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.

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATUS REPORT ON THE IMPLEMENTATION OF A HOME CONFINEMENT PROGRAM

Plaintiffs' emergency motion for an order requiring Commissioner Mici to establish a home confinement program is not moot. The Commissioner has not established a home confinement program and continues to deny any obligation to do so. Even were she to undertake such a program, this "voluntary cessation" of her unlawful failure to do so does not moot Plaintiffs' motion. Defendants' belated disclosure of a home confinement plan that leaves the Commissioner full discretion to delay its implementation indefinitely, or to abandon it altogether, makes clear there is a live controversy about DOC's obligations.

Even if DOC had fully committed to implement the program described in its status report effective immediately, there would still be an active dispute over the scope of its duties under the statutes governing home confinement, M.G.L. c. 127, §§ 48, 49, and 49A, and the SJC's opinion in this case. As discussed below, Defendants' limitation of eligibility for home confinement to those in minimum and pre-release facilities violates the statutory requirement that it have committees to evaluate individuals for home confinement in *each* of its facilities. M.G.L. ch. 127, § 49A. And the *de minimis* program Defendants describe creates eligibility criteria so unduly and arbitrarily restrictive as to render the program meaningless.

I. Defendants' Belated Disclosure of a Non-Committal Plan for Home Confinement Does Not Moot Plaintiffs' Motion

A. Defendant Mici gives no assurance that she will establish a home confinement program

Commissioner Mici has not established a home confinement program or committed to doing so. She continues to dispute that she has any obligation to create such a program. Her status report reiterates her position that whether to create a home confinement program at all is within her sole discretion. Defs.' Status Report ("Status Rep.") at 1; Opp. of Defs. Thomas Turco and Carol Mici to Pls.' Emergency Mot. at 2-3. Even the Commissioner's plans for a home confinement program, disclosed only upon order of the Court, are contingent—"upon the availability and provision of electronic monitoring equipment by the Probation Department," Status Rep. at 1—despite the fact that nothing in M.G.L. c. 127, §§ 48, 49, and 49A requires electronic monitoring. And the Commissioner expressly refuses to commit to implementing the program on any particular schedule. Status Rep. at 2. She states it would "[i]deally" be within 60 days, Status Rep. at 2, but that DOC "expects" that it will be sometime in 2021—"either when a

COVID abates or a vaccine is widely available," *id.* at 3. Under the unchecked authority the Commissioner has arrogated to herself, it could be never.

B. The doctrine of voluntary cessation bars a finding of mootness

The Defendants have not argued that the plan they present moots the Plaintiffs' claims. Even if DOC eventually implements a home confinement program, the issue will not be moot, as it well established that a defendant's voluntary cessation of allegedly wrongful conduct does render the plaintiff's claims moot. *Wolf v. Comm'r of Public Welfare*, 367 Mass. 293, 299 (1975); *Cantell v. Comm'r of Corr.*, 475 Mass. 745 (2016).

The voluntary cessation doctrine applies even where the defendants take clear action in conformance with the plaintiffs' demands, such as mailing new welfare checks in the case of *Wolf* or releasing the incarcerated plaintiffs from solitary confinement in the case of *Cantell*. Here, Defendants not only continue to deny any statutory obligation to implement a home confinement program, they refuse to commit to establishing one, stating that "[w]hether to establish a home confinement program . . . is in the Commissioner's discretion." Status Rep. at 1. Most remarkably, the Defendants suggest that the COVID-19 pandemic is a reason to delay implementation of the program, despite the fact that the SJC urged DOC to release prisoners *because of* the pandemic. *See Foster v. Commissioner of Correction,* 484 Mass. 698, 733 (2020) ("The specific measures the defendants might choose to reduce the number of incarcerated individuals in DOC custody are not as important as the goal of reduction . . ."). While the Defendants say "ideally" they would begin the process within 60 days, they admit that "in all likelihood, a wider program will not be implemented until spring 2021 because of the present pandemic." Status Rep. at 3.

These vague forecasts do not defeat mootness. "[A] defendant bears a heavy burden of showing that there is no reasonable expectation that the wrong will be repeated; and a

defendant's mere assurance on this point may well not be sufficient." *Wolf*, 367 Mass. at 299; *see also Gropper v. Fine Arts Hous., Inc.*, 12 F. Supp. 3d 664, 670 (S.D.N.Y. 2014) (holding that restaurant's voluntary compliance did not moot disability discrimination claim because restaurant's promise to build entrance ramp was contingent on municipal approvals, for which restaurant gave no guarantee or timeline). The need to clarify Defendants' statutory responsibilities remains urgent.

C. The urgency of the pandemic requires resolution of Plaintiffs' claim

Plaintiffs' claim is additionally justiciable due to the public interest at stake. Claims that would otherwise be moot may be heard "because of the public interest involved and the uncertainty and confusion that exist." *Domino v. Sec'y of the Comm.*, 427 Mass. 704, 708 (2014) (quoting *Metros v. Secretary of the Commonwealth,* 396 Mass. 156, 159 (1985), in turn citing *Wellesley College v. Attorney Gen.,* 313 Mass. 722, 731 (1943)).

As Massachusetts' COVID-19 rates surpass the peak last spring,[1] infections in the DOC have soared. In the month between October 29 and December 2, 2020, 779 prisoners were confirmed as infected, which is nearly two thirds of the 1,255 cases to date.[2] The clearest link between prisoners and the community is staff, 204 of whom have been reported as confirmed infected during that period, 57 in the last week.[3] Some prisons have already been overwhelmed by the pandemic, with 297 prisoners confirmed infected at MCI-Norfolk and 239 at MCI-Shirley

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[1] *See* Massachusetts Department of Public Health COVID-19 Dashboard-Daily at p. 6, December 3, 2020, Confirmed Cases (Since March) *available at* https://www.mass.gov/doc/covid-19-dashboard-december-3-2020/download (showing that the weighted seven-day average of positive tests has reached levels above the previous peak of May 2020).

[2] *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, No. SJC-12926, Special Master's Weekly Report (Mass. December 3, 2020) ("Special Master's Report").

[3] *Id*. This number may be understated because staff are tested only once and, since the DOC cannot control their precautions when they are not at work, they may become infected after testing.

during those five weeks. Both of those facilities house large numbers of sick and elderly prisoners. Prisons that rely on large dormitories have also been hard hit; MCI-Concord had 113 confirmed cases during those five weeks, and NCCI-Gardner reported 23 this past week.[4] Hospitalizations are not reported. However, two prisoners recently died after being hospitalized for COVID-19; both were granted medical parole less than 24 hours before their deaths, and the DOC did not report them to the Special Master as deaths in custody.[5]

With well over ten percent of the DOC's population infected in the past five weeks,[6] it is callous in the extreme for the Defendants to suggest that prisoner releases will endanger the community. *See* Defs.' Status Report p. 1. The danger to those incarcerated is far greater than the risk that any released individual could spread COVID, a risk that can be averted by testing before release. Further, any steps to mitigate contagion between prisoners and staff will only reduce the community spread caused by staff members.

It is therefore in the public interest for the Court to clarify the DOC's statutory responsibility here, given the alarming spread of COVID-19 among prisoners and staff, and the DOC's apparent unwillingness to take even minimal steps to reduce it.

II. The Home Confinement Program Described in the Status Report Fails to Comply with Statutory Requirements

A. The exclusion of prisoners held in medium and maximum security facilities conflicts with the statutes

Defendants' plan to limit eligibility for home confinement to prisoners classified to minimum security or pre-release facilities conflicts with the statutory requirement that the

[4] *Id*.
[5] *See* "2 Mass. Prisoners Hospitalized With COVID-19 Die A Day After Being Granted Medical Parole," Deborah Becker, WBUR News, updated December 4, 2020, available at https://www.wbur.org/news/2020/11/30/massachusetts-prisoners-coronavirus-medical-parole-deaths
[6] The DOC's total population in custody is 6,678. *See* Special Master's Report, December 3, 2020.

Commissioner establish committees in "*each* state correctional facility" to consider prisoners for participation. M.G.L. c. 127, § 49A (emphasis added). Section 49A prescribes specific requirements for the committees at "maximum or medium security" facilities, and it directs those committees to evaluate the "behavior and conduct of inmates within the prison" and to make written recommendations regarding whether those prisoners "shall be permitted to participate in any program outside a correctional facility, exclusive of parole." *Id.* The legislature would not have explicitly required committees at maximum and medium security facilities to evaluate and make written recommendations regarding the suitability of prisoners within those facilities if those prisoners could be categorically excluded from participation in the program. *See Volin v. Bd. of Pub. Accountancy*, 422 Mass. 175, 179 (1996) ("We do not interpret a statute so as to render it or any portion of it meaningless.") (internal quotation marks omitted).

In a strikingly analogous situation, the SJC has instructed the DOC that it may not impose restrictions on eligibility beyond those found in the statute. In *Deal v. Commissioner of Correction*, 475 Mass. 307, 312 (2016) ("Deal I"), the SJC held that DOC had categorically prohibited otherwise eligible juvenile lifers from minimum security in violation of M.G.L. c. 119, § 72B. The Court rejected DOC's argument that there was no categorical ban because DOC allowed lifers who received a positive recommendation for parole to be transferred to minimum security. The Court held that the statute required the DOC to consider each person's "suitability for minimum security on a case-by-case, rather than a categorical, basis." *Deal v. Commissioner of Correction*, 478 Mass. 332, 336 (2017) ("Deal II"). Similarly, here, DOC's proposed categorical ban on home confinement for prisoners in a medium or maximum security facility violates its statutory obligation to establish committees at each institution that can evaluate suitability for home confinement on an individualized basis.

The SJC's subsequent decision in *Deal II* also undercuts DOC's claim that it can limit home confinement to a very small number of people by imposing stringent eligibility requirements that go beyond the exclusions listed in the controlling statutes. In *Deal II*, the court held that even though DOC had started holding hearings to consider each prisoner individually, the fact that it blocked approximately 90% of otherwise eligible lifers from minimum security, "demonstrates that the department continues in effect to bar categorically many juveniles from a minimum security classification based on their life sentence, in violation of § 72B." 478 Mass. at 340. Similarly, here, DOC cannot evade its statutory obligation to establish a home confinement review process at each facility if those committees require prisoners to first be classified to minimum or pre-release before becoming eligible for home confinement.

Furthermore, Defendant's insinuation that all prisoners classified to maximum and medium security are for that reason unsuitable for release on home confinement is belied by the fact that hundreds of prisoners were paroled from those facilities just last year. *See* Massachusetts Parole Board, Annual Statistical Report (2019) at 9, *available at* https://www.mass.gov/doc/2019-annual-statistical-report/download (showing parole rates of 47% at MCI Cedar Junction, 53% at MCI Concord, 82% at MCI Framingham, 41% at MCI Norfolk, and 19% at Souza-Baranowski Correctional Center). Before a prisoner is granted parole, the parole board must determine that he or she "will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society. G.L. c. 127, § 130. Given that the parole board regularly determines prisoners at maximum and medium security facilities meet this standard, it defies logic to assert that all prisoners at such facilities should be categorically excluded from consideration of home confinement.

B. Minimal releases to home confinement would violate the DOC's duties under the statutes

Even if DOC were willing to remove the categorical prohibition against home confinement for prisoners in higher security, it would still violate the home confinement statues if it only transferred a small handful of prisoners to the program. In *Deal II*, the SJC declared that the fact that "in a small number of instances" DOC's classification hearings yielded a favorable outcome for the prisoner "does not alter our conclusion that, in practice, the process still largely deprives the inmate of an individualized review." 478 Mass. at 340. In other words, DOC cannot evade its statutory obligation to implement a home confinement program by establishing a token program that, as a practical matter, denies meaningful access to almost all prisoners who are statutorily eligible. The DOC's acknowledgement that it will consider "no more than a total of 20 to 25" prisoners even eligible for home confinement at any time demonstrates its intention to do just that. Status Rep. at 6.

CONCLUSION

For the reasons detailed above, and in Plaintiffs' Memorandum and Reply in Support of Plaintiffs' Emergency Motion to Establish a Home Confinement Program, Plaintiffs respectfully request that the Court:

1. Order Defendant Mici to establish a home confinement program under G.L. c. 127 §§ 48, 49, 49A that will allow statutorily eligible prisoners to serve a portion of their sentence outside of state correctional facilities, thereby reducing the population within those facilities.
2. Order Defendant Mici to comply with her obligation under G.L. c. 127 § 49A to establish committees at *each* state correctional facility, including all medium and

maximum security facilities, to evaluate prisoners for participation in the home confinement program.

3. Order Defendant Mici to exercise her discretion to approve or deny an individual prisoner for home confinement based on an individualized evaluation of his or her particular suitability for home confinement.
4. Order Defendant Mici to convene committees to evaluate the suitability of each of the individual prisoners identified by her in the Status Report as currently eligible for home confinement, and to render a decision within 7 days.

Dated: December 4, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on December 4, 2020 by email to the counsel of record.

/s/ David Milton
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