

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJ 2020-_____

**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.

EMERGENCY MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

The Plaintiffs hereby request that the Court consider on an emergency basis their Motion for Preliminary Injunctive Relief and grant the relief requested therein as expeditiously as possible.

As detailed in the attached Memorandum, the rapidly growing spread of COVID-19 in Massachusetts prisons and jails presents an immediate threat to the lives of those imprisoned and the lives of staff, threatens to accelerate the spread of infection in the community, and threatens to overwhelm area hospitals. The serious and imminent risk of harm violates the constitutional rights of the Plaintiffs and the class and subclasses they seek to represent.

For the reasons detailed in the Memorandum, the Plaintiffs are entitled to preliminary injunctive relief, as they would likely succeed at trial; absent relief, they will suffer irreparable harm not capable of remediation by final judgment; the risk of irreparable harm, in light of the chances of success, outweighs any possible harm to the Defendants; and granting preliminary relief will serve the public interest. *See Commonwealth v. Massachusetts CRINC*, 392 Mass. 79, 87 88 (1984). Given the urgency of the situation, the Plaintiffs request that the Court use its power under SJC Rule 2:01 to expedite this proceeding and reach the merits of the Plaintiffs' Motion with as much speed as possible.

For the reasons stated above and in the attached Memorandum, the Plaintiffs respectfully request that the Court expedite the proceedings in this case and grant the following relief:

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.

- 7. Award Plaintiffs their reasonable attorneys’ fees and costs; and
- 8. Grant Plaintiffs such other and further relief as the Court considers just and proper.

Dated: April 17, 2020

Respectfully Submitted,

/s/ Bonita P. Tenneriello

Elizabeth D. Matos (BBO #671505)

James R. Pingeon (BBO #541852)

Bonita P. Tenneriello (BBO #662132)

David Milton (BBO #668908)

Michael J. Horrell (BBO #690685)

Prisoners' Legal Services

50 Federal Street, 4th Floor

Boston, MA 02110

Telephone: (617) 482-2773

lmatos@plsma.org

jpingeon@plsma.org

btenneriello@plsma.org

dmilton@plsma.org

mhorrell@plsma.org

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that (1) the Complaint; (2) Plaintiffs' Emergency Motion for Preliminary Relief; and (3) Plaintiffs' Memorandum in Support of their Motion for Preliminary Injunction were served this date, April 17, 2020 via email upon the following: Attorney General Maura Healey; Secretary of Public Safety Thomas Turco; Gloriann Moroney, Esq.; and Nancy White, Esq., Department of Correction Legal Division.

/s/ Bonita P. Tenneriello

Bonita P. Tenneriello, Esq. (BBO #662132)
Prisoners' Legal Services
50 Federal Street, 4th Floor
Boston, MA 02110