COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **CIVIL ACTION NO. 2084CV00295**

CARL LAROCQUE, *et al.*,

Plaintiffs,
v.

THOMAS TURCO, *et al.*,
Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

This is a lawsuit brought by three inmate plaintiffs and two legal organizations. Plaintiffs Carl Larocque ("LaRoque"), Robert Silva-Prentice ("Silva-Prentice"), and Tamik Kirkland ("Kirkland") are inmates in the lawful care and custody of the Massachusetts Department of Correction (DOC) at Souza-Baranowski Correctional Center ("SBCC") in Shirley, Massachusetts. Plaintiff Committee for Public Counsel Services is a legal organization that represents indigent clients. Plaintiff Massachusetts Association of Criminal Defense Lawyers is a bar advocacy group[1]. The defendants in this civil action are Thomas Turco ("Turco"), Secretary of the Executive Office of Public Safety and Security (EOPSS), Commissioner of Correction Carol Mici ("Mici"), and Steven Kenneway ("Kenneway"), Superintendent of SBCC (collectively "defendants").[2]

On January 31, 2020, plaintiffs filed an emergency motion for a preliminary injunction seeking an order compelling Massachusetts prison officials to 1) "permit the inmate plaintiffs to

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[1] The defendants reserve their rights to challenge the standing of the Massachusetts Association of Criminal Defense Lawyers to bring this Emergency Motion for a Preliminary Injunction and the underlying Complaint.
[2] DOC defendants Carol Mici and Steven Kenneway were not served with the Complaint and Motion for Preliminary Injunction until the afternoon of February 5, 2020. Defendant Turco was served the afternoon of February 4, 2020.

possess their legal paperwork in their assigned living quarters, in conformance with 103 CMR 403.10"; 2) provide the plaintiff inmates "sufficient time out of their cells during business hours to make attorney phone calls"; and 3) allow attorney contact visits. See Plaintiff's Emergency Motion for a Preliminary Injunction.

Plaintiffs' motion for emergency injunctive relief should be denied, as the issues are moot. The named plaintiffs, and all SBCC inmates, are in possession of and have access to their legal materials, have telephone access during which they may choose to call their attorneys, and contact visits with their attorneys.

FACTS

Souza-Baranowski Correctional Center is a maximum security prison operated by the Department of Correction, located in Shirley, Massachusetts. On January 10, 2020, SBCC inmates on the North side of the institution seriously assaulted correction officers on a housing unit. See Affidavit of Steven Kenneway attached as Exhibit 1, ¶ 5.Four officers were taken to the hospital; two had injuries severe enough to require hospitalization, one for a head trauma and a badly broken nose and one for a broken jaw, and broken vertebrae in his neck.[3] See Exhibit 1, ¶ 5. Inmates attempted to take one officer hostage by dragging him into a cell, but he broke free. See Exhibit 1, ¶ 10.

The assaults led to an immediate lockdown of SBCC; the institution was put into Disorder protocol pursuant to 103 DOC 560, Disorder Management policy.[4] See Exhibit 1, ¶ 6. Prison officials received credible information that additional inmate assaults, including threats of rape, murder, and hostage-taking of DOC staff, were planned. See Exhibit 1, ¶ 12. On January

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[3] A video of the January 10, 2020 assault is attached as Exhibit A to the Affidavit of Steven Kenneway/

[4] The DOC's Disorder Management Policy, 103 DOC 560, is a private policy. The defendants will provide a copy of this private policy to the Court for an *in camera* review upon the Court's request.

10, 2020, several inmates assaulted the four officers and 23 inmates were identified as combatants; it was a planned assault. See Exhibit 1, ¶ 9.

There are numerous types of disorders that trigger DOC's Disorder protocol, including, but not limited to, emergency incidents such as inmate insurrections, inmate work stoppages, inmate dining hall boycotts, inmate demonstrations, escapes, and hostage situations. Inmate insurrections are inmate disorders, which may include riots, major fights, and/or random property destruction. See Exhibit 1, ¶ 7.

Following the January 10, 2020 attacks, due to the need to separate inmates from one another in an effort to prevent future disturbances and attacks on staff and inmates, inmates needed to be screened to determine appropriate housing placements.See Exhibit 1, ¶ 16. Numerous inmates were transferred to other institutions. See Exhibit 1, ¶ 16. The North side of SBCC now houses inmates with serious disciplinary infractions. See Exhibit 1, ¶ 17. Inmates without disciplinary infractions are housed on the South side. See Exhibit 1, ¶ 17. An inmate can be moved from the North side to the South side if he remains discipline-free. See Exhibit 1, ¶ 17.

Due to SBCC being in a state of emergency and consistent with 103 CMR 486, the DOC's Attorney Access at Massachusetts Correctional Institutions policy, attorney visits were suspended on January 10 (after the assault) through January 16, 2020. See Exhibit 1 and 103 CMR 486 attached as Exhibit 2. DOC officials were still in the process of gathering intelligence information and assessing threats so the institution remained on lockdown. See Exhibit 1, ¶ 6. As of the afternoon of January 17, 2020, attorney visits were allowed, if necessary. See Exhibit 1, ¶¶ 15, 18. It was left to the judgment of individual attorneys whether they felt it necessary to meet with their clients during the institutional lockdown. See Exhibit 1, ¶18. SBCC records reflect that

only one attorney visited a client during the Martin Luther King, Jr. holiday weekend; that visit occurred on January 20, 2020. See Exhibit 1, ¶1 8.

, On January 21, 2020, inmates were being moved throughout the facility based on their updated housing risk assessments, so no attorney visits were allowed on that day. See Exhibit 1, ¶ 19. On January 22, 2020, attorney visits were fully reinstated. See Exhibit 1, ¶ 20. From January 20, 2020 to February 4, 2020, 126 attorney visits took place. See Exhibit 1, ¶20. Plaintiff Larocque received attorney visits on January 27 and 30. See Exhibit 1, ¶ 21. Plaintiff Silva-Prentice received attorney visits on January 29 and February 2. See Exhibit 1, ¶ 22.

Court trips were not impacted by the institutional lockdown and proceeded as scheduled, pursuant to court-issued writs of habeas corpus received by SBCC. See Exhibit 1, ¶ 23. From January 10 to February 5, 2020, inmates were transported to court 36 times. See Exhibit 1, ¶ 23. Plaintiff Kirkland was transported from SBCC to Clinton District Court on January 17, 2020, and to Hampden Superior Court on January 28, 2020. See Exhibit 1, ¶ 24. According to the Docket Sheet, Attorney Merritt Spencer Schnipper represents Mr. Kirkland in that. See Docket Sheet of Commonwealth v. Tamik Kirkland; 1179CR00444 attached as Exhibit 3. The docket reflects that another court hearing in plaintiff Kirkland's criminal case is scheduled for March 26, 2020. See Exhibit 3. On January 28, 2020, the SBCC Property Officer wheeled a flatbed containing plaintiff Kirkland's legal materials into his cell prior to Kirkland leaving on his court trip. See Exhibit 1, ¶ 25. Plaintiff Kirkland took the legal materials he wanted from his vast materials, and they accompanied him to court. See Exhibit 1, ¶ 25. Inmates with extensive legal materials in their cells are able to exchange them for legal materials in storage upon request, pursuant to the DOC's Inmate Property policy, 103 CMR 403. See Exhibit 1, ¶ 25.

Due to the Disorder, the inmate telephone system was turned off from January 10, 2020 (as a result of the attacks) until January 24, 2020. See Exhibit 1, ¶ 6. No unescorted out of cell activity is permitted during a lockdown for security reasons. See Exhibit 1, ¶ 6.Under the Disorder protocol, an inmate is only allowed out of his cell with a two-person officer escort. See Exhibit 1,¶ 26 . Examples of when an inmate would be allowed out of his cell include visits with mental health staff, trips to the Health Services Unit, outside medical trips, and court trips. See Exhibit 1, ¶ 26. Approximately 1,500 escorts of inmates were made from January 10 until January 24, 2020. See Exhibit 1, ¶ 26. From January 24 to February 2, 2020, plaintiff Larocque made and completed 15 phone calls. See Exhibit 1, ¶ 27. From January 24 to February 4, 2020, plaintiff Silva-Prentice made and completed 10 phone calls. See Exhibit 1, ¶ 28. From January 24 to January 31, 2020, plaintiff Kirkland made and completed 38 phone calls. See Exhibit 1, ¶ 29.

North side inmates are presently allowed out of their cells a total of two hours and fifteen minutes a day; these inmates are housed within seven blocks. See Exhibit 1, ¶ 30. There are three set time periods a day - morning, afternoon and evening - between the hours of 8:30 a.m. and 11:00 p.m. - in which 12 inmates per block are allowed out of their cells at one time. See Exhibit 1, ¶ 30. Six of the inmates are allowed on the housing flats with access to the telephones, while the other six inmates are given recreation time outside. See Exhibit 1, ¶ 30. Each North side inmate is given one period with access to the telephones and one period with access to recreation, on a daily basis. See Exhibit 1, ¶ 30. Inmates' times out of cell are rotated on a 31 day schedule, with different time periods each day, to ensure that each inmate has approximately the same amount of access to the telephones to call their lawyers, family, etc. throughout the month. See Exhibit 1, ¶ 30.

Inmate mail was never impacted by the Disorder. See Exhibit 1, ¶ 32. There were no delays in inmates sending outgoing mail or with inmates receiving their incoming mail. See Exhibit 1, ¶ 32. An inmate could have written a letter to his attorney if he wished to contact the attorney, and the attorney could have written the inmate. See Exhibit 1, ¶ 32 .Inmates can also send and receive email to/from their attorneys (and family and friends) from the kiosks that are located on the housing flats. See Exhibit 1, ¶ 31. Inmates who own personal tablets can also send and receive emails from their tablets when they are in their cells. See Exhibit 1, ¶ 31.

On January 21, 2020, the DOC Tactical Team came to SBCC to conduct an institution-wide search. See Exhibit 1, ¶ 33. Every inmate's property was taken and searched for weapons and other contraband, including drugs. See Exhibit 1, ¶ 33. The Tactical Team conducted a thorough and methodical search – they went block by block and searched every inmate's property. See Exhibit 1, ¶ 33. Inmates in the South side blocks received their property back either the same day or the next day. See Exhibit 1, ¶ 33. The entire South side had their property back by January 24, 2020. See Exhibit 1, ¶ 33. Inmates on the North side received all their approved property back by January 31, 2020. See Exhibit 1, ¶ 33. Pursuant to 103 CMR 403.10(2)(c), Approved Inmate Property, inmates are allowed to possess one cubic foot of legal materials in their cells. See Exhibit 1, ¶ 34. Legal materials in excess of one cubic foot are kept in storage and inmates are allowed to make an exchange of legal materials upon request. See Exhibit 1, ¶ 34.

Attorney visits at SBCC are contact visits, barring any foreseeable conflict. See Exhibit 1, ¶ 36. Attorney visits for North side inmates were temporarily non-contact due to the Disorder. See Exhibit 1, ¶ 36. Superintendent Kenneway had determined that the visits be temporarily non-contact due to credible intelligence information he received regarding threatened future violence; he was concerned for the safety of inmates, staff, and visitors. See Exhibit 1, ¶ 36. Contact visits

for attorneys were reinstated for North side inmates on February 3, 2020. See Exhibit 1, ¶ 36. Attorney visits for South side inmates have always been contact visits, and remained contact visits following the January 10 assaults on correctional staff. See Exhibit 1, ¶ 36.

SBCC has three attorney visiting rooms, all of which permit contact. See Exhibit 1, ¶ 37. SBCC has 14 non-contact rooms which can also be used for attorney visits. See Exhibit 1, ¶ 37. The first three attorneys who visit during a specific time have access to those attorney visiting rooms that permit contact. See Exhibit 1, ¶ 37. If all three attorney visiting rooms are being used and a fourth attorney arrives for a visit, the attorney will be placed in the non-contact visiting area. See Exhibit 1, ¶ 37. The fourth attorney can choose to wait until one of the three attorney visiting rooms becomes available if he or she so chooses, or conduct a non-contact visit with the client. See Exhibit 1, ¶ 37.

If there are two inmates who are known enemies of one another and both want an attorney visit at the same time – then the first attorney and inmate are allowed to use the contact visiting room. See Exhibit 1, ¶ 39. The second attorney and inmate will have a non-contact visit unless they choose to wait until the first inmate and his attorney are done. See Exhibit 1, ¶ 39. The reason for this is that enemies cannot be in close proximity to each other for their own safety, plus the safety of staff and their attorneys. See Exhibit 1, ¶ 39. For a non-contact visit, the inmate and his attorney are separated by a partition that is half-wall, half-plexiglass; with the plexiglass being on top. See Exhibit 1, ¶ 38. The inmate and the attorney are able to see at least the head and shoulders of one another, depending on their heights. See Exhibit 1, ¶ 38. When an inmate has a non-contact visit with his attorney, correction officers are available to facilitate the passage of legal materials between the attorney and the inmate. See Exhibit 1., ¶ 40

103 CMR 486, the DOC's Attorney Access at Massachusetts Correctional Institutions policy, specifically states that when an emergency exits within an institution, visits by attorneys may be temporarily suspended. See Exhibit 2. "When visits are temporarily terminated, in accordance with 103 CMR 486.10(1), attorneys, law students, paralegals and private investigators shall be informed as soon as possible of the expected duration of the emergency." See Exhibit 2, specifically, 103 CMR 486.10(2). Pursuant to the CMR, DOC Commissioner Carol Mici spoke with Prison Legal Services attorney, James Pingeon, on or about January 16, 2020 to inform him that attorney visits were temporarily suspended at SBCC due to the serious January 10 staff assaults. See Affidavit of Carol A. Mici attached as Exhibit 4, ¶ 10 Commissioner Mici informed Attorney Pingeon that she anticipated that attorney visits would be suspended through the end of that week due to the seriousness and magnitude of the assaults. See Exhibit 4,¶1 0. Commissioner Mici later met with attorneys from Prison Legal Services on January 31, 2020 (a previously scheduled meeting unrelated to the January 10 assaults on staff) and advised them of the state of operations at SBCC. See Exhibit 4, ¶ 10. Earlier that week, the DOC General Counsel informed Attorney Pingeon about the anticipated resumption of attorney visits. See Exhibit 4, ¶ 11. On January 17, 2020, Attorney Victoria Kelleher was informed of the resumption of attorney visits that day. See Exhibits 4, 12.

ARGUMENT

I. THE PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF MUST BE DENIED. AS THEIR CLAIMS ARE MOOT AND THEY CANNOT SUCCEED ON THE MERITS.

A. Standard for Issuance of Preliminary Injunctive Relief.

The plaintiffs' motion for preliminary injunction should be denied, because the current state of affairs at SBCC renders their Complaint moot. In fact, all of the conditions by which the

plaintiffs claim to be aggrieved were resolved before they filed their Complaint. The inmate plaintiffs have access to their legal materials, opportunities to contact their attorneys by telephone and mail, and the ability to meet with those attorneys at SBCC. Simply put, there is nothing to restrain and nothing to enjoin.

A party moving for a preliminary injunction must show the presence of the following familiar factors: "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the (moving party's) likelihood of success on the merits, the risk of irreparable harm to the (moving part) outweighs the potential harm to the (nonmoving party) in granting the injunction." Garcia v. Department of Housing and Community Development, 480 Mass. 736, 747 (2018), citing Loyal Order of Moose v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003); see also Packaging Industries Group v. Cheney, 380 Mass. 609 (1980). A party seeking to enjoin government action must prove to the court that "the requested order promotes the public interest, or alternatively, that the equitable relief will not adversely affect the public." Fordyce v. Town of Hanover, 457 Mass. 248, 255 n. 10 (2010); Loyal Order of Moose, 439 Mass. at 601, quoting Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984). Where the status quo holds, as here, injunctive relief is unnecessary.

The Supreme Court has noted that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original); see also Peoples Fed. Sav. Bank v. People's United Bank, 672 F.3d 1, 8-9 (1st Cir. 2012), quoting Voice of Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) ("A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right."); Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 163 (1st Cir. 2004)

(a preliminary injunction is a "potent weapon"). For reasons detailed below, the plaintiffs have not made a clear showing that they are entitled to preliminary relief; accordingly, the Court should deny their motion for emergency injunctive relief.

B. Plaintiffs Are Not Likely To Succeed On The Merits.

Injunctive relief is inappropriate here because "it appears to a certainty [that plaintiffs are] entitled to no relief under any state of facts which could be proved in support of [their] claim." Harvard Law School Coalition for Civil Rights v. President and Fellows of Harvard College, 413 Mass. 66, 68 (1992). The plaintiffs' claims fail in large part because the issues they raise are moot: SBCC inmates have access to telephones; they have access to their legal materials; and they have access to contact attorney visits.

Even if plaintiffs could get around the fact that they are already in receipt of the relief they request, their claims cannot succeed. First, there is no likelihood of success because they allege no injuries. Second, they have no likelihood of success on their APA claim, because DOC regulations permit the actions that were taken. Third, even if contact visits with attorneys were currently suspended, inmates do not have a constitutional right to dictate security protocols at a correctional facility, or where security officers should be posted. Jiles v. Department of Correction, 55 Mass.App.Ct. 658, 663 (2002). Moreover, "the lack of a perfect setting for attorney-inmate communication does not deny the inmate the right of access of pursuing legal challenges in the courts." Id. Fourth, the plaintiffs cannot show any real and immediate threat of irreparable harm, as required by courts. Fifth, interference with the internal security operations of SBCC is contrary to public policy and is disfavored by courts. Finally, public safety will suffer irreparable harm were the preliminary injunction to issue because an inability to determine, and

implement, necessary, reasonable safety measures would put other inmates, staff, and visitors at risk of harm.

Though the plaintiffs allege violations of their Massachusetts and federal constitutional rights, their claims are vague, at best. Vague claims do not rise to the level of constitutional violations and are insufficient to warrant injunctive relief.

For an inmate to succeed on a claim that right of access to courts has been denied, that inmate must establish an actual injury. "The actual injury that must be established by an inmate is that an actionable claim involving a challenge to a sentence or to conditions of confinement 'has been lost or rejected, or that the presentation of such a claim is currently being prevented . . . .'" Jiles, supra, at 662, citing Lewis v. Casey, 518 U.S. 343, 356 (1996). As the First Circuit has stated, "[a] finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004). The U.S. Supreme Court has stated that inmates alleging infringement of their right to access courts must show that some actual injury has resulted.

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution . . .

Lewis, 518 U.S. at 349. Because the plaintiffs fail to allege any facts to suggest they suffered any actual harm, their various claims cannot succeed and injunctive relief is unwarranted.

1. Access to Courts and Counsel

Attorney visits were temporarily suspended on Friday, January 10, 2020 following the serious inmate assaults on correction officers. See Exhibit 1, ¶ 18. They resumed on Friday,

January 17, 2020; with the exception of only one day, January 21, when visits were temporarily suspended (due to inmates being moved throughout the facility based on their updated housing risk assessments). See Exhibit 1, ¶ 18. The plaintiffs now allege, without any legal or factual support, that they were somehow "injured" by the DOC's actions. However, the plaintiffs make no specific allegation that any actionable claim, civil or criminal, was impacted in any way by the temporary suspension of visits.

SBCC has three attorney visiting rooms, all of which are contact. See Exhibit 1, ¶ 37. The first three attorneys who visit during a specific time have access to those attorney visiting rooms. See Exhibit 1, ¶ 37. If all three attorney visiting rooms are being used and a fourth attorney arrives for a visit, the attorney will be placed in the non-contact visiting area. See Exhibit 1, ¶ 37. SBCC has 14 non-contact rooms which can be used for attorney visits. See Exhibit 1, ¶ 37. The fourth attorney can choose to wait until one of the three attorney visiting rooms becomes available if he or she so chooses, or proceed to a non-contact visit. See Exhibit 1, ¶ 37. For a non-contact visit, the inmate and his attorney are separated by a petition that is half-wall, half-plexiglass, with the plexglass on top. Exhibit 1, ¶ 38. The inmate and attorney will be able to see at least the head and shoulders of one another, depending on the heights of the attorney and inmate. Exhibit 1, ¶ 38. When an inmate has a non-contact visit with his attorney, correction officers are available to facilitate the passage of legal materials between the inmate and the attorney. Exhibit 1, ¶ 40.

If there are two inmates who are known enemies of one another and both want an attorney visit at the same time, then the first attorney and inmate are allowed to use the contact visiting room. See Exhibit 1, ¶ 39. The second attorney and inmate will have a non-contact visit unless they choose to wait until the first inmate and his attorney are done. See Exhibit 1, ¶ 39.

The reason for this is that enemies cannot be in close proximity to each other for their own safety, plus the safety of staff and their attorneys. See Exhibit 1, ¶ 39.

The Appeals Court, in Jiles, supra, 55 Mass.App.Ct. at 658, citing Lewis, addressed an inmate's claims that his right to proper attorney visits was constrained by prison officials at the Massachusetts Correctional Institution-Cedar Junction (MCI-Cedar Junction), which, for security reasons, stationed a correction officer outside of the attorney visiting room. The room had a solid door, with an open grille in it; the officer was stationed eight to 10 feet outside the door because of a past history of prisoner disruption at the facility. Id. Papers could be exchanged between the inmate and his attorney. Jiles himself was awaiting discipline for assaulting a correction officer. Id. Jiles alleged that doing so "did not adequately preserve the confidentiality of his communications with counsel," which violated his right to access the courts. Id. at 659. The Appeals Court rejected his claim, stating that the presence of a correction officer did not rise to the level of a constitutional violation because it had no legitimate impact on the inmate's legal matters.

Attorney visits at SBCC are contact visits, barring any foreseeable conflict. See Exhibit 1, ¶ 37. Attorney visits for North side inmates were temporarily non-contact due to the Disorder. See Exhibit 1, ¶ 36. Superintendent Kenneway had determined that the visits be temporarily non-contact due to credible intelligence information he received; he was concerned for the safety of inmates, staff, and visitors. See Exhibit 1, ¶ 36. Contact visits for attorneys were reinstated for North side inmates on February 3, 2020. See Exhibit 1, ¶ 36. Attorney visits for South side inmates have always been contact visits, and remained contact visits following the January 10 assaults on correctional staff. See Exhibit 1, ¶ 36.

None of the plaintiffs here allege that any legal proceeding was impacted at all – let alone jeopardized -- by the brief suspension of attorney visits; as noted, inmates were never prevented from sending or receiving mail, including legal mail, and inmates were transported to all scheduled court hearings. In fact, no specific allegations of harm are raised by any of the plaintiffs. Indeed, the facts clearly show the opposite. Plaintiff Kirkland was transported twice to court proceedings: on January 17, 2020 to Clinton District Court and on January 28, 2020 to Hampden Superior Court. See Exhibit 1, ¶ 24. Plaintiff Kirkland suffered no harm as a result of the temporary suspension of attorney visits. Furthermore, attorney visits were reinstated January 17; attorney Schnipper could have visited plaintiff Kirkland between January 17 and January 28, the date of the hearing. Plaintiff Larocque received attorney visits on January 27 and 30. See Exhibit 1, ¶ 21. Plaintiff Silva-Prentice received attorney visits on January 29 and February 2. See Exhibit 1, ¶ 22.

To the extent plaintiffs allege that the defendants' actions run afoul of the Administrative Procedures Act, they are incorrect. DOC has duly promulgated regulations that grant it wide discretion in managing its correctional facilities. For example, 103 CMR 486.10, Emergencies, expressly permits the superintendent to "temporarily terminate visits by attorneys" when an emergency exists within an institution. Contrary to plaintiffs' unsupported claims, attorney visiting procedures at SBCC have not changed.

2. Inmate Access to Legal Materials

Each SBCC inmate's property was removed from his cell beginning on January 21, 2020. Exhibit 1, ¶ 33. Prison staff undertook a thorough and methodical search, block-by-block, of all property, looking for contraband items, drugs, and weapons. Exhibit 1, ¶ 33. See 103 DOC 561, Planned Institutional Searches. This thorough search was in response to the January 10, 2020

assaults on correctional staff to credible threats of violence received by prison authorities before and after the assault. Exhibit 1, ¶ 33. All inmates on the South side of SBCC received their property, including legal materials, by January 24, 2020; inmates on the North side received their approved property, including legal materials, by January 31, 2020. Exhibit 1, ¶ 33.

It is this brief period that SBCC inmates were without their legal materials, while the safety and security search of SBCC was underway, that plaintiffs contend was an unconstitutional infringement on their right of access to courts. But, as noted, other than alleging theoretical harm, plaintiffs cite to no situation where any inmate plaintiff's criminal case was materially affected. Plaintiffs, for example, do not allege that any court deadlines were missed, or that they otherwise suffered any adverse court rulings due to the temporary removal of legal materials from their cells. See Jiles, supra, at 662, citing Lewis v. Casey, 518 U.S. 343, 356 (1996).

Here, other than to claim that the removal of legal materials from inmate cells "has resulted in a delay and an inability to meaningfully contribute to the defense in pending criminal cases," the plaintiffs do not claim that any specific legal proceeding was affected in any way because an inmate was briefly without his legal materials. There is no claim that any continuance was sought and not allowed in any pending proceeding.

3. Inmate Telephone Call Access to Attorneys

As with their claims regarding attorney visits and inmate legal materials, the plaintiffs cannot succeed on their claim that a temporary suspension in inmate telephone privileges caused any actual harm, because they do not allege any specific injury to any plaintiff.

Due to the Disorder, which began on January 10 as a result of the serious attacks on staff, the inmate telephone system was turned off until January 24, 2020. See Exhibit 1, ¶ 6. See 103

CMR 482.06(4), Inmate Telephones. Once the inmate telephone system was reactivated on January 24, the inmate plaintiffs made full use of it. From January 24 to February 2, 2020, plaintiff Larocque made and completed 15 phone calls. See Exhibit 1, ¶ 27. From January 24 to February 4, 2020, plaintiff Silva-Prentice made and completed 10 phone calls. See Exhibit 1, ¶ 28. From January 24 to January 31, 2020, plaintiff Kirkland made and completed 38 phone calls. See Exhibit 1, ¶ 29. The three plaintiff inmates clearly could have called their attorneys if they so chose, as they were not prohibited from making calls once the telephone system was reactivated. Additionally, attorney visits were reinstated as of January 17; attorneys could have visited their clients if they did not receive expected phone calls. Exhibit 1, ¶¶ 15, 18.

In asking this Court for an order mandating that DOC "allow inmates the opportunity to make and complete an attorney phone call at least twice between the hours of 9:00 a.m. and 5:00 p.m.," see Plaintiffs' Emergency Motion for a Preliminary Injunction, the plaintiffs allege they do not have enough out-of-cell time each day to call their attorneys. This is not the case, as all inmates have time during the day in which to make such calls. North side inmates are presently allowed out of their cells a total of two hours and fifteen minutes a day; these inmates are housed within seven blocks. See Exhibit 1, ¶ 30. Each North side inmate is given one period with access to the telephones and one period with access to recreation, on a daily basis. See Exhibit 1, ¶ 30. Inmates' times out of cell are rotated on a 31-day schedule, with different time periods each day, to ensure that each inmate has approximately the same amount of access to the telephones to call their lawyers, family, etc. throughout the month. See Exhibit 1, ¶ 30. Inmates can send and receive email to/from their attorneys (and family and friends) from kiosks located on the housing flats. Exhibit 1, ¶ 31. Inmates who own personal tablets can also send and receive emails from

their tablets when they are in their cells. Exhibit 1, ¶ 31. The inmates are free to use their phone time to call their attorneys if they so choose.

The plaintiffs' claims simply cannot succeed on the merits. While some inmate privileges were temporarily suspended and some inmates were moved as staff thoroughly searched the maximum security facility for weapons and other contraband, including drugs, this process was necessary to prevent further violence. Exhibit 1, ¶ 6. Every effort was made to provide attorneys with reasonable access to their clients as soon as safety and security were restored. All legal materials have been returned. Exhibit 1, ¶ 33. Inmates are given sufficient time to call their attorneys if they so choose. As such, the plaintiffs' claims fail as a matter of law, and they are not likely to succeed on the merits of the case. Their motion for injunctive relief should be denied.

C. Plaintiffs Fail to Demonstrate a Real and Immediate Threat of Irreparable Harm.

The second prong required for injunctive relief is a real and immediate threat of irreparable harm. Plaintiffs' motion should be denied because they cannot make a clear showing of a real and immediate threat of irreparable harm where the actions that they claim create that threat – lack of access to legal materials, attorney phone calls, and attorney visits – do not exist. Plaintiffs do not – and cannot -- allege that any future irreparable harm is imminent, as opposed to theoretical future harm. The real and immediate threat of irreparable harm "is a necessary threshold showing for awarding preliminary injunctive relief." Matos ex rel. Matos v. Clinton School Dist., 367 F.3d 68, 73 (1st Cir. 2004). "A preliminary injunction should not issue except to prevent a real threat of harm… A threat that is either unlikely to materialize or purely theoretical will not do." Id The institutional lockdown at SBCC ended on February 3, 2020. Plaintiffs have been provided with their legal materials, and are able to call their attorneys and have visits with them. Accordingly, their motion for a preliminary injunction must be denied.

D. Granting a Preliminary Injunction is Not in the Public Interest.

The final prong required for obtaining injunctive relief is demonstrating that such relief is in the public interest. In addition, "where a party seeks to enjoin government action, the judge also must 'determine that the requested order promotes the public interest, or alternatively, that the equitable relief will not adversely affect the public.'" Garcia v. Department of Housing and Community Development, 480 Mass. 736, 747 (2018), quoting Loyal Order of Moose, Inc. Yarmouth Lodge # 2270 v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003). Granting the relief sought here is against the public interest because it would interfere with the extremely difficult task of running a prison. Not only would the public interest not be served, but public safety would be irreparably harmed by the issuance of an injunction.

The Supreme Court has instructed time and again that "[p]rison administrators . . . should be accorded ***wide-ranging deference*** in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979). When the potential for violence ripens into actual unrest and conflict (as here), the Supreme Court's admonition "carries special weight." Whitley v. Albers, 475 U.S. 312, 321 (1986). "That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, ***just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline.***" Whitley, 475 U.S. at 322. (emphasis added). These cases stand for the proposition that prison officials have wide-ranging discretion when it comes to decisions that are made during a prison disturbance. Simply put, safety measures in prison disturbances, and their aftermath, are wisely left to the discretion of trained correctional officials.

Further, as the Supreme Judicial Court has held, "[i]t cannot be doubted that the department has a compelling interest in ensuring the safety of its staff and its inmates and the integrity of its institutions, or that that interest requires the prevention of weapons and contraband from coming into or being concealed in its facilities." Rasheed v. Commissioner of Correction, 446 Mass. 463, 473-74 (2006)(internal citations omitted). While a court has the right to order a department to do what it has a legal obligation to do where the means of fulfilling that obligation is within the discretion of a public agency, the courts normally have no right to tell that agency how to fulfill its obligation. Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 629–630 (1985); Bradley v. Commissioner of Mental Health, 386 Mass. 363, 365 (1982).

The January 10, 2020 attacks on correctional staff at SBCC caused the facility to be placed into a lockdown. As a result, all cells were searched, inmates were moved to different housing units following screening and updated housing risk assessments, and officials had to respond to numerous legitimate threats of violence, rape, and murder against correctional staff, medical staff, and inmates. As explained above, DOC's actions following the January 10, 2020 attacks on correctional staff were in furtherance of this "compelling interest." The actions were short-term, of limited scope, and status quo was restored as soon as officials believed it was safe to do so. An injunction would significantly harm correctional officials' ability to ensure the safety of the facility.

"A request for injunctive relief in the prison context must be viewed with great caution because of the intractable problems of prison administration." Thorn v. Smith, 207 Fed.Appx. 240, 241 (3rd Cir. 2006), citing Goff v. Harper, 60 F.3d 518, 520 (8th Cir. 1995). Here, the public interest will be served by permitting qualified prison administrators to make decisions regarding institutional security. In Buchanan v. United States, 915 F.2d 969 (5th Cir. 1990), the

Fifth Circuit held that the prison officials were entitled to deference because "no statute, regulation, or policy does, or indeed could, specifically prescribe a course of action for prison officials to follow in every prison uprising." Buchanan, 915 F.2d at 971. "Prison officials' minute-to-minute decision making in the chaotic circumstances of a riot is a classic example of an activity requiring the exercise of discretion." The Supreme Court instructs that, "a prison's internal security is peculiarly a matter normally left to the ***discretion*** of prison administrators." Rhodes v. Chapman, 452 U.S. 337, 376 (1981).

It is this exact circumstance in which prison officials need, and are granted, the widest latitude. As noted above, phone calls, legal materials, and attorney visits all resumed as soon as reasonably possible following the January 10, 2020 major disturbance, once officials determined it was safe to do so in light of genuine security concerns.

Moreover, the public would be irreparably harmed by the issuance of a preliminary injunction. The Commissioner and superintendent would be unable to meet their statutory obligations to maintain safety, security, and order at all state correctional facilities. By law, the Commissioner is bound to "take all necessary precautions to prevent the occurrence or spread of any disorder, riot or insurrection at any such facility . . . and take suitable measures for the restoration of order." G.L. c. 124, § 1(b); see also G.L. c. 125, § 14 (superintendent is responsible for the custody and control of all inmates in the correctional institution).

Due to the nature of DOC's sole maximum security facility, every day presents a possible changing situation. DOC officials' job is to keep staff, inmates, and visitors at SBCC safe at all times. No one at DOC wants to limit an inmate's access to his attorney or to the courts, even temporarily, but the safety of the inmates, staff, and visitors must always be paramount. As such,

the preliminary injunction sought by the plaintiffs is not in the public interest and would cause irreparable harm to the DOC.

CONCLUSION

For all the aforementioned reasons, the Court should DENY Plaintiffs' Motion for Preliminary Injunction.

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Date: February 7, 2020

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this opposition has been sent via email to plaintiffs' counsel.

Date: February 7, 2020

Daryl F. Glazer