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May 8, 2020

Francis V. Kenneally
Clerk, Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Suite 1300
Boston, MA 02108

Re: *Foster v. Mici*, SJC-12935

Dear Clerk Kenneally:

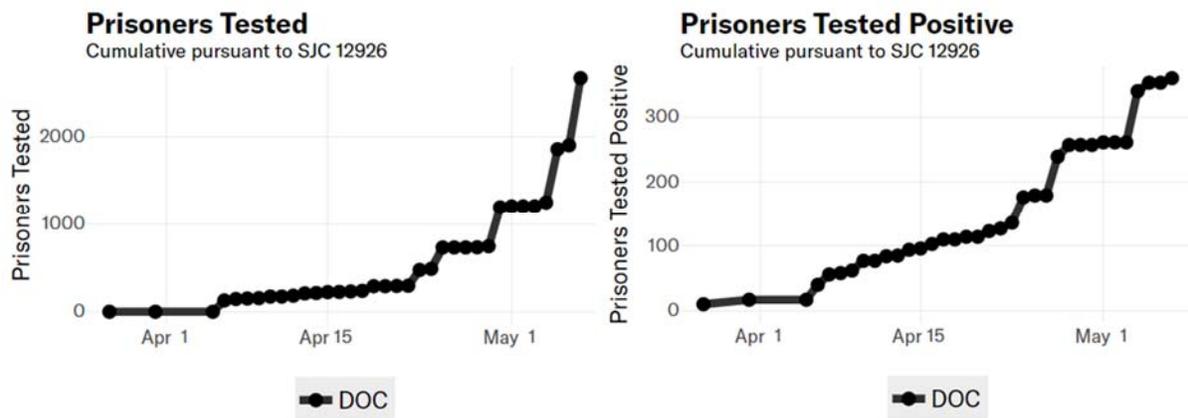
The American Civil Liberties Union of Massachusetts, Inc. and the Massachusetts Association of Criminal Defense Lawyers respectfully submit this letter as *amici curiae* to address issues raised during the oral argument in this matter on May 7, 2020, concerning the testing of Massachusetts prisoners for COVID-19. At argument, counsel for the Commissioner of the Massachusetts Department of Correction and for the Secretary of the Executive Office of Public Safety and Security indicated that the DOC presently has no constraints on its capacity to test its prisoners for COVID-19. In light of the DOC's apparent capacity to test its prisoners for COVID-19, *amici* respectfully submit that data reported by the DOC in *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, SJC-12926, which reveals limited testing at a majority of its facilities, is incompatible with any claim that it has acted adequately to protect them.

The available data demonstrate that broad testing across all DOC facilities is necessary to assess the true spread of COVID-19 among prisoners.¹ This has not

¹ Indeed, the Centers for Disease Control and Prevention (CDC) recently highlighted that “an investigation of a COVID-19 outbreak in a skilled nursing facility found that approximately one half of cases identified through facility-wide testing were among asymptomatic and presymptomatic persons, who likely contributed to transmission.” As a result, the CDC acknowledged that “[t]esting might become an important strategy to include” at jails and prisons” when it is more widely available and when facilities have developed plans for how the results can be used to inform operational strategies to reduce transmission risk.” Megan Wallace et al, *COVID-19 in Correctional and Detention Facilities – United States, February –April 2020 (updated May 6, 2020)*, Centers for

occurred. Although this Court ordered daily reporting by the DOC on April 3 to monitor “further changes to this rapidly changing situation,” the scope of infections among DOC prisoners at any facility remained largely hidden until recently, when more were tested; aggregate DOC prisoner tests increased from 296 on April 22 to 2,672 by May 7. This increase has resulted largely from several days of significant testing at a limited number of facilities—on April 23, April 25, April 30, May 5, and May 7—with lulls in between. And the results have been striking; over the last 16 days, the number of DOC prisoners diagnosed with COVID-19 has risen from 127 to 360.²

Figure 1: Tests and COVID-19 Diagnoses of DOC Prisoners Over Time



But, notwithstanding those recent testing increases, the DOC still has not conducted meaningful testing at several facilities where prisoners or staff members have already tested positive for COVID-19. The DOC has reported that prisoners or staff members tested positive for COVID-19 at *twelve* facilities, yet since April 25 (when it began reporting facility-specific testing data) the DOC has tested more than five prisoners at just *four* facilities. And at one of those four—MCI-Framingham—the DOC has tested just 45 prisoners since April 25, despite a substantial outbreak of COVID-19 that has affected perhaps one-third of the prisoner population.

Disease Control and Prevention, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm>.

² Undersigned counsel from the ACLU of Massachusetts is compiling data from the Massachusetts DOC and the Massachusetts sheriffs at <https://data.aclum.org/sjc-12926-tracker/>. Test *results* generally lag behind tests *conducted*. For example, the DOC reported that it conducted over 700 tests on May 7; the results of those tests are still unknown as of this writing.

Figure 2: COVID-19 Diagnoses of DOC Prisoners and Staff, by Facility

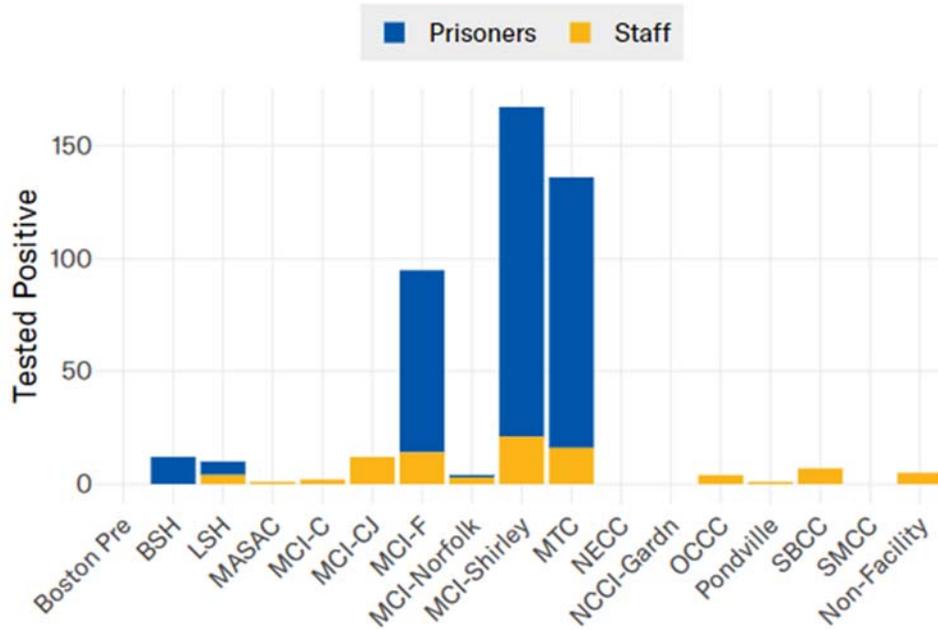
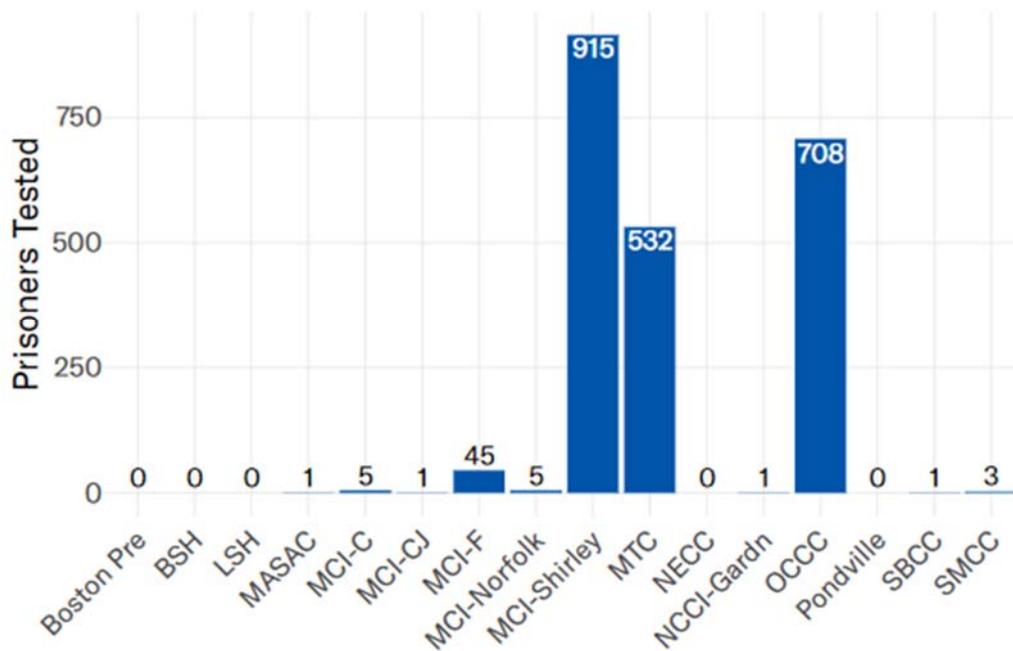


Figure 3 COVID-19 Testing of DOC Prisoners, by Facility (since April 25)



Reflecting the importance of testing as a means of mitigating outbreaks in prison settings, *amici* understand that a federal court yesterday issued an oral order requiring comprehensive COVID-19 testing of all immigration detainees in the custody of the Bristol County Sheriff. *Savino v. Hodgson*, 1:20-cv-10617-WGY

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(preliminary injunction hearing, May 7, 2020). Massachusetts prisoners generally should not have less protection than ICE detainees in Bristol County.

Accordingly, *amici* urge this Court to require comprehensive testing of both symptomatic *and* asymptomatic prisoners at every DOC and county facility. Particularly in light of claims made at oral argument concerning the DOC's testing capacity, failing to test prisoners comprehensively, and instead just *assuming* that any outbreaks have been mitigated, would be evidence of deliberate indifference.

Sincerely,

A handwritten signature in cursive script that reads "Matthew Segal".

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