SJC-13116

COMMITTEE FOR PUBLIC COUNSEL SERVICES & another[1] vs. BARNSTABLE COUNTY SHERIFF'S OFFICE & others.[2]

Suffolk. June 1, 2021. - September 28, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Sheriff. County, Correctional facilities. Committee for Public Counsel Services. Imprisonment, Safe environment. Constitutional Law, Imprisonment, Cruel and unusual punishment, Assistance of counsel. Due Process of Law, Pretrial detainees, Assistance of counsel. Pretrial Detention. Attorney at Law, Attorney-client relationship.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on December 24, 2020.

The case was reported by Cypher, J.

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[1] Massachusetts Association of Criminal Defense Lawyers.

[2] Berkshire County sheriff's office, Bristol County sheriff's office, Dukes County sheriff's office, Essex County sheriff's office, Franklin County sheriff's office, Hampden County sheriff's office, Hampshire County sheriff's office, Middlesex County sheriff's office, Norfolk County sheriff's office, Plymouth County sheriff's office, Suffolk County sheriff's office, and Worcester County sheriff's office.

Jessie J. Rossman (Matthew R. Segal & Laura K. McCready also present) for Massachusetts Association of Criminal Defense Lawyers.

Rebecca A. Jacobstein, Committee for Public Counsel Services (Benjamin H. Keehn, Committee for Public Counsel Services, also present) for Committee for Public Counsel Services.

Dan V. Bair, II, Special Assistant Attorney General, for the defendants.

CYPHER, J. Over one year ago, at the onset of the COVID-19 pandemic, this court exercised its superintendence powers to put in place certain measures designed to mitigate the risks of COVID-19 disease in the Commonwealth's prisons and jails. As part of that effort, we directed the Commonwealth's county sheriffs, among others, to report certain data to a special master in order to facilitate any further judicial response that might be necessary. With that data and additional factual and expert evidence now before us, we are asked to evaluate three alleged failures by certain of the sheriffs in their responses to the COVID-19 pandemic -- namely, a failure to implement adequate COVID-19 testing strategies by all thirteen named defendants, a failure to exercise statutory authority to reduce population levels in the houses of correction by all thirteen named defendants, and a failure by two defendants to implement adequate avenues for remote attorney-client communication in their respective houses of correction -- to determine if these efforts run afoul of Federal and State constitutional

requirements. For the reasons discussed infra, we conclude that, on this record, the responses of the named sheriff's offices and their respective houses of correction to the COVID-19 pandemic do not violate Federal and State constitutional minimum requirements.

Background. 1. Prior proceedings. In March 2020, at the beginning of the COVID-19 pandemic in Massachusetts, the plaintiffs, the Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Lawyers, filed an emergency petition in the county court against the Chief Justice of the Trial Court and others, asking this court to invoke its superintendence powers, among other things, to reduce the number of individuals housed in the Commonwealth's prisons and jails, as a means of mitigating the risk of COVID-19 within those institutions and in the community at large. The defendants, thirteen county sheriffs' offices, were among the respondents added to that emergency petition.

That case ultimately was reserved and reported to the full court, and on April 3, 2020, this court held that "[d]ue to the crisis engendered by the COVID-19 pandemic," certain pretrial detainees were entitled to a strong but rebuttable presumption of release. Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 453 (2020) (CPCS I). Judicial officers conducting bail determinations for new

arrestees also were directed to consider the risks presented by COVID-19 as an "additional, temporary" bail consideration. Id. at 449. The court further concluded that its "broad power of superintendence over the courts [did] not grant [it] the authority to authorize courts to revise or revoke [criminal] defendants' custodial sentences, to stay the execution of sentence, or to order their temporary release" unless certain conditions were met, namely: (1) the defendant had filed a timely motion to revise or revoke his or her sentence under Mass. R. Crim. P. 29, as appearing in 474 Mass. 1503 (2016); (2) the defendant had a pending appeal from his or her conviction or sentence; or (3) the defendant had moved for a new trial under Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001). CPCS I, supra at 450. However, we noted that "mechanisms to allow various forms of relief for sentenced inmates exist within the executive branch." Id. at 452.

Finally, we required the Department of Correction and the county sheriffs to report certain data to a special master, and we directed the special master to report weekly to this court "in order to facilitate any further response necessary as a result of this rapidly-evolving situation." Id. at 453, 456 (Appendix B). The plaintiffs moved for reconsideration of certain aspects of that opinion, and we affirmed, with the exception of creating specific additional reporting

requirements, which we set forth in an amended Appendix B. See Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 2), 484 Mass. 1029, 1030, 1034 (Appendix B [Amended]) (2020) (CPCS II).

In CPCS I, the plaintiffs originally had argued that the failure to release incarcerated individuals violated due process and the prohibition on cruel and unusual punishment contained in the Federal Constitution, as well as the prohibition on cruel or unusual punishment set forth in the State Constitution. CPCS I, 484 Mass. at 453. However, in their reply brief and at oral argument in that case, the plaintiffs had represented that they were not pursuing their constitutional claims, and as a result, we did not address them. Id.

Following our opinions in CPCS I and CPCS II, a putative class of incarcerated inmates and individuals civilly committed under G. L. c. 123, § 35, filed a complaint against the Commissioner of Correction and others, alleging that their confinement during the COVID-19 pandemic exposed them to unreasonable risks in violation of the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights and in violation of Federal and State due process provisions. See Foster v. Commissioner of Correction (No. 1), 484 Mass. 698, 699-700 (2020). We addressed those claims in the context of the Foster plaintiffs' request for a

preliminary injunction. Id. at 700-701. With respect to the inmates' Eighth Amendment claims, we applied a two-part, subjective and objective standard to determine whether the plaintiffs were likely to succeed in demonstrating that the defendants acted with (1) deliberate indifference (2) to a substantial risk of serious harm. See id. at 717.

With respect to the objective component of the Eighth Amendment test, we stated that "there [could] be no real dispute that the increased risk of contracting COVID-19 in prisons, where physical distancing may be infeasible to maintain, has been recognized by the [Centers for Disease Control (CDC)] and courts across the country," and we concluded that "the incarcerated plaintiffs almost certainly [would] succeed in establishing [that] component of their claims." Id. at 718. However, after considering multiple factors, including the Department of Correction's compliance with interim guidance issued by the CDC and its "widespread testing program," we concluded that the plaintiffs were unlikely to succeed in demonstrating deliberate indifference on the part of the Department of Correction. Id. at 722-724.

In December 2020, after working with the special master for a number of months, the plaintiffs in this case filed an amended petition in the full court matter that had resulted in the CPCS I and CPCS II decisions. The petition was denied without

prejudice to refiling in the county court as a civil pleading, rather than as an appellate brief. The plaintiffs subsequently filed the current complaint in the county court. A single justice appointed a retired judge to act as a special master (second special master) to make any factual findings that he deemed necessary and relevant to the resolution of the legal issues raised in the complaint. Upon receipt of the second special master's report, the single justice reserved and reported the matter to the full court.

2. Facts. We draw our facts from the findings of fact submitted by the second special master, supplemented by other undisputed facts from the record, reserving some facts for our discussion of the issues.

a. COVID-19 symptoms and transmission in congregate settings. All parties to this litigation agree, in the simplest terms, that COVID-19 is a "contagious, dangerous, and sometimes deadly disease." Indeed, this court has recognized as much in its prior cases. See, e.g., Foster, 484 Mass. at 702 ("For many, [COVID-19] causes only mild symptoms. For others, particularly the elderly or those with preexisting conditions, the disease poses a substantial likelihood of serious illness or death"); CPCS I, 484 Mass. at 437 ("while many people who contract COVID-19 are able to recover without the need for hospitalization, those who become seriously ill from the virus

may require hospitalization, intensive treatment, and ventilator support").

The CDC has recognized three ways in which SARS-CoV-2, the virus that causes COVID-19, is spread: (1) inhalation of respiratory droplets, (2) airborne transmission, and (3) touching of surfaces or objects. Available data indicate that the first method is much more common than the latter two methods.

Transmission through inhalation of respiratory droplets commonly occurs when someone physically is near (within six feet of) another person or comes into direct contact with that person. In order to reduce the spread of COVID-19, the CDC recommends that individuals practice physical distancing, often called "social distancing," which is the practice of increasing the space between individuals, ideally to a minimum of six feet.

The CDC has recognized, as has this court, that people in congregate living arrangements, such as correctional and detention facilities, where there are impediments to physical distancing, are at greater risk of contracting COVID-19. See CPCS I, 484 Mass. at 436-437. We also have recognized that "[t]hose in prisons and jails have an increased prevalence, relative to the general population, of underlying conditions that can make the virus more deadly." Id. at 437.

b. CDC guidelines applicable to managing spread of COVID-19 in correctional and detention facilities. The record in this case includes six documents issued by the CDC, which, as of the date this case was heard, the parties recognized as the most current CDC guidance applicable to managing the spread of COVID-19 in correctional and detention facilities.[3] In addition, the CDC further has updated its COVID-19 guidance regarding correctional and detention facilities since this case was heard.[4]

[3] The documents include (1) the August 21, 2020, Morbidity and Mortality Weekly Report, entitled, "Mass Testing for SARS-CoV-2 in 16 Prisons and Jails -- Six Jurisdictions, United States, April-May 2020"; (2) Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (updated Feb. 19, 2021); (3) Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities (updated Mar. 17, 2021); (4) Overview of Testing for SARS-CoV-2 (updated Mar. 17, 2021); (5) COVID-19 Pandemic Planning Scenarios (updated Mar. 19, 2021); and (6) SARS-CoV-2 Variant Classifications and Definitions (updated Apr. 30, 2021).

[4] See, e.g., Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (updated June 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [https://perma.cc/9PMC-FNUR]; Interim Guidance for SARS-CoV02 Testing in Correctional and Detention Facilities (updated June 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html [https://perma.cc/47M5-PLWZ].

The defendants brought the June 7, 2021, updates to this court's attention in a letter pursuant to Mass. R. A. P. 16 (l), as appearing in 481 Mass. 1628 (2019). See Foster v. Commissioner of Correction (No. 1), 484 Mass. 698, 719 (2020), quoting Farmer v. Brennan, 511 U.S. 825, 846 (1994) (where prospective relief sought under Eighth Amendment, "prisoner may rely 'on developments that postdate the pleadings and pretrial

The CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities is "intended to provide guiding principles for healthcare and non-healthcare administrators of correctional and detention facilities . . . and their respective health departments, to assist in preparing for potential introduction, spread, and mitigation of SARS-CoV-2 (the virus that causes Coronavirus Disease 2019, or COVID-19) in their facilities." Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (updated June 9, 2021). The CDC advises (in bold print toward the beginning of the guidelines) that "[t]he guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." Id. The guidance covers a broad range of topics, including, but not limited to, operational and communications preparations, enhanced cleaning or disinfecting and hygiene practices, social distancing strategies, infection control (including recommended personal protective equipment [PPE]), verbal screening and temperature check protocols, testing considerations, and guidelines for medical isolation of infected individuals and quarantine for close contacts. Id.

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motions, as [prison officials] may rely on such developments to show that the [prisoner] is not entitled to an injunction'").

The CDC guidance regarding screening testing for COVID-19 in correctional facilities is particularly relevant here. The CDC defines "screening testing" as "[v]iral testing of persons without symptoms or known or suspected exposure to SARS-CoV-2." Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities (updated June 7, 2021). The guidelines discuss two types of screening testing: movement-based and routine. Id.

"Movement-based screening" is "a selective screening approach which involves screening people at intake, before transfer to another facility, and before visits or release into the community." Id. According to the CDC, "[f]acilities should implement movement-based screening testing to prevent the introduction of the virus into the facility and to prevent transmission to another facility or into the community." Id.

With respect to intake, in particular, the CDC recommends that correctional facilities "[t]est incoming incarcerated [or] detained persons, including those returning after more than [twenty-four] hours away from the facility, and house them individually (when feasible) while waiting for test results." Id. "For persons who are not fully vaccinated, testing can be combined with a [fourteen]-day observation period (sometimes referred to as 'routine intake quarantine') before persons are assigned housing with the rest of the facility's

population. . . . If incoming incarcerated [or] detained persons undergo intake quarantine, consider re-testing every [three to seven] days." Id.

"Routine screening testing," sometimes also referred to as "serial screening testing," refers to regularly scheduled testing of persons without symptoms or known or suspected exposure to SARS-CoV-2. According to the CDC, "[r]outine screening testing can increase the likelihood of early case identification to prevent widespread transmission." Id. In its most recent guidance, the CDC states: "Facilities should consider implementing routine screening testing among all incarcerated [or] detained persons and staff who are not fully vaccinated or among a select group according to criteria it designates." Id. The CDC further instructs that "[d]ata on facility and community transmission level and testing capacity can guide decisions about routine screening testing strategies." Id.[5] More specifically, the CDC now recommends that "[r]outine screening testing for staff and incarcerated [or] detained persons who are not fully vaccinated should be conducted at least weekly when community transmission is substantial or

[5] This language did not appear in the relevant guidelines regarding screening testing in correctional facilities prior to June 7, 2021.

high." Id.[6] In the event that "routine screening testing is conducted only among a subset of individuals or facilities within a correctional system," the guidelines set forth criteria to guide the selection of that subset. Id.

c. COVID-19 responses at houses of correction. The responses of the various houses of correction to the COVID-19 pandemic have not been uniform; however, the responses generally have included some combination of the following: testing of symptomatic individuals and those who have had close contact with infected individuals; testing, screening for symptoms, or quarantining of new inmates; testing or screening of staff for symptoms; isolating individuals who test or screen positive; enhanced hygiene practices (including deep cleaning of surfaces, increased access to soap and hand sanitizer, education on proper hand washing, and use of PPE); increased physical distancing, where feasible, including limitation of in-person contact among inmates, staff, and visitors; and a widely available vaccination program.

[6] The CDC displays the relevant indicators for each county on its COVID Data Tracker website, https://covid.cdc.gov/covid-data-tracker/#county-view [https://perma.cc/AMZ2-DW37]. As of the submission of the defendants' postargument letter, dated June 14, 2021, no Massachusetts county was listed as having an either "substantial" or "high" level of community transmission. However, in an indication of how quickly the situation can change, as of the writing of this opinion, every Massachusetts county was listed as having a "high" level of community transmission.

The houses of correction are offering the Moderna[7] vaccine to all incarcerated people and staff. The Moderna vaccine requires two doses administered twenty-eight days apart. According to the CDC, evidence from clinical trials demonstrated that the Moderna vaccine was 94.1 percent effective at preventing COVID-19 in adults who received two doses and had no evidence of being infected previously.[8] As of the date this case was argued, the vaccination program offered by the houses of correction was voluntary; no inmate or staff member was required to participate.

The houses of correction reported that, as of April 28, 2021, a cumulative number of over 3,500 incarcerated people had received the first dose of the Moderna vaccine, and over 2,600 incarcerated people had received the second dose. As of that same date, a cumulative number of over 4,500 staff at the houses of correction had received the first dose of the Moderna vaccine, and over 4,000 staff had received the second dose.

It is undisputed that "[f]rom the onset of the pandemic to the present, the [houses of correction] have not conducted

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[7] "Moderna" refers to ModernaTX, Inc., the manufacturer of the vaccine.

[8] See CDC, Moderna COVID-19 Vaccine Overview and Safety (updated Aug. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Moderna.html [https://perma.cc/4PVT-ZWT6].

serial screening testing of all or a [random sample] of non-symptomatic incarcerated people and staff." Only four of the thirteen houses of correction test nonsymptomatic incarcerated people at intake. Eight of the houses of correction have not tested nonsymptomatic incarcerated people unless they have been in close contact with a COVID-infected individual. Four of the houses of correction have tested certain groups of nonsymptomatic incarcerated people at particular points in time, in response to events such as an uptick in positive test results in particular housing units.

d. Department of Public Health involvement in COVID-19 responses at houses of correction. Each house of correction has been assigned an epidemiologist from the Department of Public Health (department) "who is available to provide information and recommendations regarding infectious disease prevention and control with respect to COVID-19." Department epidemiologists use, and refer the houses of correction to, the publicly available CDC COVID-19 guidance regarding correctional settings. From the spring of 2020 through the present, the department has had ongoing discussions with Dr. Alysse G. Wurcel (the defendants' infectious disease expert) and representatives of the houses of correction regarding COVID-19 prevention and control. During some of those calls, COVID-19 testing practices were discussed, and on a number of those occasions, Wurcel

recommended that a particular house of correction conduct broad, or even facility-wide, testing at a particular point in time in response to a rise in positive cases.

The department has not recommended specifically that the houses of correction engage in routine, or serial, screening testing of inmates or staff, nor has the department recommended that the houses of correction decline to adopt such testing. In her affidavit in this case, Wurcel avers that "[i]f at any time [the department] were to recommend serial screening testing (facility wide repetitive testing), [she] would assist the correctional facilities in recommending and implementing these new protocols." For their part, the defendants represent that "if the [department] recommended the [houses of correction] begin serial testing of inmates and staff at their facilities, the [houses of correction] would immediately comply."

e. COVID-19 case rates, hospitalizations, and fatalities at houses of correction.[9] During the week from April 22 to April 28, 2021, around the time the second special master was compiling his findings of fact, the houses of correction reported nineteen confirmed new COVID-19 cases among a total

[9] This case was argued on June 1, 2021; however, this opinion takes into account data submitted by the special master up to and including the special master's report dated August 18, 2021.

inmate population of 5,910 people.[10] During the period from June 10 to June 16, 2021, following oral argument in this case, the houses of correction reported zero new confirmed COVID-19 cases among a total inmate population of 6,015.[11] As of the most recent report submitted by the special master, for the period from July 15 to August 16, 2021, the houses of correction reported twenty-three new confirmed COVID-19 cases among a total inmate population of 6,442.[12]

By comparison, during the period from April 23 to April 29, 2021, all but three Massachusetts counties reported at least one hundred to 199 new cases per 100,000 people among the general population. For the period from June 25 to July 1, 2021, no Massachusetts county reported more than from five to nine new cases per 100,000 people among the general population. And for the period from August 27 to September 2, 2021, all but one Massachusetts county reported at least one hundred new cases per 100,000 people among the general population. See COVID-19 State Profile Report 09.03.2021, Massachusetts State Synopsis,

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[10] We acknowledge the risk of underreporting, where the houses of correction administered a total of 301 COVID-19 tests on inmates during that period.

[11] During that period, the houses of correction administered 266 COVID-19 tests on inmates.

[12] During that period, the houses of correction administered 2,437 COVID-19 tests on inmates.

https://healthdata.gov/Community/COVID-19-State-Profile-Report-Massachusetts/j75q-tgps [https://perma.cc/72SA-JDXM].

From April 4, 2020, to August 16, 2021, the houses of correction reported two COVID-19-related deaths. There have been no reported COVID-19-related deaths of inmates at the houses of correction since June 2020. From April 4, 2020, to April 15, 2021, the houses of correction reported thirteen overnight hospitalizations of inmates due to COVID-19-related issues. From April 5, 2020, to August 16, 2021, the houses of correction reported no COVID-19-related deaths for correction officers or other staff.

f. Efforts by houses of correction to reduce their populations. Pursuant to our opinions in CPCS I and CPCS II, the sheriffs have been making periodic reports to the special master and CPCS, among other designated entities, identifying certain data, including the over-all inmate population of the houses of correction and the number of inmates who have been released pursuant to the guidelines set forth in the CPCS I decision. See CPCS II, 484 Mass. at 1034 (Appendix B [Amended]).

As of April 12, 2020, the incarcerated population for all the houses of correction was 6,863. As of April 28, 2021, the over-all population had been reduced to 5,910. The data provided do not permit us to determine what percentage of these

releases has been the product of bail orders, stays of the execution of an inmate's sentence pending appeal, parole, or some other available mechanism. However, certain data, discussed infra, suggest that the percentage attributable to independent actions by the sheriffs, as opposed to actions attributable to a judicial officer, district attorney, or other State actor, is relatively small.

Sources of independent statutory authority for the sheriffs to reduce population levels in the houses of correction include authority to employ pretrial diversion programs, see G. L. c. 127, § 20B;[13] authority to release certain qualified inmates to home confinement, see G. L. c. 127, § 49;[14] and authority to

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[13] General Laws c. 127, § 20B, provides in relevant part:

"The sheriff of any county . . . , subject to rules and regulations established in accordance with this section, may permit a detainee who is committed to a jail awaiting disposition of any criminal matter, except those being held for offenses listed in this section, to be classified to a pretrial diversion program operated by the sheriff's office in the county where the court that committed the detainee is sitting."

[14] General Laws c. 127, § 49, provides in relevant part:

"The . . . administrator of a county correctional facility, subject to rules and regulations established in accordance with the provisions of this section, may permit an inmate who has served such a portion of his sentence or sentences that he would be eligible for parole within eighteen months to participate in education, training, or employment programs established under [G. L. c. 127, § 48,] outside a correctional facility [subject to certain enumerated restrictions not relevant here]. . . . A committed

house members of their population in alternative sites designated by an inspector, based on the inspector's opinion that a disease outbreak in a house of correction "may endanger the lives or health of the prisoners to such a degree as to render their removal necessary," see G. L. c. 126, § 26.[15]

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offender enrolled in any such program shall remain subject to the rules and regulations of the correctional facility and shall be under the direction, control and supervision of the officers thereof during the period of his participation in the program. The commissioner or such administrator shall make and promulgate rules and regulations regarding programs established under [§ 48] outside correctional facilities."

We observed previously that G. L. c. 127, § 49, in conjunction with neighboring provisions, §§ 48 and 49A, and this court's holding in Commonwealth v. Donohue, 452 Mass. 256, 265 (2008), would permit the release of "certain individuals who currently are serving a sentence in a prison or house of correction to home confinement, under specified conditions, prior to the completion of their committed sentences, for certain educational, employment, and training programs." Foster, 484 Mass. at 733.

[15] General Laws c. 126, § 26, provides:

"If disease breaks out in a jail or other county prison, which, in the opinion of the inspectors of the prison, may endanger the lives or health of the prisoners to such a degree as to render their removal necessary, the inspectors may designate in writing a suitable place within the same county, or any prison in a contiguous county, as a place of confinement for such prisoners. Such designation, having been filed with the clerk of the superior court, shall be a sufficient authority for the sheriff, jailer, superintendent or keeper to remove all prisoners in his custody to the place designated, and there to confine them until they can safely be returned to the place whence they were removed. Any place to which the prisoners are so removed shall during their imprisonment therein be deemed a prison of the county where they were originally confined,

It is undisputed that the houses of correction in Barnstable, Bristol, Hampden, Hampshire, Middlesex, Plymouth, and Worcester Counties do not have pretrial diversion programs pursuant to G. L. c. 127, § 20B, and that the houses of correction in Dukes, Norfolk, and Suffolk Counties have not released any person pursuant to § 20B since at least April 2020. It also is undisputed that the houses of correction in Barnstable, Bristol, Dukes, Plymouth, Suffolk, and Worcester Counties do not have any education, training, or employment programs for parole eligible inmates pursuant to G. L. c. 127, § 49, and that the houses of correction in Berkshire and Norfolk Counties have suspended their programs under § 49. As of February 21, 2021, no house of correction had availed itself of G. L. c. 126, § 26, to house members of its population at an alternative, designated site because of disease outbreak in the prison. As of April 28, 2021, the populations of the houses of correction in ten counties (Barnstable, Berkshire, Bristol, Essex, Franklin, Hampden, Middlesex, Norfolk, Suffolk, and Worcester) were at eighty percent or more of the level first reported to the special master pursuant to our opinion in CPCS I.

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but they shall be under the care, government and direction of the officers of the county where they are confined."

g. Options for attorney-client communication at Essex and Bristol County houses of correction. During the pandemic, efforts to implement physical distancing in the houses of correction have been balanced, of necessity, with other important interests; among them, maintaining adequate avenues for confidential communication among attorneys, clients, and any third parties who may be necessary to that attorney-client communication, such as experts or interpreters. Here, the communication options available at the Essex and Bristol County houses of correction are the subject of a constitutional challenge, so we detail them briefly.

As of the date of oral argument in this case, methods available for attorney-client communication at the Essex County house of correction include the following: in-person, contact and noncontact visits; telephone communication, including three-way communications, either via a telephone located in a common area or via a computer tablet that may be used in a housing unit (often a cell with two bunk beds or a dormitory unit); video conferencing; an e-mail response system, which facilitates requests by attorneys for their clients to telephone them directly; and legal mail. Of significance here, in-person contact visits are held in private rooms, whereas noncontact visits take place in the regular visiting area, where the attorney is separated from his or her client by plexiglass,

conversations occur over a telephone (often within hearing of other people), and documents must be passed via a correction officer. The rooms used for contact visits are cleaned and disinfected after every attorney-inmate visit, and attorneys are provided with PPE before entering the facility.

Video conferencing in the Essex County house of correction is limited to two video conferencing modules at the Middleton facility. These modules only permit two-way communication, so any third parties must either be present at the attorney's end of the call or participate through a separate line of communication that can be placed on speaker at the attorney's location. Video conferences are limited to thirty or sixty minutes, and the video conferencing modules do not have a screen sharing feature.

As of the date of oral argument in this case, methods available for attorney-client communication at the Bristol County house of correction include in-person, contact and noncontact visits, telephone communication, and legal mail. With respect to telephone communication, the Bristol County house of correction has a protocol in place where attorneys may communicate via facsimile, e-mail, or telephone call with the superintendent's office to have a message delivered to a client to telephone the attorney at a set date and time. Scheduled attorney-client calls are made from telephones in a common area

(as they were before the pandemic), often within hearing of other people. Such calls are limited to thirty minutes.

Video conferencing is not available for attorney-client communication at the Bristol County house of correction. According to the Bristol County sheriff, the house of correction does not have the necessary equipment or Internet bandwidth for video conferencing beyond that required for court video conferencing.

In contrast, houses of correction in six counties (Berkshire, Franklin, Hampden, Hampshire, Middlesex, and Worcester) permit inmates to conduct video conferences with attorneys via Zoom.[16] Also, as of the date of the second special master's report, two houses of correction (in Norfolk and Plymouth Counties) permitted inmates to conduct video conferences with attorneys via JurisLink,[17] and the house of

[16] "Zoom" refers to the Internet-based video conferencing platform, Zoom Video Communications, Inc., as described in our recent opinion in Vazquez Diaz v. Commonwealth, 487 Mass. 336, 336, 338-340 (2021). Among other things, the Zoom platform permits screen sharing and the participation of third parties, such as interpreters or experts. Id. at 339.

[17] "JurisLink" refers to an Internet-based conferencing platform, which allows attorneys to conduct video conferences with clients who are housed in a correctional facility equipped with a JurisLink kiosk. Among other things, the JurisLink platform permits screen sharing and the participation of third parties, such as interpreters or experts.

correction in Barnstable County anticipated offering JurisLink in the near future.

Discussion. 1. Standard of review. Upon reservation and report of the case by a single justice of this court, we address the plaintiffs' claims in the first instance, based on the undisputed facts in the record and any facts found by the special master, according deference to any findings "drawn partly or wholly from testimonial evidence." Commonwealth v. Welch, 487 Mass. 425, 429 (2021), quoting Commonwealth v. Tremblay, 480 Mass. 645, 655 (2018). Here, the special master did not hear any live testimony. We therefore conduct an independent review of the wholly documentary evidence in the case. See Tremblay, supra at 646 (affirming "long-standing principle that an appellate court may independently review documentary evidence, but should accept subsidiary findings based partly or wholly on oral testimony, unless clearly erroneous").

2. Claims under Eighth Amendment and art. 26 on behalf of sentenced inmates. In Foster, we set forth the legal standard applicable to claims that the conditions of confinement of sentenced inmates violate the Eighth Amendment[18] in the context of the risks presented by the COVID-19 pandemic:

[18] As noted in Foster, 484 Mass. at 716, "we have not held that art. 26 provides greater protections with respect to

> "To prevail on an Eighth Amendment claim, an individual must establish that the punishment is inconsistent with 'the evolving standards of decency that mark the progress of a maturing society.' See Trop v. Dulles, 356 U.S. 86, 100-101 (1958). Prison officials have a duty under the Eighth Amendment to protect inmates in their custody from the spread of serious, communicable diseases, including where the complaining inmate does not show symptoms of the disease, or where 'the possible infection might not affect all of those exposed.' Helling v. McKinney, 509 U.S. 25, 33 (1993) ('We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year').
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> "Thus, . . . the incarcerated plaintiffs must show . . . that the defendants have been deliberately indifferent to a substantial risk of serious harm to their health or safety. See Estelle v. Gamble, 429 U.S. 97, 103-104 (1976); Torres v. Commissioner of Correction, 427 Mass. 611, 613-614, cert. denied, 525 U.S. 1017 (1998)."

Foster, 484 Mass. at 701. The latter standard includes "both an objective element and a subjective element." Id. at 717.

As noted supra, with respect to the objective element of whether the COVID-19 pandemic poses a substantial risk of serious harm to inmates' health and safety, we previously have stated that "there can be no real dispute that the increased risk of contracting COVID-19 in [correctional institutions], where physical distancing may be infeasible to maintain, has been recognized by the CDC and by courts across the country."

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conditions of confinement than does the Eighth Amendment." We therefore analyze the plaintiffs' art. 26 claims under the same standard as we do the Eighth Amendment claims.

Foster, 484 Mass. at 718 (gathering cases). See CPCS II, 484 Mass. at 1030, citing CPCS I, 484 Mass. at 445 ("the unprecedented and urgent conditions created by the global COVID-19 pandemic necessitated judicial action to reduce the population of those held in custody").

Here, as mentioned supra, the parties do not dispute that COVID-19 is a "contagious, dangerous, and sometimes deadly disease" and that people in correctional facilities are at greater risk of contracting COVID-19 than the general population, due to the close living arrangements among inmates within those institutions. Based on the record before us, we have no trouble concluding that the risks posed to inmates' health and safety by the COVID-19 pandemic constitute a substantial risk of serious harm for purposes of the Eighth Amendment. See Foster, 484 Mass. at 717-718.

We therefore turn to whether the plaintiffs have satisfied the subjective element of the Eighth Amendment analysis. As discussed infra, we conclude that the plaintiffs have failed to establish deliberate indifference on the part of the defendants in the face of the risks posed by the COVID-19 pandemic.

"While Estelle, 429 U.S. at 105-106, establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of

causing harm or with knowledge that harm will result." Foster, 484 Mass. at 718-719, quoting Farmer v. Brennan, 511 U.S. 825, 835 (1994). We have described this element as "recklessly disregarding" a substantial risk of harm, which "requires the same showing of 'subjective recklessness' as would apply in the criminal context." Foster, supra at 719, quoting Farmer, supra at 839-840.

Before the full court, the plaintiffs narrowed their deliberate indifference claims to two discrete factual bases. First, the plaintiffs argue that the defendants' failure to conduct routine, or serial, screening testing of incarcerated people and staff constitutes deliberate indifference. Second, the plaintiffs assert that the defendants' refusal to exercise their statutory authority under G. L. c. 126, § 26, and G. L. c. 127, §§ 20B and 49, to reduce the populations of their respective houses of correction constitutes deliberate indifference. We address each of these arguments in turn; however, we emphasize that we do not consider these elements of the defendants' responses to the COVID-19 pandemic in isolation. Rather, we consider whether the plaintiffs have established the defendants' deliberate indifference to the substantial risk of serious harm posed by COVID-19 in light of the totality of the defendants' efforts to control and reduce the spread of the SARS CoV-2 virus in their facilities.

a. Failure to implement routine screening testing. The plaintiffs' argument with regard to screening testing boils down to four parts: (1) the department recommends that the houses of correction follow CDC guidelines; (2) the CDC guidelines recommend that correctional facilities implement various forms of screening testing; (3) the plaintiffs' experts have opined that screening testing is a necessary part of any reasonable response to the COVID-19 pandemic; and therefore (4) the houses of correction exhibit deliberate indifference by failing to conduct the forms of screening testing recommended by the CDC. For the reasons discussed infra, we reject this argument.

As all parties acknowledge, the CDC guidelines are mere recommendations, not mandates. It is well established that while such professional guidelines "may be instructive in certain cases, they simply do not establish the constitutional minima." Bell v. Wolfish, 441 U.S. 520, 543 n.27 (1979). See Foster, 484 Mass. at 722 ("While compliance with professional guidance is not enough, on its own, to establish constitutionality [or a lack thereof], . . . such compliance does provide useful indications to be considered in conjunction with other factors . . .").

Here, the record reflects that the defendants consulted with the department's epidemiologists in an attempt to implement a testing strategy in conformity with CDC guidelines. It is

undisputed that the strategy ultimately adopted did not include regular screening testing of asymptomatic individuals. However, it also is undisputed that the department did not specifically recommend the adoption of such regular screening testing. Instead, after consultation with the department's epidemiologists, each of the defendants adopted some combination of symptom screening, testing, or quarantining at intake; testing of symptomatic individuals and close contacts; and isolation of infected individuals. Certain houses of correction also conducted broader testing of asymptomatic individuals when advised to do so by department epidemiologists in response to an uptick in positive cases.

In addition to implementing these strategies for screening, testing, isolation, and quarantine, the houses of correction adopted enhanced hygiene practices, implemented strategies to minimize in-person contact, and -- in perhaps the most significant development -- began offering a highly effective vaccine to all inmates and staff.[19]

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[19] In some jurisdictions, inmates have found it necessary to resort to litigation to gain access to COVID-19 vaccines. See, e.g., Maney v. Brown, 516 F. Supp. 3d 1161, 1185 (D. Or. 2021) (granting motion for preliminary injunction requiring Oregon correctional facilities to offer COVID-19 vaccine to inmates); In re Holden vs. Zucker, N.Y. Sup. Ct., No. 801592/2021E (Bronx County Mar. 30, 2021) (mandating New York correction officials include incarcerated individuals in priority group authorized for vaccination).

Although one can dispute whether the defendants' testing strategies with regard to the COVID-19 pandemic are in full compliance with current CDC recommendations regarding screening testing, we conclude that it is beyond dispute on the record before us that the plaintiffs have failed to establish deliberate indifference on the part of the defendants with respect to their efforts to mitigate risks and control the spread of COVID-19 in the houses of correction. Moreover, given the apparent success of the defendants' efforts -- with weekly new cases falling as of the time this case was argued and no deaths reported since June 2020 -- it was not unreasonable for the defendants to decline to accelerate their testing efforts to the highest levels recommended by the CDC. See Valentine v. Collier, 993 F.3d 270, 283 (5th Cir. 2021) ("We conclude that it was not unreasonable for Defendants to rely on the healthcare experts who were legally delegated the responsibility of crafting a COVID-19 response policy, and, in any event, the policy was a reasonable response because it set forth safety measures in accordance with the CDC guidelines"); Wilson v. Williams, 961 F.3d 829, 841 (6th Cir. 2020) (prison officials not deliberately indifferent to risks of COVID-19 where their response included "screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant

supplies, and providing masks" and they were "on the cusp of expanding testing"); Swain v. Junior, 958 F.3d 1081, 1090 (11th Cir. 2020) (plaintiffs unlikely to succeed in establishing deliberate indifference where defendants adopted "extensive safety measures" in response to COVID-19 pandemic "such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures"). Therefore, the plaintiffs have failed to establish an entitlement to relief under the Eighth Amendment or art. 26 with respect to the defendants' mitigation strategies with regard to the COVID-19 pandemic, which include as one component their strategies for testing for COVID-19.[20]

b. Failure to exercise discretionary authority under G. L. c. 126, § 26, and G. L. c. 127, §§ 20B and 49. Our conclusion,

[20] The cases cited by the plaintiffs for the proposition that the absence of regular testing of asymptomatic inmates and staff for COVID-19 constitutes deliberate indifference do not undermine our conclusion, as they do not address the widespread availability of a COVID-19 vaccine as part of that analysis. See, e.g., Zepeda Rivas v. Jennings, 504 F. Supp. 3d 1060 (N.D. Cal. 2020); Savino v. Souza, 459 F. Supp. 3d 317 (D. Mass. 2020); Pimentel-Estrada v. Barr, 464 F. Supp. 3d 1225 (W.D. Wash. 2020). Similarly, the cases cited by the plaintiffs involving a failure to conduct adequate testing for tuberculosis did not involve a situation in which a highly effective vaccine had been made available to all inmates and staff. See Hernandez v. County of Monterey, 110 F. Supp. 3d 929 (N.D. Cal. 2015); Morales Feliciano v. Rosselló González, 13 F. Supp. 2d 151 (D.P.R. 1998).

based upon the totality of the circumstances, that the plaintiffs have failed to show deliberate indifference with respect to the defendants' mitigation strategies with regard to the COVID-19 pandemic is also determinative of the plaintiffs' claims with respect to the defendants' failure to exercise their discretionary authority under G. L. c. 126, § 26, and G. L. c. 127, §§ 20B and 49.

In our prior opinions, we have expressed in the strongest terms our view that "the unprecedented and urgent conditions created by the global COVID-19 pandemic necessitated judicial action to reduce the population of those held in custody." CPCS II, 484 Mass. at 1030. See Foster, 484 Mass. at 701, quoting CPCS I, 484 Mass. at 445 ("It is undisputed . . . 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'"). However, we have also made clear that, absent a constitutional violation, our intervention in discretionary executive decisions "would co-opt [those] executive functions in ways that are not permitted by art. 30 [of the Massachusetts Declaration of Rights]." CPCS II, supra at 1030-1031. Thus, although we continue to encourage the defendants to employ every reasonably available mechanism to mitigate the risks posed by the COVID-19 pandemic, we conclude that we are without authority

to intervene in the defendants' discretionary exercise of authority under G. L. c. 126, § 26, and G. L. c. 127, §§ 20B and 49, where the defendants' over-all efforts to combat the COVID-19 pandemic in their houses of correction do not run afoul of Federal or State constitutional minimum requirements.

3. Due process claims on behalf of pretrial detainees. Our conclusion, supra, that the plaintiffs have not established deliberate indifference on the part of the defendants with respect to their responses to the COVID-19 pandemic does not put to rest entirely the plaintiffs' conditions-of-confinement claims. In particular, the plaintiffs argue that even if this court were to conclude that sentenced inmates are not entitled to relief under the Eighth Amendment or art. 26, pretrial detainees nonetheless are entitled to relief on their analogous conditions-of-confinement claims under a purely objective due process standard, such as that applied to pretrial detainees' excessive force claims under the Fourteenth Amendment to the United States Constitution. See Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) ("the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one").

Since Kingsley was decided, the Federal Courts of Appeals have split concerning whether a purely objective standard should also apply to pretrial detainees' Fourteenth Amendment claims

regarding conditions of confinement or inadequate medical care.[21] Here, we need not weigh in on this split, because the plaintiffs' due process claims on behalf of pretrial detainees fail regardless of which standard is applied.

For the same reasons discussed supra, with respect to the plaintiffs' Eighth Amendment and art. 26 claims, the defendants' multifaceted responses to the COVID-19 pandemic do not demonstrate deliberate indifference under the subjective component of the due process standard traditionally applied to pretrial detainees' Fourteenth Amendment claims. See Valentine, 993 F.3d at 283; Wilson, 961 F.3d at 841; Swain, 958 F.3d at

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[21] Compare Miranda v. County of Lake, 900 F.3d 335, 352-353 (7th Cir. 2018) (Kingsley's objective standard applies to pretrial detainees' Fourteenth Amendment claims regarding conditions of confinement and inadequate medical care), Darnell v. Pineiro, 849 F.3d 17, 33-36 (2d Cir. 2017) (same), and Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 831 (2017) (same as to pretrial detainees' Fourteenth Amendment claims of failure to protect), with Whitney v. St. Louis, 887 F.3d 857, 859 & 860 n.4 (8th Cir. 2018) (Kingsley did not extend to claim for lack of adequate medical care), Dang v. Sheriff, Seminole County Fla., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (same), and Alderson v. Concordia Parish Correctional Facility, 848 F.3d 415, 420, 424 (5th Cir. 2017) (applying deliberate indifference standard, rather than Kingsley standard, to pretrial detainee's claim for inadequate medical care, over objection of concurring judge). Although the United States Court of Appeals for the First Circuit has not spoken definitively on this issue, it has continued to apply a two-pronged objective and subjective test to pretrial detainees' claims under the Fourteenth Amendment for inadequate medical care post-Kingsley. See Zingg v. Groblewski, 907 F.3d 630, 635 (1st Cir. 2018); Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 74 (1st Cir. 2016).

1090. Nor would we conclude that these efforts are unreasonable under the purely objective standard for which the plaintiffs advocate. See Kingsley, 576 U.S. at 397, quoting Graham v. Connor, 490 U.S. 386, 396 (1989) (court cannot apply objective reasonableness standard "mechanically"; rather, "objective reasonableness turns on the 'facts and circumstances of each particular case'"). See also Mays v. Dart, 974 F.3d 810, 819 (7th Cir. 2020) (applying "objective reasonableness" inquiry to pretrial detainees' due process claims regarding conditions of confinement and concluding that Federal District Court erred in failing to consider "the totality of facts and circumstances, including all of the Sheriff's conduct in responding to and managing COVID-19"); Cameron v. Bouchard, 815 Fed. Appx. 978, 985 (6th Cir. 2020) (pretrial detainees' Fourteenth Amendment claims unlikely to succeed even if subjective component not required post-Kingsley where jail officials took "reasonable" steps to combat COVID-19 pandemic "similar to the steps taken by the officials in [Wilson, supra at 844]"). The defendants' efforts here are at least comparable to those deemed reasonable by a panel of the United States Court of Appeals for the Sixth Circuit in Cameron, supra, and arguably should be viewed even more favorably given the availability here of a highly effective vaccine to all inmates and staff. Cf. Wyckoff vs. Warden, Belmont Correctional Inst., U.S. Dist. Ct., No. 2:20-CV-5580

(S.D. Ohio June 25, 2021) ("The record indicates that prison officials have acted reasonably by offering the COVID-19 vaccine to more than [ninety-five percent] of Ohio's prison population"); Gladden vs. Doll, U.S. Dist. Ct., No. 1:21-CV-00802 (M.D. Pa. June 23, 2021) (no deliberate indifference where, among other efforts, correctional facility had begun to offer COVID-19 vaccine to detainees).

In sum, even if we were to apply a purely objective standard to the plaintiffs' due process claims on behalf of pretrial detainees, we would conclude based upon the record before us that the risks faced by pretrial detainees in the houses of correction due to the COVID-19 pandemic objectively are not unreasonable in light of the totality of the defendants' efforts to mitigate those risks, including offering a highly effective vaccine to all inmates and staff.

4. Right to counsel. Finally, we address the plaintiffs' claims that two houses of correction -- in Bristol and Essex Counties -- do not provide constitutionally adequate avenues for their inmates to communicate with counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and arts. 1, 10, and 12 of the Massachusetts Declaration of Rights.

In Massachusetts, inmates in correctional institutions have a constitutional and statutory right "to meet in reasonable

circumstances with counsel and prospective counsel." Hoffer v. Commissioner of Correction, 397 Mass. 152, 155-156 (1986), citing G. L. c. 127, § 36A. See Procunier v. Martinez, 416 U.S. 396, 419 (1974), overruled on other grounds, Thornburgh v. Abbott, 490 U.S. 401, 413-414 (1989). "In constitutional terms, the question can be whether the inmates are being denied their right of access to the courts." Hoffer, supra, citing Souza v. Travisono, 498 F.2d 1120, 1123 n.6 (1st Cir. 1974). See Procunier, supra ("The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys").

"In addition to the right of access to the courts, inmates with pending criminal charges or pending appeals have a constitutional right to effective assistance of counsel," which requires that correctional facilities provide them with "sufficient access to attorneys." Cacicio v. Secretary of Pub. Safety, 422 Mass. 764, 773 (1996). See Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001), quoting Sixth Amendment ("right of the accused '[i]n all criminal prosecutions . . . to have the Assistance of Counsel for his defence' is a direct right,

grounded squarely in the text of the Constitution"). Accordingly, "[w]hile a prisoner complaining of poor law libraries does not have standing unless he can demonstrate that a direct right -- namely his right of access to the courts -- has been impaired, in the context of the right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right." Benjamin, supra.

However, both the right of access to the courts and the right to counsel are subject to reasonable limitations. See Jiles v. Department of Correction, 55 Mass. App. Ct. 658, 664 (2002), citing, e.g., Commonwealth v. Scheffer, 43 Mass. App. Ct. 398, 400 (1997) ("Just as the lack of a perfect defense does not deprive a criminal defendant of his or her right to counsel, 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"). Correctional facilities may implement policies that impinge on an inmate's constitutional rights if the restriction is "reasonably related to legitimate penological interests," Cacicio, 422 Mass. at 770, quoting Turner v. Safley, 482 U.S. 78, 89 (1987), and courts accord special deference to correction officials "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline," Wolfish, 441

U.S. 520, 547 (1979). See Cacicio, supra at 769 (deference accorded to correction officials "particularly pronounced" in context of regulations that concern institutional security issues).

Here, the houses of correction in Bristol and Essex Counties both offer what traditionally has been considered the apex of attorney access, namely, contact visits with counsel in a private room, unmonitored by correction officers. Cf. Ching v. Lewis, 895 F.2d 608, 609-610 (9th Cir. 1990), citing Dreher v. Sielaff, 636 F.2d 1141, 1143 (7th Cir. 1980) ("The opportunity to communicate privately with an attorney is an important part of . . . meaningful access [to attorneys]"; holding that "prisoner's right of access to the courts includes contact visitation with his counsel").

The plaintiffs argue that the availability of contact visitation, although constitutionally necessary, is not sufficient constitutionally in view of the risks posed by the COVID-19 pandemic. However, the houses of correction in both Bristol and Essex Counties offer alternatives to contact visitation, including noncontact visitation, telephone communication, legal mail, and in the case of the house of correction in Essex County, video conferencing (albeit without three-way conferencing or screen-sharing capability). As discussed supra, these alternative avenues need not be perfect

to pass constitutional muster. Moreover, the risks of contact visitation have diminished considerably given the widespread availability of highly effective vaccines, not only to inmates and staff of the houses of correction, but to attorneys, experts, interpreters, and other individuals working in the Commonwealth. See Commonwealth of Massachusetts, COVID-19 vaccine information, https://www.mass.gov/covid-19-vaccine [https://perma.cc/X6Y5-YAMF] (COVID-19 vaccine available at no cost to people twelve years of age or older who live, work, or study in Massachusetts). In the circumstances, we conclude that the avenues available for attorney-client communication at the Bristol and Essex County houses of correction do not violate Federal and State constitutional minimum requirements.

Conclusion. On the record before us, we conclude that the plaintiffs have failed to establish a Federal or State constitutional violation as a result of the defendants' failure to implement across-the-board, routine screening testing for COVID-19, or to exercise their discretionary statutory authority to reduce population levels in the houses of correction. We also conclude that the plaintiffs have failed to establish a Federal or State constitutional violation as a result of the lack of availability in the Bristol and Essex County houses of correction of three-way video conferencing, with screen-sharing

capability, for the purpose of attorney-client communication. Accordingly, the plaintiffs' requests for relief are denied.

So ordered.