COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC - 12926

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

v.

THE CHIEF JUSTICE OF THE TRIAL COURT, et al.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

REPLY BRIEF OF THE PETITIONERS ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

REBECCA A. JACOBSTEIN, BBO 651048
BENJAMIN H. KEEHN, BBO 542006
REBECCA KILEY, BBO 660742
DAVID R. RANGAVIZ, BBO 681430
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 910-5726
rjacobstein@publiccounsel.net

Counsel for the Committee for Public Counsel Services

VICTORIA KELLEHER, BBO 637908
Massachusetts Association of Criminal Defense Lawyers
One Marina Park Drive, Ste. 1410
Boston, MA 02210
(978) 744-4126
victoriouscause@gmail.com

MATTHEW R. SEGAL, BBO 654489
JESSIE J. ROSSMAN, BBO 670685
LAURA K. McCREADY, BBO 703692
KRISTIN M. MULVEY, BBO 705688
ACLU Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

CHAUNCEY B. WOOD, BBO 600354
Massachusetts Association of Criminal Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

Counsel for Massachusetts Association of Criminal Defense Lawyers

Dated: March 30, 2020

Table of Contents

Table of Authorities....................4

Introduction....................6

Discussion....................8

I. **The situation is dire, urgent, and requires reducing levels of incarceration in Massachusetts**....................8

A. Prisoners are not safe, and therefore we are all less safe. 8

B. Time is of the essence....................13

C. Respondents have not rebutted petitioners' showing that incarceration must be reduced to protect prisoners, corrections staff, and the community....................15

II. **There are no legal impediments to this Court's implementation of a remedy that meaningfully reduces incarceration levels**....................16

A. This lawsuit is not barred by any standing or exhaustion requirement....................16

B. This Court can craft remedies that reduce the number of incarcerated people in Massachusetts....................18

C. The requested relief is consistent with the actions of other courts....................24

III. **This Court should impose a remedy that is both meaningful and individualized**....................25

A. Any remedy must set a decarceration benchmark that is adequate to protect those who are released and those who remain incarcerated....................26

B. Petitioners support time-limited opportunities for individualized review....................27

C. The remedy must be available to people with substance use disorder....................30

D. There must be an ongoing reporting requirement that permits the parties and the Court to assess whether the remedy is working and whether it needs to be adjusted....................32

CONCLUSION....................34

TABLE OF AUTHORITIES

Cases

Booth v. Churner,
532 U.S. 731 (2001) 18

Brangan v. Commonwealth,
477 Mass. 691 (2017) 20, 21

Bridgeman v. District Attorney for the Suffolk District,
476 Mass. 298 (2017) 27

Buchanan v. Maine,
469 F.3d 158 (1st Cir. 2006) 30

Chelsea Collaborative, Inc. v. Secretary of the Commonwealth,
480 Mass. 27 (2018) 17

Commonwealth v. Amirault,
415 Mass. 112 (1993) 23

Commonwealth v. Barclay,
424 Mass. 377 (1997) 23

Commonwealth v. Bastarache,
382 Mass. 86 (1980) 22

Commonwealth v. Charles,
466 Mass. 63 (2013) 21

Commonwealth v. McCulloch,
450 Mass. 483 (2008) 23

Commonwealth v. McLaughlin,
431 Mass. 506 (2000) 21

Commonwealth v. Tejada,
481 Mass. 794 (2019) 23

Commonwealth v. Williams,
481 Mass. 443 (2019) 33

Craig v. Boren,
429 U.S. 190 (1976) 17

Darnell v. Pineiro,
849 F.3d 17 (2d Cir. 2017) 20

Pesce v. Coppinger,

355 F. Supp. 3d 35 (D. Mass. 2018) 30

Eulitt ex rel. Eulitt v. Maine, Dept of Educ,
386 F.3d 344 (1st Cir. 2004) 17

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 17

Kingsley v. Hendrickson,
135 S. Ct. 2466 (2015) 19

New Eng. Div. of The Am. Cancer Soc'y v. *Comm'r of Admin.*,
437 Mass. 172 (2002) 17

Querubin v. Commonwealth,
440 Mass. 108 (2003) 20

Ross v. Blake,
136 S. Ct. 1850 (2016) 18

Statutes

42 U.S.C. § 1997e(a) (2013) 18

G. L. c. 127, § 119A 22

G. L. c. 127, §§ 49-49A 22

G. L. c. 211, § 3 19

Rules

Mass. R. Crim. P. 29 .... 22, 23

<u>INTRODUCTION</u>

In the 30 minutes it takes to read this brief, roughly 377 people in America will be diagnosed with COVID-19, and perhaps nine previously-infected people will die from it.[1] The United States now leads the world in COVID-19 cases,[2] and facts change faster than they can be memorialized. In just the six days since petitioners filed this case, Massachusetts COVID-19 cases have spiked at least six-fold—from 777 to 4,955—and surfaced in at least four Massachusetts correctional facilities.[3] Petitioners do not seek to assign blame for this crisis; we seek to mitigate the harm it will cause incarcerated people, correctional staffs, and the public. But achieving that goal requires acknowledging that the pandemic is too deadly and too rapid to be mitigated by the normal staffing, litigation, and disposition of criminal cases. This is a race: against the disease, and for people's lives.

The respondents' submissions confirm that incarcerated people are especially vulnerable to this threat, and therefore deserve special protections. No one disputes

---

[1] Yesterday, 18,093 people in the United States were confirmed new cases for COVID-19 and 425 people died. See Coronavirus disease 2019 (COVID-19) Situation Report - 69, World Health Organization (March 29, 2020), available at: https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200329-sitrep-69-covid-19.pdf?sfvrsn=8d6620fa_4.

[2] Donald G. McNeil Jr., *The U.S. Now Leads the World in Confirmed Coronavirus Cases*, N.Y. Times (March 26, 2020).

[3] This includes the Plymouth and Middlesex County Houses of Correction, the Massachusetts Treatment Center, and MCI Shirley. *See* Deborah Becker, *19 People in Mass. Prisons and Jails Diagnosed with COVID-19,* WBUR (updated Mar. 29, 2020), https://www.wbur.org/commonhealth/2020/03/23/coronavirus-massachusetts-prisoner. Norfolk County also has a confirmed case in its Sheriff's office. *See id.*

that COVID-19 spreads exponentially and "easily, including from asymptomatic individuals." Tsai Aff. ¶4. No one denies that this presents "a particular threat to individuals confined in close quarters such as incarcerated people." *Id.* Yet, even assuming every claim in respondents' submissions is accurate—which petitioners do not—the most telling claims are those they do not make. They do not claim that their Massachusetts prisoners can engage in the physical distancing—e.g., keeping six feet apart or avoiding groups of ten—that has been deemed essential to the safety of all human beings in Massachusetts. They do not reveal how many Massachusetts prisoners have been tested for COVID-19, how many of those tested positive, or whether there is even a *capacity* to test them in substantial numbers. And none of the respondents claim that Massachusetts has the staff, the ventilators, or the personal protective equipment (PPE) necessary to prevent a correctional outbreak from turning disproportionately deadly.

Nine parties—the Attorney General, the Trial Court, the Department of Correction, the Parole Board, the Probation Service, and four district attorneys—now agree with petitioners that this Court should play a role in solving this crisis. But the sheriffs and remaining district attorneys refuse to concede that a deadly pandemic is itself a reason to release people confined to spaces where each person is a potentially deadly threat to his or her neighbor. This blinks reality.

As explained below, petitioners are not only willing but eager to implement a solution that allows for both consideration of individual circumstances *and* rapid releases from custody. But what we are not willing to do is agree that, during a pandemic, the normal turning of the wheels of justice should be allowed to become a machine that takes in human beings and spits out dead bodies. Petitioners respectfully request that this Court exercise its superintendence authority to facilitate immediate reductions in pretrial and post-conviction custody.

DISCUSSION

I. The situation is dire, urgent, and requires reducing levels of incarceration in Massachusetts.

The petition demonstrates that, especially because COVID-19 can be spread by asymptomatic people, it poses enormous risks to everyone inside, and thus everyone outside, Massachusetts correctional facilities. The respondents' submissions indicate that, if anything, the situation is worse than we thought.

A. Prisoners are not safe, and therefore we are all less safe.

The COVID-19 pandemic has now reached at least four Massachusetts correctional facilities,[4] but its true spread is unknown. No one on behalf of the respondents has said how many prisoners have been tested or whether they have enough tests to track the spread of this disease inside their facilities.

[4] *See supra* n. 3.

Nor have the respondents provided assurances that prisoners can undertake the physical distancing and quarantining that is necessary to keep them safe. To their credit, many respondents are taking steps to limit physical interactions in their facilities, to enhance access to hygienic products, and to screen for *symptoms* of COVID-19.[5] But because COVID-19 is easily spread by people who are *asymptomatic*, Tsai Aff. ¶4, it is unclear why the respondents believe these measures provide something beyond a false sense of security.

For precisely this reason, every resident of the Commonwealth has been instructed that, to limit the spread of COVID-19, they must not only engage in good hygiene but *also* stay six feet away from other people and avoid groups of more than 10 people.[6] Yet none of the respondents—none—claim that this is happening for prisoners in their custody. Only the Sheriff for Barnstable County has claimed to

---

[5] *See, e.g.*, Cahillane Aff. ¶¶5, 15; Cocchi Aff. ¶5.t; Hodgson ¶6.d; McDermott Aff.; Tuttle Aff. ¶9.

[6] *See, e.g.,* Governor Charlie Baker Orders All Non-Essential Businesses To Cease In Person Operation, Directs the Department of Public Health to Issue Stay at Home Advisory For Two Weeks, Updates Assembly Order to Limit Gatherings to 10 People (March 23, 2020) ("The Baker-Polito Administration Order also limits gatherings to 10 people during the state of emergency, a reduction from the 25 person limit established in an earlier order"), https://www.mass.gov/news/governor-charlie-baker-orders-all-non-essential-businesses-to-cease-in-person-operation; DPH Public Health Advisory: Stay-at-Home Advisory for Individuals over 70 and for Those with Underlying Health Conditions; and Safe Practices for the General Public (March 24, 2020) ("Individuals in the Commonwealth should always practice social distancing, this means keeping a distance of 6 feet between you and the other person"), https://www.mass.gov/news/dph-public-health-advisory-stay-at-home-advisory-for-individuals-over-70-and-for-those-with.

have eliminated bunk sleeping arrangements. Cummings Aff. ¶9(a). Some respondents have reported "efforts to limit large gatherings," Vidal Aff. ¶8, but none have reported that prisoners in their custody are exposed to only nine other people.

In fact, prisoners are reporting very dangerous conditions. They still eat and bunk in very close proximity, Belger Aff. ¶¶8-12, and without the necessary supplies to protect themselves. Belger Aff. ¶¶6, 7, 10, 13. Similar conditions are found in the jails. Rosen Aff., Dubois Aff.

And some measures that respondents are reportedly taking to curtail the disease seem likely, instead, to spread it. For example, it appears that some respondents are putting newly admitted or ill prisoners *together*, without PPE, in "new man" or "quarantine units"—which seems likely to spread it to other prisoners and to the staff who must interact with them. *See, e.g.*, Cahillane Aff. ¶16; Coppinger Aff. ¶5(e). Likewise, Bristol Sheriff Thomas Hodgson reports that people in his custody who have chronic illnesses are "specially monitored." Hodgson Aff. ¶6.i. What at-risk people need, however, is not interaction with monitors who might infect them, but instead more space.

Nor do respondents claim the capacity to treat substantial numbers of infected prisoners. To the contrary, Commissioner of Correction Carol Mici instructed corrections staff members: "*Please do not ask the DOC medical provider for masks as they are in short supply.*" Mici Aff. at Ex. 7-1 (emphasis added); *see also*

Cummings Aff. Ex. B (acknowledging a limited supply of PPE). And although an estimated 15-20% of people who contract COVID-19 will require hospitalization and an estimated 5% will require intensive care, Giftos Aff. ¶ 8,[7] respondents do not discuss the availability of ventilators at a single jail or prison.

Correctional health care is not capable of duplicating hospital care, let alone in an intensive care unit (ICU). Giftos Aff ¶ 6. While each DOC facility has a health services unit that can provide care comparable to an urgent care facility, only one men's infirmary with a maximum of 36 beds provides more acute care, and even this is not equivalent to an ICU. Lewis Aff. ¶¶ 6, 9, 12. According to Dr. Victor Lewis, who for more than twenty years has monitored the medical and mental health care DOC provides to prisoners in segregation, "it will not take much to overwhelm DOC's health care system once the COVID-19 pandemic spreads." Lewis Aff. ¶15.

Notably, "the problem of a prison outbreak of COVID-19 infections cannot and will not be contained within the institution itself. Instead, it will explode into the community, increasing the pressure on our already taxed community hospitals." Giftos Aff. ¶ 9. Anyone requiring hospitalization or ICU care while incarcerated must be transferred to a hospital. Lewis Aff. ¶12; Giftos Aff ¶¶6, 9; *see also* Mici Aff. ¶ 58 (noting that at least two out of the first 10 state prisoners to be diagnosed with

---

[7] *See also Caring for COVID-19 Patients: Can Hospitals Around the Nation Keep Up?*, Harvard Global Health Institute (March 17, 2020), https://globalepidemics.org/2020/03/17/caring-for-covid-19-patients/.

COVID-19 have had to be hospitalized). But as Dr. Sivashanker, Medical Director for Quality, Safety and Equity at Brigham Health explains, even prior to the current pandemic, hospitals in the Greater Boston area frequently operated at or above 100% ICU capacity. Sivashanker Aff. ¶ 4. These hospitals are now bracing for COVID-19 needs that threaten to outstrip available ventilators and ICU beds. Sivashanker Aff. ¶¶6 - 8. Indeed, according to the Harvard Global Health Institute Study, the need for ICU beds in Massachusetts will far exceed their availability even in the researchers' best case scenario—if the rate of infection only reaches 20% of the population over the course of 18 months.[8] Facing similar numbers, other states have already started to plan for the rationing of care.[9]

"Based on projected viral spread rates," Massachusetts doctors may already "end up in a situation where [they] will have to start making decisions about who receives a life-saving resources (e.g., a ventilator) and who does not." Sivashanker Aff. ¶6. "An outbreak of COVID-19 at a jail or prison, which would likely require numerous transfers to a community hospital, could push a hospital even further past its breaking point." Giftos Aff. ¶10; *see also* Sivashanker Aff. ¶7. In these

---

[8] See *Caring for COVID-19 Patients: Can Hospitals Around the Nation Keep Up?*, Harvard Global Health Institute (March 17, 2020), available at: https://globalepidemics.org/2020/03/17/caring-for-covid-19-patients/.

[9] Karen Weise & Mike Baker, *"Chilling" Plans: Who Gets Care as Washington State Hospitals Fill Up?*, The New York Times (March 20, 2020).

circumstances, even more people will not receive the life-saving care that they need. Sivashanker Aff. ¶¶ 5, 7, 9.

The crisis that now exists inside the Commonwealth's correctional facilities cannot be solved inside those facilities. So long as substantial numbers of people are incarcerated in Massachusetts, it will not be possible to curb the spread of COVID-19 or prevent the overwhelming of the entire health care system's capacity.

B. Time is of the essence.

Petitioners have shown that, particularly now that in-person meetings and hearings are unsafe, the crisis inside the Commonwealth's correctional facilities also cannot be resolved by existing approaches to criminal procedure. The Trial Court's submissions have demonstrated that they are doing what they can, within the confines of existing rules, to hear motions on an emergency basis by incarcerated people who believe they are at risk of catching and dying from COVID-19. *See* Trial Court Br. 6. And, after the filing of this lawsuit, District Court Chief Justice Dawley instructed district court judges to "consider the impact of the COVID-19 virus" when setting bail or deciding whether to hold someone for dangerousness under G. L. c. 276, § 58A.

But those measures will not bring down the numbers of incarcerated people in time to ward off disaster. The Superior Court's report on motions for release due to COVID-19 reveals that many of those motions have been denied or remain

pending. C.J. Fabricant Aff. at Attachment 2. Likewise, two Chief Justices report a hesitance to dictate an "overall standard" for resolving motions by incarcerated people. *Id.* ¶16; C.J. Nechtem Aff. ¶14. And at least one Superior Court judge has concluded that the existing rules of criminal procedure—which this Court has the power to amend—can operate to bar trial judges from releasing people whose lives may be in danger due to COVID-19.[10] In normal times, such thoughtful and individualized deliberation, subject to existing rules of criminal procedure, would be laudable. But these are not normal times.

Attorneys are reporting serious difficulties in obtaining relief through individual motions. One attorney stated that his motion to rescind his client's bail revocation was denied in the Quincy District Court by a judge who stated that he was without authority to allow the motion. Kiley Aff. ¶6. Three different judges of the Chelsea District Court have denied agreed-upon motions for release for pretrial detainees. Kiley Aff. ¶7. And judges in at least four superior courts (Salem, Worcester, Hampden, and Norfolk) and one district court (New Bedford) have indicated that they will not regard COVID-19 as a factor weighing in favor of release

---

[10] *See* Order on Defendant's Emergency Motion to Order Defendant's Release Due to COVID-19 Crisis, *Commonwealth v. Tompkins*, No. 0878CR00039 (Superior Court Mar. 25, 2020) (Agostini, J.) (noting the "legitimate concern for the health and safety of individuals incarcerated in the various prisoners and jails," but concluding that the court could not grant relief).

until there is an actual diagnosis of COVID-19 at the facility in question. Kiley Aff. ¶11. We cannot continue in this fashion.

This crisis demands an overall standard, one that can quickly and consistently tip the scales of justice in favor of safely reducing incarceration levels. It will not be enough for courts to "consider" whether people should be locked up pretrial because they cannot afford bail during a pandemic and economic crash; this simply must not happen. Likewise, the judiciary cannot meaningfully curb the spread of COVID-19 among incarcerated people through an approach that varies from case to case or judge to judge; curbing a pandemic for some people or in some places is the same as not curbing it at all. As is implicit in the Trial Court's submissions, there is only one entity that can and should set a statewide approach: this Court.

C. Respondents have not rebutted petitioners' showing that incarceration must be reduced to protect prisoners, corrections staff, and the community.

To their credit, many of the respondents appear to agree "this Court should explore steps to reduce th[e] population" of incarcerated people. Trial Court Br. 19; *see also* DA Ryan Br. 2; DA Harrington Br. 4. And District Attorney Rachael Rollins has correctly observed "decarceration in certain instances is the just, humane, and right thing to do." DA Rollins Br. 5. The sheriffs and several district attorneys do not agree, but their views are unsupported by the record and at odds with reality. They have not rebutted petitioners' showing that incarcerated people are at greater

risk than others during this pandemic. They have no apparent plan to keep incarcerated people from dying in large numbers if the virus takes hold inside Massachusetts correctional facilities. Rather, their arguments boil down to a fact-free claim of, "We've got this." But saying that Massachusetts prisoners will be okay because they (now) have free soap, as the Sheriffs contend (Sheriffs Br. 3), is like arguing that the Titanic's passengers might have been fine if they'd taken swimming lessons. No. The only safe places were off of the ship.

II. There are no legal impediments to this Court's implementation of a remedy that meaningfully reduces incarceration levels.

The Sheriffs and the district attorneys for seven counties—Bristol, Cape & Islands, Essex, Hampden, Middle, Norfolk, and Plymouth (collectively, the "Opposing DAs")—devote much of their brief to the proposition that this Court cannot order the relief petitioners request in this case. This is not so.

A. This lawsuit is not barred by any standing or exhaustion requirement.

The Opposing DAs assert that CPCS and MACDL lack standing to bring this case because, in their view, CPCS and MACDL cannot show harm to their members. That argument is mistaken.

CPCS and MACDL have standing in several respects. First, CPCS and MACDL need not establish standing through their members because they have *organizational* standing. Both CPCS and MACDL must divert substantial resources from their usual work to the project of preventing their clients from dying in jails and

prisons, and such a diversion of resources is sufficient to meet federal standing requirements, let alone the more flexible standing rules in this Court. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Chelsea Collaborative, Inc. v. Secretary of the Commonwealth*, 480 Mass. 27 (2018) (case brought by organization whose resources were diverted by voter registration requirement); *New Eng. Div. of The Am. Cancer Soc'y* v. *Comm'r of Admin.*, 437 Mass. 172, 177 (2002) (organizations had standing because they were "directly and specially" harmed in a way that was "fairly traceable" to the challenged actions, and would receive "a likely benefit" if they won the case). Second, CPCS and MACDL have *associational* or *representational* standing because their employees and members are harmed by the issues at stake here; each time a defense attorney ventures out to a prison or jail to visit a client—even for a "non-contact" visit—they risk being exposed to COVID-19. And third, CPCS and MACDL have third-party standing to assert the rights of their incarcerated clients who cannot bring their own cases because they cannot safely meet with lawyers. *See Craig v. Boren*, 429 U.S. 190, 192–97 (1976); *Eulitt ex rel. Eulitt v. Maine, Dept of Educ*, 386 F.3d 344 (1st Cir. 2004).

For similar reasons, the Sheriffs are wrong to argue that petitioners were required to exhaust administrative remedies before bringing this case. Sheriffs Br. 15-16. Because they have been directly harmed by the circumstances at issue here, and because CPCS and MACDL are not incarcerated, exhaustion requirements do

not apply. *See* 42 U.S.C. § 1997e(a) (2013) (limiting actions under federal law "brought . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"); *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)) (noting that under the PLRA "an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of'").

Collectively, the procedural roadblocks advanced by the Sheriffs and Opposing DAs betray a startling disregard for the urgency of this crisis. Can these law enforcement entities really believe this Court should sit back and wait for another chance to craft a systemic approach to the COVID-19 crisis? Do they believe that CPCS and MACDL should wait to see how the grievance process plays out, over an unknown number of weeks, before seeking relief for their clients? If Massachusetts law were to require such an approach, it would be sentencing untold prisoners to death.

B. This Court can craft remedies that reduce the number of incarcerated people in Massachusetts.

The Opposing DAs and the Sheriffs purport to contest this Court's authority to order the requested relief. But, upon closer inspection, very little of this Court's authority is actually in dispute.

1. Both the Opposing DAs and the Sheriffs seek to refute constitutional claims that, in fact, petitioners have not yet brought. Petitioners have contended that the risks posed by COVID-19 to incarcerated persons implicate constitutional guarantees for substantive due process and against cruel or unusual punishment. *See* Pet. 12-14. But as the Trial Court, the Department of Correction, and other respondents point out, petitioners offer that contention merely to establish that COVID-19 outbreaks "carr[y] potential constitutional ramifications," not because we seek a ruling on those issues at this time. Trial Court Br. 18 n.4. That is because the most important thing to do right now is to get people out of harm's way. That is something this Court can do as an exercise of its superintendence powers under G. L. c. 211, § 3, without reaching the merits of any constitutional issue.

That said, both the Opposing DAs and the Sheriffs downplay the rights of incarcerated people to a worrying degree. They contend, for example, that even if COVID-19 were to sweep through Massachusetts prisons and jails, no prisoner would have a constitutional right to be free of that mortal danger until they could demonstrate "deliberate indifference" by their jailers. Opposing DAs Br. 19; Sheriffs Br. 8. Following the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), however, prisoners do not necessarily need to establish deliberate indifference in order to establish conditions of confinement or improper medical care that violate due process. *See Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2d Cir.

2017). And, as in their arguments with respect to standing and exhaustion, it is dismaying to hear that anyone running a jail or house of correction in Massachusetts might doubt their constitutional obligation to keep prisoners safe from COVID-19.

2. Neither the Opposing DAs nor the Sheriffs devote much energy to contesting the relief that petitioners have requested concerning people who are in pretrial detention or who are not yet in detention, and that is likely because this Court's authority to order that relief cannot reasonably be disputed. Because individual courts impose pretrial probation and detention, set bail amounts, issue warrants, it is within this Court's superintendence authority to set rules for all courts on those issues. *See, e.g., Querubin v. Commonwealth*, 440 Mass. 108, 115 (2003) (citing the "inherent powers of the judiciary" as those involving adjudication of criminal cases and judicial administration, including bail decisions). This would include, for example, instructing lower courts concerning the manner in which they conduct probation and pretrial detention hearings, canceling or suspending outstanding warrants, and adjusting conditions of release or terms of probation.

Likewise, this Court has already exercised its superintendence power to hold that a judge "is not required to set bail in an amount the defendant can afford if other relevant considerations weigh more heavily than the defendant's ability to provide the necessary security for his appearance at trial." *Brangan v. Commonwealth*, 477 Mass. 691, 693 (2017). It is equally within the Court's authority

to say that, during the unique circumstances of the COVID-19 state of emergency, judges must set bail in amounts that defendants *can* afford. No one should be exposed to a serious disease because they cannot afford bail. This is especially true when the disease has triggered an economic crash that has made it harder for members of vulnerable communities to afford bail, and when using bail "to ensure the defendant's appearance at trial" is an indefinite loss of that money because, due to mandatory physical distancing, there are no trials anyway. *See id.* at 693-94. Thus, petitioners' requested relief for current or prospective pretrial detainees is both urgent and permissible.

3. Although many of the objections advanced by the Opposing DAs and Sheriffs concern postconviction prisoners, there too this Court's authority is ample. As a threshold matter, courts have "the inherent power to stay sentences for 'exceptional reasons permitted by law.'" *Commonwealth v. Charles*, 466 Mass. 63, 72 (2013) (quoting *Commonwealth v. McLaughlin*, 431 Mass. 506, 520 (2000)). In *Charles*, the Court held that the "serious and far-reaching misconduct" at the Hinton drug lab presented exceptional circumstances warranting stays of sentences, noting that "the interest of justice is not served by the continued imprisonment of a defendant who may be entitled to a new trial." *Id.* at 74. Here, the COVID-19 pandemic presents exceptional circumstances warranting the exercise of this Court's stay authority. This pandemic is obviously serious and far-reaching, and the interest

of justice is not served by the continued imprisonment of any defendant who might be infected by a potentially fatal disease as a consequence of that imprisonment.

But, as noted by the Trial Court and Attorney General, this Court also has other mechanisms through which it can potentially deliver "expedited relief for those serving committed sentences who are . . . vulnerable to COVID-19 infection." Trial Court Br. 19 (citing G. L. c. 127, § 119A (medical parole); G. L. c. 127, §§ 49-49A (educational release); Mass. R. Crim. P. 29 (revisions or revocation of sentences)). For example, Rule 29(a)(2) permits trial judges to revise or revoke a sentence "if it appears that justice may not have been done," but only within 60 days from the imposition of a sentence or the issuance of a rescript after a direct appeal. To address the unique circumstances of the COVID-19 crisis, this Court should immediately revise Rule 29 to eliminate the 60-day limitation and to allow trial judges, *including the Single Justice in this matter*, to grant Rule 29(a)(2) relief due to the threat of COVID-19. *See Commonwealth v. Bastarache*, 382 Mass. 86, 102 (1980) (the Court "may impose requirements (by order, rule or opinion) that go beyond constitutional mandates"); *see also Commonwealth v. O'Brien*, 432 Mass. 578, 583–84 (2000).

Contrary to arguments advanced by the Opposing DAs, revising Rule 29 in this manner would not violate principles governing the separation of powers. This Court has long recognized that "a conscientious judge" can lower a sentence under

Rule 29(a) based on new information demonstrating that the existing sentence may be "too harsh." *Commonwealth v. McCulloch*, 450 Mass. 483, 487 (2008). Relying on a defendant's *post-sentencing conduct* as grounds for Rule 29 relief is generally impermissible and presents separation of powers concerns because "[t]he judiciary may not act as a super-parole board." *Commonwealth v. Amirault*, 415 Mass. 112, 117 (1993); *see also Commonwealth v. Barclay*, 424 Mass. 377, 380 (1997). But this Court has also made clear that certain post-sentencing facts *not involving the defendant's post-sentencing conduct* may be considered by judges applying Rule 29. *See Commonwealth v. Tejada*, 481 Mass. 794, 795 (2019) (upholding relief granted on the basis of unwarranted sentence disparities). That approach is warranted here. Under the unique circumstances of this pandemic, which were not anticipated when most Massachusetts defendants were sentenced, modest revisions of sentences would not violate separation of powers so long as they do not encroach on other executive or legislative commands (such as mandatory minimum sentences).

C. The requested relief is consistent with the actions of other courts.

Granting immediate relief to reduce incarceration levels in Massachusetts is not only permissible; it would be consistent with steps other courts have taken in response to the COVID-19 pandemic. These steps, some of which are collected in the Appendix to this brief, include:

- **California**: Chief Justice Tani Cantil-Sakauye of the California Supreme Court has instructed trial courts to "[l]ower bail amounts significantly"

and "[i]dentify detainees with less than 60 days in custody to permit early release[.]"

- **Michigan**: Chief Justice Bridget McCormack of the Michigan Supreme Court has instructed courts to take various steps to reduce custodial arrests, increase pretrial release, and reduce and suspend jail sentences. "Following this advice," Justice McCormack wrote, "WILL SAVE LIVES."

- **Ohio**: Chief Justice Maureen O'Connor has urged "judges to use their discretion and release people held in jail and incarcerated individuals who are in a high-risk category for being infected with the virus."

- **South Carolina**: Chief Justice Wayne Beatty instructed that "any person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk."

Likewise, last Wednesday, in ordering the release of an immigration detainee held at the Plymouth County Correctional Facility, U.S. District Judge Mark Wolf found a "genuine risk that [COVID-19] will spread throughout the jail."[11] And on Friday, in response to a COVID-19-based habeas corpus petition filed by two other immigration detainees, Immigration and Customs Enforcement released them.[12]

This Court should ensure similar relief for other incarcerated people whose lives are in danger due to the coronavirus pandemic.

---

[11] *Jimenez v. Wolf*, 18-10225-MLW (D. Mass. Mar. 26, 2020), at https://www.courtlistener.com/recap/gov.uscourts.mad.195705/gov.uscourts.mad.195705.507.1.pdf.

[12] *See Rodas-Mazariegos v. Moniz*, No. 1:20-cv-10597 (D. Mass.).

III. This Court should impose a remedy that is both meaningful and individualized.

The Opposing DAs and Sheriffs repeatedly assert that petitioners are insisting on an inflexible remedy that precludes individualized decisions. That is not so. This petition simply seeks to achieve a level of decarceration that adequately protects our communities outside the prison walls and those who remain incarcerated. Outbreaks of COVID-19 in the Commonwealth's detention facilities threaten the health and safety not only of the people confined to those facilities, but also those who work there, their families and communities, and all of us who may need to rely on a hospital system that would be overwhelmed by large-scale outbreaks in our detention facilities. In bringing this petition, and in continuing to work with the Special Master and the respondents toward a negotiated resolution, petitioners are eager to embrace a remedy that allows for individualized determinations of who should be released. But it is critical that any such remedy be applied to the entire Commonwealth, and that it achieve significant decarceration quickly.

A. Any remedy must set a decarceration benchmark that is adequate to protect those who are released and those who remain incarcerated.

Any remedy should set a decarceration benchmark that meaningfully reduces the likelihood of outbreaks behind bars. One potential benchmark could be reducing incarceration to, say, 50% of capacity. The DOC asserts that its facilities are

at an average *operational* capacity of 73%.[13] Trial Court Br. 11. But without more information, it is impossible to know whether such a benchmark would permit adequate physical distancing in all facilities. A second potential benchmark is to select categories of people who should presumptively be released. Whatever benchmark the Court uses to reduce the risk of disastrous COVID-19 outbreaks in our detention facilities, *cf.* Giftos Aff. ¶ 11, it must be tied to a very short deadline—such as 96 hours from the entry of this Court's order. One week might be too late.

B. Petitioners support time-limited opportunities for individualized review.

Urgency is not incompatible with individualized review. But, as the Suffolk District Attorney explains, any "case-by-case analysis" must be completed in an "expedited manner" to ensure that the pandemic does not reach and spread through the population. Suffolk DA Br. 14; Trial Court Br. 23-24 ("[S]uch processes should be conducted in an expedited fashion, with clear standards, reflecting the time-

[13] "[O]perational capacity" is not an appropriate metric of safety during the COVID-19 crisis. It is distinct from, and far higher than, the "design/rated capacity" of DOC facilities. Compare DOC Quarterly Report on the Status of Prison Capacity, Third Quarter 2019 ("Quarterly Report"), pp. 4 & 10 (defining "design/rated capacity" as the number of inmates that the planners or architects intended for an institution; showing a design/rated capacity for all DOC facilities of 7,492, and an average daily population of 8,320) (available at https://www.mass.gov/doc/prison-capacity-third-quarter-2019/download), with DOC Weekly Count Sheet, March 23, 2020, p. 1 (showing an operational capacity for all DOC facilities of 10,157, and a current population of 7,916) (available at https://www.mass.gov/doc/weekly-inmate-count-3232020/download).

sensitive nature of this situation."). As this pandemic grows, any delay will thwart the goal of saving lives.

The precise mechanics of the review process will depend on the benchmark. If the benchmark is 50% of the operational capacity—in recognition of the fact that "the population of an institution is itself a risk factor," *id.* at 19—the district attorneys will have the prerogative to choose who is released in their respective jurisdictions. But, particularly given the positions taken by the Sheriffs and Opposing DAs, district attorneys should be expressly instructed that they "shall exercise their prosecutorial discretion" and release all those who can be released safely in order to meet the benchmark. *Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298, 300 (2017). Likewise, this Court should instruct that the benchmark is a floor, not a ceiling, and that respondents should decarcerate further where it can be done safely, because any reduction in prisoner density will enhance protections for those left inside, correctional staff, and their families. *See* Berkshire DA Br. 2 ("[T]he only hope of reducing the spread of the coronavirus . . . is for all individuals to maintain a physical distance of at least six feet").

If the decarceration benchmark is defined by categories of incarcerated people, this Court should create a presumption in favor of release for any person falling into those categories. A presumption is appropriate because the categories themselves will be defined to ensure that those within them can be released safely.

Efforts in other states are instructive as to what categories for presumptive release this Court might establish. The following categories, as well as those identified in the Emergency Petition, include particularly strong candidates for release:

(1) All defendants who are currently detained awaiting trial on a cash bail of $5,000.00 or less who would be otherwise eligible for release if they could post the bail imposed in their case.[14] This category is appropriate because (a) any person held on cash bail is, by definition, not dangerous, see *Brangan v. Commonwealth*, 477 Mass. 691, 706 (2017) ("[A] judge may not consider a defendant's alleged dangerousness in setting the amount of bail . . . ."), and (b) the economic devastation wrought by the COVID-19 pandemic has caused unprecedented job losses and made bail less affordable for many Massachusetts families.[15] And there is no need to continue to hold people on bail where courts are largely closed.

(2) All defendants who are within six months of their date of release.[16] This category recognizes that such individuals will have nearly completed the term of their sentence, and their exposure to a highly infectious and deadly virus is not commensurate with the balance of the sentence that remains to be served. Plus, many facilities have cancelled programming and group classes, see, e.g., Tuttle Affidavit at ¶ 7, Cummings Affidavit at ¶9(i), so prisoners near their release dates have lost access to services that might otherwise have aided in their transition to release.

---

[14] *See, e.g.,* Advisory from California Chief Justice Tani Cantil-Sakauye to Presiding Judges and Court Executive Officers of the California Courts (Mar. 20, 2020), https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures.

[15] *See, e.g.,* Gary Langer, *A Third Report Job Loss, Half a Pay Cut as Coronovirus Grips the Economy*, ABC News (Mar. 26, 2020) (recent polling reveals that "one in three Americans . . . say they or an immediate family member have been laid off or lost their job as a result of the pandemic and more ―half―report a cut in pay or work hours"), https://abcnews.go.com/Politics/report-job-loss-half-pay-cut-coronavirus-crisis/story?id=69811808

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

(3) All defendants who are particularly susceptible to complications or death should they contract COVID-19, either because they are over 60 years of age or because they suffer from a pre-existing condition that renders them more vulnerable to the virus.[17]

Once the presumption applies, it would then be up to the district attorney, on a case-by-case basis, to object to release and rebut the presumption. Upon objection, this Court should establish a procedure for the incarcerated person to confer with counsel and proceed to a speedy hearing and adjudication of whether the presumption in favor of release has been rebutted. In New Jersey, for example, prosecutors agreed to a presumption of release for every person serving a county jail sentence, with continued detention permissible only upon the written objection of the prosecutor and a "finding by a preponderance of the evidence that the release of the inmate would pose a significant risk to the safety or the inmate or the public."[18] Under the order, objections are resolved by a special master in expedited, summary

---

[17] Kentucky's Chief Justice warned that "jails are susceptible to worse-case scenarios due to the close proximity of people and the number of pre-existing conditions." Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails To Stop Outbreaks. Others Are Lagging Behind.*, The Appeal (Mar. 25, 2020), https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus. *See also* Middlesex DA Br. 2 (describing "a thorough review of inmates at the House of Correction to identify all nonviolent offenders and medically compromised prisoners who can be released without danger to the community").

[18] *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.

proceedings.[19] This Court should establish the same procedure for presumptive release, individualized objections, and speedy decisions.

C. The remedy must be available to people with substance use disorder.

Particularly because so many incarcerated people in Massachusetts have substance use disorder, any remedy must take care to avoid discrimination on the basis of that disorder. *See, e.g.,* Sheriffs Br. 14; Cocchi Aff. ¶6. Substance use disorder is a disability within the meaning of the Americans with Disabilities Act, and excluding people with that disability from a practice of releasing people from incarceration—whether it is the court-supervised practice that petitioners request, or instead the informal practice that might already have begun in some counties—would be unlawful. *See Buchanan v. Maine*, 469 F.3d 158, 170-71 (1st Cir. 2006); *Pesce v. Coppinger*, 355 F. Supp. 3d 35 (D. Mass. 2018).

Contrary to the Sheriffs' suggestion, releasing prisoners with substance use disorder is eminently workable. Petitioners are aware of only two counties in Massachusetts where correctional facilities induce medication-assisted treatment (MAT); the vast majority of incarcerated people on MAT will have started that treatment in the community. Accordingly, petitioners' counsel have worked diligently to identify, and have brought to the attention of the Special Master, substantial treatment and therapy resources that will be available to people with

---

[19] *Id.*

substance use disorder who may be released as part of a resolution of this case and are already receiving, or wish to begin, MAT treatment. Burke Aff. ¶¶1-4.

For instance, the Police Assisted Addiction and Recovery Initiative (PAARI) has partnered with the Office Based Addiction Treatment Program at Boston Medical Center (BMC – OBAT), the Massachusetts Department of Public Health, Healthy Street and AHOPE of Boston Public Health Commission to provide "Survival Kits," that Sheriffs can provide to individuals upon release.[20] Each kit includes NARCAN and a direct number for BMC-OBAT, which is fully staffed to provide telemedicine consultation and buprenorphine prescriptions the day of release, as well as to facilitate placement with a local buprenorphine prescriber. BMC-OBAT is especially well-situated to provide these services, as it has built relationships with over 40 Community Health Centers across the state in the past 10 years to expand access to buprenorphine treatment, especially in underserved areas and low-income communities.[21] On March 25, 2020, the program distributed 200 kits to Essex, Suffolk and Middlesex County Sheriff Departments. Petitioners understanding is that BMC-OBAT and local buprenorphine prescribers have the

---

[20] *See* PAARI Survival Kits Distributed to County Jails in Essex, Middlesex and Suffolk County, (Mar. 25, 2020), https://paariusa.org/2020/03/25/survival-kits-distributed/; *see also PAARI Launches Survival Kit Program Amid COVID-19 Health Crisis*, (Mar. 24, 2020), https://www.enterprisenews.com/news/20200324/strongpaari-launches-survival-kit-program-amid-covid-19-health-crisisstrong/4.

[21] *See* About Us – BMC OBAT TTA, https://www.bmcobat.org/about-us/obat-tta/.

capacity to connect every individual requiring buprenorphine who is released from HOC or DOC facilities with a provider in the community, and that BMC-OBAT is eager to coordinate with every correctional facility to ensure individuals have their contact number before or at release.

D. There must be an ongoing reporting requirement that permits the parties and the Court to assess whether the remedy is working and whether it needs to be adjusted.

To assess whether we are meeting the goal of sufficiently reducing the prisoner population to permit the social distancing required to stem the tide of COVID-19, we must have data. This data needs to tell us if the actions taken are changing the living conditions in each facility. And this data needs to be provided to the Attorney General, the Special Master, and Petitioners every 48 hours to catch any uptick of this exponentially growing virus before it spreads out of control in a correctional facility.

To that end, we need to know the population numbers overall and at each facility so we know if the numbers are being reduced as necessary in all facilities. Then, we need to track the number of COVID-19 tests undertaken, the number of presumptive positives, and the number of positives in each facility, including staff, because if staff members test positive, incarcerated persons will likely follow. If the number of COVID-positive persons incarcerated at one facility increases at a higher rate than at other facilities, that is likely an indication that the facility has too many

people in close proximity to meet social distancing requirements. If all the facilities are increasing at a rate that is a threat to public health, reductions need to be quicker and more aggressive. Thus, it is important to know exactly how many and in what conditions the people at each facility are being housed--such as the number of people per cell, the number of people in each dormitory, and the number of occupied beds within six feet of each other--so that meaningful action can be taken.

Moreover, it is important to track the number of incarcerated people being treated for COVID-19 at the Shattuck, in an infirmary, or in a health services unit, and the location of each person, because that will provide information regarding the capacity of the Department of Correction to meet the health needs of the prisoners with COVID-19 and those without. Similarly, the number of incarcerated people transferred to a community hospital and the facility from which they came is important to determine if high rates of COVID-19 in a facility are having a significantly adverse impact on the community hospitals such that additional reductions at that facility may be necessary.

Finally, any reporting mechanism should track the racial composition of people released as part of a resolution of this case. This Court has noted "ample empirical evidence" of racially disparate treatment throughout the criminal legal system. *Commonwealth v. Williams*, 481 Mass. 443, 451 n.6 (2019). It is therefore

essential to ascertain whether a remedy that seeks to save prisoners from a deadly disease is yielding racially disparate outcomes.

CONCLUSION

Petitioners respectfully request the immediate implementation of an order that allows for the rapid but individualized reduction of incarceration in Massachusetts. It will save lives.

[*counsel signature block on next page]*

Respectfully submitted,

/s/ Rebecca A. Jacobstein

Rebecca Jacobstein, BBO 651048
Benjamin H. Keehn, BBO 542006
Rebecca Kiley, BBO 660742
David Rangaviz, BBO 681430
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 910-5726
rjacobstein@publiccounsel.net

Counsel for the Committee for Public Counsel Services

/s/ Matthew R. Segal

Matthew R. Segal, BBO 654489
Jessie J. Rossman, BBO 670685
Laura K. McCready, BBO 703692
Kristin M. Mulvey, BBO 705688
ACLU Foundation of
Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Chauncey B. Wood, BBO 600354
Massachusetts Association of Criminal
Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

Victoria Kelleher, BBO 637908
Massachusetts Association of Criminal
Defense Lawyers
One Marina Park Drive, Ste. 1410
Boston, MA 02210
(978) 744-4126
victoriouscause@gmail.com

Counsel for Massachusetts Association of Criminal Defense Lawyers

Dated: March 30, 2020