

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

**SUPREME JUDICIAL COURT
No. SJC-12926**

**COMMITTEE FOR PUBLIC COUNSEL SERVICES AND MASSACHUSETTS
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

v.

CHIEF JUSTICE OF THE TRIAL COURT

**BERKSHIRE DISTRICT ATTORNEY'S RESPONSE TO EMERGENCY PETITION
FOR RELIEF PURSUANT TO G.L. c. 211, § 3**

INTRODUCTION

The Berkshire District Attorney's Office (hereafter "Berkshire DA's Office") hereby responds to the Emergency Petition for Relief Pursuant to G.L. c. 211, § 3.

This unprecedented public health crisis caused by the exponential spread of the coronavirus requires district attorneys and criminal justice agencies to immediately work collaboratively to reduce the risk of a massive outbreak and protect the health and safety of the communities that we serve. The interplay between public health and public safety has never been more apparent. Every county across the Commonwealth is grappling with balancing protecting our communities from crime with protecting citizens from contracting coronavirus. This includes protecting people housed and working inside and outside of our police departments, court houses, houses of correction, and prisons.

STATEMENT OF FACTS¹

The COVID-19 pandemic is unprecedented in its nature and scope. Millions of people across the country have been ordered by the government to shelter in place to prevent the spread of coronavirus. Coronavirus is spread by asymptomatic persons and spreads easily from person-to-person and via contaminated surfaces. There is no vaccine and all of the experts and government officials in Massachusetts have opined or suggested that the only hope of reducing the spread of the coronavirus, and in turn reducing the number of deaths caused by COVID-19, is for all individuals to maintain a physical distance of at least six feet between each other and to continually wash their hands and disinfect surfaces.

The circumstances in Massachusetts jail and prison facilities make following these suggestions to reduce the spread of the coronavirus especially problematic. There are approximately 16,500 individuals incarcerated in Massachusetts prisons and county jails and houses of corrections. However, the disease prevention measures recommended by the experts fly directly in the face of long-existing rules within Massachusetts prisons and county jails and houses of corrections or are simply impossible or impracticable in such an environment.² For example, the coronavirus easily can be spread by many different individuals within a prison setting, including visitors, correctional staff, attorneys, and newly incarcerated individuals.³ Because a person can transmit the infection for 2-14 days without knowing it, the infection will

¹ Respondent Berkshire DA will rely on the joint statement of facts should such an agreed-upon joint statement be achieved with the assistance of the Special Master.

² <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>

³ See Exhibit A attached to the instant petition, Affidavit of Danielle C. Ompad, PhD, regarding SARS-CoV-2 infection (otherwise known as COVID-19) in correctional settings at paragraph 9(b).

spread quickly within corrections facilities and it has already started to happen.⁴ Several Massachusetts prisoners and staff members have already tested positive for the coronavirus. Moreover, it is undisputed that as time goes on, despite the best efforts of Sheriffs and the Department of Corrections, many more will be infected without significant guidance and action from the courts and cooperation amongst and between Petitioners and Respondents.

Fulfilling our obligation to the communities that we serve demands weighing the challenges presented by COVID-19 with other existing and anticipated public safety challenges, including, in particular, domestic violence, sexual assault, and child abuse. Reports from China indicate that domestic violence rates have nearly doubled during the COVID-19 pandemic.⁵ This is particularly troubling to me, the Berkshire District Attorney, because Berkshire County already has one of the highest rates of domestic and sexual violence in Massachusetts.

As of 2019, the rate of restraining orders requested and received in Berkshire County was thirty-three percent (33%) more than any other county in the Commonwealth. Four Berkshire towns, Stockbridge, Adams, Pittsfield, and North Adams, have the first, third, fifth, and sixth highest rate of reported rapes. According to trial court statistics, there were six hundred and fifty-four (654) 209A and 258E orders requested in Berkshire County in the first two quarters of FY20. That is one-hundred and six (106) more than the year-to-date numbers for FY19. If that trend continues, it will be the most 209A and 258E orders requested since 2011. Moreover, Berkshire County had eight (8) domestic violence murders between March 2018 and March 2019. This is a shockingly high and concerning number given that Berkshire County only has a population of approximately 130,000 people.

⁴ *Id.*

⁵ <https://www.sixthtone.com/news/1005253/domestic-violence-cases-surge-during-covid-19-epidemic>

The long term effects of this crisis will be borne by children, particularly children of color and children living in poverty. “Child neglect and abuse tend to track with greater traumatic events, economic instability, and stress. Sadly, they might be tracking already. Reportedly, a single hospital in Fort Worth, Texas, has treated six children with severe physical-abuse-related injuries. Doctors believe the cases are related to parents’ stress over the pandemic.”⁶ The Federal Bureau of Investigations has issued official warnings about the greater opportunity for predators to take advantage of vulnerable children who are spending more time alone and unsupervised due to the pandemic.⁷ Children who are suffering abuse at home have less opportunity to confide in and seek help from a trusted adult while they are isolated from school, community, and normal activities.⁸ Whereas many children of incarcerated parents will benefit from the release of their parents and grandparents during a time of great trauma and struggle, it is our obligation to ensure that we protect children from predators who are and must remain incarcerated irrespective of the Covid-19 pandemic. These are factors that can and must be weighed by Petitioners and Respondents working on individualized determinations on motions for release related to the current pandemic.

The Berkshire DA’s Office supports immediate action to prevent and/or slow the spread of the coronavirus throughout the Commonwealth, including in Massachusetts prisons, jails, and houses of correction, by releasing individuals who can be safely returned to our community. Our office remains very concerned about the potential ripple effects and consequences that would result from the sudden release of a large number of dangerous individuals at once, as well as the

⁶ <https://www.theatlantic.com/health/archive/2020/03/what-coronavirus-will-do-kids/608608/>

⁷ <https://www.fbi.gov/news/pressrel/press-releases/school-closings-due-to-covid-19-present-potential-for-increased-risk-of-child-exploitation>

⁸ <https://www.cincinnati.com/story/news/2020/03/27/coronavirus-crisis-has-put-kids-risk-abuse-home-experts-warn/2909116001/>

failure to incarcerate high risk domestic abusers and individuals who commit sexual assaults. Our local law enforcement agencies are already taxed in responding to this crisis and must devote particular energy to protecting vulnerable populations. Hundreds if not thousands of incarcerated non-violent offenders remain incarcerated in county houses of correction and across Massachusetts prisons, including individuals serving sentences for non-violent crimes such as operating under the influence. These individuals could either complete their sentences outside of penal institutions under GPS monitoring or return after the crisis to complete their sentences. It is imperative that the parties to this proceeding act quickly to release non-violent offenders so that the penal system can more safely manage the remaining incarcerated population given the current crisis.

Issues of homelessness, access to food, and access to physical and mental health providers must be addressed in the ongoing discussions in the criminal justice system. Re-entry services that are normally available to released inmates, such as non-profit and governmental assistance securing housing, transitional support, food pantries, etc., are currently understaffed and overwhelmed because of the scope of the pandemic. We simply do not know what is available now and what will be available in the weeks and months to come. In New Jersey, the parties reached a consent agreement whereby any individual who self-identifies or whom the correctional facility identifies as unable to obtain safe housing or photo identification upon release shall not be released without further instructions from the court or Special Master. In such cases, the parties are required to obtain assistance from various governmental and social services organizations to determine a plan for housing, identification, and other necessary services for the inmate.

Since the undersigned District Attorney was sworn in on January 2, 2019, the Berkshire DA's Office has implemented prosecution policies and procedures designed to eliminate the use of incarceration as a punishment for individuals convicted of non-violent crimes and who are not a threat to public safety or to victims. We have virtually eliminated the use of cash bail and have sought medical solutions, rather than incarceration, for defendants suffering from addiction and mental health issues. Since the onset of the current public health emergency, the Berkshire DA's Office has been proactive in identifying incarcerated individuals for potential release from prisons, jails, and houses of correction in light of the challenges presented by COVID-19. For example, the Berkshire DA's Office contacted members of the local criminal defense bar and informed them that it would potentially support motions to release such individuals, especially those in high risk categories and persons held on bail by order of the court. We have been reaching out to victims in order to obtain their input on motions we have received, and have been notifying them of decisions on such motions, as we believe it is our obligation to do so pursuant to the Victims Bill of Rights. *See* G.L. c. 258B, § 3(b). Likewise, we seek input from local law enforcement on motion for release in order to make informed decisions and meeting our obligations to protect public safety and victims.

Moreover, the Berkshire DA's Office sent a written request for a current census of the Berkshire County House of Correction from the Berkshire County Sheriff so that the Berkshire DA's Office could review the currently incarcerated population and begin the process of identifying individuals that the Berkshire DA's Office might support being released. *See* Respondent's Exhibit "A" attached hereto. To date, the Berkshire County Sheriff has failed to provide the requested information. The failure and refusal of the Berkshire County Sheriff to provide this information prevents the Berkshire DA's Office from effectively doing its part in

preventing the spread of the coronavirus. This is just one example of why emergency relief and guidance is needed from this Court in light of COVID-19.

Like other District Attorney Offices across the Commonwealth, the Berkshire DA's Office has been reviewing and will continue to review defense motions for the release of incarcerated individuals based upon valid COVID-19 concerns, and, since the onset of the crisis, has consented to the release of individuals being held both pretrial and under sentence. The Berkshire DA's Office reviews such motions on a case-by-case basis and makes decisions based upon a careful and thoughtful evaluation and consideration of a number of important factors unique to each person, case, and victim, including but not limited to, public safety, victim safety, the public health crisis, and the risks associated to the incarcerated population, correctional officers and the community.

With cooperation from other criminal justice actors, Berkshire DA's Office is committed to making individualized determinations on every motion filed in a timely fashion. At present, Berkshire County courts have the capacity to hear and to rule on motions for release filed by individuals within each court's jurisdiction. The Berkshire DA's Office does not see the necessity for this Court to issue blanket orders in light of local conditions including pre-existing prosecution policies around pretrial detention.

CONCLUSION

This legal proceeding is a welcome opportunity for the Court to provide urgent guidance and legal mechanisms to the named parties that allow for protecting the due process and eighth amendment rights of defendants, promote public safety and public health, while effectively and humanely managing this crisis as it relates to the incarcerated population in the Commonwealth in light of the local needs. In the words of New Jersey Attorney General Gurbir Gruwal, a career prosecutor, “When this pandemic concludes, I need to be able to look my daughters in their eyes to say that we took every step possible to help all the residents in this state, including those serving county jail sentences.”⁹

The undersigned hereby adopts the Commonwealth’s Response to Emergency Petition for Relief Pursuant to G.L. c. 211, § 3 filed by District Attorneys Ryan and Sullivan in its

⁹ <https://www.tapinto.net/sections/police-and-fire/articles/i-take-no-pleasure-nj-attorney-general-gurbir-gruwal-can-force-the-release-of-prisoners-including-those-appearing-infected-with-covid-19-88e348a4-76ef-4837-bd04-f9fc22921802>

entirety,¹⁰ supports the appointment of the Special Master, and urges the named parties to come to an agreement on these urgent matters.

Respectfully Submitted,

ANDREA HARRINGTON
DISTRICT ATTORNEY FOR THE
BERKSHIRE DISTRICT

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Andrea Harrington
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Dated: March 27, 2020

¹⁰ This adoption is with the exception of the Commonwealth's statement that the DAs and Sheriffs are working collaboratively on "a thorough review of inmates at the House of Correction to identify all nonviolent offenders and medically compromised prisoners who can be released without danger to the community."

EXHIBIT A

exhibit

-----Original Message-----

From: Harrington, Andrea (BER)
Sent: Tuesday, March 17, 2020 4:34 PM
To: Sheridan, Daniel (SDB)
Subject: RE: BDAO Covid-19 plan

Dear Dan,

Thank you for sharing your COVID-19 protocols with me. Could you give me a list of all inmates 60 and over and/or inmates with pre-existing medical conditions? Could you include their status (pretrial or serving a sentence)?

Also- what does it look like for people to be quarantined for 14 days upon entry?

Thank you.
-Andrea

-----Original Message-----

From: Daniel Sheridan [<mailto:Daniel.Sheridan@sdb.state.ma.us>]
Sent: Tuesday, March 17, 2020 1:22 PM
To: Harrington, Andrea (BER)
Subject: RE: BDAO Covid-19 plan

CAUTION: This email originated from a sender outside of the EOTSS mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Andrea:

Yes we have a protocol and we have been in multiple administrative meetings internally and multiple teleconferences daily with federal state and local authorities. We have also been coordinating with the courts, local police departments, the hospital and other agencies and entities to address COVID-19 concerns.

Dan

Daniel Sheridan
Assistant Superintendent/General Counsel Berkshire County Sheriff's Office
467 Cheshire Road
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-----Original Message-----

From: Harrington, Andrea (DAA) <andrea.harrington@state.ma.us>

Sent: Tuesday, March 17, 2020 9:28 AM

To: Daniel Sheridan <Daniel.Sheridan@sdb.state.ma.us>; Thomas Bowler <Thomas.Bowler@sdb.state.ma.us>

Subject: BDAO Covid-19 plan

Good morning.

Attached please find BDAO's statement re: our Covid 19 plan.

Does your agency have a written operational plan in light of the pandemic?

I am awaiting further instructions from the trial courts as to their operations. I will share the plan when I receive it.

-Andrea

From: Harrington, Andrea (BER)
Sent: Tuesday, March 24, 2020 1:44 PM
To: Bowler, Thomas (SDB)
Cc: Sheridan, Daniel (SDB)
Subject: Census

Dear Tom,

Thanks for the call on Friday. I am following up on my verbal request for a current census of the population housed at the Berkshire HOC and my email to Dan last week with a similar request. It is a matter of some urgency.

Thank you,
Andrea

Andrea Harrington
District Attorney

Office of the Berkshire District Attorney
7 North Street
Pittsfield, MA 01201
413-443-9131



-----Original Message-----

From: Harrington, Andrea (BER)

Sent: Wednesday, March 25, 2020 7:08 AM

To: Bowler, Thomas (SDB); Sheridan, Daniel (SDB)

Subject: SJ-2020-115 Interim Order (2020.03.24).pdf

Dear Tom,

We are both named defendants in this suit. The requested relief is highly problematic & would present significant public safety issues. It is over broad. We would never agree to a blanket order. We would only consider Motions on an individual basis analyzing public safety. We are particularly concerned about violent people in our community perpetrating DV & child abuse and also others who may take advantage of the current situation. We are also concerned w/ providing shelter, food, isolation to people who could potentially be released.

We would like to coordinate on a reply that is Berkshire specific in order to achieve the best result for Berkshire County as opposed to something that makes sense for Boston. I have requested a census from you & from DOC of Berkshire residents. I would also like to know if your facility could more safely accommodate certain inmates who are Berkshire residents from the DOC.

We have an MDAA call at 11. We should also discuss today.

I thought your public statement was excellent. I am getting a lot of inquiries about this. I imagine you are as well. I think that we can work together here for the common good.

-A