

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
No. SJC-12926**

---

**COMMITTEE FOR PUBLIC COUNSEL SERVICES and  
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,  
Petitioners**

**v.**

**THE CHIEF JUSTICE OF THE TRIAL COURT, et al.  
Respondents**

---

**EMERGENCY PETITION OF PROPOSED INTERVENOR  
PRISONERS LEGAL SERVICES OF MASSACHUSETTS**

Prisoners' Legal Services of Massachusetts' has for nearly fifty years fought for the safety and welfare of incarcerated people in Massachusetts. Now, as COVID-19 enters Massachusetts prisons and jails, these individuals are faced with potential catastrophe. PLS fully supports the Emergency Petition filed by the Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Lawyers ("the Petition"). PLS files this petition in order to ensure that the experiences of the people living in our correctional facilities are fully heard, and so that our expertise and knowledge can be utilized in developing a solution to this unprecedented threat to the health and safety of both prisoners and correctional staff.

**I. Interest and Expertise of the Petitioner**

Prisoners' Legal Services (PLS) is a not-for-profit legal services corporation founded in 1972 that provides civil legal assistance to people who are incarcerated in Massachusetts state prisons and county jails and houses of correction. PLS' mission is to defend all prisoners' legal, civil and human rights, and to advocate for reform of the correctional system

through litigation, individual advocacy, education, and public policy work. Its priorities are (1) inadequate medical and mental health care (2) extreme conditions of confinement (3) excessive use of force (4) solitary confinement and (5) medical parole.

PLS' decades of litigation and advocacy give it a unique understanding of prison conditions and treatment. Many of our cases currently in litigation or various stages of compliance monitoring deal with matters directly relevant to the Petition, including parole, inadequate medical and mental health care, and extreme conditions of confinement.<sup>1</sup> PLS opens approximately 2000 new client intakes a year, many of which deal with inadequate medical or mental health care and unsafe or unsanitary conditions of confinement.<sup>2</sup> Every day, PLS receives dozens of letters and phone calls from prisoners. PLS staff also visit prisons and jails on an almost daily basis. It therefore has a unique understanding of the living conditions and daily experiences of the men and women confined in our prisons and jails.<sup>3</sup>

---

<sup>1</sup> See, e.g., *Reaves v. Department of Correction*, 404 F.Supp.3d 520 (D. Mass. 2019) (ruling that DOC is incapable of providing adequate medical care to quadriplegic prisoner and ordering his transfer to non-correctional hospital); *Briggs v. Department of Correction*, C.A. No. 1:15-cv-40162-GAO (2019 class action settlement providing accommodations to deaf and hard of hearing prisoners); *Fowler, et al. v. Commissioner of Correction*, C.A. NO. 1:15CV12298- NMG (2018 class action settlement mandating DOC provide prisoners access to modern Hepatitis C medications); *John Does 1-10 v. Commissioner of Correction*, Suffolk No. 1984-CV-00828 (2019 class action challenge to DOC confinement of men civilly committed under Section 35); *Archer v. Massachusetts Parole Board*, Suffolk No. 1384-CV-04149 (2018 Settlement Agreement governing parole revocation proceedings); *Battle, et al. v Sheriff, Bristol County*, Bristol C.A. No. 1873-cv-00020 (class action challenging solitary confinement practices and mental health care at the Bristol County House of Correction and Jail); *Buckman and Cruz v. Massachusetts Department of Correction*, SJC-12725 (declaring unlawful DOC's regulations implementing the medical parole statute); *Cantell, et al. v. Commissioner of Correction, et al.*, Suffolk C.A. No. 1284-cv-00250 (class action on behalf of all prisoners who are or will be confined in long term non-disciplinary solitary confinement seeking to protect their due process rights); *Todd v. Commissioner of Correction*, Suffolk C.A. No. 1884-cv-03972 (challenge to extreme and unreasonable visitation restrictions in the Department of Correction); *Pearson v. Hodgson*, Case No. 1:18-cv-11130 (class action challenge to exorbitant prison telephone costs); *Minich, et al. v. Department of Correction*, Norfolk C.A. No. 1584CV00278 (class action settlement based on excessive and unnecessary use of seclusion and restraint at Bridgewater State Hospital); *Converse v. Massachusetts Department of Correction, et al.*, Suffolk C.A. No. 18-3295 (serious injury to prisoner with developmental disabilities assaulted by officers while on mental health watch).

<sup>2</sup> Since Jan. 1, 2020, PLS has opened 600 new intakes, 140 of which related to inadequate medical or mental health care, and 100 of which related to unsafe or unsanitary conditions of confinement.

<sup>3</sup> For example, just since January of this year, PLS visited more than 100 prisoners who have complained about excessive force and extreme conditions at Souza Baranowski Correctional Center.

PLS has also filed 14 petitions for medical parole and has provided assistance and advice on medical parole to attorneys and family members. With the advent of COVID-19, PLS is attempting to file as many additional petitions as possible, and is working with the DOC, the DOC's medical provider, members of the Legislature, and community nursing homes to find as many placements as possible.

PLS participates in official commissions and oversight bodies such as the Restrictive Housing Oversight Committee and Special Commission to Study the Health and Safety of LGBTQI prisoners. PLS also engages in policy advocacy, participating actively in the passage of the 2018 Criminal Justice Reform Act and other initiatives to improve policy related to prisons and prisoners. PLS additionally plays a leadership role in the Coalition for Effective Public Safety, a group of community organizations engaged in reform of the criminal justice system.

PLS is no bystander to the COVID-19 crisis. Staff members receive daily communication from incarcerated people, their family members, doctors, attorneys and even from prison staff, and have been in constant dialogue with correctional administrators and public safety officials. Many PLS clients are geriatric or otherwise especially vulnerable to death and serious complications from COVID-19. Many do not have pending criminal cases or appeals, and are, therefore, unrepresented by CPCS or MACDL attorneys. PLS is effectively their only recourse for the protection of their legal rights.

PLS is thus a significant stakeholder in this crisis, with an obligation to seek relief for its clients and significant resources to bring to the table. Without immediate action some of its clients will die. On March 21, 2020 the first Massachusetts prisoner tested positive for COVID-19, and by March 29, twelve prisoners and seven correctional staff persons had tested positive. PLS understands that two of the twelve diagnosed prisoners have already had to be hospitalized for treatment. This number will soon increase exponentially since COVID-

19 cannot be controlled in a correctional setting. In New York City's Rikers Island jail, the rate of infection is seven times higher than in the rest of the city and 87 times higher than in the U.S. overall,<sup>4</sup> and the number of infected prisoners has soared even as the City has reduced its jail population to reduce the risk.<sup>5</sup> COVID-19 is like a tsunami that is now approaching the Massachusetts correctional system. Once it strikes it will be too late. This petition seeks to ensure that immediate action is taken to protect the PLS clients from grievous harm up to and including death.

## **II. Relief Sought**

PLS endorses the relief sought by the Petitioners and welcomes the appointment of the Special Master as ordered by the Court on March 25, 2020. If granted intervenor status, PLS will bring its unique knowledge and expertise to assist the court in developing and implementing appropriate relief.

PLS seeks relief beyond that sought in the Petition, including: (1) the release of all individuals civilly committed to a correctional facility under G.L. c.123 § 35, whether held at the Massachusetts Alcohol and Substance Abuse Center operated by the Department of Correction or the Hampden County Jail and House of Correction; (2) consideration for release of all persons civilly committed to the Massachusetts Treatment Center who have not been adjudicated a sexually dangerous person under G.L. c. 123A, § 14, as well as all persons committed to Bridgewater State Hospital for evaluation of competency or criminal responsibility; (3) no person should be categorically excluded from relief due to the underlying criminal offense, without consideration of actual dangerousness; (4) consideration for release of all individuals over 50, regardless of whether they are sentenced under G.L. c

---

<sup>4</sup> See "Prisoners At Rikers Say It's Like A 'Death Sentence' As Coronavirus Spreads," Huffington Post, March 20, 2020, available at [https://www.huffpost.com/entry/rikers-prisoners-coronavirus\\_n\\_5e7e705ec5b6256a7a2a995d](https://www.huffpost.com/entry/rikers-prisoners-coronavirus_n_5e7e705ec5b6256a7a2a995d) (accessed March 30, 2020).

<sup>5</sup> As of Monday, March 30, at least 167 people currently detained in New York City jails had COVID-19, an increase of more than 60 percent since Friday, March 27. Another 114 jail staff members had also tested positive for the illness. <https://queenstown.com/all/2020/3/30/at-least-167-nyc-inmates-114-jail-staffers-now-have-covid-19>

265; (5) an order that the Parole Board (a) shall explicitly consider COVID-19 when it evaluates whether release is “incompatible with the welfare of society” under G.L. c. 127, § 130, and (b) shall 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.

**A. Men incarcerated pursuant to G.L. c. 123, § 35**

The Court should address the plight of people civilly committed to correctional facilities for treatment of alcohol and substance use disorders (SUD) under G.L. c. 123, § 35, which was not raised by Petitioners. Nearly 250 men are currently civilly committed under Section 35 to the DOC’s Massachusetts Alcohol and Substance Abuse Center and the Section 35 program run by the Hampden County Sheriff’s Office under agreement with the DOC.<sup>6</sup> The rapid turnover of this population, with stays averaging only 30-40 days, heightens the danger of community transmission since effective intake screening is impossible. This population has particular vulnerabilities to COVID-19, as they have high rates of hepatitis C and other infectious diseases and are generally in poor health.

Further, the congregate living arrangements and group programs make it extremely difficult or impossible to provide social distancing. Several MASAC patients on March 25 filed a motion in *Briggs v. Dep’t of Corr.* (D. Ma. No. 1:15-cv-40162-GAO), stating that during the COVID outbreak over 80 patients eat together in the dining hall “inches in proximity.” The motion also contains multiple affidavits describing the use of unclean portable toilets. Finally, PLS’ extensive investigation of the conditions under which these men are held, undertaken in separate litigation<sup>7</sup> has produced dozens of consistent accounts describing unsanitary conditions during the initial detoxification period, including blood, urine, vomit and feces, with extremely limited cleaning.

---

<sup>6</sup> See DOC Weekly Count Sheets for March 23, 2020. <https://www.mass.gov/doc/weekly-inmate-count-3232020/download>

<sup>7</sup> *Doe et al. v. Mici et al.* (Suffolk Super. No.. 1984CV00828).

The purpose of Section 35 confinement is negated by the fact that, according to the affidavits filed in the *Briggs* case, only 0-2 substance use disorder classes are held each day. The state is exposing a vulnerable population of men with SUD, not charged with any crime, to the potentially deadly risks of the COVID-19 outbreak – while at the same time having little or no ability to safely continue treatment programs.

**B. People Civilly Committed at the Massachusetts Treatment Center and Bridgewater State Hospital**

The largest outbreak so far of COVID-19 is at the Massachusetts Treatment Center. As of March 27, ten prisoners, one medical staff person, and one correctional staff person tested positive for COVID-19. The Court should consider this population eligible for relief, particularly those who have completed their criminal sentence, and who have not been adjudicated a sexually dangerous person under G.L. c. 123A, § 14. The Massachusetts Treatment Center is on the same complex as Bridgewater State Hospital. Relief for persons at Bridgewater State Hospital should also be implemented, particularly for those committed for evaluation of competency or criminal responsibility, but not determined to need hospital level care.

**C. Individuals over 50 and those Convicted of Chapter 265 offenses.**

The Petition asks for release of all men over 60 only if they have not been sentenced for “crimes against the person” under G.L. c. 265. *See* Petition at 30. By contrast, it seeks release of all persons with “a condition or disease that puts them at increased risk of severe COVID-19 complications and death. *Id.* This is unreasonably restrictive for several reasons.

First, advanced age is itself a condition which places a person at increased risk for suffering complications or death from COVID-19, and therefore age should be treated as any other such condition. According to the Center for Disease control, 8 out of 10 deaths from COVID-19 have been persons 65 years old or older, with this age group disproportionately

requiring hospitalization and intensive care.<sup>8</sup> At least one new study has placed the age of increased risk far lower, with people age 50 and older being “around 2-and-a-half times more likely to progress to a severe case of COVID-19.”<sup>9</sup> Furthermore, prisoners are subject to “accelerated aging” and are generally considered old at age 50 or 55 because of their generally poorer underlying health history and conditions in prison.<sup>10</sup>

[A]round age 50 prisoners start to contend with the health problems more often associated with people far older. The stress of staying safe behind bars, personal financial woes, drug or alcohol withdrawal, and a history of poor health care can speed up the aging process for inmates... Most recent studies on the subject have found that prisoners in their 50s start showing signs of deteriorating health that those outside prison don't see until significantly later. In 2007, three Pennsylvania researchers interviewed 51 male inmates in their state with an average age of 57.3 years and 33 men in the community with an average age of 72.2. They found that between the two groups, rates of high cholesterol, high blood pressure, poor vision, and arthritis suggested that the health of male inmates was comparable to men 15 years older. Dr. Brie Williams, a professor of medicine at the University of California, San Francisco, worked on a 2012 survey of 247 male and female inmates at the San Francisco County Jail with an average age of 59. They reported having poor or fair health, chronic lung disease, and recent falls, at rates similar to people on the outside who are 71.7 years old.<sup>11</sup>

Secondly, no person should be categorically excluded from relief due to the underlying criminal offense, without consideration of actual dangerousness. As discussed in PLS' Amicus Letter, Chapter 265 includes a wide range of offenses not all of which are even

---

<sup>8</sup> <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html> (visited March 29, 2020).

<sup>9</sup> See “Study Calculates Just How Much Age, Medical Conditions Raise Odds Of Severe COVID-19,” National Public Radio, <https://www.npr.org/sections/coronavirus-live-updates/2020/03/22/819846180/study-calculates-just-how-much-age-medical-conditions-raise-odds-of-severe-covid> (accessed March 30, 2020).

<sup>10</sup> See Public Health Behind Bars, Chapter 5, Growing Older: Challenges of Prisoner and Re-entry for the aging population, p. 56 (2007) (“In the community, geriatrics is the discipline of medicine specializing in care of the aged, defined as 65 years and older. In prison, the age at which an inmate is deemed ‘geriatric’ varies from state to state (Lemieux, Dyeson, & Castiglione, 2002). In some states, inmates as young as 50 are defined as geriatric; in other states, inmates are not considered geriatric until they reach age 55 or 60 (Anno et al., 2004; Lemieux et al., 2002). Despite these differing definitions, there is consensus that inmates undergo a process of accelerated aging compared to their age-matched counterparts outside of prison (Aday, 2003)); see also Brie A. Williams, MD et al., “Addressing the Aging Crisis in U.S. Criminal Justice Health Care,” *J. Am. Geriatric Soc.* 2012 Jun; 60(6): 1150–1156 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3374923/> (visited March 29, 2020) (“‘Accelerated aging’ takes into account the high prevalence of risk factors for poor health that are common in incarcerated persons, such as a history of substance abuse, head trauma, poor healthcare, and low educational attainment and socioeconomic status.4,5 While empirical studies of accelerated aging in prisoners are lacking, research shows that incarcerated individuals age 50 or older are significantly more likely to suffer from one or more chronic health conditions or disability than their community-dwelling counterparts.”).

<sup>11</sup> Maurice Chammah, “Do You Age Faster in Prison?” (Marshall Project, August 4, 2015) available at <https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison> (visited March 29, 2020).

felonies, and it is not appropriate to block relief for all convicted under that statute. Medical parole does not exclude this group of offenses, see G.L. c. 127, § 119A, and it makes no sense to exclude them from COVID-19 relief.

Third, it is well known that people largely “age out” of crime, meaning prisoners over the age of 50 simultaneously are at high risk for COVID-19 and low risk to public safety. Many of those convicted of more serious Chapter 265 offenses have already spent decades in prison and no longer pose any threat to public safety. It is irrational to categorically assume that geriatric prisoners convicted under Chapter 265 are more dangerous than younger prisoners convicted of non-Chapter 265 offenses.

#### **D. Parole**

The relief requested in the CPCS/MACDL petition excludes from accelerated parole consideration persons who were convicted under Chapter 265. As stated above, no person should be categorically excluded on this basis and the relief considered in this case must be inclusive and comprehensive in order to mitigate the threat of COVID-19.

In addition, the Parole Board has suspended hearings for those serving life sentences because these hearings “are open to the public and frequently involve multiple witnesses and spectators.” Response to Petition by the Chief Justice of the Trial Court, DOC, Parole Board, Probation Service, and The Attorney General, p. 15 (citing Affidavit of Parole Board Chair Gloriann Moroney, ¶ 11). Yet many or most prisoners serving life sentences have spent decades in prison, are vulnerable due to age, and long ago aged out of dangerousness; they should not be discriminated against because of COVID-19. The Parole Board has also cut back on House of Correction hearings as it tries to implement video hearings. *Id.*

PLS asks that the Board be allowed to grant parole without holding a hearing if it concludes the person poses no demonstrated risk to public safety. More generally, consistent with proposed Legislation, PLS requests that the Board grant parole to all prisoners at the



time of eligibility “unless it determines by clear and convincing evidence that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will not live and remain at liberty without violating the law.” See H. 1541 (“An Act Establishing Presumptive Parole”). Furthermore, in determining whether or not release would be “incompatible with the welfare of society,” as required by G.L.c. 127, § 130, the Board must expressly consider whether the failure to release would adversely impact efforts to control the spread of COVID-19.

### **III. Legal Claims**

PLS endorses the legal claims set forth in the CPCS/MACDL petition. In addition, releases are mandated under the Due Process Clause and the Eighth Amendment to the U.S. Constitution.

#### **A. Violations of the Due Process Rights of Pre-trial Detainees and Individuals Civilly Committed.**

In *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 - 74 (2015), the Supreme Court held that a pretrial detainee alleging excessive force in violation of the Due Process Clause of the Fourteenth Amendment must show only that the use of force was “objectively unreasonable.” In contrast to cases brought by sentenced prisoners under the Eighth Amendment, “the defendant’s state of mind is not a matter that a plaintiff is required to prove.” *Id.* at 2472. After *Kingsley*, numerous courts have held that subjective motive or intent has no role to play in any form of condition-of-confinement case brought by pre-trial detainees or those civilly committed to correctional facilities, not just those involving excessive force. See *Hardeman v. Curran*, 933 F.3d 816 (7th Cir. 2019); *Colbruno v. Kessler*, 928 F.3d 1155, 1161–63 (10th Cir. 2019); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017); *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (en banc).

Accordingly, the continued confinement during the COVID-19 emergency of (a) pretrial detainees, including individuals committed to Bridgewater State Hospital under G.L.

c. 123 for evaluation of competency or criminal responsibility, and who pose little risk to public safety; (b) men civilly committed to correctional facilities under G.L. c. 123, § 35; and (c) men civilly committed to the Massachusetts Treatment Center but not adjudicated a sexually dangerous person under G.L. c. 123A, § 14, violates their due process rights under the Fourteenth Amendment and article 12.

**B. Violations of the Eighth and Fourteenth Amendment Rights of Sentenced Prisoners.**

Conditions that pose an unreasonable risk of death or serious harm to the health of sentenced prisoners violate the constitutional protections of the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition”); *Good v. Comm’r of Corr.*, 417 Mass. 329, 336 (1994) (“An inmate need not wait until he suffers actual harm . . . a claim is made out if there is a substantial risk that the inmate will suffer serious harm as a result of the conditions of his confinement”). By their policies, practices, acts, and omissions, the Department of Correction, the Parole Board, and the County Sheriffs are subjecting sentenced prisoners, particularly those who are elderly or medically compromised, to an imminent risk of serious infection or death from COVID-19 in violation of the Eighth Amendment and Article 26. Finally, in interpreting article 26 PLS submits that the Court should apply the *Kingsley* standard, thereby making the subjective intent or good faith of correctional officials irrelevant.

**CONCLUSION**

The crisis in Massachusetts jails and prisons, as nationally, is without precedent. The extent of the danger to prisoners, staff, and the general public is impossible to calculate but certainly extreme. As the state-wide provider of civil legal services to Massachusetts

prisoners, PLS has a unique role to play in crafting a response to this crisis and a legal duty to represent the interests of its clients. The relief sought in this Petition will save lives.

Dated: March 30, 2020

Respectfully submitted,

PRISONERS' LEGAL SERVICES OF  
MASSACHUSETTS

/s/

---

ELIZABETH MATOS, BBO # 671505  
JAMES PINGEON, BBO # 541852  
BONITA TENNERIELLO, BBO # 662132  
JESSE WHITE, BBO #673332  
Prisoners Legal Services  
50 Federal Street, 4<sup>th</sup> Floor  
Boston, MA 02110  
(617) 482-2773  
[lmatos@plsma.org](mailto:lmatos@plsma.org)  
[jpigeon@plsma.org](mailto:jpigeon@plsma.org)  
[btenneriello@plsma.org](mailto:btenneriello@plsma.org)  
[jwhite@plsma.org](mailto:jwhite@plsma.org)

Certificate of Service

I hereby certify that I have caused a copy of this motion to be served electronically upon each of the parties of record on March 30, 2020.

---

Bonita Tenneriello, Esq.