

**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**

**Prisoners' Legal Services of Massachusetts
Motion to Intervene**

Prisoners' Legal Services of Massachusetts (PLS) hereby moves to intervene in SJC-12926, *Committee for Public Counsel Services & another v. Chief Justice of the Trial Court & others* pursuant to Mass. R. Civ. P. 24. As the Commonwealth's sole provider of civil legal services to incarcerated people, PLS is a key stakeholder in these proceedings. The COVID-19 pandemic is now approaching the Massachusetts correctional system like a tsunami.¹ For the reasons discussed in the Amicus Letter PLS submitted in support of the Petition filed by CPCS and MACDL, the lives of PLS clients are in grave danger.

¹ New York City provides a terrifying example of what may be to come in Massachusetts. There, the rate of jail infection is seven times higher than in the rest of the city and 87 times higher than in the U.S. overall. 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 (accessed March 30, 2020). And the number of infected prisoners continues to soar even as the city reduces its jail population. As of March 30, at least 167 people currently detained in New York City jails have COVID-19, an increase of more than 60 percent since March 27. Another 114 jail staff members have also tested positive for the illness. <https://queenseagle.com/all/2020/3/30/at-least-167-nyc-inmates-114-jail-staffers-now-have-covid-19>.

PLS has nearly five decades of experience advocating for the human and legal rights of Massachusetts prisoners, visiting prisoners on almost a daily basis, and constantly communicating with them and their families by telephone and mail. Since many prisoners do not have pending criminal cases or appeals, they are not represented by the petitioners' attorneys. PLS therefore seeks to intervene to ensure that the experiences of all people living in our correctional facilities are fully heard, and so that its 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. Legal Standard for Intervention

Intervention is permitted as of right “when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.” Mass. R. Civ. P. 24(a)(2). *See Beacon Residential Mgmt., LP v. R.P.*, 477 Mass. 749, 752–53 (2017). In evaluating a motion for intervention, “the judge should take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections.” *Id.* (internal quotations and citations omitted).

Where intervention as of right is not appropriate, intervention may still be permitted “when an applicant's claim or defense and the main action have a question of law or fact in common.” Mass. R. Civ. P. 24(b)(2)

II. Prisoners' Legal Services has a substantial interest in the outcome of this matter

The type and degree of interest that suffice for intervention depend on “the nature of the action in which intervention is claimed.” *Beacon Residential Mgmt., LP*, 477 Mass. at 753.

Here, the Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Lawyers have filed an emergency petition pursuant to G. L. c. 211, § 3, requesting that the Court exercise its superintendence powers to stem the tide of COVID-19 and prevent needless death and permanent harm. The people affected by this petition, prisoners in Massachusetts prisons and jails who are at grave risk of exposure to COVID-19, are PLS' clients. PLS' mission is to “promote[] the safe, humane and lawful treatment of Massachusetts prisoners through civil rights litigation, administrative advocacy, client counseling, and outreach to policy makers and the public”² and it brings a wealth of expertise to bear on the subject of the petition.

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 in the county jails and houses of correction. It provides advice and guidance in response to a wide array of requests for assistance, and focuses in particular on five priority areas: (1) medical and mental health care (2) excessive use of force (3) extreme conditions of confinement (4) solitary confinement and (5) medical parole. PLS has gained unique expertise and understanding of prison conditions and practices from decades of advocacy and litigation. Many of our ongoing cases deal with matters directly relevant to the Petition, including parole, inadequate medical and mental health care, and extreme conditions of confinement.³

² <http://plsma.org/about-us/our-mission/>

³ 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)

PLS opens approximately 2000 new intakes each year to assist persons incarcerated in state prisons and county jails and houses of correction across the Commonwealth. 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. PLS has also petitioned for medical parole for fourteen people, and with the advent of COVID-19 it is attempting to file on behalf of as many eligible people as quickly as possible. It is currently working on four additional petitions and has a list of at least 10-15 more that it is preparing to file.

Throughout the COVID-19 crisis PLS has been in constant communication with incarcerated people (through our toll-free telephone and by mail), their family members, doctors, attorneys and even prison staff. PLS has also been in dialogue with correctional administrators and public safety officials. PLS staff members have visited more than 100 prisoners in the last two months to talk to them about a variety of topics including medical parole and severe conditions of confinement. It therefore has a deep understanding of how prisoners are responding to the COVID-19 emergency and has many eye-witness accounts about how

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).

correctional officials are implementing policies intended to minimize the spread of the COVID-19 virus.

PLS has developed unique and extensive knowledge of the prison system. The organization is deeply familiar with medical and correctional policies and practices and has in-depth insight into conditions of confinement that impact the health and safety of prisoners. Our staff understands the geography and lay out of prisons and jails as well as the limits of their capacity to address this unique public health crisis.

Addressing the grave danger COVID-19 poses to PLS clients is a matter of life or death. Massachusetts prisons and jails will inevitably be breeding grounds for COVID-19, likely causing illness and death at a rate far higher than the general population. 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.⁴ PLS understands that two of the twelve diagnosed prisoners have already had to be hospitalized for treatment. Our clients are begging for immediate and extraordinary action to protect them from infection and other harm from the prison response to COVID-19.

III. PLS' interests are not adequately represented by the current parties

“An applicant for intervention as of right has the burden of showing that representation may be inadequate, although the burden ‘should be treated as minimal.’ ” *Frostar Corp. v. Malloy*, 77 Mass. App. Ct. 705, 712, (2010)(quoting *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir.1978). “[T]he intervenor need only offer ‘an adequate explanation as to why’ it is not sufficiently represented by the named party. One way for the intervenor to show inadequate representation is to demonstrate that its interests are sufficiently different in kind or

⁴ <https://www.wbur.org/commonhealth/2020/03/23/coronavirus-massachusetts-prisoner>

degree from those of the named party.” *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006).

A. Many prisoners and detainees are not represented by the current petitioners.

As detailed in PLS’ amicus letter, it supports the action and relief requested by the petitioners in this case. However, most prisoners do not have pending criminal charges or appeals, and are therefore not represented by CPCS or MACDL attorneys. PLS’ institutional perspective is also somewhat different from that of the petitioners. CPCS and MADCL are organizations representing criminal defense attorneys with a strong interest in protecting the constitutional rights of defendants in active criminal proceedings. In contrast, PLS’ mission is to defend prisoners’ legal, civil and human rights and to advocate for their health and safety while they are incarcerated, as well as to advocate for fair parole proceedings, including medical parole, and appropriate reentry services.

B. The PLS Petition Seeks Relief Not Requested in the CPCS/MACDL Petition.

PLS endorses the relief sought by the Petitioner and welcomes the appointment of the Special Master as ordered by the Court on March 25, 2020. However, PLS seeks certain additional relief 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 265; (5) an order that the Parole Board (a) 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.

1. Persons civilly committed under G.L. c. 123 § 35 should be released

The Petition does not address the plight of individuals civilly committed to correctional facilities for alcohol and substance use disorders under G.L. c. 123, § 35. There are currently almost 250 individuals civilly committed to prisons and jails under Section 35.⁵ Concerns about the safety of these individuals are heightened because the rapid turnover of the population in these facilities makes it impossible to adequately screen newly admitted residents. The average stay is only 30-40 days. Furthermore, the congregate living arrangements and group activities make it extremely difficult or impossible to provide social distancing. The therapeutic purpose of their confinement has also been negated since treatment has virtually ceased.

2. Persons Civilly Committed to the Massachusetts Treatment Center and Bridgewater State Hospital should be considered for relief.

The largest outbreak so far of COVID-19 is at the Massachusetts Treatment Center, where many people are civilly committed as sexually dangerous persons. As of March 27, ten prisoners, one medical staff person, and one correctional staff person tested positive for COVID-19.⁶ The Court should consider this population eligible for relief, particularly those who have completed their criminal sentence, but have not been adjudicated a sexually dangerous person

⁵ There are 143 individuals at the Massachusetts Alcohol and Substance Abuse Center and 95 at Hampden County House of Correction. See DOC Weekly Count Sheets for March 23, 2020. <https://www.mass.gov/doc/weekly-inmate-count-3232020/download>

⁶ <https://www.wbur.org/commonhealth/2020/03/23/coronavirus-massachusetts-prisoner>

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 only for evaluation of competency or criminal responsibility, but not determined to need hospital level care.

3. Age should be treated the same as any other condition which creates an increased risk of death or serious complication from COVID-19

The petition seeks release of all persons with “a condition or disease that puts them at increased risk of severe COVID-19 complications and death.” *See* Petition at 30. However, it asks for release of all persons over 60 only if they have not been sentenced for “crimes against the person” under G.L. c. 265. Research has shown that people in the general population age 60 and older are at much higher risk for death and serious complications from COVID-19 that require hospitalization and intensive care.⁷ Advanced age is itself a condition which places a person at increased risk of severe COVID-19 complications and death, and relief should be provided equally to persons over 60 as it is to persons with other medical conditions that place them at increased risk.

PLS also suggests relief be considered for prisoners 50 and older. At least one new study has concluded that people age 50 and older are “around 2-and-a-half times more likely to progress to a severe case of COVID-19.”⁸ Setting the threshold at age 50 makes particular sense in the correctional context because prisoners are subject to “accelerated aging” and are generally considered old at age 50 or 55, as living conditions inside prisons are hard on physical and

⁷ <https://apps.who.int/iris/bitstream/handle/10665/331475/nCoVsitrep11Mar2020-eng.pdf>;
<https://www.medrxiv.org/content/medrxiv/early/2020/02/23/2020.02.20.20025510.full.pdf>;
<https://www.medrxiv.org/content/medrxiv/early/2020/02/25/2020.02.24.20027268.full.pdf>;

<https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html>
⁸ <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>

emotional health.⁹ Further, prisoners who are over age 50 have often already served decades of time, and no longer pose a threat to public safety. In general, people convicted of violent and sexual offenses are among the least likely to be rearrested¹⁰ and research is clear that as people grow older, they age out of crime.¹¹ Categorically excluding geriatric prisoners from relief on the basis of conviction will be counterproductive and needlessly risk lives and public health and safety.

4. G.L. c. 265 is not an appropriate categorical exclusion from relief

In several areas of requested relief for sentenced persons, the existence of a G.L. c. 265 conviction would act as a categorical bar to release. This is likely in service of ensuring that public safety concerns regarding release of sentenced persons are weighed against the individual and public health risks posed by keeping people incarcerated. Chapter 265, however, includes trivial offenses such as playing a radio without headphones on public transportation. See G.L. c. 265, § 42. And many of the most common chapter 265 crimes, such as assault or assault and battery, are merely misdemeanors. See G.L. c. 265, § 13A(a). Categorically barring persons from requested relief on the basis of conviction under G.L. c. 265 will impede the decarceration necessary to minimize needless death and public health disaster. No person should be

⁹ <https://www.wgbh.org/news/local-news/2018/05/20/with-aging-prison-population-massachusetts-looks-to-possible-cost-saving-compassionate-fix>; <https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison>; See also 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)); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3374923/> (““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.”)

¹⁰ <https://www.prisonpolicy.org/reports/pie2020.html>

¹¹ https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf

categorically barred from relief on the basis of their underlying conviction, without an actual determination of dangerousness.

5. Additional persons should be eligible for parole.

The CPCS petition excludes from accelerated parole consideration persons who were convicted under Chapter 265. PLS requests that no person should be categorically excluded on the basis of their crime in order to effectively mitigate the threat of COVID-19. In addition, the Parole Board has suspended hearings for those serving life sentences due to the public nature of those hearings. Lifers should not be discriminated against during the COVID-19 emergency. The Parole Board has also cut back on House of Correction hearings as it tries to implement video hearings. PLS asks that the Board permit the release of all prisoners who are parole eligible without a hearing unless it concludes the person poses a demonstrated risk to public safety. More generally, consistent with pending 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”). Further, the Parole Board should explicitly consider COVID-19 when it evaluates whether release is “incompatible with the welfare of society” under G.L. c. 127, § 130.

Conclusion

Prisoners’ Legal Services moves to intervene in the above captioned matter in order to expand the claims and requests for relief and to give the Court the benefit of its considerable knowledge and expertise in fashioning relief.

Respectfully submitted,

PRISONERS' LEGAL SERVICES OF
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Dated: March 30, 2020

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.

/s/

Bonita Tenneriello, Esq.