

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.

No. 8084CR28954

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COMMONWEALTH                    )  
  )  
v.                                     )  
  )  
JAMES WATSON                   )  
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  )

**BRIEF OF DR. MARY T. BASSETT, THE SENTENCING PROJECT, AND THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT JAMES WATSON’S MOTION TO STAY**

*Amici*, experts in public health and evidence-based sentencing policy, write to respectfully urge this court to act in the best interests of public health and safety and release Mr. Watson from confinement immediately. *Amici* include:

- **Dr. Mary T. Bassett**, MD, MPH, Former Commissioner, New York City Department of Health and Mental Hygiene; Director, François-Xavier Bagnoud (FXB) Center for Health and Human Rights; FXB Professor of the Practice of Health and Human Rights, Department of Social and Behavioral Science, Harvard T.H. Chan School of Public Health;
- **The Sentencing Project**, a national nonprofit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project is dedicated to promoting rational and effective public policy on issues of crime and justice. Through research,

education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, including on their impact on the reintegration of those convicted of a crime into civil society; and

- **The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School**, launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law, which works to advance racial justice. The Houston Institute seeks to eliminate practices or policies which compound the excessive policing, criminalization, and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies.

## INTRODUCTION

On Saturday, March 21, 2020, the Massachusetts Department of Correction (DOC) confirmed the first case of COVID-19 in the state prison system: a man held at the Massachusetts Treatment Center (MTC), a medium-security prison at the Bridgewater Correctional Complex.<sup>1</sup> He and his cellmate had each been

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<sup>1</sup> Jackson Cote, *Coronavirus and prisons: Inmate serving life sentence tests positive for COVID-19 at Massachusetts Treatment Center in Bridgewater*, Mass Live News (Mar. 21, 2020), <https://www.masslive.com/coronavirus/2020/03/coronavirus-and-prisons-inmate-serving-life-sentence-tests-positive-for-covid-19-at-massachusetts-treatment-center-in-bridgewater.html>; *Inmate at Bridgewater prison tests positive for coronavirus, officials say*, WCVB (Mar. 21, 2020), <https://www.wcvb.com/article/inmate-at-bridgewater-prison-massachusetts-treatment-center-tests-positive-for-coronavirus-officials-say/31846456#>.

separately quarantined since Thursday, March 19, 2020. This first man to be diagnosed is serving a life sentence. As must be obvious, he did not contract COVID-19 from international travel or by intentionally flouting social distancing. The virus was introduced into the prison. Now just two weeks later, as of Thursday, April 2, the number of cases within the Commonwealth's correctional institutions has skyrocketed to a total of 56: at last count, there were 34 cases across multiple state prisons (24 incarcerated people, 8 DOC staff members, 2 medical providers) and 22 people across multiple county jails (20 staff members, 2 incarcerated people).<sup>2</sup> The virus is spreading, and many others are at risk.

As detailed in the affidavits submitted with his Motion to Stay, Mr. Watson is 61 years old and suffers from several severe, ongoing medical conditions: diabetes, arthritis, and likely cancer. For months, he has been seeking testing and treatment for a likely esophageal cancer or other cancer within the gastrointestinal tract. He received concerning initial tests confirming thickening of the stomach wall and narrowing and obstruction of the esophagus, but the DOC delayed further screening tests because of its response to COVID-19. Frank Aff. ¶¶ 6–13. Mr.

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<sup>2</sup> Jenifer B. McKim, *Coronavirus Infections Continue To Rise In Massachusetts Prisons*, WBGH News (Apr. 2, 2020), <https://www.wgbh.org/news/local-news/2020/04/02/coronavirus-infections-continue-to-rise-in-massachusetts-prisons>; see also Deborah Becker, *29 People In Mass. Prisons And Jails Diagnosed With COVID-19*, WBUR (Apr. 1, 2020), <https://www.wbur.org/commonhealth/2020/03/23/coronavirus-massachusetts-prisoner>.

Watson has been in and out of the infirmary and to outside hospitals over the past several months of his incarceration, *Blanchette Aff.* ¶¶ 10–19, and has lost more than 50 pounds in the last six months. Mr. Watson’s combined age and health conditions subject him to particular risk of life-threatening complications were he to contract COVID-19.<sup>3</sup>

Though the numbers have already advanced in the few days since oral argument transpired before the Supreme Judicial Court, on Tuesday, March 31, the DOC represented on the record that two people among the then-17 incarcerated people at MTC with confirmed COVID diagnoses were transported to outside hospitals.<sup>4</sup> It was reported last night, April 2, that one of these men had died, the

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<sup>3</sup> *Groups at Higher Risk for Severe Illness*, Cts. for Disease Control and Prevention: Coronavirus Disease 2019 (COVID-2019) (Apr. 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (listing age and diabetes as predisposing underlying conditions); Allison Aubrey, *Who’s Sickest From COVID-19? These Conditions Tied To Increased Risk*, NPR (Mar. 31, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/31/824846243/whos-sickest-from-covid-19-these-conditions-tied-to-increased-risk> (describing new CDC study finding that 78% of COVID-19 patients in the US who required admission to the ICU had at least one underlying condition; 94% of hospitalized patients who died had an underlying condition; and among COVID-19 patients admitted to the ICU, 32% had diabetes).

<sup>4</sup> Oral Argument at 2:33:34–2:34, 2:35:16–2:36:16, *Committee for Public Counsel Servs. & Mass. Ass’n of Criminal Defense Lawyers v. Chief Justice of the Trial Court*, SJC-12926, [https://boston.suffolk.edu/sjc/pop.php?csnum=SJC\\_12926](https://boston.suffolk.edu/sjc/pop.php?csnum=SJC_12926).

first incarcerated person to die of COVID-19 in Massachusetts.<sup>5</sup> He was in his 50s and had underlying health conditions. Today, Prisoners' Legal Services reported that a second incarcerated man from MTC had also died.<sup>6</sup>

Mr. Watson's continued detention during this pandemic poses a grave threat to his life and health; increases the risk that COVID-19 will be spread within the prison because the greater the density of people in a confined space, the greater the likelihood that the virus will spread; and undermines public health and safety, exposing the entire population inside MCI-Norfolk—as well as all who interact with the staff who work in the facility—to heightened risks. The safest possible response is releasing as many people as possible to self-isolate—especially people who are particularly vulnerable due to health and age like Mr. Watson—thereby protecting those who are released, the general public, and people who will remain incarcerated or who must staff the facility.

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<sup>5</sup> Steph Solis, *Coronavirus: Inmate with COVID-19 dies at Massachusetts Treatment Center in Bridgewater*, Mass Live News (Apr. 2, 2020), <https://www.masslive.com/coronavirus/2020/04/coronavirus-inmate-with-covid-19-dies-at-massachusetts-treatment-center-in-bridgewater.html>; Deborah Becker, *A Massachusetts Prisoner Has Died Of COVID-19*, WBUR (Apr. 2, 2020), <https://www.wbur.org/commonhealth/2020/04/01/mass-prisons-jails-coronavirus>.

<sup>6</sup> *COVID-19*, Prisoners' Legal Servs. (Apr. 3, 2020), <http://plsma.org/covid-19-in-ma-prisons-and-jails>; *see also* Prisoners' Legal Services (@PLSMA), Twitter (Apr. 3, 2020, 11:45 AM), <https://twitter.com/PLSMA/status/1246101451442655236?s=20>; Dave Rangaviz (DRangaviz), Twitter (Apr. 3, 2020, 8:50 AM), <https://twitter.com/DRangaviz/status/1246057610761076741?s=20>.

Close contact and conditions of incarceration are unsafe in light of the global COVID-19 pandemic.<sup>7</sup> These conditions pose a substantial risk of serious illness and death to people behind bars. As Dr. Ross MacDonald, Chief Medical Officer at Rikers Island in New York City, recently explained, “We cannot socially distance dozens of elderly men living in a dorm, sharing a bathroom.”<sup>8</sup> Every day that people remain incarcerated in unhygienic prison environments in which social distancing is functionally impossible, they are placed at greater risk. One case of COVID-19 can infect hundreds of others.<sup>9</sup> The surest way to contain the spread of an infectious disease in a jail or prison is to reduce its population.<sup>10</sup> Facing down

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<sup>7</sup> See World Health Org., *Director-General Opening Remarks* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>8</sup> Andrew Naughtie, *Coronavirus: US Doctors Demand Immediate Release of Prisoners and Detainees to Avert Disaster*, Independent (Mar. 9, 2020), <https://www.independent.co.uk/news/world/americas/coronavirus-us-prison-release-doctors-medical-workers-symptoms-a9410501.html>. The original tweet by Dr. McDonald is available here: Ross MacDonald (@RossMacDonaldMD), Twitter (Mar. 18, 2020, 9:51 PM), <https://twitter.com/RossMacDonaldMD/status/1240455801397018624?s=20>.

<sup>9</sup> See, e.g., *The Korean Clusters*, Reuters (updated Mar. 20, 2020), <https://graphics.reuters.com/CHINA-HEALTH-SOUTHKOREA-CLUSTERS/0100B5G33SB/index.html> (one South Korean patient likely responsible for transmitting virus to over 1,000 people).

<sup>10</sup> See Letter From A Group of Concerned Scientists, Physicians, and Public Health Experts RE: COVID-19 Risks for Detained Populations in Maryland (Mar. 19, 2020), <https://c026acbc-bc5d-4cef-8584->

the aggressive spread of COVID-19—and the growing risk that, if not slowed, it will overwhelm the Commonwealth’s healthcare system and thereby cause countless more needless deaths<sup>11</sup>—Mr. Watson should be released.

## DISCUSSION

### **A. The exponentially growing COVID-19 pandemic puts millions of Americans at risk, including in Massachusetts.**

On March 11, 2020, the World Health Organization declared a global pandemic based on the coronavirus, or COVID-19.<sup>12</sup> COVID-19 is an infectious disease caused by severe acute respiratory syndrome coronavirus 2.<sup>13</sup> Those who become seriously ill suffer bilateral interstitial pneumonia, which causes partial or

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[0a0bde77d83b.filesusr.com/ugd/868471\\_809ae4cc069e4177a2331fd5b80e7989.pdf](https://0a0bde77d83b.filesusr.com/ugd/868471_809ae4cc069e4177a2331fd5b80e7989.pdf) (recommending immediately implementing community-based alternatives to detention and incarcerating as few people as possible).

<sup>11</sup> Annie Waldman et al., *Are Hospitals Near Me Ready for Coronavirus? Here Are Nine Different Scenarios*, ProPublica (Mar. 17, 2020), <https://projects.propublica.org/graphics/covid-hospitals?geo=Boston,%20MA>; Lynn Jolicoeur & Lisa Mullins, *Harvard Global Health Expert: Mass. Hospitals Face Capacity Problem If Coronavirus Cases Spike Quickly*, WBUR (Mar. 10, 2020), <https://www.wbur.org/news/2020/03/10/coronavirus-covid-19-massachusetts-hospital-capacity-ashish-jha>.

<sup>12</sup> Bill Chappell, *Coronavirus: COVID-19 is Now Officially a Pandemic*, WHO Says, NPR (Mar. 11, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says>.

<sup>13</sup> See generally *Coronavirus (COVID-19)*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/index.html> (last visited Mar. 21, 2020).

total collapse of the lung alveoli, making it difficult or impossible to breathe.<sup>14</sup>

COVID-19 “is deadlier than the flu”—perhaps “10 times deadlier.”<sup>15</sup> The number of infected people is growing exponentially,<sup>16</sup> with potential for “a hundred million cases in the United States by May.”<sup>17</sup> The pandemic is uncontained.

COVID-19 takes up to fourteen days to incubate, so many people are contagious before they have symptoms. Patients showing symptoms today may have inadvertently spread the disease for the past two weeks.<sup>18</sup> The cluster of Massachusetts cases “was started by people who were not yet showing symptoms, and more than half a dozen studies have shown that people without symptoms are causing substantial amounts of infection.”<sup>19</sup> The first case in a Massachusetts

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<sup>14</sup> *See id.*

<sup>15</sup> Charles Ornstein, *This Coronavirus Is Unlike Anything in Our Lifetime, and We Have To Stop Comparing It to the Flu*, ProPublica (Mar. 14, 2020), <https://www.propublica.org/article/this-coronavirus-is-unlike-anything-in-our-lifetime-and-we-have-to-stop-comparing-it-to-the-flu>.

<sup>16</sup> *See* Harry Stevens, *Why Outbreaks Like Coronavirus Spread Exponentially, and How To ‘Flatten the Curve’*, Wash. Post (Mar. 14, 2020), <https://www.washingtonpost.com/graphics/2020/world/corona-simulator>.

<sup>17</sup> *Id.*

<sup>18</sup> Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Symptoms* (last updated Mar. 14, 2020), <https://tinyurl.com/utnov9c>.

<sup>19</sup> Elizabeth Cohen, *Infected People Without Symptoms Might Be Driving the Spread of Coronavirus More Than We Realized*, CNN (Mar. 14, 2020),



prison was confirmed by testing on Friday, March 20. The Massachusetts DOC did not prohibit general visits until March 12.<sup>20</sup> The virus likely has been spreading across the walls—from members of the community and staff and introduced into prisons—long before the first case was detected.

There are currently thousands of people under quarantine in Massachusetts,<sup>21</sup> while rapid spread continues among the general public. Thousands or tens of thousands of people are carrying a highly contagious, potentially fatal disease. Our only chance of avoiding catastrophe is through “widespread, uncomfortable, and comprehensive social distancing.”<sup>22</sup> Officials first urged us to gather in groups no

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<https://www.cnn.com/2020/03/14/health/coronavirus-asymptomatic-spread/index.html>.

<sup>20</sup> *Updated: DOC Temporarily Suspends Family and Friend Visits at Facilities Statewide*, Mass.gov (Mar. 12, 2020), <https://www.mass.gov/news/updated-doc-temporarily-suspends-family-and-friend-visits-at-facilities-statewide>.

<sup>21</sup> *See Massachusetts Residents Subject to COVID-19 Quarantine*, Mass.gov, <https://www.mass.gov/info-details/covid-19-cases-quarantine-and-monitoring#massachusetts-residents-subject-to-covid-19-quarantine->.

<sup>22</sup> Asaf Bitton, *Social Distancing: This Is Not a Snow Day*, Medium: Ariadne Labs (Mar. 13, 2020), <https://tinyurl.com/vp7hrky>.

larger than 50,<sup>23</sup> then 25,<sup>24</sup> now 10.<sup>25</sup> With fewer than 100,000 ICU beds nationwide,<sup>26</sup> failure to slow the rate of transmission will overwhelm doctors and hospitals: “[W]e won’t have anywhere for sick patients to go.”<sup>27</sup>

**B. If he remains incarcerated, Mr. Watson will be at higher risk of severe illness or death due to COVID-19. His incarceration at MCI-Norfolk creates vulnerability due to immutable conditions of confinement, a well-documented unhygienic prison environment, and inadequate medical care.**

Compared to the general public, those who are incarcerated are even more vulnerable to catching COVID-19 and to becoming seriously ill or dying from it.<sup>28</sup>

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<sup>23</sup> CDC, *Interim Guidance for Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html> (last visited Mar. 15, 2020).

<sup>24</sup> *See Gov. Baker bans gatherings of over 25 people, orders school closure, restaurants take-out only*, WCVB (Mar. 16, 2020), <https://www.wcvb.com/article/gov-charlie-baker-massachusetts-covid-19-coronavirus-update-march-15-2020/31647097#>.

<sup>25</sup> Martin Finucane et al., *Mass. issues stay-at-home advisory, closes non-essential businesses to slow coronavirus*, Bos. Globe (Mar. 23, 2020), <https://www.bostonglobe.com/2020/03/23/metro/coronavirus-latest-updates>.

<sup>26</sup> *See* Bitton, *supra* note 22.

<sup>27</sup> Ornstein, *supra* note 15.

<sup>28</sup> *See generally* David Cloud, Vera Inst. of Justice, *On Life Support: Public Health in the Age of Mass Incarceration* 5–12 (2014), [https://www.vera.org/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy\\_downloads/on-life-support-public-health-mass-incarceration-report.pdf](https://www.vera.org/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf).

Infection control in jails and prisons is nearly impossible.<sup>29</sup> The CDC has found that “[a] growing body of evidence indicates that COVID-19 transmission is facilitated in confined settings,” with “high transmissibility of COVID-19 in enclosed spaces.”<sup>30</sup> A report by the World Health Organization of painstaking case and contact tracing in China found that 1-5% of contacts of known cases subsequently developed their own confirmed cases of COVID-19.<sup>31</sup> That figure appears to be true on a per-“close contact” basis, so the risk level may be multiplied by the number of infected close contacts; someone who is in close contact with five infected people per day, or one infected person five times in a day, may have a 5-25% risk of contracting COVID-19. This underscores the

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<sup>29</sup> See, e.g., Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047 (2007), <https://doi.org/10.1086/521910>; John E. Dannenburg, *Prisons as Incubators and Spreaders of Disease and Illness*, *Prison Legal News* (Aug. 15, 2007), <https://www.prisonlegalnews.org/news/2007/aug/15/prisons-as-incubators-and-spreaders-of-disease-and-illness>.

<sup>30</sup> Kenji Mizumoto & Gerardo Chowell, *Estimating risk for death from 2019 novel coronavirus disease, China, January–February 2020*, 26 *Emerging Infectious Diseases* (2020), [https://wwwnc.cdc.gov/eid/article/26/6/20-0233\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0233_article).

<sup>31</sup> World Health Org., *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)* at 8 (Feb. 2020), <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>.

particular danger in a corrections environment,<sup>32</sup> where unknowingly infected people repeatedly encounter a limited pool of others in close confines.

Overcrowding also exacerbates risk. According to the latest available prison capacity report, MCI-Norfolk, where Mr. Watson is incarcerated, was straining at 120% of its design/rated capacity as of the third quarter of 2019.<sup>33</sup> As defined by the U.S. Department of Justice Bureau of Justice Statistics, the design/rated capacity represents the number of people that planners or architects intended for the institution, but formally updated by a rating official within the Commonwealth. When correctional facilities are beyond capacity, people are squeezed into even closer confinement: they sleep closer together, eat closer together, wash closer together, congregate closer together. If COVID-19 is introduced to an overcrowded facility like MCI-Norfolk, substantial spread will be nearly impossible to stave off.

Jails and prisons are effectively oversized petri dishes for COVID-19. The virus spreads mainly between people who are less than six feet from one another, through respiratory droplets produced and propelled when an infected person

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<sup>32</sup> See *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control and Prevention: Coronavirus Disease 2019 (COVID-19) (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>33</sup> Mass. Dep't of Corr., Quarterly Report on the Status of Prison Capacity, Third Quarter 2019 (Oct. 2019), <https://www.mass.gov/doc/prison-capacity-third-quarter-2019/download>.

coughs or sneezes.<sup>34</sup> It likely stays airborne for up to three hours.<sup>35</sup> For three days, it remains alive—and contagious—on plastic, metal, and other hard surfaces.<sup>36</sup> As a result, CDC recommends that people wash their hands frequently and thoroughly, avoid touching their own and others' faces, use alcohol-based hand sanitizers when soap and water are unavailable, regularly disinfect frequently touched items, and honor social distancing.<sup>37</sup>

These elementary, essential steps are virtually impossible for those who are incarcerated. Mr. Watson faces the following conditions—with no ability to choose otherwise or take precautions:

- He lives in a very small cell, in close quarters, and surrounded almost exclusively by hard surfaces;

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<sup>34</sup> Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19) and You* (Mar. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

<sup>35</sup> See John Bowden, *Tests Indicate Coronavirus Can Survive in the Air*, The Hill (Mar. 11, 2020), <https://thehill.com/policy/healthcare/487110-tests-indicate-coronavirus-can-survive-in-the-air>.

<sup>36</sup> See Allison Aubrey, *The New Coronavirus Can Live on Surfaces for 2–3 Days—Here's How To Clean Them*, NPR (Mar. 14, 2020), <https://www.npr.org/sections/health-shots/2020/03/14/811609026/the-new-coronavirus-can-live-on-surfaces-for-2-3-days-heres-how-to-clean-them>.

<sup>37</sup> See, e.g., Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How To Protect Yourself* (last updated Mar. 14, 2020), <https://tinyurl.com/tcn892b>.

- He is regularly in communal spaces, such as eating areas, bathrooms, and cells or holding areas;
- He lives in spaces with open toilets, which aerosolize bodily fluids, within a few feet of their beds;
- He is nearly always in “close contact” with others;
- He is frequently in actual physical contact with others, such as correctional officers, kitchen staff, and medical staff;
- He is regularly subject to intimate physical contact, including searches of mouths and body cavities; and
- He lacks regular, uninhibited access to soap, water, tissues, and paper towels.

These general conditions of confinement make any prison or jail a dangerous place for the spread of infectious disease.<sup>38</sup> But for MCI-Norfolk in particular, longstanding public health defects exacerbate these risks.

Correctional facilities in Massachusetts are subject to biannual inspection by the Department of Public Health, during which environmental health inspectors document violations in each facility, including repeat (i.e. unresolved) violations. At its most recent inspection, MCI-Norfolk had 475 repeat environmental health violations, the third highest in the Commonwealth out of 35 correctional

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<sup>38</sup> See generally Christine Mitchell, Amber Akemi Piatt & Juan Gudino, Human Impact Partners, *Liberating Our Health: Ending the Harms of Pretrial Incarceration and Money Bail* 17–19 (2020), [https://humanimpact.org/wp-content/uploads/2020/02/HIP\\_HealthNotBailNationalReport\\_2020.02\\_reduced.pdf](https://humanimpact.org/wp-content/uploads/2020/02/HIP_HealthNotBailNationalReport_2020.02_reduced.pdf) (collecting research on the toxicity of jail environments and the rapid spread of disease).

facilities.<sup>39</sup> Among these many violations, 22 violations concerned issues of overcrowding: “Cell Size: Inadequate floor space in all cells,”<sup>40</sup> 14 violations concerned mold, and dozens of violations concerned lack of cleanliness and accumulation of dirt. Mr. Watson has been incarcerated at MCI-Norfolk for almost 40 years; it is reasonable to conclude that his ailing health may be at least in part a product of his long-term incarceration in an unhygienic environment. The DOC routinely fails to meet standards that adequately promote and protect the health and safety of incarcerated people under non-emergency conditions. In a global pandemic, where heightened hygiene and physical distancing are required, corrections officials must receive every possible assistance to protect their populations—including releasing vulnerable people like Mr. Watson.

As a general matter, people in DOC custody receive inadequate healthcare. On January 9, 2020, the Massachusetts Office of the State Auditor released a two-year audit of DOC medical care, finding failure to comply with authoritative guidance for sick call requests, doctors’ appointments, health insurance coverage,

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<sup>39</sup> Executive Office of Health and Human Services, Dep’t of Public Health, Bureau of Environmental Health, Community Sanitation Program, *Facility Inspection – MCI Norfolk* (Dec. 5, 2019), <https://www.mass.gov/doc/mcinorfolk-november-14-2019/download>. All 2019 inspection reports are available here: <https://www.mass.gov/lists/2019-correctional-facility-inspection-reports>. All 2020 inspection reports are available here: <https://www.mass.gov/lists/2020-correctional-facility-inspection-reports>.

<sup>40</sup> *Id.* (documenting 22 violations of 105 CMR 451.320).

and medications during reentry preparation under normal operations.<sup>41</sup> The State

Auditor wrote:

Sick Call Request Forms (SCRFs) were not processed or triaged within 24 hours (72 on weekends) and/or were not completely filled out by nurses and/or physicians, and inmates were not always seen by a qualified healthcare professional (QHP) within seven days after they submitted SCRFs. Without timely treatment for physical and mental health issues, an inmate's condition could worsen.<sup>42</sup>

About one-third of people whose records were audited (19 out of 60) were not seen within a week. At a time of pandemic, these existing deficiencies are only likely to worsen as more people become infected and need urgent, intensive care. The State Auditor reported that “DOC officials could not provide us with a reason for these issues at the time of our audit. However, we did note that controls over the administration of these activities appeared to be deficient.”<sup>43</sup> Operating from a baseline of impairment, the DOC will be stretched thinner during this emergency, especially as some prison healthcare staff have already fallen ill with COVID-19.

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<sup>41</sup> Commonwealth of Mass., Office of the State Auditor, *Official Audit Report of Massachusetts Department of Correction For the Period July 1, 2016 through June 30, 2018* (Jan. 9, 2020), <https://www.mass.gov/doc/audit-of-the-department-of-correction/download>.

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.* at 12.



As the affidavits submitted with Mr. Watson’s motions detail, he has experienced DOC’s existing deficiencies firsthand. After Mr. Watson was diagnosed with diabetes, no one monitored his blood sugar and though he has tried to manage his diabetes on his own through diet, *see* Blanchette Aff. ¶¶ 5–8, as an incarcerated man his food choices are limited. After his barium swallowing test in February revealed narrowing or obstruction of the esophagus and thickening of the stomach wall, DOC ordered additional emergency tests of his GI tract and a colonoscopy, but those tests and procedure were canceled as part of the prison’s response to COVID-19. Frank Aff. ¶¶ 6–13. While in DOC custody, Mr. Watson has not received adequate care long before and in the wake of COVID-19. Research shows that people in the general population age 60 and older are at much higher risk for death and serious complications from COVID-19 that require hospitalization and intensive care.<sup>44</sup> Especially for someone like Mr. Watson who has been incarcerated for almost 40 years, aging is accelerated in prison and

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<sup>44</sup> *See, e.g.*, World Health Org., Coronavirus disease 2019 (COVID-19): Situation Report – 51 (Mar. 11, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331475/nCoVsitrep11Mar2020-eng.pdf>; Jiatao Lu et al., *ACP risk grade: a simple mortality index for patients with confirmed or suspected severe acute respiratory syndrome coronavirus 2 disease (COVID-19) during the early stage of outbreak in Wuhan, China* (Feb. 23, 2020), <https://www.medrxiv.org/content/medrxiv/early/2020/02/23/2020.02.20.20025510.full.pdf>.

prisoners are considered to be geriatric at age 50 or 55, depending on the state.<sup>45</sup>

Releasing Mr. Watson, who is particularly vulnerable to a severe case of COVID-19 given his predisposing conditions and his age of 61 years old, would make him—and all of us—much safer by reducing the likelihood that he will develop a case that will require outside hospitalization, burdening already strained hospitals<sup>46</sup> and risking COVID-19 transmission for anyone involved in medical transports.<sup>47</sup>

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<sup>45</sup> See, e.g., Jenifer B. McKim & Chris Burrell, *With Aging Prison Population, Massachusetts Looks To Possible Cost-Saving, Compassionate Fix*, WGBH News (May 20, 2018), <https://www.wgbh.org/news/local-news/2018/05/20/with-aging-prison-population-massachusetts-looks-to-possible-cost-saving-compassionate-fix> (“Prisoners are generally considered old in prison at 50 or 55, aging more quickly than the general public because of hard living outside the walls and stress and the challenges of maintaining healthy lifestyles while incarcerated.”); Brie Williams & Rita Abraldes, *Growing Older: Challenges of Prison and Reentry for the Aging Population*, in *Public Health Behind Bars* at 56, 56 (Robert B. Greifinger ed., 2007), [https://www.researchgate.net/publication/226961323\\_Growing\\_Older\\_Challenges\\_of\\_Prison\\_and\\_Reentry\\_for\\_the\\_Aging\\_Population](https://www.researchgate.net/publication/226961323_Growing_Older_Challenges_of_Prison_and_Reentry_for_the_Aging_Population).

<sup>46</sup> See Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus “Incubators,”* NPR (Mar. 13, 2020), <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators>.

<sup>47</sup> See, e.g., Jennifer Gonnerman, *A Rikers Island Doctor Speaks Out to Save Her Elderly Patients from the Coronavirus*, *New Yorker* (Mar. 20, 2020), <https://www.newyorker.com/news/news-desk/a-rikers-island-doctor-speaks-out-to-save-her-elderly-patients-from-the-coronavirus> (“Whenever you transport a guy in custody to the hospital, he goes with not just E.M.S. but with officers at his side who are theoretically supposed to be cuffing him to transport him. It puts those officers at risk. We contribute to an overburdened health-care crisis at our affiliated hospital. And we see patients die in custody.”).

Finally, COVID-19 makes isolation, segregation, and lockdowns all but futile. COVID-19 can survive in the air, so separation will not contain it. Surfaces inside cells, in bathrooms, on phones, and in transport will still be touched. Contact with intake officers, kitchen staff, and medical personnel is inevitable. Meanwhile, solitary confinement causes severe, long-term brain damage, and resorting to solitary confinement (or an analogue—restrictive housing, 22- or 23-hour-a-day lockdowns) would replace one acute health threat with another.<sup>48</sup>

**C. If he were released, Mr. Watson would not be a danger to any individual or to the general public.**

In addition to the Motion for Stay of Sentence that this letter supports, Mr. Watson has submitted a compelling Motion for New Trial premised on a claim of actual innocence. But regardless of his innocence, as a 61-year-old man who has served almost four decades in prison for a conviction he incurred in his early twenties, Mr. Watson's demographic profile suggests he would not be a threat to anyone if he were released. Sentenced to life without parole for a robbery and murder he maintains he did not commit, Mr. Watson has already served decades of time in prison, has aged and matured, and does not pose a threat to public safety.

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<sup>48</sup> See, e.g., Dana G. Smith, *Neuroscientists Make a Case Against Solitary Confinement*, Sci. Am. (Nov. 9, 2018), <https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement>.

In their book *The Meaning of Life: The Case for Abolishing Life Sentences*, Marc Mauer and Ashley Nellis of The Sentencing Project detail how long-term and life sentences produce declining impacts on crime as people age out of criminal behavior, while correctional costs increase as this population ages.<sup>49</sup> Research is clear that, as a general matter, as people grow older they age out of crime.<sup>50</sup> Further, empirical analysis demonstrates that people convicted of violent and sexual offenses are among the least likely to be rearrested.<sup>51</sup> In fact, no matter how recidivism is measured—rearrest for a new crime, re-incarceration, or a new sentence of imprisonment—“people convicted of violent offenses have the lowest recidivism rates by each of these measures.”<sup>52</sup>

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<sup>49</sup> Marc Mauer & Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (2018).

<sup>50</sup> See generally Jeffrey T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality* at 377, 380–81, 391–92 (Kevin M. Beaver et al. eds., 2014), [https://www.sagepub.com/sites/default/files/upm-binaries/60294\\_Chapter\\_23.pdf](https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf).

<sup>51</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol’y Initiative (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (“[P]eople convicted of any violent offense are less likely to be rearrested in the years after release than those convicted of property, drug, or public order offenses.”).

<sup>52</sup> *Id.* (citing Matthew R. Durose et al., U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* at 15 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf#page=15>).

Paroled lifers, in particular, “have very low recidivism rates, like other older people released from prison after serving long sentences even for serious or violent offenses.”<sup>53</sup> Empirical research in California found that 860 lifers with murder convictions who were paroled between 1995 and 2011 had a “miniscule” recidivism rate for new crimes; less than 1% of these 860 released individuals were sentenced to jail or prison for new felonies, and none were sentenced for new life-term crimes.<sup>54</sup>

Against this evidence base, Mr. Watson’s demographic profile alone suggests he would not be a risk to the public if he were released on a stay of sentence. But additional protective factors also support this inference. First, as detailed above, Mr. Watson’s ailing health—severe arthritis in his knee, unmonitored diabetes managed only through diet, and undiagnosed but likely cancer—reduce any fleeting possibility of recidivism. Moreover, his lawyers report

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<sup>53</sup> Nazgol Ghandnoosh, *The Sentencing Project, Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences* 29, 29 n.9 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/01/Delaying-a-Second-Chance.pdf> (citing Nazghol Ghandnoosh, *Minimizing the Maximum: The Case for Shortening All Prison Sentences; Smart Decarceration: Achieving Criminal Justice Transformation in the 21st Century* (Matthew W. Epperson & Carrie Pettus-Davis eds., 2017)).

<sup>54</sup> *Id.* (citing Robert Weisberg et al., *Stanford Criminal Justice Ctr., Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* 17 (2011), [http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/164096/doc/slspublic/SCJC\\_report\\_Parole\\_Release\\_for\\_Lifers.pdf](http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/164096/doc/slspublic/SCJC_report_Parole_Release_for_Lifers.pdf)).

that Mr. Watson has strong family and community ties; has only ever received five disciplinary tickets over the course of his incarceration, and never for violence or drugs; and has spent his time while incarcerated involved in meaningful activities for self-improvement and contributions to the community. Mr. Watson would not be a risk to release to the community. Releasing Mr. Watson would promote public health and safety; keeping him detained would threaten it.

### CONCLUSION

The storm is no longer coming<sup>55</sup>—it is here.<sup>56</sup> Circumstances at MCI-Norfolk make prisoners like Mr. Watson especially likely to contract COVID-19, get sick from it, and die from it. Given Mr. Watson’s age and ailing health, keeping him “incarcerated under conditions posing a substantial risk of serious harm,” while government officials “fail[] to act despite [] knowledge of a substantial risk of serious harm” risks violating his human rights as well as his constitutional rights. *Farmer v. Brennan*, 511 U.S. 825, 834, 842 (1994) (citation omitted). As detailed above, the Massachusetts DOC simply cannot meet its obligations to

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<sup>55</sup> See Jan Ransom & Alan Feuer, ‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails, N.Y. Times (Mar. 21, 2020), <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>.

<sup>56</sup> Jeremy C. Fox, *Inmate at Massachusetts Treatment Center in Bridgewater dies from coronavirus*, Bos. Globe (Apr. 2, 2020), <https://www.bostonglobe.com/2020/04/03/nation/inmate-dies-covid-19-massachusetts-treatment-center-bridgewater>.

protect those imprisoned from contracting and transmitting COVID-19; indeed, they have already failed in multiple facilities, with new cases emerging in new places by the day. This will have profound consequences for Mr. Watson and the public. We urge his release.

Sincerely,

*Amici Curiae*

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April 3, 2020

## **CERTIFICATE OF SERVICE**

On April 3, 2020, I served a copy of this brief on all parties by email.

/s/ Katharine Naples-Mitchell

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