COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJC-12926

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

v.

CHIEF JUSTICE OF THE TRIAL COURT, et al.,
Respondents.

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OR MODIFICATION OF DECISION

None of the Respondents say they believe this Court's April 3 decision is operating to save sufficient numbers of incarcerated individuals from illness and death. Nor could they. In the DOC, few prisoners are being released; it seems less than half of the 300 people with positive parole votes as of March 31 have actually received their parole permits. Although more people have been released from county facilities, none of the sheriffs claim that the relief ordered by this Court has enabled them to make strides in physical distancing or anything else.[1]

[1] In the Middlesex House of Correction, a population reduction has enabled the Sheriff to close dormitory style units, but the Sheriff reports that this reduction is not a result of this Court's decision. See MSO COVID-19 Information, April 10, 2020 – 9:23 a.m. (Update #20) at https://www.middlesexsheriff.org/covid19.

Nevertheless, in opposing Petitioners' request for the kind of "further response" that this Court anticipated might be necessary, *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass. 431, 453 (2020), several Respondents imply that the situation is under control. It is not.

If the situation were under control, it would be getting better, not worse. But at least 279 incarcerated individuals and at least 209 corrections staffers have been infected with COVID-19, up from a combined total of 29 on the day this petition was filed,[2] and prisoner deaths have risen from zero to at least seven during that time. And Respondents effectively concede that the true extent of the outbreak is a mystery. Two Respondents acknowledge the lack of widespread testing is a serious problem, see AGO at 2; SCDAO at 14, many of the sheriffs appear to be testing only those who are symptomatic for COVID-19, see Sheriffs Resp. at 1, and the reports from all Respondents demonstrate that a high percentage of those being tested are positive[3]—a telltale sign of inadequate testing.[4] The known infections, accordingly, are likely the tip of the iceberg, since "a symptom-based testing protocol

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[2] See Deborah Becker, *29 People in Mass. Prisons and Jails Diagnosed With COVID-19*, WBUR (March 23, 2020).

[3] See DOC Resp. at 4 (123 positives from 294 tests is 41.8%); Affidavit of Essex County Sheriff Kevin Coppinger ¶12 (38 positives from 89 tests is 42.6%).

[4] See Declaration of Yoav Golan, M.D. ¶ 9, *Foster v. Mici*, SJC-12935 (Apr. 14, 2020) (explaining how "[t]he much higher positive rate in prisons and jails is consistent with severely restricted ability to test, with testing limited to those with typical and substantial symptoms, missing many with atypical or less severe symptoms").

will not capture the true extent of the disease within jails and prisons." Affidavit of Dr. Elisa Choi ¶5.

Despite not knowing the scope of the outbreak they need to fight, and contrary to this Court's view that "a reduction in the number of people who are held in custody is necessary" to curb outbreaks, *CPCS v. Chief Justice*, 484 Mass. at 445, Respondents appear to be adopting harsh measures that might accomplish very little besides visiting psychiatric damage on incarcerated people. Some Respondents are locking prisoners in their cells for at least 23 hours a day, or only permitting them out for showers and phone calls.[5] Without sufficient testing, there will be no ability to gauge the success of the lockdowns or whether they can be discontinued, and this inhumane treatment could go on indefinitely.[6]

If we continue down this path, it is very likely many incarcerated individuals and corrections staffers will get sick, more will die, and undetected outbreaks will spread into the community. Petitioners respectfully suggest a different path, one with significantly increased testing, better data reporting in order to identify "hotspots," and a process for quicker and more releases.

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[5] See DOC Resp. at 6 ("facilities remain in lockdown"); Coppinger Aff. ¶18 (inmates "locked-in" and let out of cells "for showers and telephone calls"); Affidavit of Lisa Newman-Polk ¶8 (client locked in cell 23.5 hours per day).

[6] See *Connecticut prison warning: Prolonged solitary confinement may 'amount to torture', UN expert warns*; UN NEWS, at https://news.un.org/en/story/2020/02/1058311.

I. More testing and more detailed reporting are essential.

"You cannot contain what you don't know." Choi Aff. ¶7. Insufficient testing makes it impossible to locate, isolate, and treat outbreaks of the virus.[7] Inadequate reporting leaves defense attorneys and the courts in the dark. Yet these problems are present in this case.

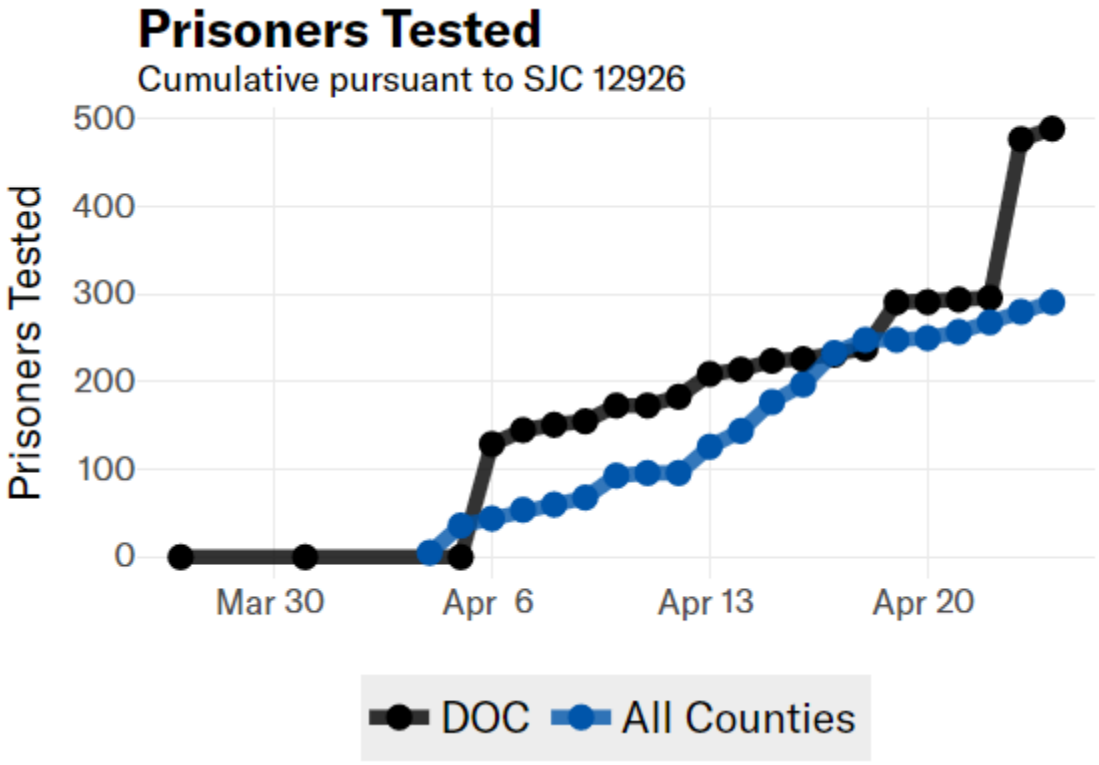
A. This Court should order more testing.

Respondents' submissions reveal that testing of incarcerated individuals in Massachusetts has focused on those exhibiting COVID-19 symptoms. Although the Attorney General suggests that a lack of widespread testing may be attributable to resource constraints, AGO Resp. at 2, the sheriffs themselves do *not* attribute their limited testing to resource constraints. Instead, they candidly acknowledge that many of them have a practice of not testing asymptomatic individuals. Sheriffs' Resp. at Ex. A (Wurcel Aff.). The sheriffs tested just 58 incarcerated individuals between April 17 (the day this motion was filed) and April 24.

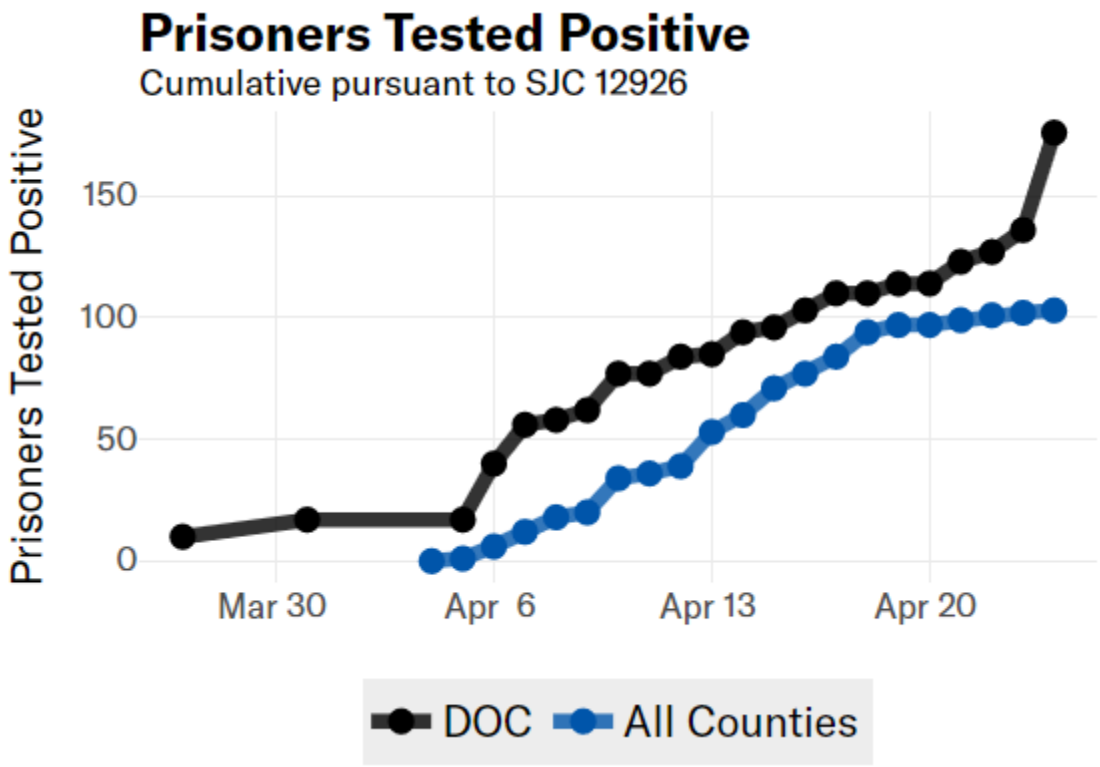
In contrast, during that same period, the DOC reportedly began using a mobile COVID-19 testing site with the capacity to test up to 200 people per day. DOC Resp. at 4. This is a commendable step. Between April 22 and April 23, the DOC increased its number of tests by 181, from 296 to 477. As shown below, where

[7] See Coppinger Aff. ¶11 ("Our team of medical experts have advised us that aggressive testing is the key to isolation and treatment of the virus. We have engaged that process knowing it will allow for better inmate treatment and care").

incarcerated individuals are tested, infections are found; where officials are not looking for infections, they are indeed not finding them.[8]



[8] This mirrors what is occurring at jails and prisons throughout the country. See, e.g., 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. For example, when North Carolina's Neuse Correctional Institution tested all 700 prisoners at its facility, it discovered that "at least 65 percent of the prisoners have the virus," 98 percent of whom did not report symptoms at the time they were tested. *Id.*



This limited assessment of the prevalence of COVID-19 in Massachusetts prisons and jails is unacceptable. "In order to stop an outbreak, you need to first understand how many infections there are." Choi Aff. ¶7. For COVID-19, that means testing those without symptoms. The CDC estimates that infected individuals can spread COVID-19 up to 48 hours before the onset of any symptoms,[9] and that up to 25% of infected individuals never develop any symptoms at all.[10] Indeed, testing asymptomatic and pre-symptomatic people is especially crucial because

[9] Centers for Disease Control and Prevention, *Public Health Recommendations for Community-Related Exposure*, https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html.

[10] Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, The N.Y. Times (March 31, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html.

"trying to understand who is infected as early as possible before there has been any secondary transmission is key to controlling an epidemic." Choi Aff. ¶11. The way to do this is through testing of individuals without symptoms.

To the extent that some sheriffs believe that it is appropriate to decline to test such individuals, they are mistaken. The Massachusetts Department of Public Health (DPH) has recognized the importance of asymptomatic testing in congregate settings; for nursing homes, it urges those using its mobile testing program to order "tests for all residents and staff, NOT just symptomatic individuals." (Emphasis in original.)[11] When it comes to disease transmission, carceral settings and nursing homes are analogous. Choi Aff. ¶13. As a result, it "is reasonable to apply what is already being recommended by DPH in a very similar congregate setting of nursing homes to Massachusetts jails and prisons." *Id.* ¶14. Likewise, Governor Baker has asserted that the DOC is following guidance from the DPH, including on testing protocols.[12] Consistent with DPH recommendations, this Court should order the

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[11] *Massachusetts COVID-19 Nursing Home, Rest Home, and ALR Mobile Testing Program* (April 13, 2020), http://www.massmed.org/Patient-Care/COVID-19/Massachusetts-COVID-19-Nursing-Home,-Rest-Home-and-ALR-Mobile-Testing-Program/.

[12] "[DOC officials] are in constant contact with the Department of Public Health around the policies and protocols that they're using, whether it's related to hand sanitizer or testing protocols or almost everything they're doing with respect to disinfectant and visitation and everything else." Remarks by Gov. Charlie Baker, Apr. 23, 2020, at https://www.youtube.com/watch?time_continue=2775&v=z4hWo6yIIi0&feature=emb_logo (from 45:12 to 47:03).

DOC and sheriffs to pursue testing of all incarcerated individuals and staff, symptomatic or otherwise. Choi Aff. ¶14.

If there are sheriffs who lack either the resources or the willingness to learn the scope of the outbreak in their facilities, they should take immediate steps to remove prisoners from those facilities. *Cf.* G. L. c. 126, § 26 (authorizing the removal of prisoners to any "suitable place" if "disease breaks out in a jail or other county prison"). Upon release, some sheriffs and DOC facilities are providing a flyer from Boston Medical Center's Office Based Addiction Treatment program offering "immediate linkage to treatment with buprenorphine (Suboxone) or naltrexone (Vivitrol) by phone intake with addiction nurse and provider" for those suffering from substance use disorder. See attached BMC flyer. Our understanding is that they have helped at least 34 people referred through the sheriffs and some DOC facilities, and that they are eager to coordinate with every correctional facility to ensure individuals have their contact number before or at release. We ask the Court to order the remaining sheriffs and DOC facilities to provide this flyer as well.

B. This Court should order clearer, more detailed reporting.

This Court should clarify and expand the Respondents' reporting obligations to ensure that, once tests have been conducted, the Petitioners and this Court will have the information necessary to adequately monitor outbreaks at each facility, and lawyers will have the facts necessary to file informed motions for their clients.

First, the Court should order facility-specific reporting by every Respondent, just as it has already done for the DOC. *CPCS v. Chief Justice*, 484 Mass. at 435, 448 n.20. Without facility-specific information, it is impossible to assess which facilities are testing for COVID-19, which ones have cases of the virus, and how many people have been released from each facility.

Second, Respondents should be ordered to report in greater detail. At present, the reporting does not consistently specify whether the numbers of positive cases include those who (a) are currently symptomatic, (b) have been moved to outside hospitals, (c) have recovered, or (d) are dead. This information should be disclosed.[13] Just as important, Respondents should be required to report deaths from all causes as well as those they attribute to COVID-19. Otherwise, individuals dying of COVID-19 might be overlooked simply because no one ever tested them.

II. Staying sentences during the pandemic is both necessary and permissible.

The deadly coronavirus outbreak equally threatens pretrial detainees and sentenced DOC prisoners, yet this Court's decision limited relief only to the former. This ongoing threat requires this Court to reconsider its April 3 pronouncements concerning stays of sentences and declare certain prisoners presumptively eligible for stays. Motion to Reconsider at 7-11. At least 176 DOC prisoners have had

[13] See, e.g., Coppinger Aff, ¶12 (noting 38 reported positive cases and that "25 of those inmates have already been design[ated] as 'recovered' by medical staff").

confirmed COVID-19 cases, and at least seven have died. Yet, per the April 21 Special Master's report, just 12 sentenced prisoners, eight pretrial detainees, and 127 parolees had been released from DOC custody since this Court's April 3 decision. It is unclear how many were released *because of* the decision. But it is clear that the pace of releases, particularly from the Parole Board, is not meeting the challenge.

Commendably, the Parole Board is reportedly conducting more hearings, expediting the review of home plans and required notifications, treating vulnerability to COVID-19 as a compelling reason to grant early parole, and significantly increasing its decisions on change of vote requests, reconsideration, and appeals. Parole Board Resp. at 2-6. And yet things are still not moving quickly. For example, even people who have been found suitable for parole, but whose receipt of a parole permit is contingent upon serving time in a minimum-security facility, are still being required to complete their time in minimum, even though the system-wide lockdown means that all prisoners, including those in minimum, are being detained in what amounts to solitary confinement. See Newman-Polk Aff. ¶¶4-9.

Other individuals deemed suitable for release on parole contingent upon the completion of programming remain incarcerated because no programming is happening. Affidavit of Debra Beard Bader ¶5. Tragically, individuals deemed suitable for release on parole have contracted the virus while awaiting action by the Parole Board. Id. ¶11. In fact, the 127 parolees released as of April 21 represent *less*

than half of the 300 people who had already been deemed suitable for release and were awaiting parole permits when this case was argued on March 31. Simply put, even though the Parole Board is considering the pandemic and moving faster than it has in the past, prisoners who are suitable for release on parole are still having to wait far too long to get out.

Contrary to the arguments of several Respondents, staying sentences is a permissible life-saving alternative to the ongoing bottleneck.[14] For starters, after Petitioners filed their motion for reconsideration, a putative class action raising constitutional claims on behalf of *all* people who are incarcerated in Massachusetts prisons and jails has been reserved and reported to this Court. *Foster v. Mici,* SJC-12935. Even if it were true that separation of powers principles prohibit staying a sentence in the absence of a separate challenge to its legality, those principles could not reasonably hinge on whether the challenge takes the form of an appeal, a new trial motion, or a class action. Otherwise an injustice that plagues hundreds of sentenced individuals would be less likely to be addressed than an injustice that affects just one.

Regardless, it is not true that separation of powers principles prohibit staying a sentence without a challenge to its legality. Plucking language from *Commonwealth*

[14] Because Petitioners have no intention of seeking a stay without first confirming the client wants a stay, the remedy does not pose any due process concerns. See DAO Br. at 8 n.10.

v. McLaughlin, 431 Mass. 506 (2000), certain Respondents assert that a stay is possible only with a challenge to the underlying conviction. See, e.g., Opposing DAs Resp. at 4-9. But the language from *McLaughlin* on which they rely involves this Court's *statutory* authority to grant stays. *McLaughlin* separately discusses the Court's *inherent* authority to issue stays that are not subject to the restrictions of Rule 31. *Id.* at 518-519 (citing examples of stays where no challenge to underlying conviction). Acknowledging the judiciary's ability to exercise this inherent power, *id.* at 520, *McLaughlin* cautioned that such stays were meant to confer "a true reprieve," and should not to be used "for punitive purposes," *id.* at 518. The clear implication of *McLaughlin* and *Commonwealth v. Charles*, 466 Mass. 63 (2013), is that courts can indeed stay sentences under their inherent power, but only where justice requires. See *McLaughlin*, 466 Mass. at 519-520 (acknowledging this authority without "delineat[ing] in detail the contours of trial judges' inherent power to stay execution of sentence"); *Charles*, 466 Mass. at 75 (holding "exceptional circumstances warranted the judge's exercise of his inherent power to stay the execution of [the defendant's] sentences pending the disposition of his motion for a new trial").

Staying sentences now would fall within these parameters, as it would be punitive *not* to permit prisoners to seek a stay during an outbreak that threatens to

kill them.[15] This Court has recognized that it would be contrary to "the interest of justice" for a defendant to serve a sentence that may be vacated due to government misconduct. *Charles*, 466 Mass. at 74. Similarly, it is contrary to the interest of justice for defendants to remain incarcerated to face the risk of infection and death while an outstanding lawsuit seeks their release for the duration of the pandemic. Pausing a sentence until the emergency has subsided ends that needless risk, and is thus squarely within the inherent power of the judiciary.

CONCLUSION

WHEREFORE, Petitioners respectfully request that this Honorable Court reconsider and modify its April 3 decision by:

A. Ordering additional testing and reporting by the DOC and sheriffs;

B. Permitting all sentenced inmates to seek stays, and establishing a rebuttable presumption of a stay in certain categories of cases;

C. Allowing individualized release decisions for those exposed to COVID-19;

D. Expediting hearings on Rule 29 and stay motions;

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[15] Respondents also rely on *Commonwealth v. Jackson*, 369 Mass. 904 (1976), but that case is inapposite. Opposing DAs Resp. at 7. In *Jackson*, the question was whether the court could "defer imposition of sentence by means of probation, a continuance without a finding, or the filing of a case" where the statute imposed a mandatory minimum sentence and explicitly prohibited such dispositions. *Id.* at 920. However, a stay, which is just a pause, is not comparable to probation, a suspended sentence, or a continuance without a finding which would be in lieu of the committed time.

E. Ordering further action and reporting by the Parole Board "to expedite parole hearings, to expedite the issuance of parole permits to those who have been granted parole, to determine which individuals nearing completion of their sentences could be released on time served, and to identify other classes of inmates who might be able to be released by agreement of the parties." *CPCS v. Chief Justice*, 484 Mass. at 436;

F. Ordering all sheriffs and the DOC to hand out the attached flyer from Boston Medical Center; and

G. Awarding all other relief deemed equitable and just.

Respectfully submitted,

/s/ Rebecca A. Jacobstein

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Dated: April 27, 2020

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES and
MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAYWERS,
Petitioners

v.

CHIEF JUSTICE OF THE TRIAL COURT, et al.,
Respondents.

Affidavit of Debra Beard Bader

I, Debra Beard Bader, hereby depose and state under the pains and penalties of perjury as follows:

1. I am an attorney licensed to practice law in the Commonwealth of Massachusetts. For thirty years, I have represented indigent defendants and prisoners, civil and criminal.

2. In the course of my professional work, I have represented several juvenile lifers who are eligible for parole pursuant to *Diatchenko v. District Attorney for the Suffolk Dist.,* 466 Mass. 655 (2013).

3. Two of my juvenile parole clients recently received positive parole decisions declaring them rehabilitated and suitable for release, yet neither has been released. Both men contracted COVID19 after their positive parole orders and were/are hospitalized with complications.

4. Delays between a positive a parole vote and actual release on parole are to be expected in ordinary times. But in the context of the COVID-19 pandemic, these delays have effectively prevented my clients from being released at all while risking their lives.

5. One client (W52968) has been ordered to complete a program and serve a term in minimum security before being released to his home plan. But, due to the pandemic, everyone is locked down, no programming exists, and all reclassifications/transfers between facilities have stopped.

6. I have learned that this client was hospitalized with COVID-19 complications and has since been released back to the prison on a medical unit with no hope of actual release.

7. It is frustrating that this client's release on parole is being held up pending completion of conditions that are impossible under present circumstances. I have made inquiries of the parole regarding this problem but have received no reply.

8. With respect to my other juvenile parole client (W32301), the parole board issued a record of decision on March 23, 2020, granting him release on parole as soon as the District Attorney's office notifies the parole board that the DA will not petition against him under G.L. c.123A.

9. Although the parole board issued its record of decision on March 23, 2020, the parole board did not send it to me for almost a month (April 22), despite multiple requests.

10. This client is 69 years old and has several pre-existing medical conditions involving his lungs and heart that leave him particularly vulnerable to the virus.

11. During the month that it took the parole board to notify me of its decision, an inmate who had just been discharged from the hospital for COVID-19 was placed in my 69 year-old client's cell. My client has now tested positive and is hospitalized, under DOC guard, with COVID-19 complications.

12. I have sent to the appropriate District Attorney's office documentation together with reasons why this client is highly unlikely to meet the probable cause standard for commitment as a sexually dangerous person under Chapter 123A.

13. I have defended SDP petitions for over twenty years. I have also supervised as CPCS counsel and as a bar advocate several dozen SDP defense lawyers. I have direct experience with hundreds of SDP cases. I have never seen anyone like my client -- who has a single juvenile sex offense, 52 years in prison, advanced age, and a remarkably positive institutional record -- face a civil commitment petition under G.L. c.123A; nor, have I ever heard of anything remotely similar.

14. The parole board has not informed me of what steps, if any, it has taken to get the District Attorney to sign off on this client's release on parole.

15. In my experience, the parole board has not "expedited release" of these "previously-approved individuals" since the SJC's April 3 decision in *Committee for Public Counsel Services* v. *Chief Justice of the Trial Court*, 484 Mass. 431, 452-453 & n.24 (2020).

Electronically signed this 26th day of April, 2020.

/s/ Debra Beard Bader
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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES and
MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,
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CHIEF JUSTICE OF THE TRIAL COURT and others,
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AFFIDAVIT OF DR. ELISA CHOI

I, Dr. Elisa Choi, state that the following is a true and accurate statement to the best of my knowledge and belief:

1. I submit this declaration on my own behalf. The views expressed herein are my own personal professional opinions, and do not represent the policies or opinions of any organizations with which I am affiliated.

2. I am a Board Certified physician in Internal Medicine and Infectious Diseases, and the Chief of the Internal Medicine department at Harvard Vanguard's Somerville location. I also have a faculty appointment at Harvard Medical School. I received my undergraduate degree from Stanford University and my medical degree from the University of Medicine and Dentistry of New Jersey, Newark (now Rutgers New Jersey Medical School). I completed my internship, residency and fellowship at Beth Israel Deaconess Medical Center. A copy of my CV is attached as Exhibit 1.

3. In my professional capacity, I have been a front line physician caring for COVID-19 patients during the pandemic. As an infectious disease specialist, I have also closely followed the medical literature on COVID-19.

4. The current literature indicates that pre-symptomatic people—individuals who are already infected with SARS-CoV2, the virus causing COVID-19, but have not yet begun to experience symptoms—can still transmit COVID-19 infection to others. We also know that there are some people who show little or very mild symptoms of the disease, yet they too can transmit COVID-19 to others. We are now recognizing that pre-symptomatic individuals, and those who have such mild symptoms that they do not even realize that they

are infected with COVID-19, can significantly contribute to the transmission and spread of the disease.

5. A strictly symptom-based testing protocol in congregate settings will miss individuals who are infected with COVID-19 but are either pre-symptomatic or have very mild symptoms which may not be recognized as requiring testing. In congregate settings like jails and prisons, there will be a percentage of individuals who are COVID-19 positive who will not be diagnosed if the facility only tests individuals who exhibit "typical" COVID-19 symptoms. As a result, a symptom-based testing protocol will not capture the true extent of the disease within jails and prisons.

6. This failure is particularly dangerous in congregate settings like jails and prisons where social/physical distancing is difficult to achieve at current population levels. Under these conditions, pre-symptomatic or mildly symptomatic individuals who remain undiagnosed in a jail or prison can rapidly spread the disease to other people.

7. You cannot contain what you do not know. In order to stop an outbreak, you need to first understand how many infections there are. A symptom-based testing protocol will not provide complete information about how many infections are present.

8. I have read the declaration that Dr. Alysse Wurcel submitted in this case. See Sheriffs' Resp. Ex. A. Based on my review of Dr. Wurcel's declaration, it is my understanding that many, if not all, of the Massachusetts sheriffs are testing only symptomatic prisoners. You have to test more broadly than this to know the extent of COVID-19 infections in Massachusetts jails and prisons. Any facility that is testing only symptomatic prisoners will not have a complete picture of the number of positive COVID-19 cases in their facility.

9. I have reviewed the data supplied by the sheriffs and the Department of Correction in response to the Court's April 3, 2020 order in this case. It is my understanding that as of April 24, 2020, Dukes and Barnstable counties had not tested any prisoners in their jails. If you have tested zero number of prisoners, you cannot say with any degree of certainty that there are no infections among prisoners in a facility.

10. Based on my review, it is also my understanding that as of April 24, 2020, Bristol, Hampden and Worcester were each reporting zero confirmed positive COVID-19 prisoners, while simultaneously reporting 7, 10 and 4 confirmed positive COVID-19 staff members, respectively. As of that date, Bristol had tested 14 of their 595 prisoners; Hampden had tested 7 of their 783 prisoners, and Worcester had tested 13 of their 574 prisoners. Given the low number of tests they each have conducted under a symptomatic-testing protocol and the existence of confirmed-positive staff members at each of these facilities, it is my professional opinion that Bristol, Hampden and Worcester cannot be certain that there are no COVID-19 infections amongst their incarcerated population.

11. From an epidemiological perspective, part of disease containment involves attempting to get ahead of an infection to try to prevent its spread. Along with social/physical distancing, trying to understand who is infected as early as possible before there has been any

secondary transmission is key to controlling an epidemic. Within a congregate setting, a symptom-based testing approach will not be able to fully capture the extent of the actual number of infections. As a result, this protocol will be inadequate to support COVID-19 containment efforts in preventing outbreak in Massachusetts jails and prisons.

12. My understanding is that Massachusetts Department of Public Health (DPH) now recommends that nursing home facilities using the DPH mobile-testing program "order tests for all residents and staff, NOT just symptomatic individuals."[1]

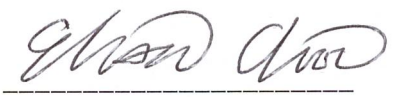
13. The congregate setting of jails and prisons is similar to nursing homes, and presents much of the same heightened risks of COVID-19 transmission.

14. Therefore, the same concerns that animate DPH's recommendation that nursing homes test asymptomatic residents suggest that jails and prisons should similarly expand their testing protocol beyond symptomatic prisoners. It is reasonable to apply what is already being recommended by DPH in a very similar congregate setting of nursing homes to Massachusetts jails and prisons. Extrapolating from DPH's recommendation, it is appropriate to pursue testing of all prisoners and staff in Massachusetts facilities, regardless of whether they are symptomatic.

[signature on the next page]

[1] Massachusetts COVID-19 Nursing Home, Rest Home, and ALR Mobile Testing Program, Revised Guidance: April 13, 2020.

Signed under the pains and penalties of perjury on April 26, 2020.



Elisa Choi, MD, FACP, FIDSA

Updated: April 2020

Name:
Elisa I. Choi, MD, FACP, FIDSA

Current Position:

- Internal Medicine, HIV Medicine, Infectious Disease specialist in clinical practice.

- Chief, Internal Medicine – Atrius Health (Harvard Vanguard Medical Associates) - Somerville.

- Clinical Instructor in Population Medicine – Harvard Medical School, Faculty.

Education:

Stanford University – B.S., A.B. (dual degree recipient)

Rutgers New Jersey Medical School (formerly University of Medicine and Dentistry of NJ – New Jersey Medical School) – M.D. (Alpha Omega Alpha Medical Honor Society degree recipient)

Postdoctoral Training:

Beth Israel Deaconess Medical Center, Boston, MA – Infectious Diseases Clinical and Research Fellowship

Beth Israel Deaconess Medical Center, Boston, MA - Chief Medical Resident

Beth Israel Deaconess Medical Center, Boston, MA – Internal Medicine Residency

Beth Israel Hospital, Boston, MA – Internal Medicine Internship

Licensure and Certification:

Certified, American Board of Internal Medicine – Infectious Disease, active and recertified every 10 years, last 2012
Certified, American Board of Internal Medicine – Internal Medicine, active and recertified every 10 years, last 2019
Massachusetts Board of Registration in Medicine – active and current

AFFIDAVIT OF KEVIN F. COPPINGER

I, Kevin F. Coppinger, 20 Manning Avenue, Middleton, MA 01949, on oath depose and state as follows:

1. I am the duly elected Sheriff of Essex County and in that role I oversee operations at the Essex County Correctional Facilities in Middleton, Massachusetts, the Pre-Release Center in Lawrence, Massachusetts, and the Women in Transition Facility in Salisbury, MA, (collectively hereafter referred to as the "Department"}. I was sworn into office on January 4, 2017. Prior to my tenure in Essex County, I was a Police Officer in the City of Lynn for 32 years, serving the last 7 ½ years as Chief of Police.

2. At present, Massachusetts is operating under a State of Emergency regarding COVID-19. In conjunction with the Governor's proclamation, the Essex County Sheriff's Department has been taking strong, proactive steps at all our facilities to ensure our work and living environments are safe for all employees, visitors, and incarcerated individuals alike.

3. The following precautionary measures, designed to limit access to our facilities and to reduce possible exposure to COVID-19, has been put into effect and will remain so until further notice:

a. All facilities have undergone a thorough deep-cleaning and these efforts continue daily on all three shifts at all locations. Efforts are focused not only on general access locations, but specific attention is given to areas such as door handles, countertops, light fixtures, or anywhere people touch.

b. The Department has installed additional hand-sanitizing stations

throughout all locations. Inmates have also been given additional bars of soap and educated on proper hand-washing and personal hygiene techniques. I am advised by staff that every occupied cell housing inmates has a sink with hot water to allow for hand-washing and personal hygiene. For those inmates detained in a dormitory style setting, inmates also have access to a sink with hot water. Signage, in both Spanish and English, has been posted throughout our facilities with this information to keep these ideas fresh on everyone's mind.

c. The Department is ensuring it is well stocked with medical masks, gloves, and protective eyewear for staff. Cleaning supplies remain at sufficient levels while an inventory for all needs is conducted and updated daily.

d. All general public visitation has been suspended at our Middleton, Lawrence, and Salisbury locations. (Inmate access to telephones has been expanded to offset the temporary loss of visits. In addition, two free 30-minutes calls are being provided for each inmate weekly during this time.)

e. Attorney visits will continue in Middleton but will be non-contact visits. Attorney visits in Lawrence and Salisbury will also continue but will be modified to respect "social distancing" for safety reasons.

f. All programming, via outside vendors/volunteers, at all three locations will be suspended until further notice. However, outside sources are continuing their programs by providing curriculum-based learning packets which the inmates can work on during their day. Examples of these include but are not limited to:

i. Victim Impact

ii. Relapse Prevention Strategies

iii. Parenting Skills

iv. Life Skills

v. Anger Management

vi. High Risk Offender

vii. Relationships and Family

viii. Cognitive Thinking

g. Programming conducted via internal resources, i.e. Department Chaplain, inmate "peer-to-peer" led groups, etc. will continue. Counseling and treatment for substance abuse and mental illness continues.

h. All volunteer visits of any type have been suspended.

i. All facility tours have been discontinued.

j. The Inmate Work Release Program has been suspended.

k. Community Service Work Crews have been suspended.

4. The following operational procedures, designed to continue critical services to our inmate population, will remain in effect without change:

a. Major outside vendors who provide critical services, i.e. Wellpath (our primary health care provider), Acadia Healthcare, Aramark Food Services, Spectrum Health Systems, etc. will remain operational at all facilities to serve the needs of the inmate population.

b. Medication Assisted Treatment will continue for eligible inmates per Department policy.

c. No disruption of routine medical care for inmates has been implemented.

d. Inmates residing in outside facilities such as sober houses, who have been deemed to be at a greater risk living these due to their frequent interaction with other residents, have been returned to the Pre-Release Center where their health can be better monitored and their exposure limited.

5. The following housing and operational changes have been implemented to provide additional protections to keep the COVID-19 virus out of our facilities:

a. We have implemented an enhanced screening process at our Intake Unit to help detect signs of COVID-19. WellPath has taken the lead on this working closely with our staff. This process has been in effect since early February. Inmates presenting with symptoms of COVID-19 are immediately referred to additional medical screening.

b. We have thoroughly educated our staff as well as our inmates on MA Department of Public Health (DPH) and the Center for Disease Control (CDC) guidelines in this regard. Employees coming to work are asked a specific set of questions regarding their well-being upon arrival. We are awaiting delivery of infra-red thermometers and these will become part of the entry screening process as soon as they arrive.

c. Employees have been educated that if they are sick with a fever or have flu-like symptoms such as cough, sore throat, or shortness of breath, they should not report to work and should consult their doctor. Inmates have also been educated in their regard and encouraged to request health care services if symptoms present themselves.

d. Separate male and female "safekeep" areas have been designated to house local police department prisoners prior to arraignment. Police Departments have been asked to implement COVID-19 screening procedures at their stations prior to anyone being transported to our facilities.

e. A "New Man" unit has been set up internally at our Middleton facility to house new Pre-Trial and/or Sentenced inmates for a 14-day period to monitor for signs of COVID-19.

f. Our Medical Housing Unit, operated by WellPath, is equipped with two "negative pressure" rooms to assist with treatment/screening of potential COVID-19 cases. Routine medical care is also available 24/7.

g. We have plans in place, and logistics identified, should this pandemic increase in severity and if it does, in fact, enter our jail. These plans have been developed between our staff and our health care providers following DPH and CDC guidelines.

h. We have contacted judges and other court personnel to strongly consider using video conferencing in lieu of inmate transports to/from courts. This request was made prior to the recent shut down of the courts and it is hoped the courts will consider using video conferencing for health and safety purposes more frequently even after this crisis subsides.

6. We have activated our *Incident Command System (ICS)* to help focus on our continued preparedness and readiness to deal with this pandemic. The team is in constant communication with federal, state, and local health care authorities as well as other resources.

ICS allows us to have a centralized command to oversee and coordinate a Department-wide safe and effective response.

7. History has shown us that many times, upon release from incarceration, inmates frequently rely on public homeless shelters and soup kitchens to meet their daily needs. Worse yet, many inmates return to living on the streets. Given the current circumstances under which we all live at present, I would suggest those life-sustaining necessities are better provided by the Sheriff's Department for those in our custody.

8. A substantial component of any successful re-entry program, and one which I strongly support, is community-based programming and housing for recently released inmates. While I cannot offer an opinion on the status of community-based initiatives during our current State of Emergency, I do believe that inmates suffering from Substance Abuse Disorders or Mental Illness, which make up a substantial portion of our incarcerated population, would be at greater risk in the community if these services were not provided.

9. The impact and spread of the COVID-19 pandemic are changing every day. Even the greatest minds in the medical community have admitted they do not know the full extent of where this will leave us. The Essex County Sheriff's Department will continue to monitor this crisis in partnership with our federal, state, and local partners focusing on best practices in health care and corrections for the health and safety of all who work or reside in our facilities.

10. In addition to the foregoing and for the time period March 27, 2020 to date, the Department has instituted additional measures, inclusive of the statistical data set forth below, including but not limited to the following:

11. Our team of medical experts have advised us that aggressive testing is the key to isolation and treatment of the virus. We have engaged that process knowing it will allow for

better inmate treatment and care.

12. As last reported to the designated Special Master on April 16, 2020, Essex County has tested 89 inmates to date with 38 reported positive cases. In each case, inmates reported only mild symptoms. 25 of those inmates have already been designed as "recovered" by medical staff.

13. Also as last reported to the designated Special Master on April 16, 2020, 8 Correctional Officers and 1 contractor have been tested positive for COVID-19. 3 staff and the 1 contractor have been designated as "recovered" and medically cleared to return to work.

14. Inmates who are currently +COVID are only housed in a single cell or with another +COVID individual.

15. On April 3, 2020, all inmates were mandated to wear protective masks anytime they are out of their cells. All inmates have now been issued commercially manufactured surgical masks.

16. All ECSD staff, vendors, as well as anyone else entering our facilities are also required to wear masks. In addition to the screening process previously mentioned, , temperatures are also now taken for all who enter our facilities.

17. On April 7, 2020, ECSD stopped accepting "Safekeep" prisoners from local law enforcement agencies.

18. On April 10, 2020, our Middleton facility began operating in a "locked-in" capacity and will remain so until further notice. This procedure allows staff to better control any additional spread of the virus and reduce the possibility of cross-contamination. Inmates will still receive time out of their cells for showers and telephone calls.

19. A direct link has been set up on our website for family and loved ones of inmates

as well as attorneys to make inquiries. Designated staff members have been assigned to prioritize the handling of these inquires and to respond in a timely fashion.

20. Supplies of Personal Protective Equipment (PPE's) continue to come in more frequently now allowing us to replenish our stock.

21. Attached as Exhibit A hereto are two (2) charts, both of which are incorporated by reference herein, one tracking the Departments' inmate count in 2019 as well as since the declaration of the State of Emergency on March 10, 2020, the second providing a snapshot of the number of inmates released since the State of Emergency through March 26, 2020.

22. Attached as Exhibit B hereto is a chart which is incorporated by reference herein, evidencing the number of releases from the Department for the period March 10 through April 16, 2020, both with respect to everyday releases in the normal course, and those releases specifically pursuant to the Supreme Judicial Court decision in SJC 12926, broken down by sentenced and pre-trial inmates.

The facts recited herein are based upon my personal knowledge.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 17th DAY OF APRIL, 2020.

Kevin F. Coppinger
Essex County Sheriff

EXHIBIT A

Essex County Sheriff's Department				
Date	Safekeeps	Pre-trial	Sentenced	Total
3/10/2019	39	743	613	1,395
3/10/2020	2	724	560	1,286
3/26/2020	4	670	543	1,217

Essex County Sheriff's Department	
Status	Total # Released Between 3/10/20 & 3/26/20
Safekeeps	34
Pre-trial	128
Sentenced	68
Total	230

EXHIBIT B

Releases since 3/10/2020

	Sentenced			Pretrial	
	Typical Release	SJC Release		Typical Release	SJC Release
10-Mar	5	0		18	0
11-Mar	1	0		19	0
12-Mar	2	0		13	0
13-Mar	3	0		19	0
14-Mar	0	0		1	0
15-Mar	0	0		0	0
16-Mar	8	0		3	0
17-Mar	0	0		24	0
18-Mar	4	0		21	0
19-Mar	0	0		7	0
20-Mar	9	0		15	0
21-Mar	0	0		2	0
22-Mar	0	0		0	0
23-Mar	0	0		9	0
24-Mar	4	0		11	0
25-Mar	2	0		9	0
26-Mar	0	0		10	0
27-Mar	6	0		8	0
28-Mar	0	0		1	0
29-Mar	0	0		1	0
30-Mar	1	0		16	0
31-Mar	2	0		12	0
1-Apr	0	0		16	0
2-Apr	1	0		10	0
3-Apr	3	0		11	0
4-Apr	0	0		1	0
5-Apr	0	0		0	0
6-Apr	1	0		9	0
7-Apr	1	0		5	0
8-Apr	2	0		8	8
9-Apr	1	1		2	12
10-Apr	5	0		6	9
11-Apr	0	0		2	1
12-Apr	0	0		0	0
13-Apr	1	0		4	3
14-Apr	2	0		6	3
15-Apr	0	0		5	3
16-Apr	9	0		0	1
Totals	**73**	**1**		**304**	**40**

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES and
MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAYWERS,
Petitioners

v.

CHIEF JUSTICE OF THE TRIAL COURT, et al.,
Respondents.

Affidavit of Lisa Newman-Polk

I, Lisa Newman-Polk, hereby depose and state the following to the best of my knowledge, information, and belief:

1. I am an attorney and I have been licensed to practice law in Massachusetts since 2006. I previously worked as a lawyer in the public defender division of the Committee for Public Counsel Services (CPCS) and I currently have a solo law practice.

2. I am also a social worker and have been licensed as an LCSW in Massachusetts since 2012. From 2013 to 2014, I worked as a mental health clinician at Souza-Baranowski Correctional Center (SBCC).

3. In my current law practice, I represent 11 men serving life sentences who are seeking parole. All of these clients are so-called "juvenile lifers."

4. On June 17, 2019, the Parole Board ("Board") granted parole to my client, Julio Nazario, stating that he had "demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society."[1] In reaching this decision, the Board noted that Mr. Nazario had "participate[d] in numerous programs" and had also "explained the emotional growth that he experienced through programming, not only understanding his flaws, but in empathizing with the damage he caused to the families of his victims."[2]

5. The Board further stated that before Mr. Nazario could be released, he must complete 18 months in lower security. Mr. Nazario transferred to minimum security at Northeastern Correctional Center in Concord on September 24, 2019. While housed in minimum security, Mr. Nazario has been rule-compliant, employed, and involved in programming.

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[1] Parole Board Decision in the Matter of Julio Nazario, June 17, 2019. https://www.mass.gov/doc/julio-nazario-life-sentence-decision/download

[2] Id.

6. On April 8, 2020, pursuant to 120 CMR 304, I filed a petition asking the Board to reduce Mr. Nazario's minimum security requirement from 18 months to six months in light of his good behavior and the worldwide COVID-19 pandemic that has impacted Massachusetts particularly hard. I also provided details of a solid home plan where Mr. Nazario would be supported financially and emotionally by a highly educated and stable family.

7. On April 19, 2020, I received notice that Mr. Nazario's minimum security requirement was amended from 18 months to 12 months. This means that Mr. Nazario will not be released for another five months and therefore is not alleviated of the current risks posed to him in a prison environment during this pandemic.

8. In addition to the heightened risk of COVID-19 contraction in prison, Mr. Nazario has been subjected to solitary confinement since April 3, 2020, when the Department of Correction (DOC) instituted a system-wide lockdown, confining prisoners in their cells or dorms. Mr. Nazario has been locked inside his cell for 23.5 hours a day. He (like many of my other clients housed in cells) is permitted out only for 30 minutes a day (or less) to take a shower and make a brief phone call. He is not allowed outside for fresh air.

9. As of this writing, the prisons are on lockdown for an indefinite period of time, and Mr. Nazario has been subjected to confinement for 25 days and counting.

10. As a former mental health clinician in the DOC, I understand the limited options available to contain the spread of COVID-19 given the numbers of incarcerated people. I am concerned for both staff and prisoners with regard to this potentially deadly disease and I appreciate that the system-wide lockdown is intended to save lives. At the same time, I am acutely aware of the psychological and physiological damage inflicted by prolonged solitary confinement. The current situation where prisoners are locked in their cells and allowed on the tier for a maximum of 30 minutes a day is worse than "normal" solitary confinement used as punishment in the DOC where prisoners are permitted outside in a recreation cage for one hour per day.

11. The United Nations has declared that "[t]he use of solitary confinement can only be accepted in exceptional circumstances where its duration must be as short as possible and for a definite term that is properly announced and communicated."[3] Importantly, "[t]he adverse acute and latent psychological and physiological effects of prolonged solitary confinement constitute severe mental pain or suffering." For these reasons, the Special Rapporteur for the United Nations concluded that "any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment . . . ."[4]

12. The reason for requiring prisoners granted parole to reside in minimum security before returning to the community is to provide a transitional phase where there is no prison wall and less

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[3] United Nations General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment*, Sixty-Sixth Session, p. 20. August 5, 2011. http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf

[4] Id. at 21.

structure. However, with the lockdown in response to the COVID-19 risk, Mr. Nazario is being subjected to confinement more extreme than if he were housed in Massachusetts's supermax prison (the Departmental Disciplinary Unit at MCI-Cedar Junction). In short, this is not preparing him for the community and instead is inflicting harm.

13. As a final note, Mr. Nazario appeared before the Board on June 21, 2018. He received the decision a year later on June 17, 2019. It took over three months to transfer to minimum security. Thus, at this time, Mr. Nazario has been in prison nearly 22 months since the Board assessed his suitability for parole.

Signed under the pains and penalties of perjury this 27th day of April 2020.

Lisa Newman-Polk
BBO #665570

BOSTON MEDICAL CENTER

OBAT Office Based Addiction Treatment

Immediate linkage to treatment with **buprenorphine** (Suboxone) or **naltrexone** (Vivitrol) **by phone** intake with addiction nurse and provider

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