

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

ON A RESERVATION AND REPORT BY A JUSTICE OF THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

THE DEPARTMENT OF CORRECTION'S RESPONSE TO MOTION FOR
RECONSIDERATION OR MODIFICATION OF DECISION

The defendant Department of Correction ("Department") responds to the petitioners' Motion for Reconsideration ("Motion") to the extent the Motion concerns the Department. The Department states that the concerns raised by the petitioners in the Motion are properly addressed to and resolved by the Special Master for in the first instance.

FACTS

I. The Department's Data Reporting.

Since April 6, 2020, the Department has provided daily reports to the Special Master containing the information sought in Appendix B of the Opinion--its overall inmate population; the number of COVID-19 tests of inmates, and the number of positive results for all inmates, correction officers and other staff members (including contractors), and the number of inmates who have been released pursuant to the procedures or guidance set forth in this decision. The Department's COVID-19 Data spreadsheet for April 21, 2020, which shows these numbers on a daily basis, is attached and is explained further below.

As stated at argument, the Department cannot provide the number of COVID-19 tests of its correction officers or other staff members because it does not conduct COVID-19 tests of its staff -- staff are tested by their own private physicians or at testing sites for first responders--at this point the Department does not have the total number of tests or the number of negative tests. Accordingly, the Department reports daily the number of positive results for its correction officers and other staff based on these individuals' self-reports of this information to the Department.

The COVID-19 Data spreadsheet, attached, shows the Department's daily population for each day since April 6, 2020, broken down by jurisdiction (those detained, committed, or

sentenced to Department custody regardless of where they are housed) and custody (those housed in Department facilities regardless of what jurisdiction detained, committed, or sentenced them). As the custody population shows who are actually housed in Department facilities, it is most relevant here.

From the time period of April 6 through April 21, 2020, the Department's criminally-sentenced population has decreased by 134 inmates, from 7,227 to 7,093. Over this same fifteen-day period, the Department's civilly committed population has decreased by 68 commitments (from 437 to 369), and its pretrial population has decreased by 9 detainees to a current total of 63 detainees. See COVID-19 Data spreadsheet (April 21, 2020). So, a total of 211 individuals have been released from Department custody in fifteen days, a decrease of 2.73% from its April 6, 2020 population of 7,735. Of these 211 releases, 12 sentenced inmates have been released by order of the trial court, following a stay or revocation of sentence. See COVID-19 Data spreadsheet at total of Inmates Released Pursuant to Decision (Sentenced) column. Since April 6, 2020, two medical parole petitions have been approved, and six inmates have been released from custody on medical parole since the state of emergency was declared on March 10, 2020.

The COVID-19 Data spreadsheet's number of inmate tests conducted, number of inmate positive tests, DOC staff positive tests, and other staff positive tests, contain total numbers as of

the date of the daily report. As of April 21, 2020, the Department's medical vendor has conducted 294 tests, the majority of them being for unique inmates, but some inmates have been tested multiple times (e.g., an inmate remaining symptomatic after a negative test result; a positive inmate being tested after becoming asymptomatic). In addition to sick and symptomatic inmates, the Department's vendor also tests inmates being transferred to non-Department facilities, e.g., long-term care facilities, as well as high-risk inmates being released so as to limit the spread of COVID to such facilities and to the community.

That the Department's vendor has conducted 294 total tests (as of April 21, 2020) in fifteen days does not show that it is "rarely testing anyone" as claimed; it shows that the Department is responsibly managing its resources by prioritizing tests of symptomatic inmates, multiple times if necessary, as well as inmates who are being transferred or released to the community or a medical/nursing care facility. As of Wednesday, April 22, 2020, the Department will host a mobile COVID-19 test site with the ability to test up to 200 individuals, both inmates and staff, per day.

The report for April 21, 2020 shows that there are 123 inmates who have tested positive. COVID-19 Data (April 21, 2020). This number includes inmates who have died as well as those who have tested positive and recovered--as of this filing there have

been 4 inmates (all at the Massachusetts Treatment Center) who had tested positive but have fully recovered.

The Special Master requested that the Department break down the number of inmate positives by facility, so, beginning with the daily report on April 13, 2020, the Department did so. See COVID-19 Data By Facility/INMATE DATA, attached. The main spreadsheet and the breakdown includes all inmates who have tested positive, and does not take inmate recovery into account. Over the reporting period from April 13 through 21, 2020, the report shows that inmate positives have remained the same at Bridgewater Hospital (12), and the Department's unit at Lemuel Shattuck Hospital (1). See COVID-19 Data By Facility/INMATE DATA, attached. The report also shows that inmate positives had remained steady at the Massachusetts Treatment Center from April 13 through 17, 2020, at 41, had decreased to 38, and have increased to a current 43 as of the April 21, 2020 report. While the number has changed, it has remained in the 41-43 range (or less) over the nine-day reporting period.

The report shows that there has been one inmate positive test at MCI-Norfolk beginning on April 18, 2020. The report also shows that, while the positives increased from 26 to 28 overnight from April 18 to 19 at MCI-Framingham, the inmate positive tests at this facility had remained steady at 26 from April 14 through

April 18, 2020, and have just decreased to 27.¹ The data does show that there has been an increase in inmate positive tests at MCI-Shirley from 9 on April 13th to 39 on April 21, 2020. As of April 13, 2020, MCI-Shirley held 1,053 inmates, so the 39 positives results in a 3.7% infection rate at this facility. Department facilities remain in lockdown to contain the spread of COVID, so these numbers will be closely monitored.

As of the April 21, 2020 report, there have been five deaths due to COVID of the 7,524 inmates housed in Department facilities: four who had been housed at the Massachusetts Treatment Center, and one who had been housed at MCI-Shirley. The five inmates who have died ranged in age from 59 to 79. All five were treated in outside hospitals and had COVID-aggravating conditions and comorbidities such as diabetes, hypertension, and cancer.

The overall number of DOC staff reporting positive is, as of April 21, 2020, 61. See COVID-19 Data (4/21/2020). Until the April 21, 2020 report, the Department had been reporting the number of staff who had tested positive and had not recovered (and returned to work). Based on a request from the Special Master, however, starting on April 21, 2020, the Department began reporting the total number of staff positives, and the 61 reported in that report included 11 DOC staff who tested positive, fully

¹As of April 13, 2020, MCI-Framingham held 198 inmates, so the highest number of 28 positives does reflect a 14% infection rate for that facility.

recovered, and returned to work. Other staff positives, including vendor staff, have remained in the 20-24 range since April 14, 2020. Ibid.

Based on a request from the Special Master, the Department began reporting its staff self-reported positives broken down by facility beginning with the daily report on April 15, 2020. See COVID-19 Data By Facility/STAFF DATA COVID-19 POSITIVES (April 21, 2020). This break-down report takes into account DOC staff who, as of that day, have tested positive and have not returned to work.² Over the course of the seven-day reporting period, the report shows that, for those facilities where there have been staff positives, these numbers have remained steady (with the exception of MCI-Cedar Junction and MCI-Shirley). See COVID-19 Data By Facility/STAFF DATA COVID-19 POSITIVES. The data shows that, while there have been increases in two facilities, the number of staff testing positive for COVID-19 has remained in a steady range.

In the end, Department-reported numbers simply do not support petitioners' sweeping contention that "there can be no credible claim that the current pace of releases will suffice to curb the spread of COVID-19, and with it the risk of more illness and death, in the Commonwealth's carceral settings." Motion at 3.

² Note that the total number of staff on the STAFF DATA COVID-19 POSITIVES spreadsheet for 4/21/2020 is 50. The difference between this total (50) and the 61 reported on the COVID-19 Data spreadsheet is the 11 staff who have recovered and returned to work.

Rather, the Department's reporting shows that the number of inmate infections has remained steady at the vast majority of its facilities, as has the number of staff infections.

II. The Department's Efforts to Accommodate the Defense Bar.

To the extent the Motion insinuates that the Department has not been facilitating communication between petitioners and their clients, Motion at pp 12-13, this is inaccurate. On April 10, 2020, the Department sent petitioners and other inmate advocacy organizations an Announcement for Attorneys. This document informs attorneys of a newly-established centralized process for attorneys to change their telephone numbers on their client's calling lists, and also announced a process designed to arrange a telephone call between attorney and client within 24 hours, and, as of April 21, 2020, within a pre-established call window. See Announcement for Attorneys (Changes Made Effective April 21, 2020), attached. These two processes are in addition to the free, non-recorded calls inmates may make to the CPCS COVID-19 hotline, the Prisoners' Legal Services hotline, and the newly-established CPCS parole assistance hotline.

ARGUMENT

I. Motions for Reconsideration.

Petitioners do not identify any change in circumstances or new information or evidence that would warrant reconsideration of the Court's prior decision. See Town of Dartmouth v. Greater

New Bedford Regional Vocational Technical High School District, 461 Mass. 366, 368 n. 4 (2012) (“Where there has been no change of circumstances, a court or judge is not bound to reconsider a case, an issue, or a question of fact or law, once decided.” (quoting Peterson v. Hopson, 306 Mass. 597, 599 (1940))). That the pandemic has progressed, both inside Department facilities and in the rest of the Commonwealth, is not a change in circumstances warranting the Court to reconsider its twenty-day old opinion.

To the extent that the petitioners repeat the same arguments made before, see generally Motion, that is not grounds for reconsideration. Parties are not entitled to seek reconsideration merely to repeat “prior unsuccessful arguments.” Audubon Hill South Condominium Ass’n v. Community Ass’n Underwriters of America, Inc., 82 Mass.App.Ct. 461, 471 (2012). A “motion for reconsideration is not ‘the appropriate place to raise new arguments inspired by a loss before the motion judge’” or to “tender new legal theories for [the] first time.” Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 312 (2009), quoting Commonwealth v. Gilday, 409 Mass. 45, 46 n. 3 (1991).

II. The Petitioners Should Be Required To Take Any Proposed Change to the Reporting Requirements to the Special Master.

The Motion requests that the Court now order the Department to provide the petitioners information regarding certain categories of sentenced inmates. Motion at pp 16-17. The Motion does not state that the petitioners have first made this request through the Special Master, and the Court should direct them to do just that in the first instance.

This Court has ordered that "the Special Master may assist the court with implementing any orders if such orders issue." Docket at Paper #2. Moreover, in its opinion, the Court states that "[t]he special master shall report weekly to this court, as set forth in this opinion, in order to facilitate any further response necessary as a result of this rapidly evolving situation." Docket at Paper #65. It is clear that the Court's Order that the Special Master report weekly in order to facilitate any further response includes the ability to resolve disputes when it comes to the reporting requirements in the Opinion. Any claim for new information not requested in Appendix B of the opinion should be first brought to the Special Master for possible resolution.

In accordance with Appendix B of the opinion, the Department reports daily the following information concerning each pretrial detainee in its custody: name, Department commitment number, gender, housing institution, date of birth, age, jurisdiction of detaining court, county of detaining court, name of detaining

court, docket number(s) for which detention order has been received, type of warrant received and disposition of such warrant (where this information is known). It takes considerable Department staff time to obtain this information and the other information provided in the daily report. Because of the strain that the daily reporting requirements place on the Department's data collection and analysis divisions, any change to existing reporting requirements must consider the efficacy and importance of this additional information sought.

Finally, the Motion states that "[p]etitioners have had to undertake substantial efforts just to get the DOC to report as much information to the Special Master as it does to the media," relying on a Tweet in support of this proposition. Motion at p.12. As stated above, the Department has consistently reported the information requested in Appendix B of the Court's decision. Where additional information has been sought by the Special Master--either new categories of information in the daily report, information concerning specific inmates, or clarification regarding information already proved--the Department has provided this information fully and promptly.

CONCLUSION

For the reasons stated above, petitioners' Motion for Reconsideration or Modification of Decision should be DENIED.

Respectfully submitted,

THE DEPARTMENT OF CORRECTION,

By its attorneys,

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Dated: April 22, 2020

CERTIFICATE OF SERVICE

I, Charles W. Anderson Jr., certify under the penalties of perjury that this Response, filed through the Court's electronic docketing system, including all attachments, will be sent electronically to the registered participants.

April 22, 2020
Date

/s/ Charles W. Anderson Jr.
Charles W. Anderson Jr.

**Department of Correction
COVID-19 Data**

<i>Date</i>	POPULATION						<i>Inmate</i>		<i>Staff Positive</i>		<i># Inmates Released</i>	
	<i>Overall Jurisdiction Population</i>			<i>Overall Custody Population</i>			<i># Tested</i>	<i># Positive</i>	<i>DOC</i>	<i>Other</i>	<i>Pursuant to decision (sentenced)</i>	<i>Medical Parole Approved</i>
	<i>Criminally Sentenced</i>	<i>Civilly Committed</i>	<i>PreTrial Detainees</i>	<i>Criminally Sentenced.</i>	<i>Civilly Committed.</i>	<i>PreTrial Detainees.</i>						
4/6/2020	7500	512	71	7227	437	71	129	40	17	10	0	21
4/7/2020	7481	488	69	7210	418	69	145	56	21	12	1	21
4/8/2020	7467	477	69	7197	408	69	151	58	21	13	0	23
4/9/2020	7459	470	66	7190	400	66	155	62	28	14	0	23
4/10/2020	7449	456	67	7180	395	67	173	77	28	15	4	23
4/12/2020	7449	456	67	7180	395	67	183	84	28	15	4	23
4/13/2020	7427	452	67	7158	387	67	209	85	36	20	1	23
4/14/2020	7417	448	67	7149	383	67	214	94	41	21	0	23
4/15/2020	7408	443	64	7140	382	64	224	96	40	22	0	23
4/16/2020	7400	428	62	7132	373	62	226	103	42	22	1	23
4/17/2020	7383	422	62	7115	372	62	231	110	41	20	1	23
4/18/2020	7377	421	63	7110	373	63	238	110	42	20	0	23
4/19/2020	7377	422	63	7110	374	63	291	114	42	21	0	23
4/20/2020	7376	424	63	7109	376	63	291	114	45	22	0	23
4/21/2020	7360	418	62	7093	369	62	294	123	61	24	0	23

**Department of Correction
 COVID-19 Data By Facility
 INMATE DATA**

<i>Date</i>	<i>MASAC</i>	<i>Boston Pre</i>	<i>MCI-Norfolk</i>	<i>NCCI-Gardn</i>	<i>BSH</i>	<i>OCCC</i>	<i>MCI-CJ</i>	<i>MCI-C</i>	<i>Pondville</i>	<i>MCI-F</i>	<i>MCI-Shirley</i>	<i>MTC</i>	<i>SMCC</i>	<i>LSH</i>	<i>SBCC</i>
4/13/2020	0	0	0	0	12	0	0	0	0	22	9	41	0	1	0
4/14/2020	0	0	0	0	12	0	0	0	0	26	14	41	0	1	0
4/15/2020	0	0	0	0	12	0	0	0	0	26	16	41	0	1	0
4/16/2020	0	0	0	0	12	0	0	0	0	26	23	41	0	1	0
4/17/2020	0	0	0	0	12	0	0	0	0	26	30	41	0	1	0
4/18/2020	0	0	1	0	12	0	0	0	0	26	32	38	0	1	0
4/19/2020	0	0	1	0	12	0	0	0	0	28	34	38	0	1	0
4/20/2020	0	0	1	0	12	0	0	0	0	28	34	38	0	1	0
4/21/2020	0	0	1	0	12	0	0	0	0	27	39	43	0	1	0

**Department of Correction
 COVID-19 Data By Facility
 STAFF DATA COVID-19 POSITIVES**

<i>Date</i>	<i>MASAC</i>	<i>Boston Pre</i>	<i>MCI- Norfolk</i>	<i>NCCI- Gardner</i>	<i>BSH</i>	<i>OCCC</i>	<i>MCI-CJ</i>	<i>MCI-C</i>	<i>Pondville</i>	<i>MCI-F</i>	<i>MCI- Shirley</i>	<i>MTC</i>	<i>SMCC</i>	<i>LSH</i>	<i>SBCC</i>	<i>NON-FACILITY DOC STAFF</i>
4/15/2020	0	0	3	0	0	0	1	1	0	10	5	12	0	3	3	2
4/16/2020	0	0	3	0	0	0	1	2	0	11	5	12	0	3	3	2
4/17/2020	0	0	3	0	0	0	1	2	0	11	4	12	0	3	3	2
4/18/2020	0	0	3	0	0	0	1	2	0	11	5	12	0	3	3	2
4/19/2020	0	0	3	0	0	0	1	2	0	11	5	12	0	3	3	2
4/20/2020	0	0	3	0	0	0	1	2	0	11	7	12	0	3	3	3
4/21/2020	0	0	3	0	0	0	6	1	0	12	10	11	0	3	1	3

ANNOUNCEMENT FOR ATTORNEYS
(Changes Made Effective April 21, 2020)

The Department of Correction (DOC) is taking the following measures to ensure attorney/client communication with inmates in DOC custody during the pandemic. **These measures are for contacting inmates housed in DOC facilities only; attorneys contacting inmates housed in jails and houses of correction must contact that facility or the respective Sheriff's Office.**

The first measure is to establish a standard and centralized process so attorneys can change their telephone numbers on the PIN list of inmates in DOC custody during the pandemic. Attorneys requesting to change their telephone numbers must call DOC's Office of Investigative Services (OIS) at **508-958-3668**, which will be staffed on Mondays through Fridays from 8:00 a.m. to 3:00 p.m. Attorneys should provide their old telephone number, the new telephone number, and the name(s), DOC commitment number(s), and current housing facility (facilities) of their clients. The contact person in OIS for this process is Officer Thomas Perry. OIS staff will make the requested changes and notify the facility, who will then notify the inmate.

If, after completing this process, there are any difficulties with the change in number, attorneys should contact Assistant Deputy Commissioner Pat DePalo at: Patrick.Depalo@MassMail.State.MA.US.

Attorneys are strongly encouraged to use this process, as contacting the housing facility directly will likely result in a delay in getting the telephone number changed.

The second measure is designed to ensure that attorneys can contact their clients housed in DOC facilities to arrange for a call with their new or existing client within 24 hours, and during a specified time window (9 a.m. to 11 a.m.; 1 p.m. to 4 p.m.; 7 p.m. to 9 p.m.). Attorneys are strongly encouraged to use the following process:

- 1) The attorney will call the facility (Point of Contact and number are provided below for each facility) Monday through Friday from 9:00 a.m. to 5:00 p.m. After 5:00 p.m. on weekdays and weekends, attorneys will call the same line and ask for the Shift Commander. Attorneys should provide the time window which they are available to receive the return call (9 a.m. to 11 a.m.; 1 p.m. to 4 p.m.; or 7 p.m. to 9 p.m.).
- 2) The inmate will be given the message they need to call their attorney within a 24 hour period, and during the specified time window.
- 3) The inmate will be allowed access to the unit phone to call.
- 4) Any updates or changes to the attorney's numbers will be addressed by OIS using the procedure above, so the most accurate number will be in the Inmate Calling System for the attorney to receive the call.

For federal detainees held at MCI-Cedar Junction, the following process is to be used:

- 1) Vanessa Rideout is assigned to the Federal Unit as the Correctional Program Officer.
- 2) Attorneys for federal detainees can contact CPO Rideout from 8:30am - 3:00 PM Monday through Friday by telephone at 508-660-3000 ext. 106, or by email at Vanessa.Rideout@doc.state.ma.us.
- 3) CPO Rideout will coordinate with the attorney the date and time for the telephone call to be placed to the attorney from the detainee at MCI-Cedar Junction.

Facility	Point of Contact #	Off Hours Number (Ask for Shift Commander)
Boston Pre-Release	617-822-5000 x 6125	617-822-5000 x 6135/6100
Lemuel Shattuck Hospital	508-889-2742	617-971-3384
MCI-Cedar Junction	508-660-8000 x 111	508-660-8000 x 201
MCI-Norfolk	508-660-5900 x 424	508-660-5900 x 477
Pondville Corr. Ctr.	508-660-3924 x 303	508-660-3924 x 311
Old Colony Corr. Ctr.	508-279-6836	508-279-6836
Mass. Treatment Ctr.	508-279-8150	508-279-8301
MCI-Concord	978-405-6100 x 418	978-405-6100
MCI-Shirley	978-425-4341 x 4122	978-425-4341
MCI-Framingham	508-532-5100 x 322	508-532-5100 x 396
NCCI-Gardner	978-630-6000 x 100	978-630-6000
North Eastern Corr. Ctr.	978-371-7941 x 1209	978-371-7941
South Middlesex Corr.Ctr.	508-875-2887 x 4100	508-875-2887 x 4100
Souza Baranowski Corr.Ctr.	978-514-6500 x 6103	978-514-6500