Commonwealth of Massachusetts
Supreme Judicial Court

MENTAL HEALTH LEGAL ADVISORS COMMITTEE

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March 27, 2020

Francis V. Kenneally, Clerk
Supreme Judicial Court for the Commonwealth
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

RE: No. SJ-2020-0115, Submission of Mental Health Legal Advisors Committee as *amici curiae* in support of the emergency petitioners seeking relief pursuant to G.L. c. 221, § 3

Dear Clerk Kenneally:

The General Court established the Mental Health Legal Advisors Committee (MHLAC) in 1973 to protect the interests of persons with mental disabilities throughout the Commonwealth. In its legal and policy advocacy, MHLAC places emphasis on protecting its most vulnerable clients. As mental hospitals have closed and as people with mental illness have faced increased criminalization, prisons and jails have replaced psychiatric facilities as mental health providers. In fact, such places of confinement are disproportionately filled with persons whose criminal conduct emerged from their mental health disabilities. Simply by virtue of their numbers, this population will disproportionately suffer the heightened risks associated with incarceration during the COVID-19 crisis. In addition to the potential for serious illness and death, restrictions designed to contain the virus within institutions will be felt more severely by persons with mental disabilities. They are less likely to receive relief from confinement without the Court's intervention, as these decisions will be unduly influenced by failures to consider reasonable accommodations as well as stereotypical assumptions about people with mental health disabilities. MHLAC therefore writes the Court to voice support for the Petitioners in this matter and to urge the remedial measures Petitioners seek.

Petitioners argue for altering the normal balancing of individual against societal interests performed by various criminal justice system actors during the current COVID-19 pandemic. They say that the risk to persons incarcerated is greatly amplified, and society's interest in confining persons for alleged or adjudicated law violations is significantly mitigated by the nature of the virus and its spread, since places of confinement are essentially "petri dishes" ensuring enhanced contagion both within and without jails and prisons. MHLAC agrees with Petitioners that the balance has changed; that the Court's intervention is necessary to assure that the analysis brought to whether persons should be placed or held in correctional institutions

when they pose minimal risk to public safety must also change; and that this Court's intervention is necessary to ensure this result in a time of profound health emergency.

This rationale applies with great force to persons with mental disabilities. They will suffer terribly from institutional efforts to contain the virus and will also, if history is any guide, be the least likely candidates for application of a revised analysis that adequately factors exigencies arising from the current crisis.

Social isolation is the chief means of combatting the virus' spread. In the general population, for most people this means that they have to stay inside their homes. In prisons or jails, a person's home is their own small cell, which they typically share with one other person or inhabit alone, and without access to media or communication tools like video conferencing that help to make social isolation in the general community more tolerable. The only way to even attempt to reduce social contact in correctional institutions is to lock prisoners separately in their own cells and to eliminate access to places where prisoners congregate (e.g., gyms; meal halls).

Prolonged cell confinement is difficult for anyone; but it is well established that persons with mental disabilities suffer profoundly when confined to their cells. In *Haverty v. Commissioner of Correction*, 437 Mass. 737 (2002), this Court credited expert testimony to the effect that such confinement is "highly toxic to psychological functioning" and can cause prisoners to "develop severe perceptual disturbances, including perceptual distortions and overt hallucinations." *Id*. at 752. No societal interest justifies forcing those persons for whom Petitioners seek relief, including those who have not been convicted of any crime, to endure such consequences.

If left without instruction from this Court, mental disabilities may well be inadequately factored in decision making around pre-trial, renewal, or continued imprisonment. It has been long-established that the Americans With Disabilities Act (ADA) applies to the criminal justice system. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998) (ADA applies to prisoners); *Thompson v. Davis*, 295 F.3d 890, 896-897 (9th Cir. 2002), cert. denied, 538 U.S. 921 (2003) (ADA applies to parole proceedings, including substantive decision-making). This Court was required to affirm this principle fairly recently in regard to parole determinations in *Crowell v. Massachusetts Parole Board*, 477 Mass. 106 (2017). The Court held that the Parole Board failed to discharge its duty to avoid excluding a plaintiff with a mental disability, merely because of his disability, from proper consideration of his suitability for parole. The Court noted that the Board, though aware that the plaintiff suffered from a disabling Traumatic Brain Injury (TBI), "negatively considered the plaintiff's attitude during the parole hearing and his own failure to identify what the board considered to be appropriate parole programs, without considering whether these behaviors were the result of his TBI" or "how the plaintiff's limitations affect[ed] his parole eligibility." *Id*. at 114. The Court found that the record before it did not demonstrate any "consideration of how the plaintiff's limitations affect his parole eligibility" and "whether these limitations could be mitigated with reasonable modifications." *Id*.

The *Crowell* Court connected the Board's behavior with bias toward persons with disabilities. It admonished the Board for denying the plaintiff parole without even a professional evaluation of the plaintiff's suitability; in this context citing federal regulation at 28 CFR § 35.130(h) (2016)

for the principle that decisions must be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities." *Id*. at n. 16. In fact, such bias is rife in our society. *See* Sickel et al., Mental Health Stigma Update: A review of consequences, Advances in Mental Health (Dec. 2014) ("[m]ounting evidence suggests that MHS [mental health stigma] is experienced in virtually all life domains . . ."). It is reasonable to expect that, without this Court's guidance, bias will influence decision making on whether persons with mental disabilities can be safely maintained in the community during the pandemic at all levels of the criminal justice system.

Societal stigma might well translate into unreasonable fear at the prospect of releasing persons with mental disabilities from incarcerated settings. But most such persons, if released, could return to their families and homes. In America, one in 38 adults has an immediate family member currently incarcerated. *See* FWD.us, *Every Second The Impact of Incarceration Crisis on America's Families*, 13, https://everysecond.fwd.us/downloads/EverySecond.FWD.us.pdf. These family members are not forgotten and discarded. In fact, recent events in Massachusetts' history demonstrate the close ties between prisoners and their families, whofight for increased contact with their incarcerated loved ones. In 2019, families challenged the high monetary costs to prisoners of calling family members. *See, e.g.*, Sarah BetanCourt, "Families want to end prison phone call charges," CommonWealth (Oct 22, 2019), https://commonwealthmagazine.org/criminal-justice/families-want-to-end-prison-phone-call-charges/; in 2018, families fought against reduced access to visit their incarcerated loved ones. *See, e.g.*, Jean Trounstine, "Prison Visiting Policies are about to Change in Massachusetts," City Life (Mar. 2, 2018).

Additionally, even when family members couldn't offer a home upon a prisoner's discharge, there are other options for released prisoners. A Boston reentry study found that for the incarcerated individuals who could not stay with a family member or other loved one, many found temporary housing after release from incarceration. *See* Rappaport Institute for Greater Boston, *The Boston Reentry Study: Housing Insecurity After Prison*, Harvard Kennedy School (June 2015), https://scholar.harvard.edu/files/brucewestern/files/housingvfinal.pdf.

Once discharged from correctional facilities, a range of community-based supports are available to formerly incarcerated people with mental health issues. Many are eligible for MassHealth, a State Agency that partners with the Department of Corrections to provide health insurance for those who have been released from prisons and jails. MassHealth provides community access upon release to medical and mental health services, as well as substance abuse treatment. *See* "Inmate healthcare," https://www.mass.gov/service-details/inmate-healthcare. For those who are not eligible for MassHealth, and who don't have private insurance, there are free and affordable clinics available for treatment. These include community mental health centers. *See* National Alliance on Mental Illness (NAMI), COVID-19 Resource and Information Guide, at 5-6, https://www.nami.org/getattachment/About-NAMI/NAMI-News/2020/NAMI-Updates-on-the-Coronavirus/COVID-19-Updated-Guide-1.pdf.

Further, many of these individuals will be eligible for services from the Department of Mental Health (DMH), including Adult Community Clinical Services (ACCS). ACCS "is a comprehensive, clinically focused service that provides clinical interventions and peer and

family support to facilitate engagement, support functioning and maximize symptom stabilization and self-management of individuals residing in all housing settings." *See* https://www.mass.gov/accs.

People with mental illness released during the pandemic will also benefit from health support services that have recently been expanded to allow all persons to isolate in place. For example, there have been efforts to ease access to medication through changes that relax requirements around prescription refills, allow for longer intervals between refills, and postal service delivery of medications. There also are efforts to increase availability of telemedicine through increased insurance coverage. *See, e.g.,* CMS.gov, Medicare Telemedicine Health Care Provider Fact Sheet, https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet (easing restrictions on Medicare funding for telemedicine).

Similarly, services specifically for people with mental health disabilities have shifted their model to establish "virtual" communities. The Recovery Learning Communities, including the Western MA RLC, Metro Boston RLC, and the Northeast RLC, are offering peer support services through virtual meetings that are open to anyone, even beyond the community's catchment area. Additional emotional support services exist for people with mental illness while sheltering in place. These include warmlines, hotlines, and on-line support communities. *See* NAMI, COVID-19 Resource and Information Guide, https://www.nami.org/getattachment/About-NAMI/NAMI-News/2020/NAMI-Updates-on-the-Coronavirus/COVID-19-Updated-Guide-1.pdf. Many addiction treatment and support services have also developed on-line capacities. *Id.*

Further, many people with mental health issues have long histories of receiving support from social service agencies, including special education services from Local Education Authorities, DCF, DYS, DMH and DDS. These prisoners, therefore, already have established links to services that will enable prompt access to services upon their discharge from prison or jail. Some prisoners may also be able to re-establish relationships with prior agency providers, and some younger prisoners may even have ongoing entitlements to services from child-serving agencies that serve persons younger than 22 years old.

It is in the interest of the general public that prisoners be afforded the best possible chance of successful reintegration in society, including those prisoners with mental illness. This goal is best achieved when prisoners are healthy. We know that compromised physical health is a factor in contributing to mental health problems. Improving the potential for successful integration is essential to making released prisoners a source of support to their families and communities. Confining them in small cells to protect them from contagion while misery resounds all around them is a scarring experience for which we all will eventually pay.

Thank you for your consideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Coco Holbrook, do hereby certify that the above letter is in compliance with Mass. R. A. P. 17 (c) (5), as ordered in Justice Budd's Interium Order regarding this matter.

/s/ Coco Holbrook
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss **SUPREME JUDICIAL COURT**
DOCKET NO. SJ-2020-0115

COMMITTEE FOR PUBLIC COUNSEL SERVICES AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

V.

CHIEF JUSTICE OF THE TRIAL COURT

CERTIFICATE OF SERVICE

I, Coco Holbrook, do hereby certify that I have served the LETTER OF AMICUS CURIAE from the MENTAL HEALTH LEGAL ADVISORS COMMITTEE on the parties by eservices via Odyssey, Electronic Filing Service Provider, due to the current state of emergency resulting in the inability to print and mail copies:

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