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May 21, 2020

Governor Charlie Baker
Massachusetts State House, Room 280
24 Beacon St
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Re: The Impact of the Current Crisis on People Held in Custody

Dear Governor Baker,

I write as President of the Boston Bar Association (BBA), a volunteer organization of 13,000 members drawn from private practice, corporations, government agencies, legal-aid organizations, the courts, and law schools, to urge you—and the state’s other elected leaders—to act promptly and decisively to address the growing crisis that the COVID-19 pandemic presents in the Commonwealth’s correctional facilities.

The BBA applauds the many steps the Governor and Legislature have taken to address the public health and economic impacts of the pandemic. But the efforts to date have failed to adequately address the urgent need for action for the more than 13,000 men and women who remain in the Department of Correction (DOC) facilities and Houses of Correction, as well as hundreds of others committed to custody for treatment of alcohol and substance use disorders pursuant to G.L. c. 123, §35 or held as immigration detainees on behalf of U.S. Immigration and Customs Enforcement.

Urgent Executive and Legislative Action Necessary to Address the Crisis in Prisons and Jails

Within the limits of its constitutional authority, the Supreme Judicial Court (SJC) has already acted decisively to address the dangers of infection among Massachusetts prisoners, appointing a Special Master and creating a process to expedite consideration of release, on a case-by-case basis, of prisoners held awaiting trial. But the SJC’s orders have recognized the constitutional limits courts face to order relief for *sentenced* prisoners—those who represent the vast majority of inmates in Department of Correction facilities and many in county Houses of Correction. According to the most recent report of the Special Master, the Department of Correction has released only 20 sentenced inmates since the SJC’s April 3 Order in *CPCS v. Chief Justice of the Trial Court*. Advocates report to us that the Parole Board’s limited resources prevent it from considering, on an expedited basis, significant numbers of requests from many prisoners who are parole-eligible.

In the meantime, the crisis in our correctional facilities continues to grow and testing in prisons and jails is dramatically inconsistent. In MCI-Norfolk, only five of the facilities 1,253 prisoners

have been tested. In the Suffolk County House of Correction, authorities have tested only 46 of the jail's 884 prisoners. Where facilities do test significant numbers of prisoners, the rate of confirmed cases is deeply concerning. In Essex County, for example, where 197 of the 975 prisoners have been tested, 67 (34%) tested positive.

To address the pandemic's impact among DOC and House of Correction prisoners, the BBA urges the Governor and Legislature to take the following steps immediately:

1. *As a matter of urgent public health necessity, the BBA requests that the Governor direct prompt testing of all prisoners in state and county correctional facilities.*

Universal testing is required to obtain adequate data about the rates of infection in prisons and jails. Only universal testing will provide reasonable assurance that the true extent of infection in facilities will be known and permit correctional facilities to reliably assess risks and take steps to quarantine individuals with confirmed cases of COVID-19.

2. *The BBA urges the Legislature to enact and the Governor to sign into law emergency legislation (limited to the current state of emergency) (a) suspending Mass. R. Crim. P. 29's requirement that judges be permitted to consider individual motions only when such motions are brought within sixty days of imposition of sentence; and (b) authorizing judges to stay the imposition of sentences previously ordered.*

This emergency action will permit sentencing judges to consider individual facts and circumstances to determine whether to order the temporary release of sentenced prisoners.

3. *The BBA requests that the Governor direct Secretary Turco of the Executive Office of Public Safety and Security to exercise his authority, pursuant to G.L. c. 27 §7, to temporarily appoint retired members and retired judges as special members of the Parole Board.*

This expansion will allow for hearings to be held at a faster rate, decisions to be issued more expeditiously, and ultimately, more currently imprisoned people who do not pose a risk to public safety to be returned to society. There, they will be better able to self-quarantine and be better able to protect themselves and their fellow residents of the Commonwealth.

4. *The BBA requests that the Legislature enact and the Governor sign into law an amendment to G.L. c. 127, §90A, to temporarily grant statutory authority to allow the Commissioner of Correction or the administrator of a county correctional facility the authority to grant extended temporary release, or furlough, to incarcerated individuals, beyond the current limits of seven days at a time and no more than 14 days in one calendar year.*

Adopting these suggestions will reduce the density of House of Correction and Department of Correction populations, thereby facilitating the implementation of proper safety precautions. This will ultimately improve correctional officials' ability to take steps to safeguard themselves

and those individuals who remain in custody. And, above all, it will help reduce the overall spread of COVID-19, which is a paramount concern to all Massachusetts residents. These are critical needs that can be readily addressed and that will reduce severe risks to the health of those in custody and those charged with their care.

Urgent Action Necessary for Individuals Committed Pursuant to G.L. c. 123, §35.

Under G.L. c. 123, §35, courts may civilly commit individuals for up to 90 days, on petition of family members, law enforcement, or medical professionals, for treatment of alcohol or substance use disorders. In 2018, more than 7,000 individuals were committed to treatment facilities pursuant to Section 35. Individuals committed under Section 35 are held in facilities, often operated by private vendors, under the supervision of the Department of Public Health, the Department of Mental Health, the Department of Correction, or the Hampden County House of Correction.

The BBA has received troubling reports from counsel for individuals currently committed for substance abuse treatment. These reports describe difficulties advocates have encountered obtaining access to their clients, access to information about their clients' health, and access to information about the extent to which—in the current environment—their clients are in fact receiving the treatment they were ordered to receive. These challenges have been exacerbated by the fact that many of these individuals are committed to privately operated facilities, and the data that the Special Master reports on a weekly basis does not include this population.

As a consequence, the BBA requests that the Governor direct the Department of Correction, the Department of Public Health, and the Department of Mental Health to:

1. *Publicly report the census of individuals committed pursuant to Section 35 in each of the facilities operated under their auspices.*
2. *Publicly report information about the number of individuals, both patients and staff, in each facility who have been tested for COVID-19 and the number of positive test results for each category.*
3. *Publicly describe, on a facility-by-facility basis, the health safeguards and protocols the facility has put in place with respect to minimizing risk of COVID-19 infection and addressing any individuals with positive test results or related symptoms.*
4. *Publicly describe the extent to which treatment programming for alcohol and substance use disorders, as mandated under Section 35 and applicable regulations, is currently available and accessible at each facility.*
5. *Require DOC, DPH, and DMH to make arrangements to permit committed individuals to communicate privately with their counsel, including opportunities to obtain counsel for those who are unrepresented.*

We thank you in advance for your attention to these important issues. We understand that the same state of emergency that prompts us to write has also caused great disruption to your work and the BBA offers our assistance if we can be helpful in any way in addressing these difficult challenges.

Sincerely,



Christine M. Netski
President

CC: Robert DeLeo, Speaker of the House
Karen Spilka, Senate President
James M. Cummings, Sheriff Barnstable County
Thomas Bowler, Sheriff Berkshire County
Thomas M. Hodgson, Sheriff Bristol County
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