

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Suffolk, ss.

SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES and  
MASSACHUSETTS ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS,  
Petitioners,

v.

CHIEF JUSTICE OF THE TRIAL COURT and others,  
Respondents.

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VERIFIED COMPLAINT FOR CIVIL CONTEMPT AGAINST  
THE DEPARTMENT OF CORRECTION  
PURSUANT TO MASS. R. CIV. P. 65.3

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This Court has established a process for the expedited release of certain incarcerated people in light of an “urgent and unprecedented” pandemic.

*Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass. 431, 445 (Apr. 3, 2020) (*CPCS v. Chief Justice*). To facilitate that process, the Court required the Department of Correction (DOC) to provide the defense bar and the Special Master with detailed, *daily* reports, including *facility-specific* information from the DOC. *Id.* at 445, 448 n.20, 456.

In key respects, that is not happening. The DOC's reports in this litigation have never included facility-specific information on the overall incarcerated population; the number of COVID-19 tests of incarcerated individuals; the number of COVID-19 tests of correctional officers, other staff, and contractors; or the number of people released as a result of the decision. Moreover, petitioners did not receive daily reports over the weekends of April 11 to April 12, 2020, or April 18 through 20. Yet, on April 20, the DOC did report facility-specific information to members of the news media. Petitioners therefore bring this contempt action in order to enforce and confirm the DOC's reporting obligations. The DOC should be ordered to provide all missing data back to April 3 and to provide daily reports including facility specific information on weekdays, weekends, and holidays moving forward.<sup>1</sup>

***The DOC's noncompliance with the court's order***

1. As part of its protocol for reducing population density and limiting the spread of COVID-19 in correctional facilities, this Court ordered that the DOC “shall” provide “the special master daily reports of inmate counts and rates of COVID-19 cases *at each facility*, as explained in Appendix B.” *CPCS v. Chief Justice*, 484 Mass. at 445 (emphasis added); see also *id.* at 448 n.20 (same).

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<sup>1</sup> Although Petitioners bring this action only against the DOC, the duty to provide daily reports applies equally to the sheriffs.

2. The DOC has not done so. In the first week after this Court’s decision, the DOC’s reports in this case did not provide any facility-specific data regarding the spread of COVID-19. Instead, it provided the overall numbers for the entire DOC system, making it impossible to assess testing, outbreaks, or releases in any single facility.

3. Petitioners’ understanding is that the Special Master flagged this error for the DOC after Petitioners raised this problem with the Special Master.

4. The following Monday, April 13, the DOC provided some facility-specific information for the first time,<sup>2</sup> in the following form:

Department of Correction  
COVID-19 Data By Facility

| <i>Date</i> | <i>MASAC</i> | <i>Boston Pre</i> | <i>MCI-Norfolk</i> | <i>NCCI-Gardn</i> | <i>BSH</i> | <i>OCCC</i> | <i>MCI-CJ</i> | <i>MCI-C</i> | <i>Pondville</i> | <i>MCI-F</i> | <i>MCI-Shirley</i> | <i>MTC</i> | <i>SMCC</i> | <i>LSH</i> | <i>SBCC</i> |
|-------------|--------------|-------------------|--------------------|-------------------|------------|-------------|---------------|--------------|------------------|--------------|--------------------|------------|-------------|------------|-------------|
| 4/13/2020   | 0            | 0                 | 0                  | 0                 | 12         | 0           | 0             | 0            | 0                | 22           | 9                  | 41         | 0           | 1          | 0           |
|             |              |                   |                    |                   |            |             |               |              |                  |              |                    |            |             |            |             |
|             |              |                   |                    |                   |            |             |               |              |                  |              |                    |            |             |            |             |
|             |              |                   |                    |                   |            |             |               |              |                  |              |                    |            |             |            |             |

5. Although this chart provides some of the ordered information, it falls short of satisfying the requirements of the Court’s order. Specifically, the document

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<sup>2</sup> Under normal circumstances, a 10-day delay may not be unreasonable. But these are not normal circumstances. For reference, between the time of this Court’s decision (April 3, 2020), and the time that DOC first provided at least *some* of the facility-specific information that the decision ordered (April 13, 2020), cases of COVID-19 in Massachusetts grew from 10,402 to 26,867, and the number of deaths spiked from 192 to 844. See *Archive of COVID-19 cases in Massachusetts*, <https://www.mass.gov/info-details/archive-of-covid-19-cases-in-massachusetts>.

lists the number of COVID-19 positive incarcerated people in each DOC facility, but it does not provide facility-specific numbers with respect to population, testing among incarcerated people, testing or confirmed cases among correctional staff, or releases.

6. Nor do the DOC's submissions in this case make clear whether the reported COVID-19 numbers include, or do not include, people who have recovered, people who have been sent to outside hospitals, or people who have died. Petitioners, as well as defendants and defense lawyers across the Commonwealth, have been left to guess at what these reports mean.

7. Around the same time that Petitioners received this document, an investigative reporter at WGBH News tweeted the following image.<sup>3</sup>

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<sup>3</sup> See Jenifer McKim (@jbmckin), Tweet Dated April 13, 2020 @ 5:41 P.M., <https://twitter.com/jbmckin/status/1249814890279247872>.

Updated 4/13/20

| Location                               | Confirmed Inmate Cases | Confirmed Inmate Deaths Due To Complications From COVID-19 <sup>4</sup> | DOC Staff Self-Reported Positive Cases | Vendor Staff Self-Reported Positive Cases |
|--|------------------------|---|--|---|
| Boston Pre-Release Center              | 0                      | 0   | 0                                      | 1   |
| Bridgewater State Hospital             | 12                     | 0   | 0                                      | 2   |
| MASAC at Plymouth                      | 0                      | 0   | 0                                      | 0   |
| Massachusetts Treatment Center         | 37                     | 4   | 10                                     | 4   |
| MCI-Cedar Junction                     | 0                      | 0   | 1                                      | 1   |
| MCI-Concord                            | 0                      | 0   | 2                                      | 0   |
| MCI-Framingham                         | 22                     | 0   | 5                                      | 2   |
| MCI-Norfolk                            | 0                      | 0   | 1                                      | 0   |
| MCI-Shirley                            | 9                      | 0   | 1                                      | 3   |
| North Central Correctional Institution | 0                      | 0   | 1                                      | 0   |
| Northeastern Correctional Center       | 0                      | 0   | 0                                      | 0   |
| Old Colony Correctional Center         | 0                      | 0   | 0                                      | 0   |
| Pondville Correctional Center          | 0                      | 0   | 0                                      | 0   |
| Shattuck Hospital Correctional Unit    | 0                      | 0   | 2                                      | 0   |
| South Middlesex Correctional Center    | 0                      | 0   | 0                                      | 0   |
| Souza Baranowski Correctional Center   | 0                      | 0   | 3                                      | 0   |
| Central Office                         | N/A                    | N/A   | 2                                      | 0   |
| Total                                  | 80                     | 4   | 28                                     | 13  |

<sup>4</sup>These numbers are not counted in the confirmed cases column  
<sup>5</sup>As you may be aware, all day-to-day operations at Bridgewater State Hospital have since 2017 been managed by Wellpath rather than DOC. While confirmed cases of COVID-19 at BSH have at all times been relayed to DOC administrators, the Department of Public Health, and local officials, they were inadvertently not relayed to the DOC communications office for a period of one week. Today's numbers include cases that were not updated during that period and the issue has been corrected.

8. This image, which appears to come from the DOC, provides a facility-specific breakdown of confirmed prisoner cases, deaths, and staff-reported positive cases. The DOC did not provide this same information to Petitioners or this Court.

9. On April 14, the DOC again provided Petitioners with facility-specific data only with respect to COVID-19 positive incarcerated people, while the WGBH reporter tweeted an image with updated facility specific numbers for confirmed prisoner cases, deaths, and staff-reported positive cases.<sup>4</sup>

10. On April 15, the DOC began reporting the number of staff positive cases per facility for the first time. It updated these numbers through April 17.

<sup>4</sup> See Jenifer McKim (@jbmckin), Tweet Dated April 14, 2020 @ 5:30 P.M., <https://twitter.com/jbmckin/status/1250174496889282568>.

11. The DOC provided no daily reports to Petitioners over the weekend or on Monday, April 20. This information was not provided to Petitioners until the evening of Tuesday, April 21. Yet, on April 20, the DOC apparently provided members of the news media with updated information. This information appears to include the following chart, which contains numerous details—including deaths due to COVID-19 and the number of incarcerated people who had recovered from the virus—that the DOC has never included in its reports as part of this litigation:<sup>5</sup>

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<sup>5</sup> See Jenifer McKim (@jbmckin), Tweet Dated April 20, 2020 @ 5:53 P.M., <https://twitter.com/jbmckim/status/1252354666874064899>. See also Sarah Betancourt (@sweetadelinevt), Tweets Dated April 20, 2020 @ 5:43 P.M. and 5:47 P.M., <https://twitter.com/sweetadelinevt/status/1252352334530670593?s=20> (reporting “Today’s counts” from the DOC); Deborah Becker (@wburdebbecker), Tweet Dated April 20, 2020 @ 6:44 P.M., <https://twitter.com/wburdebbecker/status/1252367541084676096?s=20> (“Massachusetts DOC reports 109 prisoner coronavirus cases in 6 prisons. Four prisoners recovered. 62 Cases among DOC and vendor staff”).



Jenifer Mckim  
@jbmckim

Latest update from the MA DOC: 109 prisoners with COVID-19 in the system with largest numbers at MCI-Shirley and MTC. Up from 105 on Friday. @wgbhnews @PLSMA

| Location                               | Confirmed Inmate Cases | Recovered Inmate Cases* | Confirmed Inmate Deaths Due To Complications From COVID-19* | DOC Staff Self-Reported Positive Cases** | Vendor Staff Self-Reported Positive Cases** |
|--|------------------------|-------------------------|---|--|---|
| Boston Pre-Release Center              | 0                      | 0                       | 0   | 0  | 1   |
| Bridgewater State Hospital             | 12                     | 0                       | 0   | 0  | 6   |
| MAASAC at Plymouth                     | 0                      | 0                       | 0   | 0  | 2   |
| Massachusetts Treatment Center         | 34                     | 4                       | 4   | 12                                       | 3   |
| MCI-Cedar Junction                     | 0                      | 0                       | 0   | 1  | 0   |
| MCI-Concord                            | 0                      | 0                       | 0   | 2  | 0   |
| MCI-Framingham                         | 27                     | 0                       | 0   | 11                                       | 3   |
| MCI-Norfolk                            | 1                      | 0                       | 0   | 3  | 0   |
| MCI-Shirley                            | 34                     | 0                       | 1   | 5  | 4   |
| North Central Correctional Institution | 0                      | 0                       | 0   | 0  | 0   |
| Northeastern Correctional Center       | 0                      | 0                       | 0   | 0  | 0   |
| Old Colony Correctional Center         | 0                      | 0                       | 0   | 0  | 0   |
| Pondville Correctional Center          | 0                      | 0                       | 0   | 0  | 0   |
| Shattuck Hospital Correctional Unit    | 1                      | 0                       | 0   | 3  | 0   |
| South Middlesex Correctional Center    | 0                      | 0                       | 0   | 0  | 0   |
| Souza Baranowski Correctional Center   | 0                      | 0                       | 0   | 3  | 1   |
| Central Office                         | N/A                    | N/A                     | N/A   | 2  | 0   |
| Total                                  | 109                    | 4                       | 5   | 42                                       | 20  |

\*These numbers are not counted in the confirmed cases column.  
\*\*Self-Reported Positive Cases

5:53 PM · Apr 20, 2020 · Twitter Web App

***The DOC is in civil contempt of this Court’s order***

12. “Civil contempt is found where there is a clear and undoubted disobedience of a clear and unequivocal command.” *Commonwealth v. One 1987 Ford Econoline Van*, 413 Mass. 407, 411 (1992), quoting *Allen v. School Comm. of Boston*, 400 Mass. 193, 194 (1987). Respondents have violated at least two such unambiguous directives here.

13. First, notwithstanding the clear and unequivocal terms of this Court’s April 3, 2020 decision, the DOC has never provided the overall incarcerated population at each facility, the number of COVID-19 tests of incarcerated people at each facility, the number of COVID-19 tests of correctional officers, other staff, and

contractors at each facility, or the number of people released as a result of the decision at each facility as mandated by the Court.

14. The failure to furnish this facility-specific information during a growing pandemic puts incarcerated people, prison staff, and the surrounding communities at greater risk from an outbreak. It prevents incarcerated people and their lawyers from giving complete information to courts about the spread of COVID-19 within the Commonwealth's prison system, which is highly pertinent to any request for release. And it prevents this Court, the Petitioners and the public from meaningfully assessing the impact of the April 3, 2020 Order at the facility level and evaluating any necessary response "to further changes in this rapidly-evolving situation." *CPCS v. Chief Justice*, 484 Mass. at 453.

15. Second, notwithstanding the clear and unequivocal terms of this Court's April 3, 2020 decision, Respondents have never provided daily reports during the weekend or over a holiday. In addition to failing to provide reports on April 18-20, Respondents did not provide any information during the weekend of April 11 through April 12. Petitioners' understanding is that the Special Master excused Respondents from their reporting obligations during that weekend.

16. To the extent that Respondents' failure to supply daily reports has been excused by the Special Master, their actions are less blameworthy. But they are no less violations of the Court's order requiring "daily" reports, *CPCS v. Chief Justice*,



484 Mass. at 435, 448, 456, and they are no less an impediment to the work of gauging and addressing the scope of the outbreak in Massachusetts prisons, jails, and houses of correction.

17. This failure causes delays and creates additional hurdles in the process created by the Court's April 3 decision, as it prevents incarcerated people from filing fully-informed motions for release on Mondays that take into account current numbers.

*Requested relief*

18. The DOC should be ordered to immediately provide to Petitioners both cumulative data from the start of their daily reporting obligation on April 6, as well as daily data going forward, in each of the following categories of data that this Court has already ordered them to provide:

- Inmate population, by facility;
- Inmate tests, by facility;
- Staff tests, by facility; and
- Releases, by facility.

19. The DOC should be instructed that the "daily" reporting obligation ordered by this Court is applicable through the weekend and on holidays.

20. Finally, particularly in light of the detailed charts that the DOC has been providing to members of the news media, the DOC should be instructed to

report its numbers in a comprehensible format. At the very least, this would entail disclosing, for each incarcerated individual who has tested positive for COVID-19, whether that individual has recovered, been sent to the hospital, or died. The undersigned counsel should not have to go on Twitter to find out what is really happening inside the DOC.

WHEREFORE, Petitioners respectfully request that this Honorable Court:

- A. Issue a summons, pursuant to Mass. R. Civ. P. 65.3(d), ordering the DOC to appear before this Court for the purpose of a hearing on the merits;
- B. Petitioners respectfully request that the hearing be set at the Court's earliest convenience given the exigencies of the situation;
- C. After a hearing, find the DOC civil contempt for failing to comply with this Court's April 3, 2020, order;
- D. Order the DOC to provide comprehensible and cumulative data, from the start of the daily reporting obligation and going forward, including each of the categories of data that it had already been ordered to provide by this Court's April 3 order, as well as the categories of data it has been reporting to the news media;
- E. Order the DOC to provide reports every day, including weekends and holidays; and
- F. Award all other relief deemed equitable and just.

Respectfully submitted,

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Dated: April 21, 2020