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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 20-00855-D
SJC 2020-0212**

**STEPHEN FOSTER, et. al,
Plaintiffs,
vs.**

**CAROL MICI, as Commissioner of Correction, et. al,
Defendants.**

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

The plaintiffs, inmates serving prison sentences in most instances at Massachusetts prisons and in a couple instances at county jails, allege that their conditions of confinement expose them to unreasonable risks from the COVID-19 pandemic and unreasonable restrictions that prison and jail officials have imposed on their activities to combat the spread of COVID-19, all in violation of the Eighth Amendment and article 26 of the Massachusetts Declaration of Rights, and substantive due process under the Fourteenth Amendment and articles 1, 10, and 12 of the Massachusetts Declaration of Rights. Plaintiffs have moved to certify a class of all prisoners who are incarcerated in prisons and jails in Massachusetts, including a subclass of all prisoners who they allege are at heightened risk for serious complications or death from COVID-19 due to underlying medical conditions and/or age. The defendants, Carol Mici in her official capacity as Commissioner of the Massachusetts Department of Correction ("DOC"), Gloriann Maroney, in her official capacity as Chair of the Massachusetts Parole Board, and Thomas Turco, in his capacity as Secretary of the Executive Office of Public Safety and Security (collectively, "Defendants") agree that a class action is the most efficient way of handling at least some of plaintiffs' COVID-19 related claims in this case. However, Defendants assert that a

proposed class of all Massachusetts prisoners is “massively overbroad.” The Court heard oral argument on November 2, 2020. For the below reasons, plaintiffs’ motion is **ALLOWED** to the extent that this Court will certify a class of all Massachusetts prisoners confined at DOC facilities (but not at county jails), and a subclass of all such prison inmates who according to guidelines of the Centers for Disease Control and Prevention (“CDC”) are at increased risk from COVID-19 due to their age (age 50 and older) and/or medical conditions that have been determined to increase risks from COVID-19 (but not medical conditions that “may” increase those risks). This ruling is without prejudice to the right of any party to seek modifications of the class and subclass, or the certification of additional subclasses.

Prisoner’s Legal Services shall be appointed to represent the class and the subclass.

DISCUSSION

A. This Court Will Certify a Class of All Massachusetts Prison Inmates.

Under Mass. R. Civ. P. 23 as amended, 471 Mass. 1491 (2015), members of a class may represent the class "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Mass. R. Civ. P. 23 (a). Additionally, the court must conclude that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23 (b). The plaintiffs bear the burden of providing "information sufficient to enable the motion judge to form a reasonable judgment that the class

meets the requirements of rule 23" (quotation and citation omitted). *Gammella v. P.F. Chang's China Bistrot, Inc.*, 482 Mass. 1, 12 (2019).

The above-noted requirements for a class action have clearly been met. The legal claim and its basic factual underpinning are common to all potential class and subclass members: that the increased risk of contracting COVID-19 while in prison and the restrictions on prison activities caused by DOC's response to COVID-19 constitute cruel and unusual punishment, and that the only effective remedies are reductions in the prison population that will allow for more social distancing and more opportunity for inmates to engage in activities out of their cells. Because this is precisely the claim of the named class members, because every prison inmate would benefit (to at least some extent) from the requested relief, and because the large number of prison inmates (roughly 7,000) strongly favors a class action, the proposed class action meets the requirements of Mass. R. Civ. P. 23(a) (1) through (4).

For essentially the same reasons, although there are many variations in the structure and operation of DOC's various facilities, questions of law or fact common to confinement and release of inmates at these facilities predominate over any questions affecting only individual inmates or facilities. Further, all parties agree that a class action is superior to other available methods for the fair and efficient adjudication of at least some aspects of this controversy. Therefore, the requirements of Mass. R. Civ. P. 23(b) have also been met for all inmates at DOC facilities. Because the requirements of Mass. R. Civ. P. 23(a) and 23(b) have been met, a class of all Massachusetts prison inmates should be certified. See *Gammella*, 482 Mass. at 12.

Plaintiffs, however, have not met their burden of establishing that the class should include Massachusetts prisoners who are housed in county jails. The Court reaches this conclusion primarily because the Commonwealth's sheriffs, who are responsible for the jails, are

not parties to this case. The Court further notes that the sheriffs operate under different regulations than does DOC. Therefore, it is far from clear that one class action including both inmates of state prisons and inmates of county jails is superior to other proceedings. See Mass. R. Civ. P. 23(b).

In sum, plaintiffs have satisfied the requirements for certifying a class in this proceeding of all Massachusetts prison inmates, and therefore such a class will be certified.

B. This Court Will Certify a Subclass of Massachusetts Prison Inmates at Increased Risk from COVID-19 Due to Their Age and/or Medical Conditions.

The same factors that support certification of a class of prison inmates, including all parties' agreement that a class action is the preferred way of adjudicating at least some aspects of the controversy, support certification of a subclass of all prison inmates at increased risk from COVID-19 due to their age and/or their medical conditions. While the subclass is, by definition, smaller than the class, it contains a few thousand members and therefore the numerosity requirement of a class action is easily met.

Deciding the contours of the subclass of prison inmates at increased risk from COVID-19 presents challenges. This Court had anticipated expert testimony on the issue, but the parties all seem content to rely on the CDC guidelines, and there is wisdom in this approach, particularly at a time when COVID-19 cases are rapidly rising across the Commonwealth and in at least some prisons.¹

The Court further notes that CDC has separate lists of medical conditions that have been determined to increase one's vulnerability to COVID-19, and medical conditions that "may"

¹ According to the November 9, 2020 Amended Special Master's Weekly Report in *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass.431 (2020), there were more confirmed COVID-19 cases among inmates and corrections officers in the most recent reported week (Oct. 29-Nov. 4) than there were in the previous three months.

increase one's risk.² Some of the medical conditions that "may" increase one's risk from COVID-19 are harder to quantify.³ With regard to age, the CDC uses both age 50 and age 60 as cut-off points, after which vulnerability to COVID-19 increases.⁴ Based on the need for medical and scientific support for the definition of the subclass, the need to precisely define its contours, and the need to identify and protect those who have been shown to be most vulnerable, this Court has defined the subclass to include all prison inmates who are age 50 or over and/or have a medical condition that has been determined to increase one's vulnerability to COVID-19.⁵ Using these same factors, the Court declines at this juncture to include in the subclass "prisoners with severe psychiatric illness and cognitive disabilities," as sought by plaintiffs. The Court understands that these inmates may face heightened risks from COVID-19. The Court further notes that its ruling does not preclude DOC from taking measures to protect these inmates and other inmates from the consequences of any lapses in compliance with COVID-19 prevention protocols that may result from these inmates' mental health and cognitive issues.

The subclass to be certified by the Court has a few thousand members. To the extent that any plaintiff considers this subclass to be too narrow, the Court notes that the Supreme Judicial Court has ruled that "the process of [prison population] reduction requires individual determinations." *CPCS v. Trial Court*, 484 Mass. at 445. Making individual decisions about prison release as to this entire subclass would be a herculean task. Moreover, any reduction in the inmate population benefits the entire class. Therefore, in the view of this Court, any benefits

² See [cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html) (last updated Nov. 2, 2020), last checked Nov. 11, 2020.

³ See *id.*

⁴ See [cdc.gov/coronavirus/2019-ncov/index.html](https://www.cdc.gov/coronavirus/2019-ncov/index.html), last checked Nov. 11, 2020.

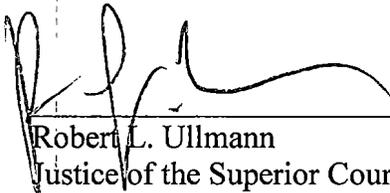
⁵ These conditions include cancer, chronic kidney disease, chronic obstructive pulmonary disease (COPD), heart conditions, immunocompromised state from solid organ transplant, obesity [BMI of 30 kg/m² or higher], pregnancy, sickle cell disease, and type II diabetes mellitus. See n. 2, *supra*. The Court excludes smokers who have none of the above conditions as part of the subclass because, while smoking is a COVID-19 risk factor, it is not a medical condition.

from adding to the subclass inmates who are under age 50 and whose medical conditions may or may not increase their vulnerability to COVID-19 are outweighed by the harms of (1) diverting attention from those whose conditions have been determined to increase risks from COVID-19, and (2) greater uncertainty about membership in the subclass. If CDC determines that additional medical conditions increase risks from COVID-19, or if plaintiffs present persuasive evidence about such medical conditions, the Court will expand the subclass accordingly.

CONCLUSION AND ORDER

For the above reasons, Plaintiffs' Motion for Class Certification (Docket # 62) is **ALLOWED**. The Court hereby certifies a class of all Massachusetts prisoners confined at DOC facilities, and a subclass of all such prisoners who are age 50 or older and/or have one or more medical conditions that, according to current guidelines of the Centers for Disease Control and Prevention, have been determined to increase one's vulnerability to COVID-19. Prisoner's Legal Services is hereby appointed to represent the class and the subclass.

Dated: November 12, 2020



Robert L. Ullmann
Justice of the Superior Court