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WRITTEN TESTIMONY OF PRISONERS' LEGAL SERVICES FOR THE SECTION 35 COMMISSION

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Introduction

Prisoners' Legal Services (PLS) greatly appreciates the work of this Commission and welcomes the opportunity to present written testimony. PLS is a non-profit law office that for over 40 years has provided civil legal assistance to incarcerated people in Department of Correction and county custody throughout Massachusetts.

We urge the Commission to address an important obstacle to effective treatment and recovery: the incarceration of Section 35 patients. Some 38 states permit civil commitment of people with substance use disorder (SUD), but Massachusetts is the only state that holds them in a prison. In 2016 the Commonwealth ended this practice for women because the members of the Legislature and the Baker Administration understood that sending people to a correctional institution for treatment is not just morally wrong, it is not evidence-based and is counter-therapeutic. Since then, however, we have expanded reliance on prison and jails to house civilly committed men, rather than establishing more inpatient treatment centers. About three-quarters of male Section 35 beds are now in correctional institutions. And this is no longer limited to the DOC: the Hampden County Sheriff's Office has converted empty space inside the House of Correction to a Section 35 unit. With jail and prison populations dwindling throughout the state, other Sheriffs may well seek to follow.

It is a cruel irony that Massachusetts is filling empty jail beds with vulnerable patients who have not been convicted or even charged with a crime, at a time when there is widespread recognition that too many people have been swept up into the criminal justice system. As the prison population declines, we should not use the vacant beds to incarcerate people who do not belong in a correctional setting. Not matter what euphemistic names they may be given by correctional officials, jails are not an appropriate substitute for inpatient treatment facilities. And the great majority of the public recognizes this. A poll released today finds about 70 percent of Massachusetts residents oppose using prisons or jails for involuntary addiction treatment.[1]

[1] Poll conducted for WBUR by MassInc Polling group, https://d279m997dpfwgl.cloudfront.net/wp/2019/05/Topline-2019-05-WBUR-Statewide-Pol-Opioids.pdf.

Placing people in prison because of a disease, no matter how much "treatment" it may offer, is stigmatizing and counter-therapeutic. It tells patients, as well as to their families and the wider community, that people with alcohol and substance use disorders are second-class citizens who don't deserve treatment in a therapeutic environment. The message is loud and clear: our society believes jail is good enough for people like them. For desperate patients and their families, treatment in prison may be better than nothing – it may even save lives in the short term. But families in crisis should never have to choose between the stigma and humiliation of treatment in prison and no treatment at all.

History

Massachusetts' leaders have acknowledged for three decades that imprisoning civilly committed SUD patients is inconsistent with proper treatment and also inconsistent with the correctional mission.

- In 1989, the Governor's Special Advisory Panel on Forensic Mental Health recommended that "only individuals who are subjects of the criminal justice system" should be committed to prison under Section 35.[2]
- In 2005, the Governor's Corrections Advisory Council recommended against incarcerating female Section 35 patients in MCI-Framingham.[3]
- In 2011, an independent consultant retained by the DOC, MGT, recommended that Massachusetts discontinue civil commitments to MCI-Framingham "as soon as possible."[4]
- In 2011, the Corrections Master Plan prepared by the Division of Capital Asset Management observed that civil commitment to correctional facilities was unique to Massachusetts, and recommended that these individuals be treated in non-correctional settings. It also pointed out that incarcerating patients at MASAC deprived the Commonwealth of reimbursements from Medicaid and Medicare, and that it reduced DOC's ability to provide treatment to sentenced prisoners.[5]
- In 2015, Governor Baker's Opioid Working Group recommended that the Commonwealth transfer responsibility for all Section 35 civil commitments from the DOC to the Executive Office of Health and Human Services, stating: "It is important that treatment occur in a clinical environment, not a correctional setting, especially for patients committed civilly under section 35 of chapter 123 of the General Laws."[6]

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[2] Commonwealth of Mass., Governor's Special Advisory Panel on Forensic Mental Health, *Final Report* 33 (1989).
[3] Commonwealth of Mass., Dep't of Corr. Advisory Council, *Final Report* 5 (2005).
[4] MGT of America, Inc., Analysis of Health Care Costs in the Massachusetts Department Of Correction 17, 78 (2011).
[5] Division of Capital Asset Management, The Corrections Master Plan-The Final Report (2011).
[6] *See* Recommendations of the Goveror's Opioid Working Group, https://www.mass.gov/files/2017-08/recommendations-of-the-governors-opioid-working-group.pdf

When Governor Baker in 2016 announced legislation ending the incarceration of female patients, he said, "Now, women with substance use disorder who are civilly committed for substance use disorder will not be sent to MCI Framingham and will get real treatment instead of jail time."[7] The Chair of this Commission, Secretary Marylou Sudders, rightly said, "Drug misuse is not a crime. It's an illness and we need to treat it as such . . . Since 1987 the Commonwealth has stated its commitment to ending this practice. Finally, the day has come."[8] The Administration shifted Section 35 treatment resources for women from MCI Framingham to treatment settings such as the Women's Addiction Treatment Center (WATC). Under Secretary Sudders' leadership, it created a Section 35 facility for women with co-occurring mental illness and those requiring secure treatment, the Women's Recovery from Addiction Program (WRAP) at Taunton State Hospital, as well as a unit for Section 35 women needing medical care in Lemuel Shattuck Hospital (LSH). These actions were a vital step in the right direction.

Massachusetts has taken the opposite path for men, expanding Section 35 capacity in correctional institutions rather than establishing new treatment facilities. When the DOC's Massachusetts Alcohol and Substance Abuse Center (MASAC) moved from Bridgewater to its current Plymouth location in 2017, it increased the number of Section 35 prison beds from 181 to 251. When DOC signed a Memorandum of Understanding with the Hampden County Sheriff in 2018, it added an additional 80 beds, 48 of them in a standard housing unit inside the House of Correction in Ludlow. We now have some 330 male Section 35 beds under correctional supervision and only 108 civilian beds in the lone civilian facility, the Men's Addiction Treatment Center (MATC). Further, there is no male facility, except in a correctional institution, for those requiring secure treatment such as the WRAP and Lemuel Shattuck units for women.

In January 2019 Rep. Ruth Balser and Sen. Cindy Friedman introduced legislation to do for men committed under Section 35 what the Commonwealth has already done for women: ensure treatment in appropriate treatment facilities and not in correctional institutions. And in March 2019 PLS filed suit with the same objective. See *Doe v. Mici*, No. SUCV 19-0828 (March 14, 2019).

Effects of Incarceration under Section 35

Witnesses before the Section 35 Commission described the harm of incarceration.

During its December 6, 2018 hearing, this Commission heard heart-wrenching testimony from former patients who were held in MASAC and from their family members.

- Zachary Wallace described it as "punishment based" and recounted the use of solitary confinement for minor infractions. He recounted that the Corrections Officers who guard the patients "would call you junkies, losers, whatever." While previously he had been

[7] https://www.mass.gov/news/governor-baker-signs-legislation-ending-civil-commitments-at-mci-framingham-for-substance-use.

[8] *See* web.archive.org/web/20160209002502/http://www.mass.gov/governor/press-office/press-releases/fy2016/lt-gov-polito-opens-addictions-program-in-taunton.html

sober for a year after MATC, he relapsed immediately after his Section 35 incarceration. "I really got nothing out of MASAC."

- Zachary's mother, Robin Wallace, is an addiction counselor with the Department of Mental Health who was formerly the clinical director of WATC. She talked about the importance of trauma-informed care in addiction, and said, "If you're not going to help somebody, don't hurt them, and I do think men are being hurt."

  She spoke from bitter experience. Her son, Zachary's brother Sean, went to MASAC after she sectioned him in 2017. Sean described it as "torture" during a 2017 WBUR interview after his release, telling the reporter, "I feel scared all the time. I feel like this is just a dream and I'm going to wake up and be back there. I shake a lot and I'm just not the same as when I went in there."[9] Zachary told the Commission of his brother's suicide in early 2018, when Sean was held in the Barnstable County Jail, which brought back the terror Sean had felt in MASAC. Robin also linked the suicide to MASAC. "I think that Sean's trauma from Section 35 was very much triggered by him being in a cell and he just felt like he couldn't take it anymore," she told WBUR.

- Joel Kergaravat talked about his experience in MASAC after his June 28, 2018 commitment. He testified that the first thing he saw at MASAC was a sign saying "what kind of shit are you?" Then he was strip searched. "The shame was palpable." Diagnosed with Post Traumatic Stress Disorder (as many with SUD are, he pointed out), he said he still has nightmares about his stay. When there were two overdoses during his stay, and he asked a CO how it happens, the CO said "better question is, who cares? That's one less junkie the state has to worry about." The experience made his recovery harder. "You think about that next drug you're going to have, and how it's going to be worth it." He had been clean for six months "in spite of MASAC, not because of it."

Section 35 incarceration causes trauma.

PLS has met with dozens of MASAC patients since the Plymouth facility opened in 2017. Consistently, they tell us stories similar to those heard by the Commission. As recounted in the PLS complaint, patients describe a traumatic environment where threats and insults from COs are constant ("pussy," "bitch," "your mother's a whore"), and even small rule infractions or symptoms of withdrawal can be met with 24-hour solitary confinement. The humiliations are constant, beginning with the strip search on entry and continuing throughout their stay. Patients experience a deep sense of shame and loss of dignity. They do not understand why they are in prison if what they need is treatment and they haven't broken the law. Many describe MASAC as the worst experience of their lives. Many family members have told us that they would never have "sectioned" their sons, brothers, or husbands had they known they might be placed in a prison.

[9] https://www.wbur.org/commonhealth/2019/03/26/section-35-suicide-sean-wallace

At MASAC, treatment is secondary to security, with correctional staff vastly outnumbering treatment staff. Patients receive even less programming than the minimum four hours per day required by DPH regulations, 105 CMR 164.133(D)(3), and programs are often cancelled or cut short without explanation. Patients receive virtually no treatment for their co-occurring serious mental illnesses. If they are at risk of suicide or self-harm, they are placed in the same solitary confinement cells as those being punished for misconduct, where they are monitored by correctional staff with virtually no therapeutic intervention.

There is no evidence that commitment to MASAC has any of long-term benefit. To the contrary, the 2017 Ch. 55 Data Brief presented to the Commission noted that opioid deaths were 120 times higher for persons released from Massachusetts jails and prisons than the rest of the adult population. The trauma of incarceration exacerbates the difficulties experienced by Section 35 patients after release. Even treatment staff at MASAC have told patients that most of them will use again the first day they get out. Not surprisingly, relapses and overdoses shortly after discharge are extraordinarily common.

Even a well-run Section 35 program in a correctional facility is stigmatizing and counter-therapeutic.

Even if a Section 35 program, such as the one in the Hampden County Correctional Center, is a vast improvement over the harsh and degrading conditions at MASAC, its essential nature cannot be smoothed over. As one Hampden County patient told us, "It is still a jail." Time and again, Section 35 patients have told PLS, in shock, "I can't believe I'm in a jail. I didn't break any law."

Putting people in a correctional institution instead of a treatment facility reinforces and perpetuates the stigma that makes recovery so difficult. Family, employers, and friends commonly believe they must have done something criminal. Incarceration can negatively affect their personal relationships, prospects for employment, housing, willingness to continue in treatment after release, and other factors that are critical to the long term ability to stay clean and sober.

Jailing people under Section 35 also directly undermines the Baker Administration's campaign to make Massachusetts a become a "State Without Stigma." The Administration has well summarized the corrosive effects of shame and stigma on its website, Mass.gov, which says:

> The stigma of drug misuse keeps people from seeking treatment. Words like "junkie," "addict," and "druggie" can hurt, damaging self-image and standing in the way of recovery. Addiction is not a choice. It's a chronic disease similar to diabetes, heart disease and arthritis. Get the facts and embrace a community that needs our support. Join us as we make Massachusetts a #StateWithoutStigma."[10]

[10] https://www.mass.gov/state-without-stigma

It is hard to take this campaign seriously when Massachusetts is the only state in the country that sends people to correctional institutions solely because they have a substance use disorder. If we wish the community to embrace SUD as the public health crisis it is, making correctional institutions the primary site for treatment is counter-productive and irrational. Family members are desperate to get treatment for their loved ones, but they feel betrayed by Section 35. They do not want their loved ones to be placed in a correctional institution but nothing else is available under Section 35. They deserve better.

Resources are better invested in civilian settings, rather than expanding Section 35 capacity in prisons and jails.

As the prison population drops in state and county facilities, re-purposing correctional beds for Section 35 may appear cost-effective. But the Commission should look carefully at the assumptions underlying that claim. Should correctional resources be re-invested in public health agencies as prison populations go down? Should empty prison beds be filled with individuals who aren't charged with crimes, or should resources instead be re-directed towards badly needed programming and medical/mental health/SUD treatment for pretrial and sentenced prisoners? Sheriff Cocchi himself acknowledges to the Commission that his pretrial and sentenced prisoners do not get the same quality SUD treatment as the Section 35 prisoners. Sheriff Cocchi is rightfully proud of his low recidivism rate compared to other counties, but still over 40% of discharged prisoners are convicted of new crimes within three years of release from his facility. There is much more the Sheriff could do to protect public safety by expanding programs for individuals who are appropriately confined to his institution.

Further, although it may be difficult in the short-term to establish a new Section 35 facility in the community, especially in Western Massachusetts, the long-term savings are likely to be considerable given the high cost of correctional housing and the inability to get reimbursement from federal Medicaid or Medicare programs.

Finally, if we open the door to expanding Section 35 in county jails and houses of correction, many more counties, with less enlightened leadership, may seek to fill empty beds with Section 35 patients. When patients are overseen by correctional staff, rather than treatment staff, the harsh, punitive and traumatizing climate described at MASAC is hard to avoid. And we will be led further down the path of shame and stigma, and away from the Commonwealth's own recognition that prison is not the place for patients.

Placing Section 35 patients in correctional facilities is unlawful.

Imprisoning people solely because of a medical condition and disability is not only bad policy, it is unlawful.

- The disparate treatment of men and women under Section 35 constitutes unlawful gender discrimination in violation of the Massachusetts and United States Constitutions. Women committed under Section 35 can only be sent to inpatient treatment facilities, even if the committing court finds that they need a secure facility. By contrast, men go to a

correctional facility whenever there are no other available Section 35 treatment beds, regardless of their actual security needs.

- Confining men to a correctional institution because of their disease also constitutes unlawful disability discrimination. It is a vestige of past times when alcoholism and substance use disorders were seen as shameful, even criminal, moral failings. We do not incarcerate people for any other medical condition or disability. The practice subjects men to stigma and punishment instead of treatment, perpetuates unwarranted negative stereotypes, and reinforces the perception that they are second-class citizens who deserve no better.

- The practice also violates Section 35 patients' fundamental right to due process of law under the U.S. and Massachusetts constitutions. The constitution requires treatment that accords with the exercise of professional judgment. Unless there were no alternative, no doctor would choose a correctional setting for addiction treatment for a person who is not facing criminal charges. The courts have ruled repeatedly that the expense and administrative difficulties of establishing an appropriate treatment environment is no excuse for violating the constitution.

Conclusion

PLS urges the Section 35 Commission to recommend ending the incarceration of Section 35 patients and to recommend that resources be instead invested in inpatient treatment facilities similar to what are now available for all women committed under Section 35.