending the hearing. The Commonwealth may make the probable cause to arrest showing by means of a complaint issued in accordance with court rules or alternatively, by means of a police report. See *Commonwealth v. Lester*, 445 Mass. 250, 256, 261 (2005) (a properly issued complaint carries with it a finding by a judicial officer of “sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him” for one of the specific offenses enumerated in the statute).

If not all witnesses are available on the defendant’s first appearance, the court can consider commencing the hearing and continuing it to accommodate being able to hear from other witnesses the court determines are relevant.

3. Police Entry into Courthouses

Police officers should be permitted access into the courthouse upon approval by a judge or clerk Magistrate to conduct the business being allowed in the courthouse during the pendency of the Supreme Judicial Court’s Order Limiting In-Person Appearances In State Courthouses That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing and District Court Standing Order 2-20 or for any other reason deemed necessary by a judge or clerk-magistrate.

Subscribing to the Complaint

Pursuant to G.L. c. 276, § 22, the complainant is required to sign the complaint. Clerks may “examine on oath” the complainant via videoconference or telephonically if necessary, but the original complaint must be subscribed to by the complainant. To the extent that subscribing to the complaint requires the police to come into the courthouse to do so, they should be permitted entry. If the arraignment on the new complaint is deferred to a later date, Clerk-Magistrates may delay the police signing of the complaint until that date.

MEMORANDUM

March 18, 2020

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In-person Application for a Warrant or Search Warrant

Notwithstanding § I of District Court Standing Order 2-20, police should be permitted, with the authorization of a judge or Clerk-Magistrate, to enter the courthouse to apply for a warrant or search warrant so long as the officer is not prohibited from entry pursuant to the Supreme Judicial Court's Order Regarding Access to State Courthouses & Court Facilities and the Magistrate agrees that the officer should be permitted entry into the building to apply for the warrant. Note, however, that, during the pendency of the Supreme Judicial Court's Order Limiting In-Person Appearances In State Courthouses That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing and District Court Standing Order 2-20, police may not be required to come into the courthouse to do so. Under art. 14 and G.L. c. 276, § 2B, the oath and personal appearance are required to support the affidavit that establishes probable cause for the warrant except where the officer seeking the warrant exhausted all reasonable efforts to find a magistrate or judge before whom he could personally appear. *Commonwealth v. Nelson*, 460 Mass. 564, 573 (2011). District Court Standing Order 2-20 recognizes that the circumstances presented by the COVID-19 virus may qualify as the "rare case" in which an officer may rely on communication by telephone and facsimile transmission or secure email to obtain an otherwise valid search warrant. *Nelson*, 460 Mass. at 573. Individual magistrates may determine and establish the best process to receive warrant applications remotely during the pendency of these orders if police are unable to physically appear before a magistrate.

Please do not hesitate to contact this office with any questions, and thank you for your dedication and hard work as the District Court works through this unprecedented process. The Administrative Office will continue to provide updated guidance as additional issues arise.