

IN THE SUPREME COURT OF PENNSYLVANIA

In re: the Petition of C.Z., A.O., and
Z.S.-W., on behalf of all similarly
situated individuals

No. 24 EM 2020

Petitioners.

**REPLY IN SUPPORT OF APPLICATION FOR EXTRAORDINARY
RELIEF UNDER THE COURT'S KING'S BENCH JURISDICTION**

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I. INTRODUCTION

As the COVID-19 public health crisis intensifies across the Commonwealth and the country, the need for dramatic and unconventional action has never been more urgent. While just one week ago Governor Wolf had yet to order a complete state shutdown and many other Governors across the country had ordered no shutdowns at all, the ground has once again shifted as public officials scramble to address the outbreak. Pennsylvania is now on statewide lockdown, and the number of Governors resisting Dr. Anthony Fauci's call for a uniform, nationwide response is dwindling. Of particular relevance, on April 3, Attorney General Barr issued a new memo ordering federal prison officials to intensify their efforts to release vulnerable prisoners at three federal prisons facing significant spread of the virus. Barr wrote: "We have to move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions."¹ Barr specifically acknowledged that the public health emergency was "materially affecting the functioning of the Bureau of Prisons" and urged the BOP to give priority to the release of the most vulnerable prisoners. Barr Memo.

While this Court has denied the Petition for Emergency relief filed on behalf of adults incarcerated in county jails, *see generally* Order, *In re: The Petition of*

¹ U.S. Dep't of Justice, *Memorandum for Director of Bureau of Prisons* (Apr. 3, 2020), <https://politi.co/2UJZIWV> ("Barr Memo"); *see* Jeffrey Gerstein, *Barr to speed releases at federal prisons hard hit by virus*, Politico (Apr. 3, 2020), <https://politi.co/2xReKvI>.

Pennsylvania Prison Soc’y, No. 70 MM 2020 (Apr. 3, 2020), that ruling need not compel a similar ruling here. The law requires heightened protections for youth, young people are at risk of specific mental health harms from being confined during the pandemic, and the relief requested in this case gives appropriate deference to juvenile and trial court judges to address the crisis while still recognizing and responding to the individualized needs of youth and protecting public health.

It is undisputed that youth status commands legal responses that reflect and address the unique attributes and vulnerabilities of children. While these differences have most recently led to the reversal or modification of decades of sentencing jurisprudence, the United States Supreme Court has consistently adapted constitutional mandates to meet the special needs and interests of children. *See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968). This Court has likewise acknowledged the differences between children and adults in its own doctrinal analyses. *See, e.g., Commonwealth v. Batts*, 640 Pa. 401, 432-33 (2017); *In re J.B.*, 630 Pa. 408, 433-34 (2014).

For all youth in confinement, whether in the adult or the juvenile system, correctional facilities administrators face a Hobson’s choice: either permit youth to congregate in common sleeping, living, and dining spaces with likely exposure to

the virus (for them and staff) or isolate youth in their rooms or cells, which has been shown to create lasting psychological harm for youth. As well-intentioned as any stakeholder or facility might be, the very circumstances of confinement create an extraordinary risk of harm to youth. Research confirms the particularly grave emotional and behavioral health risks to children who experience solitary confinement, and case law makes clear the courts' heightened duty to prevent these harms. *See, e.g., Doe v. Hommrich*, No. 3-16-0799, 2017 WL 1091864, at*2 (M.D. Tenn. Mar. 22, 2017) (mem.); *V.W. v. Conway*, No. 9:16-CV-1150, 2017 WL 696808, at *19 (N.D.N.Y. Feb. 22, 2017).²

For young people in the juvenile justice system, the legal framework also requires a unique response. The juvenile justice system rests on a commitment to treatment and rehabilitation, justifying the removal of adjudicated children from their homes and communities for the provision of educational, mental health, and other rehabilitative services specifically designed to facilitate their return home. These rights to rehabilitative services are not only constitutional but are also codified in our statutes. *See, e.g.,* 42 Pa.C.S. § 6301. When these services are denied—for any reason—the justification for confinement is substantially

² The Pennsylvania District Attorneys Association (“PPDA”) Answer focuses exclusively on case law developed in the context of adults, and fails to recognize the additional protections youth are owed under the Constitution. [See PDAA Answer at 26-31]. In the context of young people, courts must recognize the heightened burden on the institution to protect youth as well as the unique vulnerabilities of youth to harm.

diminished. This is the predicament our children face today, with little or no access to meaningful programming precisely because of the inherent challenges — indeed restrictions — placed on normal operations of youth correctional and other residential facilities during this public health emergency. [*See* McInerney Decl.].³

Finally, as set forth below, the responses to Petitioners’ King’s Bench Petition only underscore the need for emergency relief from this Court. The fact that several District Attorneys across the Commonwealth have widely differing processes in place in their respective counties, describing essentially a patchwork of procedures, creates an intolerable risk of justice by geography. It is untenable that a particular child’s opportunity or timeliness of release — and potential exposure to the fatal virus — will turn on where they reside. Only through the type of uniform review of all cases, utilizing the same set of objective criteria on the same timetable, as proposed by Petitioners, can this Court ensure youth across the Commonwealth are afforded their constitutional rights to equal protection of the laws and equal access to justice. The obvious lack of uniformity attested to by county district attorneys only heightens the risk of disparate treatment and the need for strong guidance from this Court. Moreover, there are nearly 2,000 youth

³ “Since school closures began on March 16th, ELC has received multiple reports from attorneys, parents, advocates, and youth regarding the lack of educational services or insufficiency of such services for youth in detention centers and residential facilities.” McInerney Decl. ¶ 4.

currently in placement in the Commonwealth.⁴ While it is vital, and commendable, that some counties have reduced the numbers of youth in recent weeks, these actions do not come close to the dramatic statewide interventions needed to address a crisis of this magnitude.

Similarly, the claim that King’s Bench relief is inconsistent with the individualized nature of the juvenile justice system widely misses the mark of how our system actually operates — or the relief Petitioners seek. Petitioners have not sought a “mass release” of all youth in the Commonwealth.⁵ [A.G. No Answer Letter]. The Petition instead requests uniform guidance to the lower courts to clarify under what conditions youth should be released in light of the pandemic. Pennsylvania’s juvenile justice system is not a free-for-all where judges and other stakeholders respond to juvenile delinquency according to their own idiosyncratic views of what is needed in any individual case. All decisions are made within the context of Pennsylvania’s Juvenile Act, which sets forth strict criteria for all decisions or orders judges and other juvenile justice system stakeholders are

⁴ See Attach. to Gov. No Answer, Apr. 4, 2020 Email from Richard Steele, Executive Director of the Juvenile Court Judges’ Commission (on file with Juvenile Law Center). JCMS data as of April 4, 2020 shows a total of 1,958 youth in out of home placement in the juvenile justice system as a result of delinquency proceedings. This includes 270 children in detention, 69 in shelter, 1,607 in placement, and 12 in diagnostic placements. This does not include more than 30 additional youth held in adult jails. [PDAA Answer].

⁵ Nor do Petitioners seek to litigate the facts of individual cases, notwithstanding the PDAA’s inclusion of the secure court summary and discovery for Petitioner A.O.’s pending case, which is still in the pretrial stage.

empowered to make, from charging to detention to transfer, disposition, and release. The juvenile justice system has always functioned with specific principles and mandates in mind; in this time of crisis, the need for state level guidance is not at all incompatible with individualized decision making, but it does require this Court, on its own or with the assistance of a Special Master, to put in place a new set of decision guideposts to expedite release and promote the health and safety of Pennsylvania's children.

While voluntary cooperation of certain counties and stakeholders is a useful first step, it is wholly insufficient to address the crisis at hand. Courts across the Commonwealth need clear direction and guidance from this Court on the process and standards needed to minimize the number of youth in confinement during this crisis to protect vulnerable youth, protect public health, and ensure fundamental fairness, with haste and urgency. With each passing day, the risk that inaction or mis-action will cost lives or cause grave harm rises. We urge this Court to act immediately and with foresight to get ahead of, and not risk falling behind, this public health crisis. We ask this Court to grant this King's Bench Petition, appoint a Special Master to implement and monitor uniform processes for the expedited review by juvenile and trial courts of all youth in custody in the Commonwealth, and facilitate the return of as many children as is safely possible to their homes and communities.

II. KING’S BENCH RELIEF IS WARRANTED TO ADDRESS THE UNIQUE NEEDS OF YOUTH.

A. Youth deserve heightened protections.

As the Petition sets forth, Constitutional standards are uniquely protective of children, whether in the juvenile or adult system, in part because young people have specific needs to be protected from emotional harm. *See Redding*, 557 U.S. at 379; *Ginsberg*, 390 U.S. at 638. More specifically, courts have repeatedly held the solitary confinement or isolation of youth unconstitutional because of the heightened risk of lasting emotional harm. *See, e.g., Hommrich*, 2017 WL 1091864, at *2; *Conway*, 2017 WL 696808, at *19.⁶

B. Youth face an excessive risk of harm in facilities.

Respondents’ Answers to the Petition confirm what Petitioners’ Declarations stated: facilities housing young people across the state are already relying on physical isolation to prevent the risk of contagion, [*see, e.g., A.O. Decl.* (noting that youth remain in their cells all day other than one hour of recreation); T.C. Decl. (noting that another unit is already in quarantine)], and that the plan is to rely on additional seclusion to address any additional risks, [*see, e.g., PDAA Answer*,

⁶ The PDAA Answer focuses exclusively on case law developed in the context of adults, and fails to recognize the additional protections youth are owed under the Constitution. [*See PDAA Answer* at 26-31]. In the context of young people, courts must recognize the heightened burden on the institution to protect youth as well as the unique vulnerabilities of youth to harm.

Exhibit J (describing the plan to use seclusion to address COVID-19)].⁷ Moreover, youth are also facing significant limitations to visitation and programming. DHS confirmed that a temporary ban on visitation and home visits is in place for Youth Development Centers and Forestry Camps, and that even clergy, probation, and attorney visits are limited to emergency situations. [*See, e.g.*, DHS Answer at 4; *see also* PDAA Answer, Exhibit A (noting all interactions taking place by technology)]. And while they are attempting to keep young people socially connected, their description of Z.S.-W.’s average of approximately two phone calls with family members per week makes clear that vulnerable teenagers, at a moment of heightened risk and vulnerability, remain extraordinarily isolated. [DHS Answer at 6]. Many confined young people are already deprived of regular programming and even the ability to go outside or exercise because of the pandemic. [*See* C.Z. Decl.; K.L. Decl.; L.J. Decl. (stating youth in more than one facility are unable to go outside or exercise); A.O. Decl. (stating youth are not even receiving educational worksheets under their doors)].

The Pennsylvania District Attorneys’ Association asserts that Petitioners’ experts have no knowledge of Pennsylvania’s system. That is patently false. Most

⁷ Whether it is called seclusion, isolation, or solitary confinement, it’s clear that the plan is to house a young person alone in a cell or room without direct contact with others. Even when undertaken for vital medical purposes, this treatment risks imposing serious harm on youth. [*See* Haney Decl.].

obviously, Anne Marie Ambrose is not a former leader of an “unnamed youth justice agency,” [PDAA Answer at 9], but, as her declaration notes, she was the Commissioner of Human Services for the City of Philadelphia with responsibility for child welfare and juvenile justice and Bureau Director for child welfare and juvenile justice for the Commonwealth of Pennsylvania’s Department of Public Welfare. [Ambrose Decl.]. In addition, respondents do not give sufficient weight or attention to the declaration of Timene Farlow, the former Deputy Commissioner for the Philadelphia Department of Human Services’ Division of Juvenile Justice Services. Both have extensive knowledge of Pennsylvania’s and Philadelphia’s justice systems, detention centers, and the full spectrum of placement facilities, including the physical environment of these facilities. Both made clear that it is impossible for our current systems to manage the medical and mental health needs of confined youth under the current laws during the pandemic. Moreover, as described above, the very dangers Petitioners warn about—youth being placed in isolation with the risk of lasting psychological harm—are already occurring, as confirmed by DHS, the declarations of district attorneys, individual youth, and their parents. [See Kenneth Decl. ¶¶ 5-6].

PDAA’s assertions that other experts, such as Dr. Haney and Dr. Graves, have not visited Pennsylvania facilities are irrelevant. [PDAA Answer]. That Dr. Craig Haney did not opine as to specific conditions in Pennsylvania is not

dispositive. He stated that isolation will harm children. [*See Haney Decl.*]. That Dr. Julie Graves did not opine as to specific conditions in Pennsylvania is also not dispositive. She stated that young people held in congregate care settings such as juvenile detention facilities, residential treatment facilities, and jails cannot be safe during a pandemic. [*See Graves Decl.*]. No party has averred that children in Pennsylvania are not confined in such situations. The harm from these practices stems not from any particular institution, but the nature of the practices themselves.

C. The Commonwealth has a heightened duty to youth in the juvenile justice system.

All parties appear to agree that the Commonwealth has a heightened duty to protect and care for young people in the juvenile justice system. [*See, e.g., PDAA Answer at 12, 16*]. Once the Commonwealth has assumed this responsibility, it also has a heightened duty not only to ensure basic safety, but also to provide supportive services.

The Department of Human Services notes that young people across the state, whether in confinement or not, have had their education disrupted. [*DHS Answer at 6*]. To be sure, youth across the state are currently facing uncertainty and disruptions. But youth across the state do not face the heightened medical risk of being in confinement when justice system facilities have been shown to be “Petri

dish[es]” of contagion for COVID-19.⁸ They do not face living situations that severely limit their access to sinks. [See C.Z. Decl.]. They do not face isolation without the daily support of family and friends. And they do not face being locked in a room for their protection. [See A.O. Decl.].

That the rates of hospitalization and death are lower for adolescents than for elderly adults, as noted by the Pennsylvania District Attorneys’ Association [PDAA Answer at 17], does not support the denial of relief to Petitioners. Importantly, while youth are at lower risk than adults, youth around the world have already faced hospitalization and death as a result of this virus. [Graves Decl.]. Moreover, courts and the Commonwealth have a heightened duty of responsibility to children—to protect both their physical health and their psychological well-being. The standard of care in our juvenile justice system is not placement in a facility that probably won’t kill you. Nor is the responsibility to ensure safety lessened because perhaps fewer children will die. The purpose of the system is to provide “programs of supervision, care and rehabilitation.” 42 Pa.C.S. § 6301(b)(2).

Petitioners agree with the County Commissioners Association of Pennsylvania that youth must be released to safe situations. [See Answer of

⁸ See Andy Sheehan, *Coronavirus In Pittsburgh: Amid Virus Pandemic, Allegheny County Jail Releases More Than 200 Inmates*, CBS PITTSBURGH (Mar. 20, 2020), <https://cbsloc.al/2wWdXd2>.

CCAP]. Yet this is also not a reason for this Court to deny relief. While Petitioners agree that young people must have a safe home to return to, that shared principle alone cannot justify incarcerating young people in conditions creating a heightened risk of psychological and medical harm. The Commonwealth must meet its duty to provide safe, appropriate, and rehabilitative treatment,⁹ and the trial courts can use their discretion to ensure that releases happen safely and appropriately, that youth have the supports they need, and that the court imposes any necessary conditions. *See generally* 42 Pa.C.S. §§ 6301–6365.

The urgency of recognizing the unique context of the juvenile justice system is underscored by the realities of the young people confined in the Commonwealth. Eighty percent of committed youth in Pennsylvania have been placed for offenses not on the violent crime index.¹⁰ More than half are confined because of technical probation violations.¹¹ Most youth held pre-trial in adult jails (“Direct File Juveniles”) similarly deserve this Court’s speedy action since they are presumed

⁹ Moreover, to the extent that there are issues relating to a particular young person’s own safety and psychological well-being preventing a them from returning home, those should be dealt with by the mental health or child welfare agencies, and do not justify continued justice system placement during the height of the pandemic.

¹⁰ M. Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement*, Office of Juvenile Justice & Delinquency Prevention (2019), <http://www.ojjdp.gov/ojstatbb/ezacjrp/>.

¹¹ Pa. Juvenile Court Judges’ Comm’n, *2018 Juvenile Court Annual Report* 39 (2018), <https://bit.ly/2V2CRQc>.

innocent.¹² These young people can and should be safely returned to their communities.

III. STATE-LEVEL ACTION BY THIS COURT IS ESSENTIAL TO PROTECTING PUBLIC HEALTH AND ENSURING EQUAL ACCESS TO JUSTICE

Action by this Court is necessary to ensure an immediate, statewide response of the scale and scope needed to effectively protect public health. Without prompt guidance from this Court, county-level variations in practice will undermine the Commonwealth's efforts to control this outbreak, will lead to "justice by geography" and fundamental inequities, and will leave many youth and communities vulnerable to serious harm.¹³ Clear guidance from this Court on the standards and process needed to rapidly reduce the number of youth in confinement is not only appropriate under the circumstances, it is essential to

¹² Notably, while Direct File Juveniles are considered adults under Pennsylvania law by their exclusion from the Juvenile Act, the majority of Pennsylvania youth who are "Direct Filed" have their cases returned to the juvenile justice system, where they are subject to the same policies and conditions as all other youth confined in that system. *See, e.g.,* Joshua Vaughn, *Usually, Dozens of Children Ages 14-17 Are in Adult Jails*, U.S. News & World Report (Feb. 16, 2019)

<https://bit.ly/34fvQ2k> (reporting that "[r]oughly two-thirds of all [Pennsylvania] youth cases were ultimately dropped or sent to juvenile court after being charged in adult court").

¹³ While respondents argue that releasing youth from detention may hasten the spread of the virus, [*see, e.g.,* PDAA Answer at 14, 15], they provide no medical support for this contention. The only declaration from a medical expert is that of Petitioners' expert, highlighting that keeping youth in the facility creates more significant public health damage. [Graves Decl.]. Again, the example of the cruise ships and other contained spaces in which COVID has spread to date underscore the risks of trying to address the virus by keeping large numbers of individuals in one physical location. *See* Rebecca Ratcliffe & Carmela Fonbuena, *Inside the Cruise Ship That Became A Coronavirus Breeding Ground*, Guardian (Mar. 6, 2020), <https://bit.ly/2WXwsrP>; K. Oanh Ha, *How A Cruise Ship Turns into A Coronavirus Breeding Ground*, Fortune (Feb. 10, 2020), <https://bit.ly/2wHC2nN>.

protecting the safety and health of the Commonwealth’s most vulnerable residents during this unprecedented pandemic.

A. The urgency of this public health crisis demands state-level action.

It has increasingly become apparent as the COVID-19 crisis has deepened in Pennsylvania and around the country that state-level action is necessary to effectively protect public health. As the virus has spread, both this Court and Governor Wolf have moved from county-specific responses to broad, statewide orders. On March 23, 2020, Governor Wolf issued his first stay-at-home order, applicable to seven counties.¹⁴ By April 1, just over a week later, that order had been extended to include all 67 Pennsylvania counties,¹⁵ despite not all counties yet having even one positive case reported.¹⁶ The Governor’s school closure order also shifted from targeting a few counties to statewide closures.¹⁷ Similarly, this Court replaced its initial order¹⁸ granting President Judges the authority to declare

¹⁴ Office of the Gov., *Order of the Governor of the Commonwealth of the Pennsylvania for Individuals to Stay at Home* (Mar. 23, 2020), <https://bit.ly/2xSVcHc>.

¹⁵ Office of the Gov., *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home* (Apr. 1, 2020), <https://bit.ly/2V5INrt>.

¹⁶ Pa. Dep’t of Health, *COVID-19 Cases in Pennsylvania**, <https://bit.ly/3bXzEbt>.

¹⁷ Office of the Gov., *Gov. Wolf and Sec. of Health Expand ‘Stay at Home’ Order to Carbon, Cumberland, Dauphin and Schuylkill Counties, Extend School Closures Indefinitely* (Mar. 30, 2020), <https://bit.ly/2x3Sdf2>.

¹⁸ *In re: 38th Judicial District – Request for Emergency Judicial Order*, No. 29 MM 2020 (Mar. 12, 2020), <https://bit.ly/2XbQeA7>.

judicial emergencies with a statewide order to that effect,¹⁹ which was followed soon after by a statewide order closing courts to the public.²⁰ Although undeniably exceptional actions, as this Court explained, such statewide limits reflect the “immediate need for extraordinary nationwide measures” to control the spread of the virus and are consistent with the Pennsylvania Department of Health’s efforts to “restrict the amount of person-to-person contact and mitigate the spread of COVID-19” throughout the Commonwealth.²¹

Now, several weeks into this crisis, there is no time left to adjust from a county-based response to statewide action to prevent the spread of COVID-19 into juvenile facilities and adult jails housing youth. The virus has already arrived, with staff testing positive in at least one youth detention center. [See Kenneth Decl. ¶ 5]. Even since Petitioners’ filing, two nurses at the Philadelphia Juvenile Justice Services Center have tested positive for the virus and outbreaks are underway in adult facilities around the state.²² As has been necessary in all other sectors of

¹⁹ *In re: General Statewide Judicial Emergency*, No. 531 (Pa. Mar. 16, 2020) <https://bit.ly/34fzao> .

²⁰ *In re: General Statewide Judicial Emergency*, Nos. 531& 532 (Pa. Mar. 18, 2020) <https://bit.ly/2JG2D7r>.

²¹ *Id.*

²² *See, e.g.*, Pa. Dep’t of Corr., *PA DOC COVID-19 Dashboard*, <https://bit.ly/2x3Ss9W> (detailing inmate and employee testing); Cherri Gregg, *Philadelphia jails report 8 new coronavirus cases in one day, taking total to 20 inmate infections*, KYW NewsRadio (Apr. 2, 2020), <https://bit.ly/34hKSVE> (reporting that 20 inmates in Philadelphia jails have tested positive for coronavirus); Lisa Gartner & Jeremy Roebuck, *Despite the coronavirus stay-at-home order, Pa. is transferring children across the state*, Phila. Inquirer (Apr. 2, 2020),

public life—ranging from schools, to businesses, to courts—a uniform, statewide response is essential to effectively protect public health by containing the spread of COVID-19 in youth facilities.

B. Without state-level guidance, county-level variations will lead to fundamental inequities and justice by geography.

Without statewide guidance from this Court, there will be widespread variation in county-level responses to this crisis, as is evidenced by the declarations from various county District Attorneys submitted by the Pennsylvania District Attorneys Association in opposition to this Petition. For example:

- Many counties are reviewing existing detention orders, but not all are reviewing youth in placement, and few are reviewing youth in adult jail.²³ The *process* for reviewing detention and placement orders also varies widely, with some counties proactively reviewing all cases

<https://bit.ly/2JICF36>; *see also* Gov. Wolf Answer at 2 (“The Commonwealth is currently experiencing outbreaks in several long-term care facilities and in at least one county prison.”); Kenneth Decl. ¶ 5 (noting that two nurses at JJSC tested positive for coronavirus).

²³ *Compare* PDAA Answer, Exhibit H, Stollsteimer Decl. ¶¶ 2, 4(c) (describing a joint effort among stakeholders to “identify and assess juveniles in detention, correctional and other residential facilities who could [be] immediately and safely released into the community” and weekly reviews of all cases including Direct File Juveniles) *with* PDAA Answer, Exhibit I, Sayers Decl. ¶ 4(b) (indicating that no review hearings “need to be scheduled at this time based on the statute”) *with* PDAA Answer, Exhibit J, Rice Decl. ¶ 2 (describing continuing review of youth in detention).

regularly, whereas others are doing so on an “as-needed/as-requested basis” or fail to mention any proactive or regular review process.²⁴

- Counties conducting reviews of youth currently in detention, adult jail, or placement are using very different standards for release, ranging from releasing youth “where at all possible consistent with the safety of the juvenile and the public” [PDAA Answer, Exhibit E, Piecuch Decl. ¶ 4], to continued placement “for serious felony crimes, usually to the person,” [PDAA Answer, Exhibit G, Sinnett Decl. ¶ 4(b)], to the ambiguous standard of release where “appropriate,” [PDAA Answer, Exhibit I, Sayers Decl. ¶ 5], to no standard at all, [see, e.g., PDAA Answer, Exhibit K, Salavantis Decl.].
- No county described limiting or eliminating detention or placement for failure to appear, failure to pay fines or fees, or technical probation

²⁴ See, e.g., PDAA Answer, Exhibit A, Steele Decl. ¶ 3 (placements reviewed at request of probation); PDAA Answer, Exhibit C, Lozier Decl. ¶ 3(c) (“Juvenile Services Division reviews each case on a daily basis”); PDAA Answer, Exhibit I, Sayers Decl. ¶ 3 (describing how the court, *sua sponte*, reviewed youth in placement); PDAA Answer, Exhibit K, Salavantis Decl. ¶ 3 (conducting placement reviews on an “as-needed/as-requested basis”); Howell Decl. ¶ 2 (no review process mentioned); PDAA Answer, Exhibit M, Martin Decl. (no proactive review process mentioned).

violations. Very few of the counties currently confining youth in adult jail on cash bail are reviewing the bail orders.²⁵

- No county described any modifications to conditions of probation to avoid requiring youth to comply with conditions that subject them to risk of exposure.
- Only three counties described a review process or release policy around medically fragile youth.²⁶

These dramatically different approaches to this pandemic will produce dramatically different results, depending on which county a child resides in. Indeed, the variation in outcome is already evident from the District Attorney declarations. While a few counties have substantially reduced their populations [*see, e.g.*, PDAA Answer, Exhibit A, Steele Decl. ¶ 3(b) (reporting a 50% reduction in detention from February to March in Montgomery County)], others reported that their numbers were “slightly lower than normally the case,” [PDAA Answer, Exhibit M, Martin Decl. ¶ 13], and still others did not mention any reduction in the number of youth in detention or placements. [*See, e.g.*, PDAA

²⁵ *See, e.g.*, PDAA Answer, Exhibit A, Steele Decl. ¶ 3(f) (reviewing cash bail); PDAA Answer, Exhibit B, Adams Decl. (no mention of cash bail reviews); PDAA Answer, Exhibit G, Sinnett Decl. ¶ 4(d) (“I am not aware of any exceptional efforts regarding those two defendants.”).

²⁵ *See* PDAA Answer, Exhibit J, Rice Dec. ¶ 5(f); PDAA Answer, Exhibit L, Howell Decl. ¶ 5; PDAA Answer, Exhibit N, Castro-Jimenez Decl. ¶ 2.

²⁶ *See* PDAA Answer, Exhibit J, Rice Dec. ¶ 5(f); PDAA Answer, Exhibit L, Howell Decl. ¶ 5; PDAA Answer, Exhibit N, Castro-Jimenez Decl. ¶ 2.

Answer, Exhibit F, Coppolo Decl.; PDAA Answer, Exhibit D, Snook Decl.; PDAA Answer, Exhibit L, Howell Decl.]. It is also clear from the declarations that some youth are still being detained for low-level offenses and probation violations, and that medically vulnerable youth remain confined in large group settings. [*See, e.g.*, PDAA Answer, Exhibit J, Rice Decl. ¶ 3(b), (c) (describing a youth placed for a violation of probation, and a youth in detention for failure to appear on a motion to violate probation)]. And the overall state placement numbers remain alarmingly high – state data as of April 4, 2020, shows a total of 1,958 youth in out-of-home placement as a result of delinquency proceedings, including 270 youth in detention and more than 1,600 in placement.²⁷

County variations also create fundamental inequities in our state’s administration of justice. The current hodgepodge of county responses ensures that youth will become victims of “justice by geography.” This is an intolerable affront to our notion of justice. The only way to ensure fundamental fairness and due process for young people during this crisis is for this Court to provide clear and uniform statewide guidance on the process and standards courts across the Commonwealth must use to review the cases of youth in juvenile detention,

²⁷ Attach. to Gov. No Answer, Apr. 4, 2020 Email from Richard Steele, Executive Director of the Juvenile Court Judges’ Commission.

placement, or adult jail, and minimize the number of youth confined in such facilities during this crisis.

C. Other state-level mechanisms for providing guidance are inadequate.

An order from this Court is the only effective mechanism for providing state-level guidance that can adequately protect the health and safety of youth, staff, and the community.

Although several respondents point to existing legal standards in the juvenile justice system as evidence that the requested relief is unnecessary, these standards are insufficient to address the current crisis. As the parties virtually unanimously agree, reducing the number of youth in confinement is essential to limiting the spread of COVID-19. Yet existing legal standards permit the detention and placement of youth in situations not related to the safety of the community or of the youth. *See* 42 Pa.C.S. § 6325 (permitting detention of a child to protect the child or because the child may not appear in court); 42 Pa.C.S. § 6352 (authorizing the court to commit a child to an institution if that disposition is “determined to be consistent with the protection of the public interest and best suited to the child’s treatment, supervision, rehabilitation, and welfare,” taking into consideration a number of factors unrelated to community safety, such as “development of competencies to enable the child to become a responsible and productive member of the community”). While these standards may be suitable under normal

circumstances, they are inappropriate bases for confinement during a pandemic that has been shown to spread in confined spaces. And as the actions of Attorney General Barr have shown, now is the time to urgently reconsider existing rules for confinement,²⁸ and to move with haste to reduce populations of incarcerated people.

Nor is the recent guidance from the Juvenile Court Judges' Commission ("JCJC") able to effectively address this health crisis. While Petitioners support JCJC's recommendation that "every consideration be given to the release of youth . . . when this can be accomplished in a safe manner and within the mandates of our Balanced and Restorative Justice mission," that recommendation is merely advisory.²⁹ JCJC lacks the authority to issue binding guidance, mandate a review process, or articulate a standard for release determinations other than the framework specifically codified in statute.³⁰

This Court is uniquely—and exclusively—positioned to direct and expedite the process for reducing the number of youth currently in confinement in Pennsylvania. All detention and placement decisions for youth in this State are ultimately made by juvenile and trial court judges. Just as it has with respect to court operations more generally, this Court must exercise its constitutionally

²⁸ See Barr Memo.

²⁹ Attach. To Gov.'s No Answer Letter at 2.

³⁰ See Pa. Juvenile Court Judges' Comm'n, *About JCJC*, <https://bit.ly/3aNVEFg>.

conferred supervisory authority over all courts in the Commonwealth and take affirmative steps to protect the health and safety of young people currently under its authority.

IV. PETITIONERS' REQUESTED RELIEF IS NARROWLY TAILORED AND APPROPRIATELY ALLOWS FOR INDIVIDUALIZED RELEASE DETERMINATIONS.

Respondents characterize the requested relief as a one-size-fits-all solution that is too blunt and insufficiently deferential of juvenile and trial court judges' discretion. *See, e.g.*, PDAA Answer at 1 (emphasizing the need for individualized determinations); A.G. No Answer Letter at 1 (characterizing the sought-after relief as a request for this Court to order "mass release.") These responses appear to willfully ignore the details of the relief requested. Petitioners did not request a "mass release" with no involvement from lower courts. Instead, Petitioners request that this Court provide guidance to the lower courts on the process and appropriate standards for exercising their discretion during this crisis.

Petitioners' primary request is that this Court require all juvenile courts (and trial courts in counties with youth currently facing adult charges) to conduct a proactive and comprehensive review of all youth in confinement, with a standard for release calibrated to reflect the public health emergency posed by continuing to confine large numbers of youth in group settings. The standard proposed by Petitioners accounts for the safety of the community, permitting continued

detention or confinement when release poses an immediate, specific, articulable and substantiated risk of serious physical harm to another that outweighs the risk of harm of continued confinement and cannot be mitigated through any conditions of release or alternatives to incarceration. This standard is designed to substantially reduce the number of youth in confinement—as both public health and correctional experts agree is essential under these circumstances—while still leaving room for juvenile and trial courts to appropriately exercise the discretion needed to account for individual circumstances.

Further, the more categorical limits on detention Petitioners propose are narrowly tailored to aid in the rapid reduction of the confined population while still allowing for judicial discretion. Specifically, Petitioners propose that this Court issue clear guidance that youth cannot be detained (as they could under normal circumstances) *solely* for failure to appear, failure to pay outstanding fines or fees, inability to pay cash bail, or violations of probation. During the health emergency created by this pandemic, interests such as ensuring court appearances and enforcing monetary sanctions and conditions of probation cannot justify exposing youth, staff, and communities to the dangers posed by housing large numbers of

youth in congregate settings. Youth found to pose an immediate and substantial risk to others could still be detained or placed under these proposed restrictions.³¹

Petitioners also propose a *presumptive* release standard for youth in placement, which is again intended to aid in the rapid reduction of the number of youth in confinement. Youth who are approaching completion of their dispositions, or who are currently confined for the purpose of completing an educational or treatment program that is stalled indefinitely due to this crisis, should—in most situations—be released. But the requested relief does not *mandate* such release, instead leaving room for both individualized determinations and a rebuttal of the presumption if warranted.

The *only* situation in which Petitioners propose that a change of placement be mandated is in circumstances involving medically vulnerable youth at higher risk for severe illness from COVID-19 and involving youth who display symptoms or test positive for the illness. For these youth, the health risks of congregate placement—and the risk they pose to others in such settings—clearly outweigh the

³¹ Many Respondents and District Attorneys express concern about situations where release may pose a risk to the youth. *See, e.g.*, PDAA Answer, Exhibit F, Coppolo Decl. ¶ 4(c) (“[W]e note that frequently it would be our conclusion that the juvenile is more safe in his or her current placement than they would be if returned home.”). While Petitioners share the concern for ensuring youth safety, youth should not be confined through the justice system for their own safety during this public health emergency. If there is a concern for the youth’s safety in the home, that issue is more appropriately handled through the dependency system. Further, Petitioners do not request that all youth be returned home, but rather that they be moved from congregate care settings, which are known to pose an immediate and acute risk to public health during this crisis.

need for placement in a group facility. Petitioners do not dictate the specific outcome in such cases—just that they be moved home or to another supportive setting, or to medical treatment where appropriate. Again, such relief is narrowly tailored to address the particular, and undeniably exceptional, public health emergency present in group settings during this crisis.

Finally, Petitioners request that this Court take additional steps to effectuate these reductions and to ensure the safety of all youth, including the appointment of a Special Master to administer and monitor compliance with the order. The proposed involvement of a Special Master creates another opportunity for broad stakeholder input in this process, including involvement by statewide entities such as the Juvenile Court Judges' Commission, which Petitioners agree could provide valuable input.

In Pennsylvania's juvenile justice system, the court has the ultimate authority for the decisions to detain, to place, and to release. *See* 42 Pa.C.S. §§ 6325, 6352, 6353. Petitioners have not sought to undo this fundamental legal framework. Instead, the Petition calls upon this Court to provide uniform guidance working within this framework that is essential in this time of crisis to ensure immediate action to protect vulnerable youth and the community from further spread of COVID-19.

V. CONCLUSION

As stated in the initial Petition, extraordinary times require extraordinary responses. The rehabilitation and treatment of our youth committed to juvenile justice placements have been compromised and in some instances completely halted in the face of the worst public health crisis our country has faced in a century. The physical and behavioral health risks all youth in placement face, including youth charged as adults, require setting aside customary policies or practices in favor of emergency, uniform procedures to expedite reduction of population, limit exposure and contagion, and most effectively promote the public health and safety of all citizens of this Commonwealth. Petitioners urge this Court to grant their Petition for Extraordinary Relief.

Dated: April 6, 2020

Respectfully submitted,

/s/ Courtney Saleski

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APPENDIX

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Declaration of Maura McInerney

I, Maura McInerney, declare as follows:

Background and Expertise:

1. I am the Legal Director of the Education Law Center, having served in this capacity for three years and having been a staff member of the organization since 2007.
2. The Education Law Center (ELC) is a statewide nonprofit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, and policy advocacy, ELC advances the rights of underserved children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, and children with disabilities, among others. During its forty-five-year history, ELC has handled thousands of individual matters and impact cases, including multiple class action lawsuits.
3. During my tenure at ELC, I have provided individual legal representation to youth in detention centers and residential placements and have engaged in impact litigation on behalf of youth as an education law attorney. I have also authored several reports¹ that analyzed the educational experiences of youth in residential placements. I have represented ELC in national, statewide, and local taskforces seeking to address the educational needs of youth in the juvenile justice system including the national [Legal Center for Youth Justice and Education](#), the statewide [Office of Children, Youth and Families Educational Success and Truancy Prevention Task Force](#), and Philadelphia's [Youth Residential Placement Taskforce](#).

Educational Impact of COVID-19 Pandemic on Youth in Residential Placements:

4. Since school closures began on March 16th, ELC has received multiple reports from attorneys, parents, advocates, and youth regarding the lack of educational services or insufficiency of such services for youth in detention centers and residential facilities.
5. In the first two weeks, it was reported that many residential on-grounds schools shut down in accordance with the Governor's order and most youth received no educational services at all, while some residential schools continued to remain open at grave risk of harm to youth.
6. Thereafter, a few facilities have continued to offer no educational services. The majority of facilities, however, with a few exceptions, are providing "self-guided packets" of worksheets for youth to complete on their own without the support of any qualified educators.

¹ See e.g., Children's Rights, Inc. & Education Law Center, *Unsafe and Uneducated: Indifference to Dangers in Pennsylvania's Residential Child Welfare Facilities* (2018) available at <https://www.elc-pa.org/wp-content/uploads/2018/12/2018-Pennsylvania-Residential-Facilities-Childrens-Rights-Education-Law-Center.pdf>.

7. In sharp contrast to the limited educational services offered in residential settings, school districts across the Commonwealth, including the School District of Philadelphia, have developed digital learning plans or are in the process of implementing digital learning plans. These plans may provide students with Chromebooks or other personal computing devices to access online learning through digital platforms such as Google Classroom, Infinite Campus,, Class Dojo, and other interactive opportunities. Importantly, these plans are directly supported by trained teachers to assist students to retain, learn, and apply skills and strategies. Also, in contrast to the educational services currently offered in residential settings, in addition to computer/digital interactions, districts have created opportunities for teachers to have direct contact with students via telephone, video, and other communication methods.
8. In the context of residential placements, the worksheets or packets provided to most students, at best, reinforce prior learning. Due to the absence of teacher support accessible to students in residential facilities, however, students are more likely to struggle and fall behind their peers. Moreover, a growing number of school districts are seeking or are providing “planned instruction” which consists of some formal teaching and learning similar to what occurs in a classroom setting and enables students to learn new concepts/skills aligned to grade level standards. The use of planned instruction is rare in residential facilities.
9. In addition, ELC has grave concerns regarding risk of regression for students with disabilities who remain in detention centers and residential placements. Based on our conversations with attorneys whose clients remain in these facilities, most are offering one-size-fits-all grade level packets which are not differentiated for students with disabilities based on their Individualized Education Programs (“IEPs”) despite their legal right to a free, appropriate public education and individualized plans based on their disability-related learning needs.²
10. In contrast, school districts are working to address the individualized needs of students with disabilities in this new context. Many are holding IEP meetings to develop individualized interim plans that align with existing IEP goals and services, and students who need specially designed instruction are consistently supported by special education teachers. In addition, school districts are providing remote learning support for students with disabilities who require related services such as speech therapy or occupational therapy. The School District of Philadelphia’s website states in part:

“Students with IEPs have opportunities to engage through support of teachers, related-services staff, and families, as well as have access to the communication support devices that align with their IEP. They will be able to access and benefit from instruction via the Chromebooks, digital classroom experiences, and communication with teachers and other school staff as feasible. Special education


² See *Individuals with Disabilities Education Act*, 20 U.S.C. § 1400 *et seq.*, Chapter 14 of the Pennsylvania School Code, 22 Pa. Code § 14.101 *et seq.*,

teachers will continue to engage parents in IEP meetings, parent meetings and otherwise support students in remote learning.”

School District of Philadelphia website, *Coronavirus FAQs*, available at <https://www.philasd.org/faqs/#1563289860501-3eda379a-ce52>.

11. The educational needs of students with disabilities in the juvenile justice context is a significant issue of concern because students in the juvenile justice system are far more likely to be students with disabilities eligible for special education services.³
12. Finally, ELC is concerned about the capacity of non-educator staff in residential placements to address the need for accommodations for students with qualifying disabilities, including mental health disorders such as oppositional deficit disorder, attention deficit disorder, attention deficit hyperactivity disorder, depression, and anxiety. Youth in the juvenile justice system are more likely to have such qualifying disabilities.⁴ Social distancing and increased isolation are likely to exacerbate these conditions during this difficult time. In the absence of trained school staff to develop effective accommodations plans to support the learning needs of these youth, such students are likely to be denied access to a free, appropriate public education and equal access to the curriculum guaranteed by Section 504 of the Rehabilitation Act.⁵
13. Accordingly, based on the foregoing, it is clear that youth who are currently in detention centers, jails, or longer term correctional and residential facilities would benefit educationally from being released to live in their communities at this time.

I understand that the statements herein are subject to the penalties of 18 Pa.C.S.A. § 4904 (relating to unsworn falsification to authorities).


Maura McInerney
Dated: April 5, 2020

³ While the exact number of incarcerated youth with learning disabilities is not known, figures across the U.S. estimate the percentage at between 30 to 60 percent, with some estimates as high as 85 percent. *See e.g., Supporting Youth with Disabilities in Juvenile Corrections*, Office of Special Education and Rehabilitative Services Blog, U.S. Dept. of Education, available at <https://sites.ed.gov/osers/2017/05/supporting-youth-with-disabilities-in-juvenile-corrections/>.

⁴ *Id.*

⁵ Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, *et. seq.*

Declaration of Asatta Kenneth

I, Asatta Kenneth, hereby state that the facts set forth below are true and correct to the best of my knowledge, information, and belief. I provided the information over the telephone to Annie Ruhnke, Youth Sentencing & Reentry Project Mitigation Specialist on April 3 and April 5, 2020. At the conclusion of the conversation, the information I provided was repeated to me, and I confirmed its accuracy.

1. My name is Asatta Kenneth and I am a resident of Philadelphia County, PA.
2. My daughter is C.Z., who is currently incarcerated at the Juvenile Justice Services Center, where she has been for 8 months.
3. C.Z. is currently 16 years old.
4. Prior to the COVID-19 pandemic, I spoke to C.Z. on the phone frequently and visited her often. Since the pandemic began, I have not been able to see my daughter and I have been unable to speak to her for days at a time.
5. C.Z. called me on Wednesday, April 1 to tell me that she was being quarantined. At that point, two of the nurses at the Juvenile Justice Services Center had tested positive for COVID-19 and they had locked down the entire facility. She was extremely upset. She shared that she was allowed out of her cell only by herself to use the bathroom and to shower for one hour in the evening. At the time of our phone call, she was allowed to use the phone during that hour. I was later told by her social worker that the JJSC had stopped allowing residents to make any phone calls.
6. During the several days when I was unable to speak with my daughter, the social worker was in touch with me, but the contact was inconsistent. I was not able to readily get information on the well-being of my daughter. When I spoke to C.Z. on the phone last

week, before she was no longer allowed to make calls, she was extremely upset. She described being in quarantine as a “prison within a prison” and expressed suicidal thoughts. C.Z. is generally a happy child and for her to speak this way is completely out of character. I have never heard her make threats of this nature before. I am extremely worried about her and feel so helpless.

7. I was able to speak with C.Z. yesterday (April 4), and she informed me that the youth are no longer being Quarantined. I think my daughter is doing better. However, I am concerned that similar restrictions will be imposed again, especially as Pennsylvania heads into a predicted “surge” in new COVID-19 cases. If restrictions are imposed similar to what my daughter experienced last week, I worry her mental health and well-being will once again be at great risk.

I, Annie Ruhnke, hereby state that the facts set forth above are a true and accurate representation of the facts as they were relayed to me. Further, I understand that the statements herein are subject to the penalties of 18 Pa.C.S.A. § 4904 (relating to unsworn falsification to authorities).



Annie Ruhnke, Mitigation Specialist
Youth Sentencing & Reentry Project
Dated: April 5, 2020