



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

August 7, 2017

The Honorable William Brownsberger
Senate Chair, Joint Committee on the Judiciary
State House, Rm 504
Boston, MA 02133

The Honorable Claire Cronin
House Chair, Joint Committee on the Judiciary
State House, Rm 136
Boston, MA 02133

RE: Matters before the Joint Committee on the Judiciary, June 5th and June 19th Public Hearings

Dear Chairman Brownsberger and Chairwoman Cronin:

As the Joint Committee on the Judiciary considers legislation that would reform various aspects of our state's criminal justice system, I wanted to offer some initial comments on several topics that were the subject of public hearings on June 5th and June 19th. Working with our colleagues in law enforcement, the Legislature, the courts, and other interested stakeholders, our office is committed to finding ways to make smart reforms to our criminal justice system that will improve public safety and make the system fairer for all.

Criminal justice reforms must be evidence-based and data-driven. To that end, Massachusetts enlisted the Council of State Governments Justice Center to develop policy recommendations for the 2017-18 legislative session based on available statewide data. The report and accompanying legislation, H. 74, *An Act implementing the joint recommendations of the Massachusetts criminal justice review*, are important steps forward. For example, H. 74 increases access to work release programs for certain inmates, raises the cap on good time credits, and modifies certain parole and post-release supervision practices. These incentives will better prepare people as they reintegrate into the community.

But we have more work to do. We need to look at our criminal justice system holistically, across the full spectrum of a person's involvement. We must shift the lens by increasing our focus on prevention and treatment programs, investing in diversion programs and

reentry services, updating our statutes to avoid unnecessary punishment for certain crimes, and reducing barriers for those coming out of prison. A number of the bills before you propose positive changes, and I am writing to highlight my support for several concepts in particular.

Diversion

Diversion programs can be instrumental in holding offenders accountable for their actions while connecting them with community-based resources to help them succeed and to prevent further criminal justice system involvement. In Massachusetts, the courts and the District Attorneys provide pre-trial and post-trial diversion programs for a variety of circumstances and populations. It is critical that we increase access to meaningful diversion opportunities, particularly for low-level and non-violent offenders who meet evidence-based criteria, including juveniles and individuals suffering from mental illness and drug addiction. One such example is outlined in H. 793/S. 847, *An Act promoting restorative justice practices*, which seeks to increase voluntary participation in programs that take a holistic, community-based approach to addressing crime.

Eyewitness Identification

Errors by eyewitnesses are believed to be the leading cause of wrongful convictions in the United States.¹ We join the Massachusetts Chiefs of Police Association in supporting legislation that would require the police department of any city or town of 2,000 or more residents to adopt uniform policies on eyewitness identification. Many of our police departments, as well as the Massachusetts State Police and Transit Police, are already using written policies for this purpose. We should require these practices statewide.

Law Enforcement Access to Electronic Information

Many of the provisions articulated in H. 2332, *An Act to protect electronic privacy*, are currently part of our office's normal practice for obtaining electronic information. However, as the Committee considers this issue generally, we strongly oppose limiting or repealing our office's ability to use administrative subpoenas. Administrative subpoenas are a critical tool for our criminal work in a range of cases involving such issues as child pornography, human trafficking, apprehension of violent fugitives, and threats of violence.

Bail

The purpose of bail is to ensure that a defendant appears in court, where the defendant is not otherwise being detained for public safety reasons. In November 2016, our office filed a letter with the Supreme Judicial Court in *Wagle v. Commonwealth*,² expressing our view that no defendant should be detained pending trial *solely* because he or she lacks the financial resources to post bail.³

¹ *Eyewitness Identification*, The Innocence Project, <https://www.innocenceproject.org/causes/eyewitness-misidentification/> (last visited June 16, 2017).

² *Wagle v. Comm.*, No. SJ-2016-334 (2016).

³ While we do not have precise data available, a recent study of pre-trial release in the Commonwealth suggests that a meaningful number of defendants are detained pending trial as a result of an inability to afford bail. See

As we made clear in our November 2016 letter, we believe the Court's Standing Advisory Committee on the Rules of Criminal Procedure should make recommendations regarding best practices in determining a defendant's financial resources, and we support legislative language that allows courts – where appropriate – to order individuals to pre-trial service programs and other alternative methods to ensure appearance in lieu of bail or as a condition of release.

Property Crime Thresholds

The threshold amounts for many of our property crimes are well out of date. Massachusetts has not revisited many of these statutory amounts since 1987, which has put us out of line with other states. For example, the threshold amount for larceny under Massachusetts state law – currently set at \$250 – is the third lowest in the country.

While various standalone bills that address this issue have also been filed, S. 791/ H. 2308, *An Act for Justice Reinvestment*, increases the threshold amounts of several property-related crimes enumerated in Chapter 266 – including larceny, shoplifting, credit card theft, receiving stolen property, and destruction of property – thereby downgrading existing felonies to misdemeanors. We continue to support this effort and defer to the Legislature on where best to set the threshold amount. We ask, however, that any statutory revisions provide law enforcement with the continued ability to arrest for these misdemeanor offenses, as appropriate.

Mandatory Minimums

We continue to support eliminating statutory mandatory minimums for certain drug offenses – specifically those that fall short of trafficking and do not involve minors.⁴ We are also willing to consider other revisions, including amending the minimum threshold amounts that trigger a trafficking charge for certain controlled substances. But if we are going to make changes to statutory mandatory minimums in any way, we need sentencing guidelines in place to ensure that there is some consistency and predictability in sentencing. As you know, the Sentencing Commission is currently working to reform and update guidelines.

As an alternative, implementing a statutory safety valve for drug offenses would provide a mechanism for the court to consider an individual defendant's circumstances as part of his or her sentence. When drafted with the proper safeguards and qualifications, a safety valve for drug offenses would allow a judge to deviate from a mandatory minimum where the defendant meets certain criteria – based, for example, on the defendant's criminal history, the details of the instant

Massachusetts Court System, Initial Analysis of MassCourts District & Boston Municipal Court Pre-Trial Release Events (April 5, 2016).

⁴ This includes, for example, the subsequent possession of heroin [M.G.L. ch. 94C § 34], subsequent distribution and possession with intent offenses for Classes A through D [M.G.L. ch. 94C §§ 32, 32A, 32B, and 32C], and possession or distribution of drug paraphernalia [M.G.L. ch. 94C § 32I]. See Letter from Attorney General Maura Healey to the Joint Committee on the Judiciary, June 8, 2015, available at <http://www.mass.gov/ago/docs/press/2015/s64-h1429-support-letter.pdf>.

offense, and aggravating or mitigating circumstances. Such a deviation should be made in writing and provide the prosecutor with a right of appeal.

To date, at least twenty-three states have adopted safety valves or other mechanisms to allow for some increased judicial discretion in sentencing under such circumstances.⁵ A safety valve has also existed under federal law since 1994.⁶ Our state could benefit from crafting its own safety valve that would provide for increased flexibility in sentencing for certain drug offenders, while ensuring strong sentences for serious drug traffickers or those engaged in violence.

Offender Fees

The Trial Court is statutorily mandated to collect various fees and assessments from a defendant, in addition to any restitution paid to the crime victim or fines that serve as a penalty for the specific offense. Over time, the number, categories, and amounts of fines and fees have increased. As a result of these increases, criminal defendants face a broad array of statutorily required fees: victim witness-assessments, default removal fees, arrest warrant fees, probation supervision fees, administrative probation fees, victim services surcharges, and offense-specific assessments. Many of these fees and assessments are deposited into the General Fund and do not go directly toward the category they were designed to address. And for some, the cost of these fees is prohibitive, and non-payment may result in incarceration.

The list of fees should be examined, and under no circumstance should a person be incarcerated solely for a legitimate inability to pay. At the very least, community service should be made available to satisfy a fee requirement. Additionally, the state may want to consider a payment priority order, which would allow the courts to prioritize crime victim restitution and any fees that directly support victims or other human services programs.

Automatic Suspension of Driver's Licenses

Last session, our office advocated for the repeal of the automatic suspension of a driver's license upon the conviction of a non-vehicle related drug offense, and we were very glad when the bill became law.⁷ Thank you for your work on that issue, which was a significant step forward in addressing collateral consequences of convictions. We know these suspensions unnecessarily prevent people from rebuilding their lives, getting to work, and caring for their families.

We should take a look at other statutes that include an automatic license suspension provision, where that suspension is not necessary to protect public safety because the underlying offense does not relate to driving. One example is M.G.L. ch. 266 § 126B, referenced in H. 2250, *An Act further regulating the penalties for tagging*.

⁵ Brief for the Constitution Project, et al. as Amici Curiae Supporting Respondent at 14, *Comm. v. Laltaprasad*, 475 Mass. 692 (2016).

⁶ 18 U.S.C. § 3553(f) (2016).

⁷ Chapter 64 of the Acts of 2016.

Terminally Ill Inmates

Several bills in Committee address the issue of terminally ill or permanently incapacitated inmates. As the age of our inmate population rises, issues regarding end-of-life care and treatment increasingly surface. For many, our correctional facilities play a major role in providing (and, for some, are a first exposure to) physical and/or mental health treatment. But for certain inmates who are either terminally ill or permanently incapacitated, our correctional facilities may not be the best option for end-of-life medical services.

Under certain circumstances, and where public safety would not be compromised, courts should have the ability to transfer a terminally ill or permanently incapacitated inmate to an alternative facility to receive medically appropriate services. To facilitate this change, however, we need to appropriately define “terminally ill” and “permanently incapacitated.” Additionally, victims and victims’ families should receive notice of a petition for transfer and be afforded an opportunity to submit a statement to the court.

Criminal Offender Record Information & Expungement

A person’s Criminal Offender Record Information, or CORI, provides important information to law enforcement and others about that person’s history with the criminal justice system. But it can also be a major obstacle in obtaining employment, housing, and support services aimed at reducing recidivism.

While we are open to considering further changes to the law surrounding CORI access, we must first ensure compliance with the current law. Our office recently published *Know Your Rights – Criminal Records: A Guide to Rights in Employment and Housing*.⁸ Our guide instructs individuals who believe they have been unfairly or unlawfully denied housing or employment to file a complaint with our Civil Rights Division.

As the Legislature considers potential revisions to the CORI law, the list of those with access to CORI information should be reviewed to ensure that a fully appropriate range of employers, state service entities, and others who work with our most vulnerable populations (such as the elderly, children, and people with disabilities) can access CORI information.

On the issue of expungement, we remain interested in exploring ways to further seal or expunge certain offenses from a person’s CORI – specifically, juvenile records and certain convictions for victims of human trafficking. For juveniles, allowing for the expungement of certain records that serve no public safety function would help prevent these records from needlessly hindering the opportunities of young people as they transition to adulthood. However, we recognize that the permanent deletion of records – a new practice for

⁸ <http://www.mass.gov/ago/docs/civilrights/crim-records-booklet.pdf>

August 7, 2017

Page 6

Massachusetts – could carry long-term consequences and therefore needs to be considered very carefully.

Thank you for considering these comments. As the Committee reviews these and other ways to improve our state's criminal justice system, my office stands ready to partner with you.

If you have any questions, please do not hesitate to contact Alicia Rebello-Pradas, Deputy Chief of our Policy & Government Division, at (617) 963-2057.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. Healey", with a stylized flourish at the end.

Maura Healey