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March 27, 2020

Francis V. Kenneally
Clerk of the Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square, Suite 1400, Boston, MA 02108

Re: SJC-12926: Prisoners Legal Services of Massachusetts
Amicus Letter in Support of Petitioners
CORRECTED VERSION

Dear Clerk Kenneally:

Prisoners Legal Services of Massachusetts (PLS) hereby submits this letter as amicus curiae in support of the Petitioners in the above-titled action. PLS is a not-for-profit legal services corporation, founded in 1972, that provides civil legal assistance to people who are incarcerated in Massachusetts state prisons and in the county jails and houses of correction. For the reasons discussed below PLS strongly supports the relief sought by petitioners as urgently necessary to avert, or at least mitigate, a coming catastrophe in Massachusetts prisons and jails.

Throughout this crisis we have received constant communication from incarcerated people (through our toll-free telephone and by mail), their family members, doctors, attorneys and even from prison staff. We have also been in dialogue with correctional administrators and public safety officials. While we recognize that good-faith efforts are being made, it is clear that these are not sufficient and, given the nature of the epidemic, prisons cannot be made safe for

prisoners or for staff. As former Suffolk County Sheriff and Secretary of Public Safety told WGBH, "It is insane to say that adequate protocols already exist for a disease about which you know virtually nothing."[1]

Massachusetts prisons and jails will inevitably be breeding grounds for COVID-19, as documented in the amicus letter in support of petitioners submitted by 14 medical professionals. Screening of staff and prisoners entering into facilities cannot keep the disease out,[2] and the virus is already spreading invisibly within prison walls. On March 21, 2020 the first prisoner in a Massachusetts prison tested positive for COVID-19. Three days later, eight prisoners and two staff (including a medical provider) in the Massachusetts Treatment Center (MTC) had the disease, along with a staff member at MCI-Shirley.[3] It is also doubtless already within county jails, which have much greater turnover; a Middlesex County prisoner has tested positive for the disease,[4] and we have received reports that a Corrections Officer in Norfolk County has as well. These cases will multiply exponentially as those incubating the disease develop symptoms.

Spread within our prisons and jails, COVID-19 will cause illness and death in prisoners at a rate far higher than the general population. Massachusetts has the oldest incarcerated population in the United States,[5] a group at much greater likelihood of death and severe complications necessitating hospitalization and intensive care.[6] And a catastrophe in prison will also be a catastrophe for public health. As prisons rapidly lose capacity to quarantine those

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[1] https://www.wgbh.org/news/local-news/2020/03/26/cabral-jails-need-new-protocols-for-dealing-with-covid-19

[2] Asymptomatic transmission is discussed in the amicus letter of medical professionals p. 6. *See also Matter of Extradition of Toledo Manrique*, No. 19-mj-71055, 2020 WL 1307109 (U.S. District Court, N.D. Cal. March 19, 2020) ("Symptoms of COVID-19 can begin to appear 2-14 days after exposure, so screening people based on observable symptoms is just a game of catch up," and therefore requiring detainee to wait for a confirmed outbreak is impractical. "By then it may be too late.").

[3] *See* https://commonwealthmagazine.org/criminal-justice/covid-19-cases-at-bridgewater-prison-facility-up-to-10/.

[4] *See* https://www.lowellsun.com/2020/03/27/billerica-inmate-tests-positive-for-covid-19/

[5] *See* "Aging Prison Populations Drive Up Costs," Pew Charitable Trusts (2018), *available at* https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs (visited March 26, 2020).

[6] *See* https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html

incarcerated, and as more and more prisoners require hospitalization, this will substantially burden hospitals and health care resources throughout the Commonwealth, as the epidemic strains the state's available hospital beds, staff and equipment.

These extraordinary circumstances require extraordinary action. The broadest possible prisoner release is needed as part of our broader efforts to stem the tide of this deadly disease.

Prison and Jail conditions

PLS is familiar with Massachusetts state and county facilities through decades of litigation on prison conditions and treatment[7] and through participation in official commissions and oversight bodies such as the Restrictive Housing Oversight Committee and Special Commission to Study the Health and Safety of LGBTQI prisoners. Even cursory knowledge of prison design makes clear that it is impossible to limit COVID-19 exposure in Massachusetts jails and prisons by maintaining the recommended social distancing of six feet or more and maintaining virus-free surfaces.

Throughout DOC and county facilities, prisoners are housed in dormitories, including those housing 50 or more people in Bristol, Essex, and Worcester counties.[8] Contagion in a dormitory will spell danger for each person living there, as beds are often some two feet apart from each other (or less) and residents live in close proximity to each other twenty-four hours a day. Of particular concern are medical dormitories such as the Nursing Care Unit at MCI-

[7] *See, e.g., Reaves v. Department of Correction*, 404 F.Supp.3d 520 (D. Mass. 2019)(ruling that DOC incapable of providing adequate medical care to quadriplegic prisoner and ordering his transfer to non-correctional hospital); *Briggs v. Department of Correction*, C.A. No. 1:15-cv-40162-GAO (2019 class action settlement providing accommodations to deaf and hard of hearing prisoners); *Fowler, et al. v. Commissioner of Correction*, C.A. NO. 1:15CV12298- NMG (2018 class action settlement mandating DOC provide prisoners access to modern Hepatitis C medications*); Does v. Commissioner of Correction*, Suffolk NO. 1984-CV-00828 (2019 class action challenge to DOC confinement of men civilly committed under Section 35); *Richardson v. Sheriff of Middlesex County*, Middlesex C.A. No. 05857 (class action resulting in the 2014 closure of Cambridge Jail based on overcrowded and unsanitary conditions); *Ahearn v. Vose*, 64 Mass.App.Ct. 403 (2005) (class action resulting in DOC installing flush toilets in medium security prison)

[8] Some of the other facilities that rely on dormitory housing are, ant minimum, the DOC's North Central Correctional Institute, and facilities in Hampshire, Middlesex and Plymouth counties.

Shirley, which has rooms of 4-6 prisoners each. Dining halls and medication lines are also places where prisoners still are inevitably in close contact. The attached photographs illustrate how difficult it is for prisoners to keep apart in all these settings.[9]

Indeed, some of the most vulnerable prisoners in the Department of Correction are held in a dormitory, the Clinical Stabilization Unit (CSU) at MCI-Norfolk. Some sixteen prisoners, largely elderly, with medical conditions such as COPD and congestive heart failure, live, sleep and eat in close proximity to each other. No matter how staff access is limited, if and when the disease enters it will be catastrophic for those in the CSU.

With over half of the facilities in Massachusetts operating above their approved capacity, both dormitories and double- and triple- celled units have remained full or close to capacity. Where prisoners are housed two or three to a cell, they are locked in close proximity to another person or persons for hours during the day as well as overnight. For example, in the North side of Souza Baranowski Correctional Center, many prisoners are double-celled and are locked in together nearly 22 hours a day, if not longer, creating a near certainty of transmission if and when one of the cellmates is infected through contact with a staff member or a surface area in the prison or on an outside medical or court appointment.

The vast majority of prisoners share toilets, sinks, and showers with others. DPH regulations require at least one working toilet and one working sink for every 12 male prisoners, one working toilet for every eight male prisoners, and one working sink for every 12 female prisoners.[10] In the best of circumstances, facilities have struggled with maintaining sanitation standards set forth by the Department of Public Health. For example, the most recent DPH

[9] See Exhibit 1.
[10] *See* 105 CMR 451.114.

report for the largest facility, MCI-Norfolk, notes 475 repeat violations. Given the current state of staffing in correctional institutions, it is virtually impossible to ensure virus free surfaces.

Jails including those in Hampden and Franklin counties have established separate housing units where newly admitted detainees are held during the possible incubation period, in order to limit transmission into the facility. It goes without saying that some detainees coming into these units will have COVID-19 and all others held in these units will be at tremendous and deadly risk of infection.

Lack of capacity to quarantine and provide medical care

As the crisis inevitably grows, prisons and jails will be unable to isolate those showing symptoms of COVID-19 and quarantine of those who have the disease will likely be impossible as numbers climb. Single-celled rooms in health service units and even in general population units are scarce in nearly every facility. We fear that solitary confinement in Restrictive Housing Units (RHUs) will be used for quarantine, which would be extremely dangerous as well as inhumane. In fact, this is already happening, at least in the RHU of MCI-Norfolk. In these units, prisoners are locked in their cells 22 -24 hours a day under the supervision of corrections officers. While most RHUs have daily medical rounds, prisoners with COVID can develop rapidly worsening symptoms within a matter of hours, with only COs to attend them.

Indeed, correctional culture poses a barrier to treatment for all prisoners. From our long history of litigation and advocacy, we know that corrections officers frequently neglect or disbelieve prisoner complaints. In Massachusetts[11] as nationwide, prisons and jails are notorious for severe medical neglect. An emerging disease such as COVID-19, which is not yet fulling understood, presents a grave risk that prisoners with serious and urgent medical developments will be ignored by increasingly stressed officers and staff.

[11] https://www.wgbh.org/news/local-news/2020/03/26/cabral-jails-need-new-protocols-for-dealing-with-covid-19.

The lack of prison hospital beds is cause for grave concern. Lemuel Shattuck Hospital is the only hospital serving both DOC and the counties; it has only 28 beds, 23 of which are currently occupied.[12] A conservative estimate for the general population is that some ten percent of those infected will require hospitalization,[13] likely much higher in the older and sicker prison population. As outside hospitals fill,[14] a surge in prison admissions will strain those systems – and prisoners may well be de-prioritized for admission, placing them in serious danger.

Protective practices

The Massachusetts Department of Health (DPH) has not issued COVID-19 guidelines for prisons and jails, though the DPH has issued statewide guidance for residential and congregate care programs.[15] As a result, there is no uniformity in the protective measures being put in place and practices continue to evolve daily. While some facilities have improved practices, it simply is not possible to keep the disease at bay in prison.

As noted above, screening of staff and others entering prisons and jails cannot detect asymptomatic carriers, whose numbers will skyrocket. Therefore the use of personal protective equipment (PPE), such as masks and gloves, will be essential. Massachusetts DPH guidance designed to *conserve* the use of PPE recommends the use of "standard medical masks and standard gloves" for "cleaners or caregivers" in correctional facilities and other shared spaces

[12] *See* DOC Weekly Count Sheets, https://www.mass.gov/doc/weekly-inmate-count-3232020/download

[13] *See* "What does the coronavirus mean for the U.S. health care system? Some simple math offers alarming answers," Stat news (March 10, 2020), *available at* https://www.statnews.com/2020/03/10/simple-math-alarming-answers-covid-19/

[14] See "What does the coronavirus mean?" *supra*.

[15] *See* https://www.mass.gov/info-details/covid-19-guidance-and-directives#guidance-on-prioritization-of-ppe-in-ma-

with suspected Covid-19 patients.[16] If needed for "cleaners or caregivers," this equipment is clearly needed for anyone having contact with prisoners. And while the need to conserve equipment may not permit this at present, if cleaners and caregivers risk transmission through contact with residents, then residents themselves face the same risk and – especially in a contagious setting such as prison – arguably should have this equipment as well.

While in many facilities at least some staff do have personal protective equipment (PPE), such as masks and gloves, prisoners do not. Given the national shortage affecting even medical professionals, it will not be possible to provide PPE to all staff and others entering the facility, much less to prisoners. We have spoken with prison health care providers who are already very concerned that there will not be enough PPE and other critical supplies to meet the crisis.

We recognize the tremendous strain that every jail and prison is under, and it is clear that the DOC and several counties have made efforts to improve practices over the past week. However, several weeks into the crisis we continue to receive reports of problems with screening, use of protective equipment, and sanitation. Here is a small sample:

- A prisoner in MCI-Shirley reported today, March 27, 2020, that the medical and DOC staff interacting with prisoners in the Nursing Care Unit were not wearing masks - even those doing mouth checks. And prisoners stood next to each other in a crowded line waiting for medication.
- Also from MCI-Shirley, the "sanitation team" of prisoners that spray down and clean the prison had not been called out for four days. And the "chow hall" continued to seat 300 people at a time, in tables so full that people were touching, with tables not wiped down between meal services.
- Reports from other DOC facilities indicate that staff are not routinely wearing masks or gloves; that Correctional Officers are making hospital trips without safety precautions; that Correctional Officers have entered facilities without screening; and that tactical teams are circulating between the various prisons with no protective gear for COVID-19.
- Reports from staff employed by Suffolk County indicate that the thermometers used to test staff temperatures on entry were broken, but nevertheless used to clear staff for entry; staff have no face masks; some 20-30 officers were exposed to COVID-19 at a training facility, with some using sick leave and vacation time to self-quarantine but many others

[16] *See* https://www.mass.gov/doc/guidance-for-prioritization-of-personal-protective-equipment-ppe-in-massachusetts/download.

forced to return to work. They also reported that officers are accompanying prisoners on hospital details with no extra safety protocols.

- While we would hope attitudes have changed by now, we had a report that Corrections Officers at the DOC's Lemuel Shattuck Hospital were told before March 20 not to wear masks because it would cause panic. We also received a report that a Correctional Officer at MCI-Framingham was sent home for wearing a mask.

Another protective measure, frequent hand washing, is impossible in most correctional facilities, and access to hand sanitizer with alcohol (the only type effective against COVID-19) is either denied or limited in many places. PLS also has received numerous complaints from prisoners unable to disinfect their cells and common areas, or wipe off telephones, due to lack of adequate supplies. These large institutional settings present a tremendous challenge to any effort to maintain personal hygiene and constant cleanliness of commonly used surfaces.

Group activities

As discussed above, it is virtually impossible for prisoners to maintain the recommended six feet of distance from others in dormitories, shared cells and in common areas. This creates a problem for prisons, which must negotiate a tradeoff between locking prisoners in their cells versus permitting group activities. Group programs in DOC and counties seemed to have ceased for the most part, but prisoners are given at least some recreation time necessary for their physical and mental health. But given population levels, it is often impossible to maintain distance during recreation.

Prisoners performing essential tasks such as food preparation must work closely with others during their job shift, such as one prisoner who was reportedly working 12 hour daily shifts with 15 other men at SBCC. Prisoners are also in close contact as they wait for distribution of medication. For example, we have received reports that some 50 prisoners in MCI-Shirley, largely sick and elderly, must wait for medication in the same small room.

Prisoners are safer outside, and families are waiting for them.

Despite the extreme dangers of incarceration during this crisis, some correctional administrators and others have suggested that people may be safer remaining incarcerated. This is patently not the case. As former Secretary Cabral said, ". …The second [assertion] is that inmates have access to better healthcare inside the facility than outside the facility. That's not true."[17] Attempts to portray prisoners as rootless and lacking family ties are destructive. Just this year, PLS received over one hundred phone calls from family members concerned for their incarcerated loved ones. In recent days and weeks, we have spoken to countless family members who are begging for the release of their loved ones, both for their own health and safety and to provide critical support that they cannot provide while incarcerated. Some examples include:

- The wife of a 64 year old prisoner serving time for a non-violent offense is a nurse who is needed at work. She is terrified for the safety of her husband and needs him home to provide critical child care for their disabled child.
- A prisoner's girlfriend reported that he is detained for a misdemeanor probation violation and his most recent court date to resolve his case was cancelled. They are worried that overcrowding, including holding eight men in four men cells, and traffic in and out of the prison will make him sick.
- The girlfriend of a prisoner with autoimmune disease and five months remaining on his sentence reported that he is under immense stress and subject to lock down in unsanitary condition.
- The wife of a prisoner with severe asthma and other medical conditions is terrified that her husband, who is set for release in October, cannot socially distance in a prison that is over 160% capacity.
- A family member called about his brother at the MTC who is terrified about the rapidly deteriorating situation there as COVID spreads.

Relief beyond that requested by Petitioners is necessary

PLS asks that the Court consider expanding the categories of prisoners eligible for release sought in the Petition. In particular, we suggest that release be considered for: (1) all individuals civilly committed to a correctional facility, whether the Massachusetts Alcohol and Substance

[17] https://www.wgbh.org/news/local-news/2020/03/26/cabral-jails-need-new-protocols-for-dealing-with-covid-19

Abuse Center or the Hampden County Jail and House of Correction; and (2) all individuals over 60, regardless of whether they are sentenced under G.L. c 265.

G.L. c. 123 Section 35. The Petition does not address the plight of individuals civilly committed to correctional facilities for alcohol and substance use disorders under G.L. c. 123, § 35. There are currently almost 250 individuals civilly committed to prisons and jails under Section 35, 143 at the Massachusetts Alcohol and Substance Abuse Center and 95 at Hampden County.[18] Concerns about the safety of these individuals are heightened because the rapid turnover of the population in these facilities makes it impossible to adequately screen newly admitted residents. The average stay is only 30-40 days. Furthermore, the congregate living arrangements and group activities make it extremely difficult or impossible to provide social distancing. Several MASAC patients on March 25 filed a motion in an unrelated case that PLS has in federal court, *Briggs v. Dep't of Corr.* (D., Ma. No. 1:15-cv-40162-GAO), stating that during the COVID outbreak over 80 patients eat together in the dining hall "inches in proximity." The motion also contains multiple affidavits describing the use of unclean portable toilets.

PLS has extensively investigated the conditions under which these men are held as part of ongoing litigation in *Doe et al. v. Mici et al.*(Suffolk NO. 1984CV00828). These men have particular vulnerabilities including high rates of hepatitis C and other infectious disease, and generally poor health and nutrition. On entry to the DOC's Section 35 facility, the Massachusetts Alcohol and Substance Abuse Center (MASAC), the men go through withdrawal and detoxification in dormitory setting that dozens of men in recent years have consistently described

[18] See DOC Weekly Count Sheets for March 23, 2020. https://www.mass.gov/doc/weekly-inmate-count-3232020/download

as unsanitary, including blood, urine, vomit and feces, with extremely limited cleaning. After detox, they live in crowded housing units and attend group programs together.

The purpose of Section 35 confinement is negated by the fact that, according to the filing in the *Briggs* case only 0-2 substance use disorder classes are held each day. The state is exposing a vulnerable population of men with SUD, not charged with any crime, to the potentially deadly risks of incarceration in during the COVID-19 outbreak – while at the same time having little or no ability to safely continue treatment programs.

Individuals over 60. The Petition asks for release of all men over 60 only if they have not been sentenced for "crimes against the person" under G.L. c. 265. See Petition at 30. By contrast, it seeks release of all persons with "a condition or disease that puts them at increased risk of severe COVID-19 complications and death. *Id.* This is unreasonably restrictive for several reasons. First, advanced age is itself a condition which places a person at increased risk for COVID-19, and therefore age should be treated as any other such condition. According to the Center for Disease control, 8 out of 10 deaths from COVID-19 have been persons 65 years old or older, with this age group disproportionally requiring hospitalization and intensive care.[19] Both DOC and County prisoners who need to hospitalization are placed in the correctional unit at the Lemuel Shattuck Hospital, which has only 28 beds, 23 of which are already occupied.[20] It is almost inevitable that Shattuck will soon be overrun as COVID-19 cases multiple in the correctional facility. Indeed, one of the 10 prisoners with COVID-19 at the Massachusetts Treatment Center has already required hospitalization at Shattuck.

Second, Chapter 265 is an overbroad barometer for determining who should be granted the relief in this case because not all such crimes are serious; they include trivial offenses such as

[19] https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html
[20] Weekly Count Sheet for March 23, 2020 https://www.mass.gov/doc/weekly-inmate-count-3232020/download

playing a radio without headphones on public transportation. *See* G.L. c. 265, § 42. And many of the most common chapter 265 crimes, such as assault or assault and battery, are merely misdemeanors. *See*. G.L c. 265, § 13A(a).

Third, it is well known that people largely "age out" of crime, meaning people over the age of 60 simultaneously are at high risk for COVID-19 and low risk for public safety. Categorically excluding these prisoners from release on the basis of conviction will be counterproductive and needlessly risk lives and public health and safety.

Conclusion

Every incarcerated person faces a substantial risk of serious harm during this crisis, especially older and medically compromised individuals. State and county systems are uneven at best in the protective measures they are taking, and even the most stringent measures cannot prevent tragedies from multiplying as the epidemic progresses. As infection spreads in our prisons and jails, it will result in disproportionate need for hospitalization and intensive care, which will needlessly contribute to a crisis of resources in our health care systems. We must be taking all measures we can as a Commonwealth to reduce the spread of infection in all arenas, especially high risk arenas such as prisons and jails. The most effective way to reduce the spread of infection in prisons and jails is to release as many people as we can, as quickly and efficiently as possible.

We must radically revise our conception of public safety and the way in which we balance the need for incarceration. No state prisoner was sentenced to death or permanent injury. Pretrial detainees are convicted of nothing, and those civilly committed have been charged with nothing. Prison staff and outside contractors deserve every effort to reduce their

exposure. The relief sought by CPCS is necessary and reasonable, and PLS concurs with the legal reasoning put forth in its brief.

March 27, 2020

Respectfully submitted,

PRISONERS' LEGAL SERVICES OF MASSACUSETTS

/s/

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Certification pursuant to Mass RAP 17(c)

I hereby certify that:

(A) counsel for petitioners did not author the brief in whole or inpart;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief; and

(D) the amicus curiae or its counsel does not represent any of the parties to this petition in another proceeding involving similar issues or nor was amicus involved in any related proceeding or transaction.

/s/

_____

BONITA TENNERIELLO, BBO # 662132

EXHIBIT 1

Essex County Correctional Facility, May 2018:

Source: https://www.salemnews.com/news/local_news/prison-spending-up-as-inmate-population-drops/article_9aa24139-058c-57cb-a1b4-5acf7946ce72.html

Essex County Detox Unit for Women, 2016

Source: https://www.salemnews.com/news/local_news/middleton-jail-opening-detox-unit-for-women/article_1c8be797-4e65-5a41-9294-5fb346a15793.html

Bristol County Jail, 2018

Source: https://commonwealthmagazine.org/immigration/detainees-at-jail-say-they-fear-covid-19-outbreak/

MCI-Shirley, 2011

Source: https://www.bostonglobe.com/metro/2011/11/14/minimum-security-high-concerns/DZznX932fWIMKaLtM6xwLK/story.html

Souza Baranowski Correctional Center