

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.