

IN THE SUPREME COURT OF PENNSYLVANIA

In re: the Petition of the Pennsylvania
Prison Society, Brian McHale, Jeremy
Hunsicker, Christopher Aubry,
Michael Foundos, and Frederick
Leonard, on behalf of all similarly
situated individuals

Petitioners.

No. _____

**APPLICATION FOR EXTRAORDINARY RELIEF UNDER THE
COURT’S KING’S BENCH JURISDICTION**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. PETITIONERS	6
III. JURISDICTION	8
IV. FACTUAL BACKGROUND.....	9
A. In the absence of preventive measures, COVID-19 is a rapidly spreading public health crisis, resulting in serious medical conditions or death for large numbers of high-risk individuals.....	9
B. The key measures to prevent spread of COVID-19 are impossible in county jails, making severe outbreaks likely in those facilities and the communities around them.	11
1. Social distancing is not possible in county jails at their current population levels.....	13
2. County jails do not have sufficient supplies for the enhanced hygiene and disinfecting necessary to prevent the spread of COVID-19.....	15
3. Proper isolation for symptomatic people is not possible in county jails.	16
4. County jails do not have the capacity to properly screen individuals entering their facilities.	16
C. Population reduction is the only way to prevent an outbreak of COVID-19 in the county jails and to prevent the death of those at highest risk.....	17
V. ARGUMENT.....	19
A. This Court has the legal authority to use its broad King’s Bench jurisdiction to order the requested relief.	19
B. Extraordinary measures in other jurisdictions demonstrate the need for population reduction in the county jails.....	22
C. This court should exercise its plenary and supervisory jurisdiction to expeditiously reduce county jail populations.	27
VI. CONCLUSION.....	32

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Bd. of Revision of Taxes v. City of Phila.</i> , 4 A.3d 610 (Pa. 2010).....	27
<i>City of Revere v. Mass. Gen. Hosp.</i> , 463 U.S. 239 (1983).....	27
<i>Commonwealth v. Chimenti</i> , 507 A.2d 79 (Pa. 1986).....	21
<i>Commonwealth v. Williams</i> , 129 A.3d 1199 (Pa. 2015).....	20, 22
<i>Helling v. McKinney</i> , 509 U.S. 25 (1993).....	27
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978).....	27
<i>In re Avellino</i> , 690 A.2d 1138 (Pa. 1997).....	22
<i>In re Bruno</i> , 101 A.3d 635.....	20, 21
<i>Natale v. Camden Cty. Corr. Facility</i> , 318 F.3d 575 (3d Cir. 2003)	27
<i>Silver v. Downs</i> , 493 Pa. 50 (1981).....	20
<i>Stander v. Kelly</i> , 250 A.2d 474 (Pa. 1969).....	20

Constitutions

42 Pa. Const. Art. V,
 § 2.....6
 § 10(a)6, 9, 19, 21

Statutes

42 Pa.C.S.A.
 § 502.....6
 § 726.....9, 19, 27
42 Pa.C.S. § 9762(b)(3)4
61 Pa.C.S.A. § 102.....1

Court Orders and Guidance

Memorandum from Donald W. Beatty, Chief Justice of South
Carolina Supreme Court, to Magistrates, Municipal Judges, and
Summary Court Staff (Mar. 16, 2020).....23
Emergency Order Vacating Warrants for Unpaid Fines, Unpaid
Restitution, Unpaid Court-Appointed Counsel Fees, and Other
Criminal Fees (Mar. 17, 2020)24
*In the Matter of the Request to Commute or Suspend County Jail
Sentences*, No. 082430 (N.J. March 22, 2020)5, 23
*In the Matter of Statewide Response by Washington State Courts to
the COVID-19 Public Health Emergency*, No. 25700-B-607
(Wash. Mar. 20, 2020),23
Letter from Mike McGrath, Chief Justice of Montana Supreme Court,
to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020)23

Other Authorities

I.A. Binswanger, et al., *Prevalence of chronic medical conditions
among jail and prison inmates in the USA compared with the
general population*, 63 *Journal of Epidemiology & Community
Health* 912–919 (2009)18

Jennifer Gonnerman, <i>How Prisons and Jails Can Respond to the Coronavirus</i> , The New Yorker (Mar. 16, 2020).....	18
Judy Harrison, <i>Maine courts vacate warrants for unpaid fines and fees</i> , Bangor Daily News (Mar. 17, 2020)	24
Kevin Hayes, <i>Lackawanna County reviews possible release of low level inmates to mitigate spread of COVID-19</i> (March 18, 2020)	26
Carina Julig, <i>Larimer County inmate in community corrections program tests positive for coronavirus</i> , The Denver Post (Mar. 22, 2020)	25
Amanda Klonsky, <i>An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues</i> , The New York Times, Mar. 12, 2020.....	1
Marie McCullough & Lisa Gartner, <i>Philadelphia-area hospitals brace for the coronavirus surge: ‘We are no more than 2 weeks behind N.Y.C.,’</i> The Philadelphia Inquirer (March 27, 2020)	12
Letter from Marilyn J. Mosby, State’s Attorney for Baltimore City, to Governor Larry Hogan (Mar. 23, 2020)	24
Scott Noll & Camryn Justice, <i>Cuyahoga County Jail releases hundreds of low-level offenders to prepare for coronavirus pandemic</i> (March 20, 2020).....	24
Governor Jared Polis, <i>Guidance to Counties Municipalities, Law Enforcement Agencies, and Detention Centers</i> at 5 (Mar. 24, 2020).....	24
Josiah Rich, et al., <i>We Must Release Prisoners to Lessen the Spread of Coronavirus</i> , The Washington Post (Mar. 17, 2020)	13
Robert Salonga, <i>Bay Area courts, authorities ramp up release of inmates to stem COVID-19 risks in jails</i> , The Mercury News (Mar. 19, 2020)	25
Elise Schmelzer, <i>Uneven response to coronavirus in Colorado courts leads to confusion, differing outcomes for defendants</i> , The Denver Post (Mar. 21, 2020)	25

Andy Sheehan, *Coronavirus In Pittsburgh: Amid Virus Pandemic, Allegheny County Jail Releases More Than 200 Inmates*, KDKA News (Mar. 20, 2020)26

U.S. Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (“CDC Guidance”) (Mar. 23, 2020)*passim*

Vera Institute, *Incarceration Trends in Pennsylvania*.....4

Verified Petition for Writ of Habeas Corpus (“NYLAS Petition”), *People ex rel. Stoughton v. Brann*, No. 260154/2020, at ¶ 3 (N.Y. Sup. Ct. Mar. 25, 2020)3, 12

Marissa Wenzke, *1,700 inmates in L.A. County released over coronavirus concerns* (Mar. 24, 2020)25

WTAE Action News, *545 inmates released from Allegheny County Jail due to coronavirus concern* (March 27, 2020).....26

I. INTRODUCTION

This petition presents an extraordinary issue of public safety: the urgent need to protect the health of all Pennsylvania residents and save lives by limiting the spread of COVID-19 among incarcerated people and staff in Pennsylvania’s county jails.¹ Leading public health officials have warned that unless courts act **now**, the “epicenter of the pandemic will be jails and prisons.”² The U.S. Centers for Disease Control and Prevention (“CDC”) has explained that correctional and detention facilities “present unique challenges for control of COVID-19 transmission among incarcerated persons, detention center staff, and visitors.”³ As Dr. Joseph Amon, Director of Global Health at Drexel University states, “County jails were not built for the needs of this kind of pandemic” and the “spread of COVID-19 within the jails will affect not only those who are being held there, but

¹ For purposes of this petition, “county jail” means “county correctional institution,” as that term is defined in 61 Pa.C.S.A. § 102.

² Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, The New York Times (Mar. 12, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.

³ U.S. Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (“CDC Guidance”) (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

also the correctional officers who work there, and the communities they go back to.” Amon Decl. ¶¶ 19, 40.⁴

Across Pennsylvania, it is not possible for county jails to implement the most critical preventive measures set forth in the CDC Guidance: social distancing, preventive hygiene, and the medical isolation of confirmed or suspected COVID-19 cases.⁵ Governor Wolf, Health Secretary Levine and this Court (in its March 16th and 18th Orders) have made efforts to enforce social distancing and limit the spread of the virus and prospective death toll. However, jails and prisons—by necessity, but in direct contravention of all public health and medical advice—force detainees and staff into tight quarters where frequent touching and unhygienic practices are the norm.⁶ County jails simply do not have the space to keep incarcerated individuals six feet apart. Pennsylvania jails routinely double- or triple-cell people, and confine large numbers together in one room, where they

⁴ Dr. Amon’s Declaration is attached as Exhibit A to this Petition (“Amon Decl.”), with his C.V. attached as Exhibit B. Dr. Amon is an internationally recognized authority on infectious disease control, clinical care, and obligations of government related to individuals in detention settings.

⁵ *See generally*, CDC Guidance; *see also* Amon Decl. ¶¶ 45-46; Declaration of Dr. Jonathan Golob at ¶ 13 (attached as Exhibit C). Dr. Golob is on the faculty of the University of Michigan School of Medicine, where he specializes in the study of spread of infection in immunocompromised patients and is actively involved in planning for the care of patients with COVID-19. *See* Ex. D.

⁶ Petitioners are submitting the declarations of several witnesses to attest to current jail conditions, including volunteers with the Petitioner Pennsylvania Prison Society (Exhibits J, K, and L) and the individual Petitioners, each of whom is currently incarcerated (Exhibits E, F, G, H, and I).

sleep arm’s length apart, eat shoulder to shoulder, and share rarely sanitized bathrooms. Nor do jails have the capacity to isolate symptomatic individuals. Many of these facilities lack adequate onsite health care services to evaluate or quarantine infected individuals in the manner dictated by infection-control guidance.

Under these conditions, once COVID-19 enters a correctional facility, it is virtually certain to spread like wildfire through the prison population, correctional staff, and into the nearby community. This is already happening in places like New York, where viral spread is a week or more ahead of Pennsylvania.⁷ This is not just a prisoners’ rights issue. Once the virus enters the jails, the regular movement of staff and visitors in and out means that prison walls and razor wire can neither slow nor stop viral spread. This impending viral explosion – imminently likely to occur in all sixty-seven counties – will directly impact all Commonwealth residents, including correctional staff, their families, and their respective communities. Failure to address the spread of the virus in jails will

⁷ In a court filing last week, the Legal Aid Society of New York noted that the virus’s exponential rate of infection in New York City jails far outpaces the national average, with Riker’s Island experiencing an infection rate *roughly 85 times* the rate in the community-at-large. Verified Petition for Writ of Habeas Corpus (“NYLAS Petition”), *People ex rel. Stoughton v. Brann*, No. 260154/2020, at ¶ 3 (N.Y. Sup. Ct. Mar. 25, 2020).

undermine the effectiveness of government-mandated measures to enforce social distancing, which now cover millions of Pennsylvanians.

Of the approximately 37,000 people currently detained in Pennsylvania's county jails, more than half are in pre-trial status, and therefore presumed innocent.⁸ Many are held on probation detainers due to technical violations or minor offenses, cannot afford modest bail, or have been deemed eligible for work release by a judge. Of the people serving a jail sentence in a Pennsylvania county jail—which, by law, includes only those individuals sentenced to a maximum term of two years or less, 42 Pa.C.S. § 9762(b)(3)—many have already completed their minimum terms of incarceration or are mere weeks away from doing so.

In light of the looming public health catastrophe, keeping such persons imprisoned where they face unnecessary health risks is inhumane and violates their rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections One, Thirteen, and Fourteen of the Pennsylvania Constitution. Indeed, for some individuals who are older or suffer from pre-existing medical problems, continued detention may literally be consigning them to a death sentence.

⁸ Vera Institute, *Incarceration Trends in Pennsylvania*, www.vera.org/downloads/pdfdownloads/state-incarceration-trends-pennsylvania.pdf (noting that, as of 2015, people held pretrial constituted 62% of the total jail population in Pennsylvania).

This Court, recognizing the public health threat presented by COVID-19 and acknowledging the need to “restrict person-to-person contact,” issued emergency orders on March 16th and 18th closing Pennsylvania Courts to the public. Public health imperatives require that this Court take far more dramatic steps. Indeed, for this same reason, courts in many other jurisdictions around the country have recognized that the public health emergency compels evaluation and release of significant numbers of people who pose little threat to public safety and will be endangered by continued imprisonment. Most notably, last week, in response to the “dangers posed by the Coronavirus,” the New Jersey Supreme Court ordered the presumptive release of all people currently serving a county jail sentence, an order likely to result in the release of more than 1,000 people. *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Consent Order, (N.J. No. 084230 March 22, 2020). New Jersey is not alone; jurist in the highest courts of Washington, South Carolina, Maine, and Montana have all taken similar measures.

This Court has the legal authority to follow the precedent set by New Jersey and these other jurisdictions. Justice demands no less. While a limited number of counties in the Commonwealth have adopted incremental case-by-case measures to limit jail populations, and one county (Allegheny County) has taken systemic steps to reduce its jail population, most judicial districts are taking a business-as-usual approach, failing to address, or even recognize, the looming public health

catastrophe. Such a piecemeal approach, relying on individual law enforcement and judicial officers to decide what action to take, is insufficient to address the urgency of the moment.

This Court has the power under Pennsylvania Constitution Article V, Sections 2 and 10(a), 42 Pa. Const. Stat. § 502, and Rule of Judicial Administration 1952(A) to provide for the necessary broad-based reduction of county jail populations. It is this relief that petitioners respectfully urge the Court to order. Specifically, for the reasons outlined below, petitioners request that the Court (1) direct the presumptive release, subject to challenge by district attorneys, of discrete categories of incarcerated people; and (2) direct the courts of the Commonwealth to institute measures that will further limit jail populations. This relief is warranted, reasonable, and, above all, essential in light of the unprecedented public health risk facing the Commonwealth's residents.

II. PETITIONERS

Petitioner, the **Pennsylvania Prison Society**, founded in 1787, is the nation's oldest human rights organization. Petitioner's mission is to ensure humane prison conditions and to advocate for a restorative approach to criminal justice. The Prison Society advances its mission through three programmatic areas: (1) prison monitoring, (2) social services support to family members with incarcerated loved ones, and (3) education and advocacy. Written into Pennsylvania law, the

Prison Society is the Commonwealth's prison ombuds, working to stop abuse and trauma. Every month, more than 250 incarcerated people and their families ask the Society for help with issues they face inside prison. Society staff and volunteers respond to these complaints by going into correctional facilities, meeting with incarcerated people, working to resolve concerns, and providing real-time information on prison conditions. The Prison Society is the only organization that provides public witness to what happens behind prison walls. Declarations of several Prison Society volunteers attesting to current conditions in certain jails in support of this Petition are attached as Exhibits J, K, and L.

Individual petitioners are five incarcerated individuals currently in custody at different county facilities, all of whom are incarcerated for minor offenses, and are at increased risk of contracting COVID-19 as a result of their incarceration. As each individual petitioner testifies in his declaration, current living situations in each facility, including shared living quarters, make it impossible for incarcerated individuals to maintain the recommended six-foot distance from one another.

1. Petitioner **Brian McHale**, 44, is in custody on a probation detainer at the Montgomery County Correctional Facility ("MCCF") as a result of alleged technical violations of his probation for retail theft convictions. Ex. E, Declaration of Brian McHale at ¶¶ 2-3. Because of several serious health conditions, *see id.* at ¶¶ 4-7, Petitioner McHale faces an elevated likelihood of serious harm and death should he contract the virus. At MCCF, he shares a cell with two other men. *Id.* at ¶ 8.

Petitioner McHale filed an emergency habeas petition for release due to his medical condition and susceptibility to COVID-19. The Montgomery County Court of Common Pleas deferred consideration until after “the expiration of the judicial emergency.” *Id.* ¶¶ 12-16.

2. Petitioner **Jeremy Hunsicker**, 33, is detained at a Community Correction Center (“CCC”) in Lehigh County. Ex. F, Declaration of Jeremy Hunsicker at ¶ 2. While on parole for driving under the influence, Petitioner Hunsicker was arrested for driving with a suspended license. *Id.* at ¶ 3. His parole was revoked and he was resentenced to six to twelve months, with another six to twelve months for driving with a suspended license. *Id.* Petitioner Hunsicker is eligible for work release, and is currently housed in a pod with about twenty other people. *Id.* at ¶¶ 5, 8.
3. Petitioner **Christopher Aubry**, 55, is incarcerated at MCCF on a one to twenty-three month sentence for simple assault and related misdemeanor charges. Ex. G, Declaration of Christopher Aubry at ¶¶ 2-3. He is work release eligible and currently housed in a pod with approximately fifty other people. *Id.* at ¶¶ 5-6.
4. Petitioner **Michael Foundos**, 39, is detained at George W. Hill Correctional Facility in Delaware County. Ex. H, Declaration of Michael Foundos at ¶¶ 2. Charged with retail theft, he has a probation detainer and a \$50,000 bond. Foundos Decl. at ¶¶ 4-6. At his facility, each cell block contains 30 cells, and cells are generally shared by two people. *Id.* at ¶ 9.
5. Petitioner **Frederick Leonard**, 29, is incarcerated at Pike County Correctional Facility for a six to twenty-three-and-a-half month sentence for driving under the influence, driving with a suspended license, and fleeing. Ex. I, Declaration of Frederick Leonard at ¶¶ 2-3. He has several health conditions that place him at elevated risk of serious harm and death should he contract the virus. *Id.* at ¶ 4. At his facility, he shares a cell with two other individuals. *Id.* at ¶ 5.

III. JURISDICTION

The Court has jurisdiction pursuant to its King’s Bench authority to decide this application and order the requested relief to “cause right and justice to be

done” in this matter involving “an issue of immediate public importance.”

42 Pa.C.S.A. § 726 and Pa. Const. art. V, § 10(a).

IV. FACTUAL BACKGROUND

A. In the absence of preventive measures, COVID-19 is a rapidly spreading public health crisis, resulting in serious medical conditions or death for large numbers of high-risk individuals.

COVID-19 is a disease that has reached pandemic status. According to the World Health Organization, as of March 29, there were more than 638,146 confirmed cases of COVID-19 worldwide and more than 30,105 confirmed deaths. The United States has the highest number of confirmed cases in the world—more than 135,499—and 2,381 confirmed deaths. Amon Decl. ¶ 5. In Pennsylvania, as of March 29 at 4:30 p.m., there are 3,394 confirmed cases and 38 reported deaths, more than twice the number reported three days earlier and seven times the numbers reported just a week earlier. *Id.*⁹ CDC’s projections show that, without effective public health intervention, more than 200 million people in the United States could be infected with COVID-19, with as many as 1.5 million deaths in the most severe projections. Golob Decl. ¶ 11.

⁹ The rapid rise of the pandemic means that at the time of submission, the number of confirmed cases and deaths discussed in Dr. Amon’s Declaration will have grown exponentially. The declaration was prepared based on the data available to Dr. Amon at the time.

People over the age of 45 and those with certain medical conditions face a greater risk of serious illness from COVID-19, and those over the age of 55 face the highest risk of death. Amon Decl. ¶ 9; Golob Decl. ¶ 3. The medical conditions that increase the risk of serious complications from COVID-19 include lung disease, heart disease, chronic liver or kidney disease (including patients with hepatitis and those requiring dialysis), diabetes, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, and developmental delay. Golob Decl. ¶ 3. People with these conditions are at an increased risk of developing serious complications or dying from COVID-19, regardless of age. Golob Decl. ¶ 3; Amon Decl. ¶¶ 7-9.

The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. Golob Decl. ¶ 4. According to recent estimates, the fatality rate for people with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. *Id.* For people in the highest risk populations, the fatality rate of COVID-19 is about 15 percent. Golob Decl. ¶ 4. This means about one in seven infected individuals in this high-risk group will die from COVID-19. Patients in high-risk categories who do not die from COVID-19 should expect a prolonged recovery, including the need for extensive rehabilitation for profound

reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity. Golob Decl. ¶¶ 4, 5 & 8.

B. The key measures to prevent spread of COVID-19 are impossible in county jails, making severe outbreaks likely in those facilities and the communities around them.

The only known effective measure to reduce the risk of serious illness and death that COVID-19 presents for vulnerable people is to prevent them from being infected in the first place. Golob Decl. ¶ 10; Amon Decl. ¶ 6. There is no vaccine to inoculate against COVID-19 and there is no known medication to treat COVID-19. Golob Decl. ¶ 10; Amon Decl. ¶ 6. Social distancing, quarantining or remaining physically separated from known or potentially infected individuals, and vigilant hygiene, including washing hands with soap and water, are the only known effective measures for protecting vulnerable people. Golob Decl. ¶ 10; Amon Decl. ¶ 13.

People detained in county jails cannot take these necessary measures to mitigate the risk of exposure. They are, therefore, at heightened risk of COVID-19 infection. Amon Decl. ¶¶ 24-26. County jails are “congregate settings,” places where people live or sleep in close proximity. Such enclosed group environments, like cruise ships or nursing homes, have become the sites for the most severe outbreaks of COVID-19. Amon Decl. ¶¶ 19, 20. Conditions in correctional facilities create heightened public health risks for the spread of COVID-19 far

greater than in non-custodial institutions because of crowding, security-related restrictions, scant medical resources, and the proportion of vulnerable people detained. *Id.* at ¶ 20; Golob Decl. ¶ 13. Recent experience in the Rikers Island facility in New York City bears out the devastating impact of COVID-19 infection in a jail setting. The Legal Aid Society in New York reported that the COVID-19 infection rate at Rikers is more than *seven times* higher than the rate across New York City and *85 times* greater than the country at large.¹⁰

As the rate of infection increases in Pennsylvania,¹¹ the same phenomenon seen at Rikers Island is likely to repeat itself in the Commonwealth’s county jails. COVID-19 has already been reported in Delaware County’s jail. *See Amon Decl.* ¶¶ 19, 20, 30. And, on March 27, 2020, Philadelphia reported that both an employee and an inmate tested positive for COVID-19 in its jails. *Amon Decl.* ¶ 30.

Transmission in jails will endanger not only the incarcerated, but also the broader community. As correctional staff enter and leave the facility, they will

¹⁰ *See NYLAS Petition*, n.1.

¹¹ Dr. P.J. Brennan, Chief Medical Officer of the University of Pennsylvania Health System, has stated that the Philadelphia area is “no more than two weeks behind New York City” in the rate of infection. Marie McCullough & Lisa Gartner, *Philadelphia-area hospitals brace for the coronavirus surge: ‘We are no more than 2 weeks behind N.Y.C.,’* The Philadelphia Inquirer (March 27, 2020), www.inquirer.com/health/coronavirus/philadelphia-coronavirus-cases-hospitals-testing-covid-20200327.

carry the virus with them. Amon Decl. ¶ 19.¹² Like the incarcerated people in the facilities where they work, correctional officers face an increased risk of COVID-19 exposure because they are less able to engage in required social distancing. Amon Decl. ¶ 32. In addition to staff testing positive in Philadelphia and Delaware Counties, several jurisdictions across the country have reported that correctional officers have tested positive for the virus. Amon Decl. ¶¶ 29, 30. Beyond the risk they pose to those incarcerated at the facility when they enter, correctional officers expose their families and broader communities to substantial risk every time they leave a correctional facility at the end of their daily shifts.¹³

The possibility of a COVID-19 outbreak among incarcerated people, the staff, and the communities around them is exacerbated because county jails cannot implement the CDC's recommended preventative measures in at least four respects.

- 1. Social distancing is not possible in county jails at their current population levels.**

Social distancing is the most important means to prevent the spread of COVID-19 because the disease is primarily transmitted between people who are in

¹² Josiah Rich, et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus*, The Washington Post (Mar. 17, 2020), www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus (The authors (including a professor of medicine and epidemiology) warn that unless we act swiftly to release people from jails and prisons, the virus threatens not only prisoners and corrections workers but the general public as well).

¹³ See Rich, et al., *supra* n. 12.

close contact with one another (within about six feet) via respiratory droplets produced when an infected person coughs or sneezes. Amon Decl. ¶ 13. Social distancing is so imperative that Governor Wolf has ordered people in 19 counties not to leave their homes. Amon Decl. ¶ 14. As of March 27, at least 25 states, 74 counties, and 14 cities were under similar stay-at-home orders. Governors in 40 states have barred even small social gatherings. The extraordinary impact on more than 200 million people due to stay-at-home orders and mandatory business closures, including several million throughout Pennsylvania, has been deemed necessary for one reason: to ensure appropriate social distancing.

CDC guidance on correctional and detention facilities specifically recommends implementing social distancing (“ideally 6 feet between individuals, regardless of the presence of symptoms”)¹⁴ to increase the physical space between incarcerated persons. Amon Decl. ¶ 21. Yet individuals in county jails in the Commonwealth have no ability to practice social distancing.

For example, in Montgomery County Correctional Facility, numerous cells throughout the facility are shared by three people—meaning that three people share the same confined space, one toilet, and one sink. In addition to their cellmates, each incarcerated person has close contact with thirteen other individuals on his unit and up to fifty other people on his “pod.” Amon Decl. ¶ 24. In Lehigh

¹⁴ CDC Guidance at 11.

County's Community Corrections Center, up to seventy people eat meals together at one time, and close contact with other incarcerated persons is unavoidable during regular medical checks. *Id.* In Blair County Prison, beds are just three to four feet apart. Amon Decl. ¶ 25. In Allegheny County, newly arrested individuals typically are held for more than a day in an intake cell, usually with ten or more people sharing a single toilet and sink. Amon Decl. ¶ 25.

In these circumstances, county jails will not be able to prevent COVID-19 transmission once the virus is inevitably introduced into the jail.

2. County jails do not have sufficient supplies for the enhanced hygiene and disinfecting necessary to prevent the spread of COVID-19.

The CDC Guidance also describes procedures necessary for individual hygiene and to thoroughly clean and disinfect areas where a person with confirmed or suspected COVID-19 spent time. Amon Decl. ¶ 22. In county jails, people share toilets, sinks, and showers, without disinfection between each use. *Id.* at ¶ 20. Food preparation and service is communal with little opportunity for surface disinfection. *Id.* County jails do not have enough supplies for individuals to wash their hands or to disinfect the space around them. Amon Decl. ¶ 26. There is not sufficient hand sanitizer in Lehigh County's Community Corrections Center or the Montgomery County Correctional Facility. Amon Decl. ¶ 24. Soap is limited in Blair County Prison and Allegheny County Jail. Amon Decl. ¶ 25. Failure to

provide these supplies while requiring individuals in custody to use shared bathroom facilities and to eat in common spaces creates an intolerably high risk of infectious spread.

3. Proper isolation for symptomatic people is not possible in county jails.

The CDC guidance recommends “medical isolation of confirmed or suspected COVID-19 cases.”¹⁵ Yet, once a person in a county jail has symptoms, proper isolation is not possible due to population size and the physical limitations of the facility. Amon Decl. ¶¶ 25-26. Because of forced contact between many individuals in crowded facilities, people who are exposed will need to be quarantined. Because most jails are at or near capacity, there simply is insufficient space to house people consistent with the CDC-recommended quarantine protocol, which requires separating people to prevent further spread of the disease, or to house those who test positive in true isolation units.¹⁶

4. County jails do not have the capacity to properly screen individuals entering their facilities.

County jails cannot implement screening measures necessary to prevent introduction of the virus into the jails. The CDC recommends that jails adopt intensive pre-intake screening of all prisoners, and screen all staff and individuals

¹⁵ CDC Guidance at 15-16.

¹⁶ CDC Guidance at 19.

entering the facility.¹⁷ Non-test based verbal screens—i.e., asking a person for a subjective report of symptoms—cannot adequately screen for new, asymptomatic or pre-symptomatic infections. *Id.* at ¶ 27. As COVID-19 has a typical incubation period of five days, and transmission often occurs before presentation of symptoms, such inadequate screening presents a critical problem. Golob Decl. ¶ 6. The possibility of asymptomatic transmission means that monitoring staff or incarcerated people for fevers is inadequate to identify all who may be infected and preventing transmission. Amon Decl. at ¶ 27.

Given the shortage of COVID-19 test kits in the United States, jails will not be able to test people newly admitted to the facility, individuals on work release, staff, visiting attorneys, or any other people who enter facilities daily. Amon Decl. ¶¶ 27, 28.

C. Population reduction is the only way to prevent an outbreak of COVID-19 in the county jails and to prevent the death of those at highest risk.

Significant reduction of county jail populations is the only viable option to protect incarcerated persons from COVID-19. Amon Decl. ¶ 47. Without reduction in the numbers of detained individuals, jails will be unable to implement the only scientifically recognized procedures that can reduce the risk of infection. *Id.* Reducing county jail populations will allow the facilities to reduce the risk of

¹⁷ *Id.* at 7-11.

infection for both incarcerated people and correctional officers, which in turn protects the communities to which the officers return. *Id.*

People in prisons and jails are disproportionately likely to have chronic health conditions, including diabetes, high blood pressure, and HIV, that put them at higher risk of severe health consequences upon contracting the virus. Amon Decl. ¶ 41.¹⁸ Large numbers of seriously ill incarcerated people will strain the limited medical infrastructure in the jails, heightening the risk that infected individuals will suffer serious harm.

Some county jails simply lack the necessary medical infrastructure to address the spread of infectious disease and treatment of people most vulnerable to illness. Once COVID-19 spreads throughout a jail, the burden of caring for these sick individuals will shift to local community medical facilities. Because many rural parts of the Commonwealth have limited access to hospitals with intensive care units or trained infectious disease practitioners, and limited personal

¹⁸ Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, *The New Yorker* (Mar. 16, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus>; see also I.A. Binswanger, et al., *Prevalence of chronic medical conditions among jail and prison inmates in the USA compared with the general population*, 63 *Journal of Epidemiology & Community Health* 912–919 (2009), <https://www.ncbi.nlm.nih.gov/pubmed/19648129> (concluding that people incarcerated in U.S. jails and prisons had a higher burden of most chronic medical conditions than the general population, even when adjusting for sociodemographic differences and alcohol consumption).

protective equipment and other life-sustaining supplies, thus there is an increased likelihood of death for all individuals living in such rural communities who become ill and require treatment. Amon Decl. ¶ 44.

* * *

In sum, to effectively mitigate the risk of infection and subsequent spread of the virus, the jail population must be reduced. Amon Decl. ¶ 47. Reducing the overall number of individuals in detention facilities allows social distancing for all inside, and allows infected individuals and their contacts, to be properly quarantined and monitored for health complications that require transfer to a local hospital. *Id.* It also lessens the risk to corrections officers, who, if short-staffed, will have difficulty maintaining order and proper personal protective measures. *Id.* Protecting corrections staff in turn protects the communities they come from. *Id.* Unless this Court orders measures to reduce the jail population, contagion will be more widespread, already taxed hospitals strained further, and the mortality rate likely to increase. The time to act is now.

V. ARGUMENT

A. **This Court has the legal authority to use its broad King’s Bench jurisdiction to order the requested relief.**

The Court has King’s Bench jurisdiction to decide this application in order to “cause right and justice to be done” in a matter involving “an issue of immediate public importance.” 42 Pa.C.S.A. § 726 and Pa. Const. art. V, § 10(a). This case

raises “an issue of immediate public importance affecting operation of government throughout the Commonwealth.” *Silver v. Downs*, 493 Pa. 50, 56 (1981).

As a result of its enduring King’s Bench authority, this Court possesses “every judicial power that the people of the Commonwealth can bestow under the Constitution of the United States.” *In re Bruno*, 101 A.3d 635, 666 (Pa. 2014) (quoting *Stander v. Kelly*, 250 A.2d 474, 484 (Pa. 1969)). This Court’s precedent has long “described the King’s Bench power in the broadest of terms” and, as such, has recognized that the Court “would be remiss to interpret the Court’s supervisory authority at King’s Bench in narrow terms, contrary to precedent and the transcendent nature and purpose of the power.” *In re Bruno*, 101 A.3d at 679.

The Court’s exercise of its King’s Bench authority is appropriate here, as the COVID-19 public health crisis is an unprecedented matter of public importance, which “requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015).

This Court has already recognized, in its two emergency orders of March 16th and 18th, that the COVID-19 pandemic warrants extraordinary steps to protect the public. This Petition calls upon the Court to meet this unprecedented health challenge by directing each judicial district to take reasonable and necessary measures to prevent widespread contagion. Petitioners call upon the Court to take

this necessary action to protect not just the people held within county jails, but correctional staff, their families, their respective communities and ultimately the public health of all Commonwealth residents.

Time is of the essence. Immediate intervention by this Court is necessary to avoid “the deleterious effects arising from delays incident to the ordinary process of law.” *Williams*, 129 A.3d at 1206. The risk to the general public of delaying further review cannot be overstated. To date, individual judicial districts or jurists throughout the Commonwealth have relied on a piecemeal strategy without any guidance from this Court. The lack of an urgent, unified, and concerted effort to address the grave public health risk will result in future measures that, quite simply, will be too little, too late. There will be outbreaks in county jails, an inevitable community spread, and, increased suffering.

Application of the King’s Bench power is particularly suited to this case, which asks that this Court exercise its “general supervisory and administrative authority over all the courts.” Pa. Const. art. V, § 10(a). This Court further has power under Section 10(a) “to prescribe general rules governing practice, procedure and the conduct of all courts.” *Id.* “By its ‘supreme’ nature, the inherent adjudicatory, supervisory, and administrative authority of this Court at King’s Bench ‘is very high and transcendent.’” *In re Bruno*, 101 A.3d at 669 (quoting *Commonwealth v. Chimenti*, 507 A.2d 79, 81 (Pa. 1986)). This “supervisory power

over the Unified Judicial System is beyond question.” *In re Bruno*, 101 A.3d at 678.

Under its King’s Bench authority, this Court has the power to exercise general jurisdiction over the Unified Judicial System even “where no matter is pending in a lower court.” *In re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997). When exercising King’s Bench authority, this Court’s “principal obligations are to conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth.” *Williams*, 129 A.3d at 1206 (quotation and citation omitted).

The issues raised by Petitioners plainly fall within the Court’s King’s Bench authority. The urgency to respond to this historic public health crisis cannot be gainsaid.

B. Extraordinary measures in other jurisdictions demonstrate the need for population reduction in the county jails.

In recognition of the extraordinary public health risk posed by the transmission of COVID-19 in custodial settings, courts across the country have taken steps within the past week to reduce prison populations in their respective states, including the following:

- On March 22, 2020, the Supreme Court of New Jersey ordered the release of *all* prisoners serving county jail sentences.¹⁹
- In Montana, the Chief Justice of the Supreme Court wrote to all judges in the state asking each to “review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses.”²⁰
- The chief justice of the South Carolina Supreme Court ordered that everyone held in jail on bond in a non-capital case be released, unless there exists an “unreasonable danger” or “extreme flight risk.”²¹
- The Washington Supreme Court directed that all trial courts in the state prioritize hearings that could result in the release of a defendant in custody, providing that courts “shall hear motions for pretrial release on an expedited basis” and that any person fitting within the CDC’s definition of vulnerable populations would be presumed to have demonstrated a “material change in circumstances” justifying reconsideration of previously ordered bail conditions.²²

¹⁹ *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 082430 (N.J. March 22, 2020), <https://www.njcourts.gov/notices/2020/n200323a.pdf?c=9cs>. The order provided a mechanism for prosecutors, within 24 to 48 hours, to object to the release of specific prisoners who “would pose a significant risk to the safety of the inmate or the public,” with such objections to be considered by judges or special masters appointed by the Supreme Court.

²⁰ Letter from Mike McGrath, Chief Justice of Montana Supreme Court, to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%2032020.pdf?ver=2020-03-20-115517-333>.

²¹ Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

²² *In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, No. 25700-B-607 (Wash. Mar. 20, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf>.

- In an effort to prevent new admissions to county jails, the chief judge of Maine’s trial courts, with the approval of the chief justice of the Maine Supreme Court, vacated all outstanding warrants for unpaid fines, restitution, fees, and failures to appear.²³ The order resulted in the vacatur of more than 12,000 warrants.²⁴

In addition to state Supreme Courts taking action, in Maryland²⁵ and Colorado,²⁶ executive officers urged courts to take similar measures. Similarly, in other jurisdictions, local authorities have acted to sharply reduce prison populations:

²³ See Emergency Order Vacating Warrants for Unpaid Fines, Unpaid Restitution, Unpaid Court-Appointed Counsel Fees, and Other Criminal Fees (Mar. 17, 2020), <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>.

²⁴ Judy Harrison, *Maine courts vacate warrants for unpaid fines and fees*, Bangor Daily News (Mar. 17, 2020), <https://bangordailynews.com/2020/03/16/news/state/maine-courts-vacate-warrants-for-unpaid-fines-and-fees/>.

²⁵ Letter from Marilyn J. Mosby, State’s Attorney for Baltimore City, to Governor Larry Hogan (Mar. 23, 2020), https://content.govdelivery.com/attachments/MDBALTIMORES/AO/2020/03/23/file_attachments/1408962/Gov%20Hogan%20Proposal.pdf (calling for wide-ranging releases “to reduce the prison population to enable social distancing and self-isolation, and to facilitate adequate health care resources inside these institutions”).

²⁶ Governor Jared Polis, *Guidance to Counties Municipalities, Law Enforcement Agencies, and Detention Centers* at 5 (Mar. 24, 2020), <https://drive.google.com/file/d/17wBJHdmlu3yRyF2CYQiLTVGjCgLPAB4P/view> (encouraging “the courts together with prosecutors and defense attorneys, to work to evaluate the detention centers’ populations and determine how to reduce the number of individuals in custody”).

- Cuyahoga County, Ohio, which encompasses Cleveland, has decreased its prison population by more than 30 percent, releasing approximately 600 out of a total of 1,900 incarcerated people.²⁷
- The Los Angeles County Sheriff authorized the release of 1,700 people, reducing the county jail population by 10 percent.²⁸
- Officials in two other California counties, Alameda County and Santa Clara County, released more than 300 prisoners from each jurisdiction's respective jails.²⁹
- In Colorado, the Jefferson County Sheriff's Office announced it would release all prisoners who had served more than half of their sentence,³⁰ and Larimer County temporarily released all 142 people sentenced to its work release program.³¹

²⁷ Scott Noll & Camryn Justice, *Cuyahoga County Jail releases hundreds of low-level offenders to prepare for coronavirus pandemic* (March 20, 2020), <https://www.news5cleveland.com/news/local-news/oh-cuyahoga/cuyahoga-county-jail-releases-hundreds-of-low-level-offenders-to-prepare-for-coronavirus-pandemic>.

²⁸ Marissa Wenzke, *1,700 inmates in L.A. County released over coronavirus concerns* (Mar. 24, 2020), <https://ktla.com/news/local-news/1700-jail-inmates-in-l-a-county-released-over-coronavirus-concerns-sheriff-says/>

²⁹ Robert Salonga, *Bay Area courts, authorities ramp up release of inmates to stem COVID-19 risks in jails*, *The Mercury News* (Mar. 19, 2020), <https://www.mercurynews.com/2020/03/19/bay-area-courts-authorities-ramp-up-release-of-inmates-to-stem-covid-19-risks-in-jails/>.

³⁰ Elise Schmelzer, *Uneven response to coronavirus in Colorado courts leads to confusion, differing outcomes for defendants*, *The Denver Post* (Mar. 21, 2020), https://www.denverpost.com/2020/03/21/colorado-courts-coronavirus-judges/?fbclid=IwAR0Da1qjZSsU48THOo-Hi24ibgCW_ed1nMVfmRJ1BaZNFJJlsVo1BJO0lsk.

³¹ Carina Julig, *Larimer County inmate in community corrections program tests positive for coronavirus*, *The Denver Post* (Mar. 22, 2020), https://www.denverpost.com/2020/03/22/coronavirus-larimer-county-inmate/?fbclid=IwAR0_M2BhVxD42BjIfTh_bYVwSfg6nH68cwLArtGt7GPpl58FqpE4g_Bnfgo.

Officials in Pennsylvania have just begun to address the pending crisis in county jails. Allegheny County, through a concerted effort and collaboration by the courts, the public defender, and the sheriff, released nearly 550 people from the county jail.³² It did so to address “fear that the jail would become a giant Petri dish for the virus.”³³ In Lackawanna County, to “minimize people in and out of the prison,” the President Judge initiated a review of the file of “every low-level offender,” including prisoners assigned to work release or those close to reaching their minimum release date.³⁴

The actions of Allegheny and Lackawanna Counties are important, but they are limited exceptions to what has otherwise been a business-as-usual approach by almost all other county courts. Most Pennsylvania counties have released very few, if any, people to reduce prison population levels. Without immediate statewide actions, these remaining counties are likely to become the “petri dishes” that

³² WTAE Action News, *545 inmates released from Allegheny County Jail due to coronavirus concern* (March 27, 2020), <https://www.wtae.com/article/545-inmates-released-from-allegheny-county-jail-due-to-coronavirus-concerns/31953103#>

³³ Andy Sheehan, *Coronavirus In Pittsburgh: Amid Virus Pandemic, Allegheny County Jail Releases More Than 200 Inmates*, KDKA News (Mar. 20, 2020), <https://pittsburgh.cbslocal.com/2020/03/20/allegheny-county-jail-released-inmates/>.

³⁴ Kevin Hayes, *Lackawanna County reviews possible release of low level inmates to mitigate spread of COVID-19* (March 18, 2020), <https://www.pahomepage.com/top-news/lackawanna-county-to-release-low-level-inmates-to-mitigate-spread-of-covid-19/>.

officials in Allegheny County rightly feared will spread contagion to surrounding communities throughout the Commonwealth.

The actions taken by state courts and local executive officials across the country as described above provide a template for actions this Court must take to protect the health and safety of the county jail population, the correctional staff in those jails, and the surrounding communities.

C. This court should exercise its plenary and supervisory jurisdiction to expeditiously reduce county jail populations.

This Court’s intervention is necessary to protect the people of Pennsylvania. As outlined above, the path to doing so requires a reduction in county jail populations to minimize spread of the virus among those in custody and their custodians, and thereby minimize contagion in surrounding communities.

Under 42 Pa.C.S. § 726, “[t]his Court may assume, at its discretion, plenary jurisdiction over a matter of immediate public importance” *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010). If ever there were a case that is of “immediate public importance,” it is this one, which necessarily involves a myriad of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the Federal Constitution, as well as Article I, Sections One, Thirteen, and Fourteen of the Pennsylvania Constitution. *See, e.g., Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003) (“the Fourteenth Amendment affords pretrial detainees protections ‘at least as great as the Eighth Amendment protections available to a

convicted prisoner”)) (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)) (the government violates the Eighth Amendment when it crowds prisoners into cells with others who have “infectious maladies”).

Experts urge this Court to act now to mitigate a swelling public health catastrophe. For the reasons stated above, Petitioners respectfully request that this Court exercise its extraordinary jurisdiction over this matter and instruct the President Judge of each Judicial District to take measures that both expeditiously reduce their jail populations and limit the likelihood of near-term increase in their populations.

The numerous actions taken by state supreme courts and local law enforcement authorities in other parts of the country illustrate the variety of measures available to this Court to accomplish the necessary reduction of the Commonwealth’s jail populations. These recent developments show that the Court can grant relief leading to the release of broad categories of prisoners who are in county jails as a result of minor charges or violations, prisoners who are nearing completion of their sentences, and prisoners who are at the greatest level of risk for serious complications or death from COVID-19 infections. Release of people in these categories poses little risk to public safety. To the contrary, as shown throughout this Petition, these releases and the resulting reduction in jail

populations are critically necessary to ensure public safety in the face of an unprecedented risk to public health.

Petitioners, based on their good faith understanding of the components of populations in the Commonwealth's county jails, urge the Court to:

1. Instruct all courts in the Commonwealth to immediately order county jails within their respective jurisdictions to release the following categories of people, subject to the objection provision outlined in ¶ 2 below:
 - a. Those who are within three months of, or beyond, their minimum sentence;
 - b. Those under a probation detainer (or serving a sentence) for a violation of probation or county parole where the violation does not arise out of the commission of a new felony offense;
 - c. Those eligible to periodically leave their correctional facilities, such as those eligible for work release or serving intermittent sentences (e.g., weekends);
 - d. Those detained pretrial solely due to an order imposing cash bail; and
 - e. Any incarcerated person at increased risk of severe COVID-19 complications and death as defined by the CDC, including those

over the age of 45, and people with any of the following underlying medical conditions: blood disorders, chronic kidney or liver disease, compromised immune system, endocrine disorders (including diabetes), metabolic disorders, heart and lung disease, neurological and neurologic and neurodevelopmental conditions, and current or recent pregnancy.

2. Order that, if a district attorney objects to the release of a particular person within the above categories on the ground that release of that individual would pose a significant risk to the safety of a specific person or to the public, the district attorney shall, within twenty-four (24) hours of this Court's order, lodge an objection with a judicial authority appointed by the President Judge of each district.
 - a. In the event of a district-attorney initiated objection, the appointed judicial authority shall provide counsel for the detained person, who will have an opportunity to respond to the objection prior to the judicial authority ruling on the objection.
 - b. The judicial authority shall not force the release of any detained person who opposes release for reasons of personal or family safety.

3. Order that all courts in the Commonwealth, after releasing individuals identified above, take the following measures to maintain the reduction in the jail populations:
 - a. Cease setting cash bail for any newly arrested indigent defendant, and order them released on reasonable and appropriate non-monetary conditions;
 - b. Implement a process to review and lift all probation and parole detainers;
 - c. Prioritize arraignments and preliminary hearings for any in-custody defendant;
 - d. Ensure the availability of a venue to conduct guilty pleas and sentencing hearings for any defendant where the parties anticipate that the proceeding will result in release of the defendant from detention within 30 days; and
 - e. Ensure the availability of a venue for prosecutors to file motions to nolle pros or otherwise dismiss charges.
4. Appoint a special master to administer and monitor compliance with this order; and direct the President Judge of each Commonwealth judicial district, or such official(s) designated by each President Judge, to provide

compliance reports to the special master and petitioners' counsel in this case, in a manner, and at a time interval, directed by this Court.

VI. CONCLUSION

The country, and this Commonwealth, face a public health crisis of epic proportions. COVID-19 presents risks to all of us, and has forced us as a country to come together and do what is right for the community and the public health. We must allow and encourage everyone to engage in practices that flatten the curve—social distancing and vigorous hygiene. This protects the most vulnerable among us and, hopefully, gives our overtaxed healthcare systems the chance to treat those most gravely affected by COVID-19. Absent decisive action, our overcrowded jails will become petri dishes that overwhelm both correctional and healthcare systems. The only humanitarian and constitutional solution is to immediately order the release of as many people as possible from our county jails. We urge this Court, in the strongest terms, to join the growing chorus of courts who have decided to act in an effort to save lives. The time to act is now.

Dated: March 30, 2020

Respectfully submitted,

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