

January 13, 2017

The Honorable Ralph D. Gants
Chief Justice, Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 2500
Boston, MA 02108

Robert A. DeLeo
Speaker of the House of Representatives
Massachusetts State House
24 Beacon St. - Room 356
Boston, MA, 02133

Charles D. Baker
Office of the Governor
Massachusetts State House
24 Beacon Street, Room 280
Boston, MA 02133

Stanley C. Rosenberg
President of the Massachusetts Senate
Massachusetts State House
24 Beacon St. - Room 332
Boston, MA, 02133

Re: The Council of State Governments

Dear Chief Justice Gants, Governor Baker, Speaker DeLeo and President Rosenberg:

We are a coalition of agencies, associations and individuals in Massachusetts who advocate for fairness in criminal and juvenile justice proceedings, corrections and parole or who work directly with families and communities dealing with disabilities and/or poverty. We were extremely pleased and encouraged when we learned in August of 2015 that you had invited the Council of State Governments (CSG) to Massachusetts to help guide much needed criminal justice reform.¹ As stated in your Invitational Letter, it is time for Massachusetts to implement well-researched best practices in criminal justice and corrections. It could not be clearer that doing so will lead to significantly safer communities and a dramatic reduction in spending on prisons.

Many of us have been interviewed by CSG staff, attended CSG working group meetings and read the CSG interim reports. We understand that CSG has the information it needs to draft proposed legislation and to recommend executive policy changes that will lower Massachusetts jail and prison populations, reduce recidivism and improve outcomes for those in the criminal

¹ State House News, August 3, 2015: "In a move that could lead to a bipartisan policy breakthrough, state government leaders in Massachusetts are seeking outside help to reduce recidivism, lower prison populations, and improve outcomes for those in the state's criminal justice system. In a letter dated last Wednesday and released Monday morning by Senate President Stan Rosenberg, House Speaker Robert DeLeo, Gov. Charlie Baker and Supreme Judicial Court Chief Justice Ralph Gants, the top state officials asked the U.S. Department of Justice and the Pew Center on the States to apply in Massachusetts the data-driven approach of the Council of State Government's Justice Reinvestment Initiative. ("Invitational Letter to CSG, 7/30/15")

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justice system. We are very concerned that, as CSG approaches the end of its time in Massachusetts, many of the goals announced in 2015 do not appear to be coming to fruition.

It is our understanding that CSG will present a final report to you in January and that report will include draft legislation and executive agency proposals. However, it is our understanding that the final report will only include draft legislation and executive agency proposals on the topics that the four of you have agreed upon. We are concerned that you may not have asked CSG to present draft legislation or executive agency changes on many of the issues that most impact and are most vital to public safety and taxpayer savings. **We are writing this letter to urge you to ask CSG for its assistance in developing legislative proposals and executive agency policy changes that will accomplish the important objectives you announced in August of 2015. We also urge you to ask CSG to address the Massachusetts criminal justice system's long-standing disparate treatment of people of color in its final report.** We have set forth our recommendations, beginning on page 4 of this letter.

CSG has examined state practices from the beginning of criminal cases (charging and prosecuting decisions) to the end (prison and post release supervision). Their data and the conclusions drawn from that data clarify where our present system is failing:

- 1) Massachusetts could reduce recidivism (improving public safety) and save money by diverting many more people from formal processing. Most first time offenders pose no danger to the community and giving them a criminal record only serves to make it harder for them to become gainfully employed. It is a waste to spend money prosecuting and supervising these people.
- 2) Massachusetts holds too many people in pretrial detention. This is expensive and highly disruptive of peoples' lives. Millions of dollars could be saved every year by reducing the use of pretrial detention for people who are not dangerous. Many people are held only because they are too poor to post low cash bails.
- 3) Massachusetts sends too many people to prison.² Many of them are there for too long with little or no access to the programming they need to successfully transition back

² The Invitational Letter speaks about "mothballing facilities" and gives the reader the impression that there is no more overcrowding in Massachusetts prisons. Most prisoners and their advocates would disagree with that. It is important to understand that the Department of Correction (DOC) has changed its method of determining "overcrowding." In the past, the institutional population at each facility was compared to the "design capacity" of each institution. Thus, the DOC "weekly count sheet" from 10/31/16 showed the maximum security facilities to be at 112% capacity and the medium security facilities to be at 129% capacity and DOC facilities [footnote continued]

- to the community as good neighbors. Mandatory minimum sentences are one of the primary reasons for this problem. The use of mandatory minimums undercuts the goals advanced in the Invitational Letter of 7/30/15 – reduction in prison and jail populations, reduction in recidivism, reduction in prison costs, and improvement in fairness and outcomes for those in the criminal justice system.
- 4) The Department of Correction routinely over-classifies prisoners. It does not consistently step prisoners down in security levels, often ignoring its own classification instrument. This means that taxpayers pay for higher security for many people who only need minimum security or pre-release. This also means that prisoners are less prepared to transition home. It makes no sense to pay more for a strategy that increases crime.
 - 5) The Department of Correction does not provide adequate programming to prepare prisoners to succeed when they return to the community. Utilizing best practice programming now and making it readily available to all prisoners will mean huge cost-savings down the road. Such programming also makes prisons safer and enables prisoners to move to lower security more quickly and better prepares them for parole.
 - 6) It has been understood for decades that formerly incarcerated people reoffend at significantly lower rates when they receive appropriate support and supervision on parole. The Parole Board paroles prisoners at a very low rate, forcing the majority of parole eligible people to wrap up their sentences and transition home with no help and no oversight. This problem is compounded by the failure of the Board to provide best practice support to parolees in the community. The Parole Board need look no further than our own Probation Department to find an organization that is currently

statewide to be at 119% capacity. *See Weekly Count Sheet 10/31/16:* <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2016/week-count-10312016.pdf>. By 11/28/16, DOC had changed its method of calculating and recording “overcrowding” on its website. The new method compares the institutional population at each facility to the “operational capacity” of each institution. Operational Capacity is the number of beds authorized for safe and efficient operation of the facility *determined by the Commissioner* after consulting with the Director of Resource Management and Deputy Commissioners. Thus, one month after the weekly count sheet for 10/31/16 showed DOC facilities statewide to be operating at 112% overall capacity, the DOC “weekly count sheet” for 11/28/16 showed DOC facilities statewide to be operating at only 78% overall capacity (with the maximum security facilities to be at 70% of capacity and the medium security facilities to be at 83% capacity). *See Weekly Count Sheet 11/28/16:* <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2016/week-count-11282016.pdf>. Overcrowding remains a Massachusetts problem. Reducing the prison population should remain a goal.

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employing best practices to provide probationers with individualized and effective support and supervision.

We, and many others throughout the Commonwealth, believe that the legislative reforms and the executive agency policy changes that we have set forth below are critical to achieving the goals you announced seventeen months ago and will help to address the above problems.

Legislative Reform

We understand that the CSG legislative reform package has not yet been finalized. It is concerning, however, that none of the below legislative proposals – all important reforms which advance the goals set forth in the Invitational Letter -- appear anywhere in the CSG interim reports. We are concerned that you have not asked CSG to present a legislative reform package that includes the proposals listed below. We ask that you inform CSG that it should include the following in its legislative reform package:

- **Eliminate minimum mandatory sentences for drug offenses;**
- **Increase availability and utilization of diversion for juveniles and adults;**
- **Institute compassionate release for elderly and dying prisoners; and**
- **Institute presumptive parole.**

These four legislative proposals are focused directly on achieving the goals set forth in your letter.³ The elimination of mandatory minimums will reduce the prison population while it increases public safety by reducing recidivism as prisoners become more engaged in earning parole and are released with parole supervision. Similarly, diversion will help reduce the prison population, reduce recidivism and increase public safety by placing people into appropriate programs – educational, treatment, and vocational – that will divert them from criminal activity. The implementation of a compassionate release law in this state is long overdue. Forty-five other states have mechanisms that allow for the release of medically incapacitated prisoners. The state would save millions of dollars as such prisoners are the most costly to maintain in the

³ There are other legislative reforms that many of us have discussed and advocated for with CSG over the course of the last year. Each of the following would help to achieve the goals in your Invitational Letter but also do not appear to be included in the CSG interim reports: amending the bail statute; increasing the larceny threshold from \$250 to \$1,500; reclassifying certain low-level, nonviolent misdemeanors for juveniles and adults by either removing the possibility of a sentence of incarceration or changing offenses from criminal to civil infractions; eliminating certain fees and fines; eliminating the imposition of collateral consequences for certain offenses; reforming the law on expungement of adult records and juvenile records; increasing incentives for prisoners and parolees to engage in rehabilitative programming;

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correctional system. Releasing incapacitated prisoners who objectively pose no threat to society is both ethical and sound public policy.

At present there appear to be no legislative recommendations designed “[to] further reduce our prison . . . population through early release programs,” despite the fact that it was one of the stated goals in the Invitational Letter to CSG. Carefully constructed presumptive parole legislation, something CSG has drafted for other jurisdictions, will do exactly that, while both promoting public safety and saving many millions of dollars every year. CSG research tells us that presumptive parole will reduce recidivism while it promotes safety inside of correctional facilities. It incentivizes good behavior and engagement in educational, vocational, and rehabilitative programming by creating a sense that parole release is the individual prisoner’s to lose. Having a system of presumptive parole also saves money. With the average annual cost in fiscal year 2014 of \$53,040.87 to house a Massachusetts state prisoner and the annual cost of \$5,000 to supervise one parolee, it is clear that failure to maximize parole supervision is costly for taxpayers.

Executive Agency Policy Changes

We are equally concerned that the many necessary policy changes, particularly at the Department of Correction and the Parole Board, that do not require legislation, may not be addressed in the CSG final report. These changes can, and should, be instituted now at the direction of the Governor since he has direct control over both Corrections and Parole. We are asking the Executive Branch to make sweeping changes, changes that will improve long term public safety and save hundreds of millions of tax dollars.⁴ We see these policy changes as an important first step in achieving the goals set forth in the Invitational Letter to CSG. We believe these policy changes will enable you, our top state leadership, to infuse our criminal justice agencies with a new mandate. There must be new priorities and a new agenda at the Executive Office of Public Safety and Security (EOPSS). As CSG staff said at a meeting many of us attended, “the culture” at the Department of Correction (DOC) and the Parole Board must change. It must change so that all agency employees share the same goals that you expressed in your July 30, 2015 letter of invitation to CSG: “to further reduce recidivism”, “[to] enable successful re-entry” and “[to] further reduce our prison and jail populations through early release programs” while continuing to preserve public safety. We ask that the Governor and the Secretary of EOPSS, with the support of the Chief Justice, the Speaker, and the Senate President, begin to make the following executive changes now:

⁴ In the 1970s, Republican Governor Francis Sargent unilaterally overhauled the Department of Youth Services. In so doing, he boldly closed ineffective facilities, over an outcry from the unions, and started a reform movement that has been emulated by many other states. To this day, DYS is held up as the Gold Standard by the Department of Justice’s Office of Juvenile Justice and Delinquency Prevention and by juvenile justice experts everywhere.

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• An important first step in “adequately address[ing] the needs of re-entry” for Massachusetts prisoners (Invitational letter to CSG, 7/30/15) is the reform of the DOC classification system.

One of the first steps in successful re-entry is for the prisoner to step down through security levels in the prison system. CSG has spoken about how important it is that prisoners step-down in security levels and enter lower security or pre-release facilities before they are released from prison. This is a basic tenet of re-entry best practices.⁵ When prisoners obtain “lower security” classification scores, they should *presumptively* move to a lower security prison. For many Massachusetts prisoners, the step-down process happens inconsistently, too slowly or not at all. The over-classification of Massachusetts prisoners is at the heart of many of the re-entry and recidivism problems in Massachusetts. There are too many DOC prisoners confined in maximum and medium security facilities for too long and too few in minimum security and pre-release facilities. Over-classification exists because it is tacitly approved, if not desired, by EOPSS and DOC administrators. It is problematic for at least two reasons. The first is public safety: prisoners in lower security have greater access to rehabilitative and community re-entry programming such as vocational training and work-release. They are, therefore, more likely to reintegrate successfully into the community. The second reason is fiscal resources: higher security prisons are more expensive to operate than lower security prisons.

DOC administrators will respond to direction from the Governor and from the Secretary of EOPSS. We know from experience that a change in the written classification policy will do nothing without a decided shift in direction from the top down.⁶ It is time to enforce a change in

⁵ Indeed, the Massachusetts Criminal Justice Commission unanimously made this their #1 recommendation in July of 2014. (“The Department of Correction should adopt policies and practices that ensure that all prisoners, including those whose risk to recidivate is determined to be high or moderate, are placed in a pre-release facility at least 90 days prior to discharge or parole.”)

⁶ In a series of landmark decisions, the Supreme Court and the Supreme Judicial Court determined that juveniles have a substantive right to be treated differently from adults when the state seeks to punish them for criminal wrongdoing. *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455(2012); *Diatchenko v. Dist. Att. for the Suffolk Dist.*, 466 Mass. 655 (2013); *Commonwealth v. Brown*, 466 Mass. 676 (2013). Recognizing that the DOC’s objective classification system (i.e., the system that determines the security level placement for prisoners) made no distinction between juvenile and adult homicide offenders, the Legislature amended the statutory scheme to ensure that qualifying juvenile homicide offenders could no longer be categorically barred from programming or minimum security placements based on their life sentence. G.L. c. 119, § 72B, as amended by St. 2014, c. 189, § 2. However, the DOC continued to exclude juvenile homicide offenders from minimum security unless and until they received a positive parole vote based on the use of discretionary overrides of the objective classification system. In August 2016, the Supreme Judicial Court concluded that DOC’s practice contravened state law and required the department to make an individualized determination of a juvenile homicide offender’s suitability for placement in minimum security prior to a positive parole vote. *Deal & others, v. Comm. Of Correction & another*, 475 Mass. 307 (2016). In September 2016, the DOC initiated reclassification hearings for the 42 qualifying juvenile homicide offenders. According to statistics provided by the DOC, of the 42 qualifying juvenile homicide offenders eligible for [footnote continued]

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culture and policy at the DOC. We need more minimum and pre-release beds in Massachusetts and a classification system that will fill those beds with the right prisoners.⁷ Only then will we begin to see effective step-down.

• **There is a need “[to] further reduce our prison . . . populations through early release programs.” (Invitational letter to CSG, 7/30/15) We need to release more people on parole.**

Parole is an important component of the Massachusetts criminal justice system that is dramatically underutilized. It is not necessary to wait for legislative action, such as a much needed presumptive parole amendment, to begin to reform the parole process. Change in the parole system can begin immediately with direction from the Governor and the Secretary of EOPSS to the Parole Board. The Governor needs to encourage our Parole Board to grant more paroles especially to the many prisoners who have repeatedly been denied parole on the basis of their underlying offense despite positive program accomplishments, detailed post-release plans, strong evidence of rehabilitation and low risk assessment scores. Our government needs to understand and embrace parole, not be afraid of it.⁸ The CSG data on Massachusetts parole rates confirms that our Parole Board, for whatever reason, is paroling prisoners at a very low rate. CSG reports that during FY2015 only 19% of the parole eligible prisoners in our Houses of Correction were released on parole.⁹ In FY2015, the Parole Board reported that 46.4% of the parole eligible prisoners serving DOC sentences received positive votes for parole, but 18% of those people “max out and are not released to parole

minimum security placement based on the objective DOC classification system, the DOC again applied discretionary overrides to 38 of the 42 prisoners (i.e. 90.5%). *Contrast* DOC regulation 103 CMR 420.06 (“discretionary overrides should account for 5-15 percent of all custody decisions”). A change in the written rules (and law) did not change DOC’s practice.

⁷ Whether one uses “design capacity” or operational capacity” to define overcrowding, the empty beds in the DOC are in minimum security and pre-release facilities. That is because DOC simply refuses to step prisoners down in accordance with its existing classification policy. People wrap up their sentences in medium and maximum security (and sometimes in solitary confinement) and just walk out the prison door with no services or supervision. This is the fault of both DOC and the Parole Board.

⁸ The CSG data tells us that paroling people with effective support and supervision is a hugely important public safety tool. Nevertheless, politicians and parole boards sometimes fear parole because they believe if one person receives parole and then commits a serious crime, it could mean the end of their political careers. It would be unfortunate if that fear is standing in the way of consistently paroling deserving prisoners – a practice which would make our state considerably safer.

⁹ While “80% of HOC releases in Massachusetts are parole eligible, only 19% of those parole eligible are released from HOCs to parole supervision.” CSG Working Group Meeting 4 Interim Report, October 20, 2016, CSG data for FY2015, p.39.

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supervision,¹⁰ making our DOC parole rate approximately 28%. These dismal parole rates document missed opportunities to promote public safety and better life outcomes for prisoners and parolees.

Parole is an important public safety tool that, when properly administered, would greatly ease re-entry problems, lower recidivism, and result in huge cost-savings for the criminal justice system. We ask the Governor to hold the Parole Board accountable for employing best practices to ensure the safety of the public and for using public funds wisely. When parole is implemented effectively, field parole officers consistently assist with finding housing, locating work opportunities, securing necessary counseling and otherwise supporting the parolee. This is how effective parole agencies work in other states and an approach that is presently being modeled by the Massachusetts Probation Department.¹¹ Probation leadership, on its own initiative, overhauled the department and put in place well-researched, data driven best practices. There is no reason why executive branch employees cannot make these necessary changes happen now in parole.

- **Restructure the DOC budget so that resources are realigned to provide funds for education, counseling, mental health services, programming and vocational training.**

In its most recent Annual Report (2014), the DOC listed its expenditure for all programming including education, training, treatment and re-entry services at a shockingly low 1.98% of its annual budget.¹² According to CSG, only 44% of the prisoners who had a designated need area of substance abuse programming completed a substance abuse program. And, long-term substance abuse treatment is not even available in maximum security facilities. CSG reports that only 32% of the prisoners

¹⁰ CSG Working Group Meeting 4 Interim Report, October 20, 2016, p.p. 30-31. And, the individuals who need parole support the most are not receiving it. "Individuals leaving medium and maximum security [DOC] facilities account for the lowest proportion of individuals who are paroled and the highest proportion of individuals released without any community supervision." CSG Working Group Meeting 3 Interim Report, July 12, 2016, CSG data for FY2014 DOC data, pp. 56-57.

11. Right now, parolees report that their field parole officers only monitor them for any rule-breaking but provide very little support or assistance.

¹² In July of FY 13, the DOC's population was 12,558 and its state appropriation was \$559,378,000. In July of the current fiscal year, the DOC's population was 10,145 and its appropriation is \$593,413,000. Therefore, even though the DOC population decreased nearly 20% in the past 4 years, its budget increased by 6.08%. The expenditure for programming has remained consistently low.

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who had a designated need area of violence reduction programming completed a violence reduction program.¹³

The DOC must be directed to realign its priorities. The CSG interim reports call for an increase in programming, particularly programming that can continue in the community as a tool to reduce, support prisoners in their rehabilitative efforts and improve public safety when prisoners return to their communities.

- **Stop using lengthy stays in solitary confinement as a punishment.**

The harmful effects of isolation have been recognized by the National Commission on Correctional Health Care, the American Public Health Association, and the American Psychiatric Association. The U.N. Special Rapporteur on Torture has found that severe negative effects “can occur after only a few days in solitary confinement” and has stated that “any imposition of solitary confinement beyond 15 days constitutes torture, or cruel, inhuman or degrading treatment or punishment.” The experience of jurisdictions that have limited the practice elsewhere shows the benefits that come from reducing unnecessary segregation. By policy, not by statute, Massachusetts is one of a small handful of states that allow the sentencing of a state prisoner to ten years in solitary confinement for one violation. The prisoner must remain in solitary for his entire term even if he is no longer dangerous. A number of states have implemented programs designed to help prisoners function infraction-free in the general population and to reward them for their positive efforts while in segregation. Such programs, which can greatly reduce segregation time, provide treatment that has demonstrated effectiveness in reducing targeted behaviors and provide prisoners incentives to demonstrate positive behavior. Massachusetts should join the arc of progress and discontinue this barbaric practice. No legislative change is necessary – just a change in executive practice.

¹³ CSG Working Group Meeting 4 Interim Report, October 20, 2016, CSG data for FY2015, p.22. According to DOC, 44 % of the prisoners DOC had identified as needing to attend the Criminal Thinking Program were discharged without participating in the program, 14% because they were never housed in a facility that offered Criminal Thinking Program, and an additional 30% released while on the waitlist. FY16 Gap [Footnote continued] Analysis Report. <http://www.mass.gov/eopss/docs/doc/research-reports/briefs-stats-bulletins/fy16-gap-analysis-report.pdf> At MCI Norfolk alone, there were 294 prisoners on the Violence Reduction waitlist and 241 prisoners on the Criminal Thinking waitlist in March of 2016. At Souza Baranowski Correctional Center, the maximum security prison, in March of 2016, there were 1,708 prisoners on waiting lists for General Population Services programs, while only 105 inmates were admitted to those programs. See Spectrum Health Services, Quarterly Report for January, February and March of 2016.

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- **Prioritize addressing the racial inequities in our criminal justice system.**

The Invitational Letter of 7/30/15 does not mention the problem of the disparate treatment of racial groups throughout the many phases of our state's criminal justice system. CSG has confirmed that this is a serious on-going problem in Massachusetts in the data included throughout its Interim reports and summarized in its December 21, 2016 Interim Report. (Also, data collected by the state Sentencing Commission confirm that the state imprisons African-American defendants eight times more than white defendants. Hispanic defendants are imprisoned 4.9 times more than whites.) We understand that, thanks to Chief Justice Gants, Harvard Law School is studying this problem. We are hopeful that you will ask CSG to include recommended best practices for addressing this very serious long-standing problem in its final report.

Thank you for your consideration of our concerns and suggestions. We believe that you understand that the people of this state deserve a fair and effective criminal justice system and they do not deserve to have their tax dollars spent on practices that have proven to be both expensive and counterproductive.

Sincerely,