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March 30, 2020

Francis V. Kenneally, Clerk
Massachusetts Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square, Suite 1-400
Boston, MA 02108-1724

Re: CPCS et al v. Chief Justice of the Trial Court & others, SJC-12926;
Amicus Letter in Support of Petitioners

Dear Mr. Kenneally:

Mr. Jose Rivera is detained under G. L. c. 276, § 58A on grounds of "dangerousness." People held under § 58A or charged with a violent crime -- especially those over sixty who have a serious medical condition -- should not be exempt from any relief this Court affords to the Petitioners. The Court should grant the Petitioners' requested relief and expand the class of those afforded relief to *all* pretrial detainees. The COVID-19 virus does not discriminate on the basis of crime charged, and neither do our State or Federal Constitutions. With one "carefully limited exception" discussed below, there is no constitutional basis to continue pretrial detention. United States v. Salerno, 481 U.S. 739, 755 (1987).

The 8th and 14th Amendments limit the state's power to incarcerate an innocent person based on a prediction that they will commit a future crime. Id. at 750, 754-755. To justify detention on grounds of dangerousness:

> "In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."

Id. at 750 (emphasis added). The "proposed conditions of...detention [can]not be 'excessive' in light of the perceived evil." Id. at 754, citing 8th Amendment. No one detained under § 58A has had that full-blown adversary hearing. The COVID-19 outbreak radically changes the individualized assessment each detainee is constitutionally entitled to. Few if any judges who granted a §

58A motion, before today, factored "exposure to deadly virus" into the careful factual analysis required under § 58A. No full-blown adversary hearing has been held wherein the Commonwealth had the burden to prove by clear and convincing evidence that a defendant's forced exposure to COVID-19 is not "excessive" when balanced against the Commonwealth's alleged safety concerns. Likewise, no judge's assessment of public safety under § 58A has likely included an assessment of the risk posed to the community – to healthcare workers, correctional staff, and inmates' loved ones -- by the innocent person's detention in conditions over which they have no control. That risk is rising daily.

As this Court recently recognized in In Re Matter of a Minor, (SJC-12747, March 17, 2020), factual findings that satisfy a statutorily based deprivation of liberty do not ipso facto satisfy due process. *Slip opinion* at 21. This is true now under § 58A. Regardless of why an individual is held, forced exposure or potential exposure to COVID-19 cannot be justified under the 8th or 14th Amendments absent a full-blown adversarial hearing that takes into account today's radically different factual landscape, and the defendant's potential deprivation, not just of liberty, but of life.

The danger to public safety posed by the release of pretrial detainees has been grossly overstated by Petitioners' opponents. Depriving someone of liberty based on a prediction they will commit a future crime is, scientifically, best described as a guess.[1] Petitioners' opponents cite no empirical data to support their prediction that an entire class of detainees – such as those charged under Chapter 265 - will commit future crimes if released. A prosecutor's decision to seek detention based on her prediction of future dangerousness is subjective; it cannot be objectively extracted from other incentives that motivate her decision making. Pretrial detention impairs defendants' ability to aid in their defense during the investigation phase. It prevents prompt, easy access to defense counsel. It provides the Commonwealth with access to a trove of investigative material otherwise unavailable, such as recorded phone calls and jailhouse informants. All of this gives the Commonwealth a significant and unfair litigation advantage. Pretrial detention may also chill the exercise of a defendant's right to testify, or otherwise impact defense strategy because, through cross-examination, a skilled prosecutor can use an innocuous remark to make damaging

[1] See Barefoot v. Estelle, 463 U.S. 880, 920 (1983)(Blackmun, J., in dissent) ("the unanimous conclusion of professionals in this field [is] that psychiatric predictions of long-term future violence are wrong more often than they are right."); Note: Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing, 131 HARV. L. REV. 1125, 1131-1133 (February 9, 2018)(discussing limitations of empirically based risk assessment tools used to predict future dangerousness).

insinuations. Cf. Commonwealth v. McGann, (SJC-12742, March 17, 2020), *slip opinion* at 16-20. The consequences of detention can be devastating to defendants and their loved ones, thereby encouraging pleas by innocent or overcharged defendants. Protecting the accused from this power imbalance lies at the core of the constitutional prohibition against pretrial detention. See Salerno, 481 U.S. at 767 (Marshall, J. in dissent).

Furthermore, like the inmates' lives themselves, the Sixth Amendment is not expendable during this time of crisis. Individuals charged with a crime have a right to counsel and to aid in their defense, regardless of the basis for detention. The COVID-19 outbreak has eliminated that right because defense attorneys practicing social-distancing cannot visit clients without risking the introduction of the virus into the facility. Inmates observing best practices would be wise not to regularly use a communal phone. A speculative risk posed to the community by a detainee's release does not justify the concrete, substantial burden on Sixth Amendment rights posed by the measures taken to stop the spread of COVID-19.

Consistent with recently proposed legislation,[2] this Court should grant release to all pretrial detainees, except those for whom the Commonwealth promptly requests a hearing and demonstrates, at a full-blown adversarial hearing, that the defendant poses an immediate physical threat to a specified victim which no conditions of release can alleviate; and further, that the Commonwealth's interest in alleviating the threat substantially outweighs the risk posed to the life and liberty of the defendant and the safety of the community. This remedy balances the District Attorneys' preference for a case-by-case approach with the constitutional rights retained by all detainees, and provides an opportunity for crime victims to be notified.[3]

Public safety is served by maintaining public trust in the criminal justice system. That means scrupulous adherence to constitutional rights even in a time of crisis. No statute, whether it be G. L. c. 276, § 58A or G. L. c. 258B, trumps our State and Federal Constitutions. Now is not the time to suspend constitutional rights. Our health as a community, in the aftermath of this crisis, will depend upon our shared belief in their power.

Very truly yours,

/s/ Jessica LaClair

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[2]See Bill HD.4963, "An Act Regarding Decarceration and COVID-19."
[3]Crime victims are not a monolith; not all will favor pretrial confinement.

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/s/ Nicholas Raring

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Counsel for Mr. Jose Rivera

CERTIFICATE OF SERVICE

I, Jessica LaClair, counsel for the defendant, hereby certify that on March 30, 2020, I caused the foregoing document to be served via email upon all parties of record.

/s/ Jessica LaClair

Jessica LaClair