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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

On March 20th the New York City Bar Association urged local, state and federal authorities to take steps to lower the number of individuals incarcerated in New York State in an effort to prevent the spread of COVID-19 through our jail and prison system.¹ In this statement, we echo the calls for release of many incarcerated individuals made by public health officials, the Kings County District Attorney, the New York County District Attorney, public defender organizations and many others. These calls stem from a collective desire to prevent further spread of COVID-19 in our jail system and to protect those most vulnerable to COVID-19. Every day there are reports of further individuals who are either incarcerated, or who work in a jail or prison, testing positive for COVID-19, and individuals in juvenile detention centers have also tested positive for COVID-19. Waiting any longer to release incarcerated individuals will jeopardize public health for all New Yorkers.

Below are a variety of mechanisms through which local, state and federal authorities can release incarcerated persons, with suggestions on how best to use them. These tools will allow for the kind of quick and efficient action which must be taken to release individuals from prison. We appreciate the difficulty of this task; however, the actions described below must be taken now to prevent further spread of the virus in jails, prisons and the wider community.

As a first step, and to the extent not already happening, every prison, jail and juvenile detention center should be required to compile a list of all individuals who are at high risk from COVID-19 and immediately consider release of those individuals under any and all relevant mechanisms described below as expeditiously as possible.

¹ See https://s3.amazonaws.com/documents.nycbar.org/files/COVID_Prisons_Jails_Statement_FINAL.pdf.

INDIVIDUALS HELD PRE-TRIAL OR REMANDED PENDING SENTENCE

- 1) New York City Department of Correction (NYC DOC) and other county jails, as well as public defenders and any other defense counsel, should provide lists of incarcerated individuals who are at high risk from COVID-19 to the New York State Office of Court Administration (OCA). OCA should create a process for the reconsideration of bail status for those individuals. OCA should advance all cases in which a defendant is being held who has been determined to be high risk and notify the defense they may move for reconsideration of bail pursuant to New York Criminal Procedure Law (CPL) § 530.40(2) at the next date.
- 2) After bail determinations have been made for those at high risk from COVID-19, OCA should continue to ensure that judges can remotely hear defense motions under CPL 530.40(2) for reconsideration of bail due to the threat of COVID-19.
- 3) District Attorneys' (DA) offices and judges should consider offering dispositions with a sentence of time served to those held pretrial, and DAs offices should evaluate all cases in which individuals are incarcerated pretrial or pending sentence, especially those at high risk from COVID-19, and consent to release these individuals whenever release is consistent with public safety.

INDIVIDUALS IN COUNTY AND CITY JAILS SERVING A DEFINITE SENTENCE

- 1) The New York State Board of Parole (NYS BOP) should utilize authority granted to them under New York Penal Law (PL) § 70.40(2) to release eligible persons who are serving a definite sentence of more than 90 days and have already served 60 days. In addition, the New York City Council should pass a local law establishing a "Local Release Commission" and New York City Mayor de Blasio should immediately appoint Commission members. This Local Release Commission would have authority under PL § 70.40(2) to release those who have served 90 days who were sentenced to city jail for more than 120 days.
- 2) Mayor de Blasio should direct the NYC DOC Commissioner to use the expansive definition of "work release program" under the law to authorize the release of those sentenced to jail in NYC for the purpose of furthering public health during the COVID-19 crisis. Pursuant to Article 6-A, §§ 150-160 of the New York Correction Law (Corr L), the NYC DOC Commissioner can "extend the limits of the place of confinement" for people who participate in such a work release program, so long as the program is "for the purpose of seeking or engaging in" employment, training, treatment, caring for family, or "some other compelling reason consistent with the public interest."² Other county legislatures can utilize Corr L § 870 to establish the same type of work release program.
- 3) For those who do not qualify under PL § 70.40(2) or for work release, Governor Cuomo should consider commuting the sentences for, at a minimum, all those at high risk from

² NY Corr L § 150(4).

COVID-19, and all those serving time for convictions on misdemeanors or violations. Governor Cuomo should declare his intention to do so, giving the People a short period of time to consent to commutation or raise specific objections why an individual defendant should not be released under such a commutation. In addition, the Governor should consider commutation for all other individuals serving definite sentences as they rarely pose an immediate risk to public safety.³

INDIVIDUALS SERVING DETERMINATE OR INDETERMINATE SENTENCES IN STATE PRISONS

- 1) The New York State Department of Corrections and Community Supervision (NYS DOCCS) Commissioner should consider the temporary release of all prisoners considered at high risk from COVID-19 pursuant to New York Codes, Rules and Regulations (NYCRR) 7 § 1901.1(a)(2), which allows for the temporary release of those who are incarcerated “for surgery or to receive medical treatment not available in a correctional institution only if deemed absolutely necessary to the health and well-being of the inmate and where approval is granted by the commissioner or his designee.” This provision should be interpreted to include the requirement put forth by health authorities that those at high risk from COVID-19 must isolate themselves. This crucial public health practice is not possible in a correctional institution. For this reason, pursuant to this section, the Commissioner can temporarily release those who are incarcerated, and require their return to complete their sentence after the threat from COVID-19 has passed. Release could be conditioned on the requirement that they regularly check in with DOCCS authorities and that they self-isolate at home. All incarcerated individuals who are at higher risk from COVID-19 who do not pose an immediate risk to public safety or an extreme flight risk can and should be released pursuant to this provision.
- 2) The process for granting medical parole pursuant to New York Executive Law 259-r should be streamlined and the additional threat from COVID-19 should be a consideration when deciding these requests. This provision allows for the release of those who have been “certified to be suffering from a terminal condition, disease or syndrome and to be so debilitated or incapacitated as to create a reasonable probability that he or she is physically or cognitively incapable of presenting any danger to society.” The BOP should be ordered by Governor Cuomo to reconsider any previously denied request for medical parole for any incarcerated individual who has a serious medical condition without additional motions made by that person.
- 3) All individuals who are high risk from COVID-19 and are eligible for parole should be considered for release by the BOP as soon as possible, and the Board should be instructed by Governor Cuomo to consider the risk posed by COVID-19 as part of its parole determinations. After individuals at high risk from COVID-19 have been evaluated, the

³ See New York State Constitution, Article IV, § 4 (the Governor has the power “to grant reprieves, commutations and pardons after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he may think proper”).

Board should re-evaluate all parole-eligible individuals as quickly as possible, advancing and rescheduling parole re-hearings as needed to accomplish this goal.

- 4) Governor Cuomo should consider sentence commutation for individuals at high risk from COVID-19, as well as those who are within eighteen months of parole eligibility.⁴

JUVENILES DETAINED PURSUANT TO JUVENILE DELINQUENCY PROCEEDINGS

- 1) Family Court judges should be directed by OCA to reconsider the continued detention for all juveniles held in detention pursuant to New York Family Court Act (FCA) § 320.5 prior to a dispositional hearing in light of the potential spread of COVID-19 and the harm stemming from the inability of juveniles held in detention facilities to visit family due to new regulations aimed at preventing the spread of COVID-19.
- 2) Wherever possible, the New York City Administration of Children's Services (ACS) should consider releasing juveniles from non-secure close to home programs to aftercare sooner than previously planned to prevent the spread of COVID-19 through these detention facilities.
- 3) Pursuant to FCA § 355.1, Family Court judges may modify any order, including an order to detain a juvenile after a dispositional hearing, due to a "substantial change of circumstances" either on the court's own motion, by motion of the juvenile or the juvenile's guardian, or by motion of the commissioner of social services or the Office of Children and Family Services. A mechanism should be put in place whereby counsel and guardians for the juveniles, ACS, and facility centers can notify Family Court judges when juveniles currently held in a detention center are at high risk from COVID-19, and when juveniles are housed in a facility center in which people have tested positive for COVID-19. OCA should direct a review by Family Court judges of whether a change to detention orders should be conducted, particularly for those children who have health conditions that put them at higher risk from COVID-19 and those held in facilities where individuals have contracted COVID-19.

INDIVIDUALS HELD FOR ALLEGED VIOLATIONS OF PAROLE, PROBATION AND POST-RELEASE SUPERVISION

- 1) NYS DOCCS should utilize its authority under NYCRR 9 § 8004.2(g) to vacate any pending violation of parole and post-release supervision warrants, and release all accused of technical parole violations held at Rikers Island and other local jails around the state. It should also review and consider releasing people detained for non-technical parole violations, especially those detained on the basis that their alleged parole violation is the

⁴ See New York State Constitution, Article IV, § 4. See also Letter from New York City Bar Association's Criminal Advocacy Committee and Corrections and Community Reentry Committee to Governor Andrew Cuomo, March 25, 2020 (urging the Governor to "exercise his authority to implement an immediate, one-time review of all elderly or infirm people who are currently serving sentences in New York State's prisons and consider sentence commutations for as many of them as possible, on an individual basis and subject to public safety concerns."), <https://bit.ly/2QMb7hd>.

commission of a new crime for which pre-trial release would otherwise be mandatory under the new bail law. NYS DOCCS should not issue any new warrants for technical parole violations or parole violations that do not directly implicate public safety.

FEDERAL DETAINEES

- 1) Federal trial judges should consider utilizing their authority under 18 USC § 3142(i) to grant “temporary release” to people for a “compelling reason” during the duration of this health crisis.⁵
- 2) Judges should also consider delaying surrender dates for anyone who has been sentenced but not yet reported to prison.
- 3) The United States Probation and Pretrial Services Office should utilize its authority to issue summonses for alleged violations of supervised release and probation rather than seeking to make custodial arrests. Judges should consider releasing people accused of supervised release and probation violations pending a final determination of the violation.⁶
- 4) The Federal Bureau of Prisons should utilize all of its existing statutory authority to expeditiously consider early release, including work release, home confinement and release into residential reentry centers.⁷

PREVENT FURTHER INCARCERATION AND SPREAD FROM CONTINUED LAW ENFORCEMENT

- 1) The NYPD Commissioner should direct officers to cease enforcement of certain low-level crimes, such as misdemeanor drug possession, issue summonses whenever possible to prevent spread during arrest processing, and issue Desk Appearance Tickets (DATs) whenever possible. This will protect the NYPD and their families, as well as the larger community.
- 2) District Attorneys should follow the example of the Kings County District Attorney to decline to prosecute low level offenses that do not jeopardize public safety.

About the Association and this Statement. *The mission of the New York City Bar Association, which was founded in 1870 and has 24,000 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. It includes among its membership lawyers in virtually every area of law practice, including those appearing in state and federal criminal and civil courts; lawyers in*

⁵ See, e.g. *U.S. v. Dante Stephens*, 15-cr-95 (AJN), March 18, 2020 (reconsidering prior remand order, in part due to COVID-19 pandemic and increased risk at jails, and releasing defendant to “24-hour home incarceration and electronic location monitoring”).

⁶ Fed. R. Crim. P. 32.1(a)(6).

⁷ See Second Chance Act of 2007, 42 USC § 17541; First Step Act of 2018, Pub. L. 115-391.

government service, academia, and human and civil rights organizations; and judges, alternative dispute practitioners, attorneys in large firms, small firms, solo practice, and in-house counsel at corporations. This statement contains input from the following City Bar committees: Corrections and Community Reentry, Criminal Courts, Criminal Justice Operations, Federal Courts and the Mass Incarceration Task Force. <http://www.nycbar.org>