

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Suffolk, ss.

Super. Ct. No. 20-00855-D

**STEPHEN FOSTER, MICHAEL GOMES,
PETER KYRIAKIDES, RICHARD
O'ROURKE, STEVEN PALLADINO,
MARK SANTOS, DAVID SIBINICH,
MICHELLE TOURIGNY, MICHAEL
WHITE, FREDERICK YEOMANS, and
HENDRICK DAVIS**, individually and on
behalf of all others similarly situated,
Plaintiffs,

v.

CAROL MICI, Commissioner of the
Massachusetts Department of Correction,
GLORIANN MORONEY, Chair
Massachusetts Parole Board, and **THOMAS
TURCO**, Secretary of the Executive Office of
Public Safety and Security,

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
EMERGENCY MOTION TO REQUIRE DEFENDANT MICI TO
ESTABLISH A HOME CONFINEMENT PROGRAM**

INTRODUCTION

Plaintiffs seek an order directing Defendant Mici to do what she could have and should have done months ago: implement a home confinement program for sentenced prisoners. In its June 2, 2020 decision, the Supreme Judicial Court (“SJC”) rejected the Commissioner’s argument that the Department of Correction (“DOC”) lacked statutory authority to release prisoners to home confinement. *Foster v. Comm’r of Correction*, 484 Mass. 698, 710 (2020). Indeed, not only did the Court hold that home confinement is permissible, it embraced Chief Justice Gants’s concurrence, which states that the controlling statute “requires the commissioner to establish in each correctional facility a committee to evaluate the behavior and conduct of inmates within the prison and recommend whether an inmate ‘shall be permitted to participate in any program outside a correctional facility, exclusive of parole.’” *Id.* at 737 (Gants, C.J., concurring) (emphasis in original). Nearly five months later, despite this direction from the SJC, the DOC has stubbornly refused to implement a home confinement program. It has not released a single prisoner to home confinement.¹ Indeed, in her interrogatory responses, Defendant Mici admitted to not even establishing committees to consider prisoners for participation in such a program, despite the explicit statutory requirement to do so. In the face of this intransigence, and in light of the ongoing risks created by the COVID-19 pandemic, Plaintiffs ask the Court to order Defendant Mici to institute a home confinement program, as required by Massachusetts law.

FACTS

I. DOC HAS FAILED TO IMPLEMENT A HOME CONFINEMENT PROGRAM

As the danger of COVID-19 in prisons and jails has persisted, and even in the face of recent outbreaks, DOC has refused to implement a home confinement program. *See* Def. Mici’s

¹ *See* Special Master’s Weekly Report (“S. Master’s Rpt.”), SJC 12926, October 22, 2020, at app’x p. 43, available at <https://www.mass.gov/doc/sjc-12926-special-masters-weekly-report-10222020>.

Response to Pls.’ First Set of Interrogatories (attached as Ex. A), Response 1 (not listing home confinement in response to request to describe “all actions the DOC has undertaken since February 1, 2020, to reduce the number of prisoners in DOC custody”).² Nor has she promulgated any rules or regulations requiring the county jails and houses of correction to do so. One example of DOC’s intransigence is the case of Plaintiff Steven Palladino.

On August 13, 2020, and again on September 22, 2020, counsel for Plaintiffs requested that Mr. Palladino be placed on home confinement, noting, *inter alia*, that:

- he met all the statutory requirements;
- he was willing to participate in any education, training, or employment program designated by DOC;
- he was serving time for a non-violent financial crime;
- he had already served the majority of his sentence;
- he would be eligible for parole in less than a year;
- he had not received a single disciplinary ticket during his multi-year incarceration;
- he had completed all programming recommended by DOC;
- he was willing to submit to GPS monitoring or any other requirements imposed by DOC;
- he had a family eager to have him return home and live with them; and
- his age and medical conditions, which included diabetes, kidney disease, hypertension, thalassemia, and cancer, put him at increased risk from COVID-19.

Letters from Michael Horrell to Nancy White and Stephen Dietrick (Aug. 13, 2020, and Sept. 22, 2020) (attached as Exs. C & D). DOC did not respond to the requests for nearly two months.

Finally, on October 9, 2020, counsel for Defendant Mici denied the request on the grounds that

² See also Ex. A, Response 19 (answering “not applicable” in response to request to identify members and recommendations of committees required by G.L. c. 127 § 49A); Response of Carol Mici to Pls.’ Second Set of Interrogatories (attached as Ex. B), Response 2 (“The DOC does not have an electronic monitoring program at this time”) & Response 3 (all prisoners “eligible for work and/or education release” required to “return to the facility at the end of the day”).

DOC does not utilize home confinement. Email from Stephen Dietrick to Michael Horrell, RE: Request for Home Confinement, Steven Palladino (W103923) (Oct. 10, 2020) (attached as Ex. E) (“Responding to your email below, as reflected in Commissioner Mici’s responses to plaintiff’s discovery in Foster v. Mici, the DOC does not have a home confinement program at this time.”). By the time of DOC’s denial, Mr. Palladino had been hospitalized due to difficulty breathing. He died the following day. While there is no indication that Mr. Palladino’s death was caused by COVID-19, DOC’s refusal even to consider someone in his situation for home confinement shows its complete disregard of its statutory obligation and the SJC’s ruling. The intervention of this court is therefore necessary.

II. THE SPREAD OF COVID-19 THREATENS SERIOUS HARM TO ALL INCARCERATED

In June, the SJC warned that “due to the COVID-19 pandemic, the situation inside the Commonwealth’s jails and prisons ‘is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary.’” *Foster*, 484 Mass. at 701 (quoting *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, 445 (2020)). Nearly five months later, Defendants have failed to heed the Court’s warning. Overall there are 284 *more* people in the custody of Massachusetts prisons and jails now than there were when the SJC issued its decision.³

Recent COVID-19 outbreaks illustrate the continuing risks in prisons and jails. In the past month, 38 detainees in the DOC’s Massachusetts Alcohol and Substance Abuse Center have been confirmed positive, and 159 prisoners and 37 staff in the Essex County Correctional

³ See S. Master’s Rpt. at app’x pp. 1-2, 41-42 (showing that the jail population has grown by 635 prisoners while the DOC population has gone down by 351 since June 7, 2020). Significantly, only 31 sentenced prisoners have been released since the SJC order. See *id.* at app’x p. 43. Most of the decrease in the DOC population can be attributed to a drop in admissions that began in April rather than increased releases. *Foster*, 484 Mass. at 735-36 (Gants, C.J., concurring) (“[T]he fact remains that more inmates can be released in accordance with law, without compromising public health and safety.”)

Facility (“ECCF”) were infected. S. Master’s Rpt. at app’x pp. 14, 45. Since the beginning of October, there have been positive cases at four DOC and eight county facilities. *Id.* Currently, there are also staff with active COVID-19 cases at six DOC facilities.⁴ It is likely that there are more cases that have not been identified, given that the DOC does only limited testing of prisoners and only a small amount of voluntary testing of staff.⁵ This is in contrast to routine staff testing mandated by the executive branch in all non-carceral congregate settings.⁶

DOC prisoners and staff sharing indoor spaces have no greater ability to maintain social distance now than they did during last Spring’s first wave of the infection.⁷ At the same time, the risk of airborne spread is now understood to be greater than previously recognized,⁸ and the CDC recently revised its guidelines to expand restrictions on close contact after a study showed that a prison guard wearing PPE was infected after multiple exposures lasting only about a minute each.⁹

⁴ See October 27, 2020 COVID-19 Staff Testing Daily Report, *available at*

<https://www.mass.gov/doc/october-27-2020-covid-19-staff-testing-daily-report/download>

⁵ Despite the MASAC outbreak, the DOC has reported only 42 tests of correctional staff at all facilities in the past month. S. Master’s Rpt. at app’x pp. 42. And MASAC still has 17 staff with active COVID-19 cases. See October 27, 2020 COVID-19 Staff Testing Daily Report, *supra*.

⁶ The Executive Office of Health and Human Services has issued testing guidance requiring regular staff testing in congregate care programs such as group homes and residential treatment programs. See Residential and Congregate Care Programs: 2019 Novel Coronavirus (COVID-19) Surveillance Testing Guidance Updated October 9, 2020, *available at* <https://www.mass.gov/doc/eohhs-congregate-care-surveillance-testing-guidance>

⁷ According to DOC Housing Reports, there has been no change in the number of prisoners living with one or more persons since the SJC decision. Most prisoners are still housed in settings where social distancing is impossible. See DOC COVID-19 Institution Cell Housing Reports, <https://www.mass.gov/lists/doc-covid-19-institution-cell-housing-reports>

⁸ *SARS-CoV-2 & Potential Airborne Transmission*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (Oct. 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>.

⁹ Julia C. Pringle et al, *COVID-19 in a Correctional Facility Employee Following Multiple Brief Exposures to Persons with COVID-19 -- Vermont, July-August 2020*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 21, 2020),

https://www.cdc.gov/mmwr/volumes/69/wr/mm6943e1.htm?s_cid=mm6943e1_x; Andrew Joseph, *CDC expands definition of ‘close contacts,’ after study suggests Covid-19 can be passed*

Since September COVID-19 rates of community infection have increased dramatically both nationally¹⁰ and in Massachusetts, including in correctional facilities.¹¹ Rates among those incarcerated in Massachusetts have been conservatively estimated to be three times that in the community,¹² and the risk of further spread remains at least as high as when the SJC ruled that a reduction in the population is “necessary.” *Foster*, 484 Mass. at 701.

ARGUMENT

I. HOME CONFINEMENT IS REQUIRED UNDER MASSACHUSETTS LAW

Massachusetts law requires the Commissioner of Correction to establish education, training, and employment programs for prisoners, including home confinement programs that may be completed by prisoners while outside of a correctional facility. *Foster*, 484 Mass. at 733, 736-37; *Com. v. Donohue*, 452 Mass. 256, 266 (2008) (“the statutory scheme suggests a legislative intent to allow this kind of [GPS-monitored home confinement] arrangement”). While the DOC and the county sheriffs are each responsible for establishing their own programs, the Commissioner is responsible for promulgating regulations governing them. G.L. c. 127 § 48 (“The commissioner shall make and promulgate rules and regulations governing programs established under this section”); *see also* G.L. c. 124 § 1(q). Prisoners are eligible to be considered for such programs if they are within 18 months of parole eligibility and have not been convicted of certain enumerated offenses. G.L. c. 127 § 49. The Commissioner is further

in brief interactions, STAT NEWS (Oct. 21, 2020),

<https://www.statnews.com/2020/10/21/cumulative-time-covid-19-spread/>.

¹⁰ *See* CDC COVID Data Tracker, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases, (last visited Oct. 22, 2020) (showing 60,426 new cases on Oct. 20th compared with 47,035 new cases on October 18th).

¹¹ *Massachusetts State Overview*, JOHNS HOPKINS UNIV. & MED., <https://coronavirus.jhu.edu/region/us/massachusetts> (last visited Oct. 22, 2020).

¹² Monik C. Jimenez et. al., *Epidemiology of COVID-19 Among Incarcerated Individuals and Staff in Massachusetts Jails and Prisons*, JAMA Network Open, August 21, 2020, available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2769617> (noting that low testing rates in jails likely resulted in undercounts).

required to establish a committee at each state correctional facility to evaluate prisoners for participation in such programs. G.L. c. 127 § 49A.

In this case, the SJC rejected the Commissioner’s argument that she lacks the authority to institute a home confinement program for sentenced prisoners. *Foster*, 484 Mass. at 733 (holding that G.L. c. 127 §§ 48, 49, 49A and *Donohue* “would allow the commissioner to release certain individuals who currently are serving a sentence in a prison or house of correction to home confinement”). Indeed, not only is home confinement permissible, but “General Laws c. 127 § 49A, *requires* the commissioner to establish in each correctional facility a committee to evaluate the behavior and conduct of inmates within the prison and recommend whether an inmate ‘shall be permitted to participate in any program outside a correctional facility, exclusive of parole.’” *Foster*, 484 Mass. at 737 (Gants, C.J., concurring) (emphasis in original). Despite this legislative mandate, the Commissioner has not established the required committees to evaluate prisoners for home confinement. *Id.* (“There is nothing in the record regarding the activities of these committees and no explanation as to why, especially at a time when the commissioner recognizes the need to reduce the prison population, eligible prisoners who have demonstrated good behavior and conduct have not been approved for home confinement to participate in education, employment, or training programs.”); *see* Ex. A, Response 19 (answering “not applicable” in response to request to identify members and recommendations of committees required by G.L. c. 127 § 49A). Nor has she promulgated regulations governing county home confinement programs as she is required to do by G.L. c. 127 § 48.

It is entirely appropriate for the Court to order DOC to implement a home confinement program. “Courts have traditionally issued orders and injunctions directing public officials to carry out their obligations.” *Attorney Gen. v. Sheriff of Suffolk County*, 394 Mass. 624, 629–30

(1985) (order requiring City Council to build a new 17-story jail did not violate principle of separation of powers because of the city's statutory obligation to provide suitable jail); *see also Blaney v. Comm'r of Correction*, 374 Mass. 337 (1978) (order giving commissioner explicit directions concerning treatment of protective custody inmates to fulfill statutory obligations under G.L. c. 127 § 32 did not violate separation of powers). Although the DOC undoubtedly has discretion as to which prisoners should be released to home confinement, it cannot altogether disregard its duty to establish such a program. *See Deal v. Comm'r of Correction*, 478 Mass. 332 (2017) (commissioner's use of discretionary classification overrides violated statute prohibiting DOC from categorically barring lifers from being placed in minimum security facilities).

II. THE PANDEMIC MAGNIFIES THE IMPORTANCE OF HOME CONFINEMENT

In a concurrence to the June SJC decision, Chief Justice Gants emphasized the need for the DOC to be proactive in reducing the prison population, including through the use of home confinement, before an additional wave of infections broke in the fall and winter:

Reducing the size of the prison population, especially the size of the elderly and infirm prison population, in a manner that is consistent with law and public safety takes time, both to identify appropriate candidates for release and to ensure that they have appropriate release plans. But there will be time before the fall to accomplish sensible reductions in the size of the prison population, including the release or transfer to home confinement of many elderly and medically vulnerable prisoners, to give prison superintendents the better options to protect the physical and mental health of inmates that come with fewer prisoners.

Foster, 484 Mass. at 740–41 (Gants, C.J., concurring); *see id.* at 735 (“[T]here is considerably more that the DOC and the parole board can do to reduce the inmate population, consistent with law and appropriate in terms of public health and safety. . . . [A]lthough what the DOC and parole board are doing *now* may not likely demonstrate a reckless disregard for the health and safety of prisoners arising from the risk of transmission of the COVID-19 virus, continuing

unchanged along that same path in the months ahead might constitute reckless disregard, especially if we are hit with a new wave of COVID-19 cases.”) (emphasis in original).

In the months since the SJC’s ruling, Defendant Mici’s failure to heed the SJC’s warning and to fulfill her statutory obligation to implement home confinement demonstrates “reckless disregard” for prisoner health and safety. Despite her testimony that DOC should be working to reduce the prison population (Factual Findings of the Superior Court, Dkt. 52 at 12, May 1, 2020), she has failed to make any use of home confinement, an obvious means of serving that purpose singled out by the SJC.¹³ While Defendant Mici claimed during the preliminary injunction hearing that DOC does not have the authority to allow prisoners to serve part of their sentences on home confinement, that belief was incorrect, as the SJC confirmed in June. *Foster*, 484 Mass. at 710 (“The commissioner does not believe that she has statutory authority to allow inmates to serve any portion of their State prison sentence under home confinement. We do not agree.”). Accordingly, there is no longer any justification for failing to implement such a program, particularly in light of the unprecedented danger created by the COVID-19 pandemic, and the SJC’s clear statement that “a reduction in the number of people who are held in custody is necessary.” *Foster*, 484 Mass. at 701. This Court should order DOC to implement such a program immediately, including in the houses of correction, in accordance with the SJC’s opinion and the requirements of the statutory scheme.

¹³ On March 26, 2020, the U.S. Attorney General issued a Memorandum instructing the Federal Bureau of Prisons (“BOP”) to prioritize home confinement as an appropriate response to the COVID-19 pandemic. Since then, the BOP has placed 7,729 inmates on home confinement. *See* BOP: Home Confinement Information, Frequently Asked Questions, <https://www.bop.gov/coronavirus/faq.jsp> (last visited Oct. 27, 2020).

CONCLUSION

For all the above reasons, the Court should allow Plaintiffs' Motion and order Defendant Mici to establish a home confinement program.

Dated: October 29, 2020

Respectfully Submitted,

/s/ Michael J. Horrell

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on October 29, 2020 by email to the counsel of record.

/s/ Michael J. Horrell
Michael J. Horrell