

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, SS

No. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES and MASSACHUSETTS
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Petitioners,

v.

CHIEF JUSTICE OF THE TRIAL COURT & Others,
Respondents.

**THE SHERIFFS' OF THE FOURTEEN COUNTIES OF THE COMMONWEALTH OF
MASSACHUSETTS RESPONSE TO
PETITIONERS' EMERGENCY PETITION FOR RELIEF**

A. INTRODUCTION

Respondents are the Sheriffs of the fourteen counties of the Commonwealth.¹ On or about March 23, 2020, Petitioners in the above referenced matter sought this Court's review and relief, pursuant M.G.L. c.211, § 3, for, among other things, alleged violations by county correctional facilities of the Eighth Amendment to the United States Constitution and Article 26 of the Massachusetts Declaration of Rights by subjecting inmates to the possibility of COVID-19 infection as a result of continued detainment in said facilities. Respondents in the present matter adamantly deny Petitioners contention that the continued detention of certain inmates committed to their care and custody by the courts amounts to "cruel and unusual" punishment in violation of either the Eighth Amendment or Article 26. The Petitioners' claims are supported by speculation and innuendo, rather than factual information. Moreover, the remedy sought by Petitioners, the wholesale release of inmates into their respective communities (without any substantive,

¹ Norfolk, Hampden, Berkshire, Suffolk, Middlesex, Essex, Franklin, Dukes, Worcester, Hampshire, Bristol, Plymouth, Barnstable and Nantucket.

individualized review) does not comport with remedies employed by courts in the past when attempting to ameliorate Eighth Amendment/Article 26 violations. Finally, the actual remedies Petitioners seek are short-sighted and are likely, in the end, to result in substantial harm to the inmates themselves, the already strained social services agencies still operating during this pandemic and the general public. Therefore, Respondents respectfully request the Court deny Petitioners' Petition to the extent Petitioners seek the blanket release of pre-trial and convicted inmates from county correctional facilities.

B. FACTUAL BACKGROUND

Respondents operate county correctional facilities in thirteen (13) counties in the Commonwealth.² In operating these facilities, the Sheriffs' of said counties maintain twenty-four (24) hour, seven (7) day a week care and custody of approximately 8000 inmates. This care encompasses providing inmates with basic necessities such as secure housing, food, clothing, toilets, sinks, showers with warm water and soap, hygiene supplies, and a multitude of other basic necessities. In addition, the Sheriffs provide inmates with a multitude of educational, programmatic and medical and mental health services including, but not limited to healthcare for routine and chronic inmate needs, operating and promoting medication assisted treatment MAT program (for opioid addiction), psychiatric and addiction counseling, cancer treatment, HIV treatment, programs designed to teach inmates useful job skills, instruction in reading, math and other educational subjects, and many other services.

² Nantucket County does not have a correctional facility.

Respondents acknowledge that the current COVID-19 pandemic represents a uniquely dangerous and unprecedented threat to the people of Massachusetts and the nation as a whole.³ Moreover, the Respondents also acknowledge COVID-19 is contagious, can be severely debilitating, and in a small percentage of cases, lethal. That being said, Respondents, knowing the severity of the situation, have instituted the following changes to their policies and procedures to 1) stop the spread of COVID-19, 2) mitigate the risk of future spreading of COVID-19; and 3) treat any inmates and/or employees subsequently infected by the contagion (in the interest of brevity Respondents have not listed each and every affirmative action taken by the individual Counties to combat the COVID-19 virus and the Court is encouraged to review each County's extensive affidavit; however, for purposes of this pleading Respondents have highlighted the major changes and policies and/or procedures implemented):

- Vigorous cleaning protocols instituted throughout each facility on a daily basis (for some facilities on per shift basis).
- Each inmate has been provided with soap and access to sinks with warm water in their cells, dayrooms, kitchens, inmate restrooms and other areas of each individual facility.
- Hand sanitizing stations have been installed throughout certain facilities.
- Cleaning supplies, masks, gloves, gowns, and protective eyewear have been or are being acquired, are currently at sufficient levels and are being utilized as needed.
- Inmates have been educated on proper hand-washing and personal hygiene techniques.
- All general public visitation has been temporarily suspended.
- All vendors (non-essential) and volunteers have been temporary excluded from facilities.

³ It should be noted the county correctional facilities in each of the thirteen (13) counties in the Commonwealth were able to successfully respond to other epidemics in the past such as SARS, MERS, H1N1, and seasonal Influenza without releasing inmates.

- All facility tours have been suspended.
- Inmate Work Release/Community Service Programs have been suspended.
- Conducting an enhanced screening process at a secure location within the facilities for all incoming inmates. These enhanced screening processes include, but are not limited to asking additional questions about whether inmates are experiencing signs or symptoms of COVID-19 or have traveled or been exposed to someone who has the virus, taking temperatures of incoming inmates, quarantining new inmates for fourteen (14) days,
- Educating staff about the virus, the proper use of personal protective equipment and proper cleaning procedures.
- Conducting daily administrative meetings and roll call briefs to review any signs or symptoms of the virus among staff or inmates and provide the latest information.
- Temporarily suspending inmate transfers to and from other correctional facilities.
- Sanitizing transportation vehicles after each use.
- Providing inmates with additional phone calls and envelopes for continued communication.
- Limiting professional legal and clergy visits to non-contact visits.
- Complied with the Governor's order to keep non-essential employees from reporting to work.
- If at any time there is a concern that the patient is exhibiting signs and or symptoms indicative of potential infection by COVID-19 virus, those individuals are placed in single cells in a specialized medical quarantine area for further monitoring and observation, temperatures are taken and consultation with local hospital as necessary.

- Screening of employees coming to work by asking a specific set of questions regarding their well-being upon arrival and questions about recent travel by them or their household members.
- Some facilities are also taking the temperatures of incoming staff
- Employees have been educated that if they are sick with a fever or have flu-like symptoms such as cough, sore throat, or shortness of breath, they should not report to work and they are instructed to contact their supervisor to report symptoms and to consult their doctor.
- If an employee is sent home with concerning symptoms, they must follow a medical screening process in order to return to work. Employees who have family members who have travelled to high risk areas, or are exhibiting signs and symptoms of the virus have been asked to stay at home until they are medically cleared to return to work.
- Establishing designated areas to house local police department arrestees prior to arraignment for facilities that house “safe keeps”. Police Departments have been asked to implement COVID-19 screening procedures at their stations prior to anyone being transported to our facilities.
- Limiting unnecessary movement within and between facilities.
- Providing medical care in most facilities 24 hours per day 7 days per week.
- Conducting video conferencing daily with the local courts for arraignments, and all other non-evidentiary proceedings.
- Conducting video court where available instead of transporting inmates out of the facility.

- Collaborating with the local defense bar, the District Attorney's office and the courts to identify individuals who are appropriate for release or transfer to lower security and/or day reporting on a GPS bracelet and we have honored these requests when appropriate.
- Responding to requests to review individuals with low bails who may be at risk, and assisting them with finding resources to bail out once a discharge plan is in place.
- Continuing to grant inmates earned good time. Continuation of participation in appropriate programming to allow the opportunity for earned good-time with the use of technology and other resources.
- Establishing plans and identifying logistics should this pandemic enter our jail and house of corrections facilities. These plans have been developed between our staff and our health care providers following DPH and CDC guidelines including isolation of confirmed cases and coordination with local hospitals as appropriate.
- Established regular contact with CDC, DPH, local hospitals and other data sources to obtain the most recent information.
- Some county correctional facilities have begun furloughing low-risk inmates back into the community following a re-entry review.
- The total inmate capacity for all county correctional facilities as of March 25, 2020 was approximately 14,263.
- The total inmate population for all county correctional facilities as of March 10, 2020 was approximately 8640.
- The total inmate population for all county correctional facilities as of March 25, 2020 was approximately 8000.

- The total number of inmates released from all county correctional facilities since March 10, 2020 was approximately 1441.

(See generally Affidavits and Exhibit B)

Additionally, Petitioners failed to address the following dangers to both the public and the inmates themselves should the Court grant a wholesale release of all non-dangerous inmates:

- Lack of adequate housing, food, clothing and hygiene facilities for those inmates who are homeless or who can no longer return to their previous place of residence;
- Lack of continued treatment for drug and alcohol addiction;
- Lack of adequate medical and psychiatric care for those with chronic conditions and those needing assistance with activities of daily living (ADLs);
- Lack of employment (due to the COVID-19 shutdown); and
- Lack of insurance which would not be immediately available so that diabetic and other inmates with chronic medical conditions can continue to receive their medications.
- Additional pressures on our law enforcement efforts in the community when our officers have been trying to minimize interactions that result in contact and potential arrest that may not have otherwise occurred but for the premature release of that individual into the community.
- Many are on medication assisted treatment (MAT). If released without an appointment in the community for MAT they will be at significant risk for overdose and death.

(See generally Affidavits)

C. LEGAL ARGUMENT

1. **The Continued Detention of Inmates in County Correctional Facilities is not a Violation of the Eighth Amendment to the United States Constitution or Article 26 of the Massachusetts Declaration of Rights**

The continued detention of inmates by county correctional facilities during the COVID-19 pandemic does not violate the proscription against “cruel and unusual punishment” as set forth in the Eighth Amendment and Article 26.⁴ In order for the Petitioners to establish that the actions or inaction of Respondents in continuing to detain inmates rises to the level of “cruel and unusual punishment” Petitioners must show “(1) a prison’s conditions of confinement present a ‘substantial risk of serious harm’; and (2) prison officials acted with ‘deliberate indifference’ to inmate health or safety.” *Torres v. Commissioner of Correction*, 427 Mass. 611, 613-614 (1998). *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Petitioners have failed to do both.

First, Petitioners have not established that the Sheriffs have acted with deliberate indifference. “A prison official is deliberately indifferent where she knows of and disregards an excessive risk to inmate health or safety. This requirement is subjective. Deliberate indifference is characterized by obduracy and wantonness, not inadvertence or error in good faith. To show such a state of mind, the plaintiff must provide evidence that the defendant had actual knowledge of impending harm, easily preventable, and yet failed to take the steps that would have easily prevented that harm.” *Leite v. Bergeron*, 911 F.3d 47, 52-53 (1st Cir. 2018). Petitioners fail to cite what action or inaction on the part of the Sheriffs, other than the lawful detention of inmates, rises to the level of deliberate indifference. Further, the Sheriffs establish, through supporting

⁴ The Eighth Amendment and Article 26 text differ slightly insofar as the Eighth Amendment states “cruel and unusual” punishment and Article 26 states “cruel or unusual” punishment. *Torres v. Commissioner of Correction*, 427 Mass. 611, 619 n.4 (1998). However, the Court has found that Article 26 is “. . . at least as broad as the Eighth Amendment to the Federal Constitution.” *Good v. Commissioner of Correction*, 417 Mass. 329, 335 (1994)(citing *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 534 [1983]).

affidavits, that they are not disregarding the risk of the spread of COVID-19, rather, they are employing all measures feasible to prevent such spread. (*See generally Affidavits*). “To violate the Cruel and Unusual Punishment Clause, a prison official must have a sufficiently culpable state of mind.” *Farmer*, 511 U.S. at 834. The record before this Court is devoid of any evidence which could establish the Sheriffs have acted with the requisite state of mind to establish a violation of the Eighth Amendment simply by holding inmates they are lawfully required to do, and by taking extensive measures to prevent the spread of COVID-19. It should be noted that Petitioners in their argument failed to fully set forth the standard employed by courts when evaluating Eighth Amendment/Article 26 violations as they apply to the conditions within a correctional facility. While spending an inordinate amount of time describing the insidious nature of the COVID-19 virus and its potential impact on the inmate population at the county correctional facilities in the thirteen (13) counties in the Commonwealth, Petitioners utterly failed to address whether or not Respondents have exhibited “deliberate indifference” to this looming threat. The reason for this glaring omission is that Petitioners cannot meet this legal threshold. In fact, Petitioners failed to provide any evidence that Respondents, having been made aware of the COVID-19 pandemic, simply sat back and did nothing. (*See generally Affidavits*) Moreover, this Court has held that the legal standard required for the Eighth Amendment cannot be established by a so-called expert report such as the one submitted by Petitioners as the question of “whether prison conditions are sufficiently harmful to establish an Eighth Amendment violation is purely a legal determination for the court to make. Therefore, expert opinion regarding what constitutes cruel and unusual punishment is entitled to little weight.” *Torres*, 427 Mass. at 614; *see also Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981). The record establishes the Sheriffs have not disregarded the risk of COVID-19, and as such,

Petitioners are not entitled to the relief they seek as “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety. *Farmer* , 511 U.S. at 837.

Second, Petitioners have not provided any evidence that correctional facilities in the Commonwealth represent a substantial risk of harm to inmates due to the COVID-19 pandemic. Petitioners rely upon an affidavit from an Associate Professor of Epidemiology in New York, who to Respondents’ knowledge has never stepped foot inside their county correctional facilities and has no direct knowledge whatsoever of current conditions at any county correctional facilities in Massachusetts. Petitioners rely upon conjecture and innuendo to support their extraordinary request for relief. The Petitioners have not submitted any evidence from any person with actual knowledge of the current conditions in the Respondents’ facilities. However, as set forth above, Respondents have provided the Court with numerous affidavits, from individuals with direct knowledge concerning the concrete steps taken to 1) mitigate the risk of COVID-19 infection for inmates and employees; and 2) maintain a clean and safe facility for both inmates and employees; and 3) evaluate appropriate inmates in conjunction with other agencies in the Commonwealth for transfer to lower security facilities, release, and GPS monitoring.

Petitioners failure to provide such supporting evidence is not surprising considering Respondents have submitted extensive affidavits from each of the Sheriffs’ in all thirteen (13) counties of the Commonwealth which operate correctional facilities setting forth well-educated and vigorous efforts to make significant and impactful changes to policies and procedures to combat the COVID-19 pandemic. For example, the county correctional facilities have instituted

screening and quarantine procedures for all incoming inmates or any inmates who may have had exposure, instituted employee screening when entering facilities, installed practical social distancing protocols in facilities where the inmate count is down, instituted rigorous cleaning procedures, restricted access by visitors, vendors and all non-essential personnel, instituted strict protocols for incoming inmates, temporarily halted all non-essential inmate activities and travel outside their facilities, required non-essential personnel to work from home where possible, educated inmates and staff on personal hygiene and other measures to help avoid contracting the virus, provided inmates with expanded access to soap and hand sanitizer, continued to acquire medical supplies including masks, gloves, gowns, and protective eye-wear.

Finally, certain county correctional facilities have begun to release inmates into their communities where it has been determined, through a thoughtful, deliberate and individualized re-entry analysis, that the released inmate does not represent a danger to the public and such a release will not ultimately adversely impact the health and safety of the inmate. Thus, it is not the contention of Respondents that under no circumstances should inmates be released from county correctional facilities in response to the COVID-19 pandemic; rather, any such release should be completed by trained professionals after an extensive, albeit expedient, review process. Such a review would be for the safety and welfare of both the inmate and the community at large. Not only have Petitioners utterly failed to show deliberate indifference by the Sheriffs' in the face of this unprecedented epidemic, the credible evidence establishes that the Sheriffs have gone well beyond the basic constitutional requirements and instituted vigorous and thoughtful measures designed to minimize the impact of the virus.

2. The Remedy Sought by Petitioners Is Inappropriate in Cases Involving Violations of the Eighth Amendment to the Constitution of the United States and/or Article 26 of the Massachusetts Declaration of Rights

Even if the Court were to find that the Sheriffs' in charge of the county correctional facilities throughout the Commonwealth were deliberately indifferent to the substantial risk of harm to inmates in their custody from COVID-19 (which Respondents vehemently deny), the remedy sought is inappropriate in the context of an Eighth Amendment/Article 26 violation. In the past, the Court has taken remedial action where conditions at a county correctional facility have risen to the level of an Eighth Amendment/Article 26 violation. *Michaud*, 390 Mass. at 534. Any analysis concerning potential remedial action involved a balancing test between the public interest and the constitutional rights of inmates. *Id.* In *Michaud v. Sheriff of Essex County*, 390 Mass. 523 (1983), the Court found Eighth Amendment/Article 26 violations where a correctional facility failed to provide inmates with flushing toilets and hot and cold running water despite having knowledge of the conditions and not remediating the problem.⁵ *Id.* at 524-526, 533-534. The Court considered whether to immediately close the facility or allow the County additional time to complete the repairs. *Id.* at 534. The Court afforded the County additional time to correct the conditions. *Id.* at 535. In doing so, the Court noted that to close the facility would either result in the overcrowding of other correctional facilities in the Commonwealth or a release of inmates into the community. *Id.* "The result would be either further overcrowding or an arbitrary prisoner release program. Neither of these alternatives is in the public interest." *Id.* Similarly, in *Pridgett v. Commissioner of Correction*, 443 Mass 1016 (2005), this Court held in a M.G.L. c. 211, § 3 petition challenging the constitutionality of an inmate's conditions of confinement, as Petitioners do in the present matter, "even if the petitioner

⁵ The lower court had issued an order for the repairs to be made by a date certain and the County failed to meet that deadline. *Id.* at 524-526.

could show that the conditions of his confinement are unlawful, he would be entitled only to modification of the conditions rather than immediate release.” *Id.* at 1017.

In the present matter before the Court, Petitioners seek the arbitrary release of both pre-trial and convicted inmates. Specifically, Petitioners seek, among other things, the release of:

- Individuals who will complete their sentence and be entitled to release within six months;
- Individuals incarcerated as a result of a finding of a violation of probation or parole that does not include the allegation of a new criminal offense;
- Individuals who are over the age of 60 and this at increased risk of severe COVID-19 complications and death, and are incarcerated solely for an offense or offenses not appearing in G.L. c.265 (crimes against the person);
- Individuals who have been diagnosed with a condition or disease that puts them at increased risk of severe COVID-19 complications and death including cardiovascular and respiratory disease, diabetes and liver disease;
- Individuals who qualify for medical parole;
- Individuals serving a sentence in a house of correction for an offense not appearing in G. L. c.265; and
- Any other individual for whom a release or stay is appropriate.

(Petitioners’ Brief, 30)

A review of the above remedy sought shows that Petitioners seek what is tantamount to a whole-sale release of inmates in an arbitrary manner. Such a proposed remedy would disregard the Court’s reasoning in *Michaud* and fail to allow the Respondents the opportunity to remediate any deficient conditions. *See also Pridgett*, 443 Mass. at 1017.

3. The Remedy Sought By Petitioners May Result In Harm to the Public and the Released Inmates

Petitioners request for relief, the release of certain individuals being held or serving time, using blanket standards including but not limited to the inmates age, how much time is left in their sentence, whether they were incarcerated for a probation violation or a violation of bail conditions as well as other conditions, may in fact endanger the inmates themselves. As this court is aware, in these county correctional facilities, individuals are not just housed there, the majority of individuals are being treated for numerous medical, mental health, and addiction issues. To release these individuals as the Petitioners request, does in fact endanger their health and welfare, as all the medical, psychological and therapy services will come to an abrupt stop. Presently a large portion of the inmate population being held at the county correctional facilities are related to the opiate addiction epidemic which presently exists in the Commonwealth of Massachusetts and nationwide. In an effort to combat this epidemic the county correctional facilities have implemented, as required by the legislation, a MATS programs at each of their facilities. These MATS programs involve counseling, therapy and Suboxone, to abruptly halt any of these treatments, is assuring that these individuals upon release and without support systems will more likely than not fall into the same dangerous situations they were in prior to their incarceration. This not only endangers the individuals but the community the inmate will be released into as well. The goal of Corrections is to assist the inmate to reenter the community with the right support systems and assistance in place in order to transition successfully back in society, and not re-offend.

Further, a number of individuals throughout the county correctional facilities, are also receiving medical treatment for chronic issues including cancer, HIV, diabetes and other medical

issues which require treatment on a regular basis. These treatments also will come to an abrupt halt if the inmate does not have health insurance or any other way to continue said medical care. Also, the Petitioners in their request are not considering that a number of these inmates may not have a place to go reside. To release any individuals without assuring that they have a safe place to reside is a reckless and dangerous way to introduce an inmate back to the community. For the above reasons as well as others that the respondents would like to be heard on we asked the court to consider that a blanket policy as requested by the petitioners is doing a disservice to both the individuals that they seek to protect, as well as, the community these individuals will go to. That is why the Sheriffs though they did not oppose the release of inmates, ask the court that the release should be considered on an individual basis, Taking into account the needs of the individual and the community, as well as, at a pace that can assure the safety and welfare of all involved.

4. Petitioners Have Failed to Exhaust Their Administrative Remedies Under M. G. L. c. Prior to Seeking Relief from the Court Pursuant to M. G. L. c.211, § 3

In order to preserve their rights, Respondents raise the issue that Petitioners failed to exhaust their administrative remedies under M.G.L. c.127, § 38F. The 1996 Prison Litigation Reform Act (PLRA) requires prisoners to exhaust the prison's grievance procedures before filing a lawsuit a federal claim. Civil Rights of Institutionalized Persons Act, § 7(a), as amended, 42 U.S.C. §1997e(a). In 1999, the Massachusetts Legislature enacted similar requirements for state claims. G.L. c. 127 §38F. It is settled law that a prisoner's failure to exhaust available administrative remedies bars that prisoner from challenging the action judicially. *Jones v. Bock*, 549 U.S. 199, 211 (2007); *Woodford v. Ngo*, 548 U.S. 81, 92 (2006); *Ryan v. Pepe*, 65 Mass. App. Ct. 833, 839 (2006); *Stokes v. Commissioner of Correction*, 26 Mass. App. Ct. 585, 590

(1988). Failure of an inmate to exhaust his administrative remedies curtails courts' authority to adjudicate the inmate's claims. *Ryan*, 65 Mass. App. Ct at 834.

In *Woodford*, the United States Supreme Court ruled that "proper exhaustion" is required, meaning that the prisoner is required to complete all steps that the administrative agency provides as part of its review process. 548 U.S. at 90. "Proper exhaustion" requires the prisoner to comply with all deadlines and procedural rules. *Id.* at 90; *Andrade v. Maloney*, 2006 WL 2381429 (D. Mass. 2006) (prisoner's failure to comply with procedural requirements was ground for summary judgment). In the present case, there has been no evidence submitted by Petitioners that inmates have completed any of the steps of the process the county correctional facilities provide them to in order to review any grievances.

D. CONCLUSION

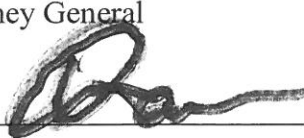
For the reasons set forth above, Respondents, the Sheriffs of the fourteen counties in the Commonwealth of Massachusetts, respectfully request that this Court DENY the Petitioners' Petition to the extent Petitioners seek the blanket release of pre-trial and convicted inmates from county correctional facilities.

**RESPECTFULLY SUBMITTED BY
RESPONDENTS, THE SHERIFFS OF
THE FOURTEEN COUNTIES OF
THE COMMONWEALTH OF
MASSACHUSETTS,**

By their Attorney
Maura Healy
Attorney General

Date: March 27, 2020

By:

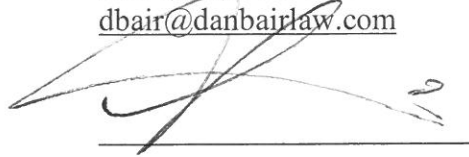


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A handwritten signature in black ink, appearing to read 'Robert Harnais', is written over a horizontal line.

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