

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

No. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES, MASSACHUSETTS
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,¹
Petitioners
v.

CHIEF JUSTICE OF THE TRIAL COURT,
Respondent

**SUFFOLK COUNTY DISTRICT ATTORNEY RACHAEL ROLLINS
RESPONSE REGARDING THE COVID-19 CRISIS**

In these times of deep uncertainty and significant risk to public health, what is needed is bold, decisive, and creative leadership with organized, collaborative solutions. Piecemeal solutions or leadership-by-committee cannot create equity or protect community safety. Accordingly, District Attorney Rachael Rollins requests that this Court use its powers of superintendence to protect an often invisible and forgotten population, the incarcerated. Significant risk is also cast upon the various groups of hard working people that come into

¹ Suffolk County District Attorney Rachael Rollins joins the petition pursuant to the Interim Order of this Court, dated Mar. 24, 2020. See also Reservation and Report issued by the Single Justice (Budd, J.), dated Mar. 25, 2020.

contact with incarcerated individuals every day. On a near daily basis Correction Officers, medical professionals, social workers, and other staff come in to our Department of Youth Services ("DYS"), House of Correction ("HOC"), and Department of Correction ("DOC") facilities unknowingly bringing harmful pathogens with them. When they leave at the end of their appointment or tour carrying those same (or new) pathogens home to our community, their families, and loved ones. Inmates, juveniles and ICE detainees are also transported in and out of these facilities on a near daily basis, again with the same harmful pathogens.

Other jurisdictions have shown leadership and collaboration in expediting decarceration in the name of public health to fight COVID-19. Around the globe, Iran and Ethiopia have released thousands of prisoners to contain the spread of this deadly virus. Ethiopia did so with the World Health Organization confirming only 12 cases of COVID-19 in their entire country.² As

² Bukola Adebayo, CNN, "Ethiopia pardons more than 4,000 prisoners to help prevent coronavirus spread"

of two days ago, here in Massachusetts, 11 people had tested positive for COVID-19 in the DOC alone.³ That number does not include confirmed cases from the multiple DYS and HOC facilities.⁴

Our Commonwealth is currently in a state of emergency. We have been ordered to socially distance and practice rigorous hygiene. Every K-12 school has been suspended until May 4, 2020, non-essential employees have been ordered to stay home, and all non-

<https://www.cnn.com/2020/03/26/africa/ethiopia-pardons-4000-prisoners-over-coronavirus/index.html>

³ As of Mar. 25, 2020, the Department of Correction states eight prisoners, one staff member, and one medical provider have tested positive for coronavirus – all of them at the Massachusetts Treatment Center in Bridgewater. Another staff member at Shirley tested positive, bringing the total number of infected within the Department of Correction to 11. On a county level, the Plymouth County Sheriff's office confirmed Monday that an employee tested for COVID-19 and received positive results on Mar. 22. See Sarah Betancourt, COVID-19 cases at Bridgewater prison facility up to 10 (Mar. 25, 2020), <https://commonwealthmagazine.org/criminal-justice/covid-19-cases-at-bridgewater-prison-facility-up-to-10/>. See also Steph Solis, Coronavirus: 11 People at Massachusetts Jails Test Positive for COVID-19 almost all cases from Mass Treatment Center in Bridgewater, <https://www.masslive.com/coronavirus/2020/03/coronavirus-11-people-at-massachusetts-jails-test-positive-for-covid-19-almost-all-cases-from-mass-treatment-center-in-bridgewater.html> (last visited March 27, 2020).

essential businesses are temporarily closed. As of yesterday, twelve courthouses were closed due to COVID-19.⁵ The Governor just issued a Public Health order suspending the use of reusable shopping bags at all supermarkets because they could be carriers for harmful pathogens. See <https://www.mass.gov/doc/march-25-2020-pharmacy-grocery-order>.

In the courts, multiple, inconsistent, and at times confusing, directives about operational matters throughout the Commonwealth has resulted in no uniform or consistent practice across the various District Attorneys, Sheriffs, Judges, Courts, DYS, HOC and DOC facilities.⁶ We lack order.

⁵ Dorchester & Roxbury Divisions of BMC, eight District Courts (Dudley, Framingham, Natick, Southern & Northern Berkshire, Springfield, Waltham, Worcester) one Juvenile Court (Worcester), one Probate and Family (Hampden), and 1 Housing Court. The Courts in Suffolk County (BMC) were allegedly closed because one individual contracted, was exposed to, or their loved-ones were exposed to COVID-19.

⁶ One example, in Suffolk County our staff currently has to comply with differing Orders from Chief Judge Fabricant for the Superior Court, Chief Judge Dawley from the District Court (Chelsea), Chief Judge Ronquillo from the BMC – who has allowed each of the eight First Justices of the BMC to set their own

Therefore, the District Attorney of Suffolk County agrees with the Committee for Public Counsel Services (CPCS) and the Massachusetts Association of Criminal Defense Lawyers (MACDL) that this Court has the power under G.L. c. 211, § 3 to address this public health emergency and also agrees that decarceration in certain instances is the just, humane, and right thing to do. She asks that this Court exercise its extraordinary powers in these extraordinary times.

BACKGROUND⁷

Most incarcerated people are confined in a small cell (average size in the United States is six by eight feet). These cells can house approximately two to six individuals in Massachusetts. Cellmates share a community toilet inside of their cell. There is no lid on, or enclosure around, these toilets. Often,

Orders - and Chief Judge Bryant from the Juvenile Court.

⁷ This section contains information District Attorney Rollins has personally heard or seen during her visits to facilities in her capacity as a sibling of incarcerated people, a criminal defense attorney, an Assistant United States Attorney, a candidate for District Attorney and the elected District Attorney of Suffolk County.

cellmates share the same roll of toilet paper until it is depleted.

Prisoners that are housed in group settings may be in bunk beds, or beds that are frequently less than six feet apart. They all use the same showers and toilets found in a common area, similar to a college dormitory style. If an inmate happens to have a single cell, they still have an open toilet within a small cell.

Some inmates, youth, and detainees may have access to a common washer and dryer in their Unit. Everyone in the Unit, sick or healthy, utilizes the same washer and dryer. In the DOC, there are institutional laundry facilities that wash the prisoners' uniforms, usually once a week - colors one day, whites the next. All of the laundry is brought back into the Unit in a same cart that was used to take the dirty clothes out of the unit. These carts are used for everything from transporting belongings when a prisoner moves cells or units, to bringing belongings to property to be housed due to an inmate moving to segregation, the infirmary, or protective custody.

In County facilities, inmates often eat with each other at tables of four in their Unit or go to the chow hall to eat. In some correctional facilities, the food is prepackaged. Other facilities have dining options that utilize cafeteria or nearly open food style service, which is now in direct violation of a recent Public Health Order issued by Governor Baker.⁸ Across the board, prisoners, detainees and youth usually have access to unlimited water, juice and coffee served community style. When inmates go to a health services unit to seek medical attention, well over ten people can be in that small area.

These conditions demonstrate that social distancing and rigorous hygiene, the two most often cited ways to prevent contracting and spreading COVID-19, are virtually impossible within the confines of our DYS, HOC, and DOC facilities. District Attorney Rollins asks that the needs and rights of vulnerable individuals in these correctional facilities therefore be balanced with the needs and rights of victims and survivors so we can maintain and protect community

⁸ <https://www.mass.gov/doc/march-25-2020-pharmacy-grocery-order>

safety and well-being as the multiple parties to this petition collaborate in crafting just, fair, and humane solutions.

ARGUMENT

General Law c. 211, § 3, in part, grants to the Massachusetts Supreme Judicial Court “general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided.” G.L. c. 211, § 3. A two-part test identifies those exceptional circumstances under which the Supreme Judicial Court will exercise this oversight power. *Forte v. Commonwealth*, 418 Mass. 98, 99 (1994); *Ventresco v. Commonwealth*, 409 Mass. 82, 83 (1991). The party seeking relief must demonstrate: (1) a substantial claim of violation of substantive rights, and (2) error that cannot be remedied under the ordinary review process. *Campiti v. Commonwealth*, 417 Mass. 454, 455 (1994); *Forte*, 418 Mass. at 99. Under the statute, the Court has broad superintendence powers, especially where an issue is one of “systemic

concern." *Bridgeman v. District Attorney for the Suffolk Dist.*, 471 Mass. 465, 474-475 (2015).

The Suffolk County District Attorney agrees that CPCS and MACDL have met the requirements of the statute. Indeed, Chief Justice Ralph D. Gants recently invited the Massachusetts Bar to figure out how we as a community, "can 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." Chief Justice Ralph D. Gants Letter to the Bar (Mar. 19, 2020), <https://www.mass.gov/news/letter-to-the-bar-from-supreme-judicial-court-chief-justice-ralph-d-gants>. An outbreak of the coronavirus in our custodial correctional facilities could likely be catastrophic. It is no different than throwing a match and pouring lighting fluid onto a massive pile of dry kindling. Jails and prisons house disproportionately large numbers of people with chronic illnesses and complex medical needs that many facilities are already ill-equipped to treat. See Peter Wagner and Emily Widra, No need to wait for pandemics: The public health case for criminal justice reform (Mar. 6, 2020),

<https://www.prisonpolicy.org/blog/2020/03/06/pandemic>.

They also disproportionately house people with limited financial means and people of color, specifically Black and Brown people.

District Attorney Rollins, the duly elected chief law enforcement officer of Suffolk County, personally understands the fears of those incarcerated and their loved ones, as well as the people working within the prisons and jails and DYS facilities of the dangers of exposure to COVID-19.⁹ As a sibling of loved ones who have spent time incarcerated in federal, state, and local facilities, and the daughter of a former Correction Officer, she has a personal and intimate understanding of the dire, sometimes desperate conditions behind the wall.¹⁰

⁹ See fn. 3.

¹⁰ People do not stop being human the day they are charged or sentenced. We cannot define them exclusively by their worst moment. Their life is a mosaic and they remain daughters, sons, parents, partners, grandparents, and siblings and loved ones. Although some have made terrible choices or engaged in reprehensible behavior, we must not simply ignore them. The sentence they received for their crime did not include contracting COVID-19 and death. And for those pre-trial detainees, the situation is even more dire. They have yet to be found guilty of their crime.

Moreover, as a candidate and since taking office, the District Attorney has visited our correctional institutions (DYS, HOC & DOC) and met with groups of inmates, detainees and youth therein on the average of once a month.¹¹ This case is one way by which elected prosecutors, the defense bar, the trial court leadership, law enforcement partners, and public health officials must work together to implement concrete steps in the near-term to immediately and dramatically reduce the potential number of incarcerated individuals and staff exposed to the threat of disastrous outbreaks behind the wall that will imperil the entire outside community.

Claims concerning a prisoner's denial of immediate liberty meet the requirements of G.L. c. 211, § 3. See, e.g., *Coffin v. Superintendent, Mass. Treatment Ctr.*, 458 Mass. 186, 188 n.6 (2010) ("The

Similarly, Correction Officers, medical professionals, social workers, and staff put themselves at risk every day doing their jobs. The nature of their workplace unfortunately increases their potential of contracting COVID-19. We are seeking decarceration to benefit them as well.

¹¹ The office as a whole has visited behind the wall nearly 100 times.

plaintiff's claim for relief meets this test. He claims his commitment under G. L. c. 123A, § 12 (b) § 12 [b]), deprives him of his substantive 'right to be free from unjustified governmental intrusion on physical liberty.'"). The claims presented in the petition also touch upon valid Eighth Amendment and art. 26 concerns. Indeed, the protections of art. 26 and the Eighth Amendment grant those within prison walls the right to be free from cruel and unusual punishment. Any analysis of those rights "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 527 (1983) (quoting *Libby v. Commissioner of Correction*, 385 Mass. 421, 431 (1982)). Any view of decency in the current situation would include protections and action to prevent the unnecessary spread of COVID-19 regardless of custodial status of an individual.¹²

¹² This would be for both prisoners that are eligible for release, as well as those that pose too great a threat to public safety and cannot be released. The Court must make specific findings and requirements for each group of individuals. The prisoners that remain incarcerated should not simply be placed in solitary confinement 24 hours a day if they contract COVID-19

District Attorney Rollins has been a leading voice in advocating that individuals who are vulnerable to the virus and pose no meaningful risk to public safety should be released. She agrees with CPCS and MACDL that the Trial Court should consider the serious health risk posed by other incarcerated individuals, and the community in probation detention hearings, bail determination and reconsideration hearings, and dangerousness hearings. As soon as the crisis began, the Suffolk County District Attorney's Office (SCDAO) committed itself to partnering with the defense bar to undertake a thorough and rapid review of individuals who were in pre-trial detention and some serving post-conviction sentences and has been undertaking such consideration on a case-by-case basis; however, the District Attorney firmly believes that the application of this consideration should be consistent across the Commonwealth.¹³

or left to die, out of public sight and scrutiny, paying a price far higher than the sentence they received for their crime.

¹³ The Court must require that each party designate a person(s) responsible for oversight on behalf of their organization for each requirement imposed by this

Accordingly the District Attorney asks for the following relief:

1. The Trial Court should cease issuing new bench warrants for failures to appear in non-violent cases or failures to pay outstanding fees and fines where the individual has been found indigent.¹⁴
2. Individuals who are vulnerable to the virus and pose no meaningful risk to public safety should be released. Any proposed order must take into account, as the SCDAO individual review does now, that there are certain individuals whom their release will create too great a risk to public safety. For that reason, any order from this Court must include guidance for all parties of a case-by-case analysis of the individual who is seeking to be released.
3. This review must take place in an expedited manner. Efforts to do so in Suffolk County have been met with some confusion and inconsistency. As such, we ask that this Court instruct the Trial Court to hear any such motions in the court of their origin, or the Superior Court pursuant to a Bail Review Petition. The District, Municipal, and Superior Court must have concurrent jurisdiction of all requests to address in a timely manner. We all must take responsibility to get the appropriate and immediate relief for those in need.
4. Motions must consider the following factors:

Court. In Suffolk County, leadership in each trial court division directly reviews all requests.

¹⁴ Those of us with our physical freedom are being offered bail-outs in virtually every facet of our financial lives: deferrals in mortgage payments, rent, student loans, free Wi-Fi and Google chrome books for BPS children, moratorium on evictions, etc.

a. With a pretrial assessment:

- i. The Court should consider: the offense; the defendant's record; any particular health concerns of the individual; and the reasons that originally justified the individual's pretrial detention.¹⁵ Again, if there is a meaningful threat to public safety caused by the release of the individual, they should remain in custody.¹⁶
- ii. This Court's order should address the existing gap in services when a Trial Court order's the release of a detained individual. In Suffolk County, unfortunately there have been instances when a Trial Court orders an individual released with conditions to be monitored by the Probation Department,

¹⁵ The SCDAO review includes specifically: Attorney name and email address; Defendant name; docket number(s); court of jurisdiction; bail status; next court date and event; assigned ADA (if known); any mitigating circumstances rendering them particularly vulnerable; and housing plan when released (if any).

¹⁶ Even more challenging will be considerations for those who pose no risk to public safety but have no home to return to upon release. COVID-19 has effectively stopped all programming for returning citizens in Suffolk County, and our shelters are at capacity and are also concerned about the spread of COVID-19. Query, would an individual rather face homelessness and uncertainty, than remain incarcerated and potentially at a higher risk of contracting COVID-19? Further, do we have any role or say in making that choice for an individual? Additionally, the Court should consider whether all currently incarcerated or detained individuals should be subject to COVID-19 screening now, or at the very least, prior to any release.

but there is no mechanism to notify probation staff that the individual has been released.

- iii. This Court's order must require information sharing. Information sharing is critical during this unprecedented time and the instructive authority of this Court is invaluable to remove any obstacle to accomplish the concurrent goal goals of public health and public safety.¹⁷

b. With a post-trial assessment:

- i. The Court should order counsel assigned to those inmates with underlying health conditions.¹⁸
- ii. DOC should provide access to teleconferencing for those inmates to virtually meet with counsel in an expeditious manner.

¹⁷ These efforts have been significantly hampered by the inability to access critical data from our law enforcement partners, including real time information about those individuals who have actually been released. Enacted in 2018, G.L. Chapter 6A, Section 18 ¾ mandates the sharing of information. This simply is not happening. District Attorney Rollins specifically asks this Court to highlight the urgency of this real need and to order the sharing of information in full compliance of the law.

¹⁸ For example, when SCDAO learns of an individual serving a sentence that is asking for early release, the office contacts CPCS to assign counsel. The District Attorney appreciates the willingness of CPCS to be extremely responsive, but is concerned that such assignments are not provided to incarcerated individuals in a consistent and expeditious manner across the Commonwealth.

- iii. A post-conviction review for release should then be consistent across the Commonwealth, considering specifically: the offense; the defendant's record; the length of time left on the sentence; any underlying health conditions; and post-release plans in place. Again, if there is a material threat to public safety caused by the release of any individual, they should remain in custody.
- iv. It is critical that this Court exercise its superintendence powers to identify or create the legal mechanism by which this can occur in a timely manner. Any such mechanism that would contemplate relief in the "interest of justice" must be done in full compliance with the Victims Bill of Rights.¹⁹

These are extraordinary times that require leadership and order.²⁰ District Attorney Rollins understands the key role prosecutors can – and must –

¹⁹ Any legal mechanism must be cognizant of art. 30 and the separation of powers. It cannot be a pardon or commutation of sentence as those powers are held exclusively by the Executive branch. See *Commonwealth v. Arsenault*, 361 Mass. 287, 291-292 (1972); see also Part II, c. 2, § 1, art. 73, of the Constitution of the Commonwealth. One suggestion is to order a stay of execution of sentence under Mass. R. A. P. 6.

²⁰ For this reason too, on Mar. 12th, District Attorney Rollins joined other elected officials and Asian American civic leaders to condemn the rise in hate speech and discrimination that community has faced amid the spread of COVID-19. She has made it clear that no such behavior will be tolerated in Suffolk County.

play in addressing the crisis this pandemic has imposed on the criminal legal system. The exceptional prosecutors and staff in Suffolk County are fulfilling that role everyday as this mounting emergency unfurls.²¹ The District Attorney emphasizes that public health is public safety, but without collaboration between the parties to this case, the efforts are too erratic and inconsistent. As an example, SCDAO is already working with the criminal defense bar to identify and highlight which of their clients should be subject to release. In an expedited manner on a case-by-case basis we then review those cases. Application of this practice should be consistent across the Commonwealth. Finally, this Court ought draft relief that recognizes the extraordinary times, as has happened in state and county jurisdictions

²¹ For example, given the threat posed by COVID-19, SCDAO has balanced all identified best practices to keep our staff and the community healthy and limit exposure to this virus. Effective Monday, March 16th, onsite SCDAO staff was reduced to a "skeleton" or essential levels and the rest of the SCDAO staff are working from home. The District Attorney remains acutely aware of her responsibility to keep all of the residents of Suffolk County safe and this staffing decision in no way compromises that obligation.

across the United States, and lead this Commonwealth and the Nation in fighting COVID-19, while remembering and considering the vulnerable, invisible and forgotten.²²

CONCLUSION

In this time of chaos and fear, we need bold leadership from this Court to bring order. We must decarcerate with all deliberate speed, before it is too late.

Respectfully Submitted,
FOR THE COMMONWEALTH

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March 27, 2020

²² According to the Washington Post, in response to the COVID-19 crisis, counties and states are releasing thousands of inmates – New Jersey alone began freeing hundreds of people this week pursuant to an order of their high court. Kimberly Kindy et. al. Thousands of inmates released as jails and prisons face coronavirus threat (Mar. 25, 2020), https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was to the parties in this case, both those who filed and those added by the Interim Order of Mar. 27, 2020. Those emails are:

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