

Supreme Judicial Court
FOR THE COMMONWEALTH OF MASSACHUSETTS
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 DEPARTMENT,
FRANKLIN COUNTY SHERIFF'S OFFICE, HAMPDEN COUNTY SHERIFF'S
DEPARTMENT, HAMPSHIRE COUNTY SHERIFF'S OFFICE, MIDDLESEX
SHERIFF'S OFFICE, NORFOLK SHERIFF'S OFFICE, PLYMOUTH COUNTY
SHERIFF'S DEPARTMENT, SUFFOLK SHERIFF'S DEPARTMENT and
WORCESTER COUNTY SHERIFF'S OFFICE, Appellees

ON SINGLE JUSTICE RESERVATION AND REPORT

**APPELLEES' BRIEF FOR BARNSTABLE COUNTY SHERIFF'S OFFICE
& others**

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Maura Healey
Attorney General
Dan V. Bair II, Esq. (BBO# 654369)
Special Assistant Attorney General
Dan V. Bair II, Attorney at Law
15 Foster Street
Quincy, MA 02169
Tel: (508) 277-0720
Fax: (617) 770-4091
dbair@danbairlaw.com

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ISSUES PRESENTED

- I. Whether the Houses of Corrections' decision not to implement COVID-19 serial screening testing of non-symptomatic inmates and staff, made in accordance with medical advice and CDC/DPH guidance, amounted to deliberate indifference in violation of art.26 of the Massachusetts Declaration of Rights or the Eighth Amendment to the United States Constitution.
- II. Whether the Houses of Corrections' decision not to unilaterally release sentenced inmates amounted to deliberate indifference in violation of art.26 of the Massachusetts Declaration of Rights or the Eighth Amendment to the United States Constitution.
- III. Whether the Houses of Corrections' decision not to unilaterally release pre-trial detainees and the decision not to implement COVID-19 serial screening testing of non-symptomatic inmates and staff, made in accordance with medical advice and CDC/DPH guidance, amounted to a due process violation under the Fourteenth Amendment to the United State Constitution.
- IV. Whether the Essex House of Correction and the Bristol House of Correction's existing attorney-inmate communication options have violated the inmates' constitutionally protected rights to access to counsel.

STATEMENT OF FACTS

In early 2020 the nation and indeed the entire world was gripped by the SARS-CoV-2 (COVID-19) pandemic. COVID-19 is a contagious, dangerous, and sometimes deadly virus which can be transmitted in a variety of ways. R: 21, ¶¶ 1-2. COVID-19 can be spread through the inhalation of respiratory droplets, airborne transmission and sometimes via surfaces and objects where the virus has landed. R: 21, ¶¶ 3-5. As a result of the emerging pandemic, on March 10, 2020, Governor Charles Baker issued a “Declaration of a State of Emergency to Respond to COVID-19 in the Commonwealth.”¹

I. General Preventative Measures Taken By the Houses of Correction to Limit the Spread of COVID

Realizing the severity of the emerging public health crisis, the Sheriffs’ Offices/Departments of the Thirteen (13) Counties of the Commonwealth (“HOCs”) took a myriad of steps to ensure the health and safety of inmates, correctional officers and staff living and working at their facilities. In April 2020 the HOCs, through the Massachusetts Sheriffs’ Association (“MSA”) retained the services of Dr. Alysse Wurcel (Dr. Wurcel), a physician licensed to practice in Massachusetts and Assistant Professor at Tufts Medical Center’s Department of

¹ Appellees ask the Court to take judicial notice of Governor Baker’s March 10, 2020, Declaration. See <https://www.mass.gov/news/declaration-of-a-state-of-emergency-to-respond-to-covid-19>.

Medicine, Division of Geographic Medicine and Infectious Diseases. R: 536, ¶¶ 3, 7-8. Dr. Wurcel through the MSA provided and continued to provide guidance on COVID-19 best practices and policies in all correctional facilities operated by the HOCs. R: 536, ¶ 7. Additionally, the HOCs instituted wide-ranging and unprecedented safety measures to prevent and/or mitigate the spread of the virus which included, but was not limited to:²

- Instituted a thorough deep cleaning regimen throughout the various HOCs on per shift and/or daily basis at all facilities. R: 32-60. Some HOCs have purchased special disinfectant fogging machines, electrostatic cleaners and other similar type equipment to sanitize their facilities. R: 32-60.
- Provided all inmates, correctional officers and staff soap, hand sanitizers and other cleaning/hygiene supplies. R: 32-60.
- Provided all inmates, correctional officers and staff masks and other personal protective equipment (PPE) as needed. R: 32-60.
- Isolating and/or quarantining inmates who test positive for the virus or who are symptomatic. R: 32-60.

² As there are thirteen (13) HOCs throughout the Commonwealth, with some HOCs having multiple facilities, there may be slight variations in the institution and delivery of the listed preventative measures. The Appellees have highlighted the most common preventative measures which exist throughout all the HOCs.

- Required all inmates, correctional officers and staff wear masks and/or PPE. R: 32-60.
- Some HOCs provided inmates with single cells where possible. R: 32-60.
- All correctional officers, staff, outside vendors and visitors were screened for COVID-19 symptoms prior to admission to the HOC's facility. R: 32-60. Symptomatic correctional officers and/or staff were not admitted to the facility. R: 32-60.
- Inmates, correctional officers and staff were educated on the COVID-19 virus, good hygiene practices, social distancing and other COVID-19 protective measures. R: 32-60.
- Most discretionary movement of inmates and staff, both inside and outside of the HOC's facilities was significantly limited in order to prevent the spread of the virus. R: 32-60.
- All general public visitation was cancelled and alternative methods of visitation for family members was instituted where possible. R: 32-60.
- All volunteers were excluded from the various HOC facilities and all tours suspended. R: 32-60.

- Only essential vendors (for example medical and dental care, essential supplies) were allowed in the HOC's facilities. R: 32-60.
- Non-essential staff were excluded from the HOC's facilities (as the pandemic has begun to wane, these restrictions have been lifted).
R: 32-60.
- Most HOCs discontinued inmate work release programs (as the pandemic has begun to wane, some HOCs have restarted these programs). R: 32-60.
- Inmate meals were provided in a manner to limit the spread of the virus such as allowing inmates to eat in their cells, staggering meal times and limiting the number of inmates served at one time. R: 32-60.
- Recreational times for inmates were staggered in order to limit the spread of the virus. R: 32-60.
- All HOCs maintained a sufficient amount of cleaning and medical supplies on-hand. R: 32-60.
- Transportation vehicles were thoroughly cleaned after use in order to limit the spread of the virus when an inmate is required to be transported outside of the facility. R: 32-60.

- Where possible, all court proceedings for inmates were held via video-conferencing. R: 32-60.

II. Oversight of the Houses of Correction’s Response to the COVID-19 Pandemic by the Court and the Department of Public Health

On or about March 23, 2020, Appellants, Committee for Public Counsel Service (“CPCS”) and Massachusetts Association of Criminal Defense Lawyers (“MACDL”) filed an Emergency Petition with the Court asserting constitutional violations (8th Amendment, Article 26, 14th Amendment, and Article 12). *Comm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct.*, 484 Mass. 431 (2020). The Court issued its decision in *C.P.C.S. v. Chief Justice of the Trial Court*, 484 Mass. 431 (2020) on or about April 3, 2020. In its decision the Court mandated trial courts institute a rigorous review of all pre-trial detainees in the custody of the HOCs to determine whether or not they were candidates for release. *Id.* at 447-448. Specifically, the Court declared that pre-trial detainees who did not fall within a certain category of offenses were to be given a “rebuttable presumption of release” by the trial courts and immediately released on their own recognizance unless the Commonwealth could establish, by a preponderance of the evidence, that the individual posed an unreasonable danger to their community.³ *Id.* at 435, 447-448.

³ Trial court judges, when evaluating pre-trial detainees for release, were tasked with taking into consideration, among other things, the individuals risk of COVID-19 exposure and whether or not the person was particularly vulnerable to COVID-19. *C.P.C.S.*, 484 Mass. at 448.

Additionally, trial courts (in order to reduce the influx of new pre-trial detainees into HOCs' facilities) were charged with taking into consideration COVID-19 factors when making bail determination for new arrestees. *Id.* at 449. Also, a Special Master was appointed to oversee the collection of data on positivity rates in the HOCs' facilities, testing statistics, and release information on both sentenced inmates and pre-trial detainees which would in turn be reported to the Court. *Id.* at 455. This mandate was later amended to include vaccination information concerning inmates and staff. The Special Master's weekly reporting to the Court was ordered ". . . to facilitate any further response necessary as a result of this rapidly-evolving situation." *Id.* at 453. The HOCs have complied with the Court's mandate and continued to submit weekly reports to the Court. See SM Reports.⁴

Aside from the Court's weekly oversight, the Massachusetts Department of Public Health ("DPH") also assigned to each HOC its own dedicated DPH epidemiologist to provide information and recommendations regarding infectious disease prevention and control concerning COVID-19. R: 391. From approximately March 2020 to the present DPH had numerous discussions with Dr. Wurcel and the HOCs regarding COVID-19 prevention and control. R: 391-392.

⁴ The Appellees respectfully ask the Court to take judicial notice of the cumulative Special Master Reports which continue to be filed by the Special Master on a weekly basis. The Appellees will refer to specific Special Master Reports as SM Report with the specific date following it. For example the Special Master Report for May 13, 2021 would be referred to as: SM Report 5/13/21.

These discussions took the form of conference calls with DPH staff, Dr. Wurcel, representatives from both the security and medical components of the HOCs, and staff from local boards of health of the municipality where the HOCs were located. R: 392. Based on the particular situation present at an individual HOC at the time, the DPH might recommend a variety of testing strategies. R: 392. Additionally, while some HOCs were in more regular communication with the DPH (such as weekly and bi-weekly conference calls) where infection prevention methods and outcomes were routinely discussed, at other times the assigned DPH epidemiologist would reach out to the particular HOC after reviewing incoming COVID-19 surveillance data without having been directly contacted. R: 395.

III. Testing Protocols for Inmates at the Houses of Correction

From the beginning of the pandemic, the HOC's testing strategies of inmates for COVID-19 have been according to recommendations of the DPH and Center for Disease Control ("CDC") (working in conjunction with Dr. Wurcel). R: 537, ¶ 8. DPH's recommendations concerning testing are derived from CDC guidelines concerning correctional settings. R: 391, 395. The CDC issued, on March 17, 2021, updated guidance on testing in the correctional setting: *Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities* (CDC March 17, 2021 Updated Guidelines). R: 318-329. The CDC guidelines discuss a variety of screening testing for correctional settings which should be considered including

1) testing based on movement between facilities and between the facility and the community; 2) expanded screening testing and; 3) serial screening testing for all or a random sample. R: 322-324, 537, ¶ 12. The screening recommendations of the CDC are a tiered approach, with each tier increasing in intensity and scope.

R: 322-324, 537, ¶ 12. From April 2, 2020 to May 3, 2021, DPH never recommended to the HOCs that 1) they test all staff on a regular basis; 2) test all inmates at intake; or 3) conduct serial screening testing of inmates as defined in the CDC March 17, 2021 Updated Guidelines. R: 396. If at any time the DPH were to recommend serial screening testing of inmates at the HOC, Dr. Wurcel would recommend adoption of such a recommendation and assist the HOCs in implementing these new protocols. R: 538, ¶ 13.

Generally speaking, the HOCs test inmates who are symptomatic and those asymptomatic people identified as potentially exposed. R: 537, ¶ 8. Some HOC facilities test all new inmates, symptomatic or not, upon intake. R: 537, ¶ 8. In addition, the HOCs test inmates before sending them to certain community programs, or for medical care at outside facilities, and for several other reasons. R: 537, ¶ 8. As previously stated, DPH monitors the conditions at the HOCs via weekly or biweekly conference calls with HOC staff and others or contacts them directly when their assigned DPH epidemiologist reviewed concerning COVID-19 surveillance data. R: 395. In instances where COVID-19 transmission increased

at a location “DPH staff arranged conference calls with facility staff and Dr. Wurcel to discuss circumstances and recommend steps to mitigate [the] spread of the virus. Topics of those discussions included, for example, isolation and quarantine, environmental cleaning, PPE supplies/use including masking, return to work criteria, symptom screening, and testing indications and testing supplies.”

R: 391.

In the context of testing, specific HOCs instituted enhanced testing protocols based upon the DPH recommendation on a case-by-case basis. R: 23, ¶¶ 16-29. For example, Plymouth HOC,⁵ following an increase in COVID-19 cases in the late fall of 2020, conducted asymptomatic testing of all inmates in three housing units. Investigatory facility-wide testing of all inmates occurred on December 3, 4, and 7, 2020. R: 24, ¶ 24. Plymouth HOC then conducted follow-up testing in all affected housing units in the weeks that followed. R: 24, ¶ 24. Plymouth HOC also conducted investigatory facility wide testing on January 26, 27, and 29, 2021 and follow-up investigatory testing of 10 housing units on January 29, February 2 and 5, 2021. R: 24, ¶ 25. Plymouth HOC then conducted follow-up investigatory testing of six housing units on February 10, 12, and 16, 2021, and follow-up investigatory testing of three housing units on February 19, 23, and 26, 2021.

⁵ Appellees refer to individual county HOCs in the following manner: Plymouth HOC.

R: 24, ¶ 26. Hampden HOC completed two rounds of testing of all inmates in their custody with the most recent round of testing being completed in November 2020.

R: 24, ¶ 27. Another example of enhanced testing was completed by the Essex HOC. R: 24, ¶ 28. In October 2020, in direct response to an increase in positive COVID-19 test results for inmates and staff, Essex HOC tested all inmates, staff and contractors. R: 24, ¶ 28.⁶ Additionally, Norfolk HOC has tested entire housing units in response to a positive COVID-19 test, and continue this practice unless it is determined that the inmate in question had no close contacts. R: 25, ¶ 29. Finally, in July 2020, the DPH and Dr. Wurcel recommended broad testing⁷ in a unit within one of Bristol HOC's facilities due to a positive test result. R: 392.

As recently as March 10, 2021, DPH and Dr. Wurcel recommended to Bristol HOC the testing of an entire barracks type unit due to multiple positive COVID-19 tests. R: 392. From April 4, 2020 to May 12, 2021, the HOCs have administered a total of 18,193 COVID-19 tests to inmates in their custody and/or control. SM Report 5/13/21. Also, from April 4, 2020 to May 12, 2021, the HOCs have administered a total of 8,356 COVID-19 tests to correctional officers and other staff. SM Report 5/13/21.

⁶ This resulted in a total of 1,773 individuals being tested. R: 24, ¶ 28.

⁷ DPH defines "facility-wide" testing as testing all humans within a facility, "broad testing" as something less than facility-wide testing (such as all inmates or just inmates in specific housing unit) and "repeat testing" as adding a time component to one of the other types of testing regimens. R: 395.

IV. The Houses of Corrections' Vaccination Program for Inmates and Staff

In addition to general preventative measures and testing protocols instituted by the HOCs, in January 2021, all HOCs began offering the Moderna vaccine to inmates, correctional officers and staff. R: 30, ¶ 82. The decision to receive the vaccine for both inmates and staff is a voluntary one. R: 30, ¶ 82. The Moderna vaccine requires two (2) shots be taken a minimum of twenty-eight (28) days apart. R: 30, ¶ 83. As the HOCs vaccination program began, the Special Master began including vaccination data in the weekly report submitted to the Court. SM Report 5/13/21. The cumulative number of inmates who voluntarily received the first shot of the vaccine through May 12, 2021, was 3,616 and the cumulative number of inmates receiving the second shot was 2,896.⁸ SM Report 5/13/21. The cumulative number of staff who voluntarily received the first shot of the vaccine through May 12, 2021, was 4,378 and the cumulative number of staff receiving the second shot was 4,028. SM Report 5/13/21. As the vaccination program at all the HOCs is a voluntary one, some inmates have refused to receive the vaccine. R: 30, ¶ 82. Through May 12, 2021, the cumulative number of inmates who refused to receive the vaccine was 4,561. SM Report 5/13/21. Vaccinations continue at all HOC facilities.

⁸ The HOCs are not reporting the number of inmates currently under their custody and control who have received either the first or second shot of the vaccine. R: 31, ¶ 90.

V. Statistics Concerning the Cumulative Number of Confirmed COVID-19 Cases for Inmates and Staff at the Houses of Correction

From April 4, 2020 to May 12, 2021, the HOCs reported the total number of confirmed inmates cases of COVID-19 as 1,683. SM Report 5/13/21.

Additionally, from April 4, 2020 to May 12, 2021, the HOCs reported the total number of confirmed staff cases of COVID-18 as 1,334. SM Report 5/13/21.

More recently, and admittedly only a “snap-shot” in time, the total number of confirmed COVID-19 inmate cases reported by the HOCs for the week of May 6, 2021 to May 12, 2021 was eight (8) and the number of confirmed COVID-19 staff cases during the same period was three (3). SM Report 5/13/21. From April 4, 2020 to May 12, 2021, both Barnstable HOC and Dukes HOC reported no confirmed COVID-19 cases among inmates. SM Report 5/13/21. Berkshire HOC for the same period only reported one (1) confirmed COVID-19 case among inmates. SM Report 5/13/21.

VI. Statistics Concerning the Number of Deaths and Hospitalizations Due to COVID-19 at the Houses of Correction

As a result of the HOCs unprecedented efforts including the general preventative measures put in place, testing protocols and vaccinations, from April 4, 2020 to May 12, 2021, the HOCs reported the total number of inmate deaths related to COVID-19 to be two (2), and none since June 2020. R: 29, ¶¶ 68-69; SM Report 5/13/21. There have been no reported deaths of correctional officers or

staff employed by the HOCs as a result of COVID-19 from April 4, 2020 to May 12, 2021. SM Report 5/13/21.

Furthermore, from April 4, 2020 to April 15, 2021, the HOCs reported a total of **thirteen (13)** overnight hospitalizations of inmates due to COVID-19 related issues. R: 30, ¶ 77. From April 4, 2020 to April 16, 2021, seven (7) of thirteen (13) HOC reported no overnight hospitalization of inmates as a result of COVID-19 related issues. R: 30, ¶ 78. These HOCs were Dukes HOC, Barnstable HOC, Worcester HOC, Berkshire HOC, Middlesex HOC, Plymouth HOC and Franklin HOC. R: 30, ¶ 78.

VII. Inmate Population in the Houses of Correction and Inmate Releases Pursuant to the Supreme Judicial Court's Order of April 3, 2020

As previously noted above, on April 3, 2020, the Court issued its decision in *C.P.C.S. v. Chief Justice of the Trial Courts*, 484 Mass. 431 (2020), which, among other things, required the HOCs to report to the Special Master the overall inmate population at the HOCs and inmate releases on a weekly basis pursuant to said decision. *C.P.C.S.*, 484 Mass. at 456. On May 12, 2021, the inmate population at all HOCs was 5,824. SM Report 5/13/21. From April 4, 2020 to May 12, 2021, the HOCs released a total of 3,986 inmates pursuant to the Court's April 3, 2020, decision. SM Report 5/13/21. In other words, since the beginning of the pandemic the HOCs have released 40.5% of their total inmate population as a result of the Court's April 3, 2020, order. SM Report 5/13/21. Embedded within the overall

number of releases are a number of inmate releases made pursuant to the discretionary authority of the Sheriffs under Massachusetts General Laws, Chapter 127, §§ 20B and 49. R: 26, ¶¶ 40-66.

VIII. Attorney-Inmate Communication Options at the Essex HOC

The Essex HOC has provided attorneys seeking to communicate with their clients numerous methods to do so since the onset of the pandemic. R: 65-68, ¶¶ 414-443. Specifically, these methods include in-person visits (contact and non-contact), telephone, tablet, video conferencing and legal mail. R: 65-68, ¶¶ 414-443.

1. In-Person Attorney-Inmate Visits

Essex HOC is open for in-person attorney-inmate visits. R: 66, ¶ 422. At the beginning of any in-person visit the attorney has the option of meeting with their client in the regular visit area, which is non-contact or in an attorney room which is contact. R: 67, ¶ 440. These meetings are held in areas of the Essex HOC which are repeatedly cleaned, disinfected and sanitized after every attorney-inmate visit. R: 66, ¶ 422. Moreover, attorneys are provided with PPE prior to entering the facility. R: 66, ¶ 422. Attorneys who elect to meet with their client in a non-contact setting are brought to the regular visit area. R: 67, ¶ 441. The regular visit area separates the attorney and inmate by Plexiglas, and the attorney is separated from other individuals by Plexiglas as well. R: 67, ¶ 441. The attorney speaks

with the inmate via a telephone and documents may be passed via a correctional officer. R: 67, ¶ 441. Should the attorney choose to conduct an in-person contact visit, the attorney and inmate meet in a private room in which the door closes. R: 67, ¶ 442. There are multiple attorney rooms for visits. R: 67, ¶ 442. From April 2, 2020 to April 22, 2021, there have been a total of 1,623 in-person attorney-inmate visits conducted at the Essex HOC. R: 66, ¶ 423.⁹

2. Video-Conferencing

The Essex HOC contracts with SECURUS to provide telephone and other communication services to the inmate population. R: 66, ¶ 426. Essex HOC and SECURUS have installed two (2) video conferencing modules for attorney-inmate conferences which are separate and distinct from the video conferencing system utilized by the courts. R: 66, ¶¶ 426-427. The Essex HOC's attorney-inmate video-conferencing system has been in effect since December 2020. R: 66, ¶ 429. The video-conferencing system only allows for the attorney and inmate to be on at the same time; however, any third-party (such as interpreters) may either call into the conference utilizing a telephone and on a speaker or be physically present with the attorney. R: 66, ¶ 433. Essex HOC's video-conferencing system does not have a screen-sharing capability. R: 66, ¶ 432. Since the installation of the attorney-

⁹ In addition to inmates in general population, inmates in the new arrival/quarantine unit and those inmates in COVID-19 related lockdown have the opportunity for in-person attorney visits. R: 66, ¶¶ 424-425.

inmate video conferencing system in December 2020, the Essex HOC has conducted approximately 1,137 attorney-inmate video conferences through April 22, 2021. R: 66, ¶ 429.

3. Telephonic/Tablet Attorney-Inmate Communication Options

At the outset of the pandemic the Essex HOC established an email response system to enhance attorneys' ability to communicate with their clients. R: 65, ¶ 414. Specifically, Essex HOC created a website and email system at covid19inmateinquires@essexsheriffma.org whereby attorneys can add their private telephone numbers to the phone system in order to better communicate with their clients by facilitating the exchange of messages between inmate and attorney and establishing the ability to request inmate medical record in an expedited manner. R: 65, ¶ 414. From April 7, 2020 to April 26, 2021, Essex HOC's COVID-19 email system received and processed 3,797 attorney-inmate inquiries. R: 65, ¶ 415. Essex HOC forwards all attorney requests for a telephone call with their client who then are able to contact their attorney from their housing unit phone or from a tablet. R: 65, ¶ 415. Housing unit telephones are located on the walls in common areas; however, tablets are mobile and can be used in the housing units. R: 65, ¶ 418.

On or about May 15, 2020, Essex HOC began facilitating third-party three-way calls between the inmate, counsel, and interpreters in response to inquiries and

requests received from counsel and interpreters via its COVID email hotline.

R: 65, ¶ 420. When the Essex HOC receives certain requested identifying information from counsel (i.e., BBO number, inmate name and D/O/B, interpreter name, etc.), the Essex HOC can request a two hour window from counsel and the interpreter during which time they would be available to receive the call. R: 65, ¶ 420. The inmate can then elect to place the call during the designated time from either the housing unit telephone or a tablet. R: 65, ¶ 420. For the time period of May 15, 2020, through April 26, 2021, the Essex HOC facilitated approximately 182 interpreter calls. R: 65, ¶ 420. In addition to interpreters, the Essex HOC has extended the ability to make third-party three-way calls to social workers and medical professionals affiliated with the defense team and has facilitated approximately an additional (114) of such three-way calls between May 15, 2020, and April 26, 2021. R: 65-66, ¶ 421. Inmates scheduled for court appearances via video/teleconference, prior to the start of the hearing, are permitted to speak confidentially with their attorney telephonically up to thirty (30) minutes on a private, non-recorded line. R: 65, ¶ 420. On a case-by-case basis as requested by counsel, the Essex HOC has provided in excess of thirty (30) minutes when necessary and warranted. R: 65, ¶ 420. Essex HOC routinely conducts approximately forty (40) such video conferences a day, and by way of further example, has conducted as many as 723 in the month of January 2021, 718 in the

month of February 2021, and 793 in the month of March 2021. R: 67, ¶ 439. This amounts to 2,234 total video conferences during the period. R: 67, ¶ 439.

Tablets are available to all inmates and they may telephonically speak with their attorneys using the tablet. R: 67, ¶ 434. Between May 1, 2020 and April 29, 2021, there were 650,864 tablet calls and of those, 13,597 were attorney-inmate calls. R: 470, ¶ 4. Inmates interested in possessing and using their own individualized tablet, which have more than merely telephonic capabilities, including downloading movies, music, and reading materials, are assessed a \$5.00 subscription charge to possess their own individualized tablet for a 30-day period. R: 67, ¶ 435. At the end of every 30-day period, they can elect to renew their subscription and are assessed another \$5.00 subscription charge. R: 67, ¶ 435. As with normal telephone calls through the Essex HOC telephone communications provider, SECURUS, there are additional charges with respect to making telephone calls via the tablet, as well as with respect to downloading other content, be it movies, music, or literature. R: 67, ¶ 435.

4. Legal Mail

All inmates have access to legal mail. R: 67, ¶ 438.

IX. Attorney-Inmate Communication Options at the Bristol HOC

The Bristol HOC has provided attorneys seeking to communicate with their clients a myriad of methods to do so since the onset of the pandemic. R: 61-62,

¶¶ 378-394. Specifically, these methods include in-person visits (contact and non-contact), telephone and legal mail. R: 61-62, ¶¶ 378-394. Video conferencing is not available at the Bristol HOC due to the lack of necessary equipment and inadequate internet bandwidth beyond that required for court video-conferencing. R: 61, ¶ 379.

1. In-Person Attorney-Inmate Visits

The Bristol HOC is open for in-person attorney visits.¹⁰ R: 62, ¶ 381. Attorneys are offered the option of having contact or non-contact in-person visits. R: 62, ¶ 381. Attorneys who wish to review documents with their clients can do so in private at the Bristol HOC. R: 61, ¶ 379. Non-contact attorney visits occur in a booth, in the visiting room via a telephone. R. 62, ¶ 392.

2. Telephonic Attorney-Inmate Communication Option

The Bristol HOC instituted a protocol whereby attorneys can fax, email, or call the superintendent's office between the hours of 8:00AM and 4:00PM to have a message delivered to their clients advising the clients to telephone the attorney at a set date or time. R: 61, ¶ 378. The attorney can ask that the call be made at any reasonable time of the day or evening. R: 61; ¶ 378. Scheduled calls to attorneys are limited to 30 minutes, however, this is something outside of the Bristol HOC's

¹⁰ Attorney visits are available to inmates in the general population, those in lockdown (unless there is an emergency situation) and during quarantine. R: 62, ¶¶ 381-382.

control and is part of the SECURUS system which handles telephone communications throughout the facility. R: 62, ¶ 388.

3. Legal Mail

All inmates have access to legal mail.

SUMMARY OF THE ARGUMENT

CPCS cannot establish violations of either art.26 of the Massachusetts Declaration of Rights or the Eighth Amendment of the United States Constitution for lack of adequate medical treatment for inmates as a result of the HOCs decision not to implement serial screening testing for COVID-19 in their facilities. There is no evidence the conditions of confinement for inmates at the HOCs pose, objectively, a substantial risk of harm to the inmates during the COVID-19 pandemic. Moreover, CPCS failed to meet the subjective element insofar as the HOCs acted with deliberate indifference to the medical needs of the inmates. Not implementing serial screening testing on its face is not evidence of deliberate indifference. Finally, the preventative measures implemented by the HOCs at their facilities, testing protocols, vaccination programs, oversight by DPH and the Court, and the historical data concerning hospitalizations and deaths proves the HOCs did not act with deliberate indifference in their response to the COVID-19 pandemic.

(Pages 32-44)

The decision of the HOCs not to release more inmates under Massachusetts General Laws, Chapter 127, Sections 20B and 49, than were already mandated under the Court's Order of April 3, 2020, does not rise to a violation of either art. 26 of the Massachusetts Declaration of Rights or the Eighth Amendment of the United States Constitution. As the Court *C.P.C.S. v. Chief Justice of the Trial Court*, 484 Mass. 431 (2020), already stated it cannot use its superintendence powers under Massachusetts General Laws, Chapter 211, Section 3 to release inmates absent a showing of deliberate indifference. As previously articulated, CPCS has failed to establish the HOCs acted with deliberate indifference to the medical needs of the inmates. Notwithstanding, the HOCs have released 3,986 inmates, after review by a trial court, pursuant to the Court's April 3, 2020 Order which amounts to a 40.5% overall reduction. (Pages 44-48)

The decision of the HOCs not to release more pre-trial inmates than mandated under the Court's April 3, 2020, Order is not a due process violation under the Fourteenth Amendment to the United States Constitution. CPCS urges the Court to join the Second, Seventh, and Ninth Circuits in concluding that, under the logic of *Kinglsey v. Hendrickson*, 576 U.S. 396-397 (2015) proving objectively unreasonable conditions of confinement sufficient to establish a due process violation; however, the First Circuit has not yet adopted this approach and the HOCs urge the Court not to at this time. Nevertheless, CPCS failed to present

any evidence which would meet the objective or subjective elements needed to establish a constitutional violation based upon conditions of confinement. Finally, the HOCs again point out that all pre-trial detainees currently in the custody of the HOCs were presumably evaluated at the trial court level, under a rebuttable presumption of release, and were still deemed not suitable for release. (Pages 48-50)

CPCS alleges that Bristol HOC and Essex HOC have violated inmates' right to counsel by failing to provide meaningful attorney-inmate communication. Both Bristol HOC and Essex HOC provided significant evidence of numerous methods attorneys have to communicate with inmates. Both Bristol HOC and Essex HOC methods of attorney-inmate communication include in-person visits (contact and non-contact), telephone and legal mail. In addition Essex HOC provides inmates the ability to utilize tablets and video-conferencing as other alternatives to communicate with their attorneys. Bristol HOC does not provide video-conferencing for attorney-inmate communications due to equipment and structural impediments. In the present case, the Bristol HOC and Essex HOC have not obstructed attorney-inmate communications in any way. In fact, both HOCs have gone above and beyond to accommodate attorneys who have chosen not to visit due to COVID-19 concerns. (Pages 50-54)

ARGUMENT

- A. The HOCs decision not to implement serial screening testing of non-symptomatic inmates and staff was made in accordance with medical advice and CDC/DPH guidance and does not amount to either a violation of art.26 of the Massachusetts Declaration of Rights or the Eighth Amendment to the United States Constitution.**

CPCS' constitutional claims concerning the medical care of inmates in the custody and/or control of the HOCs, distilled down to their very essence, are the HOCs failed to implement COVID-19 testing in a manner in which CPCS and their experts agree with. That being said, their argument is not that the HOCs failed to take preventative measures to stop and/or mitigate the spread of COVID-19, or that when inmates became ill they were denied medical care. Nor is CPCS' argument even that the HOCs refused to test for COVID-19; rather, it is that the HOCs did not conduct serial screening testing of COVID-19.

The HOCs' COVID-19 testing strategies, based upon the medical advice of Dr. Wurcel and the CDC/DPH guidance, not to engage in serial screening testing of non-symptomatic inmates and staff does not amount to "cruel or unusual punishments" as proscribed by art.26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the U.S. Constitution. "The Eighth Amendment prohibits any punishment which violates civilized standards and concepts of humanity and decency." *Foster v. Commissioner of Correction*, 484 Mass. 698, 716 (2020)(quoting *Young v. Quinlan*, 960 F.2d 351, 359 [3d Cir. 1992]). In order

to establish a constitutional violation based upon conditions of confinement CPCS must show both an objective and subjective element. *Foster*, 484 Mass. at 717 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 [1991]). The objective element requires evidence the inmates' living conditions "amount to a 'serious deprivation [] of basic human needs', which can include denial of medical care for serious medical needs." *Id.* at 717 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-105 [1976]). "The subjective element requires an inmate to demonstrate that prison officials acted or failed to act with deliberate indifference." *Id.* at 717. As set forth below, CPCS failed to meet the objective or subjective elements needed to establish their Eighth Amendment claim as it relates to inmate testing.

1. CPCS failed to meet the objective standard that the conditions at county correctional facilities pose a substantial risk of serious harm to inmates

In order to establish the objective element, the inmate must show that the conditions at the correctional facilities, objectively, pose a "substantial risk of serious harm." *Id.* at 717. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Moreover, the inquiry into whether or not the conditions at the correctional facilities pose a substantial risk of serious harm must take into account measures taken by the correctional facilities to mitigate the risk. *Chunn v. Edge*, 465 F. Supp. 3d 168, 200 (E.D.N.Y. 2020) (citing *Helling v. McKinney*, 509 U.S. 25, 36 [1993]). See also *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020)(stating

any evaluation of whether or not there is a substantial risk of serious harm requires a review of what steps were taken to mitigate risk).

CPCS cannot establish that the conditions at the various county correctional facilities pose a “substantial risk of serious harm” to the inmates incarcerated at said facilities. The HOCs have instituted extensive processes and procedures which have significantly reduced the overall risk of contracting COVID-19. Furthermore, they have engaged in extensive testing of inmates for COVID-19 and in January 2021, initiated a vaccination program for both inmates and staff. All of these preventative measures have operated to substantially reduce the threat of COVID-19 in their facilities. This assertion is bolstered by the data compiled as a result of the Court’s April 3, 2020, Order. This data shows there have been two (2) inmate deaths in all of the county facilities attributable to COVID-19, and none since June 2020. Finally and most telling, there have been a total of thirteen (13) inmate hospitalizations in all the county facilities due to COVID-19 since March 2020. In fact, the following counties have reported **no hospitalizations** of inmates from March 2020 to April 16, 2021 related to COVID-19: Dukes, Barnstable, Worcester, Berkshire, Middlesex, Plymouth and Franklin. While COVID-19 is certainly a deadly and contagious disease, the monumental efforts of the HOCs have significantly mitigated the impact of the virus in their facilities.

2. **CPCS failed to meet the subjective standard as they cannot demonstrate that the HOCs acted with deliberate indifference by not conducting serial screening testing of asymptomatic inmates and staff**

Even if CPCS could establish the objective element (which the HOCs deny) they failed to establish the subjective element needed to prevail on an Eighth Amendment claim. In order to prove the subjective element CPCS must show the HOCs “. . . know of and disregard[ed] an excessive risk to inmate health or safety; the [HOCs] must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and must also draw the inference.” *Foster*, 484 Mass. at 717 (quoting *Farmer*, 511 U.S. at 837). Deliberate indifference, in the context of an Eighth Amendment violation, has been defined as “recklessly disregarding’ a substantial risk of harm which falls somewhere between negligence and purpose or knowledge.” *Foster*, 484 Mass. at 719 (quoting *Farmer*, 511 U.S. at 836). Furthermore, in cases where plaintiffs claim “cruel and unusual punishment” in violation of the Eighth Amendment based upon medical mistreatment they must show the acts or omissions complained of are “. . . sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Feeney v. Correctional Medical Services, Inc.*, 464 F.3d 158, 161-162 (1st Cir. 2006)(quoting *Estelle*, 429 U.S. at 105-106). “A prison official is deliberately indifferent where she knows of and disregards an excessive risk to inmate health or safety. This requirement is subjective. Deliberate indifference is

characterized by obduracy and wantonness, not inadvertence or error in good faith. To show such a state of mind, the plaintiff must provide evidence that the defendant had actual knowledge of impending harm, easily preventable, and yet failed to take the steps that would have easily prevented that harm.” *Leite v. Bergeron*, 911 F.3d 47, 52-53 (1st Cir. 2018).¹¹

However, a dispute, between medical professionals, over the proper course of treatment does not meet this subjective standard. *Feeney*, 464 F.3d at 162. As the Court in *Feeney* stated, “when a plaintiff’s ‘allegations simply reflect a disagreement on the appropriate course of treatment [, s]uch a dispute may present a colorable claim of negligence, but it falls short of alleging a constitutional violation.’” *Id.* (quoting *Ferranti v. Moran*, 613 F.2d 888, 891 [1st Cir. 1980]). See *Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014); *Lopes v. Riendau*, 177 F. Supp. 3d 634, 658 (D.Mass. 2016). See also *Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020)(stating an inmate’s disagreement with testing and treatment does not rise to the level of an Eighth Amendment violation); *Valentine*, 956 F.3d at 803 (explaining the court’s disagreement with medical decisions made by the

¹¹ Deliberate indifference is comparable to criminal recklessness and is shown by “something approaching a total unconcern for [the plaintiff’s] welfare in the face of serious risks, or a conscious, culpable refusal to prevent harm.” *Duane v. Lane*, 959 F.2d 673, 677 (7th Cir. 1992). Prison officials are not expected to eliminate the possibility of all dangers. *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991).

correctional facility does not establish deliberate indifference). Also, ““where the dispute concerns not the absence of help, but the choice of a certain treatment,’ . . . deliberate indifference may be found where the attention received is ‘so clearly inadequate as to amount to a refusal to provide essential care.’” *Feeney*, 464 F.3d at 163 (quoting *Torraco v. Maloney*, 923 F.2d 231, 234 [1st Cir. 1991]). See also, *McGinnis v. Halawa Corr. Facility*, 2021 U.S. Dist. LEXIS 5533, *11 (D.Hawaii 2021) citing *Toguchi v. Ching*, 391 F.3d 1051, 1058 (9th Cir. 2004) (noting that a mere difference of medical opinion is insufficient, as a matter of law, to establish deliberate indifference). In rejecting an inmate’s Eighth Amendment violation claims on COVID grounds, the Court in *U.S. v. Werlein* stated: “The presence of COVID-19 in a prison, even in large numbers, is not tied to poor medical care, but to the fact that the entire world is in the midst of a pandemic. Laudably, Fort Dix FCI has so far been able to prevent mass casualty through adequate provision of medical care.” *U.S. v. Werlein*, 2021 WL 101131*3 (D. Minn.).

In the present case before the Court, CPCS failed to meet the subjective element needed to prove deliberate indifference by the HOCs and in sharp contrast the HOCs presented a vast amount of evidence which supports the opposite conclusion. The steps taken by the HOCs to stop the spread of COVID-19, mitigate the harm caused by outbreaks when they occurred, and then providing the necessary medical care for those inmates afflicted by this deadly disease have

proven extremely effective as reflected by the very results of these efforts. These results are nothing short of miraculous. This conclusion is supported by thirteen (13) months of data collected by both the Court and the DPH.

General Preventative Measures Undertaken by the Houses of Correction

The HOCs instituted significant preventative measures to prevent the virus from getting into its facilities, reduce or, in some cases, prevent the spread of COVID-19 in their facilities. These measures, listed above, included rigorous cleaning protocols, limiting movement of inmates and staff both inside and outside of their facilities, staggering recreational periods and meal times, screening of incoming staff for symptoms, and quarantining and isolating inmates who are positive or symptomatic. Additionally, the HOCs reduced staffing to essential personnel, limited vendor contact, cancelled visits and tours of their facilities. Further, the HOCs provided PPE, soap and cleaning supplies to inmates in their custody, and engaged in educational programs for inmates and staff on limiting the spread of COVID-19 and recognizing the symptoms of said virus in order to mitigate its effects. These efforts alone demonstrate the HOCs were not deliberately indifferent to the dangers COVID-19 posed to the inmates and staff in their facilities.

Testing for COVID-19 by the Houses of Correction

The HOCs have followed the medical advice of Dr. Wurcel in accordance with guidance from the CDC/DPH in developing and implementing COVID-19 testing strategies at their facilities. Moreover, as clearly stated by the CDC, their guidelines are recommendations and the DPH was informed by these guidelines when recommending to the HOCs how to test for COVID-19 in their facilities. First, the HOCs test all symptomatic inmates and staff for the virus. Second, when recommended by Dr. Wurcel and the DPH, certain HOCs tested select housing units based on an outbreak or even a single positive case. Third, certain HOCs tested inmates upon intake and/or release. Fourth, certain HOCs conducted facility wide screening tests based on the specific circumstances occurring at the individual HOC as recommended by Dr. Wurcel and the DPH. Finally, the DPH never recommended serial screening testing. R: 396. As the DPH explained “[i]n situations where COVID-19 transmission in the facility was apparent, the Department recommended repeat broad testing of incarcerated people and staff at specific sites to be kept in place until transmission rates decreased. The purpose of such testing would be to serve as a “snapshot” of COVID-19 in the facility at the time to guide implementation of infection control strategies.” R: 396.

The fact that CPCS offered affidavits of other medical professionals¹² (none of these medical professionals have any personal knowledge of the conditions at the HOCs' facilities) who disagree with Dr. Wurcel and DPH's testing strategies at the HOCs (with respect to one specific method of testing) does not meet the threshold needed to show deliberate indifference.¹³ The bottom line is that the HOC's testing strategies implemented during the pandemic were recommended by Dr. Wurcel and the DPH (and in line with CDC testing strategies to be considered), tailored to the specific HOC, and ranged from limited testing to facility-wide testing. In fact, there is no allegation as to an absence of testing by the HOC; rather, the allegation is that the HOCs are not doing testing exactly the way the CPCS' experts recommend. The evidence presented by the HOCs concerning their testing strategies, while at odds with what CPCS wants, are not "so clearly

¹² This Court has held that the legal standard required for Eighth Amendment violations cannot be established by expert reports such as the ones submitted by CPCS as the question of "whether prison conditions are sufficiently harmful to establish an Eighth Amendment violation is purely a legal determination for the court to make. Therefore, expert opinion regarding what constitutes cruel and unusual punishment is entitled to little weight." *Torres*, 427 Mass. at 614; *see also Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981).

¹³ In *Foster*, the Court stated that while published standards of medical care and/or guidance do not establish absolute standards for measuring medical treatment they are, however ". . . useful measures for 'determining whether contemporary standards of decency have been met.'" *Foster*, 484 Mass. at 722 (quoting *DeGidio v. Pung*, 704 F. Supp. 922, 956 [D. Minn. 1989]). Additionally, the Court in *Foster* stated compliance with CDC guidance weighed against a finding of deliberate indifference. *Foster*, 484 Mass. at 722.

inadequate as to amount to a refusal to provide essential care.” *Feeney*, 464 F.3d at 163. Most importantly, **if the DPH recommended the HOCs begin serial testing of inmates and staff at their facilities, the HOCs would immediately comply.**

Vaccination of Inmates and Staff

In January 2021, the HOCs began offering the Moderna vaccine to all inmates and staff. Vaccination is on a voluntary basis, and presently all inmates and staff have been offered the vaccine. Since beginning their vaccination program in January 2021, a total of 3,616 inmates have received the first shot and 2,896 inmates received the second shot. There is no allegation that the HOCs delayed offering the vaccine to inmates or there was any other impediment to an inmate who wanted to be vaccinated to be vaccinated. The HOCs’ comprehensive vaccination program completely obliterates CPCS’ claims of deliberate indifference as the vaccine is offered solely to protect the inmates from harm. In *Fudge v. Finley*, 2021 WL1992162 *8 (M.D. Pa. 2021), the court, in finding no deliberate indifference by correctional officials, stated:

[I]t is noteworthy that Fudge has specifically declined to be vaccinated, a simple measure that could largely ensure his well-being during the current pandemic. Given the measures undertaken by prison staff, and Fudge’s refusal to cooperate in vaccination efforts, it cannot be said that the Respondents have been deliberately indifferent to Fudge’s medical needs. Nor has Fudge shown that that he is being confined in a setting that deprives him of the minimal civilized measure of life’s necessities. Simply put, Fudge cannot refuse medical care and then cite the lack of such care as an Eighth Amendment violation.

Fudge v. Finley, 2021 WL1992162 *8 (M.D. Pa. 2021). See *Mighty v. Williams*, 2021 WL 795673 *2 (N.D. Ohio 2021); *Bevins v. Kauffman*, 2021 WL 322168 *2 (M.D. Pa. 2021); *Coreas v. Bounds*, 2021 WL 252718 *8 (D. Md. 2021)(“The provision of vaccinations to detainees who want them . . . is a highly significant new development that undermines the claim of impermissible punishment”). See also *Martinez v. Kalos*, 1993 WL 299282 *3 (S.D.N.Y.)(explaining prison officials were anything but deliberately indifferent in requiring a mandatory vaccine for inmates); *Zaire v. Dalsheim*, 698 F.Supp. 57, 59-60 (S.D.N.Y. 1988)(stating no deliberate indifference where diphtheria-tetanus inoculation was administered solely to protect inmates from harm).

Oversight by the Court and Department of Public Health

Following the onset of the pandemic in April 2020, the HOCs’ response to the COVID-19 pandemic and the results of said response have been overseen by both the Court and DPH. The Court has received weekly data on, among other things, positivity rates, testing rates, confirmed cases of COVID-19 and more recently vaccination rates of inmates and staff. At no point did the Court, after analyzing weekly data from the HOC, identify any change in circumstance which warranted intervention by the Court. Furthermore, the DPH assigned to each HOC their own dedicated epidemiologist to monitor developments at those specific facilities. In instances of an increase in COVID-19 activity DPH would

recommend an appropriate testing strategy. Even at the height of the pandemic, serial screening testing was never recommended by the DPH. R: 396.

The Results of the Houses of Correction's Responses to COVID-19

After, thirteen (13) months of comprehensive data on positivity rates, hospitalizations and deaths from the thirteen (13) HOCs, the results of the HOCs preventative measures, vaccination programs, medical care and testing strategies simply does not support CPCS' pronouncements of impending doom. It is an undisputed fact that throughout the entirety of the pandemic the thirteen (13) HOCs only reported that **thirteen (13) inmates required hospitalization** as a result of the virus. This is made all the more remarkable in light of the fact that the HOCs, during the same period, exercised custody and control over approximately 9,792 inmates. Equally positive, there have been only **two (2) inmate deaths** attributable to COVID-19 during the pandemic and none since June 2020.¹⁴ Such data completely undercuts CPCS' conclusory and unsupported allegations of dangerous conditions at the HOCs as the result of the pandemic.

In *Jones v. Hill*, 2020 WL 7664773 (N.D. Ga.), the court noted some policies and procedures could be adopted to do more to protect vulnerable inmates,

¹⁴ CPCS points to the potential long-term effects of COVID-19; however, no evidence whatsoever has been provided to the Court by CPCS with respect to this issue as it concerns inmates at the HOCs' facilities and therefore should be discounted as purely speculative.

yet it rejected a deliberate indifference claim stating: “[w]hile the evidence presently before the Court indicates that the Jail, as to its COVID-19 policies and procedures, could be doing more to protect vulnerable inmates, especially in the area of testing and responding promptly to medical requests, federal judges are not wardens. ‘The Constitution charges federal judges with deciding cases and controversies, not with running state prisons.’ *Lewis v. Casey*, 518 U.S. 343, 363 (1996) (Thomas, J., concurring) . . . Given the high threshold necessary to show deliberate indifference and the proactive measures implemented by the Jail, however imperfect the implementation of those measures may be, Plaintiffs fail to demonstrate a substantial likelihood of success on the merits.” *Jones v. Hill*, 2020 WL 7664773 *11 (N.D. Ga.).

B. The Houses of Corrections’ decision not to unilaterally release sentenced inmates does not amount to a violation of art.26 of the Massachusetts Declaration of Rights or the Eighth Amendment to the United States Constitution.

The HOC’s decision not to release sentenced inmates beyond those who the trial courts released after the determination in *C.P.C.S. v. Chief Justice of the Trial Court*, 484 Mass. 431 (2020)(Pre-trial detainees shall be ordered released pending trial on his or her own recognizance, without surety, unless an unreasonable danger to the community would result, or the individual presents a very high risk of flight), and the determination in *Christie v. Commonwealth*, 484 Mass. 397 (2020)(Mandating that COVID-19 health considerations be a factor in determining

if a stay pending an appeal is appropriate for sentenced inmates), does not amount to violations of art.26 of the Massachusetts Declaration of Rights or the Eighth Amendment to the U.S. Constitution.¹⁵ In contravention of the constitution, CPCS seeks to have the Court exercise a discretionary power which the Legislature committed exclusively to the executive branch (the HOCs). CPCS would have this Court sit as Super Sheriffs exercising the executive power to release inmates without any regard to whether adequate housing and medical, mental health and other social services are available to them upon release during this pandemic.

As stated above, CPCS failed to meet the objective or subjective elements needed to establish a constitutional violation based upon conditions of the inmates' confinement. Moreover, the relief sought by CPCS cannot be granted by the Court under the circumstances. The Court in *C.P.C.S.*, 484 Mass. at 435-436, has already articulated the parameters of its superintendence powers under Chapter 211, Section 3 with respect to the release of sentenced inmates during the COVID-19 pandemic. Specifically, the Court stated “[a]bsent a violation of constitutional rights . . . we also do not have authority under G.L. c. 211, § 3 to exercise supervision over parole, furlough, or clemency decisions by the DOC, the sheriffs, and other members of the executive branch.” *C.P.C.S.*, 484 Mass. at 446-447. *See*

¹⁵ The Court should note even inmates released pursuant to Massachusetts General Laws, Chapter 127, Sections 20B and 49, still remain under the custody and control of the HOCs. M.G.L. c. 127, §§ 20B, 49.

Foster, 484 Mass. at 402 (stating the Court would have authority to remedy unconstitutional conditions of confinement despite separation of powers under art. 30). CPCS failed to offer evidence of, let alone prove, constitutional violations based on the conditions of the HOCs' facilities, and the Court is not warranted in exercising its superintendence powers under M.G.L. c. 211, § 3 to order additional inmate releases.

The HOCs have released a total of 3,986 inmates, for the most part, after an individualized review by a trial court, since the Court's Order on April 3, 2020 through May 12, 2021. SM Report 5/13/21. This amounts to a 40.5% reduction in inmates incarcerated in the HOCs' facilities. SM Report 5/13/21.¹⁶ CPCS points to the current inmate population levels, which are close to pre-pandemic levels despite 3,986 inmate releases, as evidence that the HOCs are refusing to release inmates as a result of the Court's April 3, 2020, Order. Such an argument is a red herring. As CPCS is well aware of, county facilities house both sentenced inmates and pre-trial detainees. As there have not been any significant number of criminal trials in the Commonwealth in the last thirteen (13) months, and all 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. v.*

¹⁶ As of May 12, 2021, there were a total of 5,824 inmates incarcerated in the HOCs' facilities and 3,986 inmates had been released. SM Report 5/13/21. This equals a 40.5% release rate. SM Report 5/13/21.

Chief Justice of the Trial Court, 484 Mass. 431 (2020), it is not surprising or indicative of any constitutional violations that the total number of inmates being held at the HOCs' facilities has begun to creep upwards. Moreover, all new arrestees have been afforded a bail hearing where, pursuant to the guidelines issued in the prior CPCS litigation, a judicial officer considered the risk that an arrestee either may contract COVID-19 while detained, or may infect others in a correctional institution, as a factor in determining whether bail is needed as a means to assure the individual's appearance before court. This is an additional, temporary consideration beyond those imposed by the relevant bail statutes, M.G.L. c. 276, §§ 57 and 58. *Comm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct.*, 484 Mass. 431, 449 *aff'd as modified*, 484 Mass. 1029 (2020). Furthermore, all pre-trial detainees still in the HOC's custody have already been vetted by the trial court with a rebuttable presumption of release and consideration of COVID-19 factors before being placed in the HOCs' custody. Those pre-trial detainees who remain in custody have been deemed by the trial courts not to be suitable for release due to their extreme risk of flight or unreasonable danger they pose to the public. *Id.* at 539. It is not the role of the HOCs to second guess and then countermand the trial courts' decisions and sit as a super-judiciary deciding who stays and who is released. Those decisions fall squarely within the purview of the courts.

Finally, CPCS posits the HOCs “. . . show deliberate indifference by refusing to use their statutory powers to meaningfully reduce their incarcerated populations . . .” by not utilizing the Sheriffs’ discretionary authority under Massachusetts General Laws, Chapter 127, §§ 20B and 49. (Appellant Brief, 45) According to CPCS, such a failure is “dangerous.” (Appellant Brief, 45) The use of the statutory authority cited by CPCS is at the complete discretion of the Sheriffs of the HOCs. As previously stated, absent a finding of deliberate indifference to the medical needs of the inmates in the custody of the HOCs the Court has already indicated it was reluctant to use its superintendence power under c. 211, § 3 to order the release of additional inmates. There has been no showing of deliberate indifference and in fact the evidence instead shows the HOCs have kept the inmates in their custody safe and healthy during the pandemic (thirteen [13] hospitalizations and two [2] deaths).

C. The decision of the HOCs not to unilaterally release pre-trial detainees and the decision not to implement serial screening testing of non-symptomatic inmates and staff in accordance with medical advice and CDC/DPH guidance does not amount to a due process violation under the Fourteenth Amendment to the United States Constitution.

It is well-established that “[u]nlike convicted prisoners, who may be punished as long as the punishment is not “cruel and unusual” under the Eighth Amendment to the United States Constitution, pretrial detainees may not be punished at all.” *Richardson v. Sheriff of Middlesex County*, 407 Mass. 455, 461

(1990)(quoting *Bell v. Wolfish*, 441 U.S. 535 n.16 [1979]) . Punishment, which complies with the Eighth Amendment, may only be applied after “. . . adjudication of guilt in accordance with due process of law.” *Id.* In the context of the present case, CPCS asks the Court to find due process violations under the Fourteenth Amendment even if it is determined the HOCs did not act with deliberate indifference with respect to deciding not to implement serial screening testing of inmates and/or unilaterally release said inmates. (Appellant Brief, 47) CPCS stated that following the Supreme Court’s decision in *Kingsley v. Hendrickson*, 576 U.S. 396-397 (2015), a number of federal circuit courts concluded pretrial detainees bringing Fourteenth Amendment conditions of confinement claims only needed to establish the objective unreasonableness and not the subjective element as in Eighth Amendment cases. (Appellant Brief 46-47) Further, CPCS urges the Court to “. . . join the Second, Seventh, and Ninth Circuits in concluding that, under the logic of *Kingsley*, proving objectively unreasonable conditions of confinement sufficient to establish a due process violation.” (Appellant Brief, 46)

The First Circuit has not extended the standard set forth in *Kingsley* to due process claims, and instead continues to analyze such cases under both the objective and subjective inquiries used for the Eighth Amendment context. *Savino v. Souza*, 459 F. Supp. 3d 317 n.16 (D.Mass. 2020)(citing *Miranda-Rivera v. Toleda-Davila*, 813 F.3d 64, 74 [1st Cir. 2016]). *See also, Baez v. Moniz*, 460 F.

Supp. 3d 78, 88 (D.Mass. 2020)(stating First Circuit has not endorsed such a view); *Couchon v. Cousins*, 2018 WL 4189694 *6 (D.Mass. 2018) (explaining the court was bound by First Circuit precedent that deliberate indifference test contains both objective and subjective components). As such, the Court should not adopt the approach of analyzing due process claims related to condition of confinement on a solely objective basis. However, even if the Court were to break with the First Circuit and decide to extend the reasoning articulated in *Kingsley* to the present case, CPCS has still failed to show any due process violations. As previously argued above, CPCS failed to present any evidence which would meet the objective or subjective elements needed to establish a constitutional violation based upon conditions of confinement. Finally, the HOCs again point out that all pre-trial detainees currently in the custody of the HOCs are being held because they pose an extreme risk of flight or an unreasonable danger to the public. Such a determination by the trial court should not be unilaterally disturbed by the HOCs where the only remaining pre-trial detainees are the most dangerous.

D. The Essex HOC and the Bristol HOC have not violated inmates constitutionally protected right to counsel.

CPCS alleges that Bristol HOC and Essex HOC have violated inmates' right to counsel by failing to provide meaningful attorney-inmate communication.

(Appellant Brief) As a preliminary matter, the HOCs point out that CPCS failed to address whether or not inmates allegedly effected by the HOCs' acts/omissions

have sought relief at the trial court level. It is the HOCs' position that due to the individualized nature of these allegations relief should be first sought at the trial court level. Notwithstanding, access both to the courts and counsel by inmates are guaranteed under both the U.S. Constitution and the Massachusetts Declaration of Rights. *Cacicio v. Secretary of Public Safety*, 422 Mass. 764, 773-774 (1996). “[I]nmates with pending criminal charges or pending appeals have a constitutional right to effective counsel.” *Id.* Unjustifiable obstructions on an inmates' right to counsel violate the Sixth Amendment. *Benjamin v. Fraser*, 264 F.3d 175, 187 (2nd Cir. 2001). However, a “[p]rison regulation, even if it interferes with a prisoner's constitutional rights, ‘is valid if it is reasonably related to legitimate penological interests.’” *Jiles v. Department of Correction*, 55 Mass.App.Ct. 658, 663 (2002)(citing *Turner v. Safley*, 482 U.S. 78, 89 [1987]). *See also Bell v. Wolfish*, 441 U.S. 520, 546-547 (1979)(stating prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel). In the present case, the Bristol HOC and Essex HOC have not obstructed attorney-inmate communications in any way. In fact, both HOCs have gone above and beyond to accommodate attorneys who have chosen not to visit due to COVID-19 concerns. Additionally, any special rules that have been put into place by either Bristol HOC or Essex HOC requiring PPE and barrier visits are based upon legitimate interests in protecting against the spread of COVID-19. With this

standard as a starting point, the HOCs analyze all of the options attorneys have to communicate with their clients.

a. In-Person Attorney-Inmate Visits

Both Bristol HOC and Essex HOC currently provide confidential, in-person attorney visits (contact and/or non-contact) for inmates. It is CPCS' choice not to take advantage of in-person meetings, as opposed to restrictions or regulations limiting access instituted by Bristol HOC or Essex HOC. Moreover, CPCS only provided the Court with anecdotal evidence of a handful of attorneys not feeling safe as opposed to actual names and statistics showing the number of attorneys refusing in-person visitations, a list of COVID-19 positive attorneys who acquired the virus due to a visit at either Bristol HOC or Essex HOC, and the inmates effected by these alleged violations. The anecdotal complaints and worries of a handful of attorneys has not hampered the vast majority of attorneys from visiting inmates on an in-person basis. Essex HOC reported a total of 1,623 attorney in person visits from April 2, 2020 to April 22, 2021. Additionally, all citizens of the Commonwealth are eligible to receive the COVID-19 vaccine thus allowing individual attorneys the ability to add an additional layer of protection against the virus.

b. Telephone Calls

In addition to in-person attorney-inmate visits, both Bristol HOC and Essex HOC provide inmates with confidential access to telephones for communication with counsel. Essex HOC, in addition to telephones, also provide inmates with tablets so they may contact their attorney.

c. Video Conferencing

Essex HOC provides video conferencing as an option instead of in-person attorney-inmate visits. Like all modes of communications between inmates and attorneys, video-conferencing in the Essex HOC is subject to certain limitations. For example, Essex HOC, in December 2020, installed two video conferencing modules for attorney-inmate use and require advance notice for use. Bristol HOC does not offer video-conferencing for attorney-inmate meetings. Bristol HOC explained that due to structural and technological barriers they cannot offer wide spread video conferencing for attorney-inmate meetings.

d. Legal Mail

Both Bristol HOC and Essex HOC provide confidential legal mail for all inmates.¹⁷

¹⁷ In accordance with county correctional regulations, indigent inmates are allowed postage-free letters each week for privileged confidential communication with their attorneys of record on any pending criminal matter. 103 CMR 948.04.

CPCS cannot and does not argue that either Essex HOC or Bristol HOC instituted policies and/or procedures which significantly hamper their ability to communicate with their clients on a timely basis. Finally, in the context of restrictions placed on inmate phone calls, the Court in *Cacicio* stated “[t]hese limitations, when viewed in conjunction with an inmate’s ability to use the mails and have visits, provide sufficient access to attorneys.” *Cacicio*, 422 Mass. at 773. In this case, both Essex HOC and Bristol HOC offered multiple options for attorney-inmate communication which provide more than adequate access to counsel. “[T]he lack of a perfect setting for attorney-inmate communications does not deny the inmate the right of access of pursuing legal challenges in the courts.” *Jiles*, 55 Mass.App.Ct. at 664.

CONCLUSION

For the reasons set forth above, the Court should deny Appellants request for relief and dismiss their complaint in its entirety.

Respectfully submitted on Behalf of Defendants,

Barnstable County Sheriff's Office,
Berkshire County Sheriff's Office,
Bristol County Sheriff's Office,
Dukes County Sheriff's Office,
Essex County Sheriff's Department,
Franklin County Sheriff's Office,
Hampden County Sheriff's Department,
Hampshire County Sheriff's Office,
Middlesex Sheriff's Office,
Norfolk Sheriff's Office,
Plymouth County Sheriff's Department,
Suffolk Sheriff's Department and
Worcester County Sheriff's Office,

By their Attorney
Maura Healey
Attorney General

1/s/ Dan V. Bair J.F.

Dan V. Bair II, Esq. (BBO# 654369)
Special Assistant Attorney General
Dan V. Bair II, Attorney at Law
15 Foster Street
Quincy, MA 02169
Tel: (508) 277-0720
Fax: (617) 770-4091
dbair@danbairlaw.com

Date: 05/26/2021

ADDENDUM

**ADDENDUM
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2020-0757

COMMITTEE FOR PUBLIC COUNSEL SERVICES & another

vs.

BARNSTABLE COUNTY SHERIFF'S OFFICE & others.

RESERVATION AND REPORT

This case came before the court, Cypher, J., on a complaint for declaratory and equitable relief, and relief pursuant to G. L. c. 211, § 3. Because the parties were unable to agree to all facts necessary to permit the court to decide the issues presented in the complaint, I appointed the Honorable C. Rufo (ret.) as a Special Master and referred the matter to him to determine which, if any, relevant facts were agreed to by the parties; to hold a hearing or hearings, as necessary; to make any and all findings of fact and credibility determinations, beyond the facts agreed to by the parties, that he deemed necessary and relevant to resolution of the legal issues raised by the plaintiffs in their complaint; and to report to the court his findings of fact, credibility determinations, determinations as to agreed facts, and any recommendations or conclusions of law. The Special Master has now filed the Findings of Fact of the Special Master Under Order of Reference Dated March 5, 2021, together with a record appendix (collectively, Report).

In light of the extraordinary, declaratory and equitable relief requested by the plaintiffs, and the issues presented, I conclude this is a matter best decided by the full court, and I exercise my discretion to reserve and report this matter. The record before the full court shall include all pleadings, the Special Master's Report, and all other documents and materials filed in the county court in this case, the docket sheet for SJ-2020-757, and this Reservation and Report.

It is anticipated that the full court will hear oral argument on this case on Tuesday, June 1, 2021. The parties shall confer with the clerk of the full court as to the time for any such argument. The plaintiffs are designated as the appellants. Unless otherwise directed by the clerk of the full court, the appellants shall file their brief and record appendix by Wednesday, May 19, 2021, and the appellees shall file their brief by Wednesday, May 26, 2021. Any reply brief shall be filed by 5:00 p.m., Friday, May 28, 2021. All additional issues and questions concerning this order and the scheduling of the case before the full court shall be directed to the clerk of the full court.

/s/ Elspeth B. Cypher

Elspeth B. Cypher
Associate Justice

Date Entered: May 10, 2021

**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 with one-inch margins and contains 10,824 total non-excluded words prepared with Microsoft Word 2013.

1/s/ Dan V. Bair II

Dan V. Bair II, Esq. (BBO# 654369)
Special Assistant Attorney General
Dan V. Bair II, Attorney at Law
15 Foster Street
Quincy, MA 02169
Tel: (508) 277-0720
Fax: (617) 770-4091
dbair@danbairlaw.com

Date: 05/26/2021

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d), I the undersigned, do hereby certify, under the penalties of perjury, that a copy of the Appellees' Brief has been served electronically on all parties or their representatives in this action as listed below this twenty-sixth day of May, 2021:

Matthew R. Segal
Jessie J. Rossman
Laura K. McCready
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
jrossman@aclum.org

Rebecca Jacobstein
Benjamin H. Keehn
Committee for Public Counsel Services
100 Cambridge Street, 14th Floor
Boston, MA 02114
rjacobstein@publiccounsel.net

Chauncey B. Wood
Massachusetts Association of Criminal Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
cwood@woodnathanson.com

Victoria Kelleher
Massachusetts Association of Criminal Defense Lawyers
One Marina Park Drive, Suite 1410
Boston, MA 02210
victoriouscause@gmail.com

/s/ Dan V. Bair II

Dan V. Bair II, Esq. (BBO# 654369)
Special Assistant Attorney General
Dan V. Bair II, Attorney at Law
15 Foster Street
Quincy, MA 02169
Tel: (508) 277-0720
Fax: (617) 770-4091
dbair@danbairlaw.com