

May 5, 2020

Joint Committee on the Judiciary
Sen. Jamie Eldridge & Rep. Claire Cronin, Chairs

**SUPPORT H.4652
DECARCERATION AND COVID-19**

Chair Cronin, Chair Eldridge, and members of the Joint Committee on the Judiciary:

The ACLU of Massachusetts offers our strong support for H.4652, *An Act regarding decarceration and COVID-19*. H.4652 proposes a comprehensive roadmap to address the public health crisis that is looming in Massachusetts prisons and jails. The bill wisely provides for the release of people who pose no public safety threat to the community and prioritizes incarcerated people who are most vulnerable to COVID-19.

The legislature must do everything in its power to ensure that prison and jail sentences do not become de facto death sentences as a result of a COVID-19 outbreak. An outbreak cannot be contained within the four walls of the institution. When catastrophe strikes, it will significantly impact the health of surrounding communities and further strain the capacity of our hospitals.¹ You have an opportunity to mitigate these harms by acting quickly to reduce the number of people incarcerated in Massachusetts during this pandemic.

We urge you to respond to the growing public health crisis in our carceral facilities with the urgency it demands – including by enacting legislation that takes concrete steps to reduce the incarcerated population; providing dedicated reentry resources to ensure that people who are removed from correctional facilities can isolate to protect their own health and the health of the community at large; and safeguarding the welfare of people who remain incarcerated and staff.

The United States leads the world in incarceration and COVID-19 transmission

The United States makes up only five percent of the world's population but imprisons nearly 25% of the world's incarcerated population. We lock up more people per capita and in raw numbers than any other country in the world. Massachusetts alone has an incarceration rate comparable to the entire nation of Brazil and more than double most European countries.

¹ See Sandhya Kajeepeta & Seth J. Prins, Why Coronavirus in Jails Should Concern All of Us, *The Appeal*, Mar. 24, 2020, <https://theappeal.org/coronavirus-jails-public-health/>; Aff. of Dr. Jonathan Giftos, (Mar. 30, 2020), https://www.aclum.org/sites/default/files/field_documents/reply_brief_exhibits_-_combined_0.pdf.

The U.S. also has one of the highest rates of COVID-19 transmission, a disease that spreads rapidly when people are in close quarters, and Massachusetts is a hotspot of COVID-19 infection and death nationwide.

The racial disparities in both COVID-19 cases and incarceration rates are stark. Black people make up only seven percent of Commonwealth's population but account for 26% of the prison population. State-wide race data on COVID-19 is woefully incomplete, but COVID-19 hotspots in the Commonwealth are cities with large communities of color, including Chelsea, Brockton, and Boston. Data for Boston reveals that Black Bostonians account for over 40% of COVID-19 infections, despite making up only 25% of the population.²

Months into the state of emergency in Massachusetts, 11 DOC facilities and 5 county facilities are still operating at or above design capacity,³ which is far above the capacity that would allow for physical distancing as recommended by public health experts. Given the lethal implications of a COVID-19 outbreak in a Massachusetts correctional facility, for both the incarcerated population and the broader community, we urge you to enact legislation with the goal of lowering the carceral population enough to substantially limit the spread of infection. To have the necessary positive impact on public health, reductions and reforms must, at a minimum, create the conditions for correctional facilities to: (1) end all multiple bunking in cells, including the use of bunk beds; (2) ensure that dorms only use single beds that are six feet apart in all directions; and (3) meet physical distancing guidelines in common spaces so that incarcerated people are not forced to remain in their cells nearly 24 hours a day.

The Commonwealth's current response to COVID-19 in prison and jail is inhumane and undermines public health

Residential institutions with large groups of medically vulnerable people living in close quarters, such as prisons and nursing homes, are deadly hotboxes of contagion.⁴ Over half of all COVID-19 deaths reported statewide were residents of long-term care facilities.⁵ Likewise, according to a WBUR report, "five Massachusetts correctional institutions appear to be among the hardest hit by coronavirus infections."⁶ The House, in its recently engrossed data collection and reporting bill, implicitly acknowledged that the issues related to nursing homes and carceral facilities are

² Shannon Dooling, *Racial Disparities Continue Among Boston's Reported COVID-19 Cases*, WBUR, Apr. 25, 2020, <https://www.wbur.org/news/2020/04/25/racial-disparities-among-bostons-reported-covid-19-cases>.

³ Massachusetts Department of Correction, *Quarterly Report on the Status of Prison Capacity, First Quarter 2020*, May 2020, <https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download>.

⁴ Amy Julia Harris, John Leland, and Tracey Tully, *Nearly 2,000 Dead as Coronavirus Ravages Nursing Homes in New York Region*, New York Times, Apr. 11-14, 2020, <https://www.nytimes.com/2020/04/11/nyregion/nursing-homes-deaths-coronavirus.html>.

⁵ Bruce Mohl, *Life on the Coronavirus Plateau*, Commonwealth Magazine, Apr. 29, 2020, <https://commonwealthmagazine.org/health-care/life-on-the-coronavirus-plateau/>.

⁶ Beth Healy, Deborah Becker, and Christine Willmsen, *Mass. Prisons and Jails Among Hardest Hit by Coronavirus in U.S.*, WBUR, Apr. 28, 2020, <https://www.wbur.org/investigations/2020/04/28/coronavirus-prisons-jails-massachusetts-deaths-cases>.

similar, requiring data to be collected in these two settings in particular.⁷ However, no branch of government has paid adequate attention to actual life saving measures in the carceral setting.⁸

As public health experts predicted, COVID-19 is spreading rapidly in correctional facilities across the country. Last week, WBUR reported that there were nearly 15,000 cases of coronavirus among incarcerated people and corrections staff nationwide.⁹ Given the realities of testing availability, however, the actual number of cases in carceral settings is likely much higher.¹⁰ For instance, one county jail in Pennsylvania tested every incarcerated person for COVID-19 and found *30 times more cases than previously known*.¹¹ By failing to adequately test corrections staff and incarcerated people, while also refusing to release people from carceral settings, Massachusetts is condemning people to serious illness and death.

In a misguided attempt to stem the tide of COVID-19 inside prison walls, all DOC facilities have been on lockdown for a month. While each of us is now personally familiar with the public health advice to isolate at home if we may have been exposed to the virus, isolation in prison couldn't be more different. Under DOC's system-wide lockdown policy, people are forced to stay in their cells for more than 23 hours per day. People are let out of their cells for only 30 minutes each day to shower and use the phone.¹² All visitors have been banned. Under the lockdown, incarcerated people have no access to fresh air. Unlike those of us isolating in our homes, incarcerated people cannot even connect with the outside world virtually through the internet, computers, or cell phones. This type of prolonged isolation in prison causes such intense mental health deterioration that it has been deemed torture by multiple international human rights bodies.¹³

⁷ See H.4672, *An Act addressing COVID-19 data collection and disparities in treatment*, passed to be engrossed by the House on Apr. 23, 2020, <https://malegislature.gov/Bills/191/H4672>.

⁸ Just last week, DOC Commissioner Carol Mici passed the buck to incarcerated people themselves, saying prisoners "need to do their part" to avoid getting infected. See Sarah Betancourt, *Mici: No Need to Release Inmates Due to COVID-19*, Commonwealth Magazine, Apr. 29, 2020, <https://commonwealthmagazine.org/criminal-justice/mici-no-need-to-release-inmates-due-to-covid-19/>. As this committee knows well, incarcerated people have little control over their own movements and the conditions of their confinement. Like people in nursing homes, incarcerated people are assigned to beds and roommates. Staff control everything from access to personal hygiene supplies and movement within the facility to all cleaning of common areas and the distribution of PPE. Indeed, if EOPSS Secretary Turco and DPH Commissioner Bharel could not avoid COVID-19, it's hard to understand how incarcerated people can be expected to protect themselves.

⁹ Healy, Becker, and Willmsen, *supra*.

¹⁰ Cary Aspinwall and Joseph Neff, *These Prisons Are Doing Mass Testing for COVID-19 -- and Finding Mass Infections*, The Marshall Project, Apr. 24, 2020, <https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections>.

¹¹ Jeremy Roebuck and Allison Steele, *Montgomery County's Jail Tested Every Inmate for COVID-19 -- and Found 30 Times More Cases than Previously Known*, The Philadelphia Inquirer, Apr. 28, 2020, https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html?_vfz=medium%253Dsharebar.

¹² Deborah Becker, *Coronavirus Infections Double Among Prisoners at MCI-Shirley*, WBUR, Apr. 28, 2020, <https://www.wbur.org/commonhealth/2020/04/28/shirley-prison-coronavirus-infections>.

¹³ Juan Mendez, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/66/268, Aug. 5, 2011, <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

The lockdown solves no problems and creates many. In a declaration in support of a class action lawsuit filed by the ACLU of Massachusetts and Fick & Marx LLP last month, epidemiologist Seth Prins stated based on his experience and professional knowledge at the intersection of public health and the criminal legal system that solitary confinement “would not effectively constrain the spread of COVID-19 in a carceral setting.”¹⁴ Incarcerated people and correctional staff continue to be infected by COVID-19. Meanwhile, long lasting damage done by locking a person in solitary confinement are well documented. As Professor Prins emphasized, the “literature makes clear that solitary confinement is extraordinarily punitive and can have a severe impact on prisoners in even a short period of time.”¹⁵

Lockdown in response to the pandemic is ineffective, inhumane, and flies in the face of recently enacted solitary reform legislation. In response to this public health crisis, we should not inflict greater punishment on incarcerated people; we should release those who pose no public safety threat.

A comprehensive plan must include support for reentry

Many people who are released from prison and jail have loving families to return home to.¹⁶ Others, however, need housing and other reentry support. Resources are vitally needed to house such individuals, as well as others who live and work in congregate settings or are experiencing homelessness.

COVID-19 has exposed inequities throughout the U.S., including the lack of a robust and healthy reentry system to help people who are leaving prison and jail. The legislature has acted quickly to patch holes in other areas of the social safety net, and must do the same here. As you work with the administration to build and repair systems to support Massachusetts residents through this crisis, we urge you to include people who are leaving incarceration. People who are released from prison and jail need the same things that we all need to weather this pandemic: housing, including access to space to safely quarantine or isolate, resources to buy food and other basic necessities, and health care.

A large and dedicated network of formerly incarcerated people, families of incarcerated people, nonprofit organizations, public health experts, legal advocates, and more stand ready to work with the legislature and governor to build supports for people coming out of prison. We urge you to tap into these resources to swiftly implement a comprehensive plan to help *all* members of our community, including those currently locked in prison and jail, pull through this global pandemic.

¹⁴ Declaration of Professor Seth Prins, *Grinis v. Spaulding*, U.S. District Court for the District of Massachusetts, Civil Action No. 1:20-cv-10738, Apr. 2020, https://www.aclum.org/sites/default/files/field_documents/38-4_declaration_of_prof._prins.pdf.

¹⁵ *Id.*

¹⁶ See, e.g., CPCS v. Trial Court, SJC 12926, Amicus Letter of Families of Incarcerated Loved Ones, Mar. 27, 2020, <https://www.mass.gov/doc/sjc-12926-amicus-letter-of-families-of-incarcerated-loved-ones/download>.

Each branch of government must do its part

A comprehensive, equitable response to this public health crisis requires an all hands on deck approach that centers the most vulnerable communities. We are deeply dismayed and disturbed by the lack of any comprehensive plan to address COVID-19 in Massachusetts jails and prisons. To date, the courts have been limited in their response. In the five weeks since the ACLU of Massachusetts, CPCS, and MACDL filed an emergency petition asking the Supreme Judicial Court to take action to limit the spread of COVID-19 by reducing the number of people incarcerated in the state, known cases of COVID-19 in Massachusetts jails and prisons skyrocketed from four – three incarcerated people and one officer – to 746 at the time of this writing – 470 incarcerated people and 276 staff.¹⁷ Time is of the essence.

The court has not done enough, and the governor has done nothing. The legislature must act now.

¹⁷ These numbers reflect the best available data as of 9:00 am on Tuesday, May 5, 2020. For the most recent numbers, see ACLUM: Data for Justice, *Tracking COVID-19 in Massachusetts Prison & Jails*, updated daily, <https://data.aclum.org/sjc-12926-tracker/>.