



**Testimony of the Boston Bar Association
to the Joint Committee on the Judiciary
Regarding House Bill 4652**

May 5, 2020

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 -- strongly urges the Legislature -- as well as the Governor and his administration, and the sheriffs and district attorneys of the Commonwealth -- to act swiftly and decisively to address the developing crisis that the COVID-19 pandemic has already begun to inflict on our correctional institutions.

This is one of the very rare instances where extended litigation and deliberation will literally cost lives. Prompt legislative action is necessary to save lives and protect not only the incarcerated community but also correctional staff and the civilian community.

The Massachusetts judiciary has weighed in on this issue, providing pathways for early release or furlough of a significant number of incarcerated individuals -- in particular, pre-trial detainees. However, this is not nearly enough to meet the urgent need for decarceration, and the burden now rests with the legislative and executive branches.

We hope that the Judiciary Committee will favorably report limited emergency legislation that will honor the government's responsibility to allow those who can safely be released back into society to find proper locations to quarantine, and to protect those who remain incarcerated.

Specifically, we recommend the creation of a system-wide mechanism to expedite consideration of release of incarcerated individuals, one that provides for a review that is triggered automatically and does not require individualized filings, with a presumption for release in categories of cases not involving crimes of violence. In order to offer proper consideration of public-safety concerns, legislation should provide a short period in which district attorneys may file an opposition to release in specific cases if they can demonstrate that the need for detention significantly outweighs the health-related risks from exposure to COVID-19. Still, judicial decisions should be made on as expedited a basis as is possible.

To avoid unnecessary delays in providing the relief necessary under the circumstances, the legislation should require judges in these cases to make findings of fact concerning COVID-19 exposure risk, and to take judicial notice of medical and scientific filings on this question. These findings of fact concerning medical and scientific matters would not preclude judges considering facility-specific circumstances, the circumstances of individual detainees or inmates, or both. Judges hearing such motions should be required to specifically take into account the risk from COVID-19 exposure for the individual movant and articulate this consideration on the record when ruling on the motion. Furthermore, judges should be authorized to exercise their discretion to receive information regarding an incarcerated

person's specific medical history from counsel's own proffer or other reliable sources, since counsel's ability to provide detailed medical records is likely to be curtailed in light of the pandemic.

The Supreme Judicial Court cited the Massachusetts Constitution's provision on separation of powers (Article 30) in its decision last month in *CPCS v. Chief Justice of the Trial Court*, declining to grant petitioners' motion to allow for sentenced individuals to seek revocation and revision of their sentences, if they would otherwise be time-barred. Nevertheless, it is squarely within the authority of the Legislature to permit trial judges to stay sentences if they wish. (See, e.g., *Commonwealth v. McLaughlin*, 431 Mass. 506.) It would likewise be appropriate for the Legislature to establish rules relating to the exercise of the Parole Board's authority in granting release to qualified applicants.

H. 4652 (Sabadosa), currently before the Committee, takes an appropriately comprehensive approach toward mitigating the devastating impact of the COVID-19 pandemic within correctional institutions. It represents an important step toward achieving the above, and the BBA endorses those provisions generally, without offering comment on the details or on the remainder of the bill.

Nevertheless, should the Committee see fit to retain some form of the current bill's Section 4, providing for health and safety protections as well as access to communications, we respectfully request that such language make explicit that incarcerated individuals' access to their attorneys, and vice versa, must be assured, and that the same provision be made applicable to all jails houses of corrections, in addition to state prisons.

We recognize that this is not a job for one branch to tackle alone. In order to address this problem in a comprehensive way, the Governor, the Parole Board, the Department of Correction, the sheriffs, and the district attorneys of Massachusetts must also act, each within their own authority, to help flatten the curve, consistent with their obligations toward public safety.

Adopting these suggestions will reduce the density of House of Correction and Department of Correction populations, thereby facilitating the practice of proper safety precautions. It will also permit judges, in the interest of justice, to release those incarcerated persons whose age and other health factors present the most complex medical challenges to correctional officials. 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 the novel coronavirus, 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.

We thank you in advance for the Legislature's attention to this important issue. We understand that the same state of emergency that necessitates decarceration at this time has also caused great disruption to your work, hampering your own ability to act, but the BBA offers our assistance if we can be helpful in any way in fashioning an appropriate remedy.