COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12935

STEPHEN FOSTER, et al.,
Plaintiffs,

v.

CAROL MICI, COMMISSIONER OF CORRECTION, et al.,
Defendants.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY, SJ-2020-0212

BRIEF OF DEFENDANTS SECRETARY THOMAS TURCO, III AND COMMISSIONER CAROL MICI

Dated: May 6, 2020

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STATEMENT OF THE ISSUES

This case concerns the COVID-19 pandemic and the extensive and ongoing measures officials at the Massachusetts Department of Correction ("Department") have taken to prevent, manage, and treat COVID-19 among inmates. The Single Justice (Cypher, J.) has reserved and reported the case to the full court. The following issues are presented:

1. Whether plaintiffs have proven that prison officials have caused a deprivation of their constitutional rights by deliberate indifference to their health and safety.
2. Whether, even if plaintiffs have proven that prison officials violated their rights, the Court nonetheless has the legal authority to order the Commissioner of Correction to reduce the population of inmates sentenced to her care and custody by using her discretionary authority to furlough inmates, award good conduct deductions for good time that have not been earned, and grant petitions for release on medical parole.

STATEMENT OF THE CASE

On the evening of Friday, April 17, 2020, plaintiffs filed their putative class action Complaint and emergency motion for preliminary injunctive relief in the Single Justice Session. Out of the eleven named plaintiffs, eight are inmates

currently serving state prison sentences in the Department's custody, two are inmates serving county sentences in a house of correction,[1] and one is a former patient at the Massachusetts Alcohol and Substance Abuse Center at Plymouth ("MASAC"), committed under G.L. c. 123, § 35, but discharged to the community on April 9, 2020. The named plaintiffs purport to represent "a class of all prisoners who are incarcerated at prisons and jails in Massachusetts, including two subclasses: (1) All prisoners who are at high risk for serious complication or death from COVID-19 due to underlying medical condition or age (the 'medically vulnerable subclass'); and (2) All prisoners civilly committed to a correctional facility under G.L. c. 123, § 35 for treatment of an alcohol or substance use disorder (the 'Section 35 subclass')." Complaint at p. 24. The named defendants are Governor Charles Baker, Secretary of the Executive Office of Public Safety and Security Thomas Turco, III, Commissioner of Correction Carol Mici, and Chair of the Massachusetts Parole Board Gloriann Moroney.[2]

The Complaint faults defendants for the manner in which they have responded to the COVID-19 pandemic, and asserts three counts: (1) state constitutional violations alleged by inmate plaintiffs; (2) federal constitutional violations alleged by inmate plaintiffs; and (3) state and federal constitutional

[1] The county sheriffs are not parties to this litigation.
[2] Governor Baker and Chair Moroney are represented by separate counsel.

violations alleged by a former patient civilly committed to MASAC. Complaint at pp. 25-27.

The Complaint seeks drastic and extreme relief that has never before been countenanced by a court of the Commonwealth. Plaintiffs request that the Court usurp the authority of the Commissioner by ordering her to reduce the number of inmates sentenced to her care and custody by the courts. They also request that the Court enjoin the Commissioner from:

> a. Housing any prisoner in any correctional facility where the population exceeds the Design/Rated capacity of that institution;
>
> b. Housing any prisoner in a cell, room, dorm, or other living area that does not meet the minimum size standards established by the DPH in 105 CMR 451.320-322;
>
> c. Housing any prisoner in a cell, room, dorm, or other living area where they must sleep, eat, or recreate within six feet of another person;
>
> d. Maintaining any Medical or Health Services Unit, or medication distribution area, in which prisoners must wait for or receive treatment or medication within six feet of another person, other than their medical provider; or
>
> e. Transferring any prisoner from a county jail to the DOC.
>
> …
>
> confining in a correctional facility the Plaintiffs or any other person civilly committed under G.L. c. 123, § 35.

Complaint at pp. 27-28. Plaintiffs further request that the Commissioner be ordered to reduce the prison population by:

> a. Expanded use of home confinement;
>
> b. Expanded use of furloughs, including allowing furloughs for longer than the 14 days authorized by G.L. c. 127, § 90A;
>
> c. Maximizing the award of good conduct deductions, including completion credits and "boost time" under G.L. c. 127, § 129D, and authorizing the award of more such deductions than is permitted by § 129D;
>
> d. Identifying all prisoners who may qualify for medical parole, under G.L. c. 127, § 90A, taking all necessary steps to ensure that a medical parole petition is filed immediately, and granting medical parole to those who qualify as quickly as possible and in no event more than one week after the petition is filed.

Complaint at pp. 28.

On April 20, 2020, the Single Justice (Cypher, J.) reserved and reported the case to the full court, contemporaneously referring "this matter to the Superior Court for fact-finding that will enable the full court to decide the case in the first instance." Commissioner Mici and Secretary Turco thereafter answered the Complaint.

From April 27-29, 2020, an evidentiary hearing was conducted via videoconference in Suffolk Superior Court, with Justice Robert Ullmann presiding. The parties jointly submitted a statement of agreed facts, and each party also

submitted affidavits as direct evidence pertaining to facts not agreed. The Superior Court heard live testimony from: Michael White, an inmate at MCI-Concord; Ryan Duntin, an inmate at the Massachusetts Treatment Center; Michelle Tourigny, an inmate at MCI-Framingham; Dr. Yoav Golan, an infectious disease physician at Tufts Medical Center; Dana Durfee, an inmate at North Central Correctional Institution; Stephen Foster, an inmate at Old Colony Correctional Center; Ariel Pena, an inmate at MCI-Shirley; and Carol Mici, Commissioner of Correction.

On May 1, 2020, the Superior Court issued findings of fact. The findings of fact were promptly transmitted to the full court.

STATEMENT OF THE FACTS[3]

Defendants submit the following statement of facts to clarify, amplify, and supplement the Superior Court's findings:

It is undisputed that of DOC's sixteen correctional facilities, eleven have had no cases of COVID-19. Only the Massachusetts Treatment Center (MTC), MCI-Shirley, MCI-Framingham, and Lemuel Shattuck Hospital Correctional Unit (a secure inpatient hospitalization unit for inmates with medical care provided by DPH) have had more than one inmate test positive for the coronavirus. MCI-

[3] Where no citation to a specific exhibit it given, the statement is uncontroverted testimony from the Superior Court hearing conducted from April 27 through April 29, 2020.

Norfolk, a facility of 1,300 inmates, has had one case, traced to that inmate's visit to an outside hospital, and immediately contained via quarantine. It is undisputed that after Governor Charles Baker declared a State of Emergency due to COVID-19 on March 10, 2020, the Department of Correction immediately began implementing its COVID-19 epidemic control plans to stem the introduction and spread of the virus in its correctional facilities.[4]

Response to COVID-19

The Department's plans have constantly evolved, relying on the updated advice from the Centers for Disease Control and Prevention (CDC), Massachusetts Department of Health (DPH), and its healthcare provider, Wellpath. On March 23 and March 30, 2020, the CDC issued Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,[5] as a guide to implementing procedures for preventing and managing the spread of the virus in its correctional facilities. Commissioner Mici's unrebutted testimony was that the Department had already implemented most of the recommendations contained in the Interim Guidance.

[4] As of Friday, May 1, 2020, there were 7,404 people in the custody of the Department of Correction. Of those housed in a single or double-bed cell, 3109, or 42 percent are in single cells occupied by one individual.

[5] These guidelines are the only, and therefore the current, correctional facility guidelines issued by the CDC.

Since then, the Department has closely followed CDC recommendations and adapted new procedures as needed.

It is undisputed that, as initial measures, DOC took the following steps:

- designated clinical isolation areas for inmates who might show symptoms;
- screened and surveyed all inmates;
- provided inmates, patients, and staff with education and other updates in English and Spanish on preventing the spread of the virus, including the need for inmates to take personal responsibility for their own safety. The Commissioner issued memoranda on March 12, March 13, March 20, March 27,and April 3 and April 10, 2020
- temporarily suspended non-attorney visits;
- closed common areas such as gymnasiums and inmate dining halls to prevent inmates from congregating;
- began medically evaluating all new admissions to DOC facilities, then quarantining them for fourteen days before placing them in general population.

Beginning on March 12, 2020, two days after the Governor's State of Emergency declaration, Commissioner Mici instituted daily 10 a.m. meetings of

senior DOC staff to discuss the latest information about the virus, updated protocols, and plans for preventing and managing COVID-19 in prison. Also on March 12, 2020, Commissioner Mici began issuing flyers and directives to inmates and staff with the most updated information regarding COVID-19 protection, based on the then-latest information from state and federal experts. Affidavit of Carol Mici (Mici Affidavit), ¶¶ 19-21. On that day, Commissioner Mici issued an advisory to staff regarding COVID-19 symptoms and CDC prevention measures. Mici Affidavit, ¶ 22. On March 13, 2020, Commissioner Mici issued a flyer to inmates and patients in English and Spanish outlining CDC guidelines for prevention (frequent hand washing, social distancing, cleaning measures, and access to medical assistance). Mici Affidavit, ¶ 23. On March 20, 2020, the Commissioner issued an updated memorandum to inmates and patients in English and Spanish reminding them of the CDC preventative measures, telling them that they would receive two free telephone calls a week, and that all medical co-pays would be waived during the emergency. Mici Affidavit, ¶ 24.

Inmates were also reminded that, while it was normal to feel anxious during a pandemic, “if [they] feel the need to talk to someone,” they were encouraged to “reach out to our mental health professionals.” Mici Affidavit, ¶ 24. A similar message went to all staff, discussing: the screening of all staff before entry in

accordance with CDC/DPH guidelines; limiting of inmate transports and transports between facilities; authorizing staff to wear personal protective equipment (PPE); working with individual facilities to ensure sufficient infectious disease plans are in place; and upgraded cleaning/disinfection protocols. Mici Affidavit, ¶ 25.

On March 27, 2020, Commissioner Mici issued an updated memorandum in English and Spanish to patients, supplementing the March 20, 2020 memorandum, discussing, the screening of all persons entering facilities and the introduction of alcohol-based hand sanitizer in all facilities. The updated memorandum informed inmates and patients that: all staff are required to wear masks; PPE would be provided to inmates at the Massachusetts Treatment Center (MTC) working in infected areas; and that all persons entering DOC facilities would be screened for health, including self-administered temperature checks. Mici Affidavit, ¶ 26. Also on March 27, 2020, Commissioner Mici issued a staff update regarding efforts to prevent the virus. Mici Affidavit, ¶ 27. Among the steps: delivery of multiple gallons of hand sanitizer to all facilities; screening tents being set up at most facilities; requirement that all staff wear masks while in areas where inmates are active; and requirement that all staff take their own temperature before entering a facility. Mici Affidavit, ¶ 27.

On April 3, 2020, Commissioner Mici issued another memorandum to

inmates and patients regarding a 14-day lockdown as a safety precaution. Mici Affidavit, ¶ 28. The lockdown was implemented because of the difficulty, to the point of impossibility, of monitoring the social distancing of inmates moving throughout facilities. Inmate dining rooms were closed, with most inmates being fed in their cells or units. Gymnasiums were closed, and most programming was curtailed. Medical services and mental health treatment remained available. Mici Affidavit, ¶ 28.

At the same time that the Commissioner made the decision to modify operations and place institutions on quarantine status, a decision was also made to permit a number of inmate workers in each institution to continue at their jobs. Supplemental Affidavit of Carol Mici (Supp. Mici Affidavit), ¶ 13. Those workers include some of the core function areas, such as cleaners, laundry workers, and food service workers. Supp. Mici Affidavit, ¶ 13. In addition to being screened by medical staff daily, these inmate workers were also provided PPEs, such as gloves, exam gowns, face masks, and, in some areas such as laundry, face shields as well. Supp. Mici Affidavit, ¶ 13.

Also on April 3, 2020, Commissioner Mici issued a poster for staff outlining all the precautions that had been taken to date to protect them and inmates at all facilities. Mici Affidavit, ¶ 29. This included PPE distribution, N95 respirators for

security staff, screening tents outside each facility, and access to hand sanitizer. Mici Affidavit, ¶ 29. It also explained staff requirements such as wearing masks and self-administered temperature testing. Mici Affidavit, ¶ 29. On April 10, 2020, DOC issued an information sheet in English and Spanish updating inmates and patients on COVID-19 prevention, including the importance of frequent hand-washing, the availability of soap and hand sanitizer, and social distancing. Mici Affidavit, ¶ 30.

Cleaning and Sanitizing Facilities

The affidavits and the uncontested testimony of Commissioner Mici prove that DOC dramatically increased cleaning and sanitizing operations across all facilities – especially high-touch surfaces such as doorknobs, handrails, and telephones. These elevated health and safety protocols all remain in place. Further, it is uncontested that DOC implemented single points of entry (SPEs) at all of its correctional facilities. Mici Affidavit, ¶ 43. This requires all persons –- staff, vendor, contractor, or attorney -- entering a facility to pass an enhanced entrance screening prior to entry. Mici Affidavit, ¶ 44. The Massachusetts National Guard assisted DOC in setting up screening tents, with lighting and generators. Mici Affidavit, ¶ 43. A staff member and a manager, each wearing appropriate PPE, supervise the screening of each person, including a questionnaire and health-

related questions, along with a self-administered, non-intrusive temperature check. Mici Affidavit, ¶¶ 44-47. No person with a temperature above 99.9 degrees Fahrenheit has been permitted into a facility. Mici Affidavit, ¶ 49.

On March 11, 2020, DOC ordered alcohol-based hand sanitizer from outside vendors Custom Chemical and Simplex Chemical to be distributed to all facilities. Supp. Mici Affidavit, ¶ 7. Jobs were created at MCI-Shirley minimum for inmates separating large bottles of alcohol-based hand sanitizer into smaller jugs to be distributed in the facilities. Supp. Mici Affidavit, ¶ 8. Between March 11, 2020 and April 7, 2020, the Department spent approximately $81,373.81 on hand sanitizer, all distributed to the institutions. Supp. Mici Affidavit, ¶ 9. On March 16, 2020, MassCor began working with a local chemical distributor on the hand sanitizer initiative for the Department, producing hand sanitizer according to World Health Organization specifications. Supp. Mici Affidavit, ¶ 10.

As of April 28, 2020, MassCor filled 88,854 bottles of hand sanitizer, totaling over 4,600 gallons. Supp. Mici Affidavit, ¶ 10. Also as of April 28, 2020, approximately 831 gallons of hand sanitizer have been distributed by MassCor to the institutions, including about 78 gallons to MCI-Framingham, 107 gallons to MCI-Norfolk, 31 gallons to Old Colony Correctional Center 27 gallons to Pondville Correctional Center, and 53 gallons to the Massachusetts Treatment

Center. Supp. Mici Affidavit, ¶ 11. In addition, as of April 28, 2020, cleaning products and hand sanitizers are in stock in DOC's Milford warehouse, including 51 cases of disinfectant concentrate containing four gallons of disinfectant concentrate per case, 10 cases of liquid hand soap containing four gallons of liquid hand soap per case, 1,750 cases of hand sanitizer (4, 6 or 8 ounce bottles) containing 24 bottles of hand sanitizer per case, and 78 cases containing four-gallon-size hand sanitizer bottles for refill purposes. Supp. Mici Affidavit,¶ 17.

Between March 26, 2020 and April 27, 2020, DOC distributed throughout its facilities 175,011 pieces of PPE, including gowns, N95 masks, surgical masks, and gloves. Supp. Mici Affidavit, ¶ 12. These distributions were in addition to any PPE each institution had in stock before the COVID-19 pandemic. Id. DOC ordered 30,000 surgical masks, and as of April 27, 2020, every inmate in DOC custody has been provided with a surgical mask. Supp. Mici Affidavit, ¶ 14. After distribution, more than 22,000 masks remain in stock. Supp. Mici Affidavit, ¶ 16.

On April 28, 2020, the Commissioner issued a memorandum in English and Spanish to all inmates and patients containing the guidelines regarding the use of masks. Supp. Mici Affidavit, ¶ 17. They were reminded of the importance of wearing the masks in order to keep everyone safe and healthy. Supp. Mici Affidavit, ¶ 17. Specifically, inmates living in dorms were strongly encouraged to

wear masks, while they shelter in place within the dorm, whenever possible; inmates in single and two-person cells were advised to wear the masks when outside of their cell. Supp. Mici Affidavit, ¶ 17. Inmates were alerted that if they chose not to wear a mask, they would not be allowed out of their cells except for bathroom trips. Supp. Mici Affidavit, ¶ 17.

Although all inmates have been provided with masks, and are strongly encouraged to wear them, Commissioner Mici testified that DOC cannot force inmates to wear them. Despite DOC's attempts to educate inmates on the importance of masks, Commissioner Mici testified that ten inmates at MCI-Cedar Junction flushed their masks down the toilet. Supp. Mici Affidavit, ¶ 16.

All DOC staff has been required to wear masks while interacting with inmates since late March. As Commissioner Mici testified, this requirement is taken seriously, and video is used inside facilities to monitor correction officer PPE use, just as it is to monitor compliance with post orders, rounds, and other directives. She testified that officers caught without masks initially receive verbal warnings before sanctions escalate; a ranking officer was placed on a five-day suspension because none of the officers under his command was wearing a mask. See also Judge Ullmann's Findings of Fact, p. 9.

Lockdown and Shelter in Place

Commissioner Mici testified that she implemented a system-wide lockdown on April 4, 2020, which included preventing inmates from using outdoor prison yards, because of security concerns and also because it would be difficult, if not impossible, to monitor inmates exercising outside in the large yard areas. The lockdown necessarily also led to the cancellation of inmate classroom and social programs. The primary purpose of the lockdown was to allow inmates to "shelter in place," just as the general public has been urged to do.

By keeping inmates in their cells, or in the case of dorms, in their units, the Department is preventing the movement of possible carriers of the virus from spreading it beyond their own living areas. Obviously, it is easier to monitor for symptoms and contact tracing purposes, each cell or dorm within a facility as its own entity than to try to track each individual inmate's movement across the entire institution. It also makes it more efficient to have to isolate or quarantine a discrete number of people if an inmate in a cell or dorm tests positive or is symptomatic, as opposed to having to quarantine the entire prison.

The lower court slightly misstated Commissioner Mici's testimony regarding inmates who share a cell and who worry they have a heightened risk of the virus. Inmates may request a single cell, not for isolation, if medical staff

determines it would be medically appropriate." Judge Ullmann's Findings of Fact, p. 8. The Commissioner testified that no plaintiff or, to the best of her knowledge, other inmate has thus far requested a move to a single cell because of COVID-19.

All new inmates and transfers from other facilities are quarantined for two weeks upon arrival. Inmates who refused a test, or who have tested positive, have been quarantined. No inmate who has tested positive or who has been exposed and refused a test is placed in a cell or dorm room with inmates who have not tested positive or been exposed. As the Commissioner testified, DOC has more than sufficient space in each of its facilities to safely quarantine inmates when necessary.

Testing

It is undisputed that, as testing became more widely available, DOC implemented mobile testing for inmates at certain facilities. On April 22, 2020, all inmates at MCI-Framingham and South Middlesex Correctional Center were offered voluntary testing. Mici Affidavit, ¶ 36. At Framingham, 108 inmates were tested, with 40 testing positive; at South Middlesex (also a female facility), 41 inmates agreed to the test, but none tested positive. Judge Ullmann's Findings of Fact, p. 25. Mobile testing was then expanded to MCI-Shirley and the Massachusetts Treatment Center. Id. At MCI-Shirley, 236 inmates were tested,

with 78 positives. Id. At the Massachusetts Treatment Center, 479 were tested, with 74 testing positive. Judge Ullmann's Findings of Fact, pp. 25-26. All staff were also offered testing at these mobile sites, and officers could be tested at sites set up by DPH and other organizations. See also Mici Affidavit, ¶ 37. These numbers do not reflect the total tests done at DOC facilities. Judge Ullmann's Findings of Fact, p. 26. Once the first inmate case of COVID-19 occurred, DOC took immediate action to prevent its further spread. As of May 1, 2020, more than 1,200 inmates have been tested; 259 have tested positive.

Response to COVID-Positive Inmates

In addition to the overall steps taken system-wide, individual facilities have adjusted to address changing circumstances. MCI-Framingham is one of four DOC facilities where, despite DOC's extensive measures to prevent its transmission, inmates have contracted COVID-19. The first case is believed to have been contracted by an inmate at an outside hospital. In response to the cases, inmates exposed to someone who is potentially positive for COVID-19("close contact" individuals) were placed in in-cell medical isolation for fourteen days in the Closed Custody Unit (CCU). See also Affidavit of James Ferreira (Ferreira Affidavit), ¶ 14. Exposed inmates were allowed out of their cells only with inmates on the same status, and were required to wear a mask at all times. Ferreira Affidavit, ¶ 14.

In response to the COVID-19 emergency, staff at MCI-Framingham have been wearing proper PPE to minimize the likelihood of them contracting the disease or, conversely, if they are asymptomatic carriers, from passing it on to others. Ferreira Affidavit, ¶ 11. Staff in the CCU, where potentially positive inmates are housed, have been provided additional PPE, including gowns, suits, and face shields for direct contact with inmates. Ferreira Affidavit, ¶ 11. MCI-Framingham (along with South Middlesex) was the first DOC facility in which every inmate was offered a COVID-19 test, on April 22, 2020. Testing of inmates and staff at the Massachusetts Treatment Center and MCI-Shirley commenced on April 25, 2020.

MCI-Shirley also has had inmates test positive for COVID-19. The first inmate to test positive likely contracted the virus at an outside hospital and was immediately placed in quarantine. Like the other facilities with COVID-19 cases, MCI-Shirley has adjusted its operations to account for changed conditions. Inmates testing positive are quarantined and, should they become ill, are cared for by health care staff. Close contact inmates who have possibly been exposed to the virus are isolated with others of the same status for fourteen days.

At the Massachusetts Treatment Center (MTC), inmates with symptoms were immediately isolated, away from other inmates. Inmates were restricted to

their dorms and units to avoid potential spread of the virus. Inmates with symptoms were only housed with other symptomatic inmates. All high touch areas in the common areas of the facility are sprayed down with a disinfectant daily. Affidavit of Sean Medeiros (Medeiros Affidavit), ¶¶ 23-26. The unit officers clean all high touch areas in the living units. Medeiros Affidavit, ¶ 23. Twice per week, staff sprays down the showers and toilets throughout the facility with a Kaivac cleaning machine. Medeiros Affidavit, ¶ 24. All living unit showers at the MTC are cleaned by the unit runners twice per day, and the unit runners are given masks and gloves. Medeiros Affidavit, ¶ 25. Additionally, cleaning disinfectant spray is available for MTC inmates to spray the showers down after each use. Medeiros Affidavit, ¶ 26. At the end of the day, the showers and bathrooms are thoroughly cleaned again and sprayed down with disinfectant. Medeiros Affidavit, ¶ 26. In the modular unit of the MTC, where there are shared toilets, the unit runners clean them many times throughout the day. Medeiros Affidavit, ¶ 27.

The facilities without COVID-19 cases have taken extra precautions to remain virus-free. For example, at Pondville Correctional Center (PCC), the showers and bathrooms are thoroughly cleaned once a day by the assigned workers. Medeiros Affidavit, ¶ 14. In addition, during this pandemic, cleaning supplies/materials and mops are available in the bathroom for inmates to clean

after use. Medeiros Affidavit, ¶ 14. All inmates are offered cleaning supplies daily during the day shift, and showers and telephones are cleaned by each inmate after use. Medeiros Affidavit, ¶ 15. The Department also purchased compact sprayers for use at PCC. Medeiros Affidavit, ¶ 16. Throughout the day, staff sprays the showers, bathrooms and high touch areas with bleach and water mixture. Medeiros Affidavit, ¶ 16. Moreover, a staff member is specifically assigned to clean door knobs at PCC with bleach and water throughout the day. Medeiros Affidavit, ¶ 17.

Additionally, Wellpath providers are closely following CDC and DPH protocols for the prevention and treatment of COVID-19. Mici Affidavit, ¶ 64. This includes procedures for PPE use, triage, and quarantine for inmates who may have contracted the virus, protection for health care and correctional staff, and techniques for preventing COVID's spread. Mici Affidavit, ¶ 65. These procedures include detailed instructions for health care providers regarding the proper way to use masks and gloves, and how to avoid potential contact with COVID-infected areas. Mici Affidavit, ¶ 66.

Based on its own testing and observations, Wellpath's guidelines for returning potentially COVID-positive inmates to general population are more stringent than those recommended by the CDC. Mici Affidavit, ¶ 67. The CDC suggests that a person who shows no symptoms after seventy-two hours may be

returned to population; Wellpath has determined that it will not return an inmate until seven days after they are asymptomatic. Mici Affidavit, ¶ 68.

Testimony

The plaintiffs offered affidavits of several physicians: Josiah Rich, M.D, Yoav Golan, M.D., Victor Lewis, M.D., and "Six Internal Medicine Resident and Attending Physicians at Boston Medical Center." None of the physician affiants has any recent experience with inmate medical care, and only one – Dr. Lewis – appears to have visited a DOC facility in recent years, and then long before the outbreak of COVID-19. None has personal knowledge of DOC's COVID-19 practices or arrangements. Their affidavits recite general facts about disease prevention in group settings, both correctional and in the community.

The only physician to testify, Dr. Golan, admitted that his experience with correctional health was several years ago, and then only in the Suffolk County Jail. In his testimony, Dr. Golan noted that the testing situation was not ideal, either in prisons or in the community, and that social distancing was a challenge for all Americans. Dr. Golan testified that he had no knowledge of DOC procedures, and no personal knowledge of DOC's efforts to prevent and control COVID-19 in its sixteen correctional facilities, particularly as compared to the CDC's interim guidance, which he admitted to not having read. Dr. Golan admitted that he has not

visited a DOC facility since the start of the COVID-19 pandemic.

Inmate affidavits, declarations, and testimony reflect, at best, snapshots of a specific point in mid-April, based on each inmate's anecdotal observations of the conditions around them.[6] They do not purport to suggest any special knowledge of DOC's overall response to COVID-19, which has constantly evolved since mid-April (when the declarations were signed), and continues to evolve. Conditions in mid-April are not the same as they are on May 6, almost a month later. It is worth reiterating that none of the plaintiffs' inmate witnesses or affiants has ever been diagnosed with COVID-19.

The inmates' testimony is also perplexing; on one hand, they complain that DOC is not taking adequate steps to provide social distancing, but on the other they complain that they are not allowed to use the gyms, to go to outside recreation areas, or to socialize. The inmates' testimony shows that inmates are being offered cleaning supplies and are social distancing as much as possible. Some of the inmates who testified stated that they assist in cleaning bathrooms and public areas, beyond even what is being done by staff and inmate workers. Other inmates stated that, while inmates had access to cleaning supplies, they made no effort to assist in cleaning their units or cells.

[6] Of the named plaintiffs, only Stephen Foster, Michelle Tourigny, and Michael White testified.

Inmates testified that they have never been told by correctional staff to maintain social distance. However, signs and memoranda have been distributed to each facility with CDC guidelines and recommendations to prevent the spread of COVID-19, including maintaining social distance when possible, frequent handwashing with soap and hot water, and avoiding touching of faces. Commissioner Mici reiterated in her testimony that while DOC cannot enforce the CDC or DOC guidelines, most inmates housed in DOC's 16 correctional facilities are competent adults who need to do their part as well in containing the virus. Clearly the inmates are aware of the precautions – whether from information provided by DOC or gleaned from watching television – but they acknowledge that they do not always follow these regulations. It is clear from such testimony that even when social distancing is possible, some inmates are choosing not to do so.

Plaintiff Michael White is housed at MCI-Concord. MCI-Concord has had no cases of COVID-19. White lives in a dormitory style unit which has bunk beds on each side and picnic tables in the middle. He testified that despite the fact that there are 80 bunk beds, the number of inmates in his unit, L2, decreased "drastically" in the month of April. Judge Ullmann did not credit White's testimony about the infrequency of cleaning of the unit, as it was definitively contradicted by other testimony and evidence presented. Judge Ullmann's

Findings of Fact, p. 14.

White indicated that cleaning supplies are available, and he cleans anything he touches prior to use, including the toilet, shower, and tables, stating that "anything he sits down on," he cleans. White also testified that he and the other inmates wash their hands more than thirty times per day. His complaint that there are others in the bathroom ninety-five percent of the time is what creates the issue of social distancing while using the facilities. Despite White's testimony that correctional staff do not encourage head to toe sleeping practices or other safe practices, in his testimony and in his affidavit, he said is keenly aware of the details of the CDC guidelines.

Inmate Ryan Duntin is housed at the Massachusetts Treatment Center. He testified that some of the runners in the unit are "lazy," but that he and other inmates do extra cleaning as a "community." He testified that eight days prior to his testimony, dayroom capacity was limited to twenty-four people. Despite his testimony that he has advocated for all of the restrictions that DOC put into place, he also testified during direct examination that when the lockdown was imposed, he and other inmates sat in the hallway and refused to lock in without answers.

Plaintiff Michelle Tourigny has been incarcerated at MCI-Framingham for over 20 years. She resides in the Health Services Unit. She lives alone in a single

cell with its own toilet and sink, and need only leave her cell to take a shower. Prior to the lockdown, inmate runners cleaned her cell daily by sweeping, mopping, cleaning surfaces, the toilet, and the sink. Tourigny claims that she is unable to clean her cell herself as she fears that she will fall. She acknowledged that correctional officers regularly sweep and mop her room. The only interaction Tourigny has with others is when medical staff enter her cell, twice a day by a nurse and four times a week by a doctor.

Plaintiff Stephen Foster is incarcerated at Old Colony Correctional Center (OCCC). He has been sharing a cell with the same inmate for well over the 14-day risk period for the virus; this "sheltering in place" has thus far kept Foster and his roommate (and all other inmates at OCCC) free of the virus. There have been no cases of COVID-19 at OCCC.

Inmate Dana Durfee is housed in a dorm at NCCI-Gardner. He does not allege any health issues. There have been no cases of COVID-19 at NCCI-Gardner.

Inmate Ariel Pena is housed at MCI-Shirley. Pena testified that he wears his mask while outside his cell, but not while inside. He said it is because he feels it is "too late" because he has been living with the same cellmate for a month. By "sheltering in place" with his cellmate, Pena has remained free of the virus.

MASAC

Plaintiff Mark Santos was committed to the MASAC at Plymouth on March 4, 2020 by the New Bedford District Court for a period not to exceed 90 days. See Docket No. 2033MH000125. Santos did not contest the petition for his commitment. See Declaration of Mark Santos dated April 14, 2020, paragraph 1. Santos was released after 36 days from his civil commitment on April 9, 2020.[7] Id., paragraph 5. There is no indication in the record that Santos pursued his appellate rights concerning his commitment.

Substance Abuse and Mental Health Services Administration (SAMHSA) has issued guidance for those public health efforts to treat substance use disorders. The guidance recognizes that for treatment programs that "remain open during the current COVID-19 related emergency; care should be taken to consider CDC guidance on precautions in admitting new patients, management of current residents who may have been exposed to or who are infected with COVID-19, and visitor policies." Agreed Statement of Facts, 50.

There have been no positive tests for COVID-19 in the civil commitment population in Hampden. Crowley Affidavit, at ¶ 9. To date there have been no positive tests indicating a patient at MASAC at Plymouth has or had COVID-19.

[7] Because Santos was released from MASAC almost a month ago, his claim is moot.

Affidavit of Jennifer Gaffney, at ¶ 5

The census of patients at MASAC has dramatically dropped in recent weeks. Gaffney Affidavit, at ¶ 4. With a population of 28 patients, MASAC is currently operating at just 18.5 percent design capacity and 10 percent of operational capacity. Gaffney Affidavit, at ¶ 4; Statement of Agreed Facts, at ¶ 19. Between March 13, 2020 and April 23, 2020, there have been 14 new admissions to MASAC. MASAC's operational capacity is 275 and design capacity is 151. Similarly, the Hampden County civil commitment population has decreased by 57.5 percent and is at 46 clients. Affidavit of Kevin Crowley, Superintendent, ¶ 4. Hampden County has received 31 new admissions over the same period. Crowley Affidavit, at ¶ 4. The low census count enables MASAC to take a number of steps to isolate and manage the risk of COVID-19 exposure. Gaffney Affidavit, at ¶ 9.

Each patient is assigned to a single room. Gaffney Affidavit, at ¶ 9. Newly admitted patients spend the first 72 hours undergoing observation and detoxification in a single room with a private toilet and sink. Gaffney Affidavit, at ¶ 7. Patients are not required to undergo "cold turkey withdrawal." Gaffney Affidavit, at ¶ 8. Medication assisted treatment and comfort medications are used to treat patients as needed based upon medical history and clinical assessments. Gaffney Affidavit, at ¶ 8. If the patient is asymptomatic after 72 hours, he is placed

in a single room for self-quarantine for the next 11 days. Gaffney Affidavit, at ¶ 7. Testing is available for any symptomatic patient. Gaffney Affidavit, at ¶ 7. After 14 days, asymptomatic patients are assigned to a separate room in either the A or B housing unit. Gaffney Affidavit, at ¶ 9.

Meals and medication are delivered to patients on the housing units. Gaffney Affidavit, at ¶ 10. Each patient is asked to follow social distancing and handwashing guidelines. Gaffney Affidavit, at ¶ 10. Cleaning services are provided by a private vendor at MASAC, and the services include daily cleaning of patient rooms and sanitation of common and high touch areas. Gaffney Affidavit, at ¶ 11. Each unit is provided with a disinfectant spray bottle to clean the telephone and other areas after use. Gaffney Affidavit, at ¶ 11. Each patient is provided with a bar of soap each week and other necessary hygiene products. Gaffney Affidavit, at ¶ 12. Patients may receive additional soap or other items upon request. Gaffney Affidavit, at ¶ 12.

There is a hand sanitizer station for patients in each housing area. Gaffney Affidavit, at ¶ 12. While there is only one bathroom on both the A and B housing unit areas, each is equipped with eight separate showers. There are also eight toilets, all with stall doors, and an additional two urinals in each bathroom. Gaffney Affidavit, at ¶ 13. During the weekend of April 4 through April 6, 2020,

there were no groups held due to a Department-wide lockdown that took effect while a new operational plan was developed. Gaffney Affidavit, at ¶ 16.

Declarant Robert Peacock

Declarant Robert Peacock, a MASAC patient who filed a declaration at the end of the evidentiary hearing, exhibited signs of withdrawal for the first four days of his civil commitment, including being confused and disoriented, and trying to leave the housing unit "to catch a bus." Supp. Mici Affidavit, ¶ 22. When Peacock's Substance Abuse Counselor attempted to introduce herself to the patient, she was advised by mental health staff that he was not detox-cleared and was exhibiting signs of confusion. Supp. Mici Affidavit,¶ 23.

Once Peacock was detox-cleared on the afternoon of April 28, 2020, the Substance Abuse Counselor met with him on April 29, 2020 and provided an overview of expectations and the program, and provided him with initial homework, containing materials related to substance use treatment, mental health, and wellness. Mici Supplemental Affidavit,¶ 23.

MASAC Pre-COVID

Before the COVID-19 pandemic, patients at MASAC in Plymouth received three hours each day of Living in Balance, a substance use disorder (SUD) curriculum. Gaffney Supplemental Affidavit, ¶ 4. The curriculum was delivered in

classes which consisted of approximately 18 to30 patients. Gaffney Supplemental Affidavit, ¶ 4. In addition, Activity Therapists supplemented the curriculum classes with group activities during all non-SUD treatment times. Gaffney Supplemental Affidavit, ¶ 4. The activities were scheduled on site 8:00 am. to 8:00 pm., Monday through Friday and from 8:00 am. to 4:00 pm. on Saturdays and Sundays. Gaffney Supplemental Affidavit, ¶ 4. The activities occurred in both group areas and in dormitories and were voluntary for patients to attend. Gaffney Supplemental Affidavit, ¶ 4. Mental Health Professionals and SUD Counselors provided individual follow-up daily to assist patients with any mental health needs and for reentry planning. Gaffney Supplemental Affidavit, ¶ 4.

MASAC During COVID-19

Subsequent to the COVID-19 pandemic, all newly admitted patients are placed on a 14 day quarantine hold in the C Building. Gaffney Supplemental Affidavit, ¶ 5. For the first three days patients are in an observation room and for the next 11 days on the unit. Gaffney Supplemental Affidavit, ¶ 5. During the first three days of quarantine, patients are assessed daily by Mental Health Professional staff. Gaffney Supplemental Affidavit, ¶ 5. Over the next 11 days, each patient is assigned a room on the unit, provided with a mask, and is able to leave their room. Gaffney Supplemental Affidavit, ¶ 5. Each patient receives individual services

from their SUD Counselor daily and is provided a minimum of two packets per day of Living in Balance reading and homework. Gaffney Supplemental Affidavit, ¶ 5.

During this time the Activity Therapists also provide supportive contact and materials such as books, puzzles, etc. Gaffney Supplemental Affidavit, ¶ 5. During the initial phase of COVID-19, once a patient completed quarantine, the person received two hours of Living in Balance SUD curriculum delivered in classroom format. Gaffney Supplemental Affidavit, ¶ 6. The class size was initially approximately 15 patients per class. Gaffney Supplemental Affidavit, ¶ 6.

Once the patient census declined, MASAC was able to provide four hours of Living in Balance curriculum per day, which is currently provided. Gaffney Supplemental Affidavit, ¶ 6.

Class sizes have continued to be reduced from 15 to 10 and currently class size is 5 patients. Gaffney Supplemental Affidavit, ¶ 6. Activity Therapists continue supplementing with group activities with the same schedule as Pre-COVID-19 and Mental Health Professionals (MHPs) and SUD Counselors, providing individual follow-up daily to assist with MH needs and reentry planning. Gaffney Supplemental Affidavit, ¶ 6.

MASAC has been able to maintain the same level of mental health treatment

despite the COVID-19 pandemic. Gaffney Supplemental Affidavit, ¶ 7. The medical vendor, Wellpath, continues to provide crisis coverage Monday through Saturday, completes intake evaluations on all patients, and facilitates individual sessions to address patients' clinical needs. Gaffney Supplemental Affidavit, ¶ 7. For psychiatric services, all initial interviews are held via tele-psychiatry. Gaffney Supplemental Affidavit, ¶ 8. Psychiatric providers are providing necessary follow-up sessions focused on individuals identified as high-need by the psychiatrist or nurse practitioner, or for patients who are presenting with emergent needs. Gaffney Supplemental Affidavit, ¶ 8.

MASAC staff monitor patient participation in groups and based upon the satisfactory completion of programming and an adequate discharge plan, as recommended by clinical staff, the Superintendent determines whether a patient meets the statutory criteria for release. Gaffney Affidavit, at ¶ 18. Most civil commitments are currently released around the thirty day point of their commitment. Gaffney Affidavit, at ¶ 19.

Finally, as part of a long planned transition to have the private medical vendor assume responsibility for safety and custody of the patient population, all correction officers will be removed from MASAC on May 10, 2020. Gaffney Affidavit, at ¶ 20.

Medical Parole

Since the State of Emergency was declared on March 10, 2020, the Department has expedited the medical parole process. G.L. c. 127, § 119A permits inmates who are "terminally ill or permanently incapacitated" to petition for release from custody on medical parole. Per the statute, "[i]f the commissioner determines that a prisoner is terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society, the prisoner shall be released on medical parole." G.L. c. 127, § 119A(e). Mici Affidavit, ¶ 100. Upon receipt of a medical parole petition, the superintendent completes a public safety risk assessment by reviewing the inmate's file for criminal and institutional history, including circumstances of the crime, disciplinary and classification reports, and the inmate's participation in education, work and recommended programming. Mici Affidavit, ¶ 101.

At the same time, the Department's contracted medical provider, Wellpath, is asked to evaluate the inmate and provide an updated clinical review as to the inmate's medical condition. Id. The medical parole statute contains definite timelines: the superintendent must issue a recommendation to the Commissioner "*not more than* 21 days after receipt of the petition" and "[t]he commissioner shall

issue a written decision *not later than* 45 days after receipt of a petition" (italics added). Mici Affidavit, ¶ 102. However, these timelines only represent the outer limit of what is permitted; there is nothing preventing superintendents from exercising their discretion and making recommendations in less than 21 days; nor is the Commissioner prohibited from rendering her decision in less than 45 days. Mici Affidavit, ¶ 103.

Department staff typically expedite decisions on medical parole petitions if the inmate's condition is significantly acute. Id. Pursuant to the statute, petitioner's victims and District Attorneys' offices have the right to submit written statements or, where a murderer is under consideration, request a hearing on the matter. Mici Affidavit, ¶ 104. In order to expedite the process, the Commissioner is requiring victims and District Attorneys wishing to submit statements for or against the medical parole, or to request a hearing, to respond within five business days of notification that the petition is under consideration. Mici Affidavit, ¶ 105. Since March 10, 2020, the Commissioner has granted nine inmate petitions for medical parole. Id. Of these, seven inmates have been released and two more are awaiting community placement. Id.

SUMMARY OF THE ARGUMENT

None of the defendants is being deliberately indifferent to the risk posed by

COVID-19. In fact, the evidence was clear and Judge Ullmann's findings confirm that Commissioner Mici has taken and continues to take extensive measures to prevent, manage, and treat COVID-19 among inmates in the Commonwealth's state prisons. These measures — enhancing entrance screening, increasing cleaning and sanitizing operations, educating inmates on preventative measures, providing PPE to all staff and inmates, just to name a few — are in place at all facilities, including MASAC, where the census of patients has dramatically dropped and each patient is assigned to a single room. Above all, the DOC strives to promote and encourage social distancing practices to the maximum extent feasible by efforts such as closing common areas, preventing inmates from congregating, and delivering meals and medication to inmates in their cells. These measures are more than enough to satisfy the state and federal constitutions.

And even if plaintiffs could prove that they were incarcerated under conditions that violated the constitution, the remedies that plaintiffs seek are foreclosed by both decades of precedent and decisions issued by this Court only days ago. The separation of powers doctrine does not permit this Court to order the Commissioner of Correction to reduce the sentenced inmate population committed to her custody by courts of competent jurisdiction. Because the Court cannot order the Commissioner to stay sentences by furloughing inmates, award deductions

from sentence for good conduct credits not actually earned, or find inmates suitable for release on medical parole, all executive branch functions, the Court cannot order the relief that plaintiffs seek without usurping the Commissioner's discretionary authority. The case should be remanded to the county court with instructions to dismiss.

ARGUMENT

I. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION.

A party moving for a preliminary injunction or temporary restraining order must show the presence of the following familiar factors: "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the (moving party's) likelihood of success on the merits, the risk of irreparable harm to the (moving part) outweighs the potential harm to the (nonmoving party) in granting the injunction." Garcia v. Department of Housing and Community Development, 480 Mass. 736, 747 (2018), citing Loyal Order of Moose v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003); see Packaging Industries Group v. Cheney, 380 Mass. 609 (1980). A party seeking to enjoin government action must prove to the court that "the requested order promotes the public interest, or alternatively, that the equitable relief will not adversely affect the public." Fordyce v. Town of Hanover, 457 Mass. 248, 255 n.

10 (2010); Loyal Order of Moose, 439 Mass. at 601, quoting Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984).

The Supreme Court has noted that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, ***by a clear showing***, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original); see Peoples Fed. Sav. Bank v. People's United Bank, 672 F.3d 1, 8-9 (1st Cir. 2012), quoting Voice of Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) ("A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right.").

II. PLAINTIFFS HAVE FAILED TO PROVE THAT INMATES ARE BEING SUBJECTED TO UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT.

The plaintiffs cannot possible prove that Secretary Turco or Commissioner Mici were indifferent to their health, safety, and overall well-being. As the facts demonstrate, the defendants have made extraordinary efforts in a short time to protect inmates and others in its facilities. This is especially impressive in light of the fact that DOC, like every other agency, business, or member of the public, has had to adjust to swiftly changing guidelines and even quicker changes in knowledge of COVID-19. DOC's efforts began at the first indication that the virus

could impact its inmates, patients, and staff. Through a combination of education, careful implementation of health and hygiene protocols, and having inmates "shelter in place" in their cells and dorms, DOC has done its best to protect its inmates, patients, and staff.

A. NONE OF THE DEFENDANTS IS BEING DELIBERATELY INDIFFERENT TO THE RISK POSED BY COVID-19.

It is well established that "a prison official cannot be found liable under the Eighth Amendment… unless the official knows of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 837 (1994). The Eighth Amendment[8] protection against cruel and unusual living conditions in prison has an objective and a subjective component. The prisoner must show that 1) the alleged deprivation is, "objectively, 'sufficiently serious,'" Farmer, 511 U.S.at 834, and 2) that the prison officials were deliberately indifferent to "an excessive risk to inmate health or safety," id., at 837, meaning that the officials actually knew of and disregarded the risk. Id.; see Staples v. Gerry, 923 F.3d 7, 13 (1st Cir. 2019). To satisfy the objective component, the prisoner must prove that the conditions of confinement constituted a serious deprivation of his basic human

[8] Conditions of confinement claims under the Massachusetts Declaration of Rights are analyzed the same way as claims under the Eighth Amendment. See Butler v Turco, 93 Mass.App.Ct. 80, 88 (2018); Michaud v. Sheriff of Essex Cty., 390 Mass. 523, 534 (1983) ("the rights guaranteed under art. 26 are at least equally as broad as those guaranteed under the Eighth Amendment.").

needs in contravention of contemporary standards of decency. Rhodes v. Chapman, 452 U.S. 337, 447 (1981). "[E]xtreme deprivations are required to make out a conditions-of-confinement claim." Hudson v. McMillian, 503 U.S. 1, 9 (1992).

Here, plaintiffs failed in meeting their burden of proving the objective prong. Although COVID-19 is a disease that poses a serious risk of harm to those who contract it, that does not end the objective inquiry. The Supreme Court has recognized that the objective component "is contextual." Hudson, 503 U.S. at 8. To that end, the objective prong does not impose upon prison administrators a duty to take measures that are "ideal, or of the prisoner's choosing." Kosilek v. Spencer, 774 F.3d 63, 82 (1st Cir. 2014) (en banc), cert denied, 135 S.Ct. 2059. No prisoner has been forced to endure an extreme deprivation or even an unreasonable risk to their health or safety. The measures mentioned above, such as increased cleaning and sanitizing operations, distribution of PPE to all inmates and staff, posting of educational and institutional flyers and memoranda, and encouraging social distancing as much as possible, rival that which is being done in the community to help combat the spread of an insidious disease that all Americans, inmate or not, are at risk of contracting. The conditions inside of the prisons are not below society's minimum standards of decency. Estelle v. Gamble, 429 U.S. 97, 102-05 (1976).

Plaintiffs also cannot meet the subjective prong. As to the subjective, "deliberate indifference" component, absent a showing that prison officials consciously understood that prison conditions created an excessive risk of harm, the conditions are not "punishment" within the meaning of the Eighth Amendment. Farmer 511 U.S. at at 844. The First Circuit has held that

> [i]n order to establish deliberate indifference, the complainant must prove that the defendants had a culpable state of mind and intended wantonly to inflict pain… While this mental state can aptly be described as 'recklessness,' it is recklessness not in the tort-law sense but in the appreciably stricter criminal law sense, requiring actual knowledge of impending harm, easily preventable.

DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991).

The culpable mental state required to prove a constitutional violation is clearly not present here. For weeks, Commissioner Mici has been having senior level meetings every day to discuss and update protocols, and plan for preventing and managing COVID-19, taking guidance from the CDC recommendations for prisons. She has issued a multitude of memoranda and advisories, adjusting policies on a daily basis to reflect facts on the ground. Commissioner Mici has provided the Court with a lengthy list of the actions taken to protect inmates through her testimony and affidavits, including but not limited to enhanced entrance screening, increased cleaning and sanitizing operations, educating inmates on preventative measures, and providing PPE to all staff and inmates. DOC is

constantly adjusting its response to this pandemic by continuing to implement additional preventative measures aimed at mitigating, suppressing, and containing the virus.

To the extent plaintiffs suggest an alternative course, "the mere failure to choose the best course of action does not amount to a constitutional violation." Peate v. McCann, 294 F.3d 879, 882 (7th Cir. 2002). Moreover, the Supreme Court has repeatedly held that correctional officials are entitled to substantial deference in implementing rules and providing for institutional safety and security. See Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326 (2012); Turner v. Safely, 482 U.S. 78, 84-85 (1987). "Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face." Florence, 566 U.S. at 326. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." Turner, 482 U.S. at 84-85.

Plaintiffs simply cannot assert that Commissioner Mici has turned a blind eye or deaf ear to COVID-19. Total unconcern for the welfare of inmates is the hallmark of an Eighth Amendment violation. The record demonstrates that

Commissioner Mici has taken very proactive steps to minimize the risk of harm posed by a novel virus. Running a prison system, even in normal times, is an extremely challenging task. These are not normal times. Commissioner Mici has fashioned "reasonable measures to abate" a problem that is vexing government officials and public health experts across the county and throughout the world. Farmer, 511 U.S. at 847. Although plaintiffs suggest other steps Commissioner Mici might take, some unfeasible and others unlawful, there is no authority for the proposition that her failure to do so constitutes deliberate indifference within the meaning of the Eighth Amendment.

B. COURTS IN OTHER JURISDICTIONS HAVE REFUSED TO FIND PRISON OFFICIALS DELIBERATELY INDIFFERENT TO THE RISK POSED BY COVID-19.

With the sudden onset of COVID-19, few courts have yet addressed the conditions of inmates in state prisons in regard to the virus.[9] Recent cases in other[10] jurisdictions have addressed, and rejected, arguments similar to those raised by the plaintiffs here. On April 22, 2020, the United States Court of Appeals for the Fifth

[9] The vast number of cases decided by state and federal courts involve pre-trial detainees, bond hearings, and federal petitions for habeas corpus under federal law.

[10] Lower courts in this jurisdiction have considered these types of claims, albeit in slightly different contexts. In Duart v. Mici, Docket No. 1:19-cv-12489-LTS (D. Mass. 2020), a federal court (Sorokin, J.) denied an inmate's motion for a temporary restraining order to force officials at the Massachusetts Treatment Center to clean the showers more often and make soap more available. A copy of the Duart decision is included in the addendum.

Circuit stayed an injunction issued by a district court against the Texas Department of Criminal Justice (TDCJ), which oversees Texas's prison system. Valentine v. Collier, No. 20-20207, --- F.3d ---, 2020 WL 1934431 (5th Cir. 2020). The lower court had issued a preliminary injunction sought by the plaintiffs, inmates incarcerated in Texas state prisons, ordering the prison system to implement COVID-19 preventative measures that the Court admitted "go even further than CDC guidelines" for correctional facilities. Id. at p. 4. The Fifth Circuit reasoned that the lower court had gone too far, and that the plaintiffs were unlikely to succeed on their deliberate indifference claim. After accounting for the "protective measures TDCJ has taken," the plaintiffs would be unable to prove a substantial risk of serious harm amounting to cruel and unusual punishment as required by Farmer. Id. at 6. The Court correctly concluded that "the incidence of diseases or infections, standing alone," do not "imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks." Id. at p. 5, quoting Shepherd v. Dallas Cty., 591 F.3d 445, 454 (5th Cir. 2009).

The Eleventh Circuit issued a decision on May 5, 2020 adopting the reasoning in Valentine, a copy of which is included in the addendum. Swain v. Junior, No. 20-11622 (11th Cir. 2020). The Swain Court stayed a preliminary injunction requiring jail officials to take certain steps to prevent and control the

virus based on the CDC's March 23, 2020 Interim Guidelines for Correctional Facilities, including: educational measures; social distancing to the extent possible; free soap; access to showers; the use of PPE; access to hand sanitizer; quarantine; cleaning supplies; medical care; waiver of medical co-pays; and face masks for all inmates. The Court held that "[a]ccepting, as the district court did, that the defendants adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures, the defendants' actions likely do not amount to deliberate indifference." Swain, at p. 12.[11] The Court also noted that

> [t]he district court also likely erred by treating [officials'] inability to 'achieve meaningful social distancing' as evincing a reckless state of mind. Although the district court acknowledged that social distancing was 'impossible' . . . it concluded that this failure made it likely that the plaintiffs would establish the subjective component of their claim. But the inability to take a positive action likely does not constitute 'a state of mind more blameworthy than negligence.'

Swain, at p. 10.

In Smith v. State of Montana, No. OP-20-0185, 2020WL1660013 (Mont. 2020), the Montana Supreme Court found that the inmate had failed to prove deliberate indifference where the inmate "has made no evidentiary showing that

[11] The Department has implemented every one of these practices.

the Department of Correction is not taking reasonable measures, under the circumstances, to protect him and other inmates from the COVID-19 risk." The Montana Supreme Court reached a similar conclusion in Disability Rights Montana v. Montana Courts, No. OP-20-0189, 2020WL1867123 (Mont. 2020).

On April 21, 2020, the New York Supreme Court rejected the deliberate indifference claims of detainees at Rikers Island prison in New York City. People v. Brann, No. 260252/20, 2020WL1941972 (NY Sup. Ct. 20202). The court found that the inmates could not show deliberate indifference where New York prison officials "had made substantial efforts to ameliorate that risk by containing the spread of COVID-19 on Rikers Island." Id. at 7. Similarly, in United States v. Green, No. 1:19-cv-00539-CCB-1, 2020WL1873967 (D. Md. 2020), a federal court addressing a lawsuit brought by inmates challenging conditions during the pandemic in the Washington, D.C. jail, noted that,

> as for the adequacy of the [jail] response to the unprecedented pandemic, just as within [jail], the number of cases in the community at large, together with accompanying morbidity and mortality, continue to rise, notwithstanding a full arsenal of preventive measures being implemented such that the Court cannot conclude from a rising number of positive cases that the measures being taken are inadequate.

Id.

The United States District Court for the District of Nevada rejected a pre-

trial inmate's release because of COVID. United States v. McDonald, No. 2:19-cr-00312-KJD-VCF, 2020WL1659937 (D. Nev. 2020) Although the facts are different from those here, the court made a pertinent observation:

> Defendant offers no evidence to explain how the proposed living situation mitigates the risk of infection. Defendant fails to explain who else has or will live in or frequent the home or identify any screening practice or concrete COVID-19 precautions taken there. Defendant therefore offers nothing more than speculation that home detention would be less risk than detention [in prison] which has screening practices and other reasonable COVID-19 precautions in place.

Id.

As these cases from other jurisdictions demonstrate, the plaintiffs will be unable to prove that the Department was deliberately indifferent to their needs.[12] To the contrary, the uncontroverted evidence shows, that to the best of its ability, the Department has closely followed – if not exceeded – the CDC and DPH guidelines for controlling the spread of the virus. The steps taken by the

[12] To the extent plaintiffs rely on cases involving immigration detainees, such as Basank v. Decker, No. 20 Civ. 2518-AT, 2020 WL 1481503 (S.D.N.Y. 2020), Fofana v. Albence, No. 20-10869, 2020 WL 1873307 (E.D. Mich. 2020), and Kevin v. Decker, No. 20-4593-KM, 2020 WL 2092791 (D.N.J. 2020), their reliance is misplaced. In all three cases, federal courts ordered Immigration and Customs Enforcement to temporarily release individuals whom the courts found to be medically vulnerable. These individuals were not sentenced inmates, but rather were being held during the pendency of their civil immigration proceedings. As this Court has recognized, ICE detainers "are simply requests. They are not commands." Lunn v. Commonwealth, 477 Mass. 517, 526 (2017). Federal case law pertaining to civil ICE detainers is of no moment.

Department also exceeded the steps taken by other systems that have been found constitutional and not deliberately indifferent. As such, plaintiffs' claims must fail.

C. THE DEPARTMENT OF PUBLIC HEALTH REGULATIONS UPON WHICH PLAINTIFFS RELY ARE ONLY RECOMMENDATIONS.

Plaintiffs point to Department of Public Health (DPH) regulations on cell size or living space as evidence that prison officials are deliberately indifferent to the risk of COVID-19. However, the Department attempts to comply with relevant DPH regulations and ACA standards, and in any event, even if it was not, the DPH regulations upon which plaintiffs rely are mere recommendations.

DPH has promulgated regulations regarding the operation of state and county correctional facilities. See 105 CMR 451.010. 105 CMR 451.011 states as follows:

> ***Required*** Standards (.100 and .200 Series)
> Each correctional facility is required by M.G.L. c. 111, § 21 to comply with *Required Minimum Health and Sanitation Standards* set forth in 105 CMR 451.101 through 105 CMR 451.214 (.100 and .200 Series). Officials responsible for maintaining correctional facilities are responsible, under M.G.L. c. 111, § 21, for enforcing these Required Standards.

105 CMR 451.012 states as follows:

> ***Recommended*** Standards (.300 Series)
> In addition, in order to provide physical living conditions adequate to maintain the health and safety of inmates of correctional facilities, the Department, pursuant to M.G.L. c. 111, § 5, recommends that each

> correctional facility comply with the *Recommended Minimum Health and Sanitation Standards* set forth in 105 CMR 451.320 through 105 CMR 451.390 (.300 Series).

While all correctional facilities are ***required*** to comply with the .100 and .200 series regulations, see 105 CMR 451.011, the .300 series regulations are merely ***recommendations***, see 105 CMR 451.012. As Judge Zobel has noted, the .300 series regulations "on their face are not mandatory." Perry v. Fair, No. 89-40031, 1989 WL 159600, at *2 (D. Mass. 1989). The regulations that plaintiffs invoke most strenuously falls into the .300 series. Complaint at p. 27. 105 CMR 451.320 recommends as follows:

> Cell Size: Existing Facilities
> Each cell or sleeping area in an existing facility ***should*** contain at least 60 square feet of floor space for each occupant, calculated on the basis of total habitable room area, which does not include areas where floor-to-ceiling height is less than eight feet.

105 CMR 451.321 recommends as follows:

> Cell Size in New or Renovated Facilities
> Each cell in a new facility or a part of a facility constructed after the effective date of 105 CMR 451.000 ***should*** contain:
>
> (A) For segregation and special management areas where inmates are usually locked in for greater than ten hours per day, at least 80 square feet of floor space for a single inmate.
>
> (B) For inmates usually locked in for less than ten hours per day, contain at least 70 square feet of floor space for a single inmate.
>
> Provided, however, two inmates may occupy a room or cell designed

> for double occupancy which has a floor space of 120 square feet.
>
> Floor space shall be calculated on the basis of total habitable room area which does not include areas where floor-to-ceiling height is less than eight feet.

105 CMR 451.322 recommends as follows:

> Dormitories in New or Renovated Facilities
> Each dormitory in a new facility or a part of a facility constructed after the effective date of 105 CMR 451.000 ***should*** contain a minimum of 60 square feet for each occupant. Floor space shall be calculated on the basis of total habitable room area which does not include areas where the floor-to-ceiling height is less than eight feet.

It does not matter if a correctional facility is a "new facility" under 105 CMR 451.321 or an "existing facility" under 105 CMR 451.320, because both of those regulations are in the .300 series. Plaintiffs' attempt to invoke DPH regulations to show that it is difficult for inmates to social distance is unavailing. By their clear wording, these regulations merely ***recommend*** that correctional facilities have a certain floor space; they do not impose a legal requirement that they do so. The fact that this amount of square footage is recommended but not required means that correctional officials have discretion.

Moreover, under G.L. c. 111, § 21, the Commissioner of DPH determines whether a correctional facility is in compliance — not private actors or the courts. DPH inspectors routinely audit state correctional facilities for compliance. See 105 CMR 451.401 (DPH inspects correctional facilities at least twice annually, and

may inspect any facility at any time without prior notice). DPH regulations also contain an elaborate enforcement procedure if a correctional facility is not in compliance with one of its regulations. See e.g., 105 CMR 451.403 (transmission of inspection report to prison officials); 105 CMR 451.404 (corrective actions plans); 105 CMR 451.406 (interagency consultation between DPH and DOC to correct deficiencies); 105 CMR 451.409 (enforcement procedure for repeated non-compliance); 105 CMR 451.410 (options available to the Commissioner of Public Health if deficiencies constitute a serious threat to the health and safety of inmates or staff).

DPH regulations governing the Department of Correction do not create a constitutionally-protected liberty interest per se and do not provide a source of substantive rights to third parties such as inmates. Parker v. Dep't. of Correction, No. 93-10574-MLW, 1996 WL 74215, at *11-12 (D. Mass. 1996); see Richardson v. Sheriff of Middlesex Cty., 407 Mass. 455, 460 (1990) (DPH occupancy regulations in jail overcrowding case accorded "some weight in our consideration of the constitutional issues," but "it would be inappropriate to render a decision purely on the basis of the violation of regulations."). The Appeals Court has also noted that inmates do not have a private cause of action to enforce DPH regulations. Hudson v. Comm'r of Correction, 46 Mass.App.Ct. 538, 548 n. 18

(1999), aff'd, 431 Mass. 1 (2000). This is especially true where the Legislature has specifically vested the Commissioner of DPH with enforcement authority. G.L. c. 111, § 21 ("The commissioner [of DPH] shall, following a public hearing, cause any facility failing to comply with the rules and regulations promulgated under the authority of this section to close until said facility is found to be in compliance."). In addition to the Commissioner of DPH, the Attorney General, as chief law officer of the Commonwealth, may also seek enforcement. Attorney General v. Sheriff of Worcester, 382 Mass. 57, 59 (1980).

In sum, allowing private lawsuits by inmates against prison officials to enforce DPH recommendations — not binding requirements — is clearly inconsistent with the regulatory scheme that plaintiffs cite.

III. THE MASAC CLAIMS LACK MERIT.

Over the last several years, this Court has addressed in a comprehensive way the process due to a person subject to a petition for civil commitment for care and treatment under G.L. c. 123, § 35. Matter of G.P., 473 Mass. 112 (2015). Those protections[13] include a finding by clear and convincing evidence, id. at 120, a

[13] "The Fourteenth Amendment to the United States Constitution and arts. 1, 10, and 12 of the Massachusetts Declaration of Rights establish a fundamental right to liberty and freedom from physical restraint that cannot be curtailed without due process of law." Brangan v. Commonwealth, 477 Mass. 691, 702 (2017); see Pembroke Hosp. v. D.L., 482 Mass. 346, 347 (2019); Matter of E.C., 479 Mass.

finding based upon competent testimony, which shall include, but not be limited to medical evidence, and other substantially reliable evidence, id. at 120-121, avenues of appeal, id. at 123, and a likelihood of serious harm that is imminent, id. at 124-128. More recently, in Matter of Minor, 484 Mass. 295 (2020), this Court found that for the Fourteenth Amendment to the United States Constitution and arts. 1, 10, and 12 to be constitutionally applied, the hearing judge must find that there are no "there are no appropriate, less restrictive alternatives that adequately would protect a respondent from a likelihood of imminent and serious harm." Matter of Minor, 484 Mass. at *10. All risk need not be eliminated, "the proper focus is on whether there are any viable, plausibly available options that bring the risk of harm below the statutory thresholds that define a likelihood of serious harm." Id. citing Matter of G.P., 473 Mass. at 128-129 (discussing "quantum of risk" necessary to meet standards of G. L. c. 123, § 1).

113, 119 (2018) ("The right of an individual to be free from physical restraint is a paradigmatic fundamental right" [citation omitted]). While laws that directly infringe on fundamental rights, such as liberty from constraint, are subject to strict scrutiny, "in certain narrow circumstances a State can provide for 'the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public.'" In re Dutil, 437 Mass. 9, 13 (2002) citing Kansas v. Hendricks, 521 U.S. 346, 357 (1997); see Brangan, 477 Mass. at 703; Commonwealth v. Libby, 472 Mass. 93, 96-97 (2015); Commonwealth v. Weston W., 455 Mass. 24, 30 (2009). "To pass the strict scrutiny standard, the [law] must be narrowly tailored to further a legitimate and compelling governmental interest and be the least restrictive means available to vindicate that interest." Weston W., 455 Mass. at 35.

Against these standards, the only named plaintiff, committed under G.L. c. 123, § 35, is Mark Santos, a 29-year-old male. Plaintiff Santos was committed to the MASAC at Plymouth on March 4, 2020 by the New Bedford District Court for a period not to exceed ninety days. See Docket No. 2033MH000125. Santos did not contest the petition for his commitment. See Declaration of Mark Santos dated April 14, 2020, at ¶ 1. Santos was released after thirty six days from his civil commitment on April 9, 2020.[14] Id., at ¶ 5. There is no indication in the record Santos pursued his appellate rights concerning his commitment.

Those involuntarily confined under an order of civil commitment are entitled to conditions of confinement that comport with minimum Fourteenth Amendment due process standards. Healey v. Spencer, 765 F.3d 65, 77–78 (1st Cir. 2014)(internal citations omitted). "Disagreeable conditions can, however, be consistent with the demands of due process, so long as they do not amount to punishment. That is, so long as they 'bear some reasonable relation to the purpose[s] for which persons are committed.'" Id., quoting Seling v. Young, 531

[14] As he does not challenge the initial commitment order as wrongful, Santos has no claim to a continuing personal stake or interest in this case. See Matter of Minor, 484 Mass. at *3 (person wrongfully committed or treated involuntarily has surviving interest); Matter of F.C., 479 Mass. 1029, 1029-1030 (2018) (appeals from expired commitment orders should not be dismissed where parties have a continuing interest in the case); Ford v. Bender, 768 F.3d 15, 29 (1st Cir. 2014) (detainee's challenge to prison conditions and policies rendered moot by transfer or release).

U.S. 250, 265 (2001). Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' … or interferes with rights 'implicit in the concept of ordered liberty.' " In re Dutil, 437 Mass. 9, 13 (2002), citing Aime v. Commonwealth, 414 Mass. 667, 673 (1993), quoting United States v. Salerno, 481 U.S. 739, 746 (1987).

When challenging the treatment provided as constitutionally inadequate, civilly committed persons must show that "the defendant failed to exercise a reasonable professional judgment." Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011). "States enjoy wide latitude in developing treatment regimens," Kansas v. Hendricks, 521 U.S. 346, 368 n. 5 (1997), and "there can be more than one reasonable judgment." Battista, 645 F.3d at 453, citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982).

Plaintiffs' mere recitation that those civilly committed to MASAC at Plymouth are subject to unreasonable conditions that place their health and safety at risk and assertion that there is no treatment to serve the purpose of the underlying commitment are refuted and without meaningful factual support.

Although the Substance Abuse and Mental Health Services Administration (SAMHSA) has issued guidance for those public health efforts to treat substance use disorders (SUDs), the guidance recognizes that for treatment programs that

"remain open during the current COVID-19 related emergency; care should be taken to consider CDC guidance on precautions in admitting new patients, management of current residents who may have been exposed to or who are infected with COVID-19, and visitor policies."[15] The DOC has scrupulously followed CDC guidance as related to the care and treatment of the civilly committed population at MASAC at Plymouth.[16]

As an initial matter, it is important to recognize that while COVID-19 and the response thereto is both challenging and dynamic, MASAC is one of the Department's eleven facilities that to date has had no positive tests, suggesting that no patient at MASAC has or had COVID-19. Affidavit of Jennifer Gaffney, at ¶ 5 (hereinafter "Gaffney Affidavit"). In addition, the census of patients has dramatically dropped in recent weeks. Gaffney Affidavit, at ¶ 4. With a population of 28 patients, MASAC is currently operating at 81.5% below design capacity and

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[15] In essence, SAMHSA advises that outpatient treatment options be utilized "whenever possible." With regard to Plaintiff Santos, on March 4, 2020, the New Bedford District Court determined that the imminent risk of harm without civil commitment met the statutory threshold.

[16] While plaintiffs seek remedies for Section 35 commitments to the Hampden County Sheriff's Department as well, there is no plaintiff who was civilly committed to Hampden County, the Hampden County Sheriff's Department is not a named defendant, and the only evidence submitted related to Hampden County indicates that there have been no positive tests for COVID-19 in the civil commitment population in Hampden and that CDC Guidance is being followed. Crowley Affidavit, at ¶ 9.

90% below operational capacity. Gaffney Affidavit, at ¶ 4; Statement of Agreed Facts, at ¶ 19.[17] Between March 13, 2020 and April 23, 2020, there have been 14 new admissions to MASAC. Id.[18]

A. SAFE OPERATION USING CDC GUIDELINES

The low census count enables MASAC to take a number of steps to isolate and manage the risk of COVID-19 exposure. Each patient is assigned to a single room. Gaffney Affidavit, at ¶ 9. Newly admitted patients spend the first seventy-two hours undergoing observation and detoxification in a single room with a private toilet and sink. Gaffney Affidavit, at ¶ 7. Patients are not required to undergo "cold turkey withdrawal." Gaffney Affidavit, at ¶ 8. Medication assisted treatment and comfort medications are used to treat patients as needed based upon medical history and clinical assessments. Id. If the patient is asymptomatic after seventy-two hours, he is placed in a single room for self-quarantine for the next eleven days. Gaffney Affidavit, at ¶ 7. Testing is available for any symptomatic patient. Id. After fourteen days, asymptomatic patients are assigned to a separate room in either the A or B housing unit. Gaffney Affidavit, at ¶ 9. Meals and

[17] The MASAC operational capacity is 275 and design capacity is 151. Similarly the Hampden County civil commitment population has decreased by 57.5% and is 46 clients. Affidavit of Kevin Crowley, Superintendent, Hampden County Sheriff's Department (hereinafter Crowley Affidavit), at ¶ 4.

[18] Hampden County has received 31 new admissions over the same period. Crowley Affidavit, at ¶ 4.

medication are delivered to patients on the housing units. Gaffney Affidavit, at ¶ 10. Each patient is asked to follow social distancing and handwashing guidelines. Id.

Cleaning services are provided by a private vendor at MASAC, and the services include daily cleaning of patient rooms and sanitation of common and high touch areas. Gaffney Affidavit, at ¶ 11. Each unit is provided with a disinfectant spray bottle to clean the telephone and other areas after use. Id. Each patient is provided with a bar of soap each week and other necessary hygiene products. Gaffney Affidavit, at ¶ 12. Patients may receive additional soap or other items upon request. Id. There is a hand sanitizer station for patients in each housing area. Id. While there is only one bathroom on both the A and B housing unit areas, each is equipped with eight separate showers. There are also eight toilets, all with stall doors, and an additional two urinals in each bathroom. Gaffney Affidavit, at ¶ 13.

B. CONTINUING TREATMENT WITH MODIFIED DELIVERY

The Department of Public Health ("DPH") regulation relevant to substance abuse treatment programs provides, in part, that "[o]nce the patient receives medical clearance to participate, the licensee shall provide the patient with at least four hours of service programming each day," 105 CMR 164.133(D)(2), and

Department of Correction policy provides that each patient must be offered a minimum of twenty hours of treatment each week. See Statement of Agreed Facts, at ¶ 52. Such pronouncements, while perhaps useful guidelines, may be designed to encourage conditions or treatment better than those constitutionally mandated. See Abdullah v. Sec'y of Pub. Safety, 42 Mass. App. Ct. 387, 395 n. 13 (1997) (DPH regulations for correctional institutions); see also Hastings v. Comm'r of Correction, 424 Mass. 46, 52 (1997) (statute and regulations do not limit the broad discretion afforded prison officials by imposing substantive standards).

Plaintiffs assert without support that "patients at MASAC are now receiving no treatment at all."[19] By declaration of a patient who was released from MASAC on April 9, 2020, they assert that a lockdown occurred and groups were cancelled. While the assertion may have been briefly accurate for a three-day period during the weekend of April 4 through April 6, 2020, it was of short duration and due to a Department-wide lockdown that took effect while a new operational plan was developed. Gaffney Affidavit, at ¶ 16. A second declaration from a MASAC patient, who was admitted on Friday, April 24, 2020, asserts that as of April 28, 2020, he had not received one-to-one or group counseling. This latter declaration was refuted by the testimony and Supplemental Affidavit of Commissioner Mici.

[19] Complaint, at ¶ 77.

Four days into his commitment, the patient continued exhibiting signs of withdrawal, including being confused and disoriented, and trying to leave the housing unit "to catch a bus." Mici Supplemental Affidavit, ¶ 22. When the patient's Substance Abuse Counselor attempted to introduce herself to the patient, she was advised by mental health staff that he was not detox cleared and was exhibiting signs of confusion. Id.,¶ 23. Once the patient was detox cleared on April 28, 2020 in the afternoon, the Substance Abuse Counselor met with him and provided an overview of expectations and the program, and provided him with initial homework, containing materials related to substance use treatment, mental health, and wellness. Id. The declarations fall woefully short of stating a constitutional claim. See Foster v. Tarrant Cty. Sheriff's Dept., No. 4:20-cv-113, 2020 WL 1906095, at *3 (N.D. Tex. Apr. 17, 2020) (general rule is isolated incidents are insufficient to establish a custom or policy).

As the First Circuit has noted, even deliberately indifferent behavior does not per se shock the conscience. J.R. v. Gloria, 593 F.3d 73, 80 (1st Cir. 2010). In J.R., the court went on to instruct that:

> [a]s we stated in Rivera, deliberately indifferent behavior does not per se shock the conscience. Indeed, we suggested that it is only "[i]n situations where actors have an opportunity to reflect and make reasoned and rational decisions" that "deliberately indifferent behavior may suffice to shock the conscience." 402 F.3d at 36. [footnote omitted] The burden to show state conduct that "shocks the

> conscience" is extremely high, requiring "stunning" evidence of "arbitrariness and caprice" that extends beyond "[m]ere violations of state law, even violations resulting from bad faith" to "something more egregious and more extreme." DePoutot v. Raffaelly, 424 F.3d 112, 119 (1st Cir.2005).

J.R. v. Gloria, 593 F.3d 73, 80 (1st Cir. 2010).

Fundamentally in this matter, the assertions by declaration regarding treatment at MASAC do not represent a policy, practice or custom of the Department of Correction, much less a bad faith, deliberately indifferent violation of the law by defendants. The allegations regarding treatment are both refuted and disavowed as the current policy or practice of the Department at MASAC. Moreover, the allegations speak, at best, to brief interruptions in programming and services in the face of a global pandemic. Such minor and temporary deprivations as a matter of law cannot be said to "shock the conscience." See City of Canton v. Harris, 489 U.S. 378, 394 (1989) ("[T]he touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution"); Hutto v. Finney, 437 U.S. 678, 686–687 (1978) (prison conditions which might be tolerable for a few days may be intolerably cruel for weeks or months).

The defendants have been exercising professional judgment in adjusting the treatment program to expand social distancing and to reflect the diminishing

census. With the exception of the three-day period referenced above, patients on each unit continue to have access to substance abuse groups, activity groups, and open recreation activities on a rotating basis. Gaffney Affidavit, at ¶ 14.

Prior to the COVID-19 pandemic, patients at MASAC in Plymouth received three hours each day of *Living in Balance*, a substance use disorder (SUD) curriculum. Gaffney Supplemental Affidavit, at ¶ 4. The curriculum was delivered in classes which consisted of approximately 18-30 patients. Id. In addition, Activity Therapists supplemented the curriculum classes with group activities during all non-SUD treatment times. Id. The activities were scheduled on site 8:00 am. - 8:00 pm., Monday through Friday and from 8:00 am. - 4:00 pm. on Saturdays and Sundays. Id. The activities occurred in both group areas and in dormitories and were voluntary for patients to attend. Id. Mental Health Professionals and SUD Counselors provided individual follow-up daily to assist patients with any mental health needs and for reentry planning. Id.

Subsequent to the COVID-19 pandemic, all newly admitted patients are placed on a 14-day quarantine hold in the C Building. Gaffney Supplemental Affidavit, at ¶ 5. For the first three days patients are in an observation room and for the next 11 days on the unit. Id. During the first three days of quarantine, patients are assessed daily by Mental Health Professional staff. Id. Over the next 11 days,

each patient is assigned a room on the unit, provided with a mask, and is able to leave their room. Id. Each patient receives individual services from their SUD counselor daily and is provided a minimum of two packets per day of *Living in Balance* reading and homework. Id. During this time the Activity Therapists also provide supportive contact and materials such as books, puzzles, etc. Id.

During the initial phase of COVID-19, once a patient completed quarantine, the person received two hours of *Living in Balance* SUD curriculum delivered in classroom format. Gaffney Supplemental Affidavit, at ¶ 6. The class size was initially approximately 15 patients per class. Id. Once the patient census declined, MASAC was able to provide four hours of *Living in Balance* curriculum per day, which is currently provided. Id. Class sizes have continued to be reduced from 15 to 10 and currently class size is 5 patients. Id. Activity Therapists continue supplementing with group activities with the same schedule as Pre-COVID-19 and Mental Health Professionals MHPs and SUD Counselors, providing individual follow-up daily to assist with mental health needs and reentry planning. Id.

MASAC has been able to maintain the same level of mental health treatment despite the COVID-19 pandemic. Gaffney Supplemental Affidavit, at ¶ 7. The medical vendor, Wellpath, continues to provide crisis coverage Monday through Saturday, completes intake evaluations on all patients, and facilitates individual

sessions to address patients' clinical needs. Id.

For psychiatric services, all initial interviews are held via tele-psychiatry. Gaffney Supplemental Affidavit, at ¶ 8. Psychiatric providers are providing necessary follow-up sessions focused on individuals identified as high-need by the psychiatrist or nurse practitioner, or for patients who are presenting with emergent needs. Id.

The amount of substance use disorder treatment and delivery structure for programming is well within the constitutional minimum required and is based on the exercise of professional judgment by the defendants and informed by the clinical judgment of the private vendor hired to deliver such services. Substantial deference to their professional judgment is required, especially where, as here, there "can be more than one reasonable judgment." Youngberg v. Romeo, 457 U.S. 307, 321 (1982)(not appropriate for courts to specify which of several professionally acceptable choices should have been made); see Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (Supreme Court accords substantial deference to the professional judgment of prison administrators, who bear significant responsibility for defining legitimate goals and determining the most appropriate means to accomplish them). As was the case in Healey, plaintiffs here "submitted no expert testimony or professional standards stating that civilly committed […]

offenders must have" a particular type of program or how the program at MASAC is constitutionally deficient. Healey v. Spencer, 765 F.3d 65, 79 (1st Cir. 2014).

C. DISCHARGE AND RELEASE FROM MASAC

While commitment orders to MASAC provide for civil commitment of a person for a period not to exceed ninety days, the statute requires periodic reviews and the Superintendent may release a patient upon a determination that release will not result in a likelihood of serious harm. See G.L. c. 123, § 35. MASAC staff monitor patient participation in groups and based upon the satisfactory completion of programming and an adequate discharge plan, as recommended by clinical staff, the Superintendent determines whether a patient meets the statutory criteria for release. Gaffney Affidavit, at ¶ 18. Most civil commitments are currently released around the thirty-day point of their commitment. Gaffney Affidavit, at ¶ 19.

As this Court has recently noted in performing its judicial review responsibilities, "we must also recognize and demonstrate due respect for the diligent efforts made by the other branches of government responsible for performing the functions we are reviewing, particularly when they involve complicated policy choices." Massachusetts General Hospital v. C.R., 484 Mass. 472 (2020).

Plaintiffs' speculation invites this Court to ignore the long-standing respect

that the Commonwealth's Courts have accorded public agencies in the conduct of their official duties. The defendants here appreciate the respect accorded by the Commonwealth's courts to state agencies and are keenly aware and appreciative of the judicial assumption "that public officials will comply with the law declared by a court and that consequently injunctive orders are generally unnecessary." Coalition for the Homeless v. Secretary of Human Services, 400 Mass. 806, 825 (1987); see also Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 425 n. 18 (1988) ("courts may appropriately assume that public officials will act in accordance with their judicially defined duties."). Indeed, "[t]he courts of the Commonwealth generally have refrained from ordering public officials to comply with the law because, in the absence of evidence of a pattern of misconduct, it is assumed officials will do so." Madera v. Sec. of Executive Office of Communities and Development, 418 Mass. 452, 464 (1994) (errors in an agency's handling of a single case did not warrant injunctive relief). Further, when a court "contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard the separation of powers mandated by art. 30 of the Declaration of Rights of the Massachusetts Constitution." Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 651 (2000), citing Charrier v. Charrier, 416 Mass. 105, 110 (1993).

IV. PLAINTIFFS CANNOT SHOW IRREPARABLE HARM.

In addition to failing on the merits, the plaintiffs will be unable to show that denial of an injunction will cause them irreparable harm. For one, none of the plaintiffs have tested positive for COVID-19, and only two of them are housed in facilities where there have been any cases diagnosed. Other than their stated fears of contracting the virus, they have not shown that any of the Commissioner's actions have in any way made their situation worse. In fact, the details of the Commissioner's efforts make clear that instead of irreparable harm, the actions taken by DOC have gone a long way toward protecting them from harm. Indeed, irreparable harm to the Department of Correction would result were an injunction to issue. Commissioner Mici, as well as other Department officials, have decades of experience running the Commonwealth's state prisons. Mici Affidavit, ¶ 1 (thirty three years of correctional experience); Ferreira Affidavit, ¶ 1 (thirty four years of correctional experience); Medeiros Affidavit, ¶ 1 (thirty three years of correctional experience); Gaffney Affidavit, ¶ 1 (thirty one years of correctional experience). If the Commissioner cannot respond quickly to rapidly evolving circumstances without first seeking permission from the Court, her ability to safely manage the Commonwealth's sixteen correctional facilities would be severely compromised. See Swain, at p. 14.

V. AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.

The third prong of the injunction standard requires a "judge to 'determine that the requested order promotes the public interest, or alternatively, that the equitable relief will not adversely affect the public.'" Garcia v. Department of Housing and Community Development, 480 Mass. 736, 747 (2018), quoting Loyal Order of Moose, Yarmouth Lodge # 2270 v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003).

Granting the relief sought here is against the public interest because it would interfere with the extremely difficult task of running a prison and preserving public health.[20] Not only would the public interest not be served, but DOC would be irreparably harmed by the issuance of an injunction. The Supreme Court has instructed time and again that "[p]rison administrators . . . should be accorded ***wide-ranging deference*** in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979). While a court has the right to order a department to do what it has a legal obligation to do

[20] As Judge Cowin pointed out in Stevens v. Commonwealth, Docket No. 1779CV00778 (Berkshire Super. Ct. 2020), there is no guarantee that inmates, once released from custody, would be able to practice social distancing or engage in the necessary hygiene measures in the community. A copy of Judge Cowin's decision is included in the addendum.

where the means of fulfilling that obligation is within the discretion of a public agency, the courts normally have no right to tell that agency how to fulfill its obligation. Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 629–630 (1985); Bradley v. Comm'r of Mental Health, 386 Mass. 363, 365 (1982).

As the Eleventh Circuit ruled on May 5, 2020, in granting a stay of a district court's preliminary injunction against jail officials, the district court "assumed the role of 'super-warden'" that court decisions repeatedly condemn. Swain, at p. 13. The Eleventh Circuit criticized the lower court for usurping the jail officials' role, and for "transferring the power" to administer the jail "in the midst of the pandemic from public officials to the district court." Id. at 13. As would be the result of an injunction issuing here,

> [t]he injunction hamstrings [correctional] officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic. They cannot respond to the rapidly evolving circumstances on the ground without first seeking a 'permission slip from the [court].

Id. at 13-14.

Further, there is no risk that the Commissioner will abandon the safety measures that have been implemented since March 10, 2020. While the DOC's protocols and procedures have evolved over time, they have always moved in the direction of ***additional*** protection of inmates and staff (e.g., providing all inmates

with masks, expanded cleaning supplies and hand sanitizer). The DOC moves in accordance with the guidance of the CDC and state health officials. As such, this Court should deny the plaintiffs' motion for a preliminary injunction.

VI. THE REQUESTED REMEDIES VIOLATE THE SEPARATION OF POWERS.

Even if plaintiffs had shown that they were incarcerated under unconstitutional conditions, the Court does not have the authority to order remedies that they seek. Rather than seeking a change in prison conditions, plaintiffs request that the Court essentially order the release of large swaths of offenders who have been sentenced to the custody of the Department of Correction by courts of competent jurisdiction. As it applies to the Department, plaintiffs request that the Court order "expanded use of furloughs"; "maximizing the award of good conduct deductions"' and "granting medical parole to those who qualify." Complaint at p. 28. Plaintiffs invite the Court to vitiate the separation of powers enshrined in the state constitution. Precedent and prudence dictate that their prayer for relief be denied.

A. THE SEPARATION OF POWERS FRAMEWORK.

Article 30 of the Massachusetts Constitution states:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial

> powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Mass. Const. Pt. I, art. 30. Nearly a century ago, this Court summarized the division of responsibilities among the branches in the context of sentenced offenders:

> The definition of crimes and the establishment of penalties therefor, so far as not left to the common law, belong to the Legislature. The trial of those charged with crime and the imposition of sentences upon those convicted are a part of the functions of courts. The execution of sentences according to standing laws is an attribute of the executive department of government. This is in conformity to the sharp and strict separation of the legislative, the executive and the judicial departments of government in article 30 of our Declaration of Rights.

Sheehan, petitioner, 254 Mass. 342, 345 (1926).

This summary captures the separation of powers doctrine as it operates today. Commonwealth v. Cole, 468 Mass. 294, 303 (2014). Once imposed, only the executive branch holds the power and responsibility to execute the sentence. Id. at 302; Commonwealth v. Dascalakis, 246 Mass. 12, 21 (1923) ("The execution of the sentence belongs to the executive department of government" and is not "a judicial function"). Indeed,

> once a judge has sentenced a defendant, authority over the defendant passes from the judicial branch to the executive branch of government in that the defendant becomes subject to the sheriff's control. The Legislature has conferred on the sheriff broad authority over the house of correction. General Laws c. 126, § 16, states that "[t]he sheriff shall

> have custody and control of the jails in his county, and, except in Suffolk County, of the houses of correction therein, and of all prisoners committed thereto… and shall be responsible for them." See Sheehan v. Superintendent of Concord Reformatory, 254 Mass. 342, 345 (1926) ("The execution of sentences according to standing laws is an attribute of the executive department of government").

Commonwealth v. Donohue, 452 Mass. 256, 264 (2008).

Accordingly, once a sentence is lawfully imposed, the judicial branch, including this Court under its superintendence and inherent powers, lacks the authority to modify sentences by either terminating a sentence early before it has been fully served or by directing that inmates eligible for parole be placed on parole. See Cole, 468 Mass. at 302–303 ("The granting of parole, or conditional release from confinement, is a discretionary act of the parole board. It is a function of the executive branch of government with which, if otherwise constitutionally exercised, the judiciary may not interfere."); Commonwealth v. Amirault, 415 Mass. 112, 116–17 (1993) ("By allowing a motion to revise or revoke sentences when the parole board does not act in accordance with a judge's expectations, the judge is interfering with the executive function. The judge cannot nullify the discretionary actions of the parole board."). In addition, by providing the broad relief of authorizing the release of inmates before the full terms of their validly imposed state sentences have been served, this Court would essentially be usurping the clemency powers that are held solely by the Governor. As the Court stated

centuries ago:

> the General Court have not a right, in any case, to commute the punishment fixed by law, after sentence has been given. Our opinion is founded upon the eighth article of the first section of the second chapter of the frame of government, which article lodges the power of pardoning offences (except such as persons may be convicted of before the Senate, by an impeachment of the House) solely in the governor, by and with the advice of the Council; to which power the right of commuting punishment, if by such right be meant a right of pardoning upon condition of the convict's voluntarily submitting to a lesser punishment, must be a necessary incident. And we need not cite the last article of the declaration of rights; which means to keep the legislative, executive, and judicial departments as separate and distinct as possible, in the exercise of the respective powers assigned them by the constitution.

In re Opinion of Justices, 14 Mass. 472, 472 (1787). Under this framework, it is clear that the relief sought in the form of a decarceration order would violate the separation of powers doctrine that is vital to our ordered system of government.

B. THE COURT HAS NO AUTHORITY TO ORDER THE COMMISSIONER TO ISSUE FURLOUGHS.

Plaintiffs request that the Court order defendants to reduce the sentenced inmate population committed to their custody by "expanded use of furloughs, including allowing furloughs for longer than the 14 days authorized by G.L. c. 127, § 90A." Complaint at p. 27. Plaintiffs essentially ask that the Court order their temporary release from custody for alleged unconstitutional conditions of

confinement, only to return after an unspecified period of time. The Court lacks legal authority to do so for several reasons.

First, the furlough statute, G.L. c. 127, § 90A, vests the Commissioner with authority to temporarily release committed offenders on furloughs. Under the statute, "[t]he commissioner may extend the limits of the place of confinement of a committed offender at any state correctional facility by authorizing such committed offender under prescribed conditions to be away from such correctional facility but within the commonwealth for a specified period of time, not to exceed fourteen days during any twelve month period nor more than seven days at any one time." G.L. c. 127, § 90A. Thus, "the Commissioner may" permit the temporary release of sentenced inmates on furlough for periods not exceeding fourteen days. The statute does not afford any individual other than the Commissioner the authority to furlough an inmate. Moreover, the use of the word "may" in a statute commonly imports discretion. Turnpike Amusement Park, Inc. v. Licensing Comm. of Cambridge, 343 Mass. 435, 437-438 (1962); Sch. Comm. of Greenfield v. Greenfield Ed. Ass'n, 385 Mass. 70, 81 (1982). Thus, the Commissioner has discretion to release inmates on furlough; there is no requirement that she do so.

In Devlin v. Comm'r of Correction, 364 Mass. 435 (1973), this Court held that under a previous iteration of the statute, those serving sentences for life

without parole under G.L. c. 265, § 1 were eligible to seek temporary release on furlough "in the discretion of the appropriate correctional officials." Id. at 443.[21] However, being eligible to apply for furlough is far different from being deemed suitable for furlough by the Commissioner. For this reason, the Court went on to note that a furlough could be granted "only on recommendation of the appropriate superintendent and on approval of the commissioner, ***whose approval we take to be nondelegable***." Id. Authority is "nondelegable" when it may not be delegated to another, even with the parties' consent. Boston v. Boston Police Superior Officers Fed'n, 466 Mass. 210, 216 (2013). The Court can no more order the Commissioner to furlough an inmate than it can order the Parole Board to grant a parole permit. Commonwealth v. Amirault, 415 Mass. 112, 116-17 (1993). Each is "a function of the executive branch of government." Id., citing Stewart v. Commonwealth, 413 Mass. 664, 669 (1992) and Baxter v. Commonwealth, 359 Mass. 175, 179 (1971). As the First Circuit has declared, "[i]t is clear that the denial of a furlough implicates no inherent liberty interest." Bowser v. Vose, 968 F.2d 105, 106 (1st Cir. 1992). And in any event, there is no evidence in the record that any of the individual plaintiffs have even requested a furlough.

[21] The Legislature amended the statute in 1988 to prohibit the Commissioner from furloughing inmates committed for murder. G.L. c. 127, § 90A ("no committed offender who has been convicted of murder in the first degree shall be eligible for temporary release under the provisions of this section.").

Second, a furlough is tantamount to a stay of sentence, and this Court's precedents forbid the judicial branch from ordering a stay of sentence in a case such as this. Just weeks ago, this Court had occasion to address the effect of COVID-19 on the Commonwealth's prisons and jails. In CPCS v. Chief Justice of the Trial Court, 484 Mass. 431 (2020) (hereinafter "CPCS I"), the Committee for Public Counsel Services ("CPCS") and the Massachusetts Association of Criminal Defense Lawyers ("MACDL") asked this Court to use its extraordinary superintendence power under G.L. c. 211, § 3 to reduce the number of pretrial detainees and sentenced offenders held in prison and jail. Id. at 6. The CPCS I Court held that detainees awaiting trial for certain offenses were entitled to a rebuttable presumption of release on personal recognizance. Id. at 14. However, the Court stopped far short of ordering the release of groups of individuals serving sentences of incarceration, as this would violate the delicate separation of powers enshrined by the Declaration of Rights. The Court reiterated the bedrock constitutional principle that courts lack authority "to revise or revoke [criminal] defendants' custodial sentences, to stay the execution of sentences, or to order their temporary release unless a defendant (1) has moved under Mass. R. Crim. P. 29, within sixty days after imposition of sentence or the issuance of a decision on all pending appeals, to revise or revoke his or her sentence, (2) has appealed the

conviction or sentence and the appeal remains pending, or (3) has moved for a new trial under Mass. R. Crim. P. 30." Id. at 12.

The petitioners thereafter sought reconsideration of the full bench decision in CPCS v. Chief Justice of the Trial Court, -- Mass. –-, 2020 WL 2027846 (2020) (hereinafter "CPCS II"). The Court in CPCS II reaffirmed its decision and noted, when referring to the case at bar, that ordering prison officials to furlough an inmate is tantamount to ordering the executive branch to stay a criminal sentence: "Granting a stay without such a challenge [to an underlying criminal conviction] essentially amounts to granting a furlough, which lies within the purview of the executive branch. Thus, if a judge were to suspend execution of a sentence that is being served, without any pending motion challenging the conviction or the validity of the sentence when it was imposed, there could be a significant issue with art. 30 and the separation of powers." Id. The Court then declined to suspend the sentences of large groups of inmates. Id.

The same result is warranted here. Plaintiffs' request that the Court order widespread furloughs is nothing more than a request that the Court order valid criminal sentences stayed. This would directly contravene not only decades of precedent on the separation of powers, but also a decision issued by this Court

mere days ago. Plaintiffs request that the Court order "expanded use of furloughs" fails because the Court lacks the legal authority to do so.

C. THE COURT HAS NO AUTHORITY TO ORDER THE COMMISSIONER TO AWARD EARNED GOOD TIME.

Plaintiffs also request that the Court enter an order "maximizing the award of good conduct deductions." G.L. c. 127, § 129D empowers the Commissioner to award earned good time ("EGT"). By its clear wording, G.L. c. 127, § 129D confers on the Commissioner discretion to determine (1) which work, educational, vocational, and rehabilitation programs are eligible for EGT; (2) the amount of EGT, up to the statutory per-program limit, that satisfactory performance in an EGT-eligible work, educational, vocational, or rehabilitation program could earn; and (3) what constitutes "satisfactory performance" in a work or program which would permit the Commissioner to award EGT.

Inmates do not have any entitlement to EGT until the Commissioner actually awards it. Commonwealth v. DeWeldon, 80 Mass. App. Ct. 626, 632-33 (2011); Piggott v. Comm'r of Correction, 40 Mass. App. Ct. 678, 684 (1996). There is no constitutional right to earn good time under G.L. c. 127, § 129D; at most, there is a right to be eligible to participate in available programs. Haverty v. Comm'r of Correction, 440 Mass. 1, 6 (2003); Jackson v. Hogan, 388 Mass. 376, 379 (1983).

Consequently, inmates do not possess an entitlement to EGT until it is actually awarded. Id.

To the extent plaintiffs seek an award of unearned EGT as an equitable remedy for inadequate conditions of confinement, such an argument is foreclosed by this Court's precedents. In Haverty v. Comm'r of Correction, 437 Mass. 737 (2002) (hereinafter "Haverty I"), this Court held that it was unlawful to house inmates in non-disciplinary segregation units at MCI-Cedar Junction without procedural protections contained in state regulations. Id. at 763. On remand, a justice of the Superior Court ordered the Commissioner to award inmates in those units unearned EGT credits as an equitable remedy. This Court reversed in Haverty v. Comm'r of Correction, 440 Mass. 1 (2003) (hereinafter "Haverty II"), holding that a court did not have the power to grant equitable relief in the form of unearned EGT. The Haverty II Court reasoned that the Commissioner's decision whether to award EGT was entitled to deference. Id. at 6-7. The Court also held that the judge overstepped in fashioning an equitable remedy that included EGT because "[w]here equitable relief is appropriate, it should be confined within narrow limits determined by the necessities of the case." Haverty II, 440 Mass. at 7. "[A] grant of equitable powers does not permit a court to disregard statutory requirements."

Freeman v. Chaplic, 388 Mass. 398, 406 n. 15 (1983). And here, the statutory requirements are clear: only the Commissioner ***may*** award EGT.

Because the statute gives the Commissioner unambiguous discretion to award EGT, the Court lacks the power to award unearned EGT as an equitable remedy in a lawsuit over conditions of confinement. Under the clear holding of Haverty II, plaintiffs' request that the Court order defendants to reduce the sentenced inmate population committed to their custody by "[m]aximizing the award of good conduct deductions, including completion credits and 'boost time' under G.L. c. 127, § 129D, and authorizing the award of more such deductions than is permitted by § 129D," Complaint at p. 28, fails. And in any event, the Commissioner has attempted to maximize the award of EGT available during the COVID-19 emergency by instituting a journaling program.

D. THE COURT HAS NO AUTHORITY TO ORDER THE COMMISSIONER TO RELEASE INMATES ON MEDICAL PAROLE, OR TO EXPEDITE DECISIONS ON MEDICAL PAROLE PETITIONS.

Plaintiffs also request that the Court order defendants to reduce the sentenced inmate population committed to their custody by "[i]dentifying all prisoners who may qualify for medical parole, under G.L. c. 127, § 90A, [sic] taking all necessary steps to ensure that a medical parole petition is filed immediately, and granting medical parole to those who qualify as quickly as

possible and in no event more than one week after the petition is filed." Complaint at p. 28. The Court has no legal authority to order the Commissioner to release sentenced inmates on medical parole under G.L. c. 127, § 119A, nor does it have authority to order the Commissioner to decide medical parole petitions on a timeline different than the one established by the Legislature and enshrined in the statute.

The Parole Board, as an executive branch agency with a legislative mandate, has the sole power to determine whether an inmate may be granted parole, and a court may not substitute itself for the Parole Board in these determinations. The same principle applies to the discretionary power the Legislature granted the Commissioner in the context of ***medical*** parole. G.L. c. 127, § 119A. The Court reiterated the Article 30 separation of powers principle in Commonwealth v. Amirault, 415 Mass. 112, 116-117 (1993):

> The granting of parole, or conditional release from confinement, is a discretionary act of the parole board. It is a function of the executive branch of government with which, if otherwise constitutionally exercised, the judiciary may not interfere.

In Amirault, this Court rejected a lower court's attempt to resentence a defendant with a shorter term of years after the Parole Board denied his parole application: "By allowing a motion to revise or revoke sentences when the parole board does not act in accordance with a judge's expectations, the judge is interfering with the

executive function. The judge cannot nullify the discretionary actions of the parole board." Id. at 116-117 (citations omitted).

Further, while "[i]t is true that, in appropriate circumstances, a court may direct a public official to carry out a statutory duty, and, when there is only one way in which that can be accomplished, to order the official to proceed in that one way." Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 630-631 (1985). However, when the means of fulfilling their legal obligation is within the discretion of the public agency, the courts normally have no right to tell that agency how to fulfill its obligation. Commonwealth v. Carrata, 58 Mass.App.Ct. 86, 89 (2003), quoting Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 630 (1985).

In Carrata, the Appeals Court reversed the order of a lower court judge that the Department of Mental Health (DMH) was required to have a Taunton State Hospital staff member escort a specific civilly committed patient every time he was on the grounds. The Court held that "[DMH]has a comprehensive written policy that established standards and procedures for the granting and withdrawing of patient privileges… and a manual detailing the various levels of privilege extended to the patients… these policies and procedures are entitled to deference." Id. at 90.

Just as a court cannot substitute its judgment for an executive agency's discretionary acts, an executive branch agency cannot usurp the powers of the court. In 2014, the Court struck down a statute creating lifetime community parole supervision (CPSL) as an unconstitutional violation of the separation of powers. Commonwealth v. Cole, 468 Mass. 294 (2014). Under the CPSL statute, the Parole Board was permitted (or required, in certain cases), to "enhance" a sexual offender's parole terms such that the sex offender faced a lifetime quasi-parole, under Parole Board supervision, above and beyond the sentence imposed by the court. The Court found that sentencing was in the sole province of the court, and that the Legislature and the Parole Board had no right to, essentially, impose sentences longer than those set by the court. Cole, 468 Mass. at 297; see Commonwealth v. Okoro, 471 Mass. 51 (2015).

Thus, in our constitutional system, the Court has the authority to impose sentence. The power to execute sentence, and by extension the power to grant parole (medical or otherwise), is fundamentally the province of the executive branch. As such, the Court has stated the courts may only engage in "***limited*** review of parole proceedings." Diatchenko v. Dist. Attorney for Suffolk Dist., 471 Mass. 12, 28–29 (2015). In Deal v. Mass. Parole Board, 484 Mass. 457 (2020), the Court denied a juvenile homicide offender's certiorari petition challenging the

decision of the Massachusetts Parole Board to deny him a parole permit:

> The board is afforded significant deference with regard to its parole decisions. As the granting of parole is a discretionary function of the executive branch, generally the judiciary's role is limited to reviewing the constitutionality of the board's decision and proceedings. Commonwealth v. Cole, 468 Mass. 294, 302-303, 10 N.E.3d 1081 (2014). See, e.g., Crowell v. Massachusetts Parole Bd., 477 Mass. 106, 74 N.E.3d 618 (2017) (reviewing claims that parole decision violated constitution and statutes, and remanding for further development of record); Quegan v. Massachusetts Parole Bd., 423 Mass. 834, 673 N.E.2d 42 (1996) (reviewing constitutional claims that board may not consider refusal to admit guilt in parole determination); Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 18 N.E.3d 1096 (2014) (reviewing alleged due process violations in parole revocation proceeding, and conducting certiorari review of merits of board's decision to revoke parole).

Id. The "limited review" of parole decisions described in Diatchenko and Deal does not encompass ordering the Commissioner to release groups of inmates on medical parole.

Plaintiffs also request that the Court arbitrarily require that the Commissioner decide medical parole petitions "in no event more than one week after the petition is filed." Complaint at p. 28. There is also no legal authority to support plaintiffs' invitation that the Court order the Commissioner to decide medical parole petitions faster than the precise timeline enshrined in the statute.[22]

[22] Medical parole petitions must be filed in the first instance with the superintendent of the correctional facility where the inmate resides. Per G.L. c. 127, § 119A(c)(1), the superintendent shall submit a recommendation to the

One of the reasons the statute contains such a precise timeline is to afford district attorneys and registered victims under G.L. c. 258B notice of their right to submit written statements or, in the case of an inmate serving a sentence for murder under G.L. c. 265 § 1, to request a hearing. See G.L. c. 127, § 119A(c)(2). It clearly takes time for the Commissioner to notify all relevant parties, afford them a reasonable amount of time to submit a statement, and if appropriate, schedule a hearing in which all parties can meaningfully participate. Although the Commissioner cannot be compelled to pick up the pace, she has elected to so by shortening the time for district attorneys and registered victims under G.L. c. 258B to comment. Moreover, in Buckman v. Comm'r of Correction, 484 Mass. 14 (2020), the Court held that a prison superintendent could not return medical parole petitions that he deemed incomplete. In other words, the Commissioner must consider an inmate's petition for release on medical parole and render a decision within the statutory timeline; she does not have discretion to ignore petitions or render decisions outside the statutory timeline.

Plaintiffs also request that the Court order the Commissioner to take "all

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Commissioner "not more than 21 days after receipt of the petition." Per G.L. c. 127, § 119A(e), "the Commissioner shall issue a written decision not later than 45 days after receipt of a petition" from the superintendent. This means that the Commissioner must render a decision on all medical parole petitions no later than 66 days after they are received by the superintendent.

necessary steps to ensure that a medical parole petition is filed" on behalf of "all prisoners who may qualify for medical parole." Complaint at p. 28. First, prison officials such as the Commissioner may, in their discretion, file medical parole petitions on behalf of inmates committed to their custody. G.L. c. 127, § 119A(c)(1) (medical parole petition may be filed by "a medical provider of the correctional facility or a member of the department's staff."). But there is no duty or requirement that they do so. The vast majority of medical parole petitions are submitted by advocates (attorneys or family members) on behalf of inmates, or by inmates themselves. Second, plaintiffs' proposal is a solution in search of a problem. While the COVID-19 pandemic has disrupted nearly every facet of daily life for all people, there is one thing that it has not restricted at all: the ability of inmates to file medical parole petitions. The Department has experienced a large increase in the number of petitions for release on medical parole. Plaintiffs' request that the Court order the Commissioner to reduce the sentenced inmate population by granting more medical parole petitions should be denied.

VII. THE COURT SHOULD NOT CERTIFY THIS CASE AS A CLASS ACTION.

Plaintiffs purport to bring this lawsuit as a class action on behalf of themselves and "a class of all prisoners who are incarcerated at prisons and jails in Massachusetts, including two subclasses: (1) All prisoners who are at high risk for

serious complication or death from COVID-19 due to underlying medical condition or age (the 'medically vulnerable subclass'); and (2) All prisoners civilly committed to a correctional facility under G.L. c. 123 §. 35 for treatment of an alcohol or substance use disorder (the 'Section 35 subclass')." Complaint at ¶ 88. Certification of either subclass under Mass. R. Civ. P. 23 is inappropriate.

The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013), quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979). To achieve class certification, Mass. R. Civ. P. 23(a) requires plaintiffs to show that: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." These are often referred to as the numerosity, commonality, typicality and adequacy prerequisites. Additionally, under Mass. R. Civ. P. 23(b), plaintiffs must show that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

As the Court has explained, "the policies of judicial efficiency and access to courts that underlie the consumer class action suit [are that] it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court." Weld v. Glaxo Wellcome, 434 Mass. 81, 93 (2001). But above all, the rules require named plaintiffs "to demonstrate that the class members have suffered the same injury." Wal-Mart Stores v. Dukes, 564 U.S. 338, 350 (2011). The "claims must depend upon a common contention … of such a nature that it is capable of classwide resolution." Id. at 350. Determination of whether the contention is true or false must "resolve an issue that is central to the validity of each one of the claims in one stroke." Id.

First, with respect to the putative Section 35 subclass, the Court cannot certify a class because not a single named plaintiff is a class member. The only named plaintiff who was a patient committed under Section 35 has since been discharged to the community. This Court has held that, "a litigant must be a member of the class he or she seeks to represent at the time the trial court certifies the class." Gonzalez v. Comm'r of Correction, 407 Mass. 448, 451 (1990). "Among other things, the general rule recognizes that a named plaintiff who no longer has a personal stake in the outcome of the litigation may not be motivated to

represent adequately those persons in whose behalf the action was assertedly brought." Id. at 452. Thus, certification of the Section 35 class is totally inappropriate.

Certification of the medically vulnerable subclass is likewise inappropriate. A recent decision by a federal court in a COVID-19 inmate case is directly on point. In Money v. Pritzker, No. 20-cv-2093, --- F.Supp.3d ---, 2020 WL 1820660 (N.D. Ill. 2020), a federal court in Illinois denied class action certification in circumstances identical to this case. In Money, state inmates asked a federal court not for an order improving their conditions of confinement, but rather for a sweeping and generalized release of state inmates on medical furlough in response to COVID-19. Id. at *1. The district court explained that public interest "mandates individualized consideration of any inmate's suitability for release and on what conditions, for the safety of the inmate, the inmate's family, and the public at large." Id. at *14. This is because "[e]ach putative class member comes with a unique situation – different crimes, sentences, outdates, disciplinary histories, age, medical history, places of incarceration, proximity to infected inmates, availability of a home landing spot, likelihood of transmitting the virus to someone at home detention, likelihood of violation or recidivism, and danger to the community." Id. at *15. The Money court ruled that this resulted in a lack of commonality because

the only matter "apt to drive the resolution of the litigation" was which inmates should be released. Id. at *14, quoting Dukes, 564 U.S. at 350. Here, the identical problem exists.

Plaintiffs' proposed medically vulnerable subclass would combine inmates who have different crimes, sentences, release dates, disciplinary histories, ages, medical histories, proximities to infected inmates, availabilities of a home landing spot, likelihoods of transmitting the virus to someone in the community, likelihoods of violation or recidivism, and dangers to the community. Moreover, class members likely have different means to provide for themselves upon release and different access to medical care upon release. Plaintiffs lump together inmates at different correctional facilities, some of which have not had a single inmate test positive for COVID-19. None of the eleven named plaintiffs have contracted COVID-19; out of the nine named plaintiffs who are currently in Department custody, seven reside at correctional facilities where not a single inmate has tested positive for COVID-19, and an eighth resides at a correctional facility that has had but one (MCI-Norfolk). Moreover, plaintiffs even purport to represent inmates in jails and county houses of correction, even though none of the sheriffs are parties to this litigation. There simply is insufficient commonality or typicality among proposed class members other than the fact of their incarceration in Massachusetts.

The Court should refuse to certify either subclass.

CONCLUSION

For all the reasons mentioned above, the claims raised by plaintiffs are not supported by the factual record and are legally untenable. Plaintiff's request for extraordinary preliminary relief should be denied, and the case should be remanded to the county court with instructions to dismiss.

Respectfully submitted,

COMMISSIONER CAROL MICI and
SECRETARY THOMAS TURCO, III,

By their attorneys,

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Dated: May 6, 2020

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Stephen G. Dietrick, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R.A.P. 16 (a)(13) (addendum);
Mass. R.A.P. 16 (e) (references to the record);
Mass. R.A.P. 20 (form and length of briefs, and other documents); and
Mass. R.A.P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R.A.P. 20 because it is produced in the proportional font Times New Roman at size 14 points, and contains 20,819 total non-excluded words as counted using the word count feature of Microsoft Word.

/s/ Stephen G. Dietrick
Stephen G. Dietrick

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 20-00855-D
SJ-2020-0212
SJC-12935

STEPHEN FOSTER, MICHAEL GOMES, PETER KYRIAKIDES, RICHARD O'ROURKE, STEVEN PALLADINO, MARK SANTOS, DAVID SIBINICH, MICHELLE TOURIGNY, MICHAEL WHITE, FREDERICK YEOMANS, and HENDRICK DAVIS, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

CAROL MICI, Commissioner of the Massachusetts Department of Correction, GLORIANN MORONEY, Chair Massachusetts Parole Board, THOMAS TURCO, Secretary of the Executive Office of Public Safety and Security, and CHARLES BAKER, Governor of the Commonwealth of Massachusetts,
Defendants.

FINDINGS OF FACT OF THE SUPERIOR COURT

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

On Friday, April 17, 2020, the Plaintiffs, nine of whom are or until very recently were inmates of facilities run by the Massachusetts Department of Correction ("DOC"), and two of whom are or recently were in county correctional facilities, filed a Class Action Complaint ("Complaint") and Emergency Motion for Preliminary Injunctive Relief ("PI Motion") with supporting affidavits in the Supreme Judicial Court against the Commissioner of DOC, the Chair of the Massachusetts Parole Board, the Secretary of the Executive Office of Public Safety and Security, and the Governor (collectively, the "Defendants"), seeking extensive relief set forth *infra* at Appendix A.[1] Plaintiffs seek to certify a class including the following two categories of Massachusetts inmates: (1) inmates whose age or underlying medical conditions subject them to

[1] The Court refers to the Defendants as DOC, EOPSS, the Parole Board and the Governor.

a heightened risk of death or serious harm if they contract the COVID-19 virus; and (2) inmates who have been civilly committed to a correctional facility pursuant to G. L. c. 123, § 35 for alcohol or substance use disorders.[2] Plaintiffs assert that incarcerating them under their existing conditions of confinement during the COVID-19 pandemic violates their rights under articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights, and the 8th and 14th Amendments of the United States Constitution.

On Monday, April 20, 2020, a single justice of the Supreme Judicial Court issued a Reservation and Report & Interim Order ("Report and Order") reserving and reporting the case to the full court and also referring the matter to the Superior Court for fact-finding. That same day, the Chief Justice of the Superior Court designated the undersigned judge to conduct the proceedings and make findings as set forth in the Report and Order.

The Report and Order required the Defendants to submit their responsive pleadings by 5:00 p.m. on Friday, April 24, 2020, and further required all parties to make their best efforts to submit a Statement of Agreed Facts that same day. Absent further court order, this Court's findings of fact were to be submitted to the Supreme Judicial Court by Friday, May 1, 2020.

On Friday, April 24, 2020, the Defendants filed the following pleadings: (a) an Answer to the Complaint, filed by the DOC and EOPSS; (b) motions to dismiss the complaint, filed by the Governor and the Parole Board; (c) five affidavits described below; and (d) a 115-paragraph Proposed Statement of Agreed Facts submitted by the DOC ("DOC's Proposed Findings of Fact"). Plaintiffs filed a 109-paragraph Plaintiffs' Statement of Facts Not Agreed to by the DOC ("Plaintiffs' Proposed Findings of Fact") and a one-paragraph Statement of Facts Not Agreed to By the Governor. Plaintiffs and the DOC filed a 54-paragraph Statement of Agreed Facts

[2] This Court has not made factual findings about the treatment of persons currently committed to a correctional facility pursuant to G. L. c. 123, § 35, for reasons set forth in Section II-C of these findings. See *infra* at 29.

Between Plaintiffs and Department of Correction. Plaintiffs and the Governor filed a two-paragraph Stipulation as to Agreed Facts Between Plaintiffs and Governor Baker.

On Sunday, April 26, 2020, plaintiffs and the Parole Board filed a 28-paragraph Stipulation as to Facts Agreed Facts Between the Plaintiffs and the Chairperson of the Massachusetts Parole Board ("Parole Board Stipulation").

On Wednesday, April 29, 2020, Plaintiffs filed an affidavit of Robert Peacock, an inmate at MASAC. On April 30, 2020, shortly before the noon deadline set by this Court for all submissions other than agreed facts, Plaintiffs submitted an affidavit of a Prisoners' Legal Services ("PLS") attorney that includes an inmate affidavit, reports and other materials. Commissioner Mici submitted a supplemental affidavit ("April 30 Mici Affidavit") with additional information on the DOC's response to the COVID-19 pandemic and information responsive to the above-noted affidavit of MASAC inmate Peacock. Parole Commissioner Gloriann Moroney submitted an updated affidavit ("April 30 Moroney Affidavit").

Pursuant to paragraph 1 of the Report and Order, the single justice indicated that all of the exhibits to the PI Motion, consisting of 28 affidavits,[3] are part of the record. Presumably, the parties' subsequently filed affidavits and documents will also be part of the record.

Affidavits

Plaintiffs' initial 28 affidavits include (a) four affidavits of physicians focused on the nature and effects of COVID-19 and COVID-19 infection and transmission; (b) 21 affidavits of inmates of 10 of the 16 DOC facilities and three county correctional facilities, focused on the absence of social distancing and proper hygiene, and other conditions, in those facilities during the COVID-19 pandemic; (c) an affidavit of DOC Commissioner Carol Mici, submitted on

[3] As used herein, the term "affidavit" includes affidavits and declarations under oath.

behalf of the DOC in another Supreme Judicial Court matter, focused on general hygiene at DOC facilities and the DOC's response to the COVID-19 pandemic (the "March 27 Mici Affidavit"); (d) an attorney affidavit focused on how the DOC's response to the COVID-19 pandemic is preventing the release on parole of inmates designated as suitable candidates for parole; and (e) an attorney affidavit setting forth the number and nature of violations found by the Massachusetts Department of Public Health ("DPH") in its most recent reports for each DOC facility.

Defendants' initial affidavits include (a) an affidavit of Commissioner Mici including the information set forth in the March 27 Mici Affidavit with minor revisions and further focused on the DOC's response to the COVID-19 pandemic between March 27, 2020 and April 24, 2020 (the "April 24 Mici Affidavit"); (b) an affidavit of the DOC's Deputy Commissioner of Clinical Services and Reentry, focused on intake and treatment of persons at the Massachusetts Alcohol and Substance Abuse Center ("MASAC") in Plymouth who have been civilly committed pursuant to G. L. c. 123, § 35; (c) an affidavit of the Superintendent of the Hampden County Sheriff Department's Stonybrook Stabilization and Treatment Centers ("SSTC"), focused on persons at SSTC's facilities in Ludlow and Springfield who have been civilly committed pursuant to G. L. c. 123, § 35; (d) an affidavit of the DOC's Assistant Deputy Commissioner for the northern sector, which includes the following facilities: MCI-Concord, MCI-Framingham, MCI-Shirley, North Central Correctional Institution ("NCCI-Gardner"), Northeastern Correctional Center, South Middlesex Correctional Center, Lemuel Shattuck Hospital Correctional Unit ("Shattuck Hospital"), and Souza-Baranowski Correctional Center; and (e) an affidavit of the DOC's Assistant Deputy Commissioner for the southern sector, which includes the following facilities: Bridgewater State Hospital, Old Colony Correctional Center,

Massachusetts Treatment Center ("MTC"), MCI-Cedar Junction, MCI-Norfolk, MASAC, and Pondville Correctional Center.

The evidentiary hearing

An evidentiary hearing was held beginning Monday morning, April 27, 2020 and concluding Wednesday afternoon, April 29, 2020. Based on the May 1, 2020 deadline for submission of these Findings of Fact, the Court limited the time for the parties to present evidence, allowing plaintiffs and defendants each a total of five hours for their direct and cross examinations. Therefore, not every disputed factual issue could be addressed; the parties had to prioritize.

Six inmates who are currently incarcerated at DOC facilities and one physician testified for the plaintiffs. Commissioner Mici testified on behalf of the DOC. All testimony was presented remotely. The Court's factual findings based on the testimony are set forth *infra* in Section II-A.

Agreed-upon and uncontested facts

As noted above, on Friday, April 24, 2020, Plaintiffs and the DOC submitted a 54-paragraph Statement of Agreed Facts Between Plaintiffs and Department of Correction. The agreed facts include basic information about COVID-19, the total number and percent of DOC inmates and Massachusetts residents who had tested positive for the virus as of that date, demographic information about DOC inmates, the extent of the increase in COVID-19 infections inside DOC facilities over the last month, the protocol for entering a DOC facility, sleeping arrangements for DOC inmates, limitations on the ability to comply with federal and state social distancing guidelines, and hygiene.

Further, at this Court's request, the Plaintiffs reviewed the DOC's Proposed Findings of Fact, and the DOC reviewed Plaintiffs' Proposed Findings of Fact, to identify any facts with which the opposing party agreed or would not be offering contradictory evidence.

DOC indicated to this Court that it would not offer contradictory evidence as to the following paragraphs in Plaintiffs' Proposed Findings of Fact: 2, 3, 4, 5, 6, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 45, 47, 49, 55, 57, 61, 63, 64, 65, 66, 69, 70, 71, 72, 73, 77, 79, 80, 81, 82, 83, 85, 87, 89, 90, 91, 92, 93, 94, 97, 98, 106, 107, 108, and 109.

Plaintiffs indicated to this Court that they agreed to the following paragraphs in DOC's Proposed Findings of Fact: 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 36, 38, 51, 64, 76, 77, 86, 88, 89, 103, 104, 106, 109, 110, 111, and 112; and they would not offer contradictory evidence as to the additional following paragraphs in DOC's Proposed Findings of Fact: 3, 5, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 57, 67, 71, 72, 95, 99, 108, 114, and 115. The Court has not set forth herein all of the agreed-upon or uncontested facts. However, certain agreed-upon and uncontested facts provide important background and context. These are included in Sections II-B and II-C.

II. FACTUAL FINDINGS

A. Witness Testimony

Six current inmates of DOC facilities (all of whom had submitted affidavits), one physician, and DOC Commissioner Mici testified during the hearing. The Court found all of the witnesses to be either completely credible or credible as to significant parts of their testimony. The Court's findings reflect the portions of each witness's testimony that the Court credited. To the extent that some portions of the witness testimony has been omitted from the findings below,

such omission does not necessarily indicate that the Court discredited that testimony, but only that the Court did not have a sufficient basis upon which to credit it. In one instance, the Court specifically notes that it discredited certain witness statements based on other credible evidence.

The Court begins with the testimony of Commissioner Mici because it provides the best overview. The other witnesses are listed in the order of their testimony.

1. Commissioner Mici

Carol Mici is the Massachusetts Commissioner of Correction, having been appointed Acting Commissioner in December 2018 and Commissioner in January 2019. She has been a DOC employee for 32 years. Before becoming Commissioner, she served as a correction counselor, supervisor, deputy superintendent and superintendent of DOC facilities, and Deputy Commissioner of the DOC for inmate classification. Inmate classification is the process of determining where an inmate should be incarcerated based on his or her dangerousness. Additional factual findings based on the March 27 Mici Affidavit, the April 24 Mici Affidavit and the April 30 Mici Affidavit are set forth *infra.*

For at least several weeks, Commissioner Mici has been holding a daily staff meeting of corrections, medical, classification, and legal personnel every Monday through Friday morning, and often a second meeting later in the day. Commissioner Mici has handled a large number of phone calls over the weekend.

The 16 DOC facilities currently house roughly 7,500 inmates. Full capacity would be roughly 10,000 inmates. MCI-Framingham, MCI-Shirley, and the MTC are the three DOC facilities that have had the most serious COVID-19 problems. As of April 29, 2020, one or more inmates at five of the 16 DOC facilities had tested positive for COVID-19. No inmates at the

other 11 facilities had tested positive for the virus. Since April 3, 2020, all DOC facilities have been under a lockdown (the effects of which are described throughout these findings).

Social distancing and hygiene measures

As of April 29, 2020, 42% of all DOC inmates were in single cells, and 58% were in a cell with a second inmate or in a dorm room. It is not possible to maintain 6-foot social distancing in a two-person cell or a dorm. Therefore, currently, 58% of all inmates cannot keep a 6 foot distance from other inmates at all times.[4] In addition to cells in various facilities that are being reserved for additional quarantined inmates, there are some empty cells that could be used to separate inmates who are presently in a two-person cell. However, Commissioner Mici believes that many inmates, particularly women, would be worse off isolated in their own cells than having one cellmate, even if those cellmates cannot be a full 6 feet away. The DOC must consider the mental health consequences of isolation on inmates. If an inmate who does not have his or her own cell believes that his or her circumstances present a heightened risk from COVID-19, the inmate can request isolation and the DOC would refer the matter to its medical vendor Wellpath for an evaluation.

At least 50% of all inmates are over the age of 60 or have a medical condition putting them in a high-risk group. It would be impossible to put all such inmates in single cells. It would also require moving many inmates who have their own cells based on seniority.

In addition to the many advisories, plans, and policies issued by the Commissioner and described in her affidavits (plaintiffs do not dispute the issuance of these advisories, plans, and policies), her command staff relies on the Centers for Disease Control and Prevention ("CDC") guidelines for social distancing and hygiene during the COVID-19 pandemic. The CDC

[4] The discrepancy between the 72% statistic reported to the SJC on April 3, 2020 and the above-noted 58% statistic is explained *infra* in Section II-B.

guidelines recognize that full compliance with best practices is not feasible in all facilities, including prison facilities. Therefore, each facility has its own compliance plan. Commissioner Mici's advisories specifically address the need for inmates to refrain from fist bumps and hugs, from gang-affiliated signs involving touching which are discouraged in all circumstances, and to maintain social distance. All new inmates and any transfers from other facilities are quarantined for two weeks.

In March, the DOC began ordering very large amounts of personal protective equipment ("PPE") and cleaning supplies. The DOC also began ordering hand sanitizer that contained alcohol, which is something that it had previously avoided. Despite these efforts, supplies of hand sanitizer and cleaning equipment have run short at times. Inmates in the minimum-security section of MCI-Shirley have been transferring hand sanitizer from enormous jugs into smaller bottles for use at DOC facilities and by first responders across the Commonwealth. Existing housekeeping plans have been modified to increase the cleaning of high touch areas. Commissioner Mici believes there are sufficient numbers of inmate workers (called "runners") to keep high touch areas clean.

Only staff, vendors, and attorneys have been allowed inside DOC facilities since restrictions were imposed.[5] Staff and vendors are required to wear masks at all times inside the facilities. The DOC has used video inside the facilities to identify correctional officers ("COs") who are not wearing masks. COs who are caught without masks are initially given verbal warnings. Some have subsequently been given written warnings. One ranking officer was given a five-day suspension because none of the COs under his supervision were wearing masks.

[5] It appears that in-person attorney visits were barred at least temporarily on March 21, 2020. See March 27 Mici Affidavit, par. 64.

Between Friday, April 24 and Tuesday, April 28, surgical masks were distributed to all inmates at all facilities. Inmates have been "strongly encouraged" to wear their masks as much as possible when outside their cell or dorm. Commissioner Mici believes that the DOC does not have authority to force inmates to wear masks. She stated that the inmates are "adults" who can make the decision to protect themselves. She was told that inmates at one facility were flushing the masks down the toilet.

The DOC's medical vendor, Wellpath, is responsible for ensuring that its staff wear PPE, which includes masks, gloves, gowns and removable sleeves. DOC handles the protocol under which persons can enter the facilities.

Since COVID-19 was first detected inside a DOC facility, the DOC has implemented increasing social distancing restrictions. Initially inmates could use the gyms, weight rooms, and prison yards. DOC first banned contact sports, then barred all inmates from gyms, weight rooms, and prison yards. Outside staff (e.g. librarians, teachers) can no longer enter. Beds have been moved as far from each other as possible, although the beds in some institutions are bolted to the floor.

Other topics

The lockdown prevents inmates from using outdoor prison yards, even though in general there is less transmission of COVID-19 outdoors than indoors. There are several reasons for this decision. In many facilities, the outdoor space is a long distance from the indoor space, making it difficult to maintain social distance and security. Social distancing is difficult in some of the yards, and monitoring social distance is difficult in others. In some facilities, allowing only a safe number of inmates to use the yard at one time would essentially require a 24-hour operation.

Commissioner Mici believes it would be a bad decision to allow use of the outdoor spaces in only some of the facilities, and she must therefore consider the issues at all facilities.

Three weeks before an inmate is due to be released or transferred to another facility, Wellpath gets the inmate's name and tests any inmate who has tested positive for COVID-19 or has been quarantined. This does not happen if a judge orders the immediate release of an inmate.

The DOC has taken numerous steps to expedite the medical parole process. Commissioner Mici requires the superintendents of all facilities to provide expedited notice to the district attorneys and victims. Deadlines, including the time period within which a victim can request a hearing, have been shortened. Home plans for inmates who may qualify for medical parole are reviewed earlier in the process. MassHealth is notified so that the inmate has medical insurance upon leaving the facility. The DOC has encouraged the Committee for Public Counsel Services and PLS to assist inmates in creating home plans.

Commissioner Mici has implemented numerous measures to reduce the loss of good time credit that would otherwise result when inmates lose the opportunity to work and attend programs. Anyone who was earning good time credit as of March 1, 2020 earned the full amount of that good time credit for March. Commissioner Mici does not believe she has authority to give inmates good time credit without the inmate doing something for it. Therefore, she has implemented a journaling program in which the inmates will receive 7.5 days of good time credit in April if they keep a journal each day. Commissioner Mici is considering increasing the good time credit to 10 days in May.

The DOC immediately looked into the allegations of Robert Peacock, the MASAC inmate who alleged in an affidavit filed April 28, 2020 that he was being denied treatment and was housed in filthy conditions. Peacock entered MASAC on April 24, 2020, as a direct referral

from a hospital. He has been undergoing detox and will be quarantined for 14 days. He will receive treatment. (This is addressed in the April 30 Mici Affidavit.)

Inspectors from the DPH go through each facility twice a year and come up with an action plan. Some of the recommendations are "suggestions." Commissioner Mici testified that the DOC "compl[ies] with what we can." There have been no DPH inspections since the pandemic hit Massachusetts.

Commissioner Mici agrees that DOC should be doing what it can to reduce the prison population, consistent with law and appropriate release decisions. Commissioner Mici believes that DOC is doing the best it can to manage the COVID-19 crisis given the physical layout of the facilities and the inmate population.

The DOC and EOPSS have had discussions about ways to give inmates completion credit so that they can be released into parole supervision 80 days before the end of their sentence. The DOC has created a program in which inmates can obtain completion credit by educating themselves on COVID-19. Around 40 inmates began this process in late March, and some have been released.

As set forth above, all new inmates and any transfers from other facilities are quarantined for two weeks. Currently, there are many open cells in the quarantine unit to provide housing in the event of a spike of positive COVID-19 test results. Inmates who have tested positive or have refused a test are also quarantined. No inmate who has tested positive or who has been exposed and refused a test is in the same cell or dorm room as inmates who have not tested positive and (to the knowledge of DOC) have not been exposed. Commissioner Mici is considering separating the inmates who have refused testing from those who have tested positive.

As of April 29, 2020, there have been seven inmate deaths at DOC facilities attributed to COVID-19, including five at MTC and two at MCI-Shirley. As of the same date, there were roughly 10 inmates hospitalized with COVID-19. Around 20-25 inmates in total have been hospitalized in April due to COVID-19. Increased testing at MCI-Shirley during the weekend of April 25-26 led to a spike in positive tests. (This suggests there were many inmates there with COVID-19 who were asymptomatic or had relatively minor symptoms.). Of the roughly 250 inmates tested, roughly 50-60 inmates tested positive, centered around four "hotspot" units.

Around 23-24% of all DOC inmates have serious mental illness. There has been no spike in suicide watches during the pandemic.

There have been no furloughs or releases to home confinement during the pandemic. The DOC has not used furloughs since the 1990s, believing it is bad policy to release an inmate who will need to be re-incarcerated. The DOC does not believe it has the authority to allow an inmate to serve any portion of a state prison sentence in home confinement.

2. Michael White

White is a 35-year-old inmate at MCI–Concord, who indicated in his affidavit (PI Motion, Exhibit 13) that he is serving an 18-month sentence for unarmed robbery. White suffers from chronic obstructive pulmonary disorder (COPD) and uses a nebulizer to manage his condition. He expects to be released in July 2020.

White resides in unit L-2, which has roughly 40 bunk beds for 80 inmates. The bunk beds are perpendicular to the walls, and parallel to and roughly 3 feet apart from each other, at either end of a large room. Picnic tables are in the middle of the room.

Social distancing

White has been unable to maintain a 6-foot social distance from other L-2 occupants while sleeping, eating, using the bathrooms and talking on the phone. As noted above, the bunk beds are 3 feet apart from each other. The L-2 unit has two bathrooms, each of which have eight sinks that are roughly 1 foot apart from each other (each toilet and shower is separated by walls). White tries to wait for quiet times to use the bathroom, but other inmates frequently come in and use adjacent sinks. Because of the lockdown, meals are served in the dorm room. Whether White sits at a picnic table or on his bed, there is usually someone within arm's reach. When COs see inmates less than 6 feet from each other, they don't say anything. Inmates are also close to each other when nurses dispense medications in the hallway outside the dorm.

Hygiene

As of April 27, 2020, inmates had not been given masks.[6] The COs have masks and use them roughly 75% of the time. Earlier in April, hand sanitizer was available from a dispenser on the dorm wall until 3:00 p.m. The dispenser is now locked.

The Court did not credit this witness's testimony about the infrequency of cleaning of the unit, because it was contradicted by DOC affidavits and significantly different than the testimony of the other inmate witnesses as to frequency of cleaning, recognizing that the other witnesses are at other institutions.

Other conditions

Since the prison lockdown started in early April, inmate occupancy of L-2 has dropped from roughly 80 inmates to roughly 50 inmates, primarily because of fights and inmates being caught with home brew alcohol. White attributes both phenomena to the lockdown. Also, several inmates have been moved out of the unit because of symptoms of COVID-19. Because

[6] There is evidence that surgical masks were given to all inmates within a day after White's testimony.

of the lockdown, White has not left the unit in the past several weeks. There are no outdoor activities or group classes and use of the gym is prohibited.

3. Ryan Duntin

Duntin is a 38-year-old inmate at MTC who indicates in his affidavit (PI Motion, Exhibit 17) that he is serving a 7-10 year sentence for sex trafficking. He believes that with good time credit he is eligible for parole sometime next year. As a child, Duntin was prone to bronchitis and high fevers. He has chronic bronchitis, which periodically manifests itself in shortness of breath and dry coughing.

Duntin is housed in South One at MTC. South One includes 13 cells, with six beds in each cell. Each cell is roughly 30 x 12 feet. Each cell has three bunk beds, with the long side of each bed against the wall, and the beds roughly 2 ½ to 3 feet from each other, as well as three desks and tables for toiletries. Duntin's cell currently houses six inmates, but some of the other cells are not full, because several men were moved out due to their medical condition. There is a very long hallway outside the cells which Duntin estimates to be 6 ½ to 7 feet wide. There is also a day room, roughly 70 x 30 feet, where the South One inmates can play board games, attend support groups, read, and hang out. There are bathrooms at each end of the hallway.

Social distancing

Duntin sleeps in the middle bunk bed in his cell. Based on the layout of the beds, Duntin's head is more than 6 feet from the head of the men in the adjacent bunk beds, but closer than 6 feet to the inmate with whom he shares a bunk bed. In an effort to maintain social distancing, and following advocacy by inmates, MTC has limited dayroom occupancy to 24 inmates at a time. However, with nowhere else to go due to the lockdown, inmates hang out together in the hallways. Much of the day, inmates are within 6 feet of each other.

The bathroom sinks are roughly 14-18 inches apart from each other. Inmates are "elbow to elbow" at the sink during morning "rush hour" and at night, because everyone wants to wash up and brush their teeth at the same time.

Since the lockdown, the COs have been bringing meals to the unit. Most inmates eat in their cells or in the hallway, leaning against opposite walls. Duntin estimates that when this happens, the inmates are 4-5 feet from each other.

Duntin estimates that he is within 6 feet of another inmate at least half of the day. This includes time when he is an active participant in support groups and other group activities. Duntin has never heard a CO telling any inmate to stay farther apart from other inmates.

Hygiene

Duntin presented more favorable testimony about hygiene than was presented by some other inmates in their testimony and affidavits. Inmates try to clean the bathrooms two or three times each day, though they sometimes fall short. The toilets are cleaned once each day. The showers, which have individual stalls, are cleaned once or twice each day.

Inmates do not have masks or gloves.[7] Duntin estimates that 30-40% of the time staff members do not have their masks, or are wearing them around their neck. Staff members who are new to the unit wear their masks more frequently.

Other conditions

In March 2020, Duntin had bad head and body aches. He skipped work in the kitchen, and stayed away from other inmates, but did not initially seek medical attention. When he reported that he was sick, he was taken to MTC's Health Services Unit, given a "cold pack"

[7] As noted *supra* it appears this has changed since Duntin's testimony, as to surgical masks.

(Tylenol, Mucinex, etc.) and told to stay out of work for one day. (It should be noted that DOC's COVID-19 related protocols have changed significantly since March.)

4. Michelle Tourigny

Tourigny is a 53-year-old woman who indicates in her affidavit (PI Motion, Exhibit 12) that she is serving a life sentence with parole eligibility at MCI-Framingham. She has been incarcerated for roughly 22 years. Tourigny has her own cell in the health services unit (HSU) due to a wide range of medical conditions, including spinal stenosis, lung injury, a heart condition, morbid obesity, diabetes, and a thyroid condition. She also suffers from PTSD, bipolar disorder and anxiety disorder.

Tourigny is visited twice a day by a nurse and four times a week by a doctor. They are typically accompanied by two COs. Sometimes, the COs wear masks and gloves, and sometimes they do not. The inmates have had masks since April 18.

Tourigny applied for medical parole on March 31, 2020. On or about April 24, 2020, she was given releases to sign, which is one step in the medical parole process. As of April 27, 2020, she had not received formal notice of her application.

5. Dana Durfee

Dana Durfee is a 45-year-old inmate at NCCI-Gardner who indicated in his affidavit (PI Motion, Exhibit 18) that he is serving a two-year sentence for receiving stolen property. Durfee resides in unit G-1. The G building has two floors. The G-1 unit houses 38 inmates who sleep in a dorm room roughly 28 x 66 feet. The bunk beds are against the wall and parallel to each other, roughly 3 ½ feet apart.

Social distancing

Durfee shares a bunk bed, and there are two inmates sleeping in the bunk beds on either side of Durfee's bed. He does not sleep head to toe because, if he changed position, his head would hit a TV stand.

The G-1 unit has one bathroom that includes three currently working commodes, one urinal, three washing sinks and one mop bucket sink. The washing sinks are a foot or so apart from each other. Most of the time when Durfee washes his hands another inmate is using an adjacent sink.

Since the lockdown began on April 3, he and most other inmates eat on their beds, roughly 3 feet from each other. When the food is delivered, the inmates line up for the trays, one or two feet apart from each other. No CO has requested that the inmates distance themselves from each other.

Durfee gets medications twice a day. The procedure is that when a bell rings, the inmates line up in the hallway. The line goes up the stairs to the second floor, and includes roughly 15 inmates in the morning and 20 in the evening. There is an inmate on the stairway every one or two steps. Inmates also wait on the stairway to make phone calls.

There is a day room shared by both units in the G building for exercise, card playing, pool, and reading. During the busy times, there are roughly 20-30 inmates in the dayroom at one time. Durfee tries to maintain social distance, but he does not tell other inmates to do so.

On Friday night, April 24, there was a microwave fire, and all of the inmates in Durfee's unit were brought into the gym. They sat one or two feet apart from each other until it was safe to reenter the unit. The process was overseen by roughly five sergeants and other COs. No one attempted to enforce social distancing.

The COs have masks and generally wear them. However, Durfee has seen COs within 6 feet of each other and within 6 feet of inmates, who were not wearing masks. The use of gloves among COs is less common. All inmates in Durfee's unit received masks Friday night, April 24.

Other conditions

Since the lockdown, Durfee has not been able to work, play basketball, or leave the unit (except during the microwave fire). He is earning 7.5 days of good-time credit per month by keeping a journal.

6. Stephen Foster.

Foster is a 43-year-old inmate at Old Colony Correctional Center. He is the lead named plaintiff. Foster indicated in his affidavit (PI Motion, Exhibit 5) that he is serving a 3-5 year sentence for assault & battery and other charges. He has a significant number of physical health issues that have compromised his immune system, and serious mental illness, as set forth in his affidavit. Foster is currently housed in the orientation unit at Old Colony Correctional Center. The unit is shaped in a horseshoe with two tiers and contains a total of roughly 60 cells. Except for nine singles, all of the cells are doubles.

Social distancing

Foster lives in a 12 x 7 foot cell with a bunk bed, TV, sink, toilet, and shelves. He does not sleep head to toe because his cellmate wants to sleep with his head against the wall, and if Foster changed position his head would be 2 feet from the toilet and 6 inches from the ladder that his cellmate climbs to reach the upper bed. He is usually 4 feet from his cellmate, which is as much distance as he can maintain. Since the lockdown, Foster spends 23 ½ hours a day in his cell. He leaves the cell to make phone calls and shower.

Inmates are let out of their cells 8-10 at a time. There are two clusters of four phones each. When Foster talks on the phone, his face is often a foot or so from another inmate's face. Inmates often wipe down the phones before each use. Cleaning materials are available in the common areas. When he gets his medications, there are typically five or six inmates "an arm's length" away from each other.

Hygiene

As of April 28, most of the COs were using their masks properly. Some COs do not wear masks. This is true when meals are served, when inmates get their medications, and when inmates pick up clothing and other items that have been delivered to them. Nurses change their gloves before giving him his medications when he makes the request.

All inmates were given masks on Saturday, April 25. Foster wears his mask because of his health issues. At any given time, roughly 30-40 % of the inmates are wearing masks, but some never wear them.

Since late March, there has periodically been no hand sanitizer in the common area, and at times Foster has had no access to cleaning supplies for his cell.

Other conditions

Before work opportunities and classes were suspended, Foster was out of his cell roughly 10-12 hours per day, working in the laundry, going outdoors, playing cards in the dayroom, and some days, attending classes. He was getting 7.5 days of good time credit each month for taking a violence reduction class and 7.5 days of good time credit per month for working in the prison laundry. He cannot get a good time credit "boost" for his class because the program vendor is not in the facility to give the required quiz. Foster stopped working in the laundry after word of the pandemic had spread, but before the lockdown, because he feared handling other inmates'

laundry due to his compromised immune system. He is now getting 7.5 days of good time credit per month for keeping a journal.

Before the lockdown, Foster saw a mental health therapist twice a month for a roughly one-hour visit. He has not seen the therapist alone since the lockdown, and has had only one brief conversation with the therapist at his cell door. Mentally, he feels as if someone is "playing Russian roulette" with his life.

7. Ariel Peña

Ariel Peña is an inmate at MCI-Shirley who indicated in his affidavit (PI Motion, Exhibit 23) that he is serving a 6-8 year sentence for drug possession with intent to distribute. Peña has diabetes and other health issues set forth in his affidavit. He resides in unit F-1 in the medium security section of the prison. The cells in F-1 are arranged in a horseshoe, with an internal common area that has a kiosk, tables, microwave, and telephones. The unit has 24 singles and 35 double cells. The cells are roughly 8 x 10 or 8 x 11 feet.

Social distancing

Peña is in a double that includes a bunk bed, desk with hinged stool, two lockboxes, shelves, a toilet and a sink. He is usually 3-4 feet from his cellmate. He sleeps on the bottom bunk.

Hygiene

Peña (along with all other MCI-Shirley inmates) was given a mask on April 28. He wears his mask when he is out of his cell, but not inside his cell because he has been living with the same cellmate for the past month and feels it is too late. (This explanation does not consider the possibility that his roommate recently contracted COVID-19 or will do so in the future.).

Peña cleans his own cell with soap and water and a mop. Inmates get soap, but he is not allowed to have cleaning chemicals in his cell. For around two weeks in April, there was no hand sanitizer in the common room dispenser.

Other conditions

At the time of the lockdown, Peña was attending Boston College classes in prison with the goal of getting a college degree. All classes have been suspended.

Since the lockdown, he and the other inmates eat inside their cells. During the lockdown, inmates initially were let out of their cells for 40 minutes a day, then 50 minutes, and now one hour. During that time, inmates can shower, use the telephones and microwave, and use the kiosk to place commissary orders or send and receive email. Inmates cannot go outdoors.

8. Yoav Golan, M.D.

Dr. Golan is an attending physician, infectious disease specialist, and associate professor of medicine at Tufts University School of Medicine. For over 13 years, he provided HIV care at the Suffolk County House of Correction. He has expertise on COVID-19 and a strong general understanding of how COVID-19 might spread among inmates, staff, and those who enter prisons and jails. His affidavit (PI Motion, Exhibit 2) concisely sets forth his expert opinion as to why the standard of care for COVID-19 cannot be achieved in prisons.

Dr. Golan's direct examination sought to focus the Court on certain portions of his affidavit. His affidavit is four pages, and provides more and better information than a summary of his direct examination can provide. On cross-examination, Dr. Golan admitted that he has not been inside any prison during the COVID-19 pandemic, and therefore, he has no first-hand knowledge of the DOC's responses to the pandemic.

During his examination, Dr. Golan testified that the fact that no inmates at 11 of the 16 DOC facilities have tested positive does not necessarily mean that the virus is being contained in those facilities, because the statistic could reflect insufficient testing or lack of testing.

B. Additional Factual Findings

Having made findings of fact with regard to the testifying witnesses, including assessments of their credibility, any additional fact-finding by this Court can be done by the Justices of the Supreme Judicial Court, because it involves only assessing the affidavits, documents and agreed-upon or uncontested facts that are in the record. Certainly, there is no good reason to delay the submission of these Findings of Fact to the Supreme Judicial Court so that this Court can make such findings. However, consistent with the timeframe that the Supreme Judicial Court has given this Court for its factual findings, the Court believes that the following additional fact-finding may be of some benefit to the Supreme Judicial Court and members of the public.

1. Demographics of Massachusetts Inmates

Massachusetts has the highest percentage of elderly prisoners compared to all other states. According to the DOC, in 2019, 983 inmates (11%) were over 60 years old. PI Motion, Exhibit 2, par. 15; Exhibit 4, par. 7. Prisoners have a higher rate of chronic diseases than the general population, which gives them a greater vulnerability to severe illness or death from COVID-19. PI Motion, Exhibit 4, par. 8; Plaintiff's Proposed Findings of Fact, par. 13. Studies have also shown that prisoners age more rapidly than the general population, meaning that they develop chronic conditions and disability about 10-15 years earlier than the general population. PI Motion, Exhibit 4, par. 8; Plaintiff's Proposed Findings of Fact, par. 14.

2. Inmate and Employee COVID-19 Diagnoses and Deaths

According to DOC reports, as of April 23, 2020, a total of 127 DOC inmates had been diagnosed with COVID-19. Of that number, 44 were at MTC, 41 at MCI-Shirley, 27 at MCI-Framingham, 12 at Bridgewater State Hospital, two at the Shattuck Hospital, and one at MCI-Norfolk, who appears to have contracted the virus while outside the prison. As of April 30, 2020, there had been seven inmate deaths due to COVID-19; five at MTC and two at MCI-Shirley.

As of April 23, 2020, a total of 53 DOC staff members had also tested positive for the virus, four of whom include "non-facility" staff. The facility total included 12 employees at MCI-Framingham, 11 at MCI-Shirley, 10 at MTC, six at MCI-Cedar Junction, three each at MCI-Norfolk and Shattuck Hospital, two at the Souza-Baranowski Correctional Center, one at MCI-Concord, and one at Old Colony Correctional Center. As of the same date, there had been no staff deaths due to COVID-19.

The Special Master appointed by the Supreme Judicial Court in *CPCS* v. *Chief Justice*, 484 Mass. 431 (2020) provides weekly reports to that Court containing information on the spread of COVID-19 in the Massachusetts prisons and jails.

The rate of positive tests among prisoners is higher than the rate for the Massachusetts population as a whole. Plaintiff's Proposed Findings of Fact, par. 2. As of April 20, 2020, 548 total prisoners (DOC and counties) had been tested for COVID-19. *Id.* Of these, 214, or 39%, were positive. As of April 21, 2020, the total number of tests administered in Massachusetts was 175,372, and the number of positive results was 41,999, or 23%. *Id.* [8]

[8] See also Mass DPH COVID-19 Dashboard – Tuesday, April 21, 2020, available at https://www.mass.gov/info-details/covid-19-response-reporting

3. DOC's Response to COVID-19 Pandemic

On March 10, 2020, Governor Baker declared a state of emergency based on the spread of the COVID-19 virus. Between March 12, 2020 and April 30, 2020, the DOC has issued numerous advisories, plans, policies and procedures to staff and inmates; made extensive purchases of personal protective equipment ("PPE"), soap, hand sanitizer and cleaning equipment; limited access to its facilities and imposed strict procedures for entering its facilities; tested staff and inmates for the virus, increasing its testing over time; and quarantined inmates who have tested positive for the virus or refused to be tested. These measures are set forth in paragraphs 22-84 of the April 24 Mici Affidavit, and the exhibits thereto, and paragraphs 5-18 of the April 30 Mici Affidavit. To avoid redundancy, the Court has not included these paragraphs herein. The Court notes that plaintiffs agree or do not contest most of the measures that DOC has taken. See *supra* at 4. Plaintiffs dispute the extent to which DOC's policies and procedures on use of PPE by staff and inmates and social distancing have been implemented. Plaintiffs also rely on the fact, admitted to by DOC, that most DOC inmates (58% at last count) cannot maintain a 6 foot distance at all times from other inmates and staff.

4. Mobile testing

On April 30, 2020, DOC reported to the Court that during the second half of April it had done extensive mobile testing at the three facilities that had the highest number of positive test results for COVID-19. At MCI-Framingham, 108 inmates were tested, and 40 inmates tested positive. (Testing was also done at the South Middlesex Correctional Center ("SMCC"), because it is a pre-release facility for MCI-Framingham inmates. Of the 41 SMCC inmates who were tested, none tested positive for COVID-19.) At MCI-Shirley, 236 inmates were tested, and 78 inmates tested positive. At MTC, 460 inmates were recently tested. The results were

unavailable as of April 30, 2020. This mobile testing does not reflect the total amount of testing at any of these facilities. According to the affidavit of DOC Assistant Deputy Commissioner Ferreira, as of April 24, 2020, 62 inmates at MCI-Framingham had tested positive for COVID-19. Ferreira Aff. ¶ 25.

5. DOC Discrepancy as to 6-foot Social Distancing in Correctional Facilities

On April 3, 2020, the DOC informed the Supreme Judicial Court that 72% of all DOC inmates were sleeping within 6 feet of one another. See DOC letter to SJC in *CPCS* v. *Chief Justice*, Dkt. # 56. However, this information was based on the percentage of all *beds* in DOC facilities that were in dorms or two-person cells. DOC facilities held a total of 7,442 inmates as of April 29, 2020, a decrease of 523 inmates since March 9, 2020, the day before Governor Baker declared a state of emergency. Currently, 58% of all DOC inmates *actually sleep* in a two-person cell or a dorm, and therefore 58% of all DOC inmates sleep within 6 feet of another inmate. Comparing the 72% figure provided by the DOC on April 3, 2020 and the most recent 58% figure is comparing apples and oranges, which is why the difference between 72% and 58% (almost 20%) is significantly greater than the decrease in the total number of DOC inmates (roughly 6.6%).

6. Restrictions on Movement Due to DOC Lockdown

It appears to be uncontested that, since the DOC lockdown on April 3, 2020, inmates who live in cells have been spending 23 hours a day in their cells, and inmates living in dorms have been unable to leave their units.

C. Findings of Fact Specifically Related to Methods for Decreasing Prison Population Sought By Plaintiffs as Requested Relief

During her testimony, Commissioner Mici agreed that decreasing the inmate population at DOC facilities can help contain the spread of COVID-19, and that measures to reduce the

inmate population should be taken, though only to the extent that they are lawful and appropriate in light of the overall health and safety of the public. DOC facilities held a total of 7,442 inmates as of April 29, 2020, a decrease of 523 since March 9, 2020, the day before Governor Baker declared a state of emergency. The following findings of fact address measures that the DOC and the Commonwealth have or not taken relevant to the relief sought by Plaintiffs.

Medical Parole

DOC has taken numerous steps to expedite the medical parole process. Commissioner Mici has asked the superintendents of all facilities to expedite the processing of medical parole petitions. This includes requiring expedited notice to the district attorneys and victims. Deadlines including the time period in which a victim can request a hearing have been shortened. Home plans for inmates who may qualify for medical parole are reviewed earlier in the process. MassHealth is notified so that the inmate has medical insurance upon leaving the facility. DOC has encouraged CPCS and PLS to assist inmates in creating home plans. Mici Testimony, *supra* at 11.

Good time credit

The COVID-19 pandemic can have the unfortunate effect of lengthening sentences that would otherwise be served by inmates who pursue work and education inside the facilities, because the DOC lockdown and COVID-19 prevention measures have limited those opportunities. Plaintiffs are looking to expand rather than contract the amount of available good-time credit by increasing the availability of earned good time (awarded monthly), boost time (a one-time 10 day credit), and completion credit (a one-time credit of up to 80 days) available pursuant to G. L. c. 127, §§ 129C, 129D, and 130B.

Commissioner Mici has implemented numerous measures to reduce the loss of good time credit that would otherwise result when inmates lose the opportunity to work and attend programs. Anyone who was earning good time credit as of March 1, 2020 earned the full amount of that good time credit for March. Mici does not believe she has authority to give inmates good time credit without doing something for it. Therefore, she has implemented a journaling program in which the inmates will receive 7.5 days of good time credit in April if they kept a journal each day. Commissioner Mici is considering increasing the good time credit to 10 days in May. Mici Testimony, *supra* at 11.

Parole

Measures that the Parole Board has taken during the COVID-19 pandemic with regard to release of inmates who have been approved for parole, and the extent of recent Parole Board hearings, are set forth in the Parole Board Stipulation. On April 29, 2020, the Parole Board entered into a contract with the Massachusetts Alliance for Sober Housing ("MASH"). MASH has identified over 200 available beds in more than 50 certified sober homes. Under the contract, the Parole Board will fund, for up to eight weeks, a bed in an approved and contracting MASH sober home for a total of 150 parolees, probationers, or discharged inmates. April 30 Moroney Affidavit, ¶ 3. To increase the number of hearings the Parole Board can conduct, pursuant to 120 Code Mass. Regs. § 300.03(2), the Parole Board has designated two hearing examiners to conduct parole hearing for inmates serving house of correction sentences. This designation will increase the number of individuals available to conduct hearings. The hearing examiners expect to begin conducting hearings the week of May 4, 2020. Id., ¶ 4.

Furloughs and home confinement

There have been no furloughs or releases to home confinement during the pandemic. The DOC has not used furloughs since the 1990s, believing it is bad policy to release an inmate who will need to be re-incarcerated. The DOC does not believe it has the authority to allow an inmate to serve any portion of a state prison sentence in home confinement.

Early release by executive order or commutation of sentence

Since Governor Baker declared a state of emergency on March 10, 2020, he has not ordered the early release of any inmate by executive order and has not sought the advice and consent of the Executive Council for commutation of the sentence of any inmate. See Stipulation as to Agreed Facts Between Plaintiffs and Governor Baker, ¶¶ 1-2.

C. Other Factual Matters

1. Treatment for inmates civilly committed under G. L. c. 123, §35

In the evening of April 30, 2020, DOC submitted a Supplemental Affidavit of Jennifer Gaffney, DOC's Deputy Commissioner of Clinical Services and Reentry, describing treatment services that are currently being provided to civilly committed residents of MASAC, and treatment services that have been curtailed in light of DOC's response to COVID-19. DOC also submitted a Supplemental Affidavit of Kevin Crowley, superintendent of the Hampton County Sheriff's Department, describing the current level of treatment of civilly committed residents of the STCC. These affidavits, submitted in response to questions posed by the Court earlier in the day, discuss extensive treatment opportunities for persons civilly committed under G. L. c. 123, §35, contrary to certain allegations in plaintiffs' Complaint. However, because they were submitted after the noon April 30 deadline that the Court had set for filings other than agreed facts, the plaintiffs have not had an opportunity to respond.

2. Prison occupancy limits

The parties contest the number of inmates that lawfully can or as a policy matter should be held at various DOC facilities, based on whether design/related capacity or operational capacity is considered; whether the DPH regulations on cell or dorm size are recommended or required, and other factors. These issues involve complicated legal and factual disputes, and they were not the subject of any substantive testimony. Therefore, the Court has not addressed these issues herein.

Dated: May 1, 2020

/s/
Robert L. Ullmann
Justice of the Superior Court

APPENDIX "A"
Relief Requested by Plaintiffs

1. Certify a class of all prisoners who are incarcerated at prisons and jails in Massachusetts, including two subclasses: (1) All prisoners who are at high risk for serious complication or death from COVID-19 due to underlying medical condition or age, ("medically vulnerable subclass); and (2) All prisoners civilly committed to a correctional facility under G.L. c. 123 §. 35 for the purpose of receiving treatment for an alcohol or substance use disorder, (Section 35 subclass).

2. For the duration of the COVID-19 emergency, enjoin the Defendants, their agents, officials, employees, and all persons acting in concert with them from:

a. Housing any prisoner in any correctional facility where the population exceeds the Design/Rated capacity of that institution;

b. Housing any prisoner in a cell, room, dorm, or other living area that does

not meet the minimum size standards established by the DPH in 105 CMR 451. 320-322;

c. Housing any prisoner in a cell, room, dorm, or other living area where they must sleep, eat, or recreate within six feet of another person;

d. Maintaining any Medical or Health Services Unit, or medication distribution area, in which prisoners must wait for or receive treatment or medication within six feet of another person, other than their medical provider; or

e. Transferring any prisoner from a county jail to the DOC.

3. Enjoin the Defendants, their agents, officials, employees, and all persons acting in concert with them from confining in a correctional facility the Plaintiffs or any other person civilly committed under G.L. c. 123 § 35.

4. Order the Defendants to immediately reduce the number of people confined in prisons and jails by at least a sufficient number to ensure compliance with the relief requested in No. 2 above, prioritizing release for Plaintiffs in the medically vulnerable subclass. Mechanisms for population reductions should include but not be limited to:

a. Expanded use of home confinement;

b. Expanded use of furloughs, including allowing furloughs for longer than the 14 days authorized by G.L. c. 127, § 90A;

c. Maximizing the award of good conduct deductions, including completion credits and "boost time" under G.L. c. 127, § 129D, and authorizing the award of more such deductions than is permitted by § 129D;

d. Identifying all prisoners who may qualify for medical parole, under G.L. c. 127, § 90A, taking all necessary steps to ensure that a medical parole petition is filed immediately, and granting medical parole to those who qualify as quickly as possible and in no event more than one week after the petition is filed;

e. Maximizing the use of commutation and clemency; and

f. Maximizing the use of the Governor's emergency powers and all other available mechanisms to grant releases to all those who are vulnerable to serious illness and death from COVID-19 due to age or underlying medical condition, and all those who are within one year of release, unless there is clear and convincing evidence that such release would pose a risk to public safety outweighing the public health risk of their continued incarceration.

5. Order the Parole Board to:

a. Exercise its authority under G.L. c. 127, § 130, and 120 Code Mass. Regs. § 200.10 (2017), to make all persons serving house of correction sentences eligible for early parole;

b. Consider the dangers posed by COVID-19 when it evaluates whether "release is not incompatible with the welfare of society," as required by G.L. c. 27, § 130;

c. Presumptively grant parole to all parole eligible individuals unless it makes a determination based on clear and convincing evidence that the person cannot live at liberty without violating the law;

d. Expedite the actual release of all individuals who have been granted parole or medical parole contingent on approval of a home plan or satisfaction of some other condition;

e. Ensure that no prisoner is held beyond his "release to supervision date" under G.L. c. 127, § 130B; and

f. Conduct parole hearings for all parole eligible prisoners no later than 60 days prior to their parole eligibility date, as required by G.L. c. 127, § 136.

6. Appoint the Special Master from *Comm. for Pub. Counsel Servs. et al. v. Chief Justice of the Trial Court et al.*, SJC-12926 to oversee compliance and implementation of the Court's orders in this case.

United States Code Annotated
Constitution of the United States
Annotated
Amendment VIII. Excessive Bail, Fines, Punishments

U.S.C.A. Const. Amend. VIII

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Notes of Decisions (5878)

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII
Current through P.L. 116-140.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text
Current through P.L. 116-140.

End of Document

Article I.

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. [Annulled by Amendments, Art. CVI.]

Article X.

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. [See Amendments, Arts. XXXIX, XLIII, XLVII, XLVIII, The Initiative, II, sec. 2, XLIX, L, LI and XCVII.]

Article XII.

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2.]

Article XXVI.

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2, and CXVI.]

Article XXX.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Section 35. For the purposes of this section the following terms shall, unless the context clearly requires otherwise, have the following meanings:

"Alcohol use disorder", the chronic or habitual consumption of alcoholic beverages by a person to the extent that (1) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning, or (2) the person has lost the power of self-control over the use of such beverages.

"Facility", a public or private facility that provides care and treatment for a person with an alcohol or substance use disorder.

"Substance use disorder", the chronic or habitual consumption or ingestion of controlled substances or intentional inhalation of toxic vapors by a person to the extent that: (i) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning; or (ii) the person has lost the power of self-control over the use of such controlled substances or toxic vapors.

Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe has an alcohol or substance use disorder. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. If such person is not immediately presented before a judge of the district court, the warrant shall continue day after day for up to 5 consecutive days, excluding Saturdays, Sundays and legal holidays, or until such time as the person is presented to the court, whichever is sooner; provided, however that an arrest on such warrant shall not be made unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a qualified social worker.

If, after a hearing which shall include expert testimony and may include other evidence, the court finds that such person is an individual with an alcohol or substance use disorder and there is a likelihood of serious harm as a result of the person's alcohol or substance use disorder, the court may order such person to be committed for a period not to exceed 90 days to a facility designated by the department of public health, followed by the availability of case management services provided by the department of public health for up to 1 year; provided, that a review of the necessity of the commitment shall take place by the superintendent on days 30, 45, 60 and 75 as long as the commitment continues. A person so committed may be released prior to the expiration of the period of commitment upon written determination by the superintendent of the facility that release of that person will not result in a likelihood of serious harm; provided, that the superintendent shall provide timely notification to the committing court and, if consent is obtained from the committed person, to the petitioner; provided further, that the superintendent shall request such consent from all committed persons. Such commitment shall be for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health. Subsequent to the issuance of a commitment order, the superintendent of a facility may authorize the transfer of a patient to a different facility for continuing treatment; provided, that the superintendent shall provide timely notification of the transfer to the committing court and, if consent is obtained from the committed person, to the petitioner; provided further, that the superintendent shall request such consent from all committed persons.

If the department of public health informs the court that there are no suitable facilities available for treatment licensed or approved by the department of public health or the department of mental health, or if the court makes a specific finding that the only appropriate setting for treatment for the person is a secure facility, then the person may be committed to: (i) a secure facility for women approved by the department of public health or the department of mental health, if a female; or (ii) the Massachusetts correctional institution at Bridgewater or other such facility as designated by the commissioner of correction, if a male; provided, however, that any person so committed shall be housed and treated separately from persons currently serving a criminal sentence. The person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. The department of public health shall maintain a roster of public and private facilities available, together with the number of beds currently available and the level of security at each facility, for the care and treatment of alcohol use disorder and substance use disorder and shall make the roster available to the trial court.

Annually, not later than February 1, the commissioner shall report on whether a facility other than the Massachusetts correctional institution at Bridgewater is being used for treatment of males under the previous paragraph and the number of persons so committed to such a facility in the previous year. The report shall be provided to the clerks of the senate and house of representatives, the chairs of the joint committee on public safety and homeland security and the chairs of the joint committee on the judiciary.

Nothing in this section shall preclude a facility, including the Massachusetts correctional institution at Bridgewater or such other facility as may be designated by the commissioner of correction, from treating persons on a voluntary basis.

The court, in its order, shall specify whether such commitment is based upon a finding that the person is a person with an alcohol use disorder, substance use disorder, or both. The court, upon ordering the commitment of a person found to be a person with an alcohol use disorder or substance use disorder pursuant to this section, shall transmit the person's name and nonclinical identifying information, including the person's social security number and date of birth, to the department of criminal justice information services. The court shall notify the person that such person is prohibited from being issued a firearm identification card pursuant to section 129B of chapter 140 or a license to carry pursuant to sections 131 and 131F of said chapter 140 unless a petition for relief pursuant to this section is subsequently granted.

After 5 years from the date of commitment, a person found to be a person with an alcohol use disorder or substance use disorder and committed pursuant to this section may file a petition for relief with the court that ordered the commitment requesting that the court restore the person's ability to possess a firearm, rifle or shotgun. The court may grant the relief sought in accordance with the principles of due process if the circumstances regarding the person's disqualifying condition and the person's record and reputation are determined to be such that: (i) the person is not likely to act in a manner that is dangerous to public safety; and (ii) the granting of relief would not be contrary to the public interest. In making the determination, the court may consider evidence from a licensed physician or clinical psychologist that the person is no longer

suffering from the disease or condition that caused the disability or that the disease or condition has been successfully treated for a period of 3 consecutive years.

A facility used for commitment under this section for a person found to be a person with a substance use disorder shall maintain or provide for the capacity to possess, dispense and administer all drugs approved by the federal Food and Drug Administration for use in opioid agonist treatment, including partial agonist treatment, and opioid antagonist treatment for opioid use disorder and shall make such treatment available to any person for whom such treatment is medically appropriate.

If the court grants a petition for relief pursuant to this section, the clerk shall provide notice immediately by forwarding a certified copy of the order for relief to the department of criminal justice information services, who shall transmit the order, pursuant to paragraph (h) of section 167A of chapter 6, to the attorney general of the United States to be included in the National Instant Criminal Background Check System.

A person whose petition for relief is denied may appeal to the appellate division of the district court for a de novo review of the denial.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XVIII PRISONS, IMPRISONMENT, PAROLES AND PARDONS

Chapter 127 OFFICERS AND INMATES OF PENAL AND REFORMATORY INSTITUTIONS. PAROLES AND PARDONS

Section 90A TEMPORARY RELEASE OF COMMITTED OFFENDERS

Section 90A. The commissioner may extend the limits of the place of confinement of a committed offender at any state correctional facility by authorizing such committed offender under prescribed conditions to be away from such correctional facility but within the commonwealth for a specified period of time, not to exceed fourteen days during any twelve month period nor more than seven days at any one time; provided, however, that no committed offender who is serving a life sentence or a sentence in a state correctional facility for violation of section thirteen, thirteen B, 13B 1/2, 13B 3/4, fourteen, fifteen, fifteen A, fifteen B, sixteen, seventeen, eighteen, eighteen A, nineteen, twenty, twenty-one, twenty-two, twenty-two A, 22B, 22C, twenty-three, 23A, 23B, twenty-four, twenty-four B, twenty-five or section twenty-six of chapter two hundred and sixty-five, or section seventeen, thirty-four, thirty-five, or section thirty-five A of chapter two hundred and seventy-two, or for an attempt to commit any crime referred to in said sections shall be eligible for temporary release under the provisions of this section except on the recommendation of the superintendent on behalf of a particular

committed offender and upon the approval of the commissioner; and, provided further, that no committed offender who has been convicted of murder in the first degree shall be eligible for temporary release under the provisions of this section. The administrator of a county correctional facility may grant like authorization to a committed offender in such facility. Such authorization may be granted for any of the following purposes: (a) to attend the funeral of a relative; (b) to visit a critically ill relative; (c) to obtain medical, psychiatric, psychological or other social services when adequate services are not available at the facility and cannot be obtained by temporary placement in a hospital under sections one hundred and seventeen, one hundred and seventeen A, and one hundred and eighteen; (d) to contact prospective employers; (e) to secure a suitable residence for use upon release on parole or discharge; (f) for any other reason consistent with the reintegration of a committed offender into the community. For the purposes of this section the word "relative" shall mean the committed offender's father, mother, child, brother, sister, husband or wife and, if his grandparent, uncle, aunt or foster parent acted as his parent in rearing such committed offender, it shall also mean such grandparent, uncle, aunt or foster parent.

A person away from a correctional facility pursuant to this section may be accompanied by an employee of the department, in the discretion of the commissioner, or an officer of a county correctional facility, in the discretion of the administrator.

Any expenses incurred under the provisions of this section may be paid by the correctional facility in which the committed offender is committed. A committed offender shall, during his absence from a correctional

facility under this section, be considered as in the custody of the correctional facility and the time of such absence shall be considered as part of the term of sentence.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XVIII PRISONS, IMPRISONMENT, PAROLES AND PARDONS

Chapter 127 OFFICERS AND INMATES OF PENAL AND REFORMATORY INSTITUTIONS. PAROLES AND PARDONS

Section 119A RELEASE OF PRISONER ON MEDICAL PAROLE DUE TO TERMINAL ILLNESS OR PERMANENT INCAPACITATION; PETITION; WRITTEN DECISION; CONDITIONS OF PAROLE; APPEAL; RULES AND REGULATIONS; REPORT

Section 119A. (a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:—

"Medical parole plan", a comprehensive written medical and psychosocial care plan specific to a prisoner and including, but not limited to: (i) the proposed course of treatment; (ii) the proposed site for treatment and post-treatment care; (iii) documentation that medical providers qualified to provide the medical services identified in the medical parole plan are prepared to provide such services; and (iv) the financial program in place to cover the cost of the plan for the duration of the medical parole, which shall include eligibility for enrollment in commercial insurance, Medicare or Medicaid or access to other adequate financial resources for the duration of the medical parole.

"Department", the department of correction.

"Permanent incapacitation", a physical or cognitive incapacitation that appears irreversible, as determined by a licensed physician, and that is so debilitating that the prisoner does not pose a public safety risk.

"Secretary", the secretary of the executive office of public safety and security.

"Terminal illness", a condition that appears incurable, as determined by a licensed physician, that will likely cause the death of the prisoner in not more than 18 months and that is so debilitating that the prisoner does not pose a public safety risk.

(b) Notwithstanding any general or special law to the contrary, a prisoner may be eligible for medical parole due to a terminal illness or permanent incapacitation pursuant to subsections (c) and (d).

(c)(1) The superintendent of a correctional facility shall consider a prisoner for medical parole upon a written petition by the prisoner, the prisoner's attorney, the prisoner's next of kin, a medical provider of the correctional facility or a member of the department's staff. The superintendent shall review the petition and develop a recommendation as to the release of the prisoner. Whether or not the superintendent recommends in favor of medical parole, the superintendent shall, not more than 21 days after receipt of the petition, transmit the petition and the recommendation to the commissioner. The superintendent shall transmit with the recommendation: (i) a medical parole plan; (ii) a written diagnosis by a physician licensed to practice medicine under section 2 of chapter 112; and (iii) an assessment of the risk for violence that the prisoner poses to society.

(2) Upon receipt of the petition and recommendation pursuant to paragraph (1), the commissioner shall notify, in writing, the district attorney for the jurisdiction where the offense resulting in the prisoner being committed to the correctional facility occurred, the prisoner, the person who petitioned for medical parole, if not the prisoner and, if applicable under chapter 258B, the victim or the victim's family that the prisoner is being considered for medical parole. The parties who receive the notice shall have an opportunity to provide written statements; provided, however, that if the prisoner was convicted and is serving a sentence under section 1 of chapter 265, the district attorney or victim's family may request a hearing.

(d)(1) A sheriff shall consider a prisoner for medical parole upon a written petition filed by the prisoner, the prisoner's attorney, the prisoner's next of kin, a medical provider of the house of correction or jail or a member of the sheriff's staff. The sheriff shall review the request and develop a recommendation as to the release of the prisoner. Whether or not the sheriff recommends in favor of medical parole, the sheriff shall, not more than 21 days after receipt of the petition, transmit the petition and the recommendation to the commissioner. The sheriff shall transmit with the petition: (i) a medical parole plan; (ii) a written diagnosis by a physician licensed to practice medicine under section 2 of chapter 112; and (iii) an assessment of the risk for violence that the prisoner poses to society.

(2) Upon receipt of the petition and recommendation pursuant to paragraph (1), the commissioner shall notify, in writing, the district attorney for the jurisdiction where the offense resulting in the prisoner being committed to the correctional facility occurred, the prisoner, the person who petitioned for medical parole, if not the prisoner and, if

applicable under chapter 258B, the victim or the victim's family that the prisoner is being considered for medical parole. The parties who receive the notice shall have an opportunity to submit written statements.

(e) The commissioner shall issue a written decision not later than 45 days after receipt of a petition, which shall be accompanied by a statement of reasons for the commissioner's decision. If the commissioner determines that a prisoner is terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society, the prisoner shall be released on medical parole. The parole board shall impose terms and conditions for medical parole that shall apply through the date upon which the prisoner's sentence would have expired.

Not less than 24 hours before the date of a prisoner's release on medical parole, the commissioner shall notify, in writing, the district attorney for the jurisdiction where the offense resulting in the prisoner being committed to the correctional facility occurred, the department of state police, the police department in the city or town in which the prisoner shall reside and, if applicable under chapter 258B, the victim or the victim's family of the prisoner's release and the terms and conditions of the release.

(f) A prisoner granted release under this section shall be under the jurisdiction, supervision and control of the parole board, as if the prisoner had been paroled pursuant to section 130 of chapter 127. The parole board may revise, alter or amend the terms and conditions of a medical parole at any time. If a parole officer receives credible information that a prisoner has failed to comply with a condition of the prisoner's medical

parole or upon discovery that the terminal illness or permanent incapacitation has improved to the extent that the prisoner would no longer be eligible for medical parole under this section, the parole officer shall immediately arrest the prisoner and bring the prisoner before the board for a hearing. If the board determines that the prisoner violated a condition of the prisoner's medical parole or that the terminal illness or permanent incapacitation has improved to the extent that the prisoner would no longer be eligible for medical parole pursuant to this section, the prisoner shall resume serving the balance of the sentence with credit given only for the duration of the prisoner's medical parole that was served in compliance with all conditions of their medical parole pursuant to subsection (e). Revocation of a prisoner's medical parole due to a change in the prisoner's medical condition shall not preclude a prisoner's eligibility for medical parole in the future or for another form of release permitted by law.

(g) A prisoner, sheriff or superintendent aggrieved by a decision denying or granting medical parole made under this section may petition for relief pursuant to section 4 of chapter 249. A decision by the court affirming or reversing the commissioner's grant or denial of medical parole shall not affect a prisoner's eligibility for any other form of release permitted by law. A decision by the court pursuant to this subsection shall not preclude a prisoner's eligibility for medical parole in the future.

(h) The secretary shall promulgate rules and regulations necessary for the enforcement and administration of this section.

(i) The commissioner and the secretary shall file an annual report not later than March 1 with the clerks of the senate and the house of representatives, the senate and house committees on ways and means and

the joint committee on the judiciary detailing, for the prior fiscal year: (i) the number of prisoners in the custody of the department or of the sheriffs who applied for medical parole under this section and the race and ethnicity of each applicant; (ii) the number of prisoners who have been granted medical parole and the race and ethnicity of each prisoner; (iii) the nature of the illness of the applicants for medical parole; (iv) the counties to which the prisoners have been released; (v) the number of prisoners who have been denied medical parole, the reason for the denial and the race and ethnicity of each prisoner; (vi) the number of prisoners who have petitioned for medical parole more than once; (vii) the number of prisoners released who have been returned to the custody of the department or the sheriff and the reason for each prisoner's return; and (viii) the number of petitions for relief sought pursuant to subsection (g). Nothing in this report shall include personally identifiable information of the prisoners.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XVIII PRISONS, IMPRISONMENT, PAROLES AND PARDONS

Chapter 127 OFFICERS AND INMATES OF PENAL AND REFORMATORY INSTITUTIONS. PAROLES AND PARDONS

Section 129D GOOD CONDUCT DEDUCTIONS FOR PARTICIPATION IN AND COMPLETION OF CERTAIN PROGRAMS AND ACTIVITIES

Section 129D. Prisoners are eligible to earn deductions from sentences and completion credits, collectively known as good conduct deductions, for participation in and completion of programs and activities as follows:

(a) For the satisfactory conduct of a prisoner while confined at a correctional institution of the commonwealth, or any jail or house of correction, but working at a state hospital or state school, satisfactory completion of an educational program leading to the award of a high school equivalency certificate, satisfactory performance of said prisoner in completion of any other educational sequence or any vocational training program established within or without the institution, satisfactory performance of said prisoner while the prisoner is employed on work-release or in a prison industry, or satisfactory performance of said prisoner in any other program or activity which the superintendent of the institution shall deem valuable to said prisoner's rehabilitation, the commissioner may grant, in addition to the deductions of sentence provided under section 129C, a further deduction of sentence pursuant to

this section. For a prisoner serving a sentence to the state prison, such deduction shall not exceed 7.5 days per program or activity for each month while said prisoner is working in a state hospital or school, on work-release or working in a prison industry or partaking in any of the said programs or activities as aforesaid; provided, however, that in no event shall said deductions exceed a maximum monthly total of 15 days. For a prisoner serving a sentence to the house of correction, such deduction shall not exceed 5 days per program or activity for each month while said prisoner is working in a state hospital or school, on work-release or working in a prison industry or partaking in any of the said programs or activities as aforesaid; provided, however, that in no event shall said deductions exceed a maximum monthly total of 10 days. Further, the commissioner may grant an additional deduction of sentence of up to 10 days for a prisoner's successful completion of a program or activity, as designated by the commissioner, to be deducted in the month during which successful completion of the designated program or activity is achieved; provided, however, that for a prisoner serving a sentence to the house of correction, such additional deduction of sentence shall be granted only for completion of a program or activity requiring 6 months of satisfactory participation.

(b) All such deductions of sentence shall be added to any deduction to which the prisoner is entitled under section 129C for reducing the term of imprisonment by deduction from the maximum term for which the prisoner may be held under the prisoner's sentence or sentences; provided, however, that in no event shall such deductions reduce the imposed maximum term or aggregate maximum terms by more than 35 per cent.

(c) In addition to the foregoing, the commissioner may also grant up to 80 days of completion credits to a prisoner serving a sentence to the state prison for successful completion of a program or activity, as designated by the commissioner, to be granted in the month during which successful completion of the designated program or activity is achieved; provided, however, that in no event shall the aggregate number of completion credits awarded to a prisoner exceed a maximum of 17.5 per cent of such prisoner's imposed maximum term of imprisonment.

(d) Such deductions granted under subsection (a) and such completion credits granted under subsection (c) shall be added to any deduction to which the prisoner is entitled under section 129C for reducing from the minimum term of the sentence or sentences the good conduct credits earned under this section for parole eligibility as provided under section 133; provided, however, that in no event shall said deductions and such completion credits reduce such imposed minimum term by more than 35 per cent.

(e) No prisoner shall be eligible for any deduction under subsection (a) or any completion credit under subsection (c) unless the prisoner has satisfied both the requirements of the program or activity and demonstrated competency in the material, as determined by the commissioner.

(f) A prisoner whose term of imprisonment is reduced from the maximum term for which the prisoner may be held under the prisoner's sentence or sentences shall receive from the commissioner a certificate of discharge on the date which has been determined by such additional deductions from the maximum term of the prisoner's sentence or sentences.

Code of Massachusetts Regulations
Title 105: Department of Public Health
Chapter 164.000: Licensure of Substance Abuse Treatment Programs (Refs & Annos)
Part Two: Levels of Care
164.131: Inpatient Detoxification Services

105 CMR 164.133

164.133: Provision of Services

Currentness

(A) Admission:

(1) Determination of Level of Care:

(a) Medically Managed Intensive Inpatient Detoxification Services:

1. Level of Care: Medically managed intensive inpatient detoxification services are provided in a hospital setting and include daily medical management and primary nursing interventions.

2. Admission Criteria: At the time of admission, the licensee shall determine that the patient requires this level of care because:

a. current and potential withdrawal symptoms are severe, constitute a risk to the patient's health and well-being and require frequent medical attention; and

b. the patient's incapacity results from a substance use disorder or a mental or behavioral disorder due to psychoactive substance use.

(b) Medically Monitored Inpatient Detoxification Services:

1. Level of Care: Medically monitored inpatient detoxification services are provided in a medical setting and include 24-hour, seven-day per week nursing and medical supervision.

2. Admission Criteria: At the time of admission, the licensee shall determine that the patient requires this level of care because:

a. the patient's current or potential withdrawal symptoms constitute a risk to the patient's health and well-being and require medical monitoring; and

b. the patient's incapacity results from a substance use disorder or a mental or behavioral disorder due to psychoactive substance use.

(c) Clinically Managed Detoxification:

1. Level of Care: Clinically managed detoxification services are provided in a non-medical setting and include 24 hour per day supervision, observation and support, including at least four hours of nursing services each day, seven days each week.

2. Admission Criteria: At the time of admission, the licensee shall determine that the patient requires this level of care because:

a. the patient's current and potential withdrawal symptoms are not severe; and

b. the patient's incapacity results from a substance use disorder or a mental or behavioral disorder due to psychoactive substance use.

(2) Initial Physical Assessment: Immediately upon admission a brief physical assessment of the patient shall be made by a qualified health care professional.

(B) Assessments. In addition to the initial assessment required by 105 CMR 164.072, the licensee shall ensure that a thorough physical examination, which conforms to principles established by the American Society of Addiction Medicine, is completed for all patients within 24 hours of admission.

(1) The physical examination shall include:

(a) an assessment of the patient's substance use disorder;

(b) tests for the presence of opiates, alcohol, benzodiazepines, cocaine and other drugs of abuse as indicated by the patient's current substance use;

(c) a brief mental status exam; and

(d) an assessment of infectious diseases, including TB, Viral Hepatitis and sexually transmitted diseases (STDs); pulmonary, liver, and cardiac abnormalities; dermatological and neurological sequelae of addiction; and possible concurrent surgical problems. When indicated, laboratory tests for these conditions shall be ordered.

The licensee shall ensure that laboratory tests are completed by licensed facilities that comply with all applicable federal and state licensure and certification requirements.

(2) The licensee shall also ensure that the patient's current prescription medications are assessed in relation to interactions with medication prescribed in the course of treatment. Prior to prescribing, dispensing or administering an approved opioid agonist medication the licensee shall ensure that the approved medication is not contraindicated by the patient's current prescribed medications or health status.

(3) For women of child-bearing age, the licensee shall include a pregnancy test in the physical examination.

(4) If the examination is conducted by a qualified health care professional who is not a physician, the results of the examination and any recommendations arising from the examination shall be reviewed by the medical director prior to implementation.

(5) All medical orders shall be signed by the medical director.

(6) When re-admitting a patient who had been admitted within the previous three months, the timing, frequency and interval of a complete physical examination shall be subject to physician discretion, providing that no more than three months elapse between physical examinations.

(7) If, within 30 days of admission to inpatient detoxification treatment, a patient is transferred to a different level of detoxification care, the licensee to whom the patient is transferred shall, with the patient's consent, request:

(a) results of the physical examination described in 105 CMR 164.133(B)(1), and

(b) for women of child-bearing age, results of the pregnancy and related tests described in 105 CMR 164.133(B)(3).

(C) Additional Medical Services for Opioid Treatment: Where a full or partial opioid agonist or antagonist medication is dispensed, the licensee shall comply with requirements of 105 CMR 164.300: *Opioid Treatment* except the licensee need not comply with the requirements of 105 CMR 164.309: *Involuntary Termination from an Opioid Treatment Program,* 105 CMR 164.310: *Bureau Review of Program Decisions to Terminate,* 105 CMR 164.315: Hours of Operation and 105 CMR 164.316: *Severe Weather Accommodations,* and any other requirements which may be specified by the Department.

(D) Treatment Services:

(1) The licensee shall provide detoxification services as determined by the physical examination.

(2) Once the patient receives medical clearance to participate, the licensee shall provide the patient with at least four hours of service programming each day. The programming shall include services specified in 105 CMR 164.074: *Minimum Treatment Service Requirements,* and may be provided directly or through Qualified Service Organization Agreements.

(3) The licensee shall provide at least one multidisciplinary team review for each patient stay.

(E) Termination and Discharge: In addition to the termination and discharge requirements delineated in 164.075: *Termination and Discharge,* the licensee's written procedures shall include the following provisions and shall incorporate these provisions into the policies as described in 105 CMR 164.040: *Written Policies* and 105 CMR 164.081: *Client Policy Manual:*

(1) Criteria for medical discharge;

(2) Procedures for emergency and involuntary terminations in accordance with the following:

(a) In an emergency situation, where the patient's continuation in the program presents an immediate and substantial threat of physical harm to other patients, program personnel or property or where the continued treatment of a patient presents a serious medical risk to the patient as determined by the medical director or the nurse-in-charge, the licensee may suspend a patient immediately and without provision for further detoxification. The patient shall be afforded the right to an appeal as described in the program policies and as required by 105 CMR 164.080: *Grievances.*

(b) In a non-emergency situation, wherein the patient's continuation does not present the immediate and substantial threat or serious medical risk described in 105 CMR 164.133(E)(2)(a), the licensee may not terminate the patient without first affording the patient the procedural rights defined in 105 CMR 164.079: *Client Rights* and 164.080: *Grievances.*

The Massachusetts Administrative Code titles are current through Register No. 1415, dated April 17, 2020

Mass. Regs. Code tit. 105, § 164.133, 105 MA ADC 164.133

End of Document

Code of Massachusetts Regulations
Title 105: Department of Public Health
Chapter 451.000: Minimum Health and Sanitation Standards and Inspection Procedures for Correctional Facilities (Refs & Annos)

105 CMR 451.011

451.011: Required Standards (.100 and .200 Series)

Currentness

Each correctional facility is required by M.G.L. c. 111, § 21 to comply with Required Minimum Health and Sanitation Standards set forth in 105 CMR 451.101 through 105 CMR 451.214 (.100 and .200 Series). Officials responsible for maintaining correctional facilities are responsible, under M.G.L. c. 111, § 21, for enforcing these Required Standards.

The Massachusetts Administrative Code titles are current through Register No. 1415, dated April 17, 2020

Mass. Regs. Code tit. 105, § 451.011, 105 MA ADC 451.011

End of Document

Code of Massachusetts Regulations
Title 105: Department of Public Health
Chapter 451.000: Minimum Health and Sanitation Standards and Inspection Procedures for Correctional Facilities (Refs & Annos)

105 CMR 451.012

451.012: Recommended Standards (.300 Series)

Currentness

In addition, in order to provide physical living conditions adequate to maintain the health and safety of inmates of correctional facilities, the Department, pursuant to M.G.L. c. 111, § 5, recommends that each correctional facility comply with the *Recommended Minimum Health and Sanitation Standards* set forth in 105 CMR 451.320 through 105 CMR 451.390 (.300 Series).

The Massachusetts Administrative Code titles are current through Register No. 1415, dated April 17, 2020

Mass. Regs. Code tit. 105, § 451.012, 105 MA ADC 451.012

End of Document

Code of Massachusetts Regulations
Title 105: Department of Public Health
Chapter 451.000: Minimum Health and Sanitation Standards and Inspection Procedures for Correctional Facilities (Refs & Annos)

105 CMR 451.320

451.320: Cell Size: Existing Facilities

Currentness

Each cell or sleeping area in an existing facility should contain at least 60 square feet of floor space for each occupant, calculated on the basis of total habitable room area, which does not include areas where floor-to-ceiling height is less than eight feet.

The Massachusetts Administrative Code titles are current through Register No. 1415, dated April 17, 2020

Mass. Regs. Code tit. 105, § 451.320, 105 MA ADC 451.320

End of Document

Code of Massachusetts Regulations
Title 105: Department of Public Health
Chapter 451.000: Minimum Health and Sanitation Standards and Inspection Procedures for Correctional Facilities (Refs & Annos)

105 CMR 451.321

451.321: Cell Size in New or Renovated Facilities

Currentness

Each cell in a new facility or a part of a facility constructed after the effective date of 105 CMR 451.000 should contain:

(A) For segregation and special management areas where inmates are usually locked in for greater than ten hours per day, at least 80 square feet of floor space for a single inmate.

(B) For inmates usually locked in for less than ten hours per day, contain at least 70 square feet of floor space for a single inmate.

Provided, however, two inmates may occupy a room or cell designed for double occupancy which has a floor space of 120 square feet.

Floor space shall be calculated on the basis of total habitable room area which does not include areas where floor-to-ceiling height is less than eight feet.

The Massachusetts Administrative Code titles are current through Register No. 1415, dated April 17, 2020

Mass. Regs. Code tit. 105, § 451.321, 105 MA ADC 451.321

End of Document

Code of Massachusetts Regulations
Title 105: Department of Public Health
Chapter 451.000: Minimum Health and Sanitation Standards and Inspection Procedures for Correctional Facilities (Refs & Annos)

105 CMR 451.322

451.322: Dormitories in New or Renovated Facilities

Currentness

Each dormitory in a new facility or a part of a facility constructed after the effective date of 105 CMR 451.000 should contain a minimum of 60 square feet for each occupant. Floor space shall be calculated on the basis of total habitable room area which does not include areas where the floor-to-ceiling height is less than eight feet.

The Massachusetts Administrative Code titles are current through Register No. 1415, dated April 17, 2020

Mass. Regs. Code tit. 105, § 451.322, 105 MA ADC 451.322

End of Document

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER DUART et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 19-12489-LTS
CAROL MICI, Commissioner of Corrections, et al.,	)	
Defendants.	)	

ORDER ON MOTION FOR TEMPORARY RESTRAINING ORDER (DOC. NO. 94)

April 17, 2020

SOROKIN, J.

Plaintiff Peter Duart, proceeding pro se in this lawsuit, filed a motion for a restraining order arising out of the coronavirus pandemic asserting that defendants had cleaned the showers in the C-2 housing unit in which he resides at the Massachusetts Treatment Center only once since March 20, 2020. Doc. No. 94.[1] Duart also claims that soap has not been provided on a regular basis since March 26, 2020. Doc. No. 94-1 ¶ 4. Duart dated his filing April 6, 2020, and the Court received it on April 8, 2020. Doc. No. 94. The Court ordered the defendants to respond. They have now done so. Doc. No. 105.

The Court considers the request for injunctive relief by applying the familiar four-part test governing preliminary injunctive relief. New Comm Wireless Servs. v. Sprintcom, Inc., 287 F.3d 1, 8-9 (1st Cir. 2002) ("Whether or not to issue a preliminary injunction depends upon four factors:

[1] Citations to "Doc. No. __" reference documents appearing on the court's electronic docketing system; pincites are to the page numbers in the ECF header.

(1) the movant's probability of success on the merits, (2) the likelihood of irreparable harm absent preliminary injunctive relief, (3) a comparison between the harm to the movant if no injunction issues and the harm to the objectors if one does issue, and (4) how the granting or denial of an injunction will interact with the public interest."). "The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." Id. at 9.

Duart has failed to meet his burden under this test for several reasons. First, the affidavits filed by the defendants establish there has been substantially more cleaning of the showers in the C-2 unit than Duart asserts. See Doc. Nos. 105-1, 105-2. In light of this, Duart cannot establish a likelihood of success on the merits as to the frequency with which the showers in his unit are cleaned. No evidentiary hearing is required to resolve the factual record. Duart has not established a basis to conclude that he has first-hand knowledge of the frequency of the cleaning of the C-2 showers such that he can create a dispute as to the specific facts regarding the frequency of cleaning submitted by the defendants.

Second, as for Duart's complaints regarding the availability of soap, the record establishes that the Department of Corrections has adequate supplies of soap for the Treatment Center, Doc. No. 105-1 at 11 ¶¶ 54-57, that on April 10, 2020, each resident of C-2 received two bars of soap, Doc. No. 105-2 at 10 ¶ 3, that soap is also distributed on request, Doc. No. 105-1 at 11 ¶ 56, that Duart made one request for soap (though not to the unit officer) after which soap was delivered to the unit, Doc. No. 105-2 at 6 ¶ 6, and that Duart has filed no grievances about a lack of soap, id. at 14 ¶ 2. In these circumstances, the Court concludes Duart has not established a likelihood of success on the merits regarding the availability of soap.

In addition, the Court required defendants to explain generally their efforts to contain the coronavirus, which efforts they have explained. See generally Doc. No. 105-1.

For the foregoing reasons, the Motion for a Restraining Order (Doc. No. 94) is DENIED.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11622-C

ANTHONY SWAIN, *et al.*

Plaintiffs - Appellees,

versus

DANIEL JUNIOR, in his official capacity as Director
of the Miami-Dade Corrections and Rehabilitation Department, and
MIAMI-DADE COUNTY, FLORIDA

Defendants - Appellants.

On Appeal from the United States
District Court for the Southern District of Florida

Before: WILSON, WILLIAM PRYOR and BRANCH, Circuit Judges.

BY THE COURT:

No part of our country has escaped the effects of COVID-19. It is thus not surprising that several inmates at the Metro West Detention Center ("Metro

West")—the largest direct-supervision jail facility in the State of Florida—have tested positive for the virus. This appeal concerns the adequacy of the measures implemented by Metro West to protect its prisoners from the spread of COVID-19.

On April 5, 2020, seven Metro West inmates filed a class action complaint challenging the conditions of the inmates' confinement under 42 U.S.C. § 1983 and seeking habeas relief under 28 U.S.C. § 2241 for the named plaintiffs along with a "medically vulnerable" subclass of inmates.

At issue in this motion for a stay pending appeal is the preliminary injunction issued by the United States District Court for the Southern District of Florida on April 29, 2020, against defendants Miami-Dade County and Daniel Junior, the Director of the Miami-Dade Corrections and Rehabilitations Department ("MDCR"). The injunction requires the defendants to employ numerous safety measures to prevent the spread of COVID-19 and imposes extensive reporting requirements. Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, we stay the injunction pending appeal and expedite the appeal.

I.

MDCR, a department of Miami-Dade County, operates Metro West. When the first case of COVID-19 in Miami-Dade County was reported in early March

2020, MDCR began enacting measures to protect inmates. Those measures included cancelling inmate visitation; screening arrestees, inmates, and staff; and advising staff of use of protective equipment and sanitation practices. On March 23, 2020, the U.S. Centers for Disease Control and Prevention ("CDC") issued the *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correction and Detention Facilities*, (the "CDC Guidance"). MDCR reviewed the CDC Guidance and updated its practices. As the situation developed, MDCR continued to implement additional safety measures, including daily temperature screenings of all persons entering Metro West, establishing a "COVID-19 Incident Command Center and Response Line" to track testing and identify close contacts with the virus, developing a social hygiene campaign, and mandating that staff and inmates wear protective masks at all times. MDCR also implemented social distancing efforts, including staggering the dormitory bunks, requiring inmates to sleep head-to-toe to ensure further distancing, and instructing staff to encourage social distancing between inmates. The district court accepted as true that the defendants implemented these measures for purposes of issuing the preliminary injunction and did not resolve any factual disputes in favor of the plaintiffs.

On April 5, 2020, the plaintiffs filed a class action complaint on behalf of "all current and future persons detained at Metro West during the course of the

COVID-19 pandemic." Among other deficiencies, the class action complaint alleged that the inmates at Metro West did not have enough soap or towels to wash their hands properly, waited days for medical attention, were "denied basic hygienic supplies" like laundry detergent and cleaning materials, and were forced to sleep only two feet apart. They sought declaratory and injunctive relief for violations of the Eighth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983 on behalf of the entire class and immediate release from custody pursuant to 28 U.S.C. § 2241 on behalf of the named plaintiffs and the medically vulnerable subclass.

The district court entered a temporary restraining order ("TRO") against the defendants on April 7, two days after the complaint was filed. Consistent with the TRO, the defendants screened all new arrestees and staff as they entered the facilities, enhanced cleaning and sanitation measures, made efforts to increase social distancing, issued masks to all staff and inmates, supplied paper towels in the restrooms, and quarantined inmates showing COVID-19 symptoms.

On April 29, following a telephonic evidentiary hearing, the district court entered a preliminary injunction against the defendants on the plaintiffs' § 1983

claim.[1] The preliminary injunction enjoins the defendants to:

- "Effectively communicate to all people incarcerated at [Metro West], including low-literacy and non-English speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection";

- "To the maximum extent possible considering [Metro West's] current population level, provide and enforce adequate spacing of six feet or more between people incarcerated at Metro West so that social distancing can be accomplished";

- "Ensure that each incarcerated person receives, free of charge (1) an individual supply of soap, preferably liquid as recommended by the CDC, sufficient to allow frequent hand washing each day; (2) hand drying machines, or disposable paper towels as recommended by the CDC, and individual towels, sufficient for daily use; (3) an adequate supply of disinfectant products effective against the virus that causes COVID-19 for daily cleanings; and (4) an adequate supply of toilet paper sufficient for daily use";

- "Provide reasonable access to showers and to clean laundry";

- "Require that all MCDR staff wear personal protective equipment, including masks, and gloves when physically interacting with any person, and require that, absent extraordinary or unusual circumstances, a new pair of gloves is worn each time MDCR staff touch a different person; and require all inmate workers who are cleaning facilities or preparing food to follow this same protocol";

[1] The district court did not make a finding as to whether the defendants had complied with the TRO. We do note, however, that a report commissioned by the district court and prepared by experts for each party following a review of the facility and of the TRO appears to indicate that the defendants were in compliance with the TRO.

The district court also denied the plaintiffs' requested habeas relief under § 2241 without prejudice.

- "Require that all MDCR staff regularly wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol";

- "Ensure access to proper testing for anyone displaying known symptoms of COVID-19 in accordance with CDC guidelines and for anyone who has come in contact with an individual who has tested positive for COVID-19";

- "Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined, with continued access to showers, mental health services, phone calls with family, and communications with counsel; individuals identified as having COVID-19 or having been exposed to COVID-19 shall not be placed in cells normally used for disciplinary confinement absent emergency circumstances";

- "Respond to all emergency (as defined by the medical community) requests for medical attention as soon as possible";

- "Provide sufficient disinfecting supplies consistent with CDC recommendations in each housing unit, free of charge, so incarcerated people can clean high-touch areas or any other items in the unit between each use";

- "Waive all medical co-pays for those experiencing COVID-19-related symptoms";

- "Waive all charges for medical grievances during this health crisis"; and

- "Provide face masks for inmates at Metro West. The face masks must be replaced at medically appropriate intervals, and Defendants must provide inmates with instruction on how to use a face mask and the reasons for its use."

The district court observed that the CDC's Guidance "formed the basis" of these requirements. In order to ensure compliance, it further ordered the defendants to:

- "Continue providing the Court with updated information regarding the number of staff and inmates who have tested positive for, or are being quarantined because of, COVID-19. These notices shall be filed every three days for the duration of [the order]; Defendants shall also continue to provide this information to their state criminal justice partners";

- "Provide the [district court] with weekly reports containing the current population data for Metro West"; and

- "Submit, within 7 days of [the order], a proposal outlining steps Defendants will undertake to ensure additional social distancing safeguards in terms of housing inmates and inmate activity (medical visits, telephones, etc.)."

II.

"In considering whether to stay a preliminary injunction . . . we examine the district court's grant of the preliminary injunction for abuse of discretion, reviewing *de novo* any underlying legal conclusions and for clear error any findings of fact." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019).

III.

A court considering whether to issue a stay "considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776

(1987)). The first two factors are "the most critical." *Id.* at 434. We address each factor in turn and conclude that a stay is warranted.

A. Likelihood of Success on Appeal

In their § 1983 claim, the plaintiffs allege that the defendants violated the Eighth and Fourteenth Amendments through their deliberate indifference to the risk that COVID-19 poses to the plaintiffs. The defendants ask us to stay the injunction pending appeal because they contend that the plaintiffs failed to establish that they were entitled to a preliminary injunction. To obtain a preliminary injunction, the plaintiffs were required to establish that (1) "a substantial likelihood of success on the merits" exists; (2) they would suffer irreparable harm absent an injunction; (3) "the threatened injury to the[m] . . . outweighs" any harm the injunction might cause the defendants; and (4) if issued, the injunction would not be adverse to the public interest. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016) (internal quotation marks omitted).

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The 'cruel and unusual punishments' standard applies to the conditions of a prisoner's confinement." *Chandler v. Crosby*, 379

F.3d 1278, 1288 (11th Cir. 2004); *see also Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1306 (11th Cir. 2009) (explaining that a pre-trial detainee's "rights exist under the due process clause of the Fourteenth Amendment" but "are subject to the same scrutiny as if they had been brought as deliberate indifference claims under the Eighth Amendment"). An Eighth Amendment challenge to the conditions of confinement has two components: one objective and the other subjective. *See Farmer v. Brennan*, 511 U.S. 825, 846 (1994).

First, to satisfy the "objective component," the prisoner must show "an objectively intolerable risk of harm." *Id.* He must show that the challenged conditions were "extreme" and presented an "'unreasonable risk of serious damage to his future health' or safety." *Chandler*, 379 F.3d at 1289 (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). The defendants do not contest for purposes of this motion that the plaintiffs can satisfy this component.

Second, to satisfy the "subjective component," the prisoner must show that the prison official acted with deliberate indifference. *Id.* A prison official acts with deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837; *see also Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). A prison "official may escape liability for known risks 'if [he] responded reasonably to the risk, even if the harm ultimately

was not averted.'" *Chandler*, 379 F.3d at 1290 (quoting *Farmer*, 511 U.S. at 844). Deliberate indifference requires the defendant to have a subjective "state of mind more blameworthy than negligence," *Farmer*, 511 U.S. at 835, closer to criminal recklessness, *id.* at 839–40.

The defendants are likely to prevail on appeal because the district court likely committed errors of law in granting the preliminary injunction. In conducting its deliberate indifference inquiry, the district court incorrectly collapsed the subjective and objective components. The district court treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk. In doing so, it likely violated the admonition that resultant harm does not establish a liable state of mind. *See Farmer*, 511 U.S. at 844. The district also likely erred by treating Metro West's inability to "achieve meaningful social distancing" as evincing a reckless state of mind. Although the district court acknowledged that social distancing was "impossible" and "cannot be achieved absent an additional reduction in Metro West's population or some other measure to achieve meaningful social distancing," it concluded that this failure made it likely that the plaintiffs would establish the subjective component of their claim. But the inability to take a positive action likely does not constitute "a state of mind more blameworthy than negligence." *Id.* at 835.

The defendants are also likely to succeed on appeal because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent. Indeed, the evidence supports that the defendants are taking the risk of COVID-19 seriously. For example, the expert report commissioned by the district court concluded that the staff at Metro West "should be commended for their commitment to protect the staff and inmates in this facility during this COVID-19 pandemic. They are doing their best balancing social distancing and regulation applicable to the facility." According to the expert report, Metro West appears to have implemented many measures to curb the spread of the virus. While perhaps impossible for the defendants to implement social distancing measures effectively in all situations at Metro West's current population level, the district court cited no evidence to establish that the defendants subjectively believed the measures they were taking were inadequate. *See Valentine v. Collier*, No. No. 20-20207, 2020 WL 1934431, at *4 (5th Cir. Apr. 27, 2020) ("[T]reating inadequate measures as dispositive of the Defendants' mental state . . . resembles the standard for civil negligence, which *Farmer* explicitly rejected.").

The only other evidence the district court relied on to establish deliberate indifference is that Metro West's social-distancing policies are "not uniformly enforced." But the district court made no finding that the defendants are ignoring

or approving the alleged lapses in enforcement of social-distancing policies, so these lapses in enforcement do little to establish that the defendants were deliberately indifferent. *See Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995) (requiring plaintiffs establish a causal connection between the defendant's conduct and the constitutional violation to prevail on a deliberate-indifference claim). Accepting, as the district court did, that the defendants adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures, the defendants' actions likely do not amount to deliberate indifference. So the district court likely erred in this regard.

B. Irreparable Injury

The defendants have also shown that they will be irreparably injured absent a stay. *See Nken*, 556 U.S. at 434. Absent a stay, the defendants will lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic. Through its injunction, the district court has taken charge of many administrative decisions typically left to MDCR officials. For example, the injunction requires that the defendants provide each Metro West inmate with an individual supply of soap and

disinfectant products. Under pain of contempt, therefore, MDCR must divert these high-demand supplies to Metro West, even though they may be more critical at another county facility. Similarly, the injunction requires that the defendants test all inmates with COVID-19 symptoms and everyone with whom they have been in contact. To avoid contempt, then, MDCR must allocate limited testing resources to Metro West at the expense of other county facilities. All the while, the district court has tasked itself with overseeing the steps the defendants are taking to "ensure additional social distancing safeguards," even though it acknowledges that social distancing is "impossible" at the current inmate population level. In short, the district court assumed the role of "super-warden" that our decisions repeatedly condemn. *See Pesci v. Budz*, 935 F.3d 1159, 1167 (11th Cir. 2019); *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 965 (11th Cir. 2018).

As the Supreme Court has cautioned, "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford v. Ngo*, 548 U.S. 81, 94 (2006). In large measure, the injunction transfers the power to administer the Metro West facility in the midst of the pandemic from public officials to the district court. The injunction hamstrings

MDCR officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic. They cannot respond to the rapidly evolving circumstances on the ground without first seeking "a permission slip from the district court." *Valentine*, 2020 WL 1934431, at *5. Such a prohibition amounts to an irreparable harm.

C. Balance of Harms and Public Interest

The final two factors are the balance of harms and the public interest. *See Nken*, 556 U.S. at 426. Here, both those factors weigh in favor of a stay. The district court found that because the inmates "face immediate, irreparable harm from COVID-19," their risk of harm outweighs the harm imposed on the defendants from complying with the preliminary injunction. But the question is not whether COVID-19 presents a danger to the inmates—we do not dismiss the risk of harm that COVID-19 poses to everyone, including the inmates at Metro West. The question is instead whether the plaintiffs have shown that they will suffer irreparable injuries that they would not otherwise suffer in the absence of an injunction. *See id.*; *cf. Valentine*, 2020 WL 1934431, at *5. Nothing in the record indicates that the defendants will abandon the current safety measures absent a preliminary injunction, especially since the defendants implemented many

of those measures before the plaintiffs even filed the complaint. Nor do the plaintiffs contend that they will abandon those measures. For that reason, the balance of harms weighs in the defendants' favor.

Finally, where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest. *Nken*, 556 U.S. at 435. We therefore conclude that the defendants have satisfied all four requirements for a stay.

IV.

Before concluding, we address two other probable errors in the district court's order that make the defendants likely to succeed on appeal: its refusal to address whether the plaintiffs established that the county and defendant Junior were likely liable under *Monell* and its refusal to address the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"). Both inquiries are necessary components of the likelihood of success inquiry a court must undertake in order to issue a preliminary injunction in the first instance. *See Wreal*, 840 F.3d at 1247.

First, the district court likely erred in holding that the plaintiffs are not required to establish municipal liability under *Monell* at the preliminary injunction stage. A municipality may not be held liable under § 1983 unless a municipal

policy or custom caused the plaintiffs' injury. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). The policy or custom requirement of *Monell* applies to § 1983 claims for declaratory or injunctive relief no less than claims for damages. *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 31 (2010). Because a district court cannot award prospective relief against a municipality unless the requirements of *Monell* are satisfied, *id.*, plaintiffs must establish that they are likely to satisfy the requirements of *Monell* to obtain a preliminary injunction against a municipality. *See Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994).

Contrary to *Church*, the district court ruled that the plaintiffs did not need to establish a likelihood of success under *Monell* to obtain a preliminary injunction, and it did not address whether they were likely to satisfy *Monell*. For that reason, Miami-Dade County is likely to succeed in arguing on appeal that the district court erred by enjoining it. And because the plaintiffs sued defendant Junior only in his official capacity, which "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent," *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell*, 436 U.S. at 690), they must also satisfy the requirements of *Monell* to obtain injunctive relief against him to the extent they challenge his conduct as an officer of Miami-Dade County. *See Barnett v.*

MacArthur, No. 18-12238, 2020 WL 1870445, at *3 (11th Cir. Apr. 15, 2020); *Familias Unidas v. Briscoe*, 619 F.2d 391, 403–04 (5th Cir. 1980). The district court did not address whether the plaintiffs were likely to satisfy *Monell* as to defendant Junior, so he is also likely to succeed in having the injunction against him vacated on appeal.

Second, the district court also likely erred in declining to address PLRA exhaustion at the preliminary injunction stage. In no uncertain terms, the PLRA provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). So long as those remedies are "available" to the prisoner, a "court may not excuse a failure to exhaust, even to take [special] circumstances into account." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). But the district declined to address exhaustion because failure to exhaust is an affirmative defense, and therefore, according to the district court, is inapplicable at the preliminary injunction stage. That decision was misguided.

Just because failure to exhaust is an affirmative defense and not a pleading requirement, *see Jones v. Bock*, 549 U.S. 199, 216 (2007), does not render exhaustion irrelevant to determining whether the plaintiffs are entitled to a

preliminary injunction. "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Failure to exhaust is an affirmative defense, so the defendants bear the burden of proving it. *See Jones v. Bock*, 549 U.S. at 216. Because the defendants correctly raised and briefed the defense in a motion to dismiss and in their opposition to the plaintiffs' motion for a preliminary injunction, the district court was obliged to decide whether the defendants were likely to establish the defense. *See Gonzales*, 546 U.S. at 428; *Chandler*, 379 F.3d at 1286 (explaining that exhaustion under the PLRA is "a threshold matter" that a court "must address" before reaching the merits). Although the district court determined that the existence of the defense turned on disputed questions of fact, district courts are required to resolve factual disputes regarding PLRA exhaustion—a "preliminary issue"—at the outset of a case. *See Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008). The district court could not determine that the plaintiffs were likely to succeed on their § 1983 claim without, at the very least, finding that the defendants were unlikely to carry their burden of establishing failure to exhaust. *See Gonzales*, 546 U.S. at 428–29. Because it failed to do so, the defendants are likely to succeed on appeal.

V.

In conclusion, the defendants' motion for a stay pending appeal and motion to expedite the appeal are **GRANTED**. The plaintiffs' "Opposed Motion for Oral Argument on Appellants' Emergency Motion to Stay Injunction Pending Appeal" is **DENIED**.

The Court **DIRECTS** the Clerk to expedite the appeal for merits disposition purposes and to schedule it for oral argument before the earliest available panel.

The Court sets the following briefing schedule: the initial brief is due on May 18, 2020, the response brief is due on May 28, 2020, and the reply brief is due on June 1, 2020. No motions for extensions of time will be considered.

WILSON, Circuit Judge, dissenting from the order granting the stay:

To persuade us to grant a stay, the County bore the burden of making "a strong showing" that it is likely to succeed on the merits—a "most critical" factor. *See Nken v. Holder*, 556 U.S. 418, 433–34 (2009); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). It failed to do so. I see no strong showing of error as to the district court's factual findings or legal conclusions about (1) meaningful social distancing and population reduction or other measures to achieve it, or (2) officials' knowledge and the reasonableness of their response. *See Brown v. Plata*, 563 U.S. 493, 521, 526–30 (2011) (analyzing the necessity of reducing overcrowding after other failed remedial measures in the Eighth Amendment context); *Helling v. McKinney*, 509 U.S. 25, 36–37 (1993) (describing focus on both society's and prison authorities' current attitudes and conduct). And I otherwise fail to see an abuse of discretion here. Therefore, I dissent from the order granting the stay.

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. **SUPERIOR COURT DEPT.**
Unified Session – Suffolk Superior **NO. 1779-CV-00778**

ERIC STEVENS
v.
COMMONWEALTH

FINDINGS AND RULINGS ON PETITIONER'S EMERGENCY MOTION FOR RELEASE

The petitioner, Eric Stevens ("petitioner," or "Stevens"), seeks release from his civil confinement as a Sexually Dangerous Person ("SDP") at the Massachusetts Treatment Center ("MTC") due to the COVID-19 pandemic, asserting that continued confinement violates his rights under the Fifth, Eighth, and 14th Amendments to the U.S. Constitution, and Arts. 12, 26, and 106 of the Massachusetts Declaration of Rights. After consideration of the pleadings, including supplemental pleadings, filed on behalf of the petitioner and the Commonwealth, the motion is DENIED.

FINDINGS

A. General Findings

1. The Court incorporates as Findings the discussion of the Supreme Judicial Court ("SJC") in Committee for Public Counsel Services v. Chief Justice of the Trial Court, SJC-12926 (April 3, 2020) ("*CPCS*") at 3-5, 9-15, and Christie v. Commonwealth, SJC-12927 (April 1, 2020), at 4-6, with respect to the serious and widespread threat posed by COVID-19 in general, and in correctional institutions in particular.
2. Approximately 568 inmates are housed at the MTC; of those 142 people are civilly committed.

3. As of April 14, 2020, it was reported that 37 inmates at the MTC and 17 members of its staff had testified positive for the coronavirus, and 5 inmates have died as a result of the disease.
4. According to the petitioner**,** civilly committed inmates at the MTC are locked in their cells for 23 hours a day, some double-bunked. They share shower facilities, and do not know how their food is being prepared.
5. In order to combat the spread of the virus at the MTC, the Department of Correction ("DOC") is employing protocols recommended by state and national public health and inmate advocacy organizations, including but not limited to: making soap and hot water available at no charge to inmates in their cells and hand sanitizer available outside the cells; feeding inmates in their cells on disposable paper products; providing medication to inmates in their cells; spraying showers with cleaner between users and after the last shower of the day; screening staff upon entering the MTC; and instructing staff to wear personal protective equipment;. With respect to the measures being taken at the MTC, the Court adopts as Findings Paragraphs 58-63 of the Affidavit of Carol Mici, Commissioner of the DOC, filed in the *CPCS* matter ("Mici Affidavit").
6. MTC has suspended attorney visits, and has not provided access to videoconferencing between inmates and their counsel. Inmates have access to telephone calls, mail and e-mail on personal tablets, and the MTC has established a procedure for getting attorney messages to their clients. Telephone access is provided on a staggered basis to limit the number of inmates near the telephones and to permit cleaning of the telephones between users. In this regard, the Court adopts as Findings Paragraphs 64

and 65 of the Mici Affidavit and the statements in the Commonwealth's supplemental filing of April 20, 2020 in this matter.

7. On April 13, 2020, the Boston Health Commission announced that most local shelters are "stretched beyond capacity and are no longer accepting new guests." The Commission further advised that "discharging individuals without housing plans into any shelter at this time could very well put the health and lives of those individuals and the larger shelter community at even greater risk. Accordingly, it is not appropriate to discharge individuals into the emergency shelter system or onto the streets." Additionally, one shelter advised that its beds are 3 feet apart and guests dine shoulder to shoulder, and that, while efforts are being made to implement social distancing, recent testing showed an infection rate of 30% of guests tested. Another shelter advised that "[n]o inmate should ever be discharged without a pathway to housing as the shelter system is inappropriate and currently unavailable."

B. <u>Findings Specific to Petitioner</u>

8. Petitioner is "over 60" years old, according to his motion. He was hospitalized from October into December, 2019 for a heart condition. He has COPD, and is obese.

9. Stevens's sexual offense history includes multiple rapes and other sexual assaults of his 3- and 8-year old daughters in the early 1990s. He told his daughters that their mother would get in trouble if they told anyone of the incidents. He also sexually assaulted a friend's 8-year-old daughter in 1987 and a woman who was a stranger to him in 1991. Throughout the 1980s and 1990s and in the 2000s, he was convicted on numerous occasions of exposing himself to young girls as well as adult women, many times while on probation for other offenses. On one occasion he yelled to a woman

to whom he exposed himself, "Shut the f**k up, I'm going to rape you in the pu**y." While being apprehended by police for this incident, he assaulted an officer. He has admitted to extensive sexual misconduct which went unreported. He has been diagnosed with pedophilic disorder and exhibitionistic disorder, and presents with numerous risk factors for re-offense, including sexual preoccupation and deviant sexual interests. He scored in the well-above average risk to re-offend category on the Static-99R. He has recently regressed in his sex offender treatment.

10. Stevens was found to be a SDP in 2007 and 2017. A trial on his most recent discharge petition is scheduled for May 26, 2020. In connection with this petition, two Qualified Examiners and the Community Access Board (unanimously) have found Stevens to be SDP.

11. If released, Stevens plans to either seek housing at the Southampton Street shelter in Boston, or at a shelter in Springfield, MA. He has also indicated he would seek funding for housing through Black & Pink. There was no indication of when, or whether, such housing would be available and for how long; where it would be located; or what any of the arrangements in such housing would be.

RULINGS

A. Court's Authority to Release Petitioner

The Court concludes that it has authority to consider release of the petitioner, as he has raised legitimate claims that his continued confinement violates provisions of the U.S. Constitution and the Declaration of Rights. See Commonwealth v. G.F., 479 Mass. 180, 190 (2018); Commonwealth v. Pariseau, 466 Mass. 805, 816 (2014). The Court also may consider release of the petitioner on grounds of compassion. Christie, SJC No. 12927 (Apr. 1, 2020).

B. Petitioner's Constitutional Claims

1. Eighth Amendment

"To succeed on an Eighth Amendment claim, a plaintiff-inmate must demonstrate that (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. Comm'r of Correction, 427 Mass. 611, 613–14 (1998). Petitioner argues that the spread of COVID-19 and related deaths within the MTC satisfies the first prong of the Eighth Amendment analysis and the purported "lack of safeguards and health care" for inmates at the MTC satisfies the second.

The Court concludes the petitioner has not established that his continued confinement would violate the Eighth Amendment.

First, the petitioner has not demonstrated that, were he released, he would be at less risk of contracting the virus than if he remains confined. With respect to potentially finding housing at a shelter, as noted above, local shelters have announced that they are over capacity and are no longer accepting new intakes. Even if petitioner could find housing at a shelter, shelters are struggling as much as, if not more than, correctional facilities to protect their residents from the spread of the virus, given the communal setting of most shelters and the transient nature of their populations. As noted above, one Boston shelter identified its housing arrangements as providing beds that are 3 feet apart and dining space that is "shoulder to shoulder," arrangements that are likely shared by most shelters. Additionally, the shelter announced that 30% of its population has tested positive for the coronavirus.

As to petitioner's stated intention to obtain funding from Black & Pink for housing, petitioner put forth no evidence that he would actually receive such funding or that housing would actually be available. He further provided no information as to the nature of any such

housing, what the housing arrangements would be, or how long the housing would be available. There is no information from which the Court could conclude that petitioner would be able to practice social distancing, engage in the necessary hygiene and disinfecting measures, or effectively monitor his health.

Conversely, the MTC is engaging in steps to combat the spread of the virus, as described above. The petitioner relies on an Affidavit from Danielle C. Ompad, Associate Professor of Epidemiology at the New York University School of Global Public Health, and various news articles for the contention that correctional facilities, generally, are ill-suited to practice the preventative measures recommended by the CDC. Dr. Ompad's opinions are based on "client reports" from certain unidentified Massachusetts correctional facilities. Dr. Ompad does not provide evidence of specific conditions at any facility, and she does not opine as to how the conditions she alleges compare to those at Massachusetts shelters. On this record, the Court concludes that the risk of harm to the petitioner posed by COVID-19 would be greater were he released than if he remains confined.

Second, as stated, MTC officials are employing protocols drawn from national and state public health and inmate advocacy organizations to combat the spread of the virus. They are not practicing deliberate indifference to inmates' health and safety, but are taking measures that go beyond what the petitioner has identified would be available to him were he released.

Accordingly, the Court determines that continued confinement does not violate petitioner's Eighth Amendment rights.

2. Due Process

For the same reasons, the Court concludes that continued confinement does not violate the petitioner's rights to substantive Due Process. For the reasons stated above, continued confinement does not "shock the conscience." Rochin v. California, 342 U.S. 165, 172 (1952).

3. Sixth Amendment

Although not raised by Stevens, other petitioners for release from the MTC have argued that continued confinement violates their Sixth Amendment right to counsel because the MTC has suspended all visits and videoconferencing with counsel due to the virus. The Court concludes that it is so unlikely that petitioner would be able to meet or videoconference with his counsel were he released that he has not established a Sixth Amendment violation based on continued confinement.

4. Declaration of Rights

The petitioner has not argued that the Declaration of Rights provides rights more expansive than the Fifth, Sixth, Eighth, or 14th Amendments to the U.S. Constitution in this circumstance. Thus, the Court concludes that petitioner has not established that continued confinement violates the Declaration of Rights.

C. Compassion

As the petitioner has not established a constitutional violation, the Court considers whether release is warranted on the grounds of compassion. In considering release on these grounds, the Court has considered: (1) the danger posed by the petitioner to the safety of the community, based on his history of sexual offenses, his diagnoses, and treatment history at the MTC; (2) whether his plan for release poses a health risk to himself, specific members of the

community, or the community at large; and (3) any characteristics that put petitioner in the high-risk category for COVID-19, including age and underlying medical conditions.

The Court concludes as follows:

1. The petitioner poses too great a danger to the safety of the community, especially children in the community, to warrant release, due to his risk of re-offense. As noted, petitioner repeatedly raped and sexually assaulted his young daughters, sexually assaulted others who were known to him and who were strangers, and exposed himself to children as well as adults numerous times over three decades. He suffers from pedophilic disorder and exhibitionistic disorder, and presents with numerous risk factors for re-offense, scoring in the well-above average risk to re-offend category on the Static-99R. He has not responded well to sex offender treatment. He was found SDP in 2017 and two QEs and the Community Access Board have found him to still be SDP in connection with his latest petition for discharge.
2. The petitioner's release plan – whether he seeks residence at a shelter or funding for housing from Black & Pink – poses a health risk to himself and the community at large, for the reasons explained in Section B-1, above.
3. Petitioner's age and heart condition put him in the high-risk category for COVID-19; however, the elevated risk posed to him by continued confinement does not outweigh the health and safety risk posed to the community by his release.

WHEREFORE, the petitioner's emergency motion for release is DENIED.

Dated: April 15, 2020

_/s/Jackie Cowin_____
Jackie Cowin

Associate Justice of the Superior Court

CERTIFICATE OF SERVICE

I, Stephen G. Dietrick, hereby certify, under the penalties of perjury, that on May 6, 2020, I caused a true and accurate copy of the foregoing to be filed and served on all counsel of record by email.

/s/ Stephen G. Dietrick
Stephen G. Dietrick