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January 29, 2018

TO: Representative Claire Cronin
Representative Ronald Mariano
Representative Sheila Harrington
Senator William Brownsberger
Senator Cynthia Creem
Senator Bruce Tarr

CC: Speaker Robert DeLeo
Senate President Harriette Chandler

RECOMMENDATIONS TO THE CONFERENCE COMMITTEE ON CRIMINAL JUSTICE REFORM (H.4043/S.2200)

Dear Members of the Conference Committee,

On behalf of the ACLU of Massachusetts, we write to thank you for your leadership and dedicated work to improve the way our justice system functions for individuals and communities throughout the Commonwealth — and we urge you to make the most of this opportunity for meaningful reform.

Please adopt policies that reflect a unified view of public safety and liberty,[1] informed by both evidence and compassion. In setting drug policy, please emphasize public health over criminalization. We encourage you to minimize incarceration and state supervision, improve due process and just conditions for individuals who have contact with the criminal legal system, examine persistent and pervasive racial disparities, and guard against establishing structures that will be difficult to dismantle in the event they result in unintended harms. We are hopeful that both the House and the Senate share these goals, and we offer these recommendations to help achieve them.

The ACLU is most urgently concerned with the "front end" of the system: sentencing and pre-trial conditions. The most important thing we can do to enhance liberty, reduce recidivism and improve public safety is to keep people out of the criminal justice system in the first place.

[1] In the words of Frederick Douglass: "Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe."

To that end, we urge you to:

- Adopt all provisions repealing mandatory sentencing for drug offenses — particularly, all second and subsequent distribution offenses and school zone offenses. (House §§15, 16; Senate §§ 89, 90, 91, 105, 109)

- Promote alternative sentencing for primary caretakers of children (Senate §317) and increase opportunities for diversion to treatment for people suffering from substance abuse disorders.

- Refrain from altering our bail statute at this time, in order to enable courts to implement the positive SJC decision in *Commonwealth v. Brangan* – or, in the alternative, adopt the House provisions that codify that decision's limits on excessive and unaffordable bail. (House §§ 68-73)

- Adopt changes to the way our system treats young people.[2]

We appreciate your attention and consideration to our detailed recommendations below.

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SENTENCING

Mandatory Minimum Sentences for Drug Offenses

Mandatory minimum sentences are costly and ineffective holdovers from the failed war on drugs. They are disproportionately and unjustly used against Black and Latino residents,[3] and they significantly increase mortality for people suffering from substance use disorder.[4]

We appreciate that both the House and Senate took important steps to repeal mandatory minimum sentences for drug offenses, and we urge you to adopt the Senate's broader set of repeals. We want to highlight two particularly pernicious sets of mandatory sentences, the repeal of which we consider the 'floor' for meaningful sentencing reform.

[2] The ACLU of Massachusetts is a proud member of the Massachusetts Coalition for Juvenile Justice Reform. For detailed policy recommendations in this area, we direct your attention to a letter from that coalition dated January 12, 2018.

[3] Massachusetts sentencing data shows that Black and Latino residents make up only 22% of Massachusetts population, yet the percentage triples when looking at people serving sentences for mandatory minimum drug offenses. *Massachusetts Sentencing Commission: Selected Race Statistics* (September 27, 2016), *available at* http://www.mass.gov/courts/docs/sentencing-commission/selected-race-statistics.pdf#page=8

[4] Limitations on programming and treatment for people serving mandatory sentences are dangerous. Individuals recently released from prison are 120 times more likely to die of opioid overdoses than the general population. *An Assessment of Opioid-Related Overdoses in Massachusetts* 2011-2015, MDPH DATA BRIEF (2017), *available at* http://www.mass.gov/eohhs/docs/dph/stop-addiction/data-brief-chapter-55-aug-2017.pdf

- First, *all* distribution offenses. These are low-level retail drug offenses involving very small quantities of drugs. Overwhelmingly, these charges are brought against people engaged in petty transactions and those suffering from substance use disorder. We appreciate that the House bill would repeal mandatory sentences for second and subsequent distribution of Class B and C drugs (House §§15, 16; Senate §89 paragraphs 2 and 3). However, we would do a great disservice if we fail to also repeal mandatory sentences for Class A drugs, including possession and distribution of opioids (Senate §89 paragraph 1, §109). If we truly strive to be a "state without stigma,"[5] we must repeal Class A mandatories. Not despite the opioid epidemic, but *because of* it.

- Second, school zones (Senate § 105). People should not receive the harsh penalty of a mandatory minimum merely for being in the wrong place. This charge has been used to prosecute people who have possessed drugs while merely driving through a school zone at night while school is not in session, or who happen to sell them to adults near a school — and it disproportionately harms urban communities of color.

In addition, we urge you to adopt the Senate's provisions increasing the weight for certain trafficking offenses. (Senate §§ 90, 91). Current trafficking thresholds are low enough that they represent an amount a person with a serious substance use disorder could use in just a few days, or which could be shared among a group of friends.

Finally, we acknowledge the grave concerns and serious issues presented by Fentanyl and Carfentanil. While we oppose the creation of any new mandatory sentences, we are particularly concerned about the House's proposed dramatic departure from the treatment of other controlled substances (House §§18, 19). Let us learn from the lessons of the fight to control the crack cocaine epidemic. History has shown that policymakers may come to rue establishing overly harsh sentencing structures in response to this public health crisis.

Primary Caretakers of Children (Senate §317)

We encourage you to adopt this provision to permit judges to consider the impact of incarceration on any individual who is the primary caretaker of their children. Reliable data shows that children with an incarcerated parent are more likely to become involved in the criminal legal system. This simple reform will ensure that courts consider alternatives that will keep families whole. In 2016, 48% of women in Massachusetts state correctional facilities had a non-violent governing offense and would have been eligible for alternative sentences under this legislation.

Diversion to Treatment (Senate §§ 119-130, 136, 165, 305-312, 314, 315, 317; House §§ 4, 5, 28, 87 - 90, 98, 147)

We appreciate that both the House and Senate bills contain a variety of provisions to expand and increase opportunities for individuals to be diverted out of the criminal legal

[5] https://www.mass.gov/state-without-stigma

system and into programing or treatment. People with substance use disorders need treatment, not costly prosecution and incarceration. Keeping people out of the system to begin with – especially young people – is the most effective cure for recidivism.

Among other diversion provisions, we specifically support that would authorize trained "addiction specialists" to determine a person's eligibility for drug diversion. (Senate §§ 119-122, 128-130). This change will increase the likelihood that people who are most in need of treatment will have the opportunity to receive it in a public health setting.

BAIL/PRE-TRIAL CONDITIONS

We recommend that the legislature not make changes to the bail statute at this time.

As a general matter, the ACLU supports reforming the way bail is used across the country. For too long, instead of being treated as a tool to ensure that an individual will appear in court, excessive financial conditions have kept poor people locked behind bars and interfered with their ability to obtain justice and continue their lives. For this reason, we deeply appreciate the long-standing desire in many quarters to "pass bail reform." However, facts on the ground have changed since the start of the legislative session.

In August, the Supreme Judicial Court issued a positive, game-changing decision in *Brangan v. Commonwealth*, 477 Mass. 691 (2017). That decision established safeguards to ensure that our bail statute is applied in a way that does not discriminate against poor people. The Court in *Brangan* described clear procedural standards that must be followed before unattainable bail can be set. Mere months later, lawyers who are representing clients are reporting that the decision is already having an impact. The courts should be given an opportunity to apply the decision and develop practices that comply with its requirements. While we do not believe changes to the existing statute are necessary in light of *Brangan*, we would not object to the adoption of the House provisions that codify the decision's limits on excessive financial conditions (§§ 68-73).

Unfortunately, while well-intended, the Senate's proposed changes to the statute could entangle many more people in the criminal legal system – *before* trial. S.2200 would significantly expand the courts' ability to impose pretrial conditions on defendants, and for new reasons, under the auspices of Probation. Even before trial, thousands of people across the Commonwealth – people who have not been judged to have done anything wrong – would be subject to significant requirements and restrictions on their activities that could interfere with their ability to go about the ordinary business of their lives, including work, school, and caring for family.

In addition, an enormous expansion of pretrial probation would mean major new costs for the taxpayers of the Commonwealth. It has been estimated that S.2200's proposed changes would add an hour of legal advocacy or more to each case. This increase in the number of hours per case would require millions of dollars of additional state funding for indigent defense, prosecution, and the administration of the judiciary.

Finally, we urge you to proceed with great caution, research and deliberation before mandating the use of risk assessment tools to make pre-trial determinations. Such tools, while technologically sophisticated, are not necessarily scientific. Without adequate clarity about their objectives and careful consideration of which variables to weigh, algorithms can easily replicate unjust decision-making or amplify human biases based on race or other discriminatory factors.[6] For this reason, we exhort you to conduct extensive study before wading into this policy quagmire.

FEES & FINES

Excessive financial penalties and fees imposed throughout the criminal legal system can be disastrous for poor people. They extend people's entanglement in the system, hobble their ability to get back on their feet, and help perpetuate a permanent underclass. We urge you to adopt the following reforms, which would begin to undo such counterproductive policy.

Indigent counsel fees

- Gradually phase out indigent counsel fees for adults. (Senate §§ 193-196)
- Eliminate the indigency counsel fee for juveniles. (Senate §192)

Parole supervision fee

- Eliminate the parole supervision fee. (Senate §§ 183 & 323)

Probation fee waiver

- Direct courts to waive the probation fee for a person's first 6 months post-release if they find that it would be a substantial financial hardship on the person, their immediate family or dependents. (House §74)

Fine time amount & procedures

The House and Senate versions both contain important provisions. We urge you to adopt the following measures from Senate §§ 187,188 and House §§ 36, 37:

- Triple the fine time rate from $30/day to $90/day.
- No commitment for failure to pay fees where payment would be a significant hardship, as determined in a hearing conducted for this purpose.
- No commitment for failure to pay fees where person was not offered counsel for the commitment proceeding; no fees assessed for indigent counsel.
- Courts must consider alternatives to incarceration for failure to pay fees.
- No commitment for juveniles based solely on failure to pay fees.
- Enable people incarcerated for failure to pay fees to petition the court for discharge based on substantial financial hardship.

[6] For a thoughtful treatment of these issues, *see* An Open Letter to the Members of the Massachusetts Legislature Regarding the Adoption of Actuarial Risk Assessment Tools in the Criminal Justice System, by senior researchers at Harvard & MIT (Nov. 9, 2017).

CONDITIONS OF CONFINEMENT & RELEASE

Solitary Confinement
Please adopt the "restrictive housing" language in S. 2200, but add the following important provisions from H.4043:

- Transition from segregation in the period before scheduled release to the community.
- Oversight committee to monitor use of solitary confinement.
- Data collection and reporting regarding incidents of self-harm and suicide.
- Definition of serious mental illness – to ensure that those who are significantly mentally impaired have the opportunity to be screened out of solitary confinement.

In addition, we urge the conference committee to expand on the Senate language that would require prisoners in restrictive housing to have access to out-of-cell programming; please consider adopting the minimal standards for such access proposed by our colleagues at Prisoners' Legal Services.

Medical Release
We appreciate that both bills would create a mechanism to authorize the medical release of prisoners deemed to be medically and permanently incapacitated, and whose care is costly. We encourage you to adopt the Senate version, which provides for a thorough yet more streamlined process. Particularly for end-of-life decision-making, efficiency is critical. However, we urge the conference committee to make sheriffs the final deciders on medical release cases from county facilities, rather than the DOC Commissioner; each sheriff is best positioned to assess individual cases under his jurisdiction.

Other Provisions

- Maintaining basic in-person visitation. (Senate §177; House §148)
- Medication assisted treatment pilot programs at various facilities. These provisions will save lives. (Senate §§ 174 & 330; House §§ 145 & 224A)
- Telephone rates study. (House § 135)
- Appropriate treatment of LGBTQI prisoners. (Senate §§ 39A(c), 339, 117B)

CORI & COLLATERAL CONSEQUENCES

There is no better way to reduce recidivism than enabling people with criminal records to put their past behind them and achieve economic stability via work and housing. We urge the conference committee to prioritize these critical reforms:

Shorter sealing wait times

- Reduce waiting periods to 7 years for felonies and 3 years for misdemeanors. (House §§81-82; Senate §§292-293)

- Adjust chapter 151B protections against unlawful employment inquiries accordingly. (House §§40-41).

Opportunities for occupational licensure

- Permit applicants for occupational licenses to say they have "no record" after their records are sealed, just like job applicants. (H§§84 - 86)
- Exclude provisions that would require occupational licensors to create exclusions based on offense categories. (Senate §10; House§ 117). Such provisions are counterproductive and will undermine successful re-entry.

Other positive reforms

- Request the FBI to seal/expunge records that were sealed/expunged in MA. (House §87, subsection 100T)
- Permit vacatur and sealing of unjustifiable trafficking convictions for trafficking victims. (Senate §§235 & 303 subsection 100I)
- Various provisions in both the House and Senate bills to protect young people with juvenile records. Young people should be given the opportunity to "age out" of criminal behavior instead of being held back by early missteps.

OTHER POSITIVE REFORMS

The following provisions are less sweeping than some marquis reforms in the bills, but they are still significant and deserve to be included in your final report. We appreciate that both the House and Senate have taken an expansive view of criminal justice reform in 2018, and we encourage you to not unduly narrow your scope of vision during the conference process.

- *Arrest data transparency* (House §2)
  Identical to standalone legislation filed by Assistant Majority Leader Rep. Rushing and Chairman Brownsberger. A better picture of the offenses for which people are arrested throughout the commonwealth will inform our understanding of our criminal justice system, policing decisions, and resource needs. As we grapple with how to improve police practices and reform our criminal justice system, good data is a necessary starting place.

  We also support the provisions in §§2B and 2C to standardize data collection across the CJ system. One of the core findings from the CSG process was that we lack basic data about our criminal justice system; we can't manage what we don't measure. The ACLU strongly recommends using probation central file numbers rather than fingerprints to track an individual's interactions with and movement through the system. We oppose the Senate language regarding fingerprint-based tracking (Senate § 17), which would unnecessarily increase biometric surveillance of Massachusetts residents by requiring fingerprinting for individuals who receive summonses as well as those who are arrested. This is particularly concerning

because summonses are used for less serious allegations that in many instances are not observed by law enforcement.

- *Asset forfeiture reporting* (Senate §117)
  In 2015, a report from the nonprofit Institute for Justice gave Massachusetts a grade of "F" for its civil asset forfeiture laws. This basic transparency measure is a starting place for the conversation we need to have about asset forfeiture.

- *Forensic science commission* (Senate §11)
  This provision would advance the integrity and reliability of forensic science in the commonwealth and improve accountability for future negligence and misconduct at state crime labs. It represents a minimal recognition of the need for independent oversight in the wake of the *Dookhan* and *Farak* scandals, which have resulted in tens of thousands of cases being dismissed due to evidence tampering and related misconduct, as well as reported withholding of exculpatory breathalyzer evidence which threaten the integrity of more than 50,000 OUI cases.

- *Wrongful convictions/exoneree assistance* (Senate §§220-229)
  These simple measures will enable a person who was wrongfully convicted to receive appropriate compensation, reintegration services, support to attain higher education, and an order to expunge or seal the record.

- *Decriminalizing student misconduct* (Senate §§267-8) *and standards for school/police MOUs* (Senate §34)
  A 2012 ACLU study of the three largest school districts in the Commonwealth found that hundreds of students, disproportionately of color and with disabilities, are arrested annually for minor misbehavior once addressed by school staff. In as many as half of all cases, arrested students are charged with the vague crime of "disturbing a lawful assembly." Fact sheet.

- *Raise threshold for felony larceny to $1500* (Senate §236, §237, §241, §244, §248)

ACLU OPPOSES

We oppose several provisions in both bills that do not represent sound public policy and would result in increased incarceration. We hope you will work to keep them out of the final conference report.

- *Expanded DNA Collection* (Senate §18)
  DNA collection is an extreme intrusion into a person's privacy and bodily autonomy rights – including the constitutional right to be free from unreasonable search and seizure. Mandatory DNA collection should not be expanded beyond convicted adults. Please exclude these provisions from the final report.

- *Drug-induced homicide* (Senate §108 & House §§394, 395, 408, 409)
  Characterizing a drug overdose as a homicide by the person who provided the drugs runs completely counter to smart public health approaches to opioid use; these provisions should all be excluded. "Drug-induced homicide" charges often ensnare friends, partners, or other individuals whose role in an overdose event cannot be characterized as a dealer. Also, illicit drug use often occurs in peer groups, which means one user may purchase drugs for use by the others and then face a murder charge. Charging a person who has substance use disorder with second degree murder criminalizes an already stigmatized illness—contravening the "public health approach" we so often espouse in the Commonwealth.

  Instead, the conference report should strengthen "good Samaritan" law (Senate §§111-113).

- *Mandatory sentencing for ABPO Serious Bodily Injury* (Senate §225 & House §111)
  The ACLU opposes mandatory sentencing as a general matter. As with other mandatory sentencing structures, this will harm the integrity of the justice system by shifting discretion from judges to prosecutors and enabling prosecutors to leverage the threat of a mandatory sentence to obtain guilty pleas on lesser offenses.

- *Intimidation of a Witness* (Senate §254 & House §45A)
  These provisions broadly expand the existing intimidation statute to cover interactions and individuals not previously covered. In addition to lacking any data to support the need for expansion, the bill doubles the potential penalty without any evidence of the deterrent effect of such an increase.

- *Solicitation of a Crime* (Senate §271 & House §64)
  This provision unnecessarily creates a new crime of solicitation which could subject individuals to lengthy sentences of up to 20 years. No evidence has been presented that law enforcement is currently unable to successfully prosecute criminal activity.

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We appreciate the tremendous effort in both the House and Senate to bring forward such complex legislation, and the hard work of reconciling alternative policy ideas in a final conference report. Thank you for your commitment to passing a significant criminal justice reform bill this session, and to making our Commonwealth more safe, just and free.

We look forward to discussing our recommendations with you in the near future.

Sincerely,

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