



February 5, 2021

Via Email & Facsimile

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

Re: Reiterating the Importance of Releasing New York State Prison Inmates at Risk of Coronavirus Infection and Prioritizing Vaccination

Dear Governor Cuomo:

On behalf of the New York City Bar Association (“City Bar”) and the Corrections and Community Reentry Committee, Civil Rights Committee, Criminal Courts Committee and Mass Incarceration Task Force, we again write to urge you to expeditiously exercise your authority to reduce the State’s prison and jail populations to prevent the further spread of COVID-19 and the continued needless loss of life. In addition, we want to reiterate our call that the State prioritize providing the COVID-19 vaccine to incarcerated people at the same time it is offered to corrections officers.¹ While we are heartened to hear that it has been announced that prison inmates over 65 years old will begin to receive the vaccine, we continue to believe the entire population must be prioritized given the high risks of infection inside prisons.

Immediate Steps Are Necessary to Reduce Prison and Jail Populations

As the City Bar and other organizations have repeatedly stressed, it is critical that the State move quickly to release inmates who have health issues, have committed nonviolent crimes, or

¹ “Prioritizing COVID-19 Vaccine Distribution to Incarcerated People”, New York City Bar Association Civil Rights Committee, Corrections & Community Reentry Committee, Criminal Courts Committee, Criminal Justice Operations Committee, and Mass Incarceration Task Force (January 29, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/prioritizing-covid-19-vaccine-distribution-to-incarcerated-people>. (All sites last visited February 4, 2021).

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

near their release date.² Nevertheless, the State has consistently failed to act in a manner that is commensurate with the risk to life presented by the current pandemic.³

While New York has been a national leader in addressing this pandemic, that leadership has not extended to protecting our incarcerated population and, in failing to adequately protect New Yorkers in correctional facilities, you are failing to live up to your promise to protect *all* New Yorkers. Since the beginning of the pandemic, correctional facilities have been the largest “super spreaders” in the country.⁴ An outbreak at a prison in Forest County, Pennsylvania spread to the local community, resulting in its per capita COVID positivity rate being 25 times higher than the U.S. average.⁵ As of January 27, 2021, there have been 370,546 COVID-19 cases among incarcerated people in the United States and 89,016 cases among prison personnel, resulting in 2,287 and 141 deaths, respectively.⁶

According to the COVID Prison Project, as of January 15, 2021, New York is one of only two states whose prisons meet all four criteria for being designated “prison hotspots,” a designation which accounts for trends in the rate of new cases and positivity rates.⁷ Since that date, there have

² See “Statement of the New York City Bar Association Urging Immediate Steps to Reduce Prison and Jail Populations to Prevent Spread of the COVID-19 Virus,” (March 20, 2020), [https://s3.amazonaws.com/documents.nycbar.org/files/COVID Prisons Jails Statement FINAL.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/COVID%20Prisons%20Jails%20Statement%20FINAL.pdf); “Letter to Governor Cuomo Urging Release of New York State Prison Inmates at Risk of Coronavirus Infection,” (March 25, 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020675-CommutationsforElderlyandInfirmInmates.pdf>; “Statement of New York City Bar Association Setting Forth Legal Authority to Release Certain Categories of Incarcerated Persons from Local, State and Federal Jails and Prisons to Prevent the Further Spread of COVID-19,” (March 25, 2020), [https://s3.amazonaws.com/documents.nycbar.org/files/COVID19 Prisoner Release Guidance Statement FINAL.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/COVID19%20Prisoner%20Release%20Guidance%20Statement%20FINAL.pdf); “Statement of the New York City Bar Association 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%20Jail%20Reductions%20COVID%20FINAL.pdf); and “Letter to Governor Cuomo Urging Further Action to Enhance Health & Safety Protections for Incarcerated People During COVID-19 Pandemic,” (May 15, 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020710-PrisonReformCOVID19Cuomo.pdf>.

³ See Mark Hallum, “New York Prisons and Jails Remain COVID-19 Death Traps, Advocates Say,” AMNY, December 14, 2020, <https://www.amny.com/news/new-york-prisons-and-jails-continue-to-be-covid-19-deathtraps-advocates/>. See also “Governor Cuomo’s refusal to authorize vaccination of New Yorkers who live in the congregate settings of prisons and jails extends racist policies of incarceration to racist policies of vaccination. It defies the advice of all public health experts, and is cruel and irresponsible, said Stefen Short, Supervising Attorney with the Prisoners’ Rights Project at The Legal Aid Society. We demand that the Governor reverse his policy to ensure that our vulnerable clients receive the vaccine immediately,” (January 12, 2021), <https://legalaidnyc.org/wp-content/uploads/2021/01/01-12-20-Governor-Cuomo-Refuses-To-Permit-Vaccinations-at-Prisons-Local-Jails-Even-as-COVID-19-Claims-More-Lives-of-People-in-Custody.pdf>.

⁴ The COVID Prison Project, <https://covidprisonproject.com>, (Jan. 12, 2021) (“COVID Prison Project”)

⁵ See Jonathan Levin, “Pandemic Gets Increasing Local as U.S. Cases Keep Dropping,” Bloomberg.com, (January 25, 2021), <https://www.bloomberg.com/news/articles/2021-01-25/pandemic-gets-increasingly-local-as-u-s-cases-keep-dropping>.

⁶ See COVID Prison Project.

⁷ Using a definition developed by the Kaiser Family Fund, the COVID Prison Project designates a prison system a hotspot if it meets any of the following conditions: “(1) new cases have increased by more than five percent or more over the past 14 days; (2) test positivity rate over the past 14 days exceeds 10%; (3) a greater than one percent increase

been 938 new cases and 7 additional deaths in New York’s prisons. This spread is not confined to the facilities, but fuels increased outbreaks in outside communities that threaten other vulnerable New Yorkers. For example, cases at an assisted-living facility and an elementary school were linked to an outbreak at the nearby Greene Correctional Facility.⁸

Prisons are amplifiers of infectious disease because physical distancing opportunities are limited and outbreaks quickly travel outside the prison walls. According to the Legal Aid Society’s Pandemic in Prison Report, 97 percent of positive COVID-19 cases in prisons are the result of overcrowding. Public health experts recommend reducing prison capacity below 50 percent to avoid virus transmission, yet, as of October 27, 2020, 34 out of 52 facilities in the State remained at or above 60 percent capacity.⁹ While the Centers for Disease Control and Prevention recommends early release and incarceration alternatives to reduce overcrowding at incarceration facilities, the State’s occupancy has only been reduced by 11 percent since April 2020.¹⁰ The results have been catastrophic. According to the Marshall Project, 1 in 10 incarcerated people in the State have tested positive, a rate over 50 percent higher than New York’s general population.¹¹ Once infected, incarcerated people are three times more likely to die.¹² These tragic results are not surprising given that incarcerated people disproportionately suffer from chronic health conditions, which are exacerbated by the toxic environment of prisons.¹³

As of March 2020, the State had released 3,116 incarcerated people in order to reduce the spread of the virus, but over two-thirds of these people were already due to be released within 90 days.¹⁴ Clearly the State can and should do more. The first person to die from COVID-19 in a New

in test positivity rates in the past 14 days; and (4) cases per day per 1,000 incarcerated people over the past 14 days is greater than 0.1.” <https://covidprisonproject.com/>. In fact, as of January 15, New York was one of only four entities that met all four hotspot criteria (the other three being the Oregon State Department of Corrections, the Federal Bureau of Prisons, and Immigrations and Customs Enforcement).

⁸ See Troy Closson, “The High-Risk Group Left Out of New York’s Vaccine Rollout,” *The New York Times*, (January 26, 2021), <https://www.nytimes.com/2021/01/26/nyregion/new-york-vaccine-prisons.html>.

⁹ Pandemic in Prison, The Legal Aid Society, <https://legaidsoc.shinyapps.io/pandemicinprison>, last visited January 28, 2021 (“Pandemic in Prison”).

¹⁰ See Pandemic in Prison.

¹¹ See “A State-by-State Look at Coronavirus in Prisons,” The Marshall Project, (last visited January 28, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

¹² See National Academies of Sciences, Engineering, and Medicine 2020, “Decarcerating Correctional Facilities during COVID-19: Advancing Health, Equity, and Safety,” Washington, DC: The National Academies Press. <https://doi.org/10.17226/25945>.

¹³ “Medical Problems of State and Federal Prisoners and Jail Inmates, 2011–12,” U.S. Dept. of Justice, Bureau of Justice Statistics, Feb. 2015, <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>; Emily A. Wang, et al., “Mass Incarceration, Public Health, and Widening Inequality in the USA,” *Lancet*, (April 8, 2017), <https://pubmed.ncbi.nlm.nih.gov/28402828/>.

¹⁴ See Chelsia Rose Marcius, “A Lack of Compassion: Lawyers Say New York Prisons Are Dragging Their Feet Releasing Eligible Inmates Amid COVID Concerns,” *Daily News*, (December 10, 2020), <https://www.nydailynews.com/coronavirus/ny-covid-new-york-prisons-early-release-20201210-swdkwioezadbmjzlw4rnt5ua-story.html> (“Releasing Eligible Inmates”).

York State prison was incarcerated on a technical parole violation.¹⁵ Moreover, between March and November only five people were granted medical parole even though there are a large number of incarcerated people with medical conditions that make them more susceptible to COVID-19.¹⁶ We previously underscored the importance of using expansive clemency to slow the ravages of the pandemic and protect the health of all New Yorkers. Yet only a handful of people have been granted clemency during your tenure.¹⁷

By contrast, on November 4, 2020, New Jersey released 2,258 incarcerated people as part of one of the largest ever single day reductions of a state’s prison population. By March 2021, New Jersey expects to release at least 1,000 additional people, representing a 35 percent reduction in its prison population versus New York State’s approximately 11 percent reduction.¹⁸

Accordingly, we are again urgently requesting that you implement the following policies:

- expeditiously releasing everyone with six months or less remaining on their sentence;¹⁹
- releasing all individuals who are being detained solely because they can’t afford cash bail, unless they pose a serious risk to public safety;
- prohibiting new arrests for technical parole violations;²⁰
- releasing all incarcerated individuals who are older than 50, have serious medical conditions that could put them at risk, and are due for release within the next 12 months;
- broadly exercising your expansive powers of clemency, including commuting the sentences of anyone who has a heightened vulnerability to COVID-19, such as the elderly and people with serious illnesses; and
- expanding the use medical parole and explicitly including the risk of COVID-19 as a permissible basis to grant medical parole.²¹

¹⁵ See “Reducing Jail and Prison Populations During the COVID-19 Pandemic,” The Brennan Center, (February 2, 2021), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> (“Reducing Jail and Pandemic in Prison”).

¹⁶ See Chelsia Rose Marcius, “Only Five New Yorkers Released from Prison Through Medical Parole Since the Start of the Pandemic,” Daily News, (November 10, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-new-york-prison-parole-board-medical-parole-20201110-wt5f66w6xretpjjhlweizjfbka-story.html>.

¹⁷ See Errol Louis, “Don’t Let Them Die of COVID in Prison,” Daily News, (December 31, 2020), <https://www.nydailynews.com/opinion/ny-oped-dont-let-them-die-of-covid-in-prison-20201231-fnctlr6ntnfrafwatwwejuipq-story.html> (“Don’t Let Them Die”).

¹⁸ See Reducing Jail and Pandemic in Prison.

¹⁹ See Releasing Eligible Inmates.

²⁰ This action would be consistent with the Less is More: Community Supervision Revocation Reform Act, the bill sponsored by Sen. Brian Benjamin (S.1343C) and Assn. Walter Mosley (A.5493B). See City Bar, “Support for the Less is More Act,” (February 21, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-the-less-is-more-act>.

²¹ See “Statement of New York City Bar Association Setting Forth Legal Authority to Release Certain Categories of Incarcerated Persons from Local, State and Federal Jails and Prisons to Prevent the Further Spread of COVID-19,” (March 25, 2020),

Prioritize Providing the COVID-19 Vaccine to Incarcerated People²²

While COVID-19 has spread widely through all congregate living settings, prisons and jails are particularly prone to infectious disease because physical distancing is limited and hygiene is poor. Outbreaks in these facilities spill over to the larger community and further strain already overburdened healthcare systems. As noted in our January 29, 2021 letter, the Centers for Disease Control and Prevention (CDC) recommends that incarcerated people be vaccinated “at the same time as the frontline staff.”²³ Moreover, “the American Medical Association has also affirmed that designating correctional staff and incarcerated people as high-priority populations for the vaccine will protect them and outside communities from COVID-19 outbreaks.”²⁴ It is estimated that rapid spread from densely-packed prisons resulted in an additional 566,804 COVID cases outside of correctional institutions—or roughly 13% of all new cases—from May 1 to August 1 alone.²⁵

Given the high risks of infection inside prisons and the inevitable spread to surrounding communities, it makes profound sense to include incarcerated people in the first phases of the State’s vaccination distribution to maximize the vaccine’s impact and reduce the strain on healthcare systems. Twelve states and territories have included incarcerated people in their first phase of vaccine distribution, including Massachusetts, California, Rhode Island, Maryland and Delaware, and 27 states have made them a prioritized group within the first two phases of vaccine distribution.²⁶ The Federal Bureau of Prisons has also prioritized vaccine distribution, administering a first dose to 5,457 incarcerated people.²⁷

Accordingly, we urge you to recognize the health and moral importance to all New Yorkers of prioritizing vaccinating all incarcerated individuals as well as correction officers. We urge you to do so in the current phase – Phase 1b – of the New York Phased Distribution of the Vaccine.

https://s3.amazonaws.com/documents.nycbar.org/files/COVID19_Prisoner_Release_Guidance_Statement_FINAL.pdf.

²² *Supra* note 1.

²³ See “Interim Considerations for Phased Implementation of COVID-19 Vaccination and Sub-Prioritization Among Recommended Populations, Centers for Disease Control and Prevention,” (December 23, 2020), <https://www.cdc.gov/vaccines/covid-19/phased-implementation.html>.

²⁴ See Emily Wang, Lauren Brinkley-Rubinstein, Lisa Puglisi & Bruce Western, “Recommendations for Prioritization and Distribution of COVID-19 Vaccine in Prisons and Jails,” (December 16, 2020), https://justicelab.columbia.edu/sites/default/files/content/COVID_Vaccine_White_Paper.pdf (“Vaccine Distribution in Prisons and Jails”). See also “UCLA Law’s COVID-19 Vaccine Recommendations Letter,” signed by more than 480 health, legal and related experts urging that incarcerated populations are prioritized along with corrections staff for receipt of any COVID-19 vaccine approved for public use. <https://docs.google.com/document/d/1Riz5ICDHLCJ4Pnhl0mdNI3VeRSuBu8QWblRtjXu6zN0/edit#>.

²⁵ See “Mass Incarceration, COVID-19 and Community Spread,” the Prison Policy Initiative, (December 2020), <https://www.prisonpolicy.org/reports/covidspread.html>.

²⁶ Vaccine Distribution in Prisons and Jails.

²⁷ See “COVID-19 Vaccination Efforts Commended,” the Federal Bureau of Prisons, (January 16, 2021), https://www.bop.gov/resources/news/20210116_covid_vaccine_efforts_commended.jsp.

Prioritizing vaccines for those who live and work in correctional institutions will reduce serious complications from COVID-19, reduce the strain on healthcare systems, and benefit all of us.

Thank you again, Governor Cuomo, for your efforts to care for all New Yorkers and for continuing to demonstrate leadership by taking these steps to protect the vulnerable people currently housed in New York's correctional facilities.

Respectfully,

Gregory D. Morril, Chair
Corrections & Community Reentry Committee

Zoey Chenitz & Kevin Jason, Co-Chairs
Civil Rights Committee

Terri Rosenblatt, Chair
Criminal Courts Committee

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