

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJ 2020-12935
Super. Ct. No. 20-00855-D

**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.

STATEMENT OF AGREED FACTS

BETWEEN PLAINTIFFS AND DEPARTMENT OF CORRECTION

1. COVID-19 is a highly infectious viral disease that has rapidly spread across the globe. Although in many cases it causes only mild or moderate symptoms, for some people, particularly those that are elderly or who have underlying medical conditions, the virus can be devastating, posing a substantial risk of serious illness and death.
2. In the past few months, the virus has infected over two million people, world-wide. The U.S. has the highest number of cases in the world and the highest death toll.

3. Massachusetts is recognized as an epicenter of COVID-19 in the United States. As of April 22, over 40,000 people in Massachusetts had confirmed cases of the virus, about 4,000 required hospitalization and over 2,000 had died. *See* “COVID-19 Response Reporting,” available at <https://www.mass.gov/info-details/covid-19-response-reporting>.
4. Correctional institutions face unique difficulties in keeping their populations safe during this pandemic.
5. As by request of the Special Master in *Committee for Public Counsel Services, et al. v. Chief Justice of the Trial Court, et al.*, SJC-12926, DOC began reporting facility-level data on April 13, 2020.
6. The rate of infection with COVID-19 for DOC prisoners is 1.4% (117 of 7,863).¹
7. As of April 22, 2020, there were 44 positive cases at MTC (8.4% of total population of 548); 27 at MCI-Framingham (14.1 % of total population of 191); 12 at BSH (5.9% of total population of 203), and 41 at MCI-Shirley (3.9% of population of 1039).² In Hampshire County, as of April 20, 2020, 12.5% of the total prison population had COVID-19 (18 of 144).³
8. On April 6, 2020, the total number of positive prisoners in DOC was 40; as of April 22, 2020, it is 127.⁴
9. DOC has set aside areas in each facility to isolate and quarantine identified and suspected cases of COVID in addition to infirmaries and medical units.
10. Expanded identification of COVID-19 cases will mean increased need to isolate those who are diagnosed and quarantine those who have been in close contact with them.
11. Restrictive Housing units are being used for quarantine and isolation in some DOC facilities.
12. DOC policy is that staff and others entering each facility are screened before entry. According to policy, each person entering is required to fill out the questionnaire and a thermometer is available for each employee to take their own temperature. The thermometer is disinfected between each use. Completed questionnaires are handed to the on-site manager and upon review, the manager makes the final determination to approve/deny the person entrance. The policy requires that no person with a temperature reading above 99.9 degrees Fahrenheit is permitted to enter the facility.
13. Asymptomatic prisoners may also spread the disease.

¹ *See* Special Masters Weekly Report, 4/21/20, at 15.

² Sources: ACLU data dashboard and DOC weekly inmate count, dated 4/13/20

³ *See* SJC 12926-047, Special Master's Weekly Report, April 21, 2020, at 10

⁴ Source: Special Master's report, 4/21/20

14. Older adults and people with pre-existing health conditions such as cardiovascular diseases, respiratory diseases, liver disease, and diabetes are at increased risk for severe COVID-19 complications and death.
15. As of April 23, 2020, of the 7,806 prisoners in DOC custody, 13 percent (980) were over 60 years old and 30 percent (2,344) were over 50 years old.
16. Those prisoners who cannot be cared for by DOC will be sent to area hospitals for care.
17. The parties agree that the Centers for Disease Control’s “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>, applies to Massachusetts Prisons and jails.
18. The Massachusetts Department of Public Health has promulgated mandatory and recommended standards for Massachusetts correctional facilities. The recommended standards for minimum cell size and floor space are contained in 105 CMR 451.320-322.
19. The “operational capacity” of prisons and jails differs from “design capacity.” As the SJC has noted, “operational capacity is based on guidelines issued by the Association of State Correctional Administrators. Design capacity is measured by the DOC and reported upon by the Governor quarterly, pursuant to St. 1985, c. 799, § 21.” *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Court*, 484 Mass. 431 (2020) (footnote 12).
20. Massachusetts prisons rely on double-celled units and open dormitories to house the majority of prisoners.
21. Most prisoners in Massachusetts are housed either in multi-person cells or in dormitory-style settings.
22. Dormitory-style housing uses shared space for sleeping, eating, and recreation, and has common toilets, sinks, and showers.
23. Dormitory beds are typically less than six feet from each other; prisoners often sleep within 3 feet of one another. Some dormitories hold 80 or more prisoners.
24. Some dormitories house individuals with underlying medical conditions, such as specialized units in MCI-Norfolk and MCI Shirley.
25. Prisoners who do not live in dormitories often live in multi-person cells.
26. Approximately 72% of prisoners held by the Department of Correction sleep within six feet of another prisoner.

27. Following the lockdown of DOC facilities in response to the COVID-19 pandemic, most prisoners now eat in their housing units, either in their own cell, in shared space within their unit, or in a dormitory.
28. Within those units, many prisoners are eating within feet of other prisoners.
29. Approximately 70% of prisoners held by the Department of Correction eat within six feet of another prisoner.
30. Since prisons within the DOC have been locked down, medication is being delivered to some prisoners in their cells while others obtain it from medication lines.
31. Many prisoners in Massachusetts share common bathroom facilities.
32. Fixtures in some bathrooms are within six feet of each other.
33. In addition to social distancing, the CDC has issued other guidelines to prevent the spread of COVID-19.
34. CDC recommendations include: washing hands often with soap and water or using alcohol-based hand sanitizer, especially after having been in a public place; cleaning and disinfecting of surfaces that are frequently touched, especially in common areas, several times per day; and wearing a cloth face cover when out in public.
35. The Department of Public Health (“DPH”) inspects all Massachusetts correctional facilities twice per year to assess compliance with the health and sanitation standards set forth in 105 CMR 451.
36. As of April 23, 2020, the Massachusetts Treatment Center has had 44 COVID-19 cases, which includes 5 deaths.
37. The DOC issues masks to inmates if they are infected, symptomatic, or working, Masks are being distributed to all DOC inmates this weekend.
38. COVID-19 has put additional demand on prison and jail healthcare systems, as well as prison operations generally.
39. The onset or worsening of COVID-19 symptoms can happen suddenly.
40. In the state prisons, a system wide lock down came into effect on April 3-4. Although DOC originally stated it would be for 14 days, it still continues with no end date announced.
41. MCI Shirley has been on lockdown since on or about April 1.

42. Massachusetts Treatment Center has had at least some units on lockdown since on or about March 20.
43. Since April 4, due to a DOC-wide lockdown, inmates have experienced reduced access to recreation, programming, work, and education.
44. Since the lockdown began, some inmates have not been afforded outdoor recreation.
45. The Department of Correction has not granted any furloughs since the COVID-19 pandemic began
46. Although DOC has stopped transferring prisoners from one DOC facility to another, it is still accepting from court inmates receiving a state sentence, subject to screening and a 14-day quarantine on arrival
47. The parties agree that G.L. c. 123, § 35 (“Section 35”), governs civil commitments to DOC custody for treatment of substance use disorder.
48. The DOC houses Section 35 men at the Massachusetts Alcohol and Substance Abuse Center (“MASAC”), located at MCI Plymouth. The DOC has also entered into a Memorandum of Understanding with the Hampden County Sheriff’s Department to operate a Section 35 facility.
49. DOC’s tentative date to remove all correction officers from MASAC in April 2020 has been rescheduled to May 10, 2020.
50. On March 20, 2020, the Substance Abuse and Mental Health Services Administration (“SAMHSA”), the agency within the U.S. Department of Health and Human Services that leads public health efforts to address mental health and substance use disorders, issued the following guidance:

COVID-19 is a novel coronavirus spread by the respiratory route and contact with contaminated surfaces. It appears to be highly contagious and has a significant morbidity and mortality rate. Because these attributes are known and because this agent has been identified as responsible for a global pandemic, it is essential that behavioral healthcare facilities implement plans to protect patients and staff from infection to the greatest extent possible. The following are offered as considerations aimed at decreasing the likelihood of infection and viral transmission and providing for the behavioral health needs of patients.

There are many options for treating mental and substance use disorders which have an evidence base and/or are best practices. These include both inpatient and outpatient options. Because of the substantial risk of coronavirus spread with congregation of individuals in a limited space such as in an inpatient or residential facility, SAMHSA is advising that outpatient treatment options be used to the greatest extent possible. Inpatient facilities should be reserved for those for whom outpatient measures are not

considered an adequate clinical option; i.e.: for those with mental disorders that are life-threatening, (e.g.: the severely depressed suicidal person). For those with substance use disorders, inpatient/residential treatment has not been shown to be superior to intensive outpatient treatment. Therefore, in these extraordinary times of risk of viral infection, it is recommended that intensive outpatient treatment services be utilized whenever possible.

CDC has released guidance on the expanded use of telehealth services. SAMHSA strongly recommends the use of telehealth and/or telephonic services to provide evaluation and treatment of patients. These resources can be used for initial evaluations including evaluations for consideration of the use of buprenorphine products to treat opioid use disorder. Further, these resources can be used to implement individual or group therapies such as evidence-based interventions including cognitive behavioral therapy for mental and/or substance use disorders.

For inpatient/residential programs that plan to 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.

51. As of April 23, 2020 there were 28 patients at MASAC and 46 patients at Hampden.
52. Pursuant to DPH regulation, persons committed under Section 35 must be offered a minimum of 4 hours of treatment every day. Pursuant to DOC policy, such persons must be offered a minimum of 20 hours a treatment a week.
53. Some groups and classes offered at MASAC take place in a building that is down a hill. If a patient needs to use the bathroom, a portable toilet is available for his use.
54. Section 35 requires the superintendent to review the necessity of the commitment of all MASAC and Hampden patients after 30 days, and every 15 days thereafter until the commitment expires. It also authorizes the superintendent to release a patient at any time if she determines that release will not result in the likelihood of serious harm.

Dated: April 24, 2020

Respectfully Submitted,

FOR THE PLAINTIFFS:

/s/ Bonita P. Tenneriello

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