

September 26, 2023

Joint Committee on the Judiciary
Sen. James Eldridge & Rep. Michael Day, Chairs

SUPPORT H.1391/S.982
AN ACT RELATIVE TO TREATMENT, NOT IMPRISONMENT

Representative Day, Senator Eldridge, and members of the Joint Committee on the Judiciary:

The ACLU of Massachusetts offers our strong support for H.1391/S.982, which will align probation orders with the science on substance use disorders. Every year, Massachusetts courts mandate thousands of people suffering from addiction to submit to invasive drug-testing as a condition of pretrial release or probation. If relapse occurs, many are incarcerated – even when they are actively working to achieve long-term recovery. It is both unsafe and unjust to require defendants suffering from addiction to remain relapse-free or else face jail.

Severe substance use disorder is a health condition. Its hallmark feature is compulsive use of a substance *despite significant negative consequences*. A punitive response to relapse decreases the likelihood that people with addictions will seek care and remain in treatment. Fear of punishment interferes with treatment because patients are afraid to speak honestly about their struggles with their healthcare professionals.

Incarcerating people suffering from addiction is not just counterproductive; it endangers lives. While incarcerated, few people receive treatment – and most “treatment” in jails and prisons is not evidence-based. And even when someone is released, the aftereffects can be deadly: the opioid overdose death rate is *120 times higher* for those recently released from incarceration compared to the rest of the adult population.¹

In addition to disrupting recovery and endangering lives, jailing someone with a substance use disorder because they relapsed on the road to recovery is unjust, notwithstanding the SJC’s deeply disappointing 2018 decision in *Commonwealth v. Eldred*.² The ACLU of Massachusetts, joined by the Center for Public Representation

¹ *An Assessment of Fatal and Nonfatal Opioid Overdoses in Massachusetts (2011-2015)*, Mass. Dept. of Public Health (2017).

² 480 Mass. 90 (2018).

and Prisoners' Legal Services, filed an amicus brief in support of Julie Eldred. In the brief we noted that "when success [overcoming addiction] is so difficult, *requiring* it cannot be fair...Moreover, when an unjust condition is imposed not just on one probationer but on countless probationers, it creates systemic injustices."³

This legislation will allow judges to order a defendant to participate in treatment, but prohibits courts from imposing incarceration if *relapse is the only infraction and the defendant is otherwise engaged in treatment*. Indeed as medication assisted treatment for opioid use disorders becomes more widely available, a positive drug screen can indicate that a person is receiving the appropriate treatment. It is important to note that the legislation would not generally immunize a defendant or grant her safe harbor; it would in no way interfere with a judge's ability to incarcerate someone for new criminal misconduct.

The fundamental question here, as with all legislation on drug policy, is this: Are we trying to punish people or help people? For a century, we have predominantly responded to drug addiction with punishment. The tragic legacy of the failed "War on Drugs" has been mass incarceration alongside skyrocketing overdose death rates. Scientific research has reframed our understanding of addiction as a health condition that responds favorably to treatment, not imprisonment. If our Commonwealth is serious about ending the opioid crisis, we need to change our approach to substance use – to one that is rooted in public health, not punishment.

We urge you to give this legislation a swift, favorable report. Thank you.

³ Brief for the ACLU, CPR, and PLS as Amicus Curiae, p. 13-14, *Commonwealth v. Eldred*, 480 Mass. 90 (2018).