

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ALEXANDER GRINIS, MICHAEL
GORDON, and ANGEL SOLIZ, on behalf of
themselves and those similarly situated,

Petitioners,

v.

STEPHEN SPAULDING, Warden of Federal
Medical Center Devens, and MICHAEL
CARVAJAL, Director of the Federal Bureau
of Prisons, in their official capacities,

Respondents.

No. 20-cv-10738-GAO

NOTICE OF SUPPLEMENTAL AUTHORITIES AND INFORMATION

Petitioners submit this Notice to bring several recent court decisions and other developments to this Court’s attention.

First, in *Rivas v. Jennings*, No. 20-cv-02731-VC (N.D. Cal. April 29, 2020), D.E. 53 (attached as Exhibit 1), a case concerning ICE detainees, the court provisionally certified a class and entered a TRO. The Court found an “an exceedingly strong likelihood” that petitioners will prevail on the claim that respondents exhibit deliberate indifference “by unreasonably exposing [detainees] to a significant risk of harm.” *Id.* at 3.

There is no need to repeat a discussion of the “tinderbox” risk of the virus spreading in crowded detention facilities. Nor is there need to recount the health risks posed by the virus—not just for people in high-risk categories but for healthy people as well. . . .

[I]t is undisputed that the agency has not come close to achieving social distancing for most detainees—for example, people are still sleeping in barracks-style dorms within arms-reach of one another.

. . . .

For similar reasons, the plaintiffs have demonstrated a strong likelihood of irreparable harm to the class. Although ICE notes it has discovered no case of COVID-19 at the facilities, this is not especially comforting given that only 2 detainees have been tested.

....

The public interest and the balance of hardships also counsels in favor of emergency relief to initiate the process of mitigating health risks at the facilities. The conditions of confinement do not merely threaten detainees; they also threaten facility staff, not to mention the greater community whose health is put at risk by the congregation of large groups in cramped spaces.

Id. at 3-5. The court ordered respondents

to provide the Court and class counsel with information and records regarding each detainee at the facilities. This includes names, ages, any health vulnerabilities, and any criminal [history] information. . . . The purpose of this order is to enable the Court to implement a system for considering individual bail applications, modeled after a system created and successfully implemented by Judge Young in the District of Massachusetts.

Id. at 5. The court anticipated processing the bail applications within approximately two weeks.

See id. at 1. Responding to an objection that producing such information would be

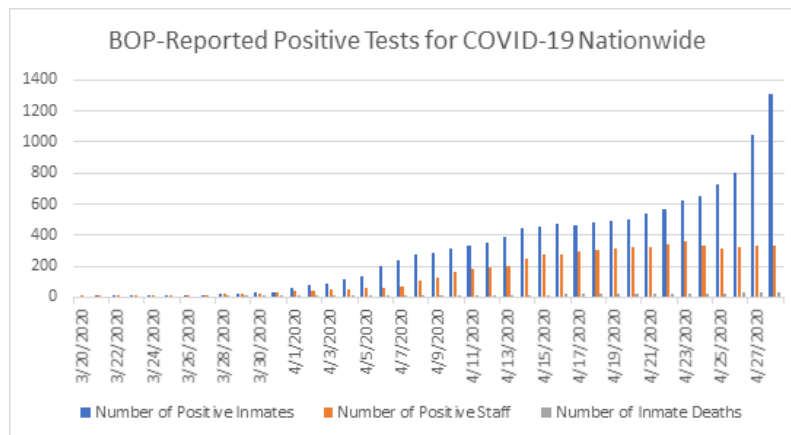
“burdensome,” the court stated:

The fact that ICE does not have such a list at the ready, six weeks after Governor Newsom shut down the entire state and one week after this lawsuit was filed, speaks volumes about where the safety of the people at these facilities falls on ICE’s list of priorities.

Id. at 4.

Second, additional evidence has emerged that the BOP’s ongoing failure to test prisoners in substantial numbers, and instead simply assuming that a COVID-19 outbreak is limited in scope, is evidence of deliberate indifference. Respondents here have not revealed how many FMC Devens prisoners, if any, have been tested since the first confirmed case was identified on April 22. Meanwhile, new data from both BOP and Massachusetts Department of Correction (“DOC”) illustrate what comes to light when broader testing is actually conducted.

There are now 2,041 confirmed “open” COVID-19 cases among prisoners and staff across BOP, with 33 prisoner deaths.¹ Of approximately 2,700 tests administered across BOP, more than 70 percent—over 2,000—have come back positive.² Mass testing at FCI Terminal Island has now uncovered 600 cases—more than half of all prisoners in the facility—among inmates and staff as of April 29, compared with only 9 confirmed cases on April 15, when Petitioners commenced this action. Confirmed cases at FMC Fort Worth have grown to 337, an increase of 105 since Monday.



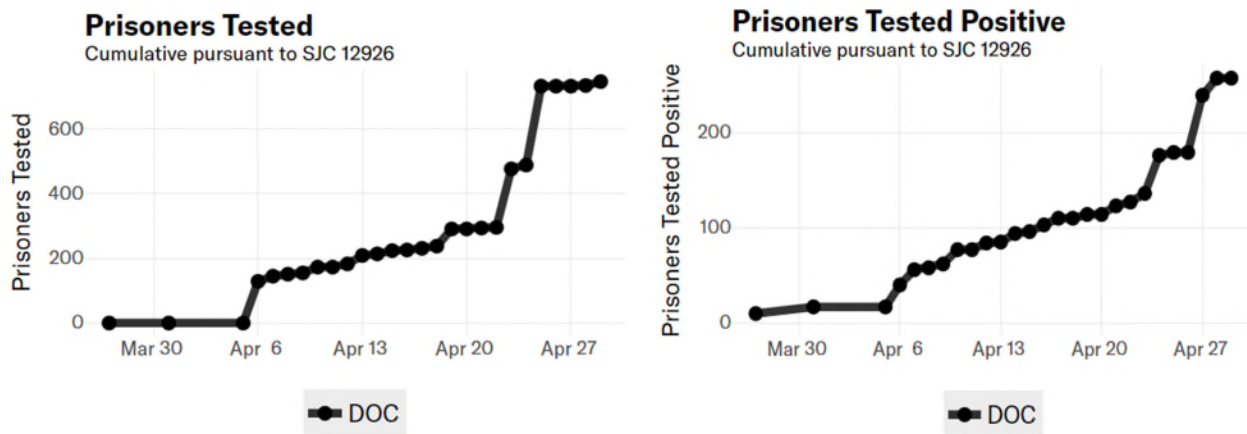
Here in Massachusetts, in late March, after the first three prisoner COVID-19 cases were reported in the DOC, undersigned counsel from the ACLU and others initiated a state lawsuit.³

¹ See <https://www.bop.gov/coronavirus/> (last visited Apr. 30, 2020). This total apparently does not include the 558 inmates and staff whose cases are not counted as “open” because they have “recovered.”

² See Michael Balsamo, “Over 70% of tested inmates in federal prisons have COVID-19,” Associated Press (Apr. 30, 2020), available at <https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f>.

³ See Emergency Petition at 3, *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, SJC-12926 (Mass. docketed Mar. 26, 2020), at <https://www.mass.gov/doc/sjc-12926-emergency-petition-under-g-l-c-211-ss-3/download>.

Much as the BOP has done here, the DOC responded by asserting that it had taken extensive measures concerning prisoner education, hygiene, social distancing, and quarantine.⁴ And, as here, those measures did not include substantially reducing prison populations. Yet more prisoners became infected, in numbers that remained largely hidden until recently, when more were tested; aggregate prisoner tests increased from 296 on April 22 to 747 by April 29. And the results have been striking; during that six-day period, the number of DOC prisoners diagnosed with COVID-19 more than doubled, from 127 to 257.⁵



The unavoidable conclusion from this new data is that there are likely many more active cases than current aggregate or individual facility numbers reveal due to lack of testing. And even if a facility like FMC Devens does not yet have multiple cases, a raging outbreak can emerge in a matter of days.

⁴ See Response of the Attorney General and Others at 10-14, *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, SJC-12926 (Mass. docketed Mar. 30 2020), at <https://www.mass.gov/doc/sjc-12926-response-of-the-attorney-general-others/download>.

⁵ Undersigned counsel from the ACLU of Massachusetts are compiling data from the Massachusetts DOC and the Massachusetts sheriffs at <https://data.aclum.org/sjc-12926-tracker/>.

Third, because Respondents imply that BOP’s testing protocols are informed by state and local health departments, as the CDC recommends, *see* Resp. at 11, it is relevant that Massachusetts has now “implemented required testing for staff and residents of nursing facilities.”⁶ As of April 27, 2020, nursing home facilities “*will be required to test all staff and residents*” to be eligible for additional state funding.⁷ As Governor Charlie Baker explained at the press conference announcing this policy, “[o]nce COVID-19 gets into a facility, it spreads rapidly and in many cases can be undetected for days” which “requires everyone to be more vigilant.”⁸ Here, that same reasoning “suggests that a similar approach would be necessary to understand the size of the COVID-19 infection rate at FMC Devens.” Declaration of Professor Lauren Brinkley-Rubinstein at ¶ 21 (April 26, 2020) [D.E. 38-1]. Without such testing, it remains impossible to know how many prisoners and staff are actually infected with COVID-19. *See id.* at ¶ 13; *see also* Supplemental Declaration of Dr. Joe Goldenson at ¶ 10 (Apr. 26, 2020) [D.E. 38-7].

Fourth, additional information has emerged highlighting the unnecessary and dangerous delays caused by the BOP’s ever-shifting criteria for transfers to home confinement, which have the effect of disqualifying many prisoners, even though such criteria are not mandated by any

⁶ Press Release, *Baker-Polito Administration Announces Further Support, Resources, and Accountability Measures for Nursing Facilities, Funding for Congregate Care Facilities During COVID-19* (April 27, 2020), <https://www.mass.gov/news/baker-polito-administration-announces-further-support-resources-and-accountability-measures>.

⁷ COVID-19 Nursing Facility Accountability and Support (April 27, 2020) (emphasis in original), attached as Exhibit 2.

⁸ Robert Weisman, *State to Send Another \$130 Million in Emergency Aid to Long-Term Care Sites*, Boston Globe (Apr. 27, 2020), available at <https://www.bostonglobe.com/2020/04/27/metro/state-send-another-130-million-emergency-aid-long-term-care-sites/>.

statute, regulation, or Justice Department directive. In *United States v. Park*, No. 16-cr-473 (S.D.N.Y. Apr. 24, 2020), the court granted – over the government’s objection – immediate compassionate release from FCI Danbury to Ms. Haena Park.⁹ As the Warden of FCI Danbury explained, within less than two weeks the BOP’s Correctional Programs Division had twice “revised the criteria which must be met in order for an inmate to be referred to home confinement.” *Park*, Declaration of Warden Diane Easter at ¶¶ 4-5 (Apr. 23, 2020) [D.E. 69-1].¹⁰ Concluding that the “ever-changing guidelines” meant “the Court cannot be assured that Ms. Park will indeed be released on April 30, as is currently being represented,” the court ordered her immediate release because “[w]e are living in novel and dangerous times” where “[e]very day—indeed, every minute—may count.”

No less than failing to evacuate in case of a fire, the BOP’s refusal to protect vulnerable prisoners from COVID-19 by rapidly reducing the population at FMC Devens constitutes deliberate indifference and necessitates immediate judicial intervention.

⁹ The decision ordering immediate compassionate release in *Park* is attached as Exhibit 3. See Dean Seal, *Fraudster Freed as Judge Slams ‘Ever-Changing’ DOJ Advice*, Law360 (Apr. 27, 2020), available at https://www.law360.com/whitecollar/articles/1267453/fraudster-freed-as-judge-slams-ever-changing-doj-advice?nl_pk=253efe11-0d6b-4833-b6a6-cd93c8d69b59&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

¹⁰ The declaration of FCI Danbury Warden Easter is attached as Exhibit 4.

Respectfully submitted,

ALEXANDER GRINIS, MICHAEL GORDON, ANGEL SOLIZ,
and others similarly situated,

By their attorneys,

/s/ William W. Fick

William W. Fick, BBO# 650562
Daniel N. Marx, BBO# 674523
Amy Barsky, BBO# 601111
FICK & MARX LLP
24 Federal Street, 4th Floor
Boston, MA 02210
857-321-8360
wfick@fickmarx.com
dmarx@fickmarx.com
abarsky@fickmarx.com

Matthew R. Segal, BBO# 654489
Jessie Rossman, BBO# 670685
ACLU FOUNDATION
OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org
jrossman@aclum.org

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 30, 2020.

/s/ William Fick