NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 20-00295

CARL LAROCQUE & others[1]

vs.

THOMAS TURCO[2] & others[3]

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

The Plaintiffs, Carl Larocque, Robert Silva-Prentice, Tamik Kirkland, the Massachusetts Association of Criminal Defense Lawyers ("MACDL"), and the Committee for Public Counsel Services ("CPCS") (the "Plaintiffs") filed this action in the aftermath of an attack on correction officials at the Souza-Baranowski Correctional Center ("SBCC"), which took place on January 10, 2020. They allege that the Defendants, Thomas Turco, Secretary of the Executive Office of Public Safety and Security; Carol A. Mici, Commissioner of the Massachusetts Department of Correction ("DOC"); and Stephen Kenneway, Superintendent of SBCC (the "Defendants"), violated their constitutional rights to counsel and access to the courts; the Massachusetts Civil Rights Act ("MCRA"); existing Department of Correction ("DOC") regulations; and the Administrative Procedure Act ("APA") when they deprived Plaintiffs Larocque, Silva-Prentice, and Kirkland (the "Plaintiff Inmates") of access to their legal material, to telephone calls with their attorneys, and to attorney contact visits following the attack.

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[1] Robert Silva-Prentice, Tamik Kirkland, the Massachusetts Association of Criminal Defense Lawyers, and the Committee for Public Counsel Services
[2] In his capacity as Secretary of the Executive Office of Public Safety and Security
[3] Carol A. Mici, in her capacity as Commissioner of the Massachusetts Department of Correction, and Stephen Kenneway, in his capacity as the Superintendent of Souza-Baranowski Correctional Center

Presently before the court is the Plaintiffs' Emergency Motion for a Preliminary Injunction seeking to permit SBCC inmates (1) to possess their legal paperwork in their assigned living quarters, in conformance with 103 Code Mass. Regs. § 403.10; (2) sufficient time out of their cells during business hours to make attorney phone calls; and (3) to have attorney contact visits. The court held an evidentiary hearing[4] on this matter on February 13 and 19, 2020. After careful consideration of the evidence, as well as the parties' submissions and arguments, and for the following reasons, the Plaintiffs' Emergency Motion for a Preliminary Injunction is **ALLOWED.**

FINDINGS OF FACT

SBCC is the state's only maximum-security prison. There are inmates at SBCC who are awaiting trial, inmates who have cases on direct appeal, and inmates who have pending post-conviction motions. There are over 700 inmates living at the prison, many of whom not only have criminal records of violent convictions but also have been found to possess drugs in the prison or committed violent acts while incarcerated. The prison is divided into the Northside and the Southside. Traditionally, the Northside is occupied by inmates who have been found to cause disciplinary problems within the institution, generally do not participate in programs, and, according to Superintendent Kenneway, are viewed by the staff as dangerous. The inmates housed on the Southside generally participate in programs and do not present institutional problems.

Efforts are generally made to keep known enemies from being housed together. There are many gangs, sometimes referred to as "Security Threat Groups" ("STG"), in the prison.

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[4] Although not required, an evidentiary hearing is often desirable at the preliminary injunction stage when material facts are contested. See *Riverdale Mills Corp.* v. *Cavatorta N. Am., Inc.*, 146 F. Supp. 3d 356, 360 (D. Mass. 2015). However, the evidentiary hearing was not consolidated with a trial on the merits. See Mass. R. Civ. P. 65(b)(2).

Because correction officials believe that it is important not to co-mingle STGs, efforts are made not to place Southside inmates on the Northside unless they cause disciplinary problems. A Northside inmate can earn a move to the Southside by participating in programs and being disciplinary report free.

January 10, 2020

On January 10, 2020, inmates on the Northside of SBCC seriously assaulted correction officers in a housing unit. Four officers were taken to the hospital for injuries. Two officers required hospitalization. One correction officer sustained head trauma and a broken nose; another correction officer sustained a broken jaw and broken vertebrae in his neck. At one point during the assault, inmates attempted to pull one correction officer into a cell before the officer broke free and got away. The prison was immediately placed in lockdown. Investigation by prison officials revealed that twenty-three inmates were involved in the assault and those men were quickly transferred out of the prison. DOC's investigation led Superintendent Kenneway to believe that many other inmates were involved in planning and continuing the assault upon officers. Multiple gangs were involved and intelligence revealed that there would be additional assaults upon staff, which included threats to rape, stab, or kill. None of the Plaintiff Inmates were involved in the incident. All three men were living in the Southside on January 10, 2020.

Lockdown

A lockdown is ordered when an event occurs within the prison that requires the entire prison to be shut down but does not require the assistance of outside personnel and can be handled internally. Lockdowns occur after instances of inmate insurrection, work stoppage, fire, power outage, or loss of other services. An emergency is declared and an announcement is broadcast in the institution. Every individual in the facility is returned to his cell. Lockdowns

are sometimes followed by institutional searches. The Superintendent is in charge of all operations, security, classification, and administration. It is the Superintendent who determines when a lockdown occurs. Since becoming Superintendent at SBCC in February 2019, Superintendent Kenneway has called for four lockdowns and four institutional searches. Once the facility is in lockdown, it remains until the Superintendent recommends to the Commissioner that the lockdown should be terminated. It is the Commissioner who determines when the lockdown ultimately ends.

Disorder Protocol

A disorder protocol is initiated when the institution realizes that it needs outside assistance in dealing with an emergency situation. The Disorder Management Policy used here is based on American Correctional Association guidelines. The goals of the disorder protocol are (1) isolation and containment; (2) stabilization; and (3) resolution.

Assistant Deputy Commissioner of Field Services Patrick DePalo testified that during the assault, it became clear that the situation was escalating and that external resources were needed. Commissioner Mici ultimately made the decision to begin the protocol. Superintendent Kenneway testified that the policy does not specify how long an institution should remain in lockdown. He also testified that there is nothing in the Disorder Management Policy about access to attorneys or inmate access to legal materials.

On January 10, 2020, correction officials determined that reclassification of all inmates was necessary. In order to facilitate the reclassification, a tactical team was organized. The team consisted of individuals from every correction facility who had applied to be a member of the team, passed an endurance test, and taken an additional forty hours of training a year. The team specializes in crowd control. The Special Operations Director served as the tactical team

commander. The tactical team has no policy concerning telephone use, no policy concerning legal materials, and no policy concerning attorney visits.

Also on January 10, 2020, when correction officials determined that there was a need to reclassify all inmates, it was contemplated that the entire plan would take one week. Inmates who were not going to programs and had disciplinary reports were sent to the Northside of the prison. Those inmates who were going to programming remained on the Southside. One hundred inmates were removed from SBCC and were relocated to medium security prisons.

All remaining inmates were locked in their cells on January 10, 2020. Three days later, for the first time since the lockdown began, some inmates were permitted to leave their cells to shower. Two correction officers would remove an inmate from his cell in handcuffs and walk him to the shower. The inmate was permitted to shower and was then handcuffed and walked back to his cell. The inmate was allowed out of his cell for a period of fifteen minutes. After the first shower, the three-day wait for a shower continued.

Inmates remained locked in their cells from January 10, 2020, until January 21, 2020. On January 21, 2020, it was determined that the tactical team would go into the prison with an "operational plan" that was in accordance with the disorder protocol. It was a concise plan, with no guesswork, and the goal was to successfully move inmates. The process to take one inmate from one cell and move him to another cell involved having two officers in every section of the prison and five officers at a time to move one inmate. A video camera was set up in every unit of the prison. DOC possesses between forty and fifty hours of this video footage from this time period.[5]

[5] Title 103 Dep't of Corr. § 560 contains the private Disorder Management Policy. Title 103 Dep't of Corr. § 561 governs planned institutional searches conducted by the tactical team. Title 103 Dep't of Corr. § 506 contains DOC's search policies, including removing inmates from cells.

January 21, 2020

On January 21, 2020, DOC began the process of moving the inmates. Correction officers and tactical team officers went to each cell and handed the inmate a T-shirt, pair of boxers, and shower slippers. Each inmate was strip-searched.

The tactical team officers all wore helmets bearing identification numbers. They carried Tasers that looked like firearms. These Tasers had a red laser beam that could be pointed at a target. The Tasers contained oleoresin capsicum ("OC") spray. Dogs were also brought into the cells. Two inmates were bitten by the dogs.

Each inmate was handcuffed and walked from the cellblock to the gym, wearing only the boxers, T-shirt, and shower slippers. Officials conducted body scans on all inmates. The inmates remained handcuffed and facing a wall while the tactical team officers pointed their laser guns at them and told them not to move or they would be shot. The uncontroverted testimony at the hearing was that the men remained standing, handcuffed, in the gym for two hours.
Each cell was searched. Each inmate's possessions, including legal paperwork, were placed in bags bearing the inmate's name and removed from the cell. The items were placed in the property room. Each bag was later searched.

The inmates, while handcuffed, were escorted to new cells. The court credits Plaintiff Silva-Prentice's testimony that he was placed in a cell in the security camera's blind spot. The person placed in the cell with him was of a different race. Shortly after arriving in the cell, several tactical team officers, dressed in army fatigue greens, carrying what appeared to be firearms, rushed into his cell. An altercation broke out in the cell and Plaintiff Silva-Prentice suffered burns from Tasers and several of his dreadlocks were pulled from his scalp.

The court also credits inmate Ricardo Arias's testimony that during the time the tactical team went through the cells, inmates were yelling that the officers did not have cameras, which they were supposed to have. Several inmates were beaten while their hands were cuffed behind their backs.

Telephone Service and Electronic Mail

Each block has eight telephones. Typically, inmates are allowed out of their cells twelve at a time. Six inmates are allowed on the tiers (hallways with cells) and six inmates on the recreation deck. Telephone calls are allowed during this time. During the lockdown, telephone service was suspended, starting on January 10, 2020. Inmates were not permitted to use the phones until January 24, 2020. Inmates are permitted to purchase tablets, which enable them to email their attorneys, family, and friends, all of whom must be identified to DOC.[6] For those inmates who do not have tablets, there is a kiosk on each housing flat with Internet access through CorrLinks.[7] Correction officers read the emails sent by the inmates. Additionally, emails sent to the inmates are not confidential and are read by correction officers. For this reason, many inmates do not communicate with their attorneys through email.

Moreover, emails sent from January 10 through January 25 on inmates' individual tablets were significantly delayed. Generally, emails are read by correction officers and sent out within a day. During the period of January 10 through January 25, some emails took more than a week to be sent out. Additionally, inmates were not permitted to use the kiosk for several days during this period.

[6] DOC must approve the inmate's proposed family and friends before the inmate can contact those people.
[7] CorrLinks is an electronic system that allows for family and friends to interact with an inmate while he is incarcerated.

Prior to the incident on January 10, 2020, Attorney Merritt Schnipper regularly communicated with his client, Plaintiff Kirkland via email, which Plaintiff Kirkland was able to access through his tablet. After the January 10, 2020 incident, all communication between the two was disrupted. Between January 8, 2020, when Attorney Schnipper last visited with Plaintiff Kirkland, and January 28, 2020, when counsel saw Plaintiff Kirkland in court, Attorney Schnipper emailed Plaintiff Kirkland three times with information regarding his case. Plaintiff Kirkland did not respond to any of those emails. On January 28, 2020, Plaintiff Kirkland was transported to the Hampden Superior Court and told Attorney Schnipper that all of his legal materials had been removed from his cell and he did not have access to it, nor did he have access to the law library.

Attorney Lisa Newman-Polk represents men serving life sentences who are seeking parole. She attested that regular communication through attorney visits and phone calls is the core of her work with clients. She has one client currently living in the Secure Treatment Program ("STP")[8] at SBCC. She had a phone call scheduled with her client on January 15, 2020, but he was not permitted to contact her because of the lockdown. When he was finally able to call her on January 27, 2020, he expressed distress that he had been unable to call her during the prior two and one half weeks.

Mail Service

If an inmate had a stamp, envelope, paper, and writing instruments in his cell during the lockdown, he was permitted to write a letter and the letter was picked up from his cell for mailing. If an inmate did not have a stamp, he could not buy one during the lockdown. In addition, if he did not have his legal materials with his attorney's address, he could not obtain

[8] The STP is a segregation tier in unit M3 on the top level of the prison.

counsel's address during the lockdown. The court credits the affidavits of criminal defense counsel representing inmates at SBCC that inmates experienced great difficulty in trying to send legal mail to their attorneys during the lockdown. The court also finds that inmates did not receive letters from their lawyers in a timely manner, sometimes ten days after the letter was posted.

Housing Status Changes

On February 3, 2020, inmates received a written document announcing the implementation of housing status changes for all inmates placed in housing units on the Northside. The document indicated that the changes would be implemented "effective Thursday, January 30, 2020." Prior to the January 10, 2020 incident, prisoners were strictly separated between the Northside and the Southside based on gang or neighborhood affiliations. Individuals from opposing sides were prohibited from interacting with each other because it was considered a safety risk. For this reason, all activities (with the rarest exception) were conducted separately between the two sides, including time spent in the chow hall or at programming, religious services, the gym, the yard, and the library. Visits with family were held on opposite days, and attorneys could only meet with clients in the contact visiting room on certain days if a prisoner from the opposite side had an attorney visit taking place. The separation of individuals on opposite sides was considered necessary for prisoner safety.

Northside Tier and Recreation Schedule

On February 13, 2020, Ronald Gardner, Director of Security at SBCC produced a memo to All Inmates regarding a Northside tier and recreation schedule. Inmates placed in Housing Units on the Northside of SBCC, effective that date, would be permitted tier and recreation access based on a schedule where up to six inmates would be permitted on the recreation deck at

a time and up to six inmates would be permitted on the tier at a time. When a scheduled recreation ends, all inmates would be secured in their assigned cells and the rotation would switch. The memo included a schedule of the times during February and March when inmates on each housing unit will be permitted time out onto the recreation deck and tier. This schedule will permit inmates to be able to coordinate phone calls, not only with attorneys but also with family.

Legal Paperwork

Title 103 Code Mass. Regs. § 403 has long permitted prisoners to have some personal items in their cells including, photographs, books, and a television. Title 103 Code Mass. Regs. § 403.10 (2)(c) permits inmates to possess one cubic foot of legal materials in their cell. Legal materials in excess of one cubic foot are kept in storage and inmates are allowed to make an exchange of legal materials upon request. There have been times where an inmate has requested more than the one cubic foot of materials and the Superintendent has allowed that request. During the lockdown and institutional search, every single item was removed from each cell and searched. These items included correspondence from counsel, transcripts of court proceedings, legal research, and any thoughts, questions, or concerns about an inmate's case that the inmate had written down. Many inmates, including the Plaintiff Inmates, are active participants in their pending cases. It is essential that they have access to their legal paperwork in order to prepare. Though represented by counsel, it is critical that the inmate be permitted to review trial transcripts, police reports, grand jury minutes, pleadings, and exhibits because, as stated by Mr. Arias, "nobody cares more about my case than I do."

Superintendent Kenneway testified that from January 10 until January 21, all legal materials had remained with the inmates. He testified that the property of inmates who were

transferred from the Northside to the Southside followed them. He testified that the inmates might have had to wait two to three days for their property to arrive, but by January 24, all legal materials had been returned to the Southside inmates. Superintendent Kenneway also testified that, by January 31, all legal materials had been returned to the Northside inmates. The court does not credit this testimony. The court credits the affidavits of counsel and exhibits one and four indicating that inmates still did not have their property until February 2, 4, 5, 6 and 9, as detailed below:

a. When Attorney Kathryn Karczewska Ohren visited her client, Plaintiff Silva-Prentice, on January 29 and February 2, in an effort to discuss his appeal, they were unable to do so because Plaintiff Silva-Prentice's legal materials had been confiscated and had not yet been returned. When the materials, including trial transcripts, were eventually returned, sometime between February 2 and February 6, they were unbound and in a jumbled and confused state.

b. Attorney Angela Lehman was told by her Northside client on February 3, 2020, that his paperwork had been taken and thrown into a messy pile along with an unknown number of other inmates' paperwork and had not been returned as of that date.

c. Attorney Libby Hugetz was told by her Northside client on February 3, 2020, that since his transfer to MCI-Shirley (due to injuries sustained at SBCC) his legal paperwork had not followed him.

d. Attorney Ira Alkalay reported that as of February 4, 2020, his Southside client had not received his legal paperwork or any personal mail since January 10, 2020.

e. Attorney Philip Weber reported that as of February 4, 2020, his client had not received his legal paperwork that had been taken from him on January 10, 2020.

f. Attorney Amy Belcher indicated that when she met with her Northside client on February 5, 2020, he told her that none of his legal paperwork that was removed from his cell on January 10, 2020 had been returned to him.

g. Attorney Elizabeth Doherty reported that as of February 6, 2020, her former Southside client, who had been moved to the Northside as a result of a disciplinary report, had not received any of his legal paperwork or personal property that was taken from his cell following the January 10, 2020 incident.

h. Attorney Ira Gant reported that when he met with his client on February 6, 2020, the inmate reported that he had not been permitted access to any of his legal paperwork since the January 10, 2020 incident.

i. Attorney Lisa Newman-Polk reports that as of February 7, 2020, her client, who resides in the STP, had not received his personal property, including his legal paperwork.

j. Attorney Katherine Essington reports that when she visited her client, Donte Henley, on February 9, 2020, his personal property and legal materials, which include his trial transcripts, had not yet been returned to him.

k. Attorney Ann Grant, counsel for Mahamadou Kante, who resides in South Restricted Housing Unit, reported that he had not received his legal material as of February 8, 2020.

The court credits the testimony of Plaintiff Silva-Prentice that he took notes during the hearing on the instant motion on February 13, 2020, and that those notes were confiscated from

him when he returned to the prison that night from court. His notes were returned to him on the evening of February 18, the night prior to his testimony in support of the instant request for a preliminary injunction, which did not give him adequate time to prepare. This court also credits the testimony of Mr. Arias that he was moved from the Southside to the Northside on January 24 and that his paperwork did not accompany him. On Friday, February 14, he received some of his trial transcripts, but much of his paperwork was missing. He did not receive the list of cases that his lawyer had sent him, which she told him he might find helpful to his case. Mr. Arias actively participates in his appeal, usually going to the law library every Wednesday and working on his case. When some of his legal paperwork was delivered to him, the correction officer told him that since the instant lawsuit commenced, they were trying to get everyone their paperwork.

Attorney Visits

Attorney visits were suspended during the disorder protocol beginning on January 10. On or about January 16, 2020, Commissioner Mici spoke with Prison Legal Services attorney, James Pingeon, and informed him that attorney visits were temporarily suspended due to the January 10 staff assaults. Commissioner Mici informed Attorney Pingeon that she anticipated that attorney visits would be suspended through the end of that week. On January 17, 2020, SBCC began to permit some attorney visits and counsel for MACDL was informed that attorney visits had been reinstated. Superintendent Kenneway stated that on January 22, 2020, attorney visits were fully reinstated. However, testimony and exhibits entered into evidence at the hearing indicates that inmates continued to be denied meaningful access to counsel beyond this date.

There are three attorney visiting rooms at SBCC. These rooms are private and permit counsel and the inmate to speak freely, review documents and filings, and when permitted by

regulation, exchange materials. SBCC also has a noncontact visitation area. When the three attorney visiting rooms are full and a fourth attorney arrives, he or she can use the noncontact room or elect to wait for one of the three attorneys to leave the attorney visiting room.

The noncontact visit occurs in an area that has been described as "cubbies," where ten to fifteen attorneys or family members sit behind a table on one side of a Plexiglass panel, while the inmate sits on the other side of the panel and behind a second table. There is no privacy. One can hear the person sitting next to her. The lawyer has to speak through an oval grate in the glass in order for her client to hear her. The attorney is unable to effectively review materials with her client because she cannot pass a paper through the window; rather, she merely can hold it up to the glass for the inmate to see.

CPCS assigns lawyers to represent indigent defendants in criminal cases. Attorneys who accept court-appointed cases must follow CPCS standards, which include timely visits with clients who are in custody and working closely with them in the preparation of their case. During the lockdown, many lawyers were prohibited from having private, contact visits where they could discuss the progress of their client's case and where they could show the inmate the work they had done on his behalf.

Attorneys were denied contact visits on January 30, 31, February 4, 6, as detailed below:

a. Attorney David Rangaviz was only permitted a noncontact visit with his Northside client on Thursday, January 30, 2020.

b. Attorney Donald Frank was only permitted a noncontact visit with his Northside client on January 31, 2020.

c. Attorney Lipou Laliemthavisay was only permitted a noncontact visit with her Northside client on Friday, January 31, 2020.

d. Attorney Chauncey Wood was told that he could only have a noncontact visit with his Northside client on February 4, 2020, because it was a Southside visit day. It did not appear to Attorney Wood that there were any Southside contact visits taking place at the time. Attorney Woods's client had only recently been moved from Southside to Northside and the move was not precipitated by any known enemies on the Southside or for a disciplinary infraction.

e. Attorney Ira Alkalay was only permitted a noncontact visit with his Southside client on February 4, 2020.

f. Attorney Philip Weber was only permitted a noncontact visit with his client on February 4, 2020.

g. Attorney Elizabeth Doherty reported that when she met with her Northside client on February 6, 2020, she was told that she could only have a noncontact visit despite the fact that she called earlier that morning to confirm that she would be able to have a contact visit. She was also told that contact restrictions only applied from 1 p.m. to 4 p.m.

h. Attorney Ira Gant was permitted only a noncontact visit with his Southside client on February 6, 2020.

i. On January 15, 2020, Attorney Catherine Essington attempted to visit clients at SBCC and was turned away at the door. The officer behind the window told her that there would be no attorney visits until the following week. On January 28, 2020, before going to the prison, Attorney Essington called and was informed that she could have contact visits with her clients because they were residing on the Southside. When she arrived, she was told by the correction officer behind the

desk that she could only have noncontact visits. Ultimately, she was able to persuade that officer to allow her to have contact visits after telling the officer that she had called ahead and had been assured of a contact visit.

j. When Attorney Kathryn Karczewska Ohren called the Superintendent's office on January 14, 2020, to arrange a visit, she was told that there would be no counsel visits for one week per order of the Commissioner. On January 21, 2020, Attorney Ohren called the prison and requested to see Plaintiff Silva-Prentice. She was told that all attorney visits were canceled until at least January 25, 2020, without exception. Attorney Ohren was advised to call the prison before arriving on January 25 to assure that entry would be permitted. On January 29 and February 2, she was able to meet with her client, though he did not have his legal materials.

Attorney Lisa Newman-Polk is a licensed social worker and worked as a mental health clinician at SBCC from 2013 to 2014. She currently represents an inmate assigned to her by CPCS who is housed in the STP and who is not alleged to have played any role in the January 10, 2020 incident. Attorney Newman-Polk reports that though the law prohibits DOC from subjecting individuals with serious mental illnesses to solitary confinement conditions, the prisoners in the STP were subjected to lockdown for most of the time between January 10 and January 26, 2020. Her client informed her that no prisoner in the unit had phone access to call lawyers or loved ones, as well as no access to the canteen, to email, or to sick slips. The STP typically conducts twelve to thirteen sessions of group therapy per week. Her client reported that during the lockdown, there were only four therapy groups. Her client also reported that he was not permitted to shower for six days from January 13 to January 18, 2020, and that none of the

men had been permitted outside on the recreation deck. Her client reported that since January 10, 2020, there have been at least eight incidents of self-injurious behavior by individuals in the unit, with at least one resulting in hospitalization.

CPCS performance standards require counsel to visit with clients at least once a month. Because of the lockdown, Attorney Newman-Polk was not able to see her client in the STP on or around January 17, 2020, which marked one month since her prior visit. Additionally, she and her client had a phone call scheduled for January 15, 2020, that was canceled because of the lockdown. She was able to visit with her client on January 28, 2020. Attorney Newman-Polk's client did not have his legal material during this visit. As a result, there were legal issues regarding his case from fifteen years ago that he is not able to provide to his attorney.

Attorney Ohren avers that as a result of significant delay in permitting counsel to visit her client and returning Plaintiff Silva-Prentice his legal documents, filing his appeal has been indefinitely delayed.

Attorney Essington avers that she will have to seek an enlargement of time for Mr. Henley's reply brief until his legal materials are returned to him because he cannot meaningfully participate in the process of drafting a reply brief without his legal materials.

Attorney Schnipper avers that as a result of his inability to communicate with Plaintiff Kirkland, he was unable to prepare additional arguments regarding his appeal that he wished to pursue. This communication barrier has caused delay in Attorney Schnipper's ability to pursue all legal arguments necessary for Plaintiff Kirkland's appeal and challenge to his conviction.

Counsel for DOC introduced into evidence the docket sheets for pending appeals indicating that deadlines had not yet expired for filing pleadings. The court notes, however, that any delay in an appellant's ability to work with his counsel could jeopardize the ability to file a

motion in a timely manner. For example, even though Mr. Arias's deadline for filing his direct appeal and new trial motion had been extended several times, motions for new trial, particularly in homicide cases, involve a great deal of investigation, discovery, and preparation.

Attorney Lisa Kavanaugh, Director of the Innocence Project for CPCS, testified that she recently visited a client at SBCC who was actively involved in his pending litigation. She was unable to have a contact visit with him. There were hundreds of pages of documents she wanted to review with him during this visit. Because she was not permitted a contact visit, she held the paperwork up against the Plexiglass and spoke to her client though the grate in the window. She later found out that there were Inner Perimeter Security officers sitting a few feet away from her client and they could hear everything he said to her.

Attorney Kavanaugh testified that her client had been unable to call her during the lockdown. During the pendency of the hearing on the instant motion, Attorney Kavanaugh learned that the District Attorney's office had agreed to her motion for a new trial for her SBCC client. She testified that she was unable to inform her client of that information until February 13, 2020, because he did not have access to her.

In their Verified Complaint, the Plaintiffs allege that when Northside inmates inquired about the basis for the collective punishment on all inmates collectively, the correction officer responded that it was retribution for the January 10, 2020 attack. As one correction officer explained it, "[i]f you put hands on an officer, you will all pay." Ver. Compl. par. 6. Further facts are reserved for the Discussion section below.

RULINGS OF LAW

I. *Standard of Review*

A preliminary injunction is warranted when the moving party establishes: (1) a likelihood of success on the merits of the claim; (2) that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm; and (3) that the harm to the moving party outweighs any harm the opposing party would suffer if the injunction entered. See *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 617 (1980). In preliminary injunction proceedings involving public entities, the court must look to whether the "requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Commonwealth* v. *Mass. CRINC*, 392 Mass. 79, 89 (1984).

"[T]he significant remedy of a preliminary injunction should not be granted unless the plaintiffs have made a clear showing of entitlement thereto." *Student No. 9* v. *Board of Educ.*, 440 Mass. 752, 762 (2004). "Trial judges have broad discretion to grant or deny injunctive relief." *Lightlab Imaging, Inc.* v. *Axsun Techs., Inc.*, 469 Mass. 181, 194 (2014).

II. *Analysis*

a. *Mootness*[9]

As a threshold matter, the court must determine whether the issues raised in the complaint are moot. The Defendants argue that the issues raised by the Plaintiffs are moot, and the Plaintiffs' motion for the preliminary injunction should be denied, because the named Plaintiff Inmates and all SBCC inmates are in possession of and have access to their legal materials, have telephone access for calling their attorneys, and have attorney contact visits. The

[9] The Defendants did not raise the issue of standing in opposition to the instant motion. However, the court notes that they did reserve the right to challenge MACDL's standing to bring the instant motion and the underlying complaint.

Plaintiffs disagree, arguing that the instant issues are not moot because the challenged conduct could reasonably be expected to recur. The court concludes that the issues raised by the Plaintiffs are not moot.

In establishing the mootness of the Plaintiffs' claims, the "[D]efendant[s] bear[] a heavy burden of showing that there is no reasonable expectation that the wrong will be repeated." *Wolf* v. *Commissioner of Pub. Welfare*, 367 Mass. 293, 299 (1975). See also *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (defendant's "voluntary cessation" of allegedly wrongful conduct does not render claim moot unless "absolutely clear" that challenged conduct "could not reasonably be expected to recur"). Here, while the affected inmates, including the Plaintiff Inmates, are no longer subject to the restrictions applied during the lockdown and disorder protocol following the January 10, 2020 attack, they remain incarcerated and subject to reapplication of such restrictions at any time. See *Cantell* v. *Commissioner of Corr.*, 475 Mass. 745, 754 n.17 (2016) (prisoners' complaints regarding conditions in special management unit not mooted by transfer out of unit because they remained incarcerated and therefore risked return to unit). Significantly, Superintendent Kenneway attested that "[t]here are numerous types of disorders that trigger DOC's Disorder protocol," and "[i]t is entirely possible that a new Disorder could arise which would lead to temporary restrictions." Kenneway Aff. pars. 7, 44. Further, he testified that "[t]his could happen at any time, this could happen any time in the future." As the restrictions raised by the Plaintiffs could reasonably be repeated at any time, the Plaintiffs' claims are not moot.

b. *Likelihood of Success on the Merits*

i. *Violation of Constitutional Rights to Assistance of Counsel and Access to the Courts*

The Plaintiffs argue that they have a likelihood of success on the merits of their claim that the restrictions the Defendants imposed as a result of the implementation of the disorder protocol—depriving the inmates of their telephone access, access to their legal material, and their attorney contact visits—violated their Federal and State constitutional rights to counsel and access to the courts under the Sixth and Fourteenth Amendments to the United States Constitution and Article XII of the Massachusetts Declaration of Rights. The court concludes that the Plaintiffs have established a likelihood of success on the merits of this claim.

The right to assistance of counsel is a fundamental constitutional right.[10] See *Commonwealth* v. *Means,* 454 Mass. 81, 88 (2009) (Sixth Amendment to United States Constitution and Article XII of Massachusetts Declaration of Rights guarantee right to assistance of counsel). In addition, prisoners possess a constitutional right of access to the courts, which requires prison authorities to assist inmates in the preparation and filing of legal papers by providing prisoners with adequate law libraries and adequate assistance from persons trained in the law. *Bounds* v. *Smith*, 430 U.S. 817, 828 (1977), abrogated on other grounds by *Lewis* v. *Casey*, 518 U.S. 343, 354 (1996) (disclaiming statements in *Bounds* suggesting state must enable prisoner to discover grievances and to litigate effectively once in court).

Prison inmates retain constitutional rights while incarcerated. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner* v. *Safley,*

[10] The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Article XII of the Declaration of Rights of the Massachusetts Constitution provides in pertinent part: "[E]very subject shall have a right to . . . be fully heard in his defense by himself, or his council at his election. . . ."

482 U.S. 78, 84 (1987). Because inmates retain constitutional rights, when a prison regulation or practice offends a fundamental constitutional guarantee, courts will discharge their duty to protect constitutional rights. See *id.*

However, the Supreme Court has recognized, and this court acknowledges, that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell* v. *Wolfish*, 441 U.S. 520, 546-547 (1979). For this reason, "[p]rison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547. See *Hoffer* v. *Commissioner of Corr.*, 397 Mass. 152, 155 (1986) (commissioner has substantial obligations to maintain security, safety, and order at state correctional facilities).

Accordingly, a prison regulation impinging on inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. To determine whether a prison directive impinges upon inmates' constitutional rights, the court considers four factors: (1) is there a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether "ready alternatives" to the regulation exist such that the regulation may constitute "exaggerated response." *Id.* at 89-90 (internal quotation marks omitted).

Here, the Plaintiffs argue that the restrictions at issue, applied during the lockdown and disorder protocol and not pursuant to any written regulation, were unconstitutional. The penological interest advanced here to justify the implementation of the restrictions at issue is that such implementation allowed correction officials to carry out the disorder protocol, pursuant to the Disorder Management Policy, following the January 10, 2020 attack.[11] However, the evidence suggests that there is no valid, rational connection between that legitimate penological interest described above and the blanket, prolonged restriction on the inmates' means of communicating with their attorneys about their cases, especially where the inmates who suffered the restrictions were not those who were involved in the attack. While Superintendent Kenneway testified that he had credible information about additional planned attacks, the restrictions at issue, coupled with severely limited mail and email access, effectively eliminated all means of communication between an inmate and his attorney. These restrictions sweep much more broadly than can be justified by the Defendants' penological objectives. See *Turner*, 482 U.S. at 90, 97-98 (regulation restricting inmate marriage swept much more broadly than could be explained by petitioners' penological objectives). See also Ver. Compl. par. 6 ("[i]f you put hands on an officer, you will all pay.").

In addition, during the time period at issue, the inmates had no available, alternative means of exercising their rights because all of their means of accessing counsel and the courts were restricted. Attorney phone calls were suspended on January 10, 2020. Attorney Newman-Polk attested that her client was not able to call her until January 27, 2020. Attorney visits were also suspended on January 10, 2020. Attorneys were denied contact visits as late as February 6,

[11] Superintendent Kenneway testified that there is nothing in the Disorder Management Policy itself about access to attorneys or inmate access to legal materials. The evidence also demonstrates that the tactical team, which carried out the disorder protocol, had no policy concerning telephone use, no policy concerning legal materials, and no policy concerning attorney visits.

2020. Removal of inmates' legal materials occurred January 21, 2020, at the latest, and in many cases, as early as January 10, and the materials were not returned to some inmates until February 9, 2020, or later. In addition, the materials, including previously bound trial transcripts, were returned in jumbled, confused states, such that they were not meaningfully useable. Moreover, the evidence suggests that mail and email access also were severely limited.

With regard to the impact on prison guards and inmates, as well as on prison resources, the evidence suggests that avoiding the wholesale restriction on all means of communication between inmates and counsel during a lockdown and disorder protocol would not be a hardship. SBCC already makes these accommodations when the prison is not in lockdown. Moreover, while the court recognizes that during a lockdown, prison staff and resources are focused on restoring order and maintaining safety, providing some means of communication between inmates and their attorneys—during a time when the need for such communication is arguably greatest—could reasonably be accommodated.

Further, the implementation of the restrictions at issue represents an exaggerated response to the serious security concerns here. While the court recognizes that during the lockdown and the execution of the disorder protocol restrictions were warranted to aid in the restoration of order, the restriction on effectively all means of confidential and meaningful communication between inmates and their attorneys for more than a week—and for some inmates, almost a month—suggests that ready alternatives existed here. For these reasons, the court concludes that the restrictions at issue were not reasonably related to the legitimate penological interest of ensuring safety and order following the attack; rather, they represent an exaggerated response to that important interest.

Notwithstanding, the Defendants contend that the Plaintiffs do not have a likelihood of success on their violation of meaningful access to the courts claim because they have not alleged actual injury. To make out such a claim, the Plaintiffs must establish that they suffered "actual injury," meaning that the restrictions at issue frustrated or impeded their efforts to pursue a nonfrivolous legal claim attacking their sentences, directly or collaterally, or challenging the conditions of their confinement. See *Lewis*, 518 U.S. at 349-355. See also *Puleio* v. *Commissioner of Corr.*, 52 Mass. App. Ct. 302, 311 (2001) (to establish meaningful access to the courts claim, plaintiff required to demonstrate that temporary inconvenience of lack of access to his legal files prevented or hindered his ability to make nonfrivolous legal claim). "The actual injury that must be established by an inmate is that an actionable claim involving a challenge to a sentence or to conditions of confinement has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided." *Jiles* v. *Department of Corr.*, 55 Mass. App. Ct. 658, 662 (2002), quoting *Lewis*, 518 U.S. at 356 (internal quotation marks omitted).

Here, the evidence suggests that the restrictions at issue prevented or hindered the presentation of several inmates' nonfrivolous legal claims, namely, the direct appeal of their convictions and postconviction motions. See *Lewis*, 518 U.S. at 354 (noting access-to-courts cases analyzed by Court in *Bounds* involved attempts by inmates to pursue direct appeals from convictions for which they were incarcerated). The evidence suggests that Plaintiff Kirkland was unable to prepare additional arguments regarding the appeal he wished to pursue because he lacked access to his legal materials.

Plaintiff Silva-Prentice could not discuss his appeal with Attorney Ohren because he did not have his legal materials, which indefinitely delayed his appeal. When his legal materials

were returned to him, they were so jumbled that Attorney Ohren was unsure if they remained useable. Additionally, the delay of his direct appeal of his conviction could result in his spending "dead time" in prison if such appeal is ultimately successful. Such "dead time" in Plaintiff Silva-Prentice's life cannot be replaced.

Additionally, the Commonwealth's brief in Mr. Henley's appeal was due on February 13, 2020, and the Appeals Court indicated that there would be no additional enlargements of time for the Commonwealth. Attorney Essington intended to seek an enlargement of time to file Mr. Henley's reply brief because he cannot meaningfully participate in the process of drafting his reply brief without his legal materials.

While the evidence shows that inmates were still transported to court dates during the lockdown and that Plaintiff Kirkland was provided with his legal materials just prior to a hearing related to the appeal of his conviction, simply placing legal paperwork into a handcuffed inmate's hands as he heads to court in shackles in a transportation van does not constitute meaningful access. See *Bounds*, 430 U.S. at 828 ("the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

An inmate's communication with his attorney, whether it be via phone, in meetings, or, particularly, with the aid of access to legal materials, is of paramount importance to his right to meaningful access to the courts. Indeed, it is difficult to imagine a more crucial right for an inmate, particularly following a prolonged lockdown as described here, where the inmate played no role in the reason for the lockdown.

The Defendants also argued that Attorney Kavanaugh's testimony that the District Attorney's office had agreed to her motion for a new trial for her SBCC client, during a period where he was denied access to her, showed that she did not need her client's input to win the motion and therefore the client was not prejudiced by the restrictions at issue. The court concludes otherwise. Though undoubtedly Attorney Kavanaugh is an excellent advocate and may or may not have needed her client's input, he had a constitutional right to participate in his defense. The fact that there was a delay in relaying to her client that he was about to be released from prison after being incarcerated for forty-five years is perhaps the ultimate violation of the rights to assistance of counsel and meaningful access to the courts. For these reasons, the court concludes that the Plaintiffs have a likelihood of success on the merits of their constitutional claims.

ii. *Violation of the Massachusetts Civil Rights Act*

The Plaintiffs claim that the Defendants violated their rights pursuant to the MCRA, G. L. c. 12, §§ 11H-11I. Neither party specifically addressed this claim in its brief. Nonetheless, the court concludes that the Plaintiffs have a likelihood of success on the merits of this claim based on the above analysis regarding the constitutional claims and for the additional reasons that follow.

The core of the Plaintiffs' MCRA claim is that the Defendants interfered with the Plaintiffs' constitutional rights to assistance of counsel and meaningful access to the courts. To prove such a claim under the MCRA, the Plaintiffs must establish "(1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Currier* v. *National Bd. of Med. Exam'rs*, 462 Mass. 1, 12 (2012). See *Jiles*, 55 Mass. App. Ct. at 664-665

(plaintiff inmate's MCRA claim lacked essential element of interference with exercise or enjoyment of constitutional rights effectuated through threat, intimidation, or coercion).

For the reasons previously stated, the court concludes that the Plaintiffs have demonstrated a likelihood of satisfying the first and second prongs of the MCRA analysis, *i.e.*, that the Defendants interfered with their constitutionally-guaranteed rights to assistance of counsel and meaningful access to the courts.

The court then turns to the third prong of the analysis: whether this interference was effectuated by threats, intimidation, or coercion. "[A] 'threat' consists of 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm'; 'intimidation' involves 'putting in fear for the purpose of compelling or deterring conduct'; and 'coercion' is 'the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.'" *Glovsky* v. *Roche Bros. Supermarkets, Inc.*, 469 Mass. 752, 763 (2014), quoting *Haufler* v. *Zotos*, 446 Mass. 489, 505 (2006). Here, the record supports the conclusion that the Plaintiffs likely will be able to satisfy this third prong of the MCRA analysis.

The evidence suggests that during the institutional search, the tactical team seized all property from the inmate's cells, including their legal material and put them in bags. While doing so, they handcuffed the inmates, pointed Tasers at them, and told them that if they did not cooperate, they would be shot. Specifically, Plaintiff Silva-Prentice suffered Taser burns and several of his dreadlocks were pulled from his scalp. There was also testimony that once noncontact attorney visits resumed, Inner Perimeter Security officers were seated a few feet away from the inmates and could hear the conversations between the attorneys and the inmates.

For these reasons, the court concludes that the Plaintiffs have a likelihood of success on the merits of their MCRA claim.[12]

c. *Irreparable Harm*

The Plaintiffs argue that the restrictions at issue have caused them to suffer irreparable harm in the form of the deprivation of their constitutional rights to assistance of counsel and access to the courts and that they will continue to suffer such harm if the Defendants are not enjoined. The Defendants contend that the Plaintiffs have failed to establish a real and immediate threat of irreparable harm because the restrictions at issue have been restored. They also argue that granting the instant request for a preliminary injunction is not in the public interest because prison administrators enjoy wide-ranging deference in the adoption and execution of policies and practices needed to preserve order and maintain institutional security, particularly at SBCC, the state's only maximum security facility.

As noted above, on one hand, prison walls do not form a barrier separating inmates from the protections of the Constitution. See *Turner*, 482 U.S. at 84. On the other hand, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources," such that correction officials should be afforded appropriate deference. *Id.* at 84-85.

On balance, any harm that the Defendants will suffer as a result of the granting of the preliminary injunction does not exceed that which the Plaintiffs will suffer by being denied their constitutional rights. See *Means*, 454 Mass. at 88-89 ("Because the right to the assistance of

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[12] The Plaintiffs also argue that they have a likelihood of success on the merits on their claims that the Defendants, by imposing the restrictions at issue, violated Massachusetts law and their own regulations and created new, unwritten regulations in violation of the APA. The court need not reach these alternative arguments because it concludes that the Plaintiffs have satisfied their burden with respect to some of their claims, and they seek the same injunctive relief at this juncture for each of their claims.

counsel is essential to individual liberty and security, and to a fair trial, its erroneous denial can never be treated as harmless error."). Cf. *T & D Video, Inc.* v. *Revere*, 423 Mass. 577, 582-583 (1996) (harm suffered by denial of First Amendment right to open adult entertainment video store outweighed harm to city resulting from location of another such store in its borders). See also *Romero Feliciano* v. *Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir. 1987) (loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury). Significantly, the restrictions at issue were imposed well beyond one week and some restrictions continued to be applied even after the lockdown was lifted.

The court recognizes the wide-ranging deference it must accord the Defendants with regard to its administration of SBCC and, particularly, the important interest of ensuring the safety of SBCC staff and inmates. See *Bell*, 441 U.S. at 547. Specifically, the court acknowledges the policies that have been implemented since the initiation of the instant litigation, such as a February 13, 2020 policy providing for a revised Northside Tier and Recreation Schedule. Ex. 7. Granting the requested preliminary injunction likely will interfere with the Defendants' ability to run SBCC in the manner they deem appropriate. This is particularly so where there is a possibility that the Defendants may deem another lockdown necessary in the future, given the credible intelligence that security concerns may persist and the fact that SBCC is a maximum security prison.

However, when the court, in its discretion, balances this harm against the harm of the violation of the Plaintiffs' constitutional rights, in light of their likelihood of success on the merits, the balance of these harms tips in the Plaintiffs' favor. This conclusion is especially true where the Plaintiff Inmates, as well as many other inmates subjected to the restrictions at issue, were determined not to be involved in the January 10, 2020 attack and nonetheless were denied

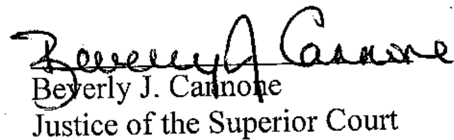
effectively all access to their counsel and legal materials for an extended period of time. Moreover, while the Defendants contend that the restrictions are presently lifted, the evidence demonstrates that they could be imposed again "at any time." Where the Defendants' implementation of the restrictions at issue here offends a fundamental constitutional guarantee, the court will discharge its duty to protect those constitutional rights. See *Turner*, 482 U.S. at 84. It is unnecessary to further dehumanize an inmate during a time of crisis. See also Board of Editors, "Videoconferencing Plan Needs a Second Look," 49 Mass. Lawyers Weekly 8, Feb. 24, 2020, at 38 ("Being a criminal defendant is a dehumanizing experience. The workings of the criminal justice system already strip away much of the dignity of these people. Limiting their ability to have meaningful participation in their defense and preventing any true human interaction with their attorneys . . . only exacerbates that dehumanization.").

Because the instant proceeding involves a public entity, the court must also look to whether the "requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Mass. CRINC*, 392 Mass. at 89. The Defendants argue that granting the relief sought here is against the public interest because it would interfere with the extremely difficult task of running a prison, such that public safety would be harmed. The requested equitable relief likely will interfere with the Defendants' administration of SBCC, which could raise public safety concerns. However, the court concludes that the requested preliminary injunction promotes the public interest. Indeed, the court can think of no greater public interest than the protection of individuals' sacred constitutional rights. See *Means*, 454 Mass. at 88-89 (individual's constitutional right to be represented by counsel is fundamental component of criminal justice system and essential to individual liberty and security). Accordingly, the Plaintiffs' request for a preliminary injunction is **ALLOWED**.

ORDER

It is therefore **ORDERED** that the Plaintiffs' Emergency Motion for a Preliminary Injunction be **ALLOWED**. The court further **ORDERS** as follows:

1. The Defendants must return to each inmate their legal materials within forty-eight (48) hours of this Order. Inmates shall be allowed to possess their legal materials in their assigned living quarters in conformance with 103 Code Mass. Regs. § 403.10 (2)(c);
2. The Defendants must reinstate attorney contact visits within forty-eight (48) hours of this Order;
3. The Defendants must allow inmates sufficient time outside their assigned living quarters during business hours (9:00 a.m. and 5:00 p.m.) on business days to make attorney phone calls;
4. The Defendants shall notify CPCS immediately when a lockdown that will impede attorney-client communication occurs.



Beverly J. Cannone
Justice of the Superior Court

DATED: February 28, 2020