

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPREME COURT

IN RE SECOND REQUEST FOR PRISON CENSUS : M.P.
CONTROL IN RESPONSE TO COVID-19 :

EMERGENCY PETITION TO MODIFY BAIL GUIDELINES
AND REQUEST FOR TELEPHONE CONFERENCE
WITH DUTY JUSTICE

Now comes the Rhode Island Public Defender under Rules 13 and 34 of the Supreme Court Rules of Appellate Procedure, and petitions this Court to issue an order to modify the Bail Guidelines to temporarily require the setting of personal recognizance bail—including in alleged violations of probation—except in extraordinary circumstances that must be enumerated on the record. This extraordinary remedy is necessary to alleviate the serious health risks posed to inmates, Department of Corrections (“DOC”) employees, and the general public by continued mass incarceration during the current outbreak of the novel coronavirus, COVID-19. As now has been demonstrated across the country and in Rhode Island, prison outbreaks imperil us all.

The Rhode Island Constitution vests the Supreme Court with the “judicial power of this state.” R.I. Const. art. X, § 1. As such, this Court has supervisory power over the inferior courts of this jurisdiction. R.I.G.L § 8-1-2 (setting forth this Court’s power of “general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided”). The

supervisory power also includes the power to promulgate rules for the inferior courts. R.I.G.L. § 8-6-2. In accordance with these powers, this Court issued a set of Bail Guidelines in 1987 that are still in effect today. *In re Bail Guidelines* (R.I. Jan. 28, 1987) (stating that the Bail Guidelines “are promulgated pursuant to the powers conferred upon this court by G.L. 1956 (1969 Reenactment) § 8-1-2, and also pursuant to its constitutional and inherent powers”). Petitioner now requests that this Court exercise its power to temporarily modify these Bail Guidelines due to the present public health emergency.

In April, with the threat of the COVID-19 pandemic bearing down upon Rhode Island, DOC sought to reduce the prison population to better respond to a potential prison outbreak. Recognizing the importance of controlling COVID-19 in the Adult Correctional Institutions (“ACI”), this Court acted to reduce the prison census by ordering the release of certain inmates whose sentences were expiring within ninety days.¹ At the same time, judges, prosecutors, and defense attorneys worked together to identify inmates who could be released from prison through personal recognizance bail or non-jail dispositions. The prison census, which was 2,572 in March, measured 2,276 in April.²

¹ Order, *In Re Request For Prison Census Control*, No. 2020-103-M.P. (R.I. Apr. 3, 2020).

² Rhode Island DOC, COVID-19 Population Update, at 4-5 (Nov. 1, 2020), *attached* as Appendix A [hereinafter COVID-19 Population Update].

This was the correct course. What was only a hypothesis in April has since been proven: Prisons are especially susceptible to the spread of COVID-19 because of the large number of people housed and working in close quarters.³ Indeed, correctional facilities have seen some of the most horrific outbreaks of the pandemic, including one in the Anamosa State Penitentiary in Iowa where 77% of the population has tested positive as of November 20, 2020, and one in Avenal State Prison in California, where more than 85% of the inmates have tested positive as of November 11, 2020.⁴

This spread threatens not only inmates, but prison staff, court staff, lawyers, and the larger community. As of late November, tens of thousands of correctional officers have contracted the virus and, tragically, at least ninety-eight of these men

³ See Department of Justice, Office of Inspector General 21-002, *Pandemic Response Report: Remote Inspection of Metropolitan Detention* (Nov. 10, 2020) (“In those institutions where widespread inmate testing has been conducted, the percentage of inmates testing positive has been substantial.”).

⁴ Kate Payne, “*It’s Horrific*”: *COVID Tears Through State Prison In Anamosa As Case Numbers Spike Statewide*, Iowa Public Radio, <https://www.iowapublicradio.org/health/2020-11-20/its-horrific-covid-tears-through-state-prison-in-anamosa-as-case-numbers-spike-statewide> (last accessed Nov. 20, 2020) (citing Iowa Corrections COVID-19 Information, <https://doc.iowa.gov/COVID19>); Mitch Smith, Amy Harmon, Lucy Tompkins, and Thomas Fuller, *What Places Are Hardest Hit by the Coronavirus? It Depends on the Measure*, New York Times, <https://www.nytimes.com/2020/11/12/us/coronavirus-crisis-united-states.html> (last accessed Nov. 20, 2020) (citing California Department of Corrections and Rehabilitation, Population COVID-19 Tracking).

and women have died as a result.⁵ After all, prisons are not closed universes; inmates are admitted and released every day, and staff members come and go throughout the state. Inmates also come into contact with many outside individuals—such as their attorneys, sheriffs, and other court staff—when they are brought to the courthouse for in-person hearing dates, and attorneys are still required to visit their clients in person at the prison. In fact, 654 people—all potentially contagious—were committed to the custody of the Rhode Island DOC in the month of October alone.⁶

The reduction in prison census in the early spring allowed DOC to weather the pandemic over the spring and summer with success. Fewer than thirty-five inmates total tested positive from March through October.⁷ With fewer inmates and more space, DOC effectively quarantined new inmates and isolated positive cases.⁸ But now Rhode Island—and DOC—is facing its most dangerous moment since this

⁵ The Marshall Project, A State-by-State Look at Coronavirus in Prisons, <http://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#staff-cases> (last accessed Nov. 20, 2020).

⁶ COVID-19 Population Update, *supra* note 2, at 8.

⁷ The Marshall Project, A State-by-State Look at Coronavirus in Prisons, <http://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#staff-cases> (last accessed Nov. 20, 2020).

⁸ See, e.g., Walt Buteau, *ACI Inmate And 7 Staff Members Test Positive For Covid-19*, WPRI (Apr. 23, 2020, 2:31 PM), <https://www.wpri.com/target-12/aci-inmate-and-7-staff-members-test-positive-for-covid-19/>.

pandemic began. Cases in the state have climbed to their highest point yet,⁹ with the seven-day average creeping close to 1,000 new cases a day.¹⁰ Indeed, total cases have increased 648% just from September to November and hospitalizations are at an all-time high.¹¹ To slow the spread, Governor Gina Raimondo has implemented a two-week “pause,” further limiting social gatherings and closing certain high-risk businesses.¹² The Superior and District Courts have also recently responded to this

⁹ Journal Staff, *Latest Numbers: RI Reports 6 COVID Deaths, New Daily Case Record*, Providence Journal (Nov. 18, 2020, 12:37 PM), <https://www.providencejournal.com/story/news/healthcare/2020/11/18/ri-covid-numbers-6-more-deaths-record-number-new-cases/6324930002/>.

¹⁰ Journal Staff, *RI Reports 27 COVID Deaths, 2,769 More Cases Over The Last Three Days*, Providence Journal (Nov. 30, 2020, 1:06 PM), <https://www.providencejournal.com/story/news/healthcare/2020/11/30/ri-covid-numbers-27-deaths-2-769-cases-over-last-3-days/6462309002/>; Journal Staff, *Latest Numbers: RI Reports 6 COVID Deaths, 1,050 Additional Cases*, Providence Journal (Nov. 20, 2020, 12:24 PM), <https://www.providencejournal.com/story/news/healthcare/2020/11/20/ri-covid-numbers-6-more-deaths-1-050-additional-cases/3776712001/>.

¹¹ Shaun Towne, *RI Reports 2,628 New Infections, 27 Deaths Since Friday As Two-Week Pause Begins*, WPRI (Nov. 30, 2020, 1:52 PM), <https://www.wpri.com/health/coronavirus/november-30-ri-coronavirus-update/>.

¹² G. Wayne Miller, *Raimondo Says RI Will Enter 2 Week ‘Pause’ Starting Nov. 30*, Providence Journal (Nov. 20, 2020, 9:45 AM), <https://www.providencejournal.com/story/news/healthcare/2020/11/19/rhode-island-covid-restrictions-governor-raimondo-weekly-press-conference/3776421001/>.

dramatic uptick in cases by imposing measures to limit in-person appearances in court.¹³

Meanwhile, cases are rapidly growing at the ACI. Two weeks ago, there were 441 cases.¹⁴ Forty-three of those positive case were individuals who were infected at the time of commitment at the prison.¹⁵ Today, cases now total 600, including both inmates and staff.¹⁶ There are currently positive cases at every single facility.¹⁷ DOC's ability to quarantine and isolate is becoming harder by the day.¹⁸ Any

¹³ Inter-Office Memo from Presiding Justice Alice B. Gibney, to Judicial Officers of the Superior Court, Reduction of In-Person Court Matters – Superior Court (Nov. 11, 2020), <https://files.constantcontact.com/503acf6b001/cb2fb502-8caa-4e84-a134-417c74ad0686.pdf>; Interoffice Memorandum from Associate Justice Maureen Keough and Magistrate Patrick Burke, to Members of the RI Bar, PAC and Diversion Calendars (Nov. 18, 2020), <https://files.constantcontact.com/503acf6b001/ea7c2bf-c25e-4bf5-8459-6989d261f447.pdf>.

¹⁴ Rhode Island DOC, COVID-19 Information, <http://www.doc.ri.gov/covid-19/> (last updated Nov. 17, 2020).

¹⁵ *Id.*

¹⁶ Katie Mulvaney, *Advocates Call For More Prisoners To Be Freed As Covid Cases Hit 600 At The ACI*, Providence Journal (Nov. 30, 2020, 4:56 PM), <https://www.providencejournal.com/story/news/courts/2020/11/30/covid-cases-hit-600-ri-state-prison-and-advocates-call-release/6464629002/>.

¹⁷ Rhode Island DOC, *RIDOC Director's Message*, Facebook (Nov. 30, 2020), https://www.facebook.com/RhodeIslandDOC/posts/3763066590416909?__tn__=K-R.

¹⁸ *See id.* (message from Director Patricia A. Coyne-Fague explaining that all newly committed inmates are tested and quarantined in a special unit).

reduction in the prison population would help DOC with this mission.¹⁹ But as in the spring, there is a limit on what DOC can do without further judicial action.

To mitigate the harm that COVID-19 is causing inmates, corrections staff, and Rhode Islanders, the Rhode Island Public Defender urges this Court to modify the Bail Guidelines to temporarily require setting personal recognizance bail—including in cases of alleged probation violations—except in extraordinary circumstances that must be enumerated on the record. This emergency measure should apply to future bail determinations as well as to motions to reduce bail. This modified standard will not affect a court’s power to hold a defendant without bail under Article I, § 9 of the Rhode Island Constitution.

The remedy sought now is a measured response tailored to public health and safety concerns. First, this aims to reduce the awaiting-trial population, which has steadily grown over the course of the pandemic. While this population was as low as 506 in April, it was up to a 608-person daily average in October—a 20% increase.²⁰ The awaiting-trial population is the current driver of population growth at the ACI; any adjustment to that population will effectively control the prison census for as long as the emergency modification is in place.

¹⁹ See Affidavit of Jennifer Clarke, M.D., RI DOC, *attached* as Appendix B [hereinafter DOC Affidavit].

²⁰ COVID-19 Population Update, *supra* note 2, at 5.

Second, the awaiting-trial population poses the largest risk to public health. These new inmates must be quarantined, taking up precious space and resources at the prison. They receive visits from their lawyers, who must meet and communicate with their pretrial clients. And sometimes they must be transported from the prison to courthouses and back again, coming into contact with prison staff and court staff. With cases rising in Rhode Island, it is a virtual certainty that some of those individuals will be COVID-19 positive upon admission.

Third, the modification of the Bail Guidelines will reduce the prison population while Rhode Island cases hit their highest marks yet. This will give DOC the precious additional space that it requires for quarantining new or sick inmates during this unprecedented outbreak²¹—especially if cases continue to grow over the winter months, as experts fear they will.²² It will also ease the prison demand for medical resources shared by all Rhode Islanders, including hospital beds, ventilators, and personal protective equipment.²³

²¹ DOC Affidavit, *supra* note 19.

²² See Will Stone, *What's Coming This Winter? Here's How Many More Could Die In The Pandemic*, NPR (Oct. 16, 2020, 10:52 AM), <https://www.npr.org/sections/health-shots/2020/10/16/924240204/how-bad-will-coronavirus-be-this-winter-model-projects-170-000-more-u-s-deaths> (stating that a model developed by the Institute for Health Metrics and Evaluation at the University of Washington predicted nearly 390,000 deaths by February 1).

²³ On Thursday November 20, Governor Raimondo stated that Rhode Island hospitals were at 97% of their COVID-19 capacity. *Nearly 200 inmates, staff at*

Finally, this proposed remedy is narrowly targeted to pretrial detainees whose releases are imminent. DOC statistics show that in nearly all misdemeanor cases in which surety bail is imposed, inmates are able to secure their release within two weeks.²⁴ But in the meantime, they pose a great risk to the public and a severe drain on DOC resources. Setting personal recognizance bail in all but the most serious of cases would cut down on these risky and resource-consuming short-term stays.

It has been eight long months since we first began to understand the particularly contagious and deadly nature of the novel coronavirus. Since then, nearly every aspect of Rhode Island life has been affected by both the virus itself and the attempts to control its insidious spread. The relative relaxation of restrictions in the summer and early fall has recently been reversed, and the dreaded “second

Rhode Island prison test positive for COVID-19, Boston Globe (Nov. 20, 2020, 5:08 PM), <https://www.bostonglobe.com/2020/11/20/metro/nearly-200-inmates-staff-rhode-island-prison-test-positive-covid-19/?outputType=amp>. As of the filing of this petition, hospitals are at 100% capacity, and two field hospitals have been established. Jack Perry, *Rhode Island Hospitals Are Full. Covid Field Hospital Opening Today*, Providence Journal (Nov. 30, 2020, 6:01 PM), <https://www.providencejournal.com/story/news/healthcare/2020/11/30/covid-field-hospital-cranston-begin-accepting-patients-monday/6461763002/>.

²⁴ Council of State Governments, Justice Reinvestment Working Group: Second Meeting, at 33-34 (Sept. 10, 2015), <https://csgjusticecenter.org/wp-content/uploads/2020/10/RhodeIslandWorkingGroup2.pdf>; Email and attachments in response to request under Access to Public Records Act from Kathleen Kelly, Executive Counsel, Rhode Island DOC, to Michael DiLauro, Director of Training and Legislation, Rhode Island Public Defender (Jan. 30, 2019) (on file with author).

wave” appears to have arrived right on schedule. While researchers toil away in search of a vaccine, we all have a part to play to ensure the collective safety of our community.

For those of us within the criminal justice system, this can best be done by controlling the prison population and giving the DOC the space and flexibility it needs to navigate this phase of the COVID-19 pandemic. Accordingly, the Rhode Island Public Defender respectfully requests that this Court exercise its power to modify the Bail Guidelines, helping to relieve the burden on the DOC during these exceptional times. In order for this remedy to be effective, it must be carried out immediately.

Wherefore, the Rhode Island Public Defender requests that this Court:

- 1) Modify the Bail Guidelines to temporarily require setting personal recognizance bail—including in cases of alleged probation violations—except in extraordinary circumstances that must be enumerated on the record.
- 2) Order that this emergency measure should apply to future bail determinations as well as to motions to reduce bail.

Respectfully, due to the immediacy of this crisis, an emergency telephone conference with the duty judge pursuant to Rule 34 of the Supreme Court Rules of Appellate Procedure is also requested.

Respectfully Submitted,

/s/ Lara E. Montecalvo
Lara E. Montecalvo, #6274
Public Defender

/s/ Matthew B. Toro
Matthew B. Toro, #5736
Deputy Public Defender

/s/ Kara J. Maguire
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2020, I served a true copy of the within Emergency Petition and Request for Telephone Duty Judge Conference upon the Office of the Attorney General by emails to:

Adi K. Goldstein, Deputy Attorney General, at agoldstein@riag.ri.gov;
Stephen G. Dambruch, Chief of the Criminal Division, at sdambruch@riag.ri.gov;
and
Christopher Bush, Chief of the Appellate Division, at cbush@riag.ri.gov.

I also served a true copy of the within Emergency Petition and Request for Telephone Duty Judge Conference upon the Department of Corrections by emails to:

Patricia A. Coyne-Fague, Director, at patricia.coynefague@doc.ri.gov; and
Kathleen Kelly, Chief Legal Counsel, at kathleen.kelly@doc.ri.gov.

/s/ Kara J. Maguire
Kara J. Maguire

APPENDIX A

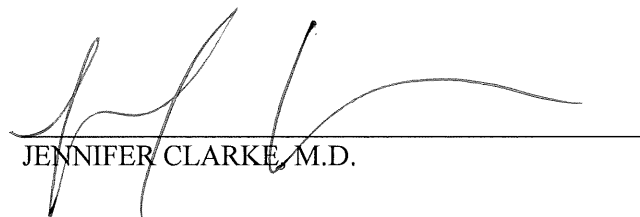
Rhode Island Department of Corrections
COVID-19 Population Update
November 1, 2020

**Leann Anderson, Acting Principal Planner
Planning and Research Unit**

**Affidavit of JENNIFER CLARKE, M.D., regarding SARS-CoV-2 infection
(otherwise known as COVID-19)**

I, Jennifer Clarke, M.D., being duly sworn and deposed, state:

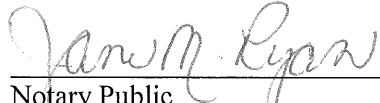
1. I am a physician duly licensed to practice medicine in the State of Rhode Island.
2. I have served as the Medical Program Director for the R.I. Department of Corrections since November 2015.
3. As the Medical Program Director, my duties include (but are not limited to) responsibility for the overall provision of healthcare services to pre-trial and sentenced inmates, to include primary care, nursing, dental, therapy services, mental health care, substance use disorder treatment, infectious disease treatment, pharmacy services, sub-specialty care and X-Ray services.
4. I have been advised through DOC legal counsel that the Rhode Island Public Defender's office has filed a petition to modify the Bail Guidelines to temporarily require the setting of personal recognizance bail except in extraordinary circumstances.
5. One of the most significant risks contributing to the spread of COVID-19 in the prison is the introduction of COVID-19 from outside sources. Many people come and go into the correctional facility including newly incarcerated inmates, correctional staff, and attorneys, all of whom may be exposed to COVID-19 in the community, thus exposing the incarcerated community to the disease.
6. Once COVID-19 is introduced into a correctional setting, the risk of rapid transmission is high. It is difficult to maintain the requisite social distancing in correctional facilities where there are many individuals sharing a communal living space, whether that be shared cells, dormitory-style beds, or open-air barred-cells that do not allow for effective isolation or quarantine.
7. Many of the inmates incarcerated at the ACI are in one or more at-risk category which means their mortality rate is elevated if they do become infected. If the care of these individuals cannot be managed at the ACI, they will be transferred out of the facility to a local hospital.
8. In my opinion, from a public health perspective, the fewer inmates the ACI maintains, in a congregate living environment, the safer the inmates are from a COVID-19 outbreak within the secured facilities.
9. In my opinion, fewer inmates incarcerated will strengthen DOC's ability to keep the virus out of the secured facilities and contain outbreaks.
10. In my opinion, reducing the admission of new inmates will better allow DOC to quarantine new commitments and contain the potential spread of the virus to other inmates, correctional officers, and the general public.



JENNIFER CLARKE, M.D.

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

Then personally appeared before me on this day of November, 2020, the above-named Jennifer Clarke, M.D. who acknowledged the foregoing statement to be true, to the best of her knowledge and belief.



Notary Public
Commission Expires: 9-12-2022

Jane M. Ryan
Notary Public, State of Rhode Island
Commission # 59430
Commission Expiration: