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Via Electronic Mail

March 30, 2020

Adam Silverman, Esq.
General Counsel
NYS Department of Corrections and Community Supervision
1220 Washington Avenue, Building 2
Albany, NY 12226-2050

Cal Whiting
Assistant Secretary for Public Safety
Office of Governor Andrew M. Cuomo
New York State Capitol Building
Albany, New York 12224

Re: Immediate Release of Incarcerated People Susceptible to Contracting COVID-19

General Counsel Silverman and Assistant Secretary Whiting:

We write to demand that New York State immediately release four incarcerated people due to their unique vulnerability to COVID-19 infection, and to demand that the New York State Department of Corrections and Community Supervision ("DOCCS") review thousands of other incarcerated people for immediate release.

As you know, institutional settings, including state prisons operated by DOCCS, are predisposed to the rapid spread of contagions such as COVID-19. Since the initial spread of COVID-19, we have been in communication with some of our most vulnerable clients and their family members. Our clients are distressed by what they perceive to be the Department's lack of care for their wellbeing during the pandemic. They report insufficient access to medical attention and an inadequate supply of hygiene and cleaning products. Some of our clients report that the Department has failed to reliably institute social distancing measures, and where such measures have been attempted, they are woefully insufficient. Our clients' family members have also expressed deep concern for their loved ones -- concern that has been exacerbated by their inability to reliably communicate with them.

We remain extremely concerned about the environment in New York State prisons and DOCCS' failure to take adequate measures to protect our clients from COVID-19 transmission. Despite the fact that many of our clients are at risk of death from COVID-19 transmission, DOCCS still has not publicly committed to consider any of our clients for medical parole, leaves of absence, or other forms of permanent or temporary release. DOCCS also has not committed to work with Governor Cuomo's office to explore clemency for our vulnerable clients. Throughout the country, corrections

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agencies are meeting this crisis with the exigency it deserves by rapidly releasing hundreds and in some cases thousands of incarcerated people. Governor Cuomo has even ordered the release of people who are incarcerated for alleged parole violations. DOCCS' silence is therefore deafening. New York State accounts for over one-quarter of the nation's COVID-19 cases. If this State is serious about "slowing the spread" and "flattening the curve," it must release people from its state prisons without further delay.

We therefore write to demand that the Department immediately review all people in its custody over the age of 50 and all people in its custody with serious medical conditions (e.g. heart disease, diabetes, lung disease, cancer, weakened immune system) for release. We first made this demand on March 18, 2020. Our demand remains unanswered. At the end of this letter, we share several mechanisms at the Department's disposal to expeditiously release people from its custody.

But first, we would like to share the stories of four incarcerated people with whom we have communicated. These people encapsulate the severity of the situation incarcerated people face as the COVID-19 pathogen continues to spread. We demand that you review these four people for immediate release.

More broadly, however, we demand that you identify other people in the Department's custody who are in similar situations, and review them for immediate release. In the coming days, we will continue to communicate with you about clients who are in similar situations. For the safety of these clients--and for the safety of Departmental staff and the communities to which they return on a daily basis--the Department must take immediate action.

I. Clients who must be Released Immediately

A. [REDACTED]

[REDACTED] is a 55 year-old man currently incarcerated at Five Points Correctional Facility. In addition to Chronic Obstructive Pulmonary Disease ("COPD") and Sarcoidosis, [REDACTED] is a lifelong asthma patient. Due to his severely inflamed lungs and his difficulty breathing, [REDACTED] requires several medications, a nebulizer, and a pump. He reports that in spite of his well-documented medical needs, he is often denied medical interventions. This situation has only worsened since his transfer to Five Points Correctional Facility. While at home in Oswego, [REDACTED] saw a physician at least once a week, received blood work every four to six weeks, and had consistent access to his medications and his medical devices. He reports that his care at Five Points is sporadic, at best. He has been hospitalized frequently, but reports that prison medical providers often refuse to implement hospital care recommendations. To make matters worse, the Department has inexplicably confined [REDACTED] to a double cell. [REDACTED] is unsuitable for a double cell even absent a pandemic. In consideration of the pandemic, however, double celling is even more dangerous for [REDACTED]. Social distancing may save [REDACTED] life. [REDACTED] situation is compounded even further by the Department's reported failure to provide him hygiene supplies or to adequately distance him during congregate activities. [REDACTED] states that the Department has instituted certain social distancing measures in the mess hall, but those same measures are

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inconsistently applied and far less effective in the Law Library and the recreation yard. Furthermore, despite the clear injustice of this policy, the Department continues to deny people incarcerated at Five Points the right to possess and use hand sanitizer, while providing that hand sanitizer to corrections officers.

██████████ is due to be released in October of this year. He is concerned about his ability to persist for another six months without contracting and potentially succumbing to COVID-19. Please release ██████████ immediately.

B. ██████████

██████████ is an 83 year-old man currently incarcerated at Watertown Correctional Facility. ██████████ has several medical conditions that put him at serious risk of contracting COVID-19. First, ██████████ has suffered from bladder cancer at least twice in his lifetime. His cancer has caused further health complications, including his development of basal cell carcinomas, melanomas, and squamous cell carcinomas on his face, arms, and legs, and the removal of one of his kidneys. Second, ██████████ suffers from degenerative arthritis, a condition that has significantly impaired his motor functioning skills. ██████████ is unable to carry commissary purchases, care packages he receives from his family, or his own belongings, and is at moderate falling risk due to his inability to remain balanced. Prior to incarceration, ██████████ had two spinal surgeries to restore some balance and movement lost to degenerative arthritis, however, the surgeries were only partially successful. ██████████ continues to experience difficulties with ambulation and completing daily living tasks. Third, prior to his incarceration ██████████ was diagnosed with atherosclerotic heart disease. According to his doctors in the community, ██████████ coronary artery calcium score is markedly elevated, putting him at five times the risk of experiencing a major cardiac event than that of a person with a normal coronary artery calcium score.

██████████ is scheduled for a parole hearing in September of this year. Due to his advanced age and serious medical conditions, the Department must release him immediately.

C. ██████████

██████████ is a 40-year old man who is currently incarcerated at Green Haven Correctional Facility. ██████████ has been diagnosed with diabetes for years, and was diagnosed with heart failure and hypertension while in Departmental custody. In February, ██████████ underwent a triple bypass surgery at a hospital in Westchester County, and later contracted a lung infection due to complications from the surgery. ██████████ reports that even before COVID-19 entered the state prisons, he was receiving subpar medical treatment. He says he has been prevented from attending follow-up appointments with his cardiologist, and facility doctors have failed to follow the hospital's post-discharge instructions. ██████████ states that his lung infection was caused in part by the Department's failure to allow him to ambulate to regain his strength while he was receiving post-surgery infirmary care. He also states that he still experiences lung pain and discomfort. ██████████ diabetes care has also been inadequate. He states that the nursing staff handles his pills without

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gloves, refuses to allow him to inject his own insulin, and fails to take precautions--including using alcohol pads--when injecting his insulin for him.

██████████ has two of the medical conditions identified by medical professionals as rendering an individual "at risk" for heightened complications, including death, from COVID-19. In spite of this risk, ██████████ reports he has not been provided adequate hygiene and cleaning supplies. He says that he is provided an insufficient supply of soap and has no access to hot water in his cell. Additionally, the Department allows him to clean his cell only once per week, without adequate cleaning supplies. The social distancing initiatives the Department has piloted in the mess hall and other congregate settings are similarly ineffective, according to ██████████.

██████████ is scheduled for conditional release on June 27, 2020. As with our other clients, an additional three months in prison exposes ██████████ to great risk of COVID-19 transmission and serious complications from the virus. Please release ██████████ immediately.

D. ██████████

██████████ is a 60 year-old woman serving a two-year sentence at Taconic Correctional Facility. ██████████ suffers from a rectovaginal fistula, a condition that developed while she was in the community after she underwent chemotherapy and radiation treatment for her rectal cancer. The treatment was successful and she is now cancer-free; however, the rectovaginal fistula has caused repeated infections that put her at serious risk of developing a blood infection. ██████████ condition has deteriorated since her incarceration. She states that in the last year she has suffered frequent infections, and her symptoms have broadened to include frequent bleeding and abscess flares. ██████████ states that medical staff at Taconic has administered antibiotics to treat her symptoms, but the frequency and severity of the infections, as well as her symptoms, are increasing. In fact, her doctor at Taconic has informed her that she requires surgery to repair the rectovaginal fistula as soon as possible or she is at significant risk of developing sepsis, a potentially life-threatening condition. Given ██████████ serious condition and treatment needs, we are concerned that she is both unnecessarily suffering and that her condition is rapidly deteriorating.

██████████ was convicted of Attempted Sale of a Controlled Substance in the 3rd Degree and Criminal Possession of a Controlled Substance in the 3rd Degree. While in custody, ██████████ has received certificates in Financial Planning from Columbia's Prison Education Program, Parenting, Cosmetology, and Knitting, and completed the Alternative Violence Program, which she was not required to attend. ██████████ also completed all three phases of the Alcohol and Substance Abuse Treatment program, for which she also served as the assistant coordinator.

██████████ has an open date for parole release on April 28, 2020. It makes little sense for the Department to risk ██████████ health by holding her another 28 days. Please release ██████████ immediately.

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II. Mechanisms the Department Can Use to Release People Immediately

The Department has several mechanisms at its disposal to release immediately people who are susceptible to COVID-19 transmission. We are identifying just a few of them here.

- New York Executive Law § 259-r(10): At his discretion, Assistant Commissioner Annucci can grant medical parole to people who suffer from certain "terminal conditions, diseases, or syndromes" where those conditions "create a reasonable probability that [the person] is physically or cognitively incapable of presenting any danger to society." This provision covers people who are not serving a conviction for first degree murder or an attempt or conspiracy to commit murder, people who have served at least one half of the period of an indeterminate sentence, and people who have served at least one half the term of a determinate sentence for second degree murder, first degree manslaughter, or any Penal Law Article 130 offense or attempt at such an offense. Therefore, this provision covers all of the people named in this letter and hundreds of our clients. Acting Commissioner Annucci should liberally invoke this provision to release hundreds of incarcerated New Yorkers.
- New York Correction Law §§ 851, 855: The Department has the authority to grant temporary release to people who suffer from similar conditions pursuant to several provisions of the Correction Law and their implementing agency regulations. New York Correction Law § 851(4) provides the Department the ability to grant furloughs for up to seven days for incarcerated people to "seek employment, maintain family ties, solve family problems, seek post-release housing, attend an educational or vocational course, *or for any matter necessary to the furtherance of such purposes.*" While furloughs are limited to people who are within two years of parole or conditional release and limited to certain convictions, New York Correction Law § 851(6) allows the Commissioner to grant leaves of absence to any incarcerated person for any period of time. This includes for surgery or medical treatment that is absolutely necessary and not available in the Department. These provisions are subject to the conditions of 7 NYCRR Part 1900, but are still applicable to all of the people named in this letter and potentially thousands of people statewide.
- Commutations/Clemency/Emergency Powers: Finally, as we suggested in our March 18, 2020 letter, the Department can work with Governor Cuomo to grant commutations and clemencies. Article 4 of the New York State Constitution grants Governor Cuomo wide-ranging clemency power, and allows him to issue executive orders commuting sentences and invoking his emergency powers. New York Executive Law § 15 lays out Governor Cuomo's authority to commute sentences. New York Executive Law Article 2-B delineates the Governor's authority to suspend the enforcement of state laws in an emergency. California Governor Gavin Newsom has invoked similar provisions to grant clemency to 26 Californians susceptible to COVID-19. Other nations have taken similar steps in their federal prison systems. In addition, the Governor has the authority to suspend the requirements of these laws under any provision he deems necessary. He could remove the limitations set out in some of these mechanism for early release to make it clear, for example, that someone would not ordinarily fit the definition of medical parole would now be a candidate. This

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approach was taken by the Governor of Colorado in removing some of the statutory obligations for good time release and we urge the Governor to take similar steps here. We encourage the Department to work with the Governor's Office to take similar steps here in the State of New York.

There are additional mechanisms for the Department and the Governor's Office to release incarcerated individuals who are susceptible to COVID-19 transmission. Some of those mechanisms are outlined in the enclosed publication of the New York City Bar Association. We will continue to share the names of our clients whom the Department should consider for immediate release. We again demand that the Department take swift action to ensure that our clients and Departmental staff are protected from this pandemic. Thank you for your attention to this pressing public health emergency.

Sincerely,

/s/ Stefen R. Short

Stefen R. Short
Staff Attorney

Encl. 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

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