



NEW YORK
CITY BAR

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

Re: Release of New York State Prison Inmates at Risk of Coronavirus Infection

Dear Governor Cuomo:

During your press conference on March 23rd, you announced that you are currently considering clemency for at-risk inmates in state detention. Following on the March 17th statement of the New York City Bar Association (“City Bar”) urging the Unified Court System to take additional steps to protect the health and safety of New Yorkers during the COVID-19 pandemic¹ and its March 20th statement urging immediate steps to reduce prison and jail populations to prevent the spread of COVID-19,² we write to urge you to exercise your authority

¹ See “Statement of New York City Bar Association President Roger Juan Maldonado on Measures Taken by the Unified Court System in Response to the COVID-19 Pandemic,” March 17, 2020, <https://www.nycbar.org/media-listing/media/detail/statement-of-new-york-city-bar-association-president-roger-juan-maldonado-on-measures-taken-by-the-unified-court-system-in-response-to-the-covid-19-pandemic>. (urging that judges “consider all alternatives to bail for defendants [with] [t]he goal [of] avoid[ing] increasing the incarcerated population to the greatest extent possible,” that criminal court judges “should be required to consider release for anyone in pretrial detention who is over 60 or who has an underlying health condition that puts them at heightened risk from COVID-19,” should “re-examine bail in other appropriate cases,” and should promptly re-examine and consider for release (with appropriate conditions) individuals who are incarcerated because they are unable to make bail). (All links in this letter were last checked on March 24, 2020).

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. (joining the New York City Board of Correction, the Federal Defenders of New York, the Legal Aid Society, and district attorneys in Brooklyn and Manhattan and other organizations in calling on law enforcement and government “to take bold action not only to prevent death among vulnerable populations, but to protect the health of corrections

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. The Criminal Advocacy Committee and the Corrections and Community Reentry Committee include criminal defense lawyers, Assistant U.S. Attorneys (current and former), and New York City prosecutors, among others.³

The coronavirus represents a perfect storm for the New York State prison system.

The virus is highly contagious and is easily spread by infected individuals who are asymptomatic and do not know that they are infected with the virus. Prisoners in the New York State prison system live in close quarters to each other and come into contact every day with prison employees and vendors who live near the prison facilities. There is a high likelihood that more inmates or employees at a New York State facility will contract the virus and then spread it rapidly within the prison community. Such an outbreak will overwhelm the medical facilities at the prison where the outbreak occurs and at neighboring hospitals.

And any outbreak of the coronavirus at a New York State prison is likely to result in the death of inmates, particularly inmates who are elderly or pregnant, or who have pre-existing medical conditions.

This is not a theoretical risk – according to the Wall Street Journal, employees of the federal and city prison systems in New York City have already been diagnosed with the COVID-19 virus.⁴

Not surprisingly, there has been a recent and steady drumbeat of thoughtful, persuasive support voiced for the prompt release of at-risk inmates.

Last Thursday, Doctor Ross MacDonald, Chief Medical Officer for New York City Correctional Health Services, took to Twitter to urge city and state authorities to “let as many” at-risk inmates “out as you possibly can.” He noted that nothing medical or correctional staff can do will “change the fundamental nature of jail,” which prohibits the social distancing necessary to slow the spread of COVID-19.⁵

officers, prison administrators, prison health workers, law enforcement, attorneys, judges, court personnel and other essential actors in the corrections and criminal justice systems.” Accordingly, the City Bar calls on all actors in the criminal justice system to “(1) immediately remove all high-risk individuals from incarceration; (2) swiftly move to reduce the density at all New York area jails and prisons to prevent or slow the spread of the virus; (3) refrain from adding additional people to jails and prisons in New York; and (4) ensure that all facilities have plans in place to prevent the spread of the virus and remove stricken individuals to appropriate care facilities”).

³ The Committees’ support of this action does not constitute an official statement of any office represented by their individual members.

⁴ Elinson, Zusha and Deanna Paul, “Jails Release Prisoners, Fearing Coronavirus Outbreak,” *Wall Street Journal*, March 22, 2020, <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600?mod=djem10point>.

⁵ Ranson, Jan and Alan Feuer, “A Storm Is Coming: Fears of an Inmate Epidemic as the Virus Spreads in the Jails,” *New York Times*, Mar. 18, 2020, <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>.

Over the weekend, the New York City Board of Correction, an independent oversight agency, sent a letter to New York City and New York State officials urging them to rapidly reduce the jail population because a “failure to drastically reduce the jail population threatens to overwhelm the City jails’ healthcare system as well its basic operations.”⁶

The Board of Correction makes a compelling case for urgent action:

Over the past six days, we have learned that at least twelve DOC employees, five CHS employees, and twenty-one people in custody have tested positive for the virus. There are more than 58 individuals currently being monitored in the contagious disease and quarantine units (up from 26 people on March 17). It is likely these people have been in hundreds of housing areas and common areas over recent weeks and have been in close contact with many other people in custody and staff. Given the nature of jails (e.g. dense housing areas and structural barriers to social distancing, hygiene, and sanitation), the number of patients diagnosed with COVID-19 is certain to rise exponentially. The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them.

The Wall Street Journal, reporting on the Board of Correction letter, noted that “experts fear the coronavirus could overwhelm correctional facilities, particularly because there are more inmates than ever in the older demographic that is at greater risk. The number of people 55 or older in state and federal prisons reached 164,000 in 2016, more than tripling from 1999, according to the Pew Charitable Trusts.”⁷

Similar support for a rapid draw down in the at-risk New York State prison population was voiced last week by the Correctional Association of New York (“CANY”), which issued a series of specific recommendations to you.⁸

CANY recommended that you “use clemency power to commute the sentences of anyone who has a heightened vulnerability to COVID-19, including the elderly, pregnant women, people with serious illnesses, and people with otherwise compromised immune systems.” CANY also recommended that you “commute the sentences of people aged 60 and older who have served at

⁶ Sherman, Jacqueline, “Letter from BOC re NYC Jails and COVID-19,” *Board of Correction City of New York*, March 21, 2020, <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf>.

⁷ Elinson, Zusha and Deanna Paul, “Jails Release Prisoners, Fearing Coronavirus Outbreak,” *Wall Street Journal*, March 22, 2020, <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600?mod=djem10point..>

⁸ “Reducing the Impact of COVID-19 on Incarcerated People: Recommendations for the Governor and DOCCS,” <https://www.correctionalassociation.org/recent-news>. According to the CANY website, “[f]or 175 years, CANY has been the only independent organization in New York with authority under state law to monitor prisons and report our findings to the legislature and the broader public.”

least 10 years in DOCCS custody,” noting that “there are approximately 1,311 people who meet these criteria.” And CANY recommended that you “commute the sentences of people with medical issues without regard to whether they meet the criteria for medical parole.”

And, finally, last week, Dr. Amanda Klonsky, a Harvard University doctoral candidate working with the MacArthur Foundation in Criminal Justice Reform, voiced her support for a prompt effort to release at-risk inmates across the country, noting that:

With about 40 percent of incarcerated people suffering from a chronic health condition, the overall health profile of people in jails and prisons is abysmal. And the older prison population is among the most vulnerable to severe complications from Covid-19. There are 274,000 people aged 50 or older in state and federal prisons in the United States. If this group were separated from the rest of the U.S. prison population, they would be the seventh-largest prison system in the world.⁹

Dr. Klonsky added that “aging people who are released after serving long sentences have a recidivism rate close to zero.”

We understand and are sensitive to the policy and logistical hurdles associated with this action, including where these individuals will be housed, who will care for them, and how they will be supervised. But as Dr. MacDonald wrote last week, a storm is coming to New York’s jails and prisons. Decisive action now will save lives, for a population that is at once extraordinarily at risk and highly unlikely to recidivate.

The City Bar therefore joins in the recommendations of the medical and correctional authorities above and urge that you take immediate steps, consistent with the requirements of public safety, to reduce the number of elderly and infirm individuals in the New York State prison system. Extraordinary circumstances exist today for you to move promptly to commute the sentences of these people and reduce the risk of a massive coronavirus outbreak in the New York State prison system. Notwithstanding the further steps that will need to be taken by a variety of stakeholders in the justice system to stop the spread of coronavirus and protect vulnerable New Yorkers, we submit that sentence commutations are an immediately available response.

Respectfully,

Brian A. Jacobs
Chair, Criminal Advocacy Committee

Gregory D. Morril
Chair, Corrections & Community Reentry Committee

⁹ Klonsky, Amanda, “An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues,” *New York Times*, March 16, 2020, <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.