



Statement of the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights Regarding COVID-19 and Incarcerated Persons in the Commonwealth

April 16, 2020

Herein, the Massachusetts Advisory Committee informs the U.S. Commission on Civil Rights (Commission) about recent developments regarding the status of incarcerated persons in the Commonwealth of Massachusetts. On March 20, the Commission on Civil Rights called for adequate healthcare for prisoners during the COVID-19 pandemic, recognizing “the potential for serious health consequences for those incarcerated in prisons.” The Committee shares this concern. The Commission concluded that “[o]fficials should take all necessary steps to provide adequate treatment to those who are incarcerated.”¹

The Massachusetts Advisory Committee agrees and believes that to better address the looming crisis in correctional facilities, state officials should establish a clear, concise and transparent process for the timely release, absent demonstrable evidence that their release would endanger the public, of those who are: (1) juveniles; (2) have filed a Rule 30 motion for a new trial or whose case is pending on appeal and have filed a motion for a stay of execution of sentence; (3) eligible for parole; (4) set to be released within six months; (5) reincarcerated after violations of parole or probation that did not involve a new offense; (6) over sixty years of age; (7) suffering from a preexisting condition that heightens their risk of death from the virus; (8) eligible for medical parole; or (9) other persons that officials deem would not represent a danger to the community.

Currently, Massachusetts judges have postponed holding hearings for most motions and cases.² While the Supreme Judicial Court has ordered a review process for pretrial detainees and guaranteed hearings within 48 hours, they did not address wrongfully convicted individuals who have filed a Rule 30 motion for post-conviction relief and a motion to stay execution of sentence. These individuals must also be prioritized. Legislators may also facilitate release by authorizing courts to release incarcerated persons unless the Commonwealth can show they are dangerous.

We urge the Commission to recommend that executive and legislative branches act with speed and purpose to protect this vulnerable population. Governor Baker should exercise his full array of powers including clemency. He should also direct the Department of Correction and parole board to achieve these ends immediately. We must note, however, that Governor Baker’s clemency powers are rarely invoked, and historically the Parole Board has been slow in effectuating releases. While the board characterized that delay as “two weeks after a favorable decision,”³ the Council of State Governments Justice Center reported “People in

¹ <https://www.usccr.gov/press/2020/03-20-COVID-19-Detention-Prison-Healthcare.pdf>

² Massachusetts Court System Notice Regarding Operations In Response to the Covid-19 Pandemic, <https://www.mass.gov/news/trial-court-and-trial-court-departments-issue-orders-concerning-court-operations-and>.

³ <https://www.mass.gov/doc/sjc-12926-opinion/download>

DOC facilities remained incarcerated for an average of approximately 200 days after they had been approved for parole.”⁴ And a report by Prisoners’ Legal Services found that “the current average wait between the hearing and receipt of the written decision is 262 days, with the longest wait 537 days.”⁵

In today’s context, even two weeks can amount to a death sentence, the parole board’s record in these matters demands immediate and direct action by the governor on all of those awaiting parole.

Background: The Massachusetts Advisory Committee believes that the health and well-being of all residents are of paramount importance and should be considered our highest public policy priority. In recent weeks it has become clear that certain baseline conditions are required to protect individuals from contracting and spreading COVID-19 regardless of their circumstances.

An emergency decision issued on April 3, 2020, by the Commonwealth’s Supreme Judicial Court agreed “that the situation is urgent and unprecedented and that a reduction in the number of people held in custody is necessary.”⁶ Despite this finding, the court’s remedy was limited and insufficient to address the issue; the court’s ruling generally directed only the release of pretrial detainees. The court acknowledged that the executive and legislative branches are the appropriate bodies to direct the classes of incarcerated individuals that the Supreme Judicial Court lacks legal authority to reach.

In its court ordered response to questions about the conditions of confinement, state officials acknowledged that 72 percent of prisoners sleep within six feet of one another, while 70 percent eat within that distance. As of April 14, 2020, 4 prisoners have died, 140 have tested positive for the virus, as well as 120 employees of facilities.⁷ These conditions are more likely to intensify in conditions of well-documented overcrowding of Massachusetts prisons. For example, the Norfolk MCI is operating at 134 percent of capacity, Bristol Dartmouth facility at 278 percent, and the Suffolk Nashua facility at 122 percent.⁸

Much of the relief ordered by the court calls for processes that unduly delay action, particularly at a time when our systems are all under stress. While we understand the need for order and process, we believe the incarcerated deserve the same urgency as the public at large. Further, the state’s most recent response has been to confine prisoners in their cells for 23.5 hours a day -- a kind of confinement typically associated with punishment and known to cause additional mental and physical health problems if maintained over an extended period. As noted by petitioners and the court, these stringent conditions of confinement, and the unjust imposition of a higher risk of COVID-19 infection, raise issues related to prohibitions against cruel and unusual punishment under the Eighth Amendment, and due process rights under the Fourteenth Amendment of the U.S. Constitution.

We are aware that the Connecticut Advisory Committee has produced a statement of concern. We highlight directives issued by the New Jersey and Maryland judiciaries to reduce the risks to the incarcerated, which are attached to this Statement. We also note that our state

⁴ <https://csgjusticecenter.org/wp-content/uploads/2020/01/MA-JR-Summary.pdf>

⁵ <https://www.plsma.org/current-issues/parole-white-paper/>

⁶ <https://www.mass.gov/doc/sjc-12926-opinion/download>

⁷ <https://www.plsma.org/covid-19-in-ma-prisons-and-jails/>

⁸ <https://www.nbcboston.com/news/local/aclu-files-emergency-petition-to-protect-incarcerated-people-from-coronavirus/2096505/>

legislature is considering proposals to expand the authority of the Supreme Judicial Court to release prisoners threatened by COVID-19. We urge the Commission to recommend the governor draw upon these resources in the timely development of concrete plans.

As stated by various public health experts in their letter to the Supreme Judicial Court, “Unequal distribution of the social determinants of health produces discriminatory incarceration and exposes incarcerated people to great risk of developing serious cases.”⁹ This comment does not even address the stark disparities in race, prosecution, and sentencing in a state whose Supreme Judicial Court ruled it was not unreasonable for a Black person to flee the police rather than face the persistent humiliation and danger of racial profiling.

The incarcerated population of the Commonwealth reflects these persistent disparities. The current situation raises forms of disparate treatment by race, national origin, gender, age, and disability in the administration of justice. This is of utmost concern to us as the Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights whose mandate is to consider these very matters.

⁹ https://www.aclum.org/sites/default/files/field_documents/amici_letter_-_public_health_experts_-_cpcs_macdl_v._chief_of_trial_court_1.pdf