**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss BOSTON MUNICIPAL COURT**

**WEST ROXBURY DIVISION**

**Docket No:**

**Matter of Your Client**

**MOTION FOR FINDINGS AND MEMORANDUM OF LAW IN SUPPORT**

Now comes the Respondent, your client, through counsel, and asks this Honorable Court to hold Petitioner to its burden of proving, beyond a reasonable doubt, the two additional required elements for civil commitments established through the supervisory powers of the Supreme Judicial Court in *Foster v. Comm'r of Correction*, 484 Mass. 698 (2020) ("*Foster I")* for the duration of the COVID-19 pandemic*.* Should this Honorable Court order Respondent committed, Respondent asks this Court to issue written findings substantiating that Order consistent with the two additional elements established by the Supreme Judicial Court in *Foster I.*  See *In the Matter of a Minor*, SJC-12747, S.C.J. March 17, 2020 at 21; *Brangan v. Commonwealth* 477 Mass. 691, 708 (2017).

The language of the Court’s ruling in *Foster I* is mandatory: “Going forward, a judge *shall not commit* an individual…” without making the two additional findings.

First, the trial court must assess the risk of harm in the community versus the risk of transmission of COVID-19 in the facility. *Foster, supra* at \*21.

Second, the judge "must find that commitment is necessary notwithstanding the treatment limitations imposed by quarantine protocols." *Id.*

1. **INTRODUCTION**

In three recent decisions, the Supreme Judicial Court has recognized the significant risk to health and life posed by the coronavirus and ordered enhanced court review procedures to reduce the spread of the virus and minimize the risk of illness and death to those confined in congregate settings. In *Christie v. Commonwealth*, 484 Mass. 397 (2020), the Court found that the virus can cause "severe complications, such as pneumonia in both lungs, multi-organ failure, and in some cases death" and “is a particular risk to older adults and to individuals with underlying health conditions, such as cardiovascular disease, diabetes, and chronic respiratory disease." 484 Mass at 399.

Given this “unprecedented and urgent” threat, the SJC subsequently held that “a reduction in the number of people in custody is necessary” *CPCS v. Chief Justice of the Trial* *Court,* 484 Mass. 431, 445 (2020) and that due to the inherent risks of the COVID-19 pandemic and the changed circumstances the disease presents, any qualifying individual is entitled to a "rebuttable presumption of release." *CPCS v. Chief Justice*, 484 Mass. at 435. During these "extraordinary times," a judge must now consider not only the danger to the community if the defendant is released, but also the “health risk *to the defendant* if the defendant were to remain in custody.” Christie, 484 Mass. 397 at 401–02 (Emphasis added).

Most recently, the Court held in *Foster v. Comm'r of Correction*, 484 Mass. 698 (2020) ("*Foster I")* that for people subject to civil commitment for alcohol or substance use disorder under G.L. c. 123, § 35, the increased health risks in congregate settings and limitations on treatment required trial courts to make two additional findings before ordering commitment under section 35. 484 Mass. at \*21. It further held that individuals currently committed would be entitled to a re-hearing, since their orders of commitment may have been made “without consideration of the crisis currently ravaging the planet.” *Id.*  For the reasons set out in more detail below, this decision is applicable to the Respondent’s current commitment order and entitles the Respondent to a rehearing on that commitment.

1. **THE SJC’S RULING IN *FOSTER I***

Following a discussion of federal and state constitutional due process claims on which the detained plaintiffs were denied preliminary injunctive relief on the record before the Court, the SJC nevertheless exercised its supervisory powers under G.L. c. 211, § 3 to require that,

Going forward, a judge shall not commit an individual under G. L. c. 123, § 35, unless the judge finds that the danger posed by the individual's substance use disorder outweighs the risk of transmission of COVID-19 in congregate settings. “Given the high risk posed by COVID-19 for people who are more than sixty years of age or who suffer from a high-risk condition as defined by the CDC, the age and health of [the individual] should be factored into [the] determination.” CPCS v. Trial Court, 484 Mass. at 449, 142 N.E.3d 525. Additionally, the judge must find that commitment is necessary notwithstanding the treatment limitations imposed by quarantine protocols. A judge's findings may be made in writing or orally on the record. These requirements will remain in effect for the duration of the COVID-19 state of emergency, unless altered by further order of this court. These are additional, temporary requirements beyond those imposed by G. L. c. 123, § 35, due process principles, and any other applicable law. See Matter of a Minor, 484 Mass. at 307-310, ––– N.E.3d ––––; Matter of G.P., 473 Mass. at 120-122, 124-129, 40 N.E.3d 989.

*Foster v. Commr. of Correction,* 484 Mass. 698 at \*21 (2020)

Relevant to the within motion, the SJC determined that "current orders of commitment may have been made without consideration of the crisis currently ravaging the planet." *Id.* With regard to those currently committed, it held that the risks of COVID-19 transmission constitute “a material change in circumstances with regard to any order of commitment currently in effect" and that “individuals committed pursuant to G. L. c. 123, § 35, at the time of the issuance of the slip opinion in this case may file a motion for reconsideration of the commitment order." *Id.* When such motions for reconsideration are filed, the SJC held that "hearings shall take place by videoconference or teleconference no later than two business days after the filing of the motion," and a "decision on the motion shall be rendered promptly." *Id.*

1. ***FOSTER* *I* APPLIES TO CIVIL COMMITMENTS FOR MENTAL ILLNESS**

The class action and requests for preliminary injunction in *Foster I* were brought on behalf of people in prisons and jails. Therefore, the civilly committed plaintiffs in the case were those who had been committed to such facilities under G.L. c. 123, § 35. However, the concerns driving the Court’s exercise of its supervisory powers extend to those who are similarly committed to locked congregate facilities on the basis of mental illness.

In commitments under both § 35 and §§ 7/8 and 16, the individual is completely deprived of his liberty and committed to a locked facility. In both types of proceedings, the purpose of the civil commitment is to address an asserted likelihood of serious harm through treatment. The Court’s concern with a commitment becoming unconstitutional if little to no treatment is being provided applies equally to both types of commitments. “Therefore, if patients are not receiving meaningful and reasonably effective treatment for substance use disorders, which advances their health and safety, their commitment violates Federal due process requirements.” *Foster v. Commr. of Correction*, 484 Mass. 698 at \*19 (2020).

In defining the “paradigmatic” and “fundamental” right to liberty that is abridged by commitment, the Court cited two recent cases involving commitment for mental illness.  *Id., citing* *Pembroke Hospital v. D.L*., 482 Mass. 346 (2019) and *Matter of E.C.,* 479 Mass. 113 (2018). For both types of commitments, the restraint on liberty must be reviewed under a “strict scrutiny” analysis to insure that the fundamental right to liberty is only curtailed to achieve a compelling government interest and that commitment is “the least restrictive means available to vindicate that interest.” *Id., citing* *Massachusetts General Hospital v. C.R.,* 484 Mass. 472, 489 (2020)

The *Foster* *I* Court noted that it had no evidence that the dangers of substance use disorder or the need for treatment had been reduced by the pandemic and thus the compelling government interest appeared unchanged. In contrast, “the pandemic, however, may affect whether commitment is narrowly tailored to that interest. If the commitment and treatment do not promote effectively the government’s interest in the individual’s and others health and safety, the government action cannot survive strict scrutiny.” *Foster v. Commr. of Correction,* 484 Mass. 698 at \*20 (2020).

The finding that commitment is the “least restrictive alternative” was recently given constitutional status in the section 35 case of *Matter of a Minor,* 484 Mass. 295, 310 (2020). The Court held that commitment is intended to be a “carefully circumscribed… tool of last resort.” *Foster v. Commr. of Correction*, 484 Mass. 698 at \*18 (2020), *citing* *Matter of a Minor* at 484 Mass. 295 at 311. While *Matter of a Minor* was also a section 35 case, it reaffirmed and elevated to constitutional status principles from a 40 year old case involving commitment for mental illness under G.L. c. 123, §16 . In *Com. v. Nassar*, 380 Mass. 908, 917–18 (1980), the Court stated that “…all concerned in the law and its administration should strive to find the least burdensome or oppressive controls over the individual that are compatible with the fulfilment of the dual purposes of our statute, namely, protection of the person and others from physical harm and rehabilitation of the person". Thus, the constitutionally required “strict scrutiny” analysis applies to both forms of commitment*. See also* *Matter of E.C.,* 479 Mass. 113, 119 (2018)and *Sharris v. Com*, 480 Mass. 586, 601-602 (2018) which both involved section 16 commitments for mental illness.

In addition, both types of commitments require a finding that the Respondent presents an imminent “likelihood of serious harm” if not committed, employing the same statutory definition, found at G.L. c. 123, §1. As a result, the body of case law that has developed around the nature and extent of evidence required to prove a “likelihood of serious harm” is a shared body of case law that applies equally to both types of commitments. *See*, *e.g*. *Matter of G.P.,* 473 Mass. 112 (2015) (section 35 case holding that “likelihood of serious harm” must be imminent and further defining type of proof required); *Matter of M.C.,* 481 Mass. 336, 346 *(*section 16 case citing to *Matter of G.P*. for meaning of “likelihood of serious harm”); *Matter of D.K.*, 95 Mass. App. Ct. 95, 100-101 (2019) (section 16 case citing *Matter of G.P.* “imminence” requirements.) Whether the cause of the likelihood of serious harm is mental illness or alcohol/ substance use disorder, the compelling government interest in commitment is the same, *i.e.* involuntary civil commitment to prevent a likelihood of serious harm. Since the compelling government interest is the same, the limitations placed on the curtailment of liberty to achieve that interest set forth in *Foster I* apply with equal force to civil commitments to congregate facilities for mental illness.

1. **RESPONDENT’S COMMITMENT CANNOT BE ORDERED WITHOUT CONSIDERATION OF THE FACTORS SET FORTH IN *FOSTER I***

As noted above, the SJC in *Foster I* determined that "current orders of commitment may have been made without consideration of the crisis currently ravaging the planet." *Foster v. Commr. of Correction,* 484 Mass. 698 at \*21 (2020).

With regard to those currently committed, it held that the risks of COVID-19 transmission constitute “a material change in circumstances with regard to any order of commitment currently in effect" and that “individuals committed pursuant to G. L. c. 123, § 35, at the time of the issuance of the slip opinion in this case may file a motion for reconsideration of the commitment order." *Id.* When such motions for reconsideration are filed, the SJC held that "hearings shall take place by videoconference or teleconference no later than two business days after the filing of the motion," and a "decision on the motion shall be rendered promptly." *Id.*

The trial court must first assess the risk of harm in the community versus the risk of transmission of COVID-19 in the facility:

Going forward, a judge shall not commit an individual under G. L. c. 123, § 35, *unless* the judge finds that the danger posed by the individual's substance use disorder outweighs the risk of transmission of COVID-19 in congregate settings.

*Foster v. Commr. of Correction*, 484 Mass. 698 at \*21 (2020)

Since COVID-19 poses a heightened risk for people who are over the age of sixty or suffer from a high-risk condition as defined by the CDC, a court must take into account “the age and health of [the individual],” when assessing the risk of transmission in the facility. *Id.,* *citing* to *CPCS v. Trial Court*, 484 Mass. at 449.

Second, the judge "must find that commitment is necessary notwithstanding the treatment limitations imposed by quarantine protocols." *Id.*

1. **THE BURDEN OF PROOF REMAINS WITH THE PETITIONER TO PROVE THE ADDITIONAL REQUIRED ELEMENTS IN SUPPORT OF COMMITMENT**

The *Foster* *I* Court used its supervisory powers to impose two additional requirements for civil commitments “going forward” for the duration of the COVID-19 pandemic. The burden of proof remains on the Petitioner to prove the two additional elements if the Court is going to order commitment. The language of the Court’s ruling in *Foster I* is mandatory. “Going forward, a judge *shall not commit* an individual…” without making the two additional findings. Id.

The purpose of the prompt rehearing on current orders of commitment, in which these pandemic-related findings may not have been made, is to place currently committed individuals in the same position as they would have been had their hearing had taken place after the Court’s ruling. This mechanism eliminates the arbitrary result that individuals currently in congregate facilities facing the same risks to their health and safety would be denied the potential benefits of a Court ruling designed to take that health and safety into account prior to ordering commitment. For that reason, the burden of proof as to the two additional required elements remains with the petitioner at the rehearing. The burden for these additional required elements, as with others, remains beyond a reasonable doubt.

Respectfully Submitted,

Your client

By his Attorney,

Date: Attorney

**CERTIFICATE OF SERVICE**

I, your attorney, hereby certify that on this day of October, 2020, I served this motion and memorandum upon Petitioner’s counsel by electronic mail.

Your attorney