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March 30, 2020

Maura S. Doyle, Clerk
Supreme Judicial Court for the County of Suffolk
John Adams Courthouse, First Floor
One Pemberton Square, Suite 1300
Boston, MA 02108

Re: *Committee for Public Counsel Services and Massachusetts Association of Criminal Defense Lawyers v. Chief Justice of the Trial Court (SJC-12926)* amicus curiae letter in support of Petitioners' Request for Relief

Dear Clerk Doyle:

The Boston Bar Association (BBA) respectfully submits this *amicus curiae* letter. The letter focuses on two issues that the BBA believes are particularly critical for the Court to address in the current emergency: (1) the need to create a system wide-mechanism to expedite consideration of release of individuals held pre-trial and in connection with certain probation violations; and (2) the need to permit individualized judicial determination of the possible release of individuals serving sentences.

The BBA recognizes and applauds the efforts of the law enforcement officials and District Attorneys who have worked cooperatively with defense lawyers to obtain the release of some incarcerated individuals. But this is one of the very rare instances where litigation and judicial deliberation by trial judges under the ordinary rules will literally cost lives. Prompt system-wide action is necessary to save lives and protect both the incarcerated community and the civilian community.¹

The BBA urges the Court to take three specific actions:²

¹ This Court recognized this in its March 17, 2020 Order, *Order Limiting in-Person Appearances in State Courthouses to Emergency Matters That Cannot be Resolved Through a Videoconference or Telephonic Hearing*, at 8, providing “in criminal cases, where appropriate, a defendant may ask the court for reconsideration of bail or conditions of release.”

² We do not intend to suggest that these are the only two forms of relief the Court should grant; we focus on these two because, in the view of the BBA, they are the most critical.

First, we urge the Court to use its powers of superintendence under G. L. c. 211, §3 to create a system-wide mechanism to quickly reduce the number of persons held pending trial. In particular, the BBA requests that the Court direct the Chief Justices of the Trial Court to designate a judicial officer in each judicial district to review existing bail conditions in pending cases in that district.

Second, we ask the Court to instruct that judicial officer to apply a strong presumption of release for individuals held on cash bail and for probation detainees held pending final surrender for allegations of violations of their conditions of probation other than new offenses involving abuse as defined under G. L. c. 209A.

Third, we urge the Court to issue an order suspending Mass. R. Crim. P. 29's requirement that defendants file motions to revise and revoke sentences within sixty days of the imposition of sentence, and explicitly permit judges addressing those motions to consider the COVID-19 pandemic in deciding whether to revise or revoke sentences.

Adopting these three suggestions will reduce the density of House of Corrections and Department of Corrections populations, thereby facilitating the practice of proper safety precautions. It will also permit judges, in the interest of justice, to release those incarcerated persons whose age and other health factors present the most complex medical challenges to correctional officials. This will ultimately improve correctional officials' ability to take steps to safeguard themselves and those individuals who remain in custody. It will also help reduce the overall spread of the virus, which is a paramount concern to all Massachusetts residents.

A. Pre-Trial Detainees

To address the risks facing pre-trial detainees, the BBA respectfully suggests that the Court direct the Chief Justices of the Trial Court to designate a judicial officer in each judicial district to work with a group consisting of a designee of the local District Attorney, the Committee for Public Counsel Services, and the local bar advocate organization. This group would be charged with obtaining from the Sheriff in that county a list of all persons held in pretrial confinement, and with reviewing the conditions of pretrial confinement with a strong presumption for immediate release of:

- All pretrial detainees who are held on cash bail and not on the basis of dangerousness under G. L. c. 276, § 58A³; and

³ The great majority of pretrial detainees are not held based on a finding of dangerousness. Most are instead held on relatively low cash bails. Data from the trial court published in a recent report of a Special Commission that examined the Massachusetts bail system following this Court's decision in *Brangan v. Commonwealth*, 477 Mass. 691 (2017) revealed that judges held only 3.7% of those charged without bail. See *Report of the Special Commission to Evaluate Policies and Procedures Related to the Current Bail System*, Ex. C at 2 (December 31, 2019), available at <https://malegislature.gov/Reports>. Statistics gathered by the Trial Court in the seventeen months after the Court's decision in *Brangan* reveal that judges ordered cash bail in four times as many cases as they ordered defendants held without bail. But nearly half of those

- All probation detainees held pending final surrender based on allegations of violations of their conditions of probation other than for new offenses involving abuse as defined under G. L. c. 209A.

The BBA further suggests that this review should:

- Be triggered automatically upon order of this Court and not require individualized filings by defendants or probationers;
- Provide a short period in which District Attorneys may file an opposition to release in specific cases in which they can demonstrate that the need for detention significantly outweighs the health-related risks from exposure to COVID-19; and
- Provide for decisions of the judicial officer on as expedited a basis as is possible.

The BBA respectfully suggests that judges should be encouraged to consider appropriate forms of remote check-in with the probation department or court, or to fashion any other order addressing the need to ensure a defendant’s continued appearance at court.

The BBA respectfully suggests that this same mechanism be used for all other pretrial detainees and probation detainees who are not in the two categories stated above, without the strong presumption for immediate release. This will ensure that all individuals receive some level of immediate review.

B. Persons Serving Sentences in the House of Correction or the Department of Correction:

To address the equally serious risks for individuals serving sentences, the BBA respectfully suggests that the Court suspend the sixty-day filing requirement under Mass. R. Crim. P. Rule 29 and permit all individuals serving a House of Correction sentence or a parole-eligible sentence⁴ in the Department of Correction to immediately file a motion to revise or revoke their sentence.⁵

The BBA respectfully suggests that this Court order that judges hearing motions pursuant to Rule 29(a)(2) specifically take into account the risk from COVID-19 exposure for the individual movant and articulate this consideration on the record when ruling on the motion.⁶

defendants for whom cash bail was set still could not make bail – and more than 60% of those defendants (nearly 2,000) were held on bail of less than \$1,000. *Id.*

⁴ This includes individuals eligible for medical parole under G. L. c. 127, § 119A.

⁶While Rule 29 does permit judges to consider some new mitigating factors, such as good behavior on part of a defendant while incarcerated, *Commonwealth v. White*, 436 Mass. 340, 345 (2002), this Court should clearly dispel any concern by trial judges that they may only “reconsider the sentence [] imposed . . . in light of the facts as they existed at the time of sentencing.” *Commonwealth v. Rodriguez*, 461 Mass. 256, 260 (2012). That limitation was designed to ensure that sentencing judges were not invested with the power and responsibility of overseeing a sentenced individual’s progress through the correction system. It never contemplated an overwhelming health crisis like the one we face today. Our request that the Court suspend

To avoid unnecessary delays in providing the relief necessary under the circumstances, the BBA respectfully suggests that this Court make findings of fact concerning COVID-19 exposure risk, and that it encourage judges to take judicial notice of medical and scientific filings, submitted to this Court or other courts, on this question.⁷ These findings of fact concerning medical and scientific matters would not preclude judges considering facility-specific circumstances, the circumstances of individual detainees or inmates, or both. Furthermore, the BBA requests this Court urge judges to be flexible in exercising their discretion to receive information regarding an incarcerated person's specific medical history from counsel's own proffer or other reliable sources, where counsel's ability to provide detailed medical records may likely be curtailed in light of the pandemic.⁸

C. Conclusion.

The BBA has focused the Court's attention on two issues it considers particularly important, because it believes these issues and the framework it suggests are critical needs, that can be readily addressed, and that will reduce severe risks to the health of those in custody and those charged with their care.

The BBA thanks this Court for its work and leadership in guiding the lower courts through the early days of the pandemic. There is more work to be done. The BBA likewise strives to continually support the legal community, practitioners, and all people of Massachusetts through this difficult ordeal.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)(5)

No party, party's counsel, or person or entity other than amicus curiae and its counsel, authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Neither amicus curiae nor its counsel has either represented any of the parties to this appeal in another proceeding involving similar issues, or been or represented a party in a proceeding or legal transaction at issue in the present appeal.

Respectfully submitted,
BOSTON BAR ASSOCIATION
Christine M. Netski, President

Rule 29's 60-day's requirement is not intended to suggest that other relief—particularly with respect to prisoners approaching the end of their sentences—would not also be appropriate.

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⁸ The federal detention statute, for example, permits defendants seeking release "to present information by proffer or otherwise." 18 U.S.C. §1342 (f)(2)(B). See also *Buckman v. Commissioner of Correction*, 484 Mass. 14 (2020) (petition containing proffer of terminal illness diagnosis by an attorney or other appropriate party is sufficient to apply for medical parole because to require a diagnosis by a licensed physician would cause such delay as to "frustrate[e] the very purpose of the statute").

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Certificate of Service

I certify that on March 30, 2020, I served a copy of this letter on all parties in this case via electronic mail.

/s/ Martin F. Murphy