Supreme Judicial Court for the Commonwealth Full Court: SJC-13116 Filed: 5/28/2021 4:24 PM

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

NO. SJC-13116

COMMITTEE FOR PUBLIC COUNSEL SERVICES and
MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,
APPELLANTS,

v.

BARNSTABLE COUNTY SHERIFF'S OFFICE, BERKSHIRE COUNTY SHERIFF'S OFFICE, BRISTOL COUNTY SHERIFF'S OFFICE, DUKES COUNTY SHERIFF'S OFFICE, ESSEX COUNTY SHERIFF'S OFFICE, FRANKLIN COUNTY SHERIFF'S OFFICE, HAMPDEN COUNTY SHERIFF'S OFFICE, HAMPSHIRE COUNTY SHERIFF'S OFFICE, MIDDLESEX COUNTY SHERIFF'S OFFICE, NORFOLK COUNTY SHERIFF'S OFFICE, PLYMOUTH COUNTY SHERIFF'S OFFICE, SUFFOLK COUNTY SHERIFF'S OFFICE and WORCESTER COUNTY SHERIFF'S OFFICE,
APPELLEES.

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INTRODUCTION

Much of the Sheriffs' brief is devoted to claiming credit for safety measures that are not at issue in this case. The Sheriffs do deserve credit for those measures. But to imply that they negate what is actually at issue—an unsupported decision to reject the Centers for Disease Control and Prevention's COVID-19 testing guidelines, a steadfast refusal to exercise release authorities expressly granted by the legislature to the Houses of Correction, and a failure in two counties to assure confidential attorney-client communications—is to misunderstand the law and imperil public safety. Denying someone access to COVID-19 testing because they have a mask is no better than denying them access to a dentist because they have a toothbrush.

With respect to COVID-19 testing, the HOCs claim that they can constitutionally manage what they deliberately refuse to measure. They do not deny that, in March 2021, the CDC deemed the testing of people who are non-symptomatic and without known or suspected SARS-CoV-2 exposure—known as screening testing—to be "essential to stop the spread of COVID-19." R:318, 320. Nor do the HOCs deny that they have the resources to begin such testing "immediately." HOC Br. 41. But they have declined to implement this testing, as if the CDC updated its guidance for no reason. The HOCs reason that the Massachusetts Department of Public Health has not explicitly recommended

screening testing, and that plaintiffs' testing claim founders on a disagreement between experts. HOC Br. 39-40. Not so. The DPH's recommendation to the HOCs is that they follow the testing recommendations in the CDC guidance, R:395, so in effect DPH *has* deemed screening testing to be essential. But even if it hadn't, the HOCs would still need to show some justification for refusing to do what the CDC has determined is essential to protect incarcerated people, R:318, and what the plaintiffs' experts confirm must be a part of "any reasonable response to the COVID-19 pandemic," R:197.

This justification cannot come from the HOCs' asserted "disagreement" among experts because, in fact, there is no such disagreement. The record contains no opinion whatsoever from the HOCs' expert, Dr. Alysse Wurcel, on whether the HOCs should conduct screening testing. R:536-38. Her affidavit does not indicate that she was asked for such an opinion, let alone that she disputes the opinions of plaintiffs' experts. *Id.* Thus, the HOCs have declined to implement testing that the CDC has recommended, and that plaintiffs' experts have shown to be the medical standard of care, not because there is some "dispute," but because they simply refuse. That is deliberate indifference.

With respect to releasing people to pretrial diversion or home confinement, the HOCs agree that they have such statutory authority. R:26, ¶¶37, 39. Nor do they disagree that the majority of HOCs have not used these authorities to

release—or even to consider releasing—*any* incarcerated people during the pandemic. R:26, ¶¶ 38, 40. They instead claim that they have released "40.5% of their total inmate population," HOC Br. 22, and that it is not "the role of the HOCs" to do more, *id.* at 47.

Again, the HOCs are mistaken. Although it is unclear how the HOCs calculated their 40.5% figure, see HOC Br. 46 n.16, it is wrong. As of May 19, 2021, the HOCs' combined population was still 85% of the population on April 12, 2020. SJC-12926, Dkt. #163, (May 24, 2021) (hereinafter, 5/20/21 SM Report).[1] Equally wrong is the HOCs' view of their role; it is decidedly their role to release prisoners during a disease outbreak because the legislature has authorized them to do just that. If the HOCs are unwilling to accept their assigned function during a global pandemic, then that too is deliberate indifference.

With respect to attorney-client communications, Bristol and Essex argue that they satisfy the constitutional requirements because it is a defense attorney's "choice" not to meet in person, HOC Br. 52, and because they believe other available modes of communication are sufficient alternatives to in-person meetings. Yet it is not unreasonable to avoid entering a jail during a pandemic, and Bristol and Essex do not offer sufficient videoconferencing—the closest

[1] The Special Master's report was docketed on May 24, but signed on May 20.

approximation of in-person communication—to satisfy the constitutional standard during the pandemic.

Just recently, this Court held that COVID-19 presents elevated risks to persons in the "confined space" of the courtroom. *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 354 (2021). Moreover, the Trial Court COVID Safety Protocols effective June 1, 2021, still has occupancy limits in the courthouses, requires mask wearing and social distancing, and for people in lock-up, only permits multiple people in a cell if social distancing is possible.[2] If these risks still justify significant changes to time-limited gatherings of relatively small numbers of people in courthouses, then they surely demand changes at the HOCs, where hundreds of people live together in close quarters. Governor Baker's recent announcement that mask requirements will remain in effect in jails and prisons,[3] even as non-incarcerated individuals face fewer restrictions,[4] likewise augurs that COVID-19 will especially threaten incarcerated populations going forward. With other infectious diseases, such as tuberculosis, it is "generally recognized that

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[2] See Trial Court COVID Safety Protocols Effective June 1, 2021 for External Stakeholders, *infra* at page 26.

[3] See Massachusetts Department of Public Health, *COVID-19 Mask Requirements* (last visited May 28, 2021) (hereinafter Mass. Mask Mandate), https://www.mass.gov/info-details/covid-19-mask-requirements.

[4] See Press Release, *Baker-Polito Administration to Lift COVID Restrictions May 29, State to Meet Vaccination Goal by Beginning of June* (May 17, 2021), https://www.mass.gov/news/baker-polito-administration-to-lift-covid-restrictions-may-29-state-to-meet-vaccination-goal-by-beginning-of-june.

correctional facilities must implement robust [] screening and prevention programs in order to protect against unnecessarily exposing inmates." *Hernandez v. Cty. of Monterey*, 110 F. Supp. 3d 929, 942 (2015). The same is true here.

<u>ARGUMENT</u>

I. The HOCs' inadequate COVID-19 testing and decarceration practices unconstitutionally punish sentenced people in violation of the Eighth Amendment and art. 26.

A. COVID-19 presents a substantial risk of serious harm to incarcerated people.

The HOCs claim that the risk of COVID-19 is no longer serious in their facilities, pointing to (1) their reported rates of hospitalizations and deaths; (2) their "extensive processes and procedures" for managing COVID; and (3) their vaccination program. HOC Br. 33-34. But the test for substantial harm is not whether there is a completely uncontrolled pandemic raging inside a facility. Cf. *Foster v. Commissioner of Correction*, 484 Mass. 698, 701 (2020) ("Prison officials have a duty under the Eighth Amendment to protect inmates in their custody from the spread of serious, communicable diseases including where the complaining inmate does not show symptoms of the disease, or where 'the possible infection might not affect all of those exposed.'" (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993))). Thus, notwithstanding the HOCs' argument, "[t]here is, and can be, no meaningful dispute that COVID-19 presents a substantial risk of

serious harm" to incarcerated people. *Baez v. Moniz*, 460 F. Supp. 3d 78, 89 (D. Mass. 2020).

First, the HOCs' reported rates of hospitalizations and deaths do not demonstrate an absence of risk because COVID-19 infections can cause serious long-term harm even when they do not result in hospitalization or death. See CPCS/MACDL Br. 19-20; R:141, ¶¶20-26. The HOCs claim that the potential effects of long-term COVID at the HOCs "should be discounted as purely speculative." HOC Br. 43 n.14. But undisputed record evidence shows that an estimated one in ten COVID-19 patients will experience long-term symptoms such as fatigue, chest pain, shortness of breath, headache, and brain fog, or receive a new neurological or psychiatric diagnosis within six months of their COVID-19 diagnosis. R:143, ¶26. The HOCs have not put forward any reason why this "long haul" COVID would be less of a concern in the carceral setting. Instead, Dr. Wurcel states that she has "reviewed the scientific studies and literature cited by Plaintiffs' experts" and has "not discounted these scientific findings." R:537, ¶9.

Second, notwithstanding the HOCs' cleaning and safety protocols, the record is clear that, without regular screening testing, the HOCs "are completing only part of the testing strategy the CDC has identified as necessary to prevent SARS-CoV-2 transmission in carceral settings." R:201, ¶50. Indeed, without

screening testing, the HOCs cannot possibly know how well their other mitigation efforts are working. R:148-49, ¶¶52-54; R:198, ¶¶31-32.

Finally, the HOCs' vaccination program cannot be said to have eliminated the substantial risk of serious harm because the HOCs do not even know what percentages of their staff and currently incarcerated people have been vaccinated. R:31, ¶¶87-88, 90-91, 96; HOC Br. 20 n.8. Based on the number of cumulative vaccinations, it is nevertheless clear that the HOCs are nowhere near the level of vaccination required to prevent uncontrolled COVID outbreaks in their facilities. "[T]he vast majority of the people living and working in the HOCs will have to be vaccinated before the HOCs achieve community immunity." R:204, ¶65. And as of May 19, 2021, the HOCs had administered a total of only 2,978 second doses to incarcerated people, including the doses administered to people no longer in their custody, while their combined population was 5,827. 5/20/21 SM Report. Moreover, "[g]iven that it takes weeks for the vaccines to confer full effectiveness, routine testing of non-symptomatic people is critical to preventing outbreaks amongst the constantly changing population." R:149, ¶58.

B. The HOCs' failure to conduct regular screening testing of incarcerated people and staff constitutes deliberate indifference.

The HOCs demonstrate deliberate indifference not because they have failed to conduct the testing that plaintiffs "want[]," HOC Br. 40, but because they have failed to conduct the testing that the CDC recommends, to which the DPH has

expressly referred, and which plaintiffs' experts have established is necessary to protect incarcerated people. More than that, the HOCs have failed to conduct this testing without ever offering any rationale—including from their own expert—for why they can't or won't do so.

To begin, the HOCs' arguments rely on a mistakenly narrow view that only "serial screening testing" is at issue here. HOC Br. at 9, 29, 32, 35, 41. Yet as plaintiffs previously explained, the CDC recommends *multiple* types of screening testing in addition to serial testing, including (1) testing all staff every three to seven days; (2) testing all incarcerated people at intake; and (3) unit- or facility-wide testing whenever there is a single positive test. R:325-28; see CPCS/MACDL Br. 13-14, 21-22.[5] None of the HOCs do the first; nine fail to do the second; and at least eight have never conducted the third. R:23, ¶¶16-18.

The HOCs' primary defense of their scant testing practices is the suggestion that the CDC, DPH, and Dr. Wurcel disagree with the plaintiffs' experts, and the HOCs have simply chosen to follow one group of experts over another. HOC Br. 32, 39-41. Although the HOCs correctly note that "a dispute, between medical professionals," typically does not establish deliberate indifference, HOC Br. 36

[5] As in plaintiffs' opening brief, see CPCS/MACDL Br. 36-41, this brief utilizes the CDC's broader definition of screening testing.

(citing *Feeney v. Corr. Med. Servs., Inc.*, 464 F.3d 158, 162 (1st Cir. 2006)), that is irrelevant here because *there is no dispute*. The CDC testing guidelines establish that screening testing is "essential to stop the spread of COVID-19" in jails and prisons. R:318. DPH, in turn, directs the HOCs to follow the CDC. R:390-91, 393, 395. And after reviewing the plaintiffs' experts' affidavits, the HOCs' own expert, Dr. Wurcel, agrees that the "CDC is the leading authority for COVID-19 prevention and mitigation—including testing—in correctional facilities," and that CDC guidelines should "inform decisions for the jails." R:537-38. Aside from these statements, Dr. Wurcel's affidavit provides no advice regarding testing strategies, let alone a recommendation to depart from the CDC's guidelines, or a disagreement with the plaintiffs' experts that "any reasonable response to the COVID-19 pandemic" must include regular testing of non-symptomatic incarcerated people and staff. R:197, ¶28.[6]

[6] The HOCs' assertion that experts cannot opine on whether an action constitutes cruel and unusual punishment as a matter of law, while true, is irrelevant. HOC Br. 40 n.12. Plaintiffs' experts do not assert legal conclusions, but rather speak to factual matters that are squarely within their purview. See, e.g., *Torres v. Commissioner of Correction*, 427 Mass. 611, 614 n.5 (1998) (noting "while 'the opinions of experts are entitled to little weight in determining whether a condition is 'cruel and unusual punishment' under the Eighth Amendment . . . expert opinion may be considered in assessing the effects of challenged conditions or practices'") (quoting *Madrid v. Gomez*, 889 F. Supp. 1146, 1159 (N.D. Cal. 1995)).

At bottom, the HOCs seem to argue that they have satisfied their constitutional obligations simply because they have "consulted local public health officials and CDC guidance in deciding to now take *some* precautionary measures." *Criswell v. Boudreaux*, No. 1:20-cv-01048, 2020 WL 5235675, at *18 (E.D. Cal. Sept. 2, 2020) (emphasis in original). But that is not so when, after such consultation, they have ignored this testing guidance without explaining why it is "not reasonable and available here." *Id*.

The HOCs' deliberate indifference is all the more pronounced after months of hearings before the Special Master in this case, which presented the HOCs with ample opportunities to rebut the plaintiffs' evidence or offer any scientific basis or practical impediment that might explain their failure to do more testing. Cf. *Farmer v. Brennan*, 511 U.S. 825, 846 n.9 (1994) (noting courts can consider developments during the litigation in its deliberate indifference analysis). In response, the HOCs neither changed nor justified their policies; they just continued them. The HOCs cannot now "plausibly persist in claiming lack of awareness" that screening testing is necessary in their jails. *Id.*

Far from marshalling any medical justification to support their testing practices, the HOCs resort to arguing that this Court and DPH *tacitly* approved those practices by failing to force a change. See HOC Br. 14-15, 17, 29, 42-43. But that is not how this Court and DPH operate. The absence of sua sponte relief does

not amount to this Court's imprimatur. Likewise, while DPH has the authority to investigate diseases, disseminate information, and make recommendations, R:391, there is no record evidence that it oversees the HOCs. In fact, the record suggests that DPH does not intervene when the HOCs fail to follow its recommendations. For example, although DPH states that it recommended facility-wide testing at Middlesex "three separate times," R:392, 394, the total number of tests administered to incarcerated people at Middlesex throughout the entire pandemic is just 1.7 times the current population, suggesting that at least one, if not more, of these facility-wide tests never occurred.[7] Similarly, DPH identifies at least two instances in which it recommended broad testing in units at Bristol, R:392, yet there is no evidence that these tests ever occurred.

Finally, neither the HOCs' "general preventative measures" nor their provision of the vaccine negates their deliberate indifference with respect to testing. HOC Br. 38, 41. Implementing some safety measures will not insulate a facility from liability if it fails to include a necessary step that renders other safety measures inadequate. Cf. *Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (ignoring clear warnings that the care provided is inadequate can evidence deliberate indifference). And here, testing remains a "sine qua non" upon which

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[7] See 5/20/21 SM Report (showing that as of May 19, 2021, Middlesex had a total incarcerated population of 558 and had administered a total of 946 COVID-19 tests to incarcerated people throughout the pandemic).

other preventative measures rely. *Foster*, 484 Mass. at 723. For this reason, Judge Young determined that even though a jail had taken "significant steps" to protect detainees from COVID-19, which largely mirror the measures described in the HOCs' brief, it likely still evidenced deliberate indifference because it "obstinately refused" to conduct "robust testing." *Savino v. Souza*, 459 F. Supp. 3d 317, 329, 331 (D. Mass 2020). Similarly, screening testing remains critical in jails even after a vaccine has been offered. The Bureau of Prisons, for example, still tests all intakes despite fully vaccinating more than 86,107 incarcerated people and staff,[8] and long-term care facilities in the Commonwealth still require weekly testing of non-vaccinated staff even though all residents have been offered the vaccine.[9]

C. The HOCs' refusal to exercise their statutory decarceration authority also constitutes deliberate indifference.

The HOCs do not dispute that they could release more people under their own statutory authority. But they have made a "decision"—a deliberate choice—

[8] Compare Federal Bureau of Prisons, *BOP Modified Operations* (last visited May 28, 2021), https://www.bop.gov/coronavirus/covid19_status.jsp, with Centers for Disease Control and Prevention, *CDC COVID Data Tracker: COVID 19 Vaccinations in the United States* (last visited May 28, 2021), https://covid.cdc.gov/covid-data-tracker/#vaccinations; see also *Catchings v. Wilson*, No. 1:21-cv-00428, Dkts, 70, 70-1 & 70-2 (D. Md, April 15, 2021) (settlement agreement requiring both the provision of vaccinations to, and the weekly testing of, incarcerated people and staff).

[9] Memo from Kevin Cranston and Margret Cooke, Mass. Dep't of Public Health, to Skilled Nursing Facilities, Rest Homes, Assisted Living Residences (May 5, 2021), https://www.mass.gov/doc/updates-to-long-term-care-surveillance-testing-0/download.

not to. HOC Br. 44. The HOCs appear to reason that the limited relief ordered in *CPCS* justifies this near-blanket rejection to consider transfers out of their facilities. *Id.* at 4, 44-47. That is not so.

First, as opposed to the *CPCS* litigation, this case raises constitutional claims, including the claim that under the circumstances of this pandemic it is unconstitutional for the HOCs to refuse to exercise their authority to meaningfully reduce their incarcerated populations. See CPCS/MACDL Br. 30-31, 41-45. Contrary to the HOCs' suggestion, plaintiffs' constitutional argument is not that this Court should sit as "Super Sheriff[]." HOC Br. 45. Instead, it is that the HOCs' near-blanket refusal to exercise their statutory authority to meaningfully decarcerate constitutes deliberate indifference that violates the constitutional rights of incarcerated people—just as it would be deliberate indifference for the HOCs to refuse, without reason, any other measure that is "a necessary component for any reasonable strategy to combat the spread of SARS-CoV-2 in Massachusetts prisons and jails." R:202, ¶56. Because of that constitutional violation, this Court can order the HOCs to meaningfully reduce their populations through individualized consideration of each person eligible for release. See CPCS/MACDL. Br. 41-45, 55-56.

Second, by construing *CPCS*'s pronouncements concerning limits on *the judiciary's* authority to order the release of sentenced prisoners, as an excuse to

abandon *their own* decarceration authority, the HOCs have all but conceded deliberate indifference. This Court held in *CPCS* that, absent a constitutional violation, it lacked the inherent authority to order relief for "sentenced inmates who have been serving a legal sentence." 484 Mass. 431, 452 (2020). Yet the HOCs now say that they are not releasing "sentenced inmates beyond those who the trial courts released after the determination in *C.P.C.S.*," HOC Br. 44, because they insist, incorrectly, that the judiciary already declined to order their releases on the merits. See HOC Br. 46 ("[A]ll previously sentenced inmates still incarcerated have already been evaluated and deemed not appropriate for release under the conditions set forth by the Court in *C.P.C.S.* . . .").

The need for further releases is not diminished by the HOCs' puzzling insistence that there has been a "40.5% reduction in inmates incarcerated in the HOCs' facilities." HOC Br. 46; see also *id.* at 22, 30 & 46 n.16. As a threshold matter, and as the HOCs acknowledge, the majority of the releases reported to the Special Master were due to decisions by a trial court or district attorney's office. HOC Br. 46. In fact, the record demonstrates that the HOCs have used their own authority to release just 142 people since April 2020. See CPCS/MACDL. Br. 25, 44; R:28-29, ¶¶61-62, 64-66. Moreover, it is simply not the case that there has been a 40.5% population reduction. Because the HOCs experience regular turnover and new arrivals, the salient calculation to determine population reduction must

compare the current population to the population at the start of the pandemic. Here, this comparison demonstrates that the HOCs' current population (5,827 on May 19, 2021) is 15%—not 40.5%—less than their population at the start of reporting (6,863 on April 12, 2020). 5/20/21 SM Report.

The HOCs' intentional refusal to even consider individualized assessments under the powers granted to them by the legislature, based on a misconception of this Court's decision in *CPCS*, and an overstatement of the releases that have already occurred, demonstrates deliberate indifference.

II. The HOCs' inadequate COVID-19 testing and decarceration practices also violate the due process rights of pretrial detainees.

The HOCs acknowledge that, unlike convicted prisoners, "pretrial detainees may not be punished at all." HOC Br. 48-49 (quoting *Richardson v. Sheriff of Middlesex Cty.,* 407 Mass. 455, 461 (1990)). Nevertheless, they argue that an identical analysis should apply to both Eighth Amendment and due process claims, warning that this Court should not "break with the First Circuit." HOC Br. 50. But the First Circuit has not answered this question. The sole First Circuit case cited by the HOCs notes that the boundaries of the duty to provide medical care to pretrial detainees "have not been plotted exactly." *Miranda-Rivera v. Toledo-Dávila*, 813

F.3d 64, 74 (1st Cir. 2016), quoting *Gaudreault v. Municipality of Salem, Mass*., 923 F.2d 203, 208 (1st Cir. 1990).[10]

As noted above and in the opening brief, the HOCs' treatment of pretrial individuals is unconstitutional under any applicable standard. But if this Court chooses to resolve this legal question, it should join the Second, Seventh, and Ninth Circuits in reading *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), to require an objective standard for pretrial detainees' Fourteenth Amendment claims.[11]

III. Because carceral settings are high-risk environments for COVID-19, videoconferencing capabilities are still necessary to provide effective assistance of counsel.

The HOCs argue that in-person visiting options, telephone calls, and legal mail are sufficient to protect the right to counsel. HOC Br. 54. Under normal circumstances, plaintiffs would agree. But these are "exceptional circumstances." *Vazquez Diaz*, 487 Mass. at 344 n.13. While vaccine availability improves these circumstances, "pandemics are unpredictable[,] with potentially widespread and catastrophic impacts." *Id*. at 349 n.15.

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[10] Although, as the HOCs note, some district courts in the First Circuit continue to apply the deliberate indifference standard, HOC Br. 49-50, others have applied an objective standard to detainees' claims regarding the failure to provide adequate medical care. See, e.g., *da Silva Medeiros v. Martin*, 458 F. Supp. 3d 122, 128 (D.R.I. 2020); *Yanes v. Martin*, 464 F. Supp. 3d 467, 469 n.3 (D.R.I. 2020).

[11] See *Darnell v. Pineiro*, 849 F.3d 17, 35, 36 (2d Cir. 2017); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018).

This is particularly true in jails and prisons, which remain higher risk environments for the continued transmission of COVID-19. For example, even while vaccination rates have improved outside of carceral settings, the CDC's general guidance with respect to jails and prisons still recommends reducing the number of interactions in carceral facilities, including "limit[ing] transfers of incarcerated/detained persons to and from other jurisdictions and facilities," and "mak[ing] every possible effort to modify staff assignments to minimize movement across housing units and other areas of the facility."[12] Similarly, the Commonwealth's updated mask requirements, which take effect on May 29, 2021, still explicitly command mask wearing in the HOCs.[13]

Given this ongoing risk in jails, videoconferencing remains necessary to ensure that clients have meaningful access to confidential communications with their attorney, as well as with members of the defense team—e.g., social workers and other experts, investigators, or interpreters—who might be unable to go safely into and out of Bristol and Essex. Notwithstanding the HOCs' assertions to the contrary, neither the telephones, nor the tablets, nor the non-contact visits they

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[12] Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated May 6, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html. Please note that while the version of this general guidance in the Record Appendix, at R:330-63 is now outdated, the testing guidance, at R:318-29, is still current.
[13] See Mass. Mask Mandate.

provide are confidential because other people can overhear portions of the conversations. R:62, ¶386; R:65, ¶418; R:67, ¶¶434-37; R:68, ¶¶ 448-449; R:302-05. A meeting is not confidential just because it is not recorded. Only in-person contact visits and videoconferencing provide the opportunity for confidential communications. So long as the former is an insufficient option, Bristol and Essex's failure to provide sufficient access to the latter violates the right to counsel.

CONCLUSION

For the foregoing reasons, plaintiffs ask this Court to grant the relief described in their opening brief. See CPCS/MACDL Br. 56.

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Respectfully,

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May 28, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a) (13) (addendum); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P 18 (appendix to the briefs); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction). The brief was typed in Times New Roman 14 point font using Microsoft Word 2016, and includes 4,094 non-excluded words.

Dated: May 28, 2021

/s/ Rebecca Jacobstein
Rebecca Jacobstein

CERTIFICATE OF SERVICE

I certify that on May 28, 2021, I caused a true copy of the Brief and Record Appendix to be served by electronic filing through the CM/ECF system and also served the Brief and Record Appendix via email to Carrie Hill at carrie.hill@massmail.state.ma.us and Dan V. Bair, II at dbair@danbairlaw.com.

Dated: May 28, 2021

/s/ Rebecca Jacobstein
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Trial Court COVID Safety Protocols Effective June 1, 2021 for External Stakeholders

The Trial Court does not currently have the ability to confirm who is vaccinated and who is not, therefore the protocols for courthouses are as follows. These protocols will be monitored to achieve the appropriate balance of safety and reevaluated as circumstances change.

Masks, Distancing, Screening

- Employees, court users and other individuals who work in or visit the courthouse must wear masks and must practice social distancing.

- Occupancy limits, plexiglass and current screening protocols remain in effect.
    - maximum courthouse occupancy / social distancing data will enable local managers to determine reasonable levels based on flow of traffic.

Lock-up Occupancy

- Multiple detainees are allowed in a cell where social distancing is possible.
- Court Officers and detainees are required to wear masks at all times in the lockup and while Court Officers escort detainees to and from the courtroom.

All Jury Trials and Evidentiary Hearings

- Judges who have been fully vaccinated may remove their masks while speaking and may allow mask removal as follows:
    - counsel while speaking, provided that all counsel who have speaking roles in the trial or hearing have been fully vaccinated;
    - witnesses while testifying, including jurors during individual voir dire;
    - during jury impanelment, counsel, a party or witness, briefly and without speaking, for the purpose of permitting potential jurors to determine if they may have a disqualifying relationship with the person; and
    - a criminal defendant or juvenile, if identification is a live issue at trial and jurors' view of that person is necessary to enable jurors to resolve that issue.
- Except as set forth above, all persons must wear masks at all times during jury trials and evidentiary hearings.
- Courthouses not previously approved for jury trials will be reviewed to determine the feasibility of resuming jury trials in those courthouses.