

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT FOR  
THE COMMONWEALTH

SUFFOLK, ss.

NO. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES &  
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,  
Petitioners

v.

CHIEF JUSTICE OF THE TRIAL COURT,  
Respondent

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**SUPPLEMENTAL OPPOSITION TO THE PETITIONERS' G.L. c. 211, §3 PETITION  
BY THE DISTRICT ATTORNEYS FOR THE BRISTOL, CAPE & ISLANDS, ESSEX,  
HAMPDEN, MIDDLE, NORFOLK, & PLYMOUTH DISTRICTS**

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On March 27, 2020, the District Attorneys for the Bristol, Cape and Islands, Essex, Hampden, Middle, Norfolk, and Plymouth Districts [seven district attorneys], filed an **OPPOSITION TO THE PETITIONERS' G.L. c. 211, §3 PETITION BY THE DISTRICT ATTORNEYS FOR THE BRISTOL, CAPE & ISLANDS, ESSEX, HAMPDEN, MIDDLE, NORFOLK, & PLYMOUTH DISTRICTS** [opposition memorandum]. Additional legal authority to support its opposition memorandum, Argument C at 12-19, is found below:

**Argument**

On March 10, 2020, the governor declared a State of Emergency in the Commonwealth of Massachusetts to respond to COVID-19. Executive Order No. 591. In so doing, the governor invoked the powers provided to him by Chapter 639 of the Acts of 1950 and G.L. c. 17, §2A. Executive Order No. 591, paragraph 13. In 1950, in an act “relative to pandemic and disaster preparation and response in the Commonwealth”, session bill S2028, the legislature addressed the conditions, procedures and governmental powers that exist when a disaster impacts the

health, security and safety of the public during a declared state of emergency. More commonly known as the Civil Defense Act, the Legislature explicitly grants additional powers to the governor regarding the health and safety of all inmates in the Commonwealth. Acts of 1950, Chapter 639, section 7.

Specifically, Section 7 of the Civil Defense Act states,

*During the effective period of so much of this act as is contingent upon the declaration of a state of emergency . . . , the governor, in addition to any other authority vested in him by law, shall have and may exercise any and all authority over persons and property necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces, there of . . . , the Governor shall have and may exercise such authority relative to any or all of the following: - - - a. Health or Safety of inmates of all institutions. (emphasis added).*

In his declaration of a state of emergency on March 10<sup>th</sup>, the Governor invoked the powers of Section 7 and declared that he would “from time to time issue recommendations, directives, and orders as circumstances may require.” Executive Order No. 591, paragraph 13.<sup>1</sup>

Without any statutory or constitutional support, and in contravention to the Civil Defense Act, the petitioners claim that this Court, under its G.L. c. 211, §3 emergency powers, is the appropriate governmental body with which incarcerated persons, detained either pretrial or post-conviction, may address collectively, by designated category, their conditions of incarceration

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<sup>1</sup> Pursuant to G.L. c. 17, §2A, inserted by St.1965, c. 473, the governor’s emergency order also invoked the powers provided by legislature to the Commissioner of the Department of Public Health. Executive Order No. 591, paragraph 13. G.L. c. 17, §2A provides:

Upon declaration by the governor that an emergency exists which is detrimental to the public health, the commissioner may, with the approval of the governor and the public health council, during such period of emergency, take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease.

The commissioner, with the approval of the public health council, may establish procedures to be followed during such emergency to insure the continuation of essential public health services and the enforcement of the same.

during the COVID-19 pandemic. It is not. The legislature explicitly vested such authority in the executive, not judicial, governmental branch. The petitioners' claims rest solely on the issue of whether, and in some cases where, they should be detained during the COVID-19 pandemic, not whether there is an illegality in the imposition of their individual detention orders. *Contrast Diatchenko v. District Atty. For the Suffolk Dist.*, 466 Mass. 655, 673 (2013), S.C. 471 Mass. 12 (2015)(incarcerated defendant claimed error in imposition of life without parole sentence for first-degree murder due to his status as a juvenile when it was imposed); *Commonwealth v. Perez*, 477 Mass. 677, 688 (2017), S.C. 480 Mass. 562 (2018)(incarcerated defendant claimed error in the imposition of aggregate state prison sentences for non-homicide offenses that exceeded *Diatchenko* limits); *Commonwealth v. Latraprasad*, 475 Mass. 692, 701 (2016) (departure from imposition of minimum mandatory sentences was not valid until the sentencing guidelines recommended by the sentencing commission are enacted by the Legislature). The Legislature, who has the statutory and constitutional powers to decide issues relative to the execution of detention orders outside a state of emergency, has transferred that power to the executive branch when the citizens of this Commonwealth are in a declared state of emergency.

The petitioners' requested relief from this Court violates the separation of powers. Massachusetts Declaration of Rights art. 30. The petition must be dismissed.

### **Conclusion**

For the foregoing reasons, and those stated in its previously filed opposition memorandum, the seven district attorneys will continue to represent the Commonwealth at any individualized hearing of an aggrieved incarcerated person or probationer pursuant to the established Rules of Criminal and Appellate Procedure during this COVID-19 pandemic, but respectfully suggest the petition must be dismissed.

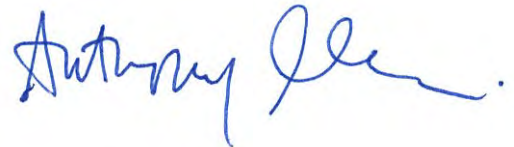
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March 30, 2020

**CERTIFICATE OF SERVICE**

I hereby certify, under the pains and penalties of perjury, that I today served the within supplemental memorandum electronically to all parties on the following list:

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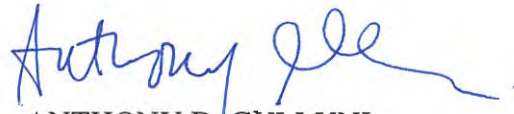
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