Trial Court of the Commonwealth
District Court Department

Paul C. Dawley
Chief Justice

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TRANSMITTAL NO.	**1229**
Last Transmittal No. to:	
First Justices	1228
Other Judges	1228
Clerk-Magistrates	1228
Assistant Clerk-Magistrates	1228
CPOs	1228

M E M O R A N D U M

TO: District Court Judges, Clerk-Magistrates, Assistant Clerk-Magistrates, and Chief Probation Officers

FROM: Hon. Paul C. Dawley, Chief Justice

DATE: April 18, 2018

SUBJECT: **New Criminal Justice Reform Laws**

On April 13, 2018, at 3:31 p.m., the Governor signed An Act Relative to Criminal Justice Reform (the "Act"). As noted in the Executive Office transmittal that was distributed yesterday, **many of these provisions are effective immediately.** The Governor also signed An Act Implementing the Joint Recommendations of the Massachusetts Criminal Justice Review (the "CSG Act"), which becomes effective on January 13, 2019. This memorandum highlights the provisions of these new laws that most effect the District Court.

Attached please find:

- Chapter 69 of the Acts of 2018, An Act Relative to Criminal Justice Reform,
- Chapter 72, An Act Implementing the Joint Recommendations of the Massachusetts Criminal Justice Review
- Updated "Reasons for Bail" form
- Complaint Offense Code Update memo with new complaint language
- List of Offenses Ineligible for Decriminalization under G.L. c. 277, § 70C and Diversion under G.L. c. 276A
- Updated "Assessment or Waiver of Moneys in Criminal Cases" form

The most immediate implementation action is the need to enter the correct complaint language for the new and amended crimes for offenses committed after the Act was signed, April 13, 2018. See Sections II and II, below. The complaint manual language is being updated. In the meantime, however, clerks should use docket code 999999 and enter the complaint language manually for new complaints, and identify any complaints issued after April 13, 2018 for which the old complaint language was used so that the language can be amended by the court. The new complaint language is attached. See Offense Code Update 149.

The Administrative Office of the District Court, in coordination with the District Court Committee on Criminal Proceedings, will update the existing jury instructions. These will not

need to be immediate as these will only apply to offenses committed after April 13, 2018; cases involving offenses committed prior to April 13, 2018, should continue to use the current instructions.

Other immediately effective provisions of the Act also amend numerous statutes related to fines and fees, including the probation service fee, which now provides community service as a *discretionary* alternative upon finding the waiver standard has been met and caps community service at 4 hours per month regardless of whether probation is supervised or administrative. This change applies to current probationers prospectively. The Administrative Office is working with JISD to update these docket codes, as well as other codes affected by the new law. In addition, as we identify benchcards and forms that are affected by the changes to the law, we will update and distribute. If you identify an affected area that has not been updated, please let me know.

Other issues related to the enactment of these new laws are addressed in the summaries below. If you have any questions, please contact Bethany Stevens, Esq., Zachary Hillman, Esq., or Kristen Stone, Esq. at the Administrative Office of the District Court.

Immediately Effective Provisions (eff. April 13, 2018, 3:31 p.m.)

I. REPEALED CRIMES

- G.L. c. 94C, § 35 (knowingly being present at a place where heroin is being kept) (Act § 60). The Act expressly provides that this amendment "shall apply to convictions obtained on or after the effective date of the act." (Act § 238).

II. NEW CRIMES

Applicable to offenses committed after April 13, 2018.

The updated complaint language should be utilized.

A. Identity Fraud (G.L. c. 266, § 37E). Subsection "c ½" has been added to this statute, making it a misdemeanor offense punishable by imprisonment up to 2 ½ years and/or up to a $5,000 fine for anyone who "possesses a tool, instrument, or other article adapted, designed or commonly used for accessing a person's financial services" or identifying information "under circumstances evincing an intent to use or knowledge that some person intends to use the same to commit larceny" (e.g., a credit card skimmer). (Act § 145).

B. Solicitation of a Felony (G.L. c. 274, § 8). This offense, which previously existed only as a common-law misdemeanor and therefore punishable only by a house of correction sentence, is now codified to provide varying state prison sentences depending on the felony solicited. A house of correction sentence of up to 2½ years remains an alternative, and District Court has jurisdiction over this offense. G.L. c. 218, § 26, as amended by Act § 109. See *Commonwealth v. Barsell*, 472 Mass. 737, 742 (1997) (highlighting the fact that no statutory crime exists to punish soliciting a murder as a "notable deficiency" in the criminal law and commenting that the task of revising the schedule of punishments for soliciting felonies by the Legislature was "long overdue"). (Act § 162).

III. AMENDED CRIMES

Applicable to offenses committed after April 13, 2018, unless otherwise noted. See Commonwealth v. Didas, 471 Mass. 1, 5 (2015) ("presumption of prospective application governs 'unless its observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute'."), quoting G.L. c. 4, § 6. See also Commonwealth v. Dotson, 462 Mass. 96, 100-101 (2012) (reduced punishment for first offense disorderly conduct applies only to offenses committed after effective date of the amendment as "[t]he repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect."), quoting G.L. c. 4, § 6, Second.

The updated complaint language should be utilized.

A. Intimidation of Witnesses, Jurors (G.L. c. 268, § 13B). The statute has been rewritten so that an act committed in retaliation for past participation in a criminal investigation or court proceedings can now be charged as a crime under § 13B, correcting the error identified in *Commonwealth v. Hamilton*, 459 Mass. 422, 431-437 (2011). The rewrite also eliminates the category of persons protected by the statute that were defined as "a person who is furthering a civil or criminal proceeding . . . of any type," and instead adds to the list of specifically identified people protected by the statute to also include:

- A person who is or was aware of information, records, document or objects that relate to a violation of a court order;
- Victim witness advocate
- Correction officer
- Federal agent
- Investigator
- Court Reporter
- Court Interpreter
- A family member of a person described in this section

The rewrite also adds an aggravated penalty of up to 20 years in state prison where "the proceeding in which the misconduct is directed at is the investigation or prosecution of a crime punishable by life imprisonment or the parole of a person convicted of a crime punishable by life imprisonment." (Act § 155).

Finally, all offenses defined in G.L. c. 268, § 13B are now within the jurisdiction of the District Court and Boston Municipal Court, correcting this jurisdictional limitation identified in *Commonwealth v. Muckle*, 478 Mass. 1001, 1002-1003 (2017). G.L. c. 218, § 26, as amended by Act § 109.

B. Reckless Operation of a Motor Vehicle Causing Death (G.L. c. 90, § 24G(c). Reckless operation of a motor vehicle causing death has been removed from the misdemeanor branch of the motor vehicle homicide statute and is now a felony. The potential penalty in the house of correction remains the same of up to 2½ years, but there is no longer a 30 day minimum mandatory. Additionally, there is a state prison alternative of up to 5 years. (Act § 37).

C. Operating under the Influence, Subsequent Offenses (G.L. c. 90, § 24) – increased penalties. Increased penalties have been added for operation of a motor vehicle while under the influence of alcohol for 5th, 6th, 7th, 8th, and 9th offenses. With these enhanced penalties, the District Court retains jurisdiction up to an OUI-6th offense, but not OUI-7th or subsequent offenses. (Act § 33).

Offense	Penalty
OUI – 5th and 6th offenses	Not less than 2½ years in a house of correction or state prison nor more than 5 years in state prison and a fine of not less than $2,000 nor more than $50,000
OUI – 7th and 8th offenses	Not less than 3½ years nor more than 8 years in state prison and fine of not less than $2,000 nor more than $50,000
OUI –9th offense	Not less than 4½ years nor more than 10 years in state prison and fine of not less than $2,000 nor more than $50,000

D. Under the Influence Crimes – replacement of "vapors of glue" language. The offenses listed below, which make it a crime in certain circumstances to be under the influence of "vapors of glue," have been amended to replace that language with "smelling or inhaling the fumes of any substance having the property or releasing toxic vapors as defined in section 18 of chapter 270." This amendment is in response to *Commonwealth v. Sousa*, in which the Appeals Court vacated the defendant's conviction of operating under the influence of drugs where the evidence was that he had driven after inhaling an aerosol spray canister containing computer cleaner. 88 Mass. App. Ct. 47, 47-48 (2015). (Act §§ 28-30, 32, 34, 37, 38, 40-44,157). With this amendment, smelling or inhaling "the fumes of any substance having the property of releasing toxic vapors, for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system, " G.L. c. 270, § 18, is now incorporated into the following statutes:

G.L. c.90, § 24 G.L. c.90, § 24G G.L. c.90, § 24L	OUI-Drugs Motor Vehicle Homicide OUI with Serious Injury
G.L. c.90B, § 8 G.L. c.90B, § 8A G.L. c.90B, § 8B G.L. c.90B, § 26A	OUI Boat OUI Boat with Serious Injury Homicide by Boat OUI Snowmobile
G.L. c.269, § 10H	Carrying Loaded Firearm While Under the Influence

E. Drug Crimes.

i. School Zone Enhancement (G.L. c. 94C, § 32J). The school zone statute has been rewritten to require that, in addition to committing a drug offense within 300 feet of a school between 5 a.m. and midnight or within 100 feet of a public park, the Commonwealth must also has to prove that the offender:

- used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or dangerous weapon or induced another to do so during the offense; or
- directed another person to commit a felony drug offense; or
- the offense consisted of unlawfully manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute, dispense, or cultivate a controlled substance to minors in violation of G.L c. 94C, § 32F, or induced a minor to distribute or sell a controlled substance in violation of G.L. c. 94C, § 32K.

(Act § 57).

ii. Certain Mandatory Minimum Sentences Eliminated. The mandatory minimum sentences to the house of correction and state prison have been eliminated for convictions of unlawful manufacture, distribution, dispensing or possessing with intent to manufacture, distribute dispense, or cultivate the following controlled substances, including subsequent offenses:

G.L. c.94C, §§ 32A(b), (c), & (d)	Class B substances
G.L. c.94C, § 32B(b)	Class C substances
G.L. c.94C, § 32C(b)	Class D substances
G.L. c. 94C, § 32I	Selling, possessing, purchasing with intent to sell, or manufacturing with intent to sell drug paraphernalia to a person over the age of eighteen years of age G.L. c. 94C, § 32I. Minimum fine also eliminated.

(Act §§ 47, 48, 52-56). These sentencing changes apply to pending cases. (Act § 238, providing that these amendments "shall apply to initial convictions occurring on or after the effective date of this act").

iii. Fentanyl and Carfentanil. Fentanyl and derivatives have been reclassified as a Class A controlled substance and carfentanil has been added as a class A controlled substance. In addition, the amendments add fentanyl, derivatives, and carfentanil to the

provision of the trafficking statute, G.L. c. 94C, § 32E(c), that covers heroin, morphine, and opium. Subsection (c½), which provided an enhanced penalty for trafficking more than 10 grams of fentanyl has been amended to prohibit trafficking of 10 grams or more of any mixture that contains fentanyl or derivative of fentanyl. The penalty has also been enhanced to establish a minimum mandatory state prison sentence of no less than three and one-half years for a conviction under that section.

Additionally, a new offense of trafficking in any amount of carfentanil, including a mixture containing carfentanil or any carfentanil derivative, has been created (G.L. c. 94C, § 32E(c¾)) and makes a violation punishable by up to twenty years in state prison with a mandatory minimum sentence of no less than three and one-half years. (Act §§ 49-51).

F. Property Crimes. The threshold between a misdemeanor and felony has been increased from $250 to $1,200 for the crimes of **larceny** (G.L. c. 266, § 30), **misuse of credit cards** (G.L. c. 266, §§ 37B and 37C), **receiving stolen property** (G.L. c. 266, § 60) and **malicious or wanton destruction of property** (G.L. c. 266, § 127). The $250 threshold, however, remains the same for larceny from an elderly or disabled person. (G.L. c. 266, § 30(5)). The crime of **shoplifting** (G.L. c. 266, § 30A) has also been amended to increase the threshold amount of $100 to $250; if the retail value of the goods is less than $250, the offense can only be punished as shoplifting, not larceny under $1,200. (Act §§ 136-144, 146-148). *Note: The value of the property damaged or destroyed, which is the difference between the misdemeanor and felony charge, is determined by the loss suffered by the victim (usually the reasonable cost of repair or replacement) and not the reasonable value of the entire property or the portion thereof that is damaged. See Commonwealth v. Deberry, 441 Mass. 211, 220–222 (2004).*

The following additional amendments were made to these crimes:

- **Larceny (G.L. c. 266, § 30, amended by Act §§ 136-138)**
  - Officer can make warrantless arrest where value of property stolen is in excess of $250
  - Punishable fine increased from no more than $300 to no more than $1,500 where value of property is less than $1,200
  - Offense of stealing from the conveyance of a common carrier or a person carrying on an express business has been eliminated

- **Misuse of Credit Cards (G.L. c. 266, § 37B, amended by Act §§ 141-142)**
  - Punishable fine increased from not more than $500 to not more than $2,500

- **Fraudulent Use of Credit Cards (G.L. c. 266, § 37C, amended by Act §§ 143-144)**
  - Punishable fine increased from not more than $2,000 to $10,000

- **Receiving Stolen Property (G.L. c. 266, § 60), amended by Act §§ 146-148)**
  - Officer can make warrantless arrest where value of property stolen is in excess of $250

- Punishable fine increased from no more than $1,000 to no more than $3,000 where value of property is less than $1,200

- **Malicious or Wanton Destruction of Property (G.L. c. 266, § 127, amended by Act §§ 154)**
  - Decreases the punishable fine for wanton destruction of property valued at more than $1,200 from no more than $1,500 to no more than $1,000 (the alternative fine of three times the value of the property has been amended to three times the value of the *damage* to the property). The imprisonment alternative remains the same.
  - Increases the penalty applicable to destruction of property valued at less than $1,200 from no more than 2½ months to no more than 2½ years

Additionally, the driver's license suspension requirements upon convictions for **defacement of real or personal property** (G.L. c. 266, § 126A), **tagging** (G.L. c. 266, § 126B), and **malicious damage to a motor vehicle or trailer** (G.L. c. 266, § 28) have been eliminated. (Act §§ 134, 152-153). This repealed penalty applies only to offenses committed after April 13, 2018. *See Dotson*, 462 Mass. at 100-101.

G. Giving False Name Following Arrest (G.L. c. 268, § 34A). This statute, which previously only prohibited providing a false name or Social Security number following an arrest, has been amended to prohibit providing any false personal identification information requested following an arrest. (Act § 156).

H. Assault and Battery on a Police Officer Causing Serious Bodily Injury (G.L. c. 265, § 13D). An aggravated crime of assault and battery on a police officer causing serious bodily injury has been added to § 13D with a minimum mandatory of no less than 1 year in either the house of correction or state prison. Serious bodily injury is defined as "bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ or substantial risk of death." (Act § 128).
Note: While this provision provides for a house of correction alternative, this aggravated crime is not within the jurisdiction of the District Court where the state prison penalty is up to 10 years and this offense is not listed in G.L. c. 218, §26, the District Court jurisdictional statute.

I. Disturbing a Lawful Assembly (G.L. c. 272, § 40). This offense has been rewritten to eliminate the alternative offense of interrupting or disturbing a school, leaving only the prohibition of interrupting or disturbing "an assembly of people meeting for a lawful purpose." The rewrite also eliminates increased penalties for subsequent offenses. (Act § 159).

J. Conspiracy (G.L. c. 274, § 7). District Court now has concurrent jurisdiction over all conspiracy offenses, regardless of the crime committed. G.L. c. 218, § 26, as amended by Act § 109.

IV. IMMUNITY FROM PROSECUTION

Underage Alcohol Possession. Immunity from prosecution, pursuant to G.L. c. 138, § 34E, has been expanded to prohibit the prosecution of a person under the age of 21 for violating G.L. c. 138, § 34A (**purchasing or attempting to purchase alcohol by a minor**) or G.L. c. 138, § 34C (**possession by minor of alcohol in a motor vehicle**) if the evidence was gained as a result of someone who, in good faith, sought medical assistance for alcohol-related incapacitation. This immunity extends to the person who seeks the medical assistance, whether for themselves or another person, as well as the subject of a good faith request for medical assistance. "Alcohol-related incapacitation" is defined as "the condition of an intoxicated person who, by reason of the consumption of intoxicating liquor, is: (a) unconscious; (b) in need of medical attention; or (c) likely to suffer or cause physical harm or damage property. (Act §§ 101-102).

V. BAIL

A. Pretrial Use of Community Corrections Program. Both G.L. c. 276, §§ 58 and 58A have been amended to expressly authorize utilization of OCC pretrial in lieu of bail or as a condition of release, but only with the defendant's consent. (Act §§ 173, 175). Until the conditions of release form is amended, this should be indicated in the "other" space.[1]

B. Section 58A Dangerousness Hearing. A charge of a third or subsequent offense of operating under the influence where the prior offense was within the past ten years now qualifies as a trigger for a dangerousness hearing pursuant to G.L. c. 276, § 58A, superseding *Commonwealth v. Dayton*, 477 Mass. 224, 226 (2017) (interpreting § 58A as requiring three, not two, prior OUI convictions). (Act § 174).

C. Consideration of Defendant's Financial Resources. The requirement set forth in *Brangan v. Commonwealth*, 477 Mass. 691, 707 (2017), to take into consideration a defendant's financial resources and only set a bail higher than affordable if neither alternative nonfinancial conditions nor a bail amount the person could afford would adequate assure the defendant's appearance before the court, has now been codified in G.L. c. 276, §§ 57 and 58. (Act §§ 166-172). While the codified language is slightly different than the language in *Brangan*, there is no substantive difference. The statutes now include the following sentence:

> Except in cases where the person is determined to pose a danger to the safety of any other person or the community under section 58A, bail shall be set in an amount no higher than what would reasonably assure the appearance of the person before the court after taking into account the person's financial resources; provided,

[1] Effective January 13, 2019, the court is authorized to order, without the defendant's consent, participation in a "pretrial services program," which will be a separate track of programming from community correction programs offered under G.L. c. 211F, § 3, in lieu of bail or as a condition of release. More detail is provided below in the section addressing the "Provisions Effective Six Months and Beyond."

> however, that a higher than affordable bail may be set if neither alternative nonfinancial conditions nor a bail amount which the person could likely afford would adequately assure the person's appearance before the court.

These statutes have also been amended to require, consistent with *Brangan*, written findings explaining "why, under the relevant circumstances, neither alternative nonfinancial conditions nor a bail amount that the person can afford will reasonably assure his or her appearance before the court, and further, must explain how the bail amount was calculated after taking the person's financial resources into account and why the commonwealth's interest in bail or a financial obligation outweighs the potential adverse impact on the person, their immediate family or dependents resulting from pretrial detention." While this additional language does not take effect until July 13, 2018, this language is not substantively different from the requirement of *Brangan*, and the new "Reasons for Bail" form promulgated with this transmittal and posted on Courtyard, should be used immediately. Clerks should make an adequate supply of copies of the attached form until new forms are ordered. *Note: Consistent with the directive in Brangan, the defendant's financial resources should always be a factor when setting a cash bail; as such, box #1 should always be checked.*

VI. DECRIMINALIZATION

The decriminalization statute, G.L. c. 277, § 70C, has been amended to exclude larceny from a person as a crime that can be decriminalized. The Act also amends § 70C to no longer exclude offenses within c. 119, delivering contraband to a prisoner (G.L. c. 268, §§ 28 and 31), and compounding or concealing a felony (G.L. c. 268, § 36). The attached amended "Offenses Ineligible for Decriminalization" list has been updated to reflect these changes and will be posted on Courtyard. (Act §§ 203-205).

VII. DIVERSION (G.L. c. 276A)

Diversion by the District Court and Boston Municipal Court pursuant to G.L. c. 276A has previously not been available as there were no certified and approved programs to which to divert a defendant as required by G.L. c. 276A, §§ 1, 2 & 8. The chapter has now been amended to no longer require probation to certify and approve programs to which a defendant may be diverted. Now a defendant, if eligible, can be diverted to any program of community supervision and services including, but not limited to, medical, educational, vocational, social, substance use disorder treatment and psychological services, corrective and preventive guidance, training, performance of community service work, counseling, provision for residence in a halfway house or other suitable placement, and other rehabilitative services designed to protect the public and benefit the individual provided the court receives a recommendation from a program that he would, in light of the capacities of and guidelines governing it, benefit from participation in said program.

The amendments eliminate the age restriction for diversion pursuant to G.L. c. 276A, so an adult of any age can be diverted if otherwise eligible. To be eligible for diversion, the defendant must not have previously been convicted of a crime in any criminal court proceeding after having reached the age of 18, and cannot have any outstanding warrants, continuances, appeals or criminal cases pending in any court of the commonwealth, any other state or the United States. The crime

with which the person is charged must be one for which a term of imprisonment may be imposed and over which the District Court may exercise final jurisdiction, and may not be one of the following excluded offenses:

- Any offense in c. 265, except assault and battery pursuant to G.L. c. 265, § 13A(a)
- Any offense in c. 119 or c. 268A
- Any offense for which a penalty of incarceration greater than five years may be imposed
- Any offense for which there is a minimum term penalty of incarceration or which may not be continued without a finding or placed on file
- Any offense which is ineligible for decriminalization pursuant to G.L. c. 277, § 70C, except for assault and battery in violation of G.L. c. 265, § 13A(a). See attached "Offenses Ineligible for Decriminalization."

This broadened list of excludable offenses appears applicable to VALOR diversion for offenses that occur after the effective date of the Act, April 13, 2018. See *Commonwealth v. Morgan*, 476 Mass. 768, (construing sections 10 and 11 as part of c. 276A as a whole).

The chapter has also been amended to require the judge to consider the recommendation of any victim as defined in section 1 of chapter 258B regarding the diversion of the defendant, in addition to providing an opportunity for a recommendation by the prosecution. The recommendation, however, is not binding on the judge. See *Morgan*, 476 Mass. at 780-81 (2017) (c. 276A provides specific authority to a District Court judge to dis miss a valid complaint over the Commonwealth's objection). The statute does explicitly prohibit, however, requiring a district attorney or police department to accept an offender into a program that they operate. (Act §§ 196-201).

Note: Where diversion was available for eligible defendants age 18-22, the ability to now divert to a program that is not certified and approved by probation would not appear to require prospective application – i.e., it may be available for pending cases where the defendant is between the ages of 18-22, and the amended list of excluded offenses would not be applicable – eligibility would be determined by the eligibility applicable at the time of the offense. However, defendants 22 years of age and older that were not previously eligible would only be eligible where the offense was committed after April 13, 2018. See Commonwealth v. Dotson, 462 Mass. 96, 99-100 (2012) (reduced punishment from incarceration to fine for first offense of disorderly conduct did not apply to offense committed prior to the effective date of the Act).

Note, further: supervision by the probation service is not available for pre-arraignment diversion; if post-arraignment diversion (e.g., pretrial probation conditions or conditions of release), the probation service can be utilized.

VIII. RESTORATIVE JUSTICE (G.L. c. 276B)

A new chapter has been added, G.L. c. 276B, providing for the diversion of a defendant to a community-based restorative justice program pre-arraignment or at any stage of a case with the consent of the defendant, district attorney and the victim. Restorative justice is a voluntary process by which offenders, victims and members of the community collectively identify and address

harms, needs and obligations resulting from an offense, in order to understand the impact of that offense. The offender is required to accept responsibility for his or her actions and the process supports the offender as the offender makes reparation to the victim or the community in which the harm occurred. Restorative justice is not available pre-disposition where the defendant is charged with a sexual offense as defined in G.L. c. 123A, § 1, an offense against a family or household member as defined in G.L. c. 265, § 13M, or an offense resulting in serious bodily injury or death.

Participation in a community-based justice program shall not be used as evidence or as an admission of guilt, delinquency or civil liability in current or subsequent legal proceedings against any participant. Any statement made during the course of an assignment to a community-based restorative justice program shall be confidential and shall not be subject to disclosure to any judicial or administrative proceeding and no information obtained during the course of such assignment shall be used in any stage of a criminal investigation or prosecution or civil or administrative proceeding; provided, however, that any evidence obtained through an independent source or that would have been inevitably discovered by lawful means is not precluded from being admitted at such proceedings. (Act § 202).

IX. PROBATION CONDITIONS / VIOLATIONS

A. Probation Fees. The court shall not assess the monthly probation fee (supervised or administrative) for the first six months of probation after release from prison or a house of correction. Thereafter, the fees shall be imposed unless waived by the court. (See "Waiver of Fees"). If waived, community service is no longer required; rather, a judge *may* require the defendant to perform community service. Additionally the amount of community service that can be ordered has been reduced to no more than 4 hours per month, for both supervised and administrative probation. (Act § 181). The attached "Assessment or Waiver of Moneys in Criminal Case" form has been updated to reflect this change. Note: Parole fees are also eliminated for a defendant's first year on parole. (Act §§ 210 & 212).

B. Permitted Use of Prescribed Drugs. No person placed on probation shall be found to have violated a condition of probation: (i) solely on the basis of possession or use of a controlled substance that has been lawfully dispensed pursuant to a valid prescription to that person by a health professional registered to prescribe a controlled substance pursuant to chapter 94C and acting within the lawful scope of the health professional's practice; or (ii) solely on the basis of possession or use of medical marijuana obtained in compliance with and in quantities consistent with applicable state regulations if that person received a written certification from a healthcare professional for the use of medical marijuana to treat a debilitating medical condition and the person possesses a valid medical marijuana registration card and if the quantity in the person's possession is not greater than the amount recommended in the healthcare professional's written certification. (Act § 180).

C. Drug possession when seeking medical assistance. Immunity from prosecution pursuant to G.L. c. 94C, § 34A for possession of a controlled substance, where the evidence was a result of seeking medical assistance, has been extended to prohibit finding a person in violation

of a condition of probation or pre-trial release where the violation is connected to that person seeking medical assistance for a drug related overdose, either for themselves or others. (Act §§ 58 &59).
Note: This would not preclude amending conditions of probation based on a material change of circumstances. The Probation Service will be issuing an advisory to probation officers noting this distinction.

X. FINES AND FEES

A. Notification to Defendants. When a person is sentenced to pay a fine of any amount or is assessed fines, fees, costs, civil penalties or other expenses at disposition of a case, "the court shall inform that person that: (i) nonpayment of the fines, fees, costs, civil penalties or expenses may result in commitment to a correctional facility; (ii) payment must be made by a date certain; (iii) failure to appear at such date certain or failure to make the payment may result in the issuance of a default; and (iv) if an inability to pay exists as the result of a change in financial circumstances or for any other reason, the person has a right to address the court if the person alleges that such assessed fines, fees, costs, civil penalties or other expenses would cause a substantial financial hardship to the person, the person's immediate family or the person's dependents." G.L. c. 279, § 1, as amended by Act § 206.

The Administrative Office of the District Court is working on a form to meet this responsibility.

B. Uniform Fee Waiver Standard. The many fee waiver standards have been replaced with a uniform standard of authorizing waiver upon a finding of "substantial financial hardship to the individual, the individual's immediate family or the individual's dependents." (Act §§ 35, 36, 105, 112, 129, 133, 135, 149-151, 158, 163-165, 181-182, 184, 208-209, 211, 213). The attached updated "Assessment or Waiver of Moneys in Criminal Case" form reflects the changed waiver standard language and will be posted on Courtyard. *Note: the amendments to the fee waiver standard do not change the fees that may not be waived; in particular, the OUI Victim Assessment and OUI Head Injury Assessment or Operating to Endanger Head Injury Assessment remain unwaivable. If payment, however, would cause a substantial financial hardship to the person or the person's immediate family or dependents, imprisonment for failure to pay to earn credit is not available, see G.L. c. 127, § 145, as amended by Act § 100, and probation cannot be extended due solely to an inability to pay, see Commonwealth v. Henry, 475 Mass. 117, 124 (2016). Similarly, SJC Rule 3:10, § 11, expressly prohibits incarceration for the failure to pay an indigent counsel fee or contribution fee (or as a basis to withhold or revoke appointed counsel).*

C. Committed Time for Unpaid Money. Before committing a defendant solely for non-payment of money pursuant to G.L. c. 127, § 145, the judge must hold a hearing at which the defendant has the right to be represented by counsel (and, if indigent, no counsel fee shall be assessed), to consider the person's employment status, income, financial resources, living expenses, number of dependents, and any special circumstances that may affect a person's ability to pay. If the defendant establishes, by a preponderance of the evidence, an inability to pay the fine without causing substantial financial hardship to the person or their immediate family or

dependents, the judge is prohibited from committing the person. The court may instead impose an alternative to the fine "including, without limitation, community service." (Act § 100). If the defendant is committed, the credit a defendant receives pursuant to G.L. c. 127, § 144, has been increased from $30 per day to $90 per day. (Act § 99).

XI. PARENT TESTIMONIAL DISQUALIFICATION

The child/parent disqualification in G.L. c. 233, § 20 has been extended to disqualify a parent from testifying against his or her minor child in a proceeding before an inquest, grand jury, trial of an indictment or complaint, or any other criminal delinquency or youthful offender proceeding unless the victim of the proceeding is a family member and resides in the household. A parent is also disqualified from testifying to any communication with the minor child for the purpose of seeking advice regarding the child's legal rights, even if the victim is a family member who resides in the household. "Parent" is defined as a biological or adoptive parent, stepparent, legal guardian or other person who has the right to act in loco parentis for the child. (Act § 111). This expanded definition of parent also applies to the child disqualification. By the express terms of the Act, these broadened disqualifications apply to offenses committed after April 13, 2018. (Act § 237).

Provisions Effective in 90 Days (eff. July 13, 2018)

I. DRUG REHABILITATION (G.L. c. 111E)

Chapter 111E has been amended to no longer require an examination and report from a psychiatrist or physician to determine whether a defendant is a drug dependent person who could benefit from treatment. Now the examination and report are to be done by an "addiction specialist," defined as "a licensed physician who specializes in the practice of psychiatry or addiction medicine, licensed psychologist, a licensed independent social worker, licensed mental health counselor, licensed psychiatric clinical nurse specialist, licensed alcohol and drug counselor I, as defined in section 1 of chapter 111J, or any other professional considered qualified by the department to evaluate whether an individual is a drug dependent person." (Act §§ 62-71). *Note: Effective December 31, 2018, all inmates committed for a term of 30 days imprisonment or more shall be examined for substance use disorder by a qualified addiction specialist. (Act § 89).*

II. SENTENCING PRIMARY CARETAKER OF DEPENDENT CHILD

Unless a sentence is required by law, a defendant may request consideration of the defendant's status as a primary caretaker of a dependent child before imposing a sentence of incarceration. A primary caretaker is defined as a parent with whom a child under the age of 18 has a primary residence. Such request must be made within 10 days after the entry of judgment by means of a motion supported by an affidavit. If such motion is filed, the court must make written findings concerning the defendant's status as a primary caretaker of a dependent child and alternatives to incarceration. If such a motion has been filed, the court shall not impose a sentence of incarceration without first making such written findings. (Act § 207).

III. DRIVER'S LICENSE CONSEQUENCES

There will no longer be a license suspension imposed upon the issuance of a default warrant or an arrest warrant. (Act § 31).

IV. VICTIMS OF HUMAN TRAFFICKING

The affirmative defense available to victims of human trafficking for certain crimes has been extended to the crime of resorting to a restaurant or tavern for an immoral purpose (G.L. c. 272, § 26). (Act § 131).

Additionally, a new section (§ 59) was added to c. 265 that permits a victim of human trafficking to move to vacate a conviction for resorting to a restaurant or tavern for an immoral purpose, in violation of G.L. c. 272, § 26; common night or street walking or other offense set out in G.L. c. 272, § 53(a); engaging in, or agreeing to engage in, or offering to engage in, sexual conduct for a fee, in violation of G.L. c. 272, § 53A(a); or simple possession of a controlled substance in violation of G.L. c. 94C, § 34. (Act § 132).

Additional guidance on the procedure for the filing and hearing of such a motion will be provided shortly before this provision becomes effective.

Provisions Effective Six Months and Beyond (as noted)

I. SEALING (eff. Oct. 14, 2018)

The amount of time in which an adult must wait before requesting that the Commissioner of Probation seal a record was reduced from 10 to 7 years for a felony and from 5 to 3 years for a misdemeanor. Additionally, an adult may now move to seal a conviction for resisting arrest. (Act §§ 186-194).

II. EXPUNGEMENT (eff. Oct. 14, 2018)

The legislation creates a new statutory regime, set forth in new sections 100E-100U of c. 276, for the expungement of records, including all court records apart from unidentifiable information kept for evaluative and statistical purposes. Expungement is defined as "the permanent erasure or destruction of a record so that the record is no longer accessible to, or maintained by the court, any criminal justice agencies or any other state agency, municipal agency or county agency." If the Commissioner of Probation determines that the record is eligible for expungement, a judge will then determine whether to expunge the record in the interests of justice.

To qualify for expungement:

- the offense for which the record was created must have occurred prior to the petitioner's twenty-first birthday.

- The offense must be one that qualifies for expungement; the new law includes twenty categories of offenses which do not qualify (e.g., any offense resulting in death or serious bodily injury, any offense committed while armed with a dangerous weapon, any offense in violation of G.L. c. 90, § 24, any sexual offense as defined in G.L. c. 123A, § 1, to list a few).

- If the offense is a felony, the offense must have occurred not less than 7 years before the date on which the petition was filed; if the offense is a misdemeanor, the offense must have occurred not less than 3 years before the date on which the petition was filed.

- The petitioner must not have any other criminal or juvenile court appearances or dispositions on file (other than motor vehicle offenses in which the penalty does not exceed a fine of $50).

Additionally, the new law permits the expungement of a record that was created as a result of fraud or specifically defined errors. (Act § 195).

The expungement protocols will be fully detailed in a transmittal shortly before this provision becomes effective.

III. EMPLOYER ACCESS TO CRIMINAL RECORDS (eff. Oct. 14, 2018)

The time period for which an employer can request information regarding a person's conviction of a misdemeanor has been decreased from five years to three years prior to the date of an application for employment. Employers are also prohibited from requesting information regarding sealed or expunged records. G.L. c. 151B, § 4, as amended by Act §§ 103-104).

IV. PRETRIAL SERVICES PROGRAM (eff. Jan. 13, 2019)

Participation in a pretrial services program may be ordered by the court, in lieu of bail or as a condition of release consistent with G.L. c. 276, §§ 57, 58 and 58A. The court may dictate the duration and conditions of the pretrial services program. Any conditions should be imposed to ensure return of the defendant to court or, where permitted by law, to assure the safety of any person or the community. These pretrial service programs can also be utilized pursuant to G.L. c. 276, § 87, with the defendant's consent.

The CSG Act also authorizes a sheriff having custody of a defendant held on bail pursuant to G.L. c. 276, §§ 57 or 58 to determine if the defendant may benefit from entering a pretrial services program and provide a written recommendation of such determination to the court, the commissioner of probation, the prosecutor, the defendant, and the defendant's attorney. The court, in its discretion, may set the matter for a hearing and either decline to modify its earlier bail order or make an order authorizing the defendant's participation in a pretrial services program, but such order must be with the defendant's consent. G.L. c. 211F, § 1, amended by CSG Act § 12.

Victim notification, pursuant to G.L. c. 258B, § 3(t), is required when a defendant is placed in a pretrial services program. (CSG Act § 12).

More information about the availability of and parameters of these pretrial services program will be provided closer to the effective date of this provision.

V. PROBATION COMPLIANCE CREDITS (eff. Jan. 13, 2019)

Eligible offenders can earn probation compliance credits that operate to reduce the length of post-disposition probation supervision. An "eligible offender" is defined as "an offender whose sentence includes incarceration followed by a term of probation supervision who has been released to probation after serving the incarcerated portion of the sentence, excluding any person who is under post-disposition supervision for a sex offense as defined in section 178C of chapter 6." G.L. c. 276, § 87B, inserted by CSG § 15. Eligible offenders shall begin to accrue compliance credits following one year of supervision on probation; thereafter, up to the completion of two years of supervision on probation, an eligible offender shall earn 5 days of compliance credit on the first day of each month if the offender was in compliance for the prior calendar month. After two years of supervision, an eligible offender shall earn 10 days of compliance credit on the first day of each month if the eligible offender was in compliance for the prior calendar month.

Compliance credits will not accrue for any month in which a violation of probation is pending; if, after a probation violation hearing, no violation is found, compliance credits shall be awarded retroactively. If the court finds a violation, then no credits shall be awarded for the time in which the violation was pending, and the court may revoke any earned credits. If the court places the offender in a correctional institution upon revocation, any prior compliance credits previously earned shall be revoked.

At sentencing, the court shall notify an eligible offender that compliance with post-disposition supervision conditions shall result in earning compliance credits. (CSG Act § 15).

VI. DNA COLLECTION UPON FELONY CONVICTION (eff. Apr. 13, 2019)

Section 3 of chapter 22E has been rewritten to replace the requirement that a defendant provide a DNA sample within one year of being convicted of a felony, and instead requires a defendant to submit a sample "as a condition of probation forthwith upon conviction or, if sentenced to a term of imprisonment, the DNA sample shall be collected within 10 days of intake" and a defendant shall not be released from a correctional facility until a DNA sample has been collected. (Act § 19). This change will apply to convictions entered on or after a date one year after the effective date of the Act. (Act §§ 234-235). A probation officer will now have the authority to take the sample and the sample can be submitted to either the department of correction or the commissioner of probation. (Act §§ 20-22). Failure to submit a DNA sample remains punishable for up to six months in the house of correction, but the fine alternative will be increased from no more than $1,000 to no more than $2,000, and punishment will no longer depend on

written notice of the requirement to submit a sample, just notice and a finding of "willfully" failing to provide. (Act § 23).

VII. OFFENSE BASED TRACKING NUMBER (eff. July 1, 2019)

Applications for complaints against persons arrested for felonies are to be accompanied by an offense based tracking number (OBTN) and fingerprint-based state identification number. Electronic communication must also be established to communicate with the state police all criminal disposition information, including sealing and expungement orders and dismissals with OBTN and fingerprint-based state ID numbers to the extent such numbers were assigned. (Act §§ 106, 108, 110).

Other Provisions of Interest

- **Counsel fee (eff. Apr. 13, 2018).** The counsel fee for persons under the age of 18 has been eliminated. (Act § 107).

- **CORI definition (eff. Apr. 13, 2018).** The definition of "criminal offense record information" has been amended to be restricted to "information recorded in criminal proceedings that are not dismissed before arraignment," and to include findings of not guilty by reason of insanity. (Act §§ 3, 6).

- **58A detention in Superior Court (Apr. 13, 2018).** Detention pursuant to G.L. c. 276, § 58A has been increased from 120 days to 180 days where detained by the Superior Court. The detention period of 120 days remains the same for District Court. (Act § 176).

- **Forensic Science Oversight Board (eff. April 13, 2018).** Establishes a forensic science oversight board in the executive office of public safety and security to oversee all commonwealth facilities engaged in forensic services in criminal investigations. The board is required to comprehensively review and audit all facilities and practices being utilized for criminal forensic analysis in the Commonwealth and the operation and management of the Massachusetts state police crime laboratories. The board shall initiate an investigation into any forensic science, technique or analysis used in a criminal matter upon certain qualifying circumstances and shall report the results of its investigation to EOPSS, the Legislature, the Supreme Judicial Court, MDAA, the AG, CPCS, the Massachusetts Association of Criminal Defense Lawyers and the New England Innocence Project. Among other duties, the board is also to develop protocols to ensure proper chain of custody of evidence. (Act § 9).

- **Special Commissions (eff. Apr. 13, 2018)**
    - **Bail Reform.** There shall be a bail reform special commission, consisting of 19 members, to include the chief justice of the supreme judicial court or designee, chief justice of the superior court or designee, chief justice of the district court or designee and chief justice of the Boston municipal court, to evaluate policies and procedures related to the current bail system and recommend improvement or

changes. The commission shall submit a report to by June 30, 2019, which shall include an evaluation of the potential to use risk assessment factors for bail decision; an evaluation on eliminating cash bail, an evaluation of the setting of conditions on defendants who are released, an evaluation of any disparate impact on defendants because of gender, race, gender identity or other protected class, and proposed statutory changes concerning the pretrial system. (Act § 220).

- **Juvenile Court jurisdiction.** There shall be a task force to examine and study the treatment and impact of individuals 18-24 in the court system and correctional system. The task force shall consist of 20 members, including the chief justice of the district court or designee, chief justice of the Boston municipal court or designee, and chief justice of the juvenile court or designee. The task force shall evaluate the feasibility and impact of changing the age of juvenile court jurisdiction to defendants younger than 21 year of age. The task force shall also consider the advisability and feasibility of establishing a separate young adult court for persons age 18-24. (Act § 221).
- **Restoration center commission in Middlesex.** There shall be a restoration center commission that shall develop and implement a 3 year plan to build a restoration center plan in Middlesex to divert persons from suffering from mental illness or substance use disorder who interact with law enforcement or the court system during a pre-arrest investigation or the pre-adjudication process from lock-up facilities and hospital emergency departments to appropriate treatment. (Act § 225).

- **Bias-free policing training (eff. July 13, 2018).** The municipal police training commission, in consultation with the executive office of public safety and security shall establish and develop an in-service training program related to bias-free policing, practices and techniques to emphasize de-escalation and disengagement tactics and techniques, responding to mental health emergencies, and interacting with persons with a mental illness or developmental disability. (Act § 2).

- **Data collection and reporting standards (eff. July 13, 2018)**. The secretary of public safety shall establish data collection and reporting standards for the trial court relative to recidivism rates and race and ethnicity data. (Act § 10). There shall also be an inter-branch, interagency oversight board (which includes as a member the Chief Justice of the Trial Court) to monitor and ensure that the justice reinvestment policies relative to data collection and its availability to the public achieve anticipated goals. (Act § 13).

- **Information to defendants regarding public access to criminal record information (eff. July 13, 2018).** The secretary of public safety is to create a uniform booklet of informational material to be distributed to persons committed to the department of correction upon their release that contains a summary of who can access criminal offender record information, how to file a complaint with the Department of Criminal Justice Information Services about handling of information, a step by step explanation of the sealing process, and a list of answers to frequently asked questions about criminal offender record information. (Act § 10).

- **Diversion by district attorneys (eff. July 13, 2018).** The district attorneys are required to establish "a pre-arraignment diversion program which may be used to divert a veteran or person who is in active service in the armed forces, a person with a substance use disorder or a person with mental illness if such veteran or person is charged with an offense or offenses against the commonwealth." (Act § 16). *Note: that diversion pursuant to G.L. c. 276A does not permit a court to order diversion into a program run by the police or district attorney.*

- **Delinquent child (eff. July 13, 2018).** The age of a child who can be found delinquent has been increased from 7 to 12. (Act §§ 72-74, 77-79). The juvenile court has the authority "to divert from further court processing" a child who is subject of a complaint to a program as defined by G.L. c. 276A, § 1. (Act § 75).

- **Pretrial service initiative (eff. July 13, 2018).** A new "pretrial service initiative" will be instituted in the office of probation, the duties of which will be to develop, in coordination with the court and other criminal justice agencies, programs to minimize unnecessary pretrial detention and provide notifications and reminders to defendants of court appearance obligations to reduce the risk of accidental defaults. (Act § 185).

- **Inmate Programming (eff. Oct. 14, 2018).** There shall be at least one educational program leading to a high school equivalency certificate made available to persons committed for not less than six months who have not obtained a high school degree or equivalency. (Act § 95).

- **Employer access to criminal records (eff. Oct. 14, 2018).** The time period for which an employer can request information regarding a person's conviction of a misdemeanor has been decreased from five years prior to the date of an application for employment to three years. Employers are also prohibited from requesting information regarding sealed or expunged records. G.L. c. 151B, § 4, as amended by Act § 103-104.

- **Good time credits on state prison sentences (eff. Jan. 13, 2019).** The good time credit for state prison sentences has been increased to 7.5 days per program per month, not to exceed a maximum monthly total of 15 days, and allows credit to be applied to minimum mandatory sentences for certain drug crimes. The minimum mandatory sentence imposed for a school zone violation, G.L. c. 94C, § 32J, the only drug conviction for which the District Court has jurisdiction to sentence to a minimum mandatory sentence, is not one of the drug crimes that can be reduced. G.L. c. 127, § 129D, as amended by CSG Act § 5. The CSG Act also provides a "supervision to release date," calculated by the maximum terms of the sentence imposed, which requires mandatory release from a state prison sentence to parole. G.L. c. 127, § 130B, inserted by CSG