



May 15, 2020

Via E-Mail & Facsimile

The Honorable Andrew M. Cuomo  
Governor of New York State  
NYS State Capitol Building  
Albany, NY 12224

**Re: New York Must Lead to Protect People in Our Prisons and Jails**

Dear Governor Cuomo:

On behalf of the New York City Bar Association (“City Bar”), we write to urge you to exercise your authority over the Department of Corrections and Community Supervision (“DOCCS”) to further enhance health and safety protections for incarcerated people in order to mitigate the spread of COVID-19 and to provide more humane conditions for this vulnerable population of New Yorkers during this unprecedented crisis.<sup>1</sup>

New York’s prisons and jails present unique health dangers and are particularly vulnerable to the spread of COVID-19.<sup>2</sup> As of May 13, 2020, over 1,100 DOCCS staff and 400 incarcerated people have tested positive for COVID-19.<sup>3</sup> Absent additional interventions, the virus will continue spreading through incarcerated populations, risking the lives of incarcerated people, corrections officers, and other staff, at an alarming rate.<sup>4</sup> Furthermore, the spread of COVID-19 within correctional facilities represents a threat to all residents of the state as the virus can easily spread to the community as prison employees commute to and from work.<sup>5</sup> For example, Marion County in Ohio has the most COVID-19 cases in that state as result of its correctional institution, which has been determined to be the source of over half of the county’s infections. Nationwide,

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<sup>1</sup> The undersigned committees include among their membership lawyers appearing in state and federal criminal and civil courts; lawyers in government service, academia, and human and civil rights organizations; and judges, alternative dispute practitioners, attorneys in large firms, small firms, and solo practice.

<sup>2</sup> See Lauren-Brooke Eisen, “How Coronavirus Could Affect U.S. Jails and Prisons,” *Brennan Center for Justice*, March 13, 2020, last visited April 30, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons> (all websites last visited May 14, 2020).

<sup>3</sup> Department of Corrections and Community Supervision, “DOCCS COVID-19 Report Daily Update,” *Department of Corrections and Community Supervision*, last updated May 13, 2020, <https://doccs.ny.gov/doccs-covid-19-report>.

<sup>4</sup> See Rosa Goldensohn et al., “State Prison Virus Cases Mounting as Outside Figures Plateau,” *The City*, April 19, 2020, <https://thecity.nyc/2020/04/new-york-prison-virus-cases-mounting-as-state-city-plateau.html>.

<sup>5</sup> See Katie Park et al., “Tracking the Spread of Coronavirus in Prisons,” *The Marshall Project*, April 24, 2020, <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons>.

seven of the ten largest-known sources of infection have been traced to jails and prisons.<sup>6</sup> The conditions of New York’s correctional facilities represent a threat not only to those incarcerated in them but to the communities that surround them as well.

New York has been a national leader in addressing this pandemic and the entire country has been impressed and comforted by your steady, professional leadership in response to the current health crisis.<sup>7</sup> However, we have not led the nation in protecting our incarcerated population and, in failing to adequately protect New Yorkers in correctional facilities, we risk failing to live up to your promise to protect *all* New Yorkers. While we commend your March 28<sup>th</sup> order releasing up to 1,100 people incarcerated for technical parole violations in local jails, as well as your recent announcements that the state will begin releasing some people incarcerated in state prisons who are at least 55 years old or who are pregnant non-violent offenders, and others with 90 days or less on their sentence and whose underlying crime was not a sex offense or violent felony,<sup>8</sup> these efforts fall short of those taken by other states.<sup>9</sup> Based on analysis conducted by the Justice Collaborative, the criteria being applied to identify incarcerated people eligible for release covers less than one percent of the current incarcerated population.<sup>10</sup> Therefore, we urge you to strongly consider releasing more incarcerated people as outlined in our April 15 statement.<sup>11</sup> All of the approximately 5,000 typically incarcerated for technical parole violations should be released automatically without individual review.<sup>12</sup> Additionally, DOCCS should stop making new arrests

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<sup>6</sup> See “Coronavirus in the U.S.: Latest Map and Case Count,” *New York Times*, last updated May 11, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>; “Cases Surge in an Ohio Prison, Making It a Top U.S. Hot Spot,” *New York Times*, April 21, 2020, <https://www.nytimes.com/2020/04/20/us/coronavirus-live-news.html#link-4ced1d>; and “Marion Prison Coronavirus Outbreak Seeping into Larger Community,” *Marion Star*, April 25, 2020, <https://www.marionstar.com/story/news/local/2020/04/25/marion-prison-ohio-coronavirus-outbreak-seeping-into-larger-community/3026133001/>.

<sup>7</sup> See “Cuomo Wins Praise for ‘Wisdom’ Amid Coronavirus Crisis as Trump Blusters,” *The Guardian*, March 23, 2020, <https://www.theguardian.com/world/2020/mar/23/cuomo-wins-praise-for-wisdom-amid-coronavirus-crisis-as-trump-blusters>.

<sup>8</sup> See Ryan Tarinelli, “New York Will Release More Nonviolent Offenders Amid Pandemic, Top Cuomo Aide Says,” May 11, 2020, <https://www.law.com/newyorklawjournal/2020/05/11/new-york-will-release-more-non-violent-offenders-amid-pandemic-top-cuomo-aide-says/>.

<sup>9</sup> See Jon Campbell, “Coronavirus: New York Is Releasing Aging Prisoners as COVID-19 Spreads. Is it Enough?,” *Democrat & Chronicle*, April 17, 2020, <https://bit.ly/2KKhs9H>.

<sup>10</sup> Researchers from the Justice Collaborative used data sourced from <https://doccs.ny.gov/system/files/documents/2019/09/Under%20Custody%20Report%202018.pdf> to estimate the number of incarcerated people who would be eligible for release under the current guidelines.

<sup>11</sup> New York City Bar Association, “City Bar Statement Urging Swifter Action to Reduce Prison and Jail Populations in Light of Coronavirus Pandemic,” April 15, 2020, [https://s3.amazonaws.com/documents.nycbar.org/files/Prison\\_Jail\\_Reductions\\_COVID\\_FINAL.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/Prison_Jail_Reductions_COVID_FINAL.pdf).

<sup>12</sup> Although DOCCS has not released the current number of people incarcerated in state prisons for technical parole violations, as of as of March 31, 2019, there were 4,293 people in prison sentenced for technical parole violations. See New York State, “Inmates Under Custody: Beginning 2008,” <https://data.ny.gov/Public-Safety/Inmates-Under-Custody-Beginning-2008/55zc-sp6m>. Additionally, as of April 2020, there was a daily average of 1,118 people held in local jails accused of technical parole violations. See New York State Division of Criminal Justice Services, “Jail Population in New York State,” May 1, 2020, [https://www.criminaljustice.ny.gov/crimnet/ojsa/jail\\_population.pdf](https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf). Therefore, before the releases announced in March, an estimated approximately 5,000 people were held in the state’s prisons and jails on technical parole violations. See Jennifer Gonnerman, “The Purgatory of Parole Incarcerations

for technical parole violations, which continues to result in new admissions to local jails where people can be held indefinitely since most parole revocation hearings have been suspended due to the COVID-19 crisis.<sup>13</sup> Moreover, for those who are older than 50, have serious medical conditions that put them at risk, and/or are due for release within the next 12 months, time is of the essence and they should be automatically released without individual review.<sup>14</sup> We also encourage you to consider release for those convicted of violent offenses, if they fall within the vulnerable population described above, but only after a speedy individual review has been conducted to consider public safety concerns.<sup>15</sup>

Finally, as Governor you have expansive powers of clemency granted to you, and slowing the ravages of a pandemic and protecting the health and livelihood of New Yorkers clearly justifies using these powers now.<sup>16</sup>

For incarcerated people who will not be released, we acknowledge the important first steps DOCCS has taken to mitigate the spread of the virus within prisons. We ask that you continue to provide leadership and a commitment to conditions of confinement that are both safe and humane to protect incarcerated New Yorkers by taking these additional important steps, as detailed below.

### **Additional Health and Safety Precautions**

The Centers for Disease Control and Prevention (“CDC”) has recently issued Interim Guidelines (“CDC Guidelines”) on Management of Coronavirus Disease 2019 (COVID-19) in

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During the Coronavirus Crisis,” *The New Yorker*, April 11, 2020, <https://www.newyorker.com/news/news-desk/the-purgatory-of-parole-incarcerations-during-the-coronavirus-crisis> (“Before the pandemic, there were about five thousand people in New York’s prisons and jails for parole violations.”).

<sup>13</sup> See Denis Slattery and Chelsia Rose Marcus, “47 minor parole violators brought to NYC jails despite Cuomo’s promise of coronavirus release,” *Daily News*, April 24, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-minor-parole-violators-20200424-v5og3kxcpbczbebt3w4agtq5u-story.html>; Jan Ransom, “Jailed on a Minor Parole Violation, He Caught the Virus and Died,” *New York Times*, April 9, 2020, <https://www.nytimes.com/2020/04/09/nyregion/rikers-coronavirus-deaths-parolees.html>.

<sup>14</sup> See Paul Skip Laisure et al., “Release Many More People from Prison Now, Gov. Cuomo,” *Daily News*, April 15, 2020, <https://www.nydailynews.com/opinion/ny-oped-release-more-prison-cuomo-20200415-smib6uwwarbuwjnygbpqmn5zja-story.html>.

<sup>15</sup> As of 2018, nearly two-thirds of those serving a sentence in the State’s prison had been convicted of a violent offense. If those convicted of violent felonies are categorically excluded from consideration for release, our prison population will remain too large and we will fail to protect those incarcerated, as well as correctional staff and the general public. See DOCCS, “Under Custody Report: Profile of Under Custody Population As of January 1, 2018,” <https://doccs.ny.gov/system/files/documents/2019/09/Under%20Custody%20Report%202018.pdf>; Michele Alexander, “Reckoning with Violence,” *N.Y. Times*, March 3, 2019, <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html>.

<sup>16</sup> New York Constitution Article 4, Section 4; see also “Letter to Governor Cuomo Urging Release of New York State Prison Inmates at Risk of Coronavirus Infection,” City Bar, March 25, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/covid-19-response-clemency-for-at-risk-inmates-in-state-detention>.

Correctional and Detention Facilities.<sup>17</sup> Although we encourage DOCCS to incorporate all of the applicable CDC Guidelines into its response to the spread of COVID-19, in the interest of brevity, we are highlighting only some key aspects of the Guidelines in this letter. Specifically, we encourage DOCCS to ensure that sufficient stocks of hygiene supplies, cleaning supplies, personal protective equipment (“PPE”), and medical supplies are on hand and available. Hygiene practices and supplies include:

- standard medical supplies for daily clinic needs;
- tissues;
- liquid soap when possible;
- hand drying supplies, including hand drying machines or disposable paper towels and no-touch trash receptacles for disposal;
- alcohol-based hand sanitizer containing at least 60% alcohol (where permissible);
- regular access to showers;
- making anti-viral wipes (as approved by the CDC) available wherever phones are located;
- providing anti-viral wipes daily to each incarcerated individual with a tablet device;
- cleaning supplies, including EPA-registered disinfectants effective against the virus that causes COVID-19; and, facemasks, N95 respirators, eye protection, disposable medical gloves, and disposable gowns/one-piece coveralls.

Additionally, based on specific issues incarcerated people have raised with their lawyers and families in recent weeks, we encourage DOCCS to:

- ensure daily access to showers with hot water;
- provide disposable gloves and masks to all incarcerated persons with a priority for those who are required to continue to perform work assignments, or transferred to another facility or for medical care. While effective April 9, 2020, DOCCS revised its policy to allow staff; and quarantined incarcerated people to wear face masks, the general prison population has only been allowed to use state-issued handkerchiefs as masks. We have heard from some incarcerated people that the state-issued handkerchiefs are

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<sup>17</sup> Centers for Disease Control and Prevention, “Interim Guidelines on Management of Coronavirus Disease 2019 in Correctional and Detention Facilities,” March 23, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

too small to provide adequate protection and that those who have received masks have only received one low-quality single-use mask without replacement;<sup>18</sup> and,

- mandate that facilities continue to accept and distribute outside packages sent to incarcerated people.

We fully support DOCCS's new procedure to issue hand sanitizer to all facilities for staff and the incarcerated population to use. We note that for many people who are incarcerated, however, that soap is either unavailable or unaffordable which places the entire facility at greater risk of infection.<sup>19</sup> To address this problem, we recommend that you direct DOCCS to suspend all commissary charges related to soap and personal hygiene products for the duration of the pandemic. Arizona, Minnesota, and Pennsylvania have already done so.<sup>20</sup> Further, we recommend that you mandate that DOCCS change restrictions on accepting packages so that incarcerated people are allowed to receive packages that contain soap, personal hygiene products, masks, and gloves for the duration of the pandemic.

Finally, we strongly urge you to ensure robust testing inside all congregate care settings in New York State, including jails and prisons. So far, less than one percent of New York's prison population has been tested for COVID-19 despite a mounting death toll.<sup>21</sup> In order to stop the spread of the virus in correctional settings, it is critical that there be widespread testing of incarcerated people and staff akin to the new testing protocols in place for nursing homes in the state. According to the New York State Health Department, New Yorkers should be tested if "they have had close (*i.e.*, within six feet) or proximate contact with a person known to be positive with COVID-19."<sup>22</sup> Because social distancing while incarcerated is practically impossible, this protocol should be in place for jails and prisons in New York State.<sup>23</sup> On May 1<sup>st</sup>, Governor Phil

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<sup>18</sup> See Samantha Michaels, "New York Prisoners Are Sewing Masks for Hospitals—But Most Don't Have Their Own," *Mother Jones*, May 6, 2020, <https://www.motherjones.com/crime-justice/2020/05/new-york-prisoners-are-sewing-masks-for-hospitals-but-most-dont-have-their-own/>. We are encouraged by recent media reports that DOCCS intends to provide two cloth masks to every detained person and urge it to follow through with this proposal as soon as possible. See David Brand, "New York state will give all inmates face masks as COVID-19 death toll rises," *Queens Eagle*, May 7, 2020, <https://queenseagle.com/all/new-york-state-will-give-all-inmates-face-masks-as-covid-19-death-toll-rises>.

<sup>19</sup> See Conor Friedersdorf, "Can't We at Least Give Prisoners Soap?," *The Atlantic*, April 1, 2020, <https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/>.

<sup>20</sup> See "Reducing Jail and Prison Populations During the Covid-19 Pandemic," *Brennan Center for Justice*, March 27, 2020, last modified May 8, 2020, <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

<sup>21</sup> See DOCCS report, April 2020, <https://doccs.ny.gov/system/files/documents/2020/04/doccs-covid-19-confirmed-incarcerated-population-by-facility-april-27-2020.pdf>.

<sup>22</sup> See New York State Department of Health, April 2020, <https://coronavirus.health.ny.gov/covid-19-testing>.

<sup>23</sup> See "At a New York Prison, Social Distancing 'Is Impossible,' Inmate Says," April 9, 2020, *NPR.org*, <https://www.npr.org/2020/04/09/830474543/an-inmate-in-new-yorks-sing-sing-prison-shares-his-view-on-covid-19>. John Lennon, an incarcerated person in Sing Sing Correctional Facility, told NPR that: "[s]ocial distancing, to the extent that you guys do it in society, is impossible to achieve in a place like Sing Sing and most prisons around the nation, I would say. The tier is like 2 feet wide. You literally have to like go chest-to-chest to slide by somebody."

Murphy announced that the New Jersey Department of Corrections would begin universal COVID-19 testing for incarcerated people and corrections staff.<sup>24</sup>

### **Provide More Information, Access to Free Communication Tools and Maintenance of Certain Activities**

This is a very uncertain time and, even for those of us with ready access to accurate information, trying to understand the status of the pandemic is incredibly stressful. For those in New York’s prisons and jails, it is even more alienating and stressful as they grapple with a lack of information and an inability to see, or even speak with, their families, legal counsel and loved ones. In a recent New York Magazine article, a person incarcerated at Rikers Island described the current situation as “*The Walking Dead* in here...[w]e’re all trying to survive right now.”<sup>25</sup> And, The New York Times’ The Daily Podcast — “Getting Off Rikers Island” — describes the very real and incredibly unsettling situation of sharing an overcrowded cell with prisoners who are testing positive for the virus: “[t]hey are killing us...[w]hat are we supposed to do?”<sup>26</sup>

To address these issues, we fully support the humane conditions of confinement included in the Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody.<sup>27</sup> In addition, to alleviate some of this stress and uncertainty, we encourage DOCCS to implement certain standard information protocols, to allow incarcerated people more free channels of communication with their lawyers, families, and loved ones, and to institute practices that ensure incarcerated people’s constitutional rights are respected and mental health and safety are prioritized.

We recommend that DOCCS either include the following additional information in its Daily Update or otherwise provide organizations serving incarcerated individuals with a regular, twice-weekly update, as to:

- the status of containment in the facilities, including information on the number of positive cases identified, and the specific measures taken in response to these cases including the number of transfers to outside hospitals or other correctional facilities due to the type of care needed to treat the individual;

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<sup>24</sup> See “Reducing Jail and Prison Populations During the Covid-19 Pandemic,” *Brennan Center for Justice*, March 27, 2020, last modified May 8, 2020, <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

<sup>25</sup> See Zach Cheney-Rice, “‘We’re Going to All Start Dropping’: Rikers Inmates on Life as Prisoners of COVID-19,” *New York Magazine*, April 1, 2020, <https://nymag.com/intelligencer/2020/04/rikers-inmates-on-life-as-prisoners-of-the-coronavirus.html>.

<sup>26</sup> See Michael Barbaro et al., “Getting Off Rikers Island,” *The Daily*, April 23, 2020, <https://www.nytimes.com/2020/04/23/podcasts/the-daily/jails-inmates-coronavirus.html?action=click&module=audio-series-bar&pgtype=Article&region=header&showTranscript=1>.

<sup>27</sup> See “Joint Statement from Elected Prosecutors on COVID-19 and Addressing Rights and Needs of Those in Custody,” March 2020, [https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf?utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=f1bf35014e-EMAIL\\_CAMPAIGN\\_2020\\_03\\_17\\_12\\_07&utm\\_medium=email&utm\\_term=0\\_5e02cdad9d-f1bf35014e-144150717](https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf?utm_source=The+Marshall+Project+Newsletter&utm_campaign=f1bf35014e-EMAIL_CAMPAIGN_2020_03_17_12_07&utm_medium=email&utm_term=0_5e02cdad9d-f1bf35014e-144150717).



- any additional information that should be disseminated to incarcerated individuals and their families, such as care packages and visitation rights; and,
- a detailed explanation of DOCCS safety and testing protocols.

We also recommend implementing the following communication protocols:

- officially suspend the DOCCS directive limiting legal calls to once every 30 days, not exceeding 30 minutes;<sup>28</sup>
- direct the state contractor, JPay, to provide all incoming and outbound phone calls, email, mail and all other forms of communication without cost for the duration of this crisis;
- provide free access to audio books and other reading materials as quarantined incarcerated people are being held indefinitely in cells;
- increase video and teleconferencing capacity to compensate for the restrictions on in-person family and legal visitation resulting from the crisis; and,
- avoid unnecessary interruptions or revocation of mail, email and phone privileges and facilitate, wherever possible, access to free video visitation tools.

Finally, we recommend the following protocols, with appropriate social distancing measures, in order to ensure that incarcerated people's constitutional rights continue to be respected and the environment is both safe and humane, and to decrease the possibility of violence from lengthy periods of isolation:

- prioritize keeping commissaries up and running, with limited staff and robust cleaning protocols, so that inmates may continue to purchase items including personal hygiene items and clothing;
- ensure that incarcerated people continue to receive regular non-COVID-19-related medical treatments and medications that they require, which we have heard are now being provided sporadically or not at all;
- prioritize keeping religious services available to inmates;
- prioritize allowing daily, or at least regular, access to the yard or outdoors in place to provide for physical exercise and access to fresh air; and,
- allow continued access to the law library.

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<sup>28</sup> Inmate Telephone Calls DOCCS Directive (4423), last revised May 21, 2015, <https://doccs.ny.gov/system/files/documents/2019/08/4423%20%20Inmate%20Telephone%20Calls.pdf>.

Thank you, Governor Cuomo, for your tireless efforts to care for all New Yorkers and for continuing to demonstrate leadership by taking these steps to both protect and provide humane treatment for the vulnerable men, women, and youth currently housed in New York's incarceration facilities.

Respectfully,

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