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## **Criminal Law - One Step Closer to Affordability as SJC Rules Judges Must Now Consider a Defendant's Financial Resources as a Factor When Making Bail Determinations - Brangan v. Commonwealth, 80 N.E.3D 949 (Mass. 2017)**

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**CRIMINAL LAW—ONE STEP CLOSER TO  
AFFORDABILITY AS SJC RULES JUDGES MUST  
NOW CONSIDER A DEFENDANT’S FINANCIAL  
RESOURCES AS A FACTOR WHEN MAKING BAIL  
DETERMINATIONS—BRANGAN V.  
COMMONWEALTH, 80 N.E.3D 949 (MASS. 2017).**

The right to bail has been a part of Massachusetts law since the codification of the Massachusetts Body of Liberties in 1641.<sup>1</sup> This right is safeguarded by both the Eighth Amendment of the U.S. Constitution as well as Article 26 of the Massachusetts Declaration of Rights, and the importance of that right has been highlighted by the judiciary for centuries.<sup>2</sup> In *Brangan v. Commonwealth*,<sup>3</sup> the Massachusetts Supreme Judicial Court (“SJC”) addressed the extent to which a judge must consider a criminal defendant’s financial resources when setting bail.<sup>4</sup> In a unanimous decision, the court set

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<sup>1</sup> See *Commonwealth v. Baker*, 177 N.E.2d 783, 784-85 (Mass. 1961) (noting right to bail has been part of Massachusetts Body of Liberties since colonial times); see also Charles Doyle, *Bail: An Overview of Federal Criminal Law*, CONGRESSIONAL RESEARCH SERVICE, at 2 (July 31, 2017), <https://fas.org/sgp/crs/misc/R40222.pdf> (discussing widely-recognized right to bail dating back to Massachusetts Body of Liberties). The Massachusetts Body of Liberties states:

No mans person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unless it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of [the General] Court doth allow it.

See *The Body of Liberties*, 18, reprinted in, WILLIAM H. WHITMORE, *THE COLONIAL LAWS OF MASSACHUSETTS* 36 (1889).

<sup>2</sup> See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); MASS. CONST. Art. XXVI, pt. I (“No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”); *Bail Not Jail*, CARTER DEYOUNG ATTORNEYS AT LAW, <http://www.carterdeyoung.com/bail-not-jail>, (last visited Nov. 11, 2017) (“As early as 1641, the colonists recognized that a free society is premised upon the belief that its citizens should be afforded due process of law before they are jailed for a crime for which they have yet to be convicted and sentenced.”); see, e.g., *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (discussing important implications and function of bail); *United States v. Bentvena*, 288 F.2d 442, 444-45 (2d Cir. 1961) (mentioning recognition of bail throughout U.S. history); *Querubin v. Commonwealth* 795 N.E.2d 534, 540-41 (Mass. 2003) (examining how purpose of bail is of “fundamental importance to the basic functioning of the judiciary.”).

<sup>3</sup> 80 N.E.3d 949 (Mass. 2017).

<sup>4</sup> See *id.* at 954 (discussing consideration of financial resources).

a new precedent, holding that when determining bail, a judge “must consider a defendant’s financial resources, but is not required to set bail in an amount the defendant can afford if other relevant considerations weigh more heavily than the defendant’s ability to provide the necessary security for his appearance at trial.”<sup>5</sup>

On January 17, 2014, Jahmal Brangan robbed a bank in Springfield, Massachusetts.<sup>6</sup> Following his arrest, Brangan appeared before the Superior Court, where the judge set bail at \$20,000 or \$200,000 surety based on a probation violation notice filed by the probation department.<sup>7</sup> On March 10, 2014, after a grand jury indictment, Brangan was arraigned and the judge set bail at \$50,000 or \$500,000 surety.<sup>8</sup> A year later, Brangan was convicted on the charge of armed robbery, but the trial judge declared a mistrial.<sup>9</sup>

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<sup>5</sup> See *id.* (stating same proposition within case); see also *Bail Not Jail*, *supra* note 2 (analyzing new precedent and maintaining “. . . money should not be the determining factor as to when someone’s freedom is taken away.”); Hon. Peter B. Krupp, *A Call for More Focused Advocacy: Setting Bail After Brangan*, BOSTON BAR JOURNAL (Feb. 2, 2018), <https://bostonbarjournal.com/tag/affordable-bail/> (“Although [this decision] did not purport to change the law, *Brangan*, at a minimum, collected and clearly articulated the foundational principles underlying bail, re-centering judges and advocates on what matters and what does not.”).

<sup>6</sup> See *Brangan*, 80 N.E.3d at 955 (stating facts from case). Brangan passed a note to the bank teller, who then handed over less than \$1,000, before fleeing the scene. *Id.* He was arrested later that day after his thumbprint was found on the robbery note. *Id.*

<sup>7</sup> See *id.* (describing Brangan’s court proceedings). At the time, Brangan “was on probation following a prison sentence of from eight to twelve years for rape of a child and related charges.” *Id.* The probation department ended up filing a notice of surrender, to which the judge relied on when setting bail. *Id.* He was subsequently indicted by a grand jury for armed robbery while masked under Massachusetts General Law Chapter (“M. G. L. c.”) 265, § 17. M. G. L. c. 265, § 17 states the following:

Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years; provided, however, that any person who commits any offence described herein while masked or disguised or while having his features artificially distorted shall, for the first offence be sentenced to imprisonment for not less than five years and for any subsequent offence for not less than ten years. Whoever commits any offence described herein while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years. Any person who commits a subsequent offence while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than 15 years.

See Mass Gen. Laws ch. 265, §17.

<sup>8</sup> See *Brangan*, 80 N.E.3d at 955 (discussing Brangan’s bail).

<sup>9</sup> See *id.* (discussing procedural history of case). The court declared a mistrial because of “certain statements in the prosecutor’s closing argument.” *Id.* Prior to the declaration of a mistrial, Brangan’s bail was revoked. *Id.* However, after the mistrial order, the judge held another bail hearing, where the original bail of \$50,000 or \$500,00 surety was reinstated. *Id.*

Subsequently, Brangan unsuccessfully tried to seek reduction of his bail in both July and December of 2015.<sup>10</sup>

Brangan filed four successive petitions, seeking relief from his pretrial detentions in accordance with M. G. L. c. 211, § 3.<sup>11</sup> Each of the petitions were denied for various reasons and the defendant appealed pursuant to SJC Rule 2:21.<sup>12</sup> The SJC ordered the appeal to proceed with briefing and argument, noting that “filing a petition pursuant to M. G. L. c. 211, § 3 is the proper means for seeking relief from bail determinations in the Superior Court, and that Brangan had no other means of obtaining adequate appellate review.”<sup>13</sup>

The principle of bail is addressed in both the Eighth Amendment of the U.S. Constitution and Article 26 of the Massachusetts Declaration of Rights.<sup>14</sup> While American bail laws have their roots in English common law,

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<sup>10</sup> See *id.* (stating same proposition). A month later, in January, the SJC granted “Brangan’s application for direct appellate review of the Commonwealth’s appeal from the trial judge’s mistrial order.” *Id.* The SJC held that the Commonwealth had no right to appeal, “leaving the armed robbery to stand for retrial.” *Id.*

<sup>11</sup> See *id.* at 955-56 (explaining Brangan’s petition requests). M. G. L. c. 211, § 3 states that the:

supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws . . . .

See Mass Gen. Laws ch. 211, § 3.

<sup>12</sup> See *Brangan*, 80 N.E.3d at 956-57 (analyzing each appeal). The court stated that Brangan “followed a long and tortuous path to seek relief from his pretrial detention. . . .” *Id.* at 955. His first petition was denied without prejudice “due to his failure to file the record materials necessary to support his claims.” *Id.* at 955-56. On considering Brangan’s second petition, the single justice remanded the matter for a hearing that reduced the defendant’s bail for the armed robbery charge and retained the original bail amount for the probation violation. *Id.* at 956. Upon filing a third petition, the single justice remanded the matter again, and effectively came out the same way as Brangan’s second petition. *Id.* The judge justified denying Brangan’s release on “personal recognizance without surety” due to several factors that included his history of mental illness, the potential penalty he faced, his conviction record, and the nature of the offense charged. *Id.* In his fourth petition, Brangan argued that the judge had “failed to give meaningful consideration to his inability to make the bail, to the equities in the case, and to his alternative proposal to post \$5,000 cash bail and wear a GPS bracelet.” *Id.* However, his petition was denied and appealed pursuant to SJC Rule 2:21, which provides the parameters for when “a single justice denies relief from a challenged interlocutory ruling in the trial court and does not report the denial of relief to the full court, the party denied relief may appeal the single justice’s ruling to the full court.” *Id.* at 956-57; see also SJC Rule 2:21, as amended, 434 Mass. 1301 (2001) (stating means for utilization of SJC Rule 2:21).

<sup>13</sup> See *Brangan*, 80 N.E.3d at 957 (stating similar proposition).

<sup>14</sup> See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); MASS. CONST. Art. XXVI, pt. I (“No

these laws have undergone significant changes throughout history.<sup>15</sup> *Stack v. Boyle*<sup>16</sup> was the first major U.S. Supreme Court case dealing with the administration of bail.<sup>17</sup> In *Stack*, the Court discussed the dual-function of bail and held that “[b]ail set at a figure higher than an amount reasonably calculated to [ensure the accused’s presence in court] is ‘excessive’ under the Eighth Amendment.”<sup>18</sup> Both *Stack* and a later Supreme Court case, *Carlson v. Landon*,<sup>19</sup> established that “while a right to bail is a fundamental precept of the law, it is not absolute, and its parameters must be determined by federal and possibly state legislatures.”<sup>20</sup>

In Massachusetts, the judiciary has held that a Superior Court judges’ authority to set bail can be found in M. G. L. c. 276, § 57 (“section 57”).<sup>21</sup> Interestingly, section 57 makes no mention of a defendant’s financial resources as a factor to be considered when making bail determinations.<sup>22</sup> However, the SJC has interpreted section 57 to include consideration of a defendant’s financial resources, in addition to other historical common law

magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”)

<sup>15</sup> See, e.g., Amanda Zaniewski, *Bail in the United States: A Brief Review of the Literature*, MASSACHUSETTS DEP’T OF CORRECTIONS (Nov. 2014), <http://www.mass.gov/eopss/docs/doc/research-reports/briefs-stats-bulletins/bail-in-united-states-literature-review.pdf> (tracing U.S. history of right to bail and its descent from English common law); *About Bail- History of Bail*, PBUS, <http://www.pbud.com/general/custom.asp?page=14>, (last visited Nov. 11, 2017) (discussing how “knowledge of the English system and how it developed until the time of American independence is essential [to understanding American bail laws.]”); John-Michael Seibler & Jason Snead, *The History of Cash Bail*, THE HERITAGE FOUNDATION (Aug. 25, 2017), <http://www.heritage.org/courts/report/the-history-cash-bail> (tracking history of bail and waves of reform to date); Doyle, *supra* note 1 (outlining significant changes in bail throughout history); see generally William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34-66 (1977) (describing origins and history of bail in England).

<sup>16</sup> 342 U.S. 1 (1951).

<sup>17</sup> See *Stack v. Boyle*, 342 U.S. 1 (1951) (discussing bail administration); see also Timothy R. Schnacke, et. al, *The History of Bail and Pretrial Release*, PRETRIAL JUSTICE INSTITUTE, at 8 (Sept. 23, 2010), [https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI\\_2010.pdf](https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf) (stating significance of *Stack* as first major case dealing with bail).

<sup>18</sup> See *Stack*, 342 U.S. at 4-5 (holding as described).

<sup>19</sup> 342 U.S. 524 (1952).

<sup>20</sup> See Timothy R. Schnacke, et. al, *supra* note 16 (discussing impact of *Stack* and *Carlson* in context of right to bail).

<sup>21</sup> See, e.g., *Commonwealth v. Torres*, 806 N.E.2d 895, 897 (Mass. 2004) (maintaining section 57 authorizes judges to set bail); *Querubin v. Commonwealth*, 795 N.E.2d 534, 539 (Mass. 2003) (holding section 57 is applicable to setting bail in the Superior Court); *Serna v. Commonwealth*, 768 N.E.2d 548, 548 (Mass. 2002) (discussing reasoning behind applicability of section 57 in setting bail over M. G. L. C. 276, § 58 (“section 58”)).

<sup>22</sup> See Mass Gen. Laws Ann. ch. 276, § 57 (LexisNexis 2017) (describing requirements of statute entitled “Officials Authorized to Admit; Procedures; Persons Precluded from Admission.”).

factors.<sup>23</sup> Specifically, in *Querubin v. Commonwealth*,<sup>24</sup> the SJC refers to the Reporters' Notes in Rule 6 of the Massachusetts Rules for Criminal Procedure, which states that the aforementioned factors are to be considered when conducting a bail hearing under section 57.<sup>25</sup>

Constitutional principles also help shed light on whether a defendant's financial resources should be considered when setting bail.<sup>26</sup> Federal courts have contemplated this question in light of the constitutional principles of due process and equal protection.<sup>27</sup> In *Pugh v. Rainwater*,<sup>28</sup> the Fifth Circuit Court of Appeals observes that incarcerating those individuals that cannot meet their "master bail bond schedules" without considering other alternatives, like finances, infringes on both due process and equal protection requirements.<sup>29</sup> Looking at Massachusetts precedent and constitutional principles, the courts should naturally address whether a defendant's financial resources should be a factor considered in making bail determinations.<sup>30</sup>

In *Brangan v. Commonwealth*, the SJC addressed whether a Superior Court judge should consider a defendant's financial resources in setting bail.<sup>31</sup> The court looked to the applicable statute governing bail proceedings and, relying on precedent, determined that section 57 was

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<sup>23</sup> See *Querubin*, 795 N.E.2d at 541 n.6 ("In making a determination as to what form of release to set, the following factors shall be considered: (1) the nature and circumstances of the offense charged, (2) the accused's family ties, (3) his financial resources, (4) his length of residence in the community, (5) his character and mental condition, (6) his record of convictions and appearances at court proceedings or of any previous flight to avoid prosecution or (7) any failure to appear at any court proceedings."); see also *Torres*, 806 N.E.2d at 899 (quoting *Querubin* factors for judge to consider when conducting bail hearings under section 57).

<sup>24</sup> 795 N.E.2d 543 (Mass. 2003).

<sup>25</sup> See *Querubin*, 795 N.E.2d at 541 n.6 (referencing how Reporters' Notes "include a discussion of the ways of guaranteeing a defendant's appearance in court.").

<sup>26</sup> See sources cited *supra* note 14 (looking at language of U.S. Constitution and Massachusetts Declaration of Rights); see also *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (setting limits on excessive bail). The court described excessive bail as "a figure [set] higher than an amount reasonably calculated to fulfill [its purpose of assuring the presence of the accused]." *Id.*

<sup>27</sup> See *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) (stating "[A] bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement."); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968) ("The mere fact that petitioner may not have been able to pay the bail does not make it excessive.").

<sup>28</sup> 572 F.2d 1053 (5th Cir. 1978).

<sup>29</sup> See *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) ("The incarceration of those who cannot [meet master bond schedule], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.").

<sup>30</sup> See cases cited *supra* notes 20, 22, 28 and accompanying text (discussing Massachusetts precedent and constitutional principles of bail in light of financial resources).

<sup>31</sup> See *Brangan*, 80 N.E.3d at 957 (answering question at issue in context of making bail determinations).

controlling in this case.<sup>32</sup> From there, the court ascertained section 57 indicated, amongst other historical common law factors, that financial resources should be one of several considerations when making bail determinations.<sup>33</sup> Additionally, the court regarded constitutional principles as mandating “consideration of a defendant’s financial resources in setting bail.”<sup>34</sup>

Following this discussion, the court made a powerful statement, holding “bail that is set without any regard to whether a defendant is a pauper or a plutocrat runs the risk of being excessive and unfair.”<sup>35</sup> The SJC

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<sup>32</sup> See *id.* at 957-58 (determining section 58 did not apply based on precedent). The SJC reached this conclusion because section 57 “specifically authorizes judges of the Superior Court, among others, to admit a prisoner to bail,” while section 58 does not. *Id.* at 957.

<sup>33</sup> See *id.* at 958 (delineating factors to consider at bail hearings); see also cases cited *supra* note 22 (discussing factors this court should apply to *Brangan*, which includes financial resources under section 57). The court stressed that, “[a]lthough the judge must take a defendant’s financial resources into account in setting bail, that is only one of the factors to be considered, and it should not override all the others.” *Brangan*, 80 N.E.3d at 960; see also Christopher Bavitz, *MA SJC Ruling on Bail Instructive Re: Algorithms and Criminal Justice*, CYBERLAW CLINIC HARVARD LAW SCHOOL, BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY (Sept. 5, 2017), <http://clinic.cyber.harvard.edu/2017/09/05/ma-sjc-ruling-on-bail-instructive-re-algorithms-and-criminal-justice/> (citing same proposition in case analysis).

<sup>34</sup> See *Brangan*, 80 N.E.3d at 958-59 (analyzing constitutional principles at play). The court cited to the Eighth Amendment, Article 26 of the Massachusetts Declaration of Rights, and *Stack v. Boyle*, amongst other sources for constitutional consideration. *Id.* at 958. Specifically, drawing from *Stack*, the court notes that “to be reasonable, [the bail calculation] must be based on the individual character and circumstances of each defendant, including his or her financial circumstances.” *Id.* (citing *Stack*, 342 U.S. at 5); see also Darren Griffis, *Massachusetts High Court Rules that Judges Must Consider a Defendant’s Financial Resources When Setting Bail*, GSKG (Oct. 23, 2017), <https://www.gskandg.com/massachusetts-high-court-rules-that-judges-must-consider-a-defendant-s-financial-resources-when-setting-bail/> (“[J]udges violate defendants’ due process and equal protection rights when they set bail amounts that have the effect of confining indigent defendants while charges are pending without regard for their financial constraints. Defendants who cannot afford to post bail suffer a loss of liberty during a period when they are supposed to enjoy a presumption of innocence and also lose the ability to fully participate in the preparation of their defense.”).

<sup>35</sup> See *Brangan*, 80 N.E.3d at 959 (expanding on importance of considering defendant’s financial resources). This contention has important implications. See generally John R. Ellement, *Judges Must Set Cash Bails Defendants Can Afford, SJC Rules*, BOSTON GLOBE (Aug. 25, 2017), <https://www.bostonglobe.com/metro/2017/08/25/sjc-judges-must-set-cash-bails-that-defendants-can-afford/LxvxqoOnCXXQLEmbNx3QAN/story.html> (“Saying a pauper’s freedom should be protected with the same fervor afforded a plutocrat, the state’s high court Friday instructed judges to set bail at levels that defendants can pay in order to keep faith with legal principles laid out some 375 years ago.”); Matthew Barison, *Bail: What You Need to Know*, BARISON LAW (Nov. 6, 2017), <http://www.matthewbarison.com/bail-need-know/> (“At the broadest level, the court must give each Defendant an individualized bail determination that takes his/her financial resources into account. This is particularly important to poor and indigent Defendants.”). The *Brangan* court further explained that “a \$250 cash bail will have little impact on the well-to-do, for whom it is less than the cost of a night’s stay in a downtown Boston hotel, but it will probably result in detention for a homeless person whose entire earthly belongings can be carried in a cart.” *Brangan*, 80 N.E.2d at 959.

maintained that a judge must keep in mind the question iterated by former Supreme Court Justice William O. Douglas: “Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?”<sup>36</sup> In light of these assertions, the SJC declared that nothing in the bail judge’s order or in the record established that he considered Brangan’s financial resources in setting bail, but moving forward, these considerations must be addressed in writing or orally on record in every case “where bail is set in an amount that is likely to result in a defendant’s long-term pretrial detention because he or she cannot afford it.”<sup>37</sup> However, the court limited the scope of bail determinations by noting there is no requirement that bail be set “in an amount the defendant can afford if other relevant considerations weigh more heavily than the defendant’s ability to provide the necessary security for his appearance at trial.”<sup>38</sup> In turn, the court reversed and remanded the case for a new bail hearing consistent with its opinion.<sup>39</sup> The effects of this landmark case will be far-reaching.<sup>40</sup>

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<sup>36</sup> See *Brangan*, 80 N.E.3d at 959.

<sup>37</sup> See *id.* (stressing necessity that record evidences financial consideration when defendant cannot afford bail). Additionally, the *Brangan* court noted in a footnote that there are “practical reasons [for] why it is sensible to avoid detaining a defendant on unaffordable bail unless it is truly necessary.” *Id.* at 966 n.23. These reasons include the fact that “[p]retrial detention disrupts a defendant’s employment and family relationships, with often tragic consequences” and “[p]retrial detention disproportionately affects ethnic and racial minority groups.” *Id.* Instead, these funds “might be better spent on treatment and supervision” than the means currently in place. *Id.*

<sup>38</sup> See *id.* at 954 (differentiating between requirement to consider bail affordability and requiring bail to be affordable); see also Spring & Spring, *Massachusetts Supreme Judicial Court Issues Reminder that Bail is Not a Substitute for a Pretrial Detention Order*, (Aug. 25, 2017), <https://www.massachusettscriminalattorney-blog.com/2017/08/25/massachusetts-supreme-judicial-court-issues-reminder-bail-not-substitute-pretrial-detention-order/> (discussing limitation of holding, wherein “if a trial judge properly determines a certain amount of bail is necessary to assure a defendant’s future appearance at court hearings, the bail will be upheld even if the defendant cannot afford it.”).

<sup>39</sup> See *Brangan*, 80 N.E.3d at 967 (directing lower court, on remand, to evaluate bail in accordance with this opinion).

<sup>40</sup> See Daniel S. Medwed, *Bail Reform and the Legacy of Justice Geraldine Hines*, WGBH (Aug. 28, 2017), <http://news.wgbh.org/2017/08/28/news/bail-reform-and-legacy-justice-geraldine-hines/> (“*Brangan* should affect the lives of thousands of criminal defendants and save the state millions of dollars.”); see also Karen Anderson & Kevin Rothstein, *State’s High Court Rules on Bails Impact on Poor Defendants*, WCVB (Aug. 25, 2017), <http://www.wcvb.com/article/states-high-court-rules-on-bails-impact-on-poor-defendants/12098218> (“This decision is going to make a big change for our clients for poor people and level the playing field and make things more equal when it comes to the bail system in Massachusetts.”); Pat Murphy, *Omnibus Bills Fall Short on Bail Reform*, *Defense Bar Says*, MASSACHUSETTS LAWYERS WEEKLY (Jan. 25, 2018), <https://masslawyersweekly.com/2018/01/25/omnibus-bills-fall-short-on-bail-reform-defense-bar-says/> (comparing how proposed House and Senate bills are taking steps to address bail considerations in wake of *Brangan*). Various members of the legal community and social advocacy groups have preferred the House’s version in the efforts to reform bail, with one defense attorney,

The SJC issued an important decision in *Brangan v. Commonwealth* that is meant to keep pace with legal principles laid out years ago in the Massachusetts Body of Liberties.<sup>41</sup> With this ruling, *Brangan* makes clear that a defendant's financial resources should be one of several considerations when making bail determinations.<sup>42</sup> In turn, judges will now face more stringent standards than before in assessing bail as they will now be required to explain, either in writing or orally, their reasons for setting bail that go beyond the defendant's financial means.<sup>43</sup> Although Massachusetts precedent mandated consideration of a defendant's financial resources already, *Brangan* requires this extra step when the bail amount will surely exceed the defendant's ability to pay.<sup>44</sup>

However, the SJC made it clear that this decision does not stand for the proposition that bail be made affordable.<sup>45</sup> Instead, the *Brangan* court reasoned that a bail determination will be upheld even if the defendant cannot afford to post the amount where a judge properly determines that the bail amount is necessary to ensure a defendant's appearance at trial.<sup>46</sup> Thus, the

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David Dearborn, characterizing the House bill "as simply a good, incremental step in the right direction."

<sup>41</sup> See sources cited *supra* note 1 (laying out founding principles of bail in Massachusetts Body of Liberties); Ellement, *supra* note 34 (connecting *Brangan* court's rationale with principles in Massachusetts Body of Liberties); see also *Bail Not Jail*, *supra* note 2 (discussing Massachusetts Body of Liberties in context of how a free society is "premised upon the belief that its citizens should be afforded due process of law.")

<sup>42</sup> See *Brangan*, 80 N.E.3d at 958 (listing various factors to consider, including financial resources).

<sup>43</sup> See *id.* at 959 ("the judge must address this [issue of financial resources] in writing or orally on the record in every case where bail is set in an amount that is likely to result in a defendant's long-term pretrial detention because he or she cannot afford it."); see also Ellement, *supra* note 34 ("The SJC notified judges that they must now provide their reasoning for bail amounts that are beyond the financial reach of defendants."); Barison, *supra* note 34 (discussing importance of individualized bail determination); Griffis, *supra* note 33 ("Although judges were already required to consider a defendant's financial resources in setting bail, this ruling should require judges to more carefully weigh that particular consideration, as well as requires judges to provide a statement of reasons when the bail amount exceeds the defendant's resources.")

<sup>44</sup> See *Brangan*, 80 N.E.3d at 959 (stating individualized bail determinations must be conducted when amount will go beyond defendant's financial means); cases cited *supra* notes 20 and 22 (highlighting Massachusetts precedent on decisions accounting for financial resources in bail determinations).

<sup>45</sup> See *Brangan*, 80 N.E.3d at 961 ("[A] defendant is not constitutionally entitled to an affordable bail. . ."); see also Spring & Spring, *supra* note 37 (analyzing *Brangan* limitation of affordable bail); *Bail Not Jail*, *supra* note 2 (stating SJC made it clear that this decision is not same as making bail affordable).

<sup>46</sup> See *Brangan*, 80 N.E.3d at 958 (discussing constitutional requirement for considering defendant's financial resources, but acknowledging it is not sole consideration); see also Spring & Spring, *supra* note 37 ("If a trial judge properly determines a certain amount of bail is necessary to assure a defendant's future appearance at court hearings, the bail will be upheld even if the defendant cannot afford it. In those cases, trial judges are obligated to make detailed findings to

*Brangan* court kept faith with constitutional principles and precedent interpreted by the Supreme Court in *Stack v. Boyle* and other federal court decisions.<sup>47</sup> Nevertheless, the court's decision to implement an individualized bail determination is a step forward in the right direction in making bail more affordable, particularly in light of the recent call for bail reform.<sup>48</sup>

Moving forward, the Massachusetts courts will now have to implement a reasonableness test in making these individualized determinations.<sup>49</sup> The standards used will include the financial ability of the defendant to post bail as a reasonable bail for one defendant (i.e. a CEO of a company) may be excessive for another defendant (i.e. a homeless person).<sup>50</sup> This process should lead to a reduction in pretrial detention and provide a more level playing field for those who cannot afford bail due to their inability to post a set bail that goes beyond their financial means.<sup>51</sup> Consecutively, this important decision will have a major impact on both the poor and indigent, whom have been disadvantaged by this system in the past, like *Brangan* himself.<sup>52</sup>

In *Brangan v. Commonwealth*, the SJC confronted the issue of whether a Superior Court judge should consider a defendant's financial

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support the amount of bail being ordered."); Griffis, *supra* note 33 (discussing constitutional implications on confining defendants without considering their respective financial constraints). However, "[w]hile the court unfortunately stopped short of requiring judges to set a bail in an amount a defendant can afford, the decision in *Brangan* made it clear that judges must more clearly delineate the reasons for setting a bail that a defendant will not be able to pay." Griffis, *supra* note 33.

<sup>47</sup> See sources cited *supra* notes 16, 25, 26, 28 (discussing constitutional precedents in *Stack* and other federal courts with respect to bail).

<sup>48</sup> See sources cited *supra* notes 15, 40, and accompanying text (examining bail reform efforts).

<sup>49</sup> See *Brangan*, 80 N.E.3d at 958 (alluding to this in case analysis); see also Barison, *supra* note 34 ("The test instead is based on reasonableness; the amount of bail set must be no higher than that which would secure the [d]efendant's appearance.").

<sup>50</sup> See *Brangan*, 80 N.E.3d at 959 (comparing how standards may differ); see also sources cited *supra* note 34; Spring & Spring, *supra* note 37 (providing aforementioned analogy of reasonableness between CEO and homeless individual in analysis of case).

<sup>51</sup> See Medwed, *supra* note 39 ("The *Brangan* case should help reduce pretrial detention in the Commonwealth. American city and county jails teem with criminal defendants languishing behind bars before their trials, not because they pose a danger to society or represent a flight risk, but simply because they are too poor to pay high bail sums.").

<sup>52</sup> See *Brangan*, 80 N.E.3d at 966 n.23 ("There are also practical reasons why it is sensible to avoid detaining a defendant on unaffordable bail unless it is truly necessary. Pretrial detention disrupts a defendant's employment and family relationships, with often tragic consequences. Pretrial detention disproportionately affects ethnic and racial minority groups."); see also Anderson & Rothstein, *supra* note 39 ("Too many people – who are supposed to be innocent until proven guilty – fill our jails and have their lives disrupted because they cannot afford bail. This decision ensures that judges will take the appropriate steps to avoid detaining people simply because they're poor.") (quoting Rahsaan Hall, director of the ACLU of Massachusetts' Racial Justice Program).

resources in making a bail determination. Although the *Brangan* court stopped short of making bail affordable, the outcome follows Massachusetts as well as Supreme Court precedent. With this decision, the court has taken one step forward in making bail more affordable for defendants as *Brangan* will provide both poor as well as indigent defendants with an opportunity to post bail on an individualized basis due to the new steps judges are now required to take when setting bail.

*Jennifer Amaral*