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VIA ELECTRONIC MAIL ONLY

December 14, 2020

Governor Andrew M. Cuomo
New York State Capitol Building
Albany, New York 12224

Anthony J. Annucci
Commissioner
NYS Department of Corrections and Community Supervision
1220 Washington Avenue, Building #9
Albany, NY 12226

Re: **Demand for the Immediate Release of Medically Vulnerable People Incarcerated in New York State Prisons During the COVID-19 Pandemic**

Governor Cuomo and Acting Commissioner Annucci:

We write to you amidst a deepening public health crisis. Almost nine months into the COVID-19 pandemic, case numbers continue to increase. New York, once the epicenter of the pandemic, has now entered a dangerous second wave that threatens to engulf the entire region. Several outbreaks raging at prisons across the state have now pushed the number of reported COVID-19 cases in New York State Department of Corrections and Community Supervision (“DOCCS” or the “Department”) facilities beyond two thousand, leaving our clients, DOCCS staff, and the communities and health care infrastructures near prisons at grave risk. At this critical juncture, we again implore you to disclose more and better data, to adopt decarceration measures to significantly reduce prison populations, and to release the medically vulnerable people in your custody. A combination of increased transparency and expanded release mechanisms will greatly reduce the risk of a public health catastrophe in New York’s prisons and surrounding communities.

Specifically, we demand that DOCCS:

- 1. Share meaningful data about the scope of the crisis in New York State prisons by publishing a daily COVID dashboard.** DOCCS must improve its data disclosure policies by maintaining a daily dashboard, with accessible historical data, so that the public can track DOCCS’s response to the pandemic. Many other state correctional systems take this

approach to COVID-19 data disclosure, providing guidance on how to clearly and consistently promote transparency.¹

2. Release medically vulnerable people who remain in State custody and adopt decarceration measures to significantly reduce prison populations. The rampant outbreaks in DOCCS facilities over the past three months show that current mitigation policies and early release mechanisms are not enough. The warnings from public health experts are clear: decarceration is necessary to mitigate the risk of virus spread in prisons.² To stem the spread of the virus and to preventing a tragic loss of life, the State must release a critical mass of incarcerated individuals without delay.

DOCCS’s Existing Infection Control Practices Have Failed to Prevent Recent Second-Wave Outbreaks in Prisons Across the State.

On September 28, 2020, Elmira Correctional Facility (“Elmira”) and Greene Correctional Facility (“Greene”) each reported one COVID-19 case. As of December 2, roughly 605 and 162 people in custody at Elmira and Greene, respectively, had tested positive for the virus. But these two facilities are far from the only facilities experiencing spikes. Burgeoning outbreaks at other prisons, including Attica, Auburn, Cayuga, Clinton, and Wyoming Correctional Facilities, underscore the importance

¹ A number of states have implemented COVID-19 “dashboards” or other robust online resources providing detailed, facility-specific, and viewable-over-time data on testing, rates of infection, and deaths among incarcerated people and correctional staff; comparisons of infection rates within facilities to their surrounding communities; and/or prisoner releases and population changes. *See, e.g.*, “Pennsylvania Department of Correction COVID-19 Dashboard,” available at <https://www.cor.pa.gov/Pages/COVID-19.aspx> [last accessed December 12, 2020] (Pennsylvania); “COVID-19 (CORONAVIRUS) Information Home,” available at [https://doc.wi.gov/Pages/COVID19\(Coronavirus\)/COVID19.aspx](https://doc.wi.gov/Pages/COVID19(Coronavirus)/COVID19.aspx) (direct URL to dashboard: [https://doc.wi.gov/Pages/COVID19\(Coronavirus\)/COVID19TestingDashboard.aspx](https://doc.wi.gov/Pages/COVID19(Coronavirus)/COVID19TestingDashboard.aspx)) [last accessed December 12, 2020] (Wisconsin); “Population COVID-19 Tracking,” available at <https://www.cdcr.ca.gov/covid19/population-status-tracking/> and “CDCR/CCHCS COVID-19 Employee Status,” available at <https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status/> [both last accessed December 12, 2020] (California). Unlike New York, California also publishes detailed information related to COVID-19 cases among employees broken down by facility, as well as status of infected staff (*i.e.* whether they have returned to work) and the number of new cases among staff, again by facility, over the prior 14 days.

² For example, in October the National Academies of Sciences published a report calling for and presenting best practices regarding decarceration of correctional facilities during the COVID pandemic. In particular, the report calls on authorities to “use their discretion” to release individuals from incarceration. The report also notes that decarceration measures taken by jurisdictions thus far have been *insufficient* to reduce the risk of the virus in jails and prisons. National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities during COVID-19: Advancing Health, Equity, and Safety*, Washington, DC: The National Academies Press 2020, available at <https://doi.org/10.17226/25945>. *See also, e.g.*, Matthew J. Akiyama, et al., *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, *New England Journal of Medicine* 2020, Vol. 382:2075-2077, available at <https://www.nejm.org/doi/full/10.1056/NEJMp2005687> (calling for the release of “as many people as possible” in response to the virus); Montoya-Barthelemy, AG, et al., *COVID-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health*, *American Journal of Preventive Medicine* 2020, Vol. 58(6):888-891 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7164863/> (releasing prisoners and decreasing admissions among author’s “most important recommendations”); Kathryn Nowotny, et al., *COVID-19 Exposes Need for Progressive Criminal Justice Reform*, *American Journal of Public Health* 2020, Vol.110:967-968, available at <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2020.305707> (authors “join[ing] the activists and legal scholars calling for releasing as many people from prisons and jails as possible”).

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of swift, decisive action to corral the virus.³ Experience has shown the rapidity with which these outbreaks arise: Greene’s case count, only two at the beginning of the October, jumped by over 90 cases in the first two weeks of that month. During a two-week period in October, Elmira went from 20 reported cases to 590 cases. Indeed, this frightful pattern appears to be currently repeating at Attica, Bare Hill, Cayuga, Clinton and Mohawk Correctional Facilities, among others, which have shown rapid and significant increases in positive cases in over the past two weeks.⁴ Experience has also shown that outbreaks within correctional facilities can spread rapidly *outside* facility walls: Greene County public health officials have attributed an outbreak at an assisted living facility in Greene County, as well as closure of a local school, to the outbreak at Greene Correctional Facility.⁵

Even though this latest wave of infections signals a colossal medical emergency, neither the Department nor the Governor’s office has increased the pace of COVID-related early releases. As chronicled in the press, the Department has persisted in its refusal to grant applications for medical parole.⁶ And Governor Cuomo still lags far behind the Governors of other states by refusing to grant clemencies, even for people incarcerated in prisons experiencing outbreaks.⁷ Indeed, on October 28, 2020, Governor Cuomo – instead of promising to grant clemencies or otherwise decrease the incarcerated population – stated that the Department was considering transferring vulnerable people

³ See “DOCCS COVID-19 Report,” available at <https://doccs.ny.gov/doccs-covid-19-report> [last accessed Dec. 12, 2020].

⁴ *Id.* (DOCCS reported 48, 0, 53, 27, and 3 cases at these facilities, respectively; on December 11 these numbers jumped to 81, 33, 89, 55, and 36).

⁵ See Bethany Bump, *Greene County officials say delayed state response fueled prison virus outbreak*, Times Union, Oct. 21, 2020, available at <https://www.timesunion.com/news/article/Greene-County-officials-say-delayed-state-15665611.php>.

⁶ See, e.g., Chelsia Rose Marcus, *Only five New Yorkers released from prison through medical parole since the start of the pandemic*, New York Daily News, Nov. 10, 2020, available at <https://www.nydailynews.com/coronavirus/ny-coronavirus-new-york-prison-parole-board-medical-parole-20201110-wt5f66w6xretpjjhlweizjfbka-story.html>; Natasha Haverty, *Why NYS is releasing so few inmates during the pandemic*, NPR, Jul. 27, 2020, available at <https://news.wbfo.org/post/why-nys-releasing-so-few-inmates-during-pandemic>.

⁷ 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 while Article 2-B delineates the Governor’s authority to suspend the enforcement of state laws in an emergency. California Governor Gavin Newsom, for example, has invoked similar provisions to grant clemency to 26 Californians susceptible to COVID-19 in June and to commute the sentences of 13 people and grant four medical reprieves for those at high risk for COVID-19 earlier this month. See Sam Levin, *California governor grants clemency to 21 prisoners as thousands infected with Covid-19*, The Guardian, Jun. 26, 2020, available at <https://www.theguardian.com/us-news/2020/jun/26/california-clemency-covid-19-governor-prisons>; Carla Marinucci, *Newsom issues new pardons, commutations and medical reprieves*, POLITICO, Nov. 11, 2020, available at <https://www.politico.com/news/2020/11/11/newsom-pardons-commutes-sentences-436223>. Meanwhile, Governor Cuomo’s meager early release program – in which individuals are eligible for release if they are serving a sentence for a non-violent, non-sex offense, are within 90 days of their earliest release date and have available housing – has failed to produce meaningful and consistent results. Already too narrowly defined to facilitate the release of a sufficient number of people from custody, see *supra* note 2, the release program has failed to work for even those individuals actually eligible. See Reuven Blau, *‘Hundreds’ of Prisoners Approved for Early Release Stuck Behind Bars as COVID Spikes*, Nov. 24, 2020, available at <https://www.thecity.nyc/2020/11/24/21717723/prisoners-approved-for-early-release-stuck-behind-bars-covid>.

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from Elmira to other prisons.⁸ This is despite the fact that comparable prisons are already above 60 percent capacity (including many over 75 percent capacity) and all evidence pointing towards all DOCCS facilities being on the precipice of outbreaks just like the present situation at Elmira.

Recent Reports from Our Clients Indicate the Inevitability of COVID-19 Outbreaks Throughout New York State Prisons.

Throughout this crisis, we have received reports from our clients and their concerned loved ones – particularly recent reports received during this “second wave” – which lay bare the life-threatening deficiencies in the Department’s response to COVID-19. We have been inundated with stories of officers flouting mask mandates and social distancing protocols, improper and inadequate testing, and quarantining procedures that go against public health recommendations.

We spoke to a client at **Greene Correctional Facility**, whose entire dorm was forced to quarantine together, as a group, in early October, after someone in the dorm tested positive. On October 14, *before receiving his test results*, this individual was placed in a *double cell* in the Special Housing Unit (“SHU”). We also have received reports that, following facility-wide testing at Greene, no one was isolated pending their test results. These practices violate CDC testing guidelines and completely undermine the purpose of utilizing testing as a tool to help to stop the virus’ spread. As a result, individuals continued to contract the virus. Incarcerated people who tested negative during the initial facility-wide testing then received a positive result after being retested. Some of these reports appeared in a recent article published by The Marshall Project.⁹

Despite the ongoing outbreak at **Elmira Correctional Facility**, we hear that mask use among staff remains inconsistent, with a client reporting on November 20, for example, that that staff persist in wearing masks around their neck or even not at all, instead pulling up their turtlenecks over their mouths only when superior officers are present.

A client at **Watertown Correctional Facility** reported on October 22 that a civilian mess hall staff member had tested positive for the virus. In response, he reports, the entire civilian mess hall staff was replaced, and one incarcerated individual who worked in the mess hall was put in isolation. Our client, however, had not been tested or quarantined as of October 29, despite the fact that he had, for weeks, worked the same shift as the infected staff member and the individual who was isolated. According to Departmental data, and as of December 2, 2020, nobody has been tested at Watertown since this incident.

⁸ Dan Clark, *NY May Transfer Vulnerable Inmates from COVID Stricken Prison, Cuomo Says*, New York Now, Oct. 28, 2020, available at <https://nynow.wmht.org/blogs/criminal-justice/ny-may-transfer-vulnerable-inmates-from-covidstricken-prison-cuomo-says/>.

⁹ Jermaine Archer, Cecil Myers, Eric Manners, *Lax Masking, Short Quarantines, Ignored Symptoms: Inside a Prison Coronavirus Outbreak in ‘Disbeliever Country,’* The Marshall Project, Oct. 29, 2020, available at <https://www.themarshallproject.org/2020/10/29/lax-masking-short-quarantines-ignored-symptoms-inside-a-prison-coronavirus-outbreak-in-disbeliever-country>.

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At the end of October, a client at **Downstate Correctional Facility** reported that numerous Corrections Officers had been out with COVID-19, and that there were cuts in programming and other adjustments due to staff shortages.

Our clients at **Five Points Correctional Facility** have shared extremely concerning reports pointing to a lack of compliance with CDC testing guidelines at the facility. After facility-wide testing at Five Points began October 21, we learned that even where people were housed with people who had tested positive, exposed individuals were not being isolated pending their tests results. They instead continued to go to the mess hall and the yard, participate in group programming, and use the phones. Additionally, in a housing unit where two individuals had tested positive, no contact-tracing or cleaning of the block occurred following the two positive tests.

We already alerted the Department (in an email dated October 20, 2020) to troubling reports of a lack of mask compliance at **Mid-State Correctional Facility**. These reports included that officers do not wear masks unless a superior is scheduled to be present, and that even when wearing masks, most officers wear their masks only over their mouths or even under their chins. We also reported that incarcerated individuals have difficulty receiving new masks, resulting in several clients on medical hold being forced to wear single-use surgical masks for months at a time. As you know, COVID-19 cases are rising at this facility.

Clients at **Otisville Correctional Facility** have reported that mask-wearing by corrections officer remains inconsistent, there are inadequate cleaning supplies, and social distancing is nearly impossible in the facility's high-occupancy, dormitory-style housing. We have received numerous troubling reports about the virus spreading through dorms, where the incarcerated people are sleeping just two or three feet apart from one another, and the subsequent lack of adequate medical care. Clients at Otisville describe being disciplined for refusing to clean the living areas of people who have tested positive without appropriate protective equipment. We have also received reports that COVID-19 testing at Otisville has been sporadic and conducted using incorrect procedures.

Quarantined individuals at **Wyoming Correctional Facility** have reported being housed in a formerly vacant and substandard dorm building. Reportedly, these individuals do not have access to heat or hot water and the water supply is discolored and malodorous. We have been informed that there is a significant accumulation of black mold, dust, broken tiling, rodents, and chipped paint falling from the ceilings throughout the building. For individuals infected with COVID-19 who also have pre-existing conditions, being in such an environment can aggravate those conditions, potentially causing the individual further health complications as they combat the virus. We have also been informed that people who are awaiting their test results are being housed with people who have tested positive for the COVID-19 infection, sleeping in beds that are placed only four feet apart. Individuals are thus concerned about both further exposure to COVID-19, but also about potential exposure to mold or asbestos. Finally, quarantined individuals have also reported being served cold meals and denied access to their property or additional sets of clothing. By housing people in such deplorable conditions during quarantine and isolation, the Department is fostering widespread reluctance to testing rather than compliance with its testing protocols.

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We have also received concerning reports from our clients at **Woodbourne Correctional Facility** which indicate staff are not conducting robust contact tracing, quarantining, and cleaning in response to positive tests; we transmitted these reports to the Department on November 16, 2020. One client states that an individual in his dorm began showing acute symptoms of the virus on October 26 and was subsequently hospitalized and put into isolation. However, the dorm was not quarantined, and no cleaning or contact-tracing took place. Moreover, no one in the dorm was tested for the virus.

We heard from a client at **Cayuga Correctional Facility** that approximately half of his dorm tested positive for COVID-19 on October 19. Our client reported that at least four people were hospitalized, and that one individual passed away either on November 8 or 9.¹⁰ Those who tested positive remained in the dorm, while those who tested negative were isolated in SHU until November 3. Our client, who tested negative, told us they were denied access to phones, stamps, use of their tablets, personal property, commissary, and sufficient personal hygiene products. This is one among many reports of punitive quarantine conditions.

Finally, a client at **Mohawk Correctional Facility** reported on December 1 that dozens of correctional officers and civilian staff had contracted the virus and were working alongside incarcerated people, including in food service, before testing positive. No official communication was provided to the incarcerated population, among whom cases are increasing, about this outbreak. Meanwhile, hand sanitizer pumps are reportedly constantly empty and, for the past five weeks, no fresh bars of soap have been provided to our client's dorm due to a supposed 'soap shortage'.

These are by no means all the reports we have received about dangerous conditions in DOCCS facilities. They represent a cross-section, however, of the serious complaints we field daily. We have already shared many of these complaints with the Department. For the last eight months, the Department has failed to respond. We therefore cannot assure the hundreds of clients and family members who contact us on a regular basis that the State has agreed to act in response to these complaints or even that the State takes these complaints seriously. We are instead relegated to explaining to our clients and their terrified loved ones that the State has decided to ignore our complaints. Our clients and their loved ones also remain deeply discouraged by the reports they find in the press, most notably recent news articles about the Department's tepid response to the outbreaks at Elmira and Greene.¹¹

¹⁰ As of November 27, the Department's reports of facility-specific COVID-19 infections and deaths lists no one deceased from the virus at Cayuga.

¹¹ See, e.g., *Hundreds of inmates test positive as COVID-19 rips through New York prison*, CBS News Online, October 28, 2020, available at <https://www.cbsnews.com/news/covid-new-york-elmira-correctional-facility-outbreak/> (noting that those incarcerated in Elmira and their families doubt the sufficiency of the Department's testing and treatment protocols and report "a frustrating lack of communication from prison officials.").

The State Should Disclose Information Sufficient to Keep the Public Informed About its Pandemic Response.

Based on the foregoing reports, we remain concerned that the Department is not taking adequate measures to combat the outbreaks at Attica, Auburn, Cayuga, Elmira, Greene, and other hotspot facilities, nor to prevent future outbreaks throughout the system. The Department reports insufficient information, leaving us – and the rest of the residents of this state – without an adequate way to assess its response to the pandemic.¹² Accordingly, we request that the Department adopt and adhere to daily reporting of key public health metrics, published in a means easily accessible to the public and reviewable over time.¹³

More specifically, although the Department is reporting data and information about its COVID response, **its data is insufficient in several ways:**

- DOCCS does not publicly post historical data, only point in time data.
- DOCCS does not report demographic breakdowns.
- DOCCS does not report staff infections by facility.
- DOCCS does not report active cases by facility. Instead, it reports positive cases cumulatively.
- DOCCS does not provide context for the prevalence of infection as it relates to facility population/density.
- DOCCS does not report COVID-related release numbers by facility.

Instead, the Department should report regular, facility-specific, and viewable-over-time data, based on public health metrics such as testing frequency and population density. **Such data reporting must at least include:**

- testing data, of both incarcerated individuals and in-facility correctional staff, disaggregated by facility, further disaggregated by whether the tests were positive, negative or pending results, presented daily and viewable over time;
- the number of active cases at a facility;
- reporting on population and density information per facility; and
- the number of people in the infirmary or transferred to a hospital.

The Department must also disclose other metrics consistent with those disclosed by other state corrections agencies, such as the Pennsylvania Department of Corrections and the California

¹² The lack of information can also inhibit the implementation of effective mitigation measures in those communities surrounding prisons where outbreaks are occurring. For example, a Greene County official has stated that the Department’s lack of transparency during the recent outbreak at Greene Correctional Facility “frustrate[ed] the local health department’s ability to isolate and quarantine residents who may have been exposed to infected [correctional staff].” See Bump, *supra* note 4.

¹³ See, for example, the “dashboards” produced by other states’ correctional agencies, *supra* note 1.

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Department of Corrections and Rehabilitation.¹⁴ To be clear, we are requesting the disclosure of this information so that we and members of the public can assess the Department's response to the burgeoning outbreaks at multiple state prisons. As a New York State executive agency, the Department is funded by, and accountable to, all New Yorkers. We ask that the Department take seriously its responsibility to the public by disclosing this important information. We will also seek this information from the Department's Freedom of Information Law officer through the Department's open FOIL request website.

The Little Data That is Available Show Troubling Trends in the Department's Response to COVID-19.

Since April 20, 2020, the New York Department of Corrections has released, but failed to archive, daily COVID-19 reports on its 52 correctional facilities. The Legal Aid Society has done the Department's work for it over the past several months, archiving 164 reports from April 20, 2020 to November 12, 2020. The Legal Aid Society has presented information gleaned from the Department's COVID-19 data and population data in an interactive report entitled *Pandemic in Prison*.¹⁵

The report shows a number of extremely disturbing trends in the Department's COVID-19 prevention, testing, and data reporting practices, including:

- Inadequate testing practices
 - On an average day, 88 percent of facilities reported conducting zero COVID-19 tests.
 - Testing was relatively low for the first 68 days of reports, spiked during July, and then flattened through September 15, with the exception of a spike on August 7. Only 6 facilities were responsible for this latter spike in testing.
 - 83 percent of outbreaks were not followed by increased testing, which would otherwise be expected to occur if contact tracing were being implemented. In fact, testing actually *decreased* following the reporting of positive cases 56 percent of the time.
 - Several facilities are particularly woeful in their testing numbers: for example, Downstate only conducted 61 tests, total, from the beginning of the pandemic through November 5, while Fishkill conducted only three tests between August 7 and November 12.

- Insufficient Efforts to Reduce the Prison Population
 - The average facility reduced its January occupancy rate by only 12 percent.
 - 34 facilities remained at or above 60 percent occupancy by October 27.

¹⁴ The data reporting practices of these states, as well as others, are detailed in note 1, *supra*.

¹⁵ The report is available online at <https://legaidsoc.shinyapps.io/pandemicinprison/>.

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- 97 percent of positive cases come from high-occupancy facilities.
- Elmira accounts for 35 percent of all positive cases at 85 percent capacity.
- New York has not provided any data on how space is maximized within facilities, such as in areas for sleeping, recreation, eating, or working.

The Department Must Act Quickly to Release Medically Vulnerable People.

As you know, institutional settings, including state prisons operated by DOCCS, are predisposed to the *rapid* spread of contagions such as COVID-19. As noted above, the wildfire spread of the virus at Elmira and Greene have shown this, as well as burgeoning outbreaks at facilities across the state.

We again encourage the Department to take swift action to ensure that our clients and Departmental staff are protected from this pandemic. For the first time during the pandemic, the Department should commit to timely review applications for medical parole and grant a meaningful number of these applications. The Governor's Office should use its unfettered power to grant clemencies, commutations, and pardons. It is a significant blight on the State's record that Governors across the country have done far more to stem the spread of the virus in their prisons. To avoid future litigation and respond to legitimate public pressure, the Department and the Governor's office must act. Thank you for your attention to this pressing public health emergency.

Sincerely,



Sophie Gebreselassie
Staff Attorney, Prisoners' Rights Project



Elizabeth Isaacs
Supervising Attorney, Criminal Appeals Bureau

We, the undersigned organizations, sign on in support of this call to action:

**Appellate Advocates
The Center for Appellate Litigation
Office of the Appellate Defender
Legal Aid Society of Nassau County
Legal Aid Society of Suffolk County
New York Civil Liberties Union
The Parole Preparation Project
Correctional Association of New York**

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cc: Cal Whiting
Assistant Secretary for Public Safety, Office of Governor Andrew M. Cuomo

Cathy Sheehan, Esq.
Acting Deputy Commissioner and Counsel, NYS Department of Corrections and Community
Supervision

Senator Gustavo Rivera
Chairman, Committee on Health

Senator Luis Sepúlveda
Chairman, Committee on Crime Victims, Crime, and Correction