

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJC 2020-12395
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.

PLAINTIFFS' STATEMENT OF FACTS NOT AGREED TO
BY THE DEPARTMENT OF CORRECTION

The Defendants did not agree to include the facts below in the Statement of Agreed Facts. Counsel for the Department of Correction has not indicated which of these facts they intend to oppose with evidence. While counsel for the Executive Office of Public Safety and Security received the Plaintiffs' proposed facts and participated in the same conference call, they did not express assent or objection to any fact nor indicate which if any facts they intended to oppose with evidence.

1. Correctional institutions face difficulties in the prevention of COVID-19, including difficulties providing for social distancing; obstacles to isolating and managing known and suspected cases of COVID-19; and endemic problems of hygiene and sanitation in prisons and jails.
2. The rate of positive tests among prisoners is higher than the rate for the Massachusetts population as a whole. As of April 20, 2020, 548 total prisoners (DOC and counties) had been tested for COVID-19. Of these, 214, or 39%, were positive. As of April 21, 2020, the total number of tests administered in Massachusetts is 175,372, and the number of positive results was 41,999, or 23%.¹ Nationally, about one-fifth of all tests are positive.²
3. This higher rate of positive results among prisoners tested suggests that there is likely a higher incidence of hidden positives in the prison population than in the general population, increasing risks of asymptomatic spread in the absence of adequate space for social distancing.
4. In Hampshire County, as of April 20, 2020, there were 18 prisoners with confirmed cases of COVID-19; this is almost half (49%) of the total number tested (37). In Middlesex County, 76% (25 of 33) of tests given to prisoners came back positive.³
5. Because the DOC did not begin reporting facility-level data until April 13, 2020, there is no cumulative data on the number of tests performed at individual facilities.
6. The infection rate for the general Massachusetts population is 0.6% (42,944 positive out of 6,902,149). The aggregate rate of infection for all prisoners in Massachusetts (state and county) is 1.6% (222 out of 13,845).⁴
7. DOC prisons and county facilities have limited space in existing infirmaries and medical units.
8. 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.
9. Most Massachusetts prisons, even if below operational capacity, are close to or exceed their design capacity (as both are defined in the parties' Statement of Agreed Facts).
10. Like the DOC, Massachusetts jails rely on double-celled units and open dormitories to house the majority of prisoners.

¹ Mass DPH COVID-19 Dashboard – Tuesday, April 21, 2020, available at <https://www.mass.gov/info-details/covid-19-response-reporting>

² In U.S. there have been 835,316 positives (or 20%) out of 4,171,896 tested. <https://coronavirus.jhu.edu/map.html>

³ See SJC 12926-047, Special Master's Weekly Report, April 21, 2020, at 9-10.

⁴ Source: ACLU data dashboard

11. Therefore there is limited capacity to isolate and quarantine suspected and identified COVID-19 patients within existing units of Massachusetts prisons and jails.
12. While prisons and jails generally screen staff, vendors and others entering the facility by taking their temperature and asking questions, this screening cannot stop asymptomatic carriers of COVID from entering the facility.
13. 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.
14. 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.
15. Community resources to assist homeless individuals in accessing shelter and healthcare have increased during the COVID-19 pandemic.
16. Area homeless shelters have expanded capacity.
17. These shelters are taking precautions to avoid COVID-19 spread such as increased distancing, plastic barriers between beds, meals served in shifts, additional hand washing and sanitizing capacity, and increased cleaning.
18. Healthcare providers and substance use disorder treatment programs have also expanded capacity to treat patients through the adoption of telemedicine.
19. Those suspected or confirmed as having COVID-19 who cannot isolate at home are being served by programs set up by the Commonwealth, the City of Boston, Boston Medical Center, Boston Health Care for the Homeless, Partners Healthcare, and shelter organizations.
20. CDC guidelines⁵ describe social distancing as “one of the best tools we have to avoid being exposed to the virus and slowing its spread locally and across the country and world.”
21. As defined by the CDC, social distancing requires staying at least six feet from other people, not gathering in groups, and staying out of crowded places and avoiding mass gatherings.
22. The CDC has stated that “[a]lthough social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19.”

⁵ Available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>

23. It is not possible for most prisoners in Massachusetts prisons and jails to practice social distancing in accordance with CDC guidelines.
24. Massachusetts Department of Public Health standards, 105 CMR 451.320-322, require cells and dormitories to have at least 60 square feet of habitable floor space per occupant.
25. Nearly 68% of all correctional facilities in Massachusetts contain cells or living areas that do not comply with the DPH cell size and floor space standards.
26. The DOC is required by law to report quarterly on overcrowding. In these reports DOC is mandated to compare the actual population of each facility to its Design Capacity.
27. The Design Capacity of each facility assumes cells and living areas comply with DPH standards relating to minimum floor space per person.
28. Prisoners living in dormitories cannot consistently maintain six feet apart throughout the day.
29. Prisoners who live in multi-person cells cannot remain six feet apart from their cellmates.
30. In Middlesex County, over 64% of county prisoners sleep within six feet of another prisoner.
31. In Bristol County, 64% of county prisoners sleep within six feet of another prisoner.
32. In Norfolk County, 80% of county prisoners sleep within six feet of another prisoner.
33. In Suffolk County, 24% of prisoners at the Nashua Street Jail and 45% of prisoners at the South Bay House of Correction sleep within six feet of another prisoner.
34. In Worcester County, approximately 75% of county prisoners sleep within six feet of another prisoner.
35. In Plymouth County, approximately 49% of county prisoners sleep within six feet of another prisoner.
36. In Berkshire County, 3% of prisoners sleep within six feet of another prisoner.
37. In Middlesex County, over 92% of county prisoners eat meals within six feet of another prisoner.
38. In Hampden County, prisoners at the main county institution are not able to eat six feet apart from one another.
39. In Norfolk County, 50% of county prisoners eat within six feet of another prisoner.
40. In Worcester County, all county prisoners must eat within six feet of another prisoner.

41. In Plymouth County, approximately 56% of county prisoners eat meals within six feet of another prisoner.
42. In many cases, prisoners standing in line to receive medication do not stand more than six feet apart from one another.
43. At MTC, a prisoner with a dry cough and a fever waited in the same medline as other prisoners, some of whom were also coughing.
44. The lockdown has disrupted the regular schedule of medication distribution. For example, some prisoners who need to take insulin at regular intervals are not able to do so.
45. Waiting rooms to see medical personnel sometimes require prisoners to stand within six feet of one another. For example, a 64-year-old man at Plymouth County with severe chronic respiratory illness went to health services twice for ear and throat infections; he waited both times in a small foyer with three or four other people. .
46. Reports from Department of Public Health inspections, enforcing health and sanitation standards set forth in 105 CMR 451, show that the DOC and county sheriffs routinely fail to meet minimum standards that promote and protect the health and safety of their populations, even under non-emergency conditions.
47. According to the most recent inspections from late 2019 and early 2020, only one of the Commonwealth's 35 correctional facilities had zero repeat environmental health violations at its most recent inspection; 25 of them (71%) had 50 or more repeat violations; 11 (31%) had more than 190 repeat violations each. For example, the most recent report for MCI-Norfolk, notes 475 repeat violations.
48. Many prisoners are using common showers, common toilets and common sinks shared with an entire dorm or unit that are often filthy and unsanitary.
49. For example, a recent DPH inspection of the Massachusetts Treatment Center (MTC) found: Throughout the facility, bathrooms and shower areas were observed to be poorly maintained resulting in unsanitary conditions. The CSP is concerned with the increased risk of disease transmission with the high number of inmates being exposed to such unsanitary conditions.⁶
50. Not all prisoners have soap and water or sanitizer always available throughout the day..
51. Phones in many facilities are less than six feet apart, and they are not always disinfected between uses.

⁶ See Letter from Patrick Wallace, Environmental Health Inspector, DPH, to Lisa Mitchell, Superintendent of MTC (Sept. 26, 2019) DPH September 26, 2019 report at 22, available at <https://www.mass.gov/doc/massachusetts-treatment-center-bridgewater-september-17-2019/download>.

52. Many items in dormitories—such as hot pots, microwaves, and televisions—are shared and are not disinfected between uses.
53. Cleaning crews are working less frequently in prisons since the DOC lockdown.
54. Some prison and jail bathrooms and showers are not cleaned even daily with bleach or other appropriate disinfectants.
55. Many prisoners are only allowed to shower once every few days.
56. At Souza-Baranowski, healthy prisoners in restrictive housing are forced to share showers and telephones with prisoners who are quarantined because of possible COVID-19.
57. Staff at MTC required a prisoner with a fever and dry cough to go back to work serving food and cleaning the dining room.
58. To date, although some prisoners have received facemasks if infected, symptomatic, or working, most prisoners have not received masks.
59. Most correctional staff have masks, but many do not always wear them or wear them properly.
60. The food is not always distributed by workers or correctional staff wearing gloves and masks. Even when gloves are worn, they may not be changed after touching other common surfaces.
61. Medical staff do not always wear masks and gloves, or change gloves between patients.
62. For example, since the lockdown at MCI-Shirley, diabetic prisoners receive insulin injections in their cells from nurses wearing the same gloves used when giving injections to other prisoners.
63. A state audit report issued on Jan. 9, 2020 found that DOC sick call request forms were not processed promptly and properly, with prisoners often waiting more than a week to see a medical provider after requesting care.
64. A federal court recently found that the DOC was “neither able nor willing to provide” for a prisoner’s medical needs and that as a result of its “woeful disregard” for his wellbeing, DOC was “slowly killing him”.
65. A recent WBUR investigation documented medical care deficiencies in county correctional facilities, including inadequate medical care and lack of responsiveness to medical needs that led to some prisoners’ deaths.

66. Some prisoners are experiencing lapses in their access to needed chronic care such as post organ transplant anti-rejection medication, blood thinners, and insulin.
67. Some prisoners presenting with COVID-19 symptoms such as fever, cough, and headache are being told that they cannot have a COVID-19 test.
68. Where prisoners are locked in for 23 or more hours daily, timely access to correctional and medical staff is reduced.
69. In hospital settings persons with suspected COVID-19 are placed in single occupancy rooms and kept separated from other patients. Patients who have tested positive for COVID-19 may be placed in a room shared with one other person who has tested positive.
70. While hospitalized, patients with suspected or confirmed COVID-19 receive food service, personal care, and medication distribution.
71. While hospitalized, patients with suspected or confirmed COVID-19 are evaluated regularly by health care providers, and are able to get the attention of medical staff easily by pushing a call light button.
72. COVID -19 patients who do not require hospitalization, patients who are discharged from the hospital, and patients suspected of having COVID-19 are directed to self-isolate at home, sleeping in a separate room from other household members, using a separate bathroom, avoiding shared eating spaces and common spaces, and avoiding leaving their home.
73. The Department of Correction has only 29 hospital beds, at Lemuel Shattuck Hospital, for all purposes, including COVID-19
74. Prisons and jails do not have sufficient space to properly quarantine and isolate suspected and confirmed COVID-19 cases, so prisoners who are quarantined or isolated may share common spaces and surfaces with those who are healthy and/or who have not yet tested positive for COVID-19.
75. Medical and correctional staff also may move between quarantine/isolation units and general population units without taking proper preventative measures.
76. Prisoners who are in quarantine or isolation often have reduced access to medical care, causing lapses in receipt of needed medications.
77. Prisoners who have tested positive at Massachusetts Treatment Center are being held together in one unit. Medical staff does rounds to pass out Tylenol, a small cup of ice and to take temperatures. Prisoners have to ask for soap and toilet paper, and many are too sick to shower or use the phone.
78. Mental health services have been reduced since the lock down.

79. Mental health services are being conducted in areas that do not allow for confidentiality, such as dormitories.
80. Prisoners have an increased need for mental health services with the onset of COVID-19.
81. Prisoners are experiencing increased emotional distress as the result of lockdown conditions.
82. Prisoners are experiencing increased emotional distress as the result of fears related to the spread of COVID-19.
83. Under the current DOC lockdown, prisoners have been locked in cells, dorms or other living areas for 23-24 hours daily.
84. Courts, public health experts, and corrections professionals agree that a significant decrease in the incarcerated populations is essential to combat the spread of COVID-19 among prisoners, staff, and the greater community.
85. Reducing the incarcerated populations serves four critical public health aims: (1) targeting prisoners who are at elevated risk of suffering from severe symptoms of COVID-19; (2) allowing those who remain incarcerated to better maintain social distancing and avoid other risks associated with forced communal living; and (3) helping to “flatten the curve” of Covid-19 cases among incarcerated populations and limit the impact of transmission both inside correctional facilities and in the community; (4) reducing the burden on the correctional system in terms of treating critically ill patients, as well as the burden on the community health care system where they may have to be hospitalized.
86. In order to meaningfully decrease the risk of COVID-19 infections, Massachusetts officials must act to reduce the prisoner population sufficiently to ensure social distancing and permit personal hygiene in compliance with CDC guidelines.
87. Other state systems and the federal system have recognized and acted upon the immediate and pressing necessity of reducing prisoner populations in response to COVID-19. Measures employed include, but are not limited to, home confinement, expanded good time, furloughs, early release, accelerated parole.
88. The Department of Correction has not increased awards of good conduct deductions, nor placed any prisoner in home confinement. The DOC has not modified its medical parole criteria or procedures and has only released two prisoners on medical parole since April 1.
89. The Governor has not used his emergency powers to authorize modification of any practices or statutes in order to effectuate the early release of prisoners.

90. The Governor has not issued a commutation to any prisoner.
91. G.L. c. 123, § 35 (“Section 35”) provides that a court may order a person to be committed “ 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.”
92. Every year, over 2,000 men are committed to correctional facilities under Section 35. As of March 30, 2020, there were 103 men civilly committed to MASAC and 79 men civilly committed to Hampden County. Most were placed in a correctional institution because there was no room in a DPH-licensed treatment facility.
93. In 2017, the Legislature repealed the provisions in Section 35 that allowed women to be committed to a correctional facility. In 2019, the commission established by the legislature to evaluate Section 35 recommended that the “Commonwealth should prohibit civilly-committed men from receiving treatment for addictions at any criminal justice facility.”⁷
94. MASAC patients commonly report that correctional officers mock them and insult and threaten them.
95. Despite the minimum programming requirements for Section 35 contained in DOC policy and DPH regulations, since MASAC was placed on lockdown in early April all groups and classes have been cancelled. Individuals civilly committed to MASAC for treatment now receive no treatment at all.
96. After admission, MASAC patients are typically housed in the “C Dorm” for detoxification. C-Dorm has beds arranged in rows with about 3-4 feet between rows. The dorm does not comply with DPH standards regarding the minimum floor space for each occupant.
97. Patients describe C-Dorm as filthy and sometimes stinking of the vomit, urine and excrement of patients in the throes of withdrawal. The most recent DPH sanitation inspection report describes plumbing in poor repair, mold on the ceilings, scum on shower walls, a missing door on a bathroom stall, and “generally dirty” conditions.⁸
98. After detoxification, most MASAC patients live in A dorm or B dorm. Until recently, when the MASAC population declined, two patients were typically housed in cells that were designed for one person. When occupied by two people, these cells do not comply with DPH standards that call for each cell or sleeping area to contain at least 60 square feet of floor space for each occupant.

⁷ Section 35 Commission Report (July 1, 2019) available at <https://www.mass.gov/doc/section-35-commission-report-7-1-2019/download>.

⁸ Department of Public Health, Bureau of Environmental Health, Community Sanitation Program Report (February 11, 2020), available at <https://www.mass.gov/doc/massachusetts-alcohol-and-substance-abuse-center-masac-in-plymouth-january-30-2020/download>.

99. Since the lockdown began, MASAC patients have been confined to their cells all day. They are allowed to leave only to use the bathroom, go to medication line, or use the telephone.
100. Because the cells are so small, social distancing is not possible if the patient has a cellmate.
101. There is only one bathroom for each unit. Patients are allowed to leave their cells at any time to use the bathroom. There is no soap in the bathroom. Patients must bring their own soap to the bathroom.
102. Correctional officers and Wellpath staff at MASAC do not always wear the masks that are supplied to them.
103. DOC has not provided patients with masks. Patients are not allowed to cover their face with masks they make themselves using a shirt or other material.
104. No patients at MASAC have been tested for COVID-19. Newly admitted patients are not tested for COVID-19.
105. The average stay of Section 35 patients at MASAC is about 30-40 days and the rapid turnover of the population makes it impossible to adequately screen newly admitted residents.
106. The Men's Addiction Treatment Center (MATC) – the only DPH licensed Section 35 facility for men—is operating at about one-third of capacity as the number of Section 35 commitments drops, and treatment is still provided there.
107. Since there are many empty beds at MATC no one may be lawfully committed to MASAC or Hampden under Section 35 unless the court makes “a specific finding that the only appropriate setting for treatment for the person is a secure facility.”
108. Although Section 35 authorizes the superintendent of MASAC to release a patient at any time if she determines that release will not result in the likelihood of serious harm, the superintendent has not conducted a release review for any patient prior to the mandatory 30-day review since the COVID-19 emergency began.
109. The superintendent has not transferred any patient from MASAC or Hampden to MATC or any DPH licensed Section 35 facility since the COVID-19 emergency began.

Dated: April 17, 2020

Respectfully Submitted,

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