COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12276

COMMONWEALTH OF MASSACHUSETTS,
Respondent-Appellee,

v.

SREYNUON LUNN,
Petitioner-Appellant.

BRIEF FOR AMICUS CURIAE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF APPELLANT

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The Harvard Immigration and Refugee Clinical Program ("HIRC" or "Clinic") respectfully submits this brief pursuant to the Court's solicitation of amicus briefs issued on February 8, 2017.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Harvard Immigration and Refugee Clinical Program ("HIRC" or "Clinic") has been a leader in the field of immigration law for over thirty years. The Clinic's staff includes Harvard Law School faculty members who teach courses and publish scholarship concerning the intersection of criminal law and immigration law, immigration detention, refugee law, and immigration policy. Additionally, the Clinic has extensive experience directly representing noncitizens who have been detained in the Commonwealth of Massachusetts pursuant to a detainer request from Immigration and Customs Enforcement ("ICE Detainer").

The Clinic therefore has an interest in the appropriate application of Massachusetts state law as it relates to federal immigration law. The Clinic regards the issues in this case as especially important in ensuring the correct and consistent interpretation of Massachusetts state laws concerning civil arrest and detention authority.[1]

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[1] HIRC is submitting this amicus curiae brief in its capacity as a clinical program at Harvard Law School. No counsel for a party other than amicus, its members, or its counsel authored this brief in whole

ISSUES PRESENTED

This amicus curiae brief discusses the lack of legislative authorization for Massachusetts law enforcement officers and courts to arrest and detain an individual solely pursuant to an ICE Detainer. This Court requested input from potential amici as to (1) whether Massachusetts state courts are authorized to order that an individual be held pursuant to an ICE Detainer, following the dismissal of criminal charges or release on bail or personal recognizance; (2) whether detention pursuant to an ICE Detainer violates an individual's federal and state constitutional rights, given the lack of an individualized determination of probable cause by a neutral magistrate and the absence of an opportunity to challenge the detainer's issuance; and (3) whether state courts must comply with ICE Detainers pursuant to federal law, and whether state courts can comply voluntarily without violating an individual's federal and state constitutional rights.

The arguments herein relate to all three issues upon which this Court requested amicus briefs. This brief primarily focuses on the lack of procedural protections afforded an individual arrested and detained pursuant to an ICE Detainer, protections

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or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

considered critically important by the Massachusetts Declaration of Rights, the Massachusetts Legislature, and this Court.

STATEMENT OF THE CASE

HIRC has no independent knowledge of the facts in this case. For purposes of this brief, HIRC accepts the statements of the case and of those facts that appear undisputed as set forth by the parties in their respective briefs to this Court.

INTRODUCTION

Massachusetts law enforcement officers and courts have no statutory authority to arrest or detain an individual solely pursuant to an ICE Detainer. In the limited situations where the Massachusetts Legislature has granted civil arrest and detention authority, it has simultaneously afforded arrested individuals certain core procedural protections that are absent in the ICE Detainer context.

The critical procedural protections afforded by the Massachusetts Legislature for civil arrest and detention include (1) oversight by a neutral arbiter, (2) notice, and (3) particularized factual findings to support the potential deprivation of liberty. The Legislature's decision to provide civil arrestees with these protections is not surprising, given the importance of these protections recognized by the

Massachusetts Declaration of Rights and this Court when a significant deprivation of liberty is at stake.

Arrest and detention pursuant to an ICE Detainer is a significant deprivation of liberty.[2] See Addington v. Texas, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."). Indeed, the U.S. Court of Appeals for the First Circuit has ruled that detention on the basis of an ICE Detainer constitutes a new seizure solely for federal immigration purposes. See Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015). However, unlike other contexts in which similar deprivations occur, individuals against whom ICE Detainers are enforced receive virtually no procedural protections.

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[2] Individuals transferred from criminal custody to ICE custody pursuant to an ICE Detainer are routinely held for weeks, if not months, in detention facilities prior to their first appearance before an immigration judge. See Statement of Uncontroverted Facts and Conclusions of Law in Support of Gonzalez Plaintiffs' Motion for Partial Summary Judgment ¶ 13, Roy v. Los Angeles Cty. Sheriff's Dep't, No. 2:12-cv-09012 (C.D. Cal. Feb. 22, 2017); see also Complaint ¶¶ 47-49, Castellar v. Kelly, No. 3:17-cv-00491 (S.D. Cal. Mar. 9, 2017) (stating that Plaintiff-Petitioner Castellar was held for 20 days with no hearing date set at the time of filing; Plaintiff-Petitioner Aguas' bond hearing was set for 34 days after arrest; Plaintiff-Petitioner Gonzalez was taken into ICE custody on November 17, 2016 with a first immigration court hearing scheduled for April 5, 2017).

Civil arrest or detention is only allowed in Massachusetts in a handful of contexts. Specifically, the Massachusetts Legislature has authorized civil arrest and detention for individuals who (1) pose a risk of serious harm because of mental illness, (2) are alcohol or controlled substance abusers, (3) are considered sexually dangerous persons, or (4) are in contempt for non-payment of child support or in violation of other domestic relations matters. Notably, all four of these statutes explicitly guarantee some degree of oversight by a judge or neutral arbiter, notice, and particularized findings of fact to support the arrest or detention.

The Legislature's care to provide these procedural protections as a condition of authorizing civil arrest and detention is strong evidence that it has not authorized civil arrest or detention pursuant to ICE Detainers. Given the lack of express authorization of civil arrest or detention authority in this context, this Court should rule that Massachusetts law does not authorize state officers or courts to arrest or detain individuals based solely on an ICE Detainer.

ARGUMENT

THE MASSACHUSETTS LEGISLATURE HAS ONLY AUTHORIZED CIVIL ARREST AND DETENTION WHEN COUPLED WITH PROCEDURAL PROTECTIONS THAT ARE ABSENT WHEN AN INDIVIDUAL IS HELD PURSUANT TO AN ICE DETAINER

Four Massachusetts statutes show how the Legislature has implemented civil arrest and detention power when it seeks to authorize it: G.L. c. 123 § 12 (emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness), G.L. c. 123 § 35 (commitment of alcoholics or substance abusers), G.L. c. 123A (care, treatment, and rehabilitation of sexually dangerous persons), and G.L. c. 215 § 34A (non-payment of family support). Like the ICE Detainer context, all four Massachusetts statutes allow for civil arrest and detention pending a merits hearing, but unlike the ICE Detainer context, the Massachusetts provisions provide core procedural protections that are absent when an individual is arrested and detained pursuant to an ICE Detainer.

Within these Massachusetts civil arrest and detention statutes, the Legislature has identified three basic procedural protections that must be met before an individual can be arrested and detained: (1) oversight by a neutral arbiter, (2) notice, and (3) particularized findings of fact. See G.L. c. 123 § 12; G.L. c. 123 § 35; G.L. c. 123A § 12; G.L. c. 215 § 34A. These due process rights are indicative of the

procedural protections guaranteed in the Massachusetts Declaration of Rights, and—as this Court has noted—they are critically important when an individual is arrested or detained based on a civil statute. See, e.g., Commonwealth v. Bruno, 432 Mass. 489, 504 (2000) (noting that commitment proceedings under G.L. c. 123A provide "ample procedural protections to those subjected to potential commitment, and therefore, [do] not violate the defendants' procedural due process rights); see also In re Andrews, 368 Mass. 468, 486-488 (1975) (noting that "it is still clear that persons subjected to c. 123A proceedings are entitled to procedural due process" and finding that "a person who stands to lose his freedom and to be labeled sexually dangerous is entitled to the benefit of the same stringent standard of proof [in the civil commitment process] as that required in criminal cases").

ICE Detainers do not provide individuals with these basic procedural protections. In light of the Massachusetts Legislature's consistent decision to condition civil arrest and detention authority on explicit procedural protections in other contexts, this Court should be highly suspicious of any argument that the Legislature has implicitly or otherwise authorized Massachusetts law enforcement officers or courts to arrest or detain an individual solely

pursuant to an ICE Detainer.

A. Oversight By A Neutral Arbiter Is Critical To Ensure That Deprivation Of Liberty Is Justified

Massachusetts law requires oversight by a judge or neutral arbiter before an individual can be arrested and detained pursuant to a civil statute. The Massachusetts Declaration of Rights guarantees this core procedural protection when an individual's liberty is at stake. See Jenkins v. Chief Justice of Dist. Court Dep't, 416 Mass. 221, 232-233 (1993) (noting that "[Article] 14 embodies the common law guarantee that a warrantless arrest must be followed by a judicial determination of probable cause no later than reasonably necessary to process the arrest and to reach a magistrate" and "guarantee[s] . . . that control over one's liberty will rest solely in the hands of the judiciary, whose function it is to guarantee that sufficient grounds to justify such deprivation exists"). The Supreme Court of the United States has similarly stated that the principle of neutral oversight protects against the "'disregard of cherished liberties . . . [resulting from the] overzealous as well as the despotic.'" Gerstein v. Pugh, 420 U.S. 103, 118 (1975) (quoting McNabb v. United States, 318 U.S. 332, 343 (1943)).

The Massachusetts Legislature likewise recognized the importance of oversight by a judge or neutral

arbiter by codifying that protection in all four civil arrest and detention provisions. See G.L. c. 123 § 12; G.L. c. 123 § 35; G.L. c. 123A § 12(b); G.L. c. 215 § 34A. The only limited exception to judicial oversight is the statute authorizing the commitment of a mentally ill person, under which a qualified and impartial medical professional or a police officer may arrest without judicial oversight if he or she determines there is a "likelihood of serious harm by reason of mental illness." G.L. c. 123 § 12. But even in those cases, a detained individual is entitled to an immediate psychiatric examination by a qualified physician to determine whether a continued deprivation of liberty is justified. Id.; see also McCabe v. Life-Line Ambulance Service, Inc., 77 F.3d 540, 552 (1st Cir. 1996) (affirming medical professional's role as impartial party under Massachusetts law).

Once detained, individuals held because they are considered mentally ill or sexually dangerous also have the right to challenge their temporary detention in a judicial hearing. Section 12 of chapter 123 provides for an emergency hearing, to be held no later than the next business day, if an individual believes that his or her confinement was "an abuse or misuse" of authority. See G.L. c. 123 § 12(b); see also Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777, 784 (2008) (noting intent of Massachusetts Legislature "to

extend further procedural protections to persons who, by virtue of their temporary involuntary commitment [under § 12], are experiencing a 'massive curtailment' of their liberty"). Pursuant to section 12(c) of chapter 123A, an individual has an opportunity—after being notified of the petition—to "contest probable cause" in a hearing in Superior Court. See G.L. c. 123A § 12(c).

While there is no similar opportunity to challenge detention under the substance abuse or non-payment of family support provisions, both statutory provisions authorize detention only to ensure appearance at an immediate court hearing. These statutes therefore do not authorize a period of lengthy detention before a merits hearing before a judge. See G.L. c. 123 § 35 (an individual may not be arrested under section 35 "unless the person may be presented immediately before a judge"); G.L. c. 215 § 34A(b) (an individual held under section 34A must be brought before a judge upon arrest or during the court's next session).

By contrast, ICE Detainers do not require oversight by a judge or any neutral arbiter. Any ICE agent may issue an ICE Detainer by simply filling out a one-page form. See 8 C.F.R. § 287.7(b) (authorizing all "[d]eportation officers" and "[i]mmigration enforcement agents," among others, to issue ICE

Detainers). There is no requirement that the cursory form be reviewed by a neutral magistrate, either during the 48 hours of detention allegedly authorized by the ICE Detainer or at any time thereafter. See Statement of Uncontroverted Facts ¶ 2, Roy v. Los Angeles Cty. Sheriff's Dep't, No. 2:12-cv-09012 (C.D. Cal. Feb. 22, 2017) ("No judge, magistrate, or immigration judge reviews immigration detainers before or after they are issued.").

The absence of this procedural protection often results in detention that can last for weeks or months before a detainee first appears before an immigration judge. See Id. ¶ 13 ("A person who is detained on an immigration detainer generally does not see an immigration judge for weeks after his arrest on the detainer."); see also Declaration of Bardis Vakili in Support of Plaintiff-Petitioners' Motion for Class Certification ¶ 4, Castellar v. Kelly, No. 17CV491 (S.D. Cal. Mar. 10, 2017) (noting that detainees at immigration facilities in the Southern District of California can wait one to three months before seeing an immigration judge).

B. Notice Is Required To Inform Individuals Of The Reasons Why They Are Being Arrested Or Detained

Massachusetts civil arrest statutes require notice to the individual whose liberty is at risk. Notice is explicitly required in the criminal context

by Article 12 of the Massachusetts Constitution, which states that "[n]o subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him." Mass. Const. Part. I, art. 12. This Court has similarly recognized "fair notice of the charges" as a core procedural protection. In re Kenney, 399 Mass. 431, 436 (1987); see also Kirk v. Commonwealth, 459 Mass. 67, 71 (2011) (observing legislative and judicial consensus to "provide in commitment cases procedural protections characteristic of criminal trials and other civil trials").

All four Massachusetts civil arrest provisions discussed herein contain a formal notice requirement. For example, if an individual is to be temporarily held as mentally ill, he or she must be informed of the limited period of hospitalization and of his or her right to be represented by an appointed attorney. G.L. c. 123 § 12(b)-(c). A similar notice requirement is codified in the statute authorizing the arrest of a sexually dangerous person. See G.L. c. 123A § 12(c) (an individual must be given "notice of, and an opportunity to appear in person at, a hearing to contest probable cause"). Under section 35 of chapter 123, a court may issue an arrest warrant without prior notice only if "there are reasonable grounds to believe that such person will not appear and that any

further delay in the proceedings would present an immediate danger to the physical well-being of the respondent." G.L. c. 123 § 35. But even in such emergency circumstances, arrestees must be presented immediately before a judge following arrest. Id. Finally, commitment based on non-payment of family support has robust notice obligations that require a properly served court summons before an arrest can occur. See G.L. c. 215 § 34A.

These protections contrast with the lack of notice often provided to individuals arrested pursuant to ICE Detainers. ICE detainers are not subject to either a statutory or regulatory notice requirement. Although the ICE Detainer form has a section labeled "Notice to the Detainee," which explains the purpose of the ICE Detainer, ICE has no mechanism to ensure the form's service on the detainee. See R.A. 16-17 (DHS Form I-247D); see also Manuel, "Immigration Detainers: Legal Issues," Congressional Research Service 7-8 (May 7, 2015). Furthermore, in practice, notice of ICE Detainers is often not provided to the detainee. See R.A. 6, ¶ 16 (Statement of Agreed Facts); Immigrant Legal Resource Center, "Legal Issues with Immigration Detainers" 5 (Nov. 2016).

In this case, Petitioner-Appellant only received notice of the ICE Detainer lodged against him with the help of his criminal defense attorney, and only after

he had already been held by Massachusetts officials pursuant to the ICE Detainer and subsequently taken into federal custody. See R.A. 11, ¶ 43 (Statement of Agreed Facts). The lack of required notice in the ICE Detainer context thus contrasts with the procedural rights guaranteed by the Massachusetts Legislature in all four comparable civil arrest and detention contexts.

C. Particularized Factual Findings Are Required To Protect Against Arrest And Detention Based On Conclusory And Unsupported Allegations

Massachusetts law requires particularized factual findings to support an arrest and detention. See, e.g., Commonwealth v. Williams, 422 Mass. 111, 119, n.11 (1996) ("Probable cause to arrest exists where the facts and circumstances in the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing" that a violation has been committed (emphasis added)). The particularized findings requirement ensures that the reviewing magistrate's actions are not a "mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 213, 239 (1983).

The Massachusetts Legislature has embedded the requirement of particularized findings of fact in all four civil arrest and detention statutes. For

example, to arrest and detain an individual pursuant to G.L. c. 123A, the District Attorney must file "a petition alleging that the [individual] is a sexually dangerous person and stating sufficient facts to support such allegation." G.L. c. 123A § 12(b). Similarly, detention under section 12 of chapter 123 requires a judicial finding based on particular facts relating to the condition and conduct of the specific individual. G.L. c. 123 § 12(b), (e); G.L. c. 123 § 13(a). Section 35 only authorizes an arrest if there is a specific judicial finding that "there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent." G.L. c. 123 § 35. Finally, under section 34A of chapter 215, an arrest warrant issued after non-appearance requires an affidavit from the Department of Revenue providing details of the individual's outstanding family support payments and a description of attempts to serve the capias on the defendant. G.L. c. 215 § 34A(b).

ICE Detainers, conversely, contain no particularized findings of fact to support probable cause—or any other legal standard—showing that the detainee is removable. In fact, the ICE Detainer form has no requirement that it be supported by any evidence whatsoever. Furthermore, the form speaks in

boilerplate and conclusory language that makes no reference to specific facts or circumstances. See R.A. 16 (DHS Form I-247D). Section 1B of the form simply asserts that the individual is removable based on one or more of four scenarios. Id. Two of those scenarios include vague and unsubstantiated assertions that (1) "biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law" and/or (2) "statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law." Id. The other two listed scenarios are less vague, but equally problematic in that no evidence is required to demonstrate their veracity. Id. ((1) "a final order of removal against the subject" and/or (2) "the pendency of ongoing removal proceedings against the subject").

ICE Detainers do not require even a basic set of facts to support an assertion of probable cause, a procedural protection that is present in all other analogous civil arrest and detention contexts in

Massachusetts.

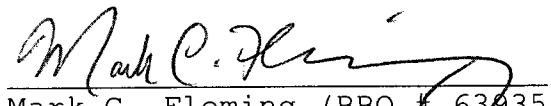
* * *

Given the Massachusetts Legislature's commitment to authorizing civil arrest and detention only when based on particularized factual findings and in conjunction with notice and oversight by a neutral decisionmaker, there is no basis to infer that the Legislature has authorized state or local officials or courts to arrest and detain people solely based on an ICE Detainer. Without such legislative authority, state and local officials and courts may not effectuate civil arrests or detention of the type at issue in this case.

CONCLUSION

For the foregoing reasons, this Court should conclude that no authority exists for state or local law enforcement agents or courts to arrest and detain individuals pursuant to ICE Detainers.

March 20, 2017 Respectfully submitted,



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ADDENDUM

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Massachusetts General Laws Chapter 123 Section 12

Emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness

(a) Any physician who is licensed pursuant to section 2 of chapter 112 or qualified psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section 80B of said chapter 112 or a qualified psychologist licensed pursuant to sections 118 to 129, inclusive, of said chapter 112, or a licensed independent clinical social worker licensed pursuant to sections 130 to 137, inclusive, of chapter 112 who, after examining a person, has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period at a public facility or at a private facility authorized for such purposes by the department. If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist or licensed independent clinical social worker on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. In an emergency situation, if a physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist or licensed independent clinical social worker is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a 3[-]day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall

telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

(b) Only if the application for hospitalization under the provisions of this section is made by a physician specifically designated to have the authority to admit to a facility in accordance with the regulations of the department, shall such person be admitted to the facility immediately after his reception. If the application is made by someone other than a designated physician, such person shall be given a psychiatric examination by a designated physician immediately after his reception at such facility. If the physician determines that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness he may admit such person to the facility for care and treatment.

Upon admission of a person under the provisions of this subsection, the facility shall inform the person that it shall, upon such person's request, notify the committee for public counsel services of the name and location of the person admitted. Said committee for public counsel services shall forthwith appoint an attorney who shall meet with the person. If the appointed attorney determines that the person voluntarily and knowingly waives the right to be represented, or is presently represented or will be represented by another attorney, the appointed attorney shall so notify said committee for public counsel services, which shall withdraw the appointment.

Any person admitted under the provisions of this subsection, who has reason to believe that such admission is the result of an abuse or misuse of the provisions of this subsection, may request, or request through counsel an emergency hearing in the district court in whose jurisdiction the facility is located, and unless a delay is requested by the person or through counsel, the district court shall hold such hearing on the day the request is filed with the court or not later than the next business day.

(c) No person shall be admitted to a facility under the provisions of this section unless he, or his parent or legal guardian in his behalf, is given an opportunity to apply for voluntary admission under the provisions of paragraph (a) of section ten and unless he, or such parent or legal guardian has been informed (1) that he has a right to such voluntary admission, and (2) that the period of hospitalization under the provisions of this section cannot exceed three days. At any time during such period of hospitalization, the superintendent may discharge such person if he determines that such person is not in need of care and treatment.

(d) A person shall be discharged at the end of the three day period unless the superintendent applies for a commitment under the provisions of sections seven and eight of this chapter or the person remains on a voluntary status.

(e) Any person may make application to a district court justice or a justice of the juvenile court department for a three day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. The court shall appoint counsel to represent said person. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility or examined by a qualified psychologist in accordance with the regulations of the department. If said physician or qualified psychologist reports that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may order the person committed to a facility for a period not to exceed three days, but the superintendent may discharge him at any time within the three day period. The periods of time prescribed or allowed under the provisions of this section shall be computed pursuant to Rule 6 of the Massachusetts Rules of Civil Procedure.

Massachusetts General Laws Chapter 123 Section 35

Commitment of alcoholics or substance abusers

For the purposes of this section the following terms shall, unless the context clearly requires otherwise, have the following meanings:

"Alcohol use disorder", the chronic or habitual consumption of alcoholic beverages by a person to the extent that (1) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning, or (2) the person has lost the power of self-control over the use of such beverages.

"Facility", a public or private facility that provides care and treatment for a person with an alcohol or substance use disorder.

"Substance use disorder", the chronic or habitual consumption or ingestion of controlled substances or intentional inhalation of toxic vapors by a person to the extent that: (i) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning; or (ii) the person has lost the power of self-control over the use of such controlled substances or toxic vapors.

Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe has an alcohol or substance use disorder. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any

further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. If such person is not immediately presented before a judge of the district court, the warrant shall continue day after day for up to 5 consecutive days, excluding Saturdays, Sundays and legal holidays, or until such time as the person is presented to the court, whichever is sooner; provided, however that an arrest on such warrant shall not be made unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a qualified social worker.

If, after a hearing which shall include expert testimony and may include other evidence, the court finds that such person is an individual with an alcohol or substance use disorder and there is a likelihood of serious harm as a result of the person's alcohol or substance use disorder, the court may order such person to be committed for a period not to exceed 90 days to a facility designated by the department of public health, followed by the availability of case management services provided by the department of public health for up to 1 year; provided, that a review of the necessity of the commitment shall take place by the superintendent on days 30, 45, 60 and 75 as long as the commitment continues. A person so committed may be released prior to the expiration of the period of commitment upon written determination by the superintendent of the facility that release of that person will not result in a likelihood of serious harm. Such commitment shall be for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health. Subsequent to the issuance of a commitment order, the superintendent of a facility may authorize the transfer of a patient to a different facility for continuing treatment; provided, that the superintendent shall provide

notification of the transfer to the committing court.

If the department of public health informs the court that there are no suitable facilities available for treatment licensed or approved by the department of public health or the department of mental health, or if the court makes a specific finding that the only appropriate setting for treatment for the person is a secure facility, then the person may be committed to: (i) a secure facility for women approved by the department of public health or the department of mental health, if a female; or (ii) the Massachusetts correctional institution at Bridgewater, if a male; provided, however, that any person so committed shall be housed and treated separately from persons currently serving a criminal sentence. The person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. The department of public health shall maintain a roster of public and private facilities available, together with the number of beds currently available and the level of security at each facility, for the care and treatment of alcohol use disorder and substance use disorder and shall make the roster available to the trial court.

Nothing in this section shall preclude a facility, including the Massachusetts correctional institution at Bridgewater, from treating persons on a voluntary basis.

The court, in its order, shall specify whether such commitment is based upon a finding that the person is a person with an alcohol use disorder, substance use disorder, or both. The court, upon ordering the commitment of a person found to be a person with an alcohol use disorder or substance use disorder pursuant to this section, shall transmit the person's name and nonclinical identifying information, including the person's social security number and date of birth, to the department of criminal justice information services. The court shall notify the person that such person is prohibited from being issued a firearm identification card pursuant to section 129B of chapter 140 or a license to carry pursuant to sections 131 and 131F of said chapter 140 unless a petition for relief pursuant to this section

is subsequently granted.

After 5 years from the date of commitment, a person found to be a person with an alcohol use disorder or substance use disorder and committed pursuant to this section may file a petition for relief with the court that ordered the commitment requesting that the court restore the person's ability to possess a firearm, rifle or shotgun. The court may grant the relief sought in accordance with the principles of due process if the circumstances regarding the person's disqualifying condition and the person's record and reputation are determined to be such that: (i) the person is not likely to act in a manner that is dangerous to public safety; and (ii) the granting of relief would not be contrary to the public interest. In making the determination, the court may consider evidence from a licensed physician or clinical psychologist that the person is no longer suffering from the disease or condition that caused the disability or that the disease or condition has been successfully treated for a period of 3 consecutive years.

If the court grants a petition for relief pursuant to this section, the clerk shall provide notice immediately by forwarding a certified copy of the order for relief to the department of criminal justice information services, who shall transmit the order, pursuant to paragraph (h) of section 167A of chapter 6, to the attorney general of the United States to be included in the National Instant Criminal Background Check System.

A person whose petition for relief is denied may appeal to the appellate division of the district court for a de novo review of the denial.

Massachusetts General Laws Chapter 123A Section 12

Notification of persons adjudicated as delinquent juvenile or youthful offender by reason of a sexual offense; petitions for classification as sexually dangerous person; hearings

(a) Any agency with jurisdiction of a person who has ever been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense as defined in section 1, regardless of the reason for the current incarceration, confinement or commitment, or who has been charged with such offense but has been found incompetent to stand trial, or who has been charged with any offense, is currently incompetent to stand trial and has previously been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense, shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months prior to the release of such person, except that in the case of a person who is returned to prison for no more than six months as a result of a revocation of parole or who is committed for no more than six months, such notice shall be given as soon as practicable following such person's admission to prison. In such notice, the agency with jurisdiction shall also identify those prisoners or youths who have a particularly high likelihood of meeting the criteria for a sexually dangerous person.

(b) When the district attorney or the attorney general determines that the prisoner or youth in the custody of the department of youth services is likely to be a sexually dangerous person as defined in section 1, the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner or youth is a sexually dangerous person and stating sufficient facts to support such allegation in the superior court where the prisoner or youth is committed or in the superior court of the county where the sexual offense occurred.

(c) Upon the filing of a petition under this section, the court in which the petition was filed shall determine whether probable cause exists to believe

that the person named in the petition is a sexually dangerous person. Such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause.

(d) At the probable cause hearing, the person named in the petition shall have the following rights:

(1) to be represented by counsel;

(2) to present evidence on such person's behalf;

(3) to cross-examine witnesses who testify against such person; and

(4) to view and copy all petitions and reports in the court file.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the court's probable cause determination, the court, upon a sufficient showing based on the evidence before the court at that time, may temporarily commit such person to the treatment center pending disposition of the petition. The person named in the petition may move the court for relief from such temporary commitment at any time prior to the probable cause determination.

Massachusetts General Laws Chapter 123A Section 13

Temporary commitment of prisoner or youth to treatment center; right to counsel; psychological examination

(a) If the court is satisfied that probable cause exists to believe that the person named in the petition is a sexually dangerous person, the prisoner or youth shall be committed to the treatment center for a period not exceeding 60 days for the purpose of examination and diagnosis under the supervision of two qualified examiners who shall, no later than 15 days prior to the expiration of said period, file with the court a written report of the examination and diagnosis and their recommendation of the disposition of the person named in the petition.

(b) The court shall supply to the qualified examiners copies of any juvenile and adult court records which shall contain, if available, a history of previous juvenile and adult offenses, previous psychiatric and psychological examinations and such other information as may be pertinent or helpful to the examiners in making the diagnosis and recommendation. The district attorney or the attorney general shall provide a narrative or police reports for each sexual offense conviction or adjudication as well as any psychiatric, psychological, medical or social worker records of the person named in the petition in the district attorney's or the attorney general's possession. The agency with jurisdiction over the person named in the petition shall provide such examiners with copies of any incident reports arising out of the person's incarceration or custody.

(c) The person named in the petition shall be entitled to counsel and, if indigent, the court shall appoint an attorney. All written documentation submitted to the two qualified examiners shall also be provided to counsel for the person named in the petition and to the district attorney and attorney general.

(d) Any person subject to an examination pursuant to the provisions of this section may retain a psychologist or psychiatrist who meets the requirements of a qualified examiner, as defined in

section 1, to perform an examination on his behalf. If the person named in the petition is indigent, the court shall provide for such qualified examiner.

Massachusetts General Laws Chapter 123A Section 14

Trial by jury; right to counsel; admissibility of evidence; commitment to treatment; temporary commitments pending disposition of petitions

(a) The district attorney, or the attorney general at the request of the district attorney, may petition the court for a trial. In any trial held pursuant to this section, either the person named in the petition or the petitioning party may demand, in writing, that the case be tried to a jury and, upon such demand, the case shall be tried to a jury. Such petition shall be made within 14 days of the filing of the report of the two qualified examiners. If such petition is timely filed within the allowed time, the court shall notify the person named in the petition and his attorney, the district attorney and the attorney general that a trial by jury will be held within 60 days to determine whether such person is a sexually dangerous person. The trial may be continued upon motion of either party for good cause shown or by the court on its own motion if the interests of justice so require, unless the person named in the petition will be substantially prejudiced thereby. The person named in the petition shall be confined to a secure facility for the duration of the trial.

(b) The person named in the petition shall be entitled to the assistance of counsel and shall be entitled to have counsel appointed if he is indigent in accordance with section 2 of chapter 211D. In addition, the person named in the petition may retain experts or professional persons to perform an examination on his behalf. Such experts or professional persons shall be permitted to have reasonable access to such person for the purpose of the examination as well as to all relevant medical and psychological records and reports of the person named in the petition. If the person named in the petition is indigent under said section 2 of said chapter 211D, the court shall, upon such person's request, determine whether the expert or professional services are necessary and shall determine reasonable compensation for such services. If the court so determines, the court shall assist the person named in the petition in obtaining an expert or

professional person to perform an examination and participate in the trial on such person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred and compensation received in the same case or for the same services from any other source. The court shall inform the person named in the petition of his rights under this section before the trial commences. The person named in the petition shall be entitled to have process issued from the court to compel the attendance of witnesses on his behalf. If such person intends to rely upon the testimony or report of his qualified examiner, the report must be filed with the court and a copy must be provided to the district attorney and attorney general no later than ten days prior to the scheduled trial.

(c) Juvenile and adult court probation records, psychiatric and psychological records and reports of the person named in the petition, including the report of any qualified examiner, as defined in section 1, and filed under this chapter, police reports relating to such person's prior sexual offenses, incident reports arising out of such person's incarceration or custody, oral or written statements prepared for and to be offered at the trial by the victims of the person who is the subject of the petition and any other evidence tending to show that such person is or is not a sexually dangerous person shall be admissible at the trial if such written information has been provided to opposing counsel reasonably in advance of trial.

(d) If after the trial, the jury finds unanimously and beyond a reasonable doubt that the person named in the petition is a sexually dangerous person, such person shall be committed to the treatment center or, if such person is a youth who has been adjudicated as a delinquent, to the department of youth services until he reaches his twenty-first birthday, and then to the treatment center for an indeterminate period of a minimum of one day and a maximum of such person's natural life until discharged pursuant to the provisions of section 9. The order of commitment, which shall be forwarded to the treatment center and

to the appropriate agency with jurisdiction, shall become effective on the date of such person's parole or in all other cases, including persons sentenced to community parole supervision for life pursuant to section 133C of chapter 127, on the date of discharge from jail, the house of correction, prison or facility of the department of youth services.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the final judgment, the court may temporarily commit such person to the treatment center pending disposition of the petition.

Massachusetts General Laws Chapter 215 Section 34A

Contempt; support or custody orders; costs; service; attorney's fees; interest; [] arrest warrants

(a) Actions for contempt against any party for failure to obey any order or judgment of the probate court relative to support of a wife or children or affecting the custody of children shall be commenced in accordance with the rules of probate courts applicable to domestic relations matters.

The cost of such service shall, upon approval of the court, be borne by the county. If the party summonsed for contempt fails to appear, the court may order a capias to issue which shall be returnable forthwith or at such time as the court may order. The capias shall be served by a deputy sheriff, constable, or upon motion any person designated by the court to make such service and the costs of service, upon approval of the court, shall be paid by the county.

Any judge of probate may with the approval of the chief of police, through the office of said chief, order a police officer to make service of the summons or of a capias if, in his opinion, service by a police officer is necessary in order to promote the efficient enforcement of this section. The schedule of fees in section eight of chapter two hundred and sixty-two shall not apply to cost of service made pursuant to this section.

In entering a judgment of contempt for failure to comply with an order or judgment for monetary payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant, in addition to the judgment on monetary arrears, all of his reasonable attorney's fees and expenses relating to the attempted resolution, initiation and prosecution of the complaint for contempt. The contempt judgment so entered shall include reasonable attorney's fees and expenses unless the probate judge enters specific findings that such attorney's fee and expenses shall not be paid by the defendant.

Any monetary contempt judgment shall carry with it

interest, from the date of filing the complaint, at the rate determined under the provisions of section six C of chapter two hundred and thirty-one of the General Laws.

(b) Upon the request of the IV-D agency as set forth in chapter 119A, when a total arrearage amounting to the support owing for a 6-month period has accrued under the defendant's most recent order or judgment for support and the IV-D agency has been unable to bring the defendant before the court on a capias, the court shall issue a warrant for the arrest of the defendant. The IV-D agency shall file an affidavit accompanying the request for a warrant that states: (1) a total arrearage amounting to the support owing for a 6-month period has accrued under the defendant's most recent order or judgment for support; (2) the amount of the total arrearage; (3) the date of the last payment, if any; and (4) a description of the efforts made to serve the capias on the defendant. The IV-D agency shall also provide the court with identifying information on the defendant's name, last known address, date of birth, gender, race, height, weight, hair and eye color, any known aliases and any such information as shall be required for a warrant to be accepted by the criminal justice information system maintained by the department of criminal justice information services. A warrant that contains the above identifying information as provided by the IV-D agency to the court shall not be nullified if the information is later found to be inaccurate. If any of the above identifying information is not known to the IV-D agency, the IV-D agency may apply to the court for an exemption from the requirement to provide the information. The court shall grant the exemption if the court decides that the unknown information is not essential to identifying the defendant. The defendant may not challenge the validity of a warrant based on the granting of the exemption. The court shall enter the warrant, including the identifying information provided by the IV-D agency to the court and the name of the court that issued the warrant, into the warrant management system as set forth in section 23A of chapter 276. The warrant shall consist of the information that appears in the warrant management system, and a printout of the warrant from the criminal justice information system shall

constitute a true copy of the warrant. The entry of the warrant into the warrant management system and the criminal justice information system shall constitute notice and delivery of the warrant to all law enforcement agencies who have arresting authority pursuant to section 23 of chapter 276.

Upon arrest, the arresting authority shall arrange for transportation of the defendant to the court that issued the warrant. If the defendant is arrested when the court is not in session, the defendant shall be held by the arresting authority or county jail facility, and transported to the issuing court during the next session and presented to the court. If the defendant voluntarily submits his person to the court, he shall likewise be brought before the court. The court shall notify the IV-D agency and conduct a hearing to recall the warrant and shall issue an order for the defendant to do one or more of the actions set forth in clauses (1) to (6), inclusive, of section 34.

Whenever a warrant is recalled or removed, the court shall, without unnecessary delay, enter the recall or removal in the warrant management system which entry shall be electronically transmitted to the criminal justice information system. The court shall also provide to the defendant a notice of recall of warrant.

A law enforcement officer who in the performance of his duties relies in good faith on the warrant appearing in the warrant management system shall not be liable in any criminal prosecution or civil action alleging false arrest, false imprisonment, or malicious prosecution or arrest by false pretense.

The issuing court shall provide notice no later than 30 days after the issuance of the warrant to the defendant. The notice shall contain information on the name and address of the issuing court, the date of the last payment of child support, if any, the amount of the total child support arrearage, a description of the method by which the defendant may clear the warrant and a summary of the consequences the defendant may face for not responding to the warrant. The notice shall be deemed satisfactory if mailed to the address stated on the warrant.

If a warrant remains outstanding for 1 year following the date that the warrant is entered into the warrant management system it shall constitute evidence of willful nonsupport in a criminal action pursuant to chapter 273.

CERTIFICATE OF SERVICE

I, Mark C. Fleming, hereby certify, under the penalties of perjury that on March 20, 2017, I caused true and accurate copies of the foregoing to be filed in the office of the clerk of the Supreme Judicial Court and served two copies upon the following counsel United States mail:

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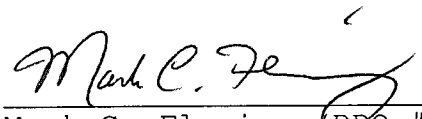
MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.



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