

BRENNAN CENTER FOR JUSTICE

March 30, 2020

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

Re: Further Release of New York State Incarcerated Population at Risk of Coronavirus Infection

Dear Governor Cuomo:

The novel coronavirus represents an unprecedented crisis for the State of New York. We write today to urge you to use your full authority as Governor to release as many people as possible from incarceration for the duration of the pandemic, focusing on people who are especially vulnerable to infection. Specifically, we recommend you take the following steps, which we explain in depth below:

- Use your clemency authority to commute the sentences of vulnerable people to time served, allowing their immediate release, or fashion other appropriate relief;
- Expand the State’s “Merit Time Program” to reduce overall incarceration; and,
- Work with state prosecutors to keep people who have been convicted of crimes, but not yet sentenced, out of prison for the duration of the crisis.

With nearly 60,000 New Yorkers already testing positive for COVID-19, and likely tens of thousands of additional New Yorkers sick from the virus, the scope of this pandemic presents extraordinary challenges to state and local officials, including prison officials, law enforcement, and those responsible for our systems of justice.¹ We are grateful for your efforts to keep all New Yorkers safe during this pandemic.

We also applaud your Friday, March 28 order announcing the release of 1,100 people being held on parole violations from jails and prisons across the state, 600 of whom were held in New York City jails. This is an important first step toward ensuring that some of those who are in our state’s jails and prisons can remove themselves from the close quarters and often unhygienic conditions in our correctional facilities. As you are aware, prisons and jails are places where communicable diseases spread rapidly. This is because incarcerated people often live in the same cells, are double-bunked, and have to share toilets, sinks, and soap (if they are lucky enough to

¹ New York State, “County by County Breakdown of Positive Cases,” last modified March 28, 2020, <https://coronavirus.health.ny.gov/county-county-breakdown-positive-cases>; World Health Organization, *Coronavirus disease 2019 (COVID-19) Situation Report – 68*, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200328-sitrep-68-covid-19.pdf?sfvrsn=384bc74c_2.

have access to it).² Cramped in close quarters, our nation’s correctional facilities — including those in New York State holding over 40,000 people — are essentially petri dishes for disease transmission.

Even after Friday’s release order, however, vulnerable people remain in our state prisons, many of whom suffer from serious underlying health conditions that put them at increased risk of contracting COVID-19. Specifically, more than 10,000 people in New York’s prison system are over the age of 50 and could be at serious risk of major health complications related to COVID-19.³ Already, 103 people have tested positive for COVID-19 within New York City jails, up from just a single case on March 20th, making the rate of infection within correctional walls almost 90 times faster than the national rate.⁴ As Dr. Homer Venters, physician, epidemiologist, and the former chief medical officer of the NYC Correctional Health Services recently noted: “We especially need to be concerned about everybody in a correctional setting with a chronic medical problem who is older than age 50 or 55. It is important to think about their path out of jail and prison.”⁵

We write now to strongly encourage you to use your authority as Governor to grant clemency to those in our prison system who are elderly or suffer from serious medical conditions. As Governor, you possess the nearly unlimited power to grant clemency to people convicted and incarcerated under the laws of New York State.⁶ This authority is extraordinarily flexible, allowing you to delay punishment, cut a prison sentence short, or even pardon an offense outright. Furthermore, the law allows you to set conditions on any grant of clemency: an order of commutation can, for example, direct people whose sentences are shortened to remain subject to supervisory authorities.⁷ Working with State correctional officials, your office could rapidly identify people vulnerable to the novel coronavirus and develop appropriate conditions for their early release. Ideally, people who are older, medically compromised, or nearing the end of their prison terms could have their sentences commuted to time served and be released outright. We

² See Lauren-Brooke Eisen, “How Coronavirus Could Affect U.S. Jails and Prisons,” *Brennan Center for Justice*, March 13, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons>; Nathalie Baptiste, “Correctional Facilities Are the Perfect Incubators for the Coronavirus,” *Mother Jones*, March 6, 2020, <https://www.motherjones.com/politics/2020/03/correctional-facilities-are-the-perfect-incubators-for-the-coronavirus/>.

³ Releasing Aging People in Prison, *Releasing New Yorkers From Prison is the Only Way to Save Lives in the Wake of COVID-19*, 2020, 1, https://4411e058-27c0-4b13-9697-267baceaaea3.filesusr.com/ugd/5982b2_7c681b17292b4e44a278dd121e2af7c0.pdf.

⁴ Samantha Michaels, “‘This Feels Like a Death Sentence’: Rikers Jail Inmates Speak Out As Coronavirus Cases Spread,” *Mother Jones*, March 27, 2020, <https://www.motherjones.com/crime-justice/2020/03/this-feels-like-a-death-sentence-rikers-jail-inmates-speak-out-as-coronavirus-cases-spread/>.

⁵ Eisen, “How Coronavirus Could Affect U.S. Jails and Prisons.”

⁶ See N.Y. CONST., art. IV, § 4; see also *Boyd v. Pataki*, 52 A.D.3d 1128, 1129-30 (3d Dep’t 2008) (“[T]he power to grant reprieves, commutations, and pardons is conferred upon the governor to grant upon such conditions and with such restrictions and limitations, as he may think proper, and the exercise of such discretion and power, ‘unless illegal or impossible conditions are attached, is not subject to judicial review.’”) (internal citations omitted).

⁷ See, e.g., *Vanilla v. Moran*, 272 A.D. 859, 859 (3d Dep’t 1947), aff’d 298 N.Y. 796 (1949) (rejecting perfunctorily clemency recipient’s claim that a condition of his commutation, requiring him to be subject to the Parole Board, was illegal) (cited in *Boyd*, 52 A.D.3d at 1130); see also generally Paul J. Larkin, *Revitalizing the Clemency Process*, 39 HARV. J. L. & PUB. POL’Y 833, 846-48 (2016) (discussing forms of clemency relief, generally).

urge you to grant the broadest relief to the largest group of people possible, but should this prove impracticable, we urge you to consider clemency relief in other forms.

The clemency power was created to extend mercy to those convicted of crimes. The public health epidemic we currently face in New York calls for the kind of rapid relief that only clemency can offer. Writing in the Federalist Papers, Alexander Hamilton, himself a New Yorker, drew on colonial law and English precedent to argue that the *federal* clemency power should be “as little fettered or embarrassed,” and used proactively in “critical moments” to defuse tension.⁸ COVID-19 has already started to spread in our state’s prison system, necessitating quick action, and the clemency power gives you the authority to respond humanely.

There is no reason to believe that extending clemency to especially vulnerable people behind bars would jeopardize public safety. Our own research has shown that state prison sentences are often too long to begin with, and that roughly 14 percent of imprisoned people have “served sufficiently long prison terms and could likely be released within the next year with little risk to public safety.”⁹ Moreover, researchers have shown, time and time again, that the likelihood of recidivism plummets as people age. One seminal study by the U.S. Sentencing Commission found that “offenders over sixty years old at the time of release had a recidivism rate of 16.0 percent” — roughly a quarter the rate of people released before age 21.¹⁰ Reducing the incarcerated population is a public safety imperative. Starting with older individuals, people who are medically compromised, and people who are close to completing their sentences makes sense from both a public health and criminological perspective.

We also encourage you to use your other unique executive powers to shrink the prison population as much as possible at this critical time. Specifically, we encourage you to issue an executive order expanding the criteria for sentence reductions under New York State’s “Merit Time” Program.¹¹ New York State utilizes merit-time credits to incentivize incarcerated individuals to participate in programming and avoid disciplinary actions while behind bars. This “Merit Time” program provides credits against sentences, ultimately shortening the length of an individual’s time behind bars. Given today’s public health crisis, you can — through an executive order — expand the New York State Department of Corrections and Community Supervision’s discretion to make additional awards by loosening or suspending the criteria needed to award “Merit Time” credits. Similarly, Colorado’s Governor Jared Polis recently issued an executive order suspending the criteria for issuance of earned time credits and the caps on earning them, directing the Colorado Department of Corrections “to make awards of earned

⁸ See THE FEDERALIST NO. 74 (referencing, specifically, “seasons of insurrection or rebellion”); Larkin, *Revitalizing the Clemency Process*, 844-48 (detailing the history of clemency in the American system).

⁹ LAUREN-BROOKE EISEN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 8, 35-41 (2016), <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>.

¹⁰ U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5, 23 & n.56 (2016), <https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>; see also MARIEL ALPER ET AL., BUREAU OF JUSTICE STATISTICS, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 8-9 & tbl.5 (2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266>.

¹¹ See N.Y. CORRECT. L. § 803(1)(d).

time credits as it deems necessary and appropriate to safely facilitate the reduction of the population of incarcerated persons and parolees to prevent an outbreak in prisons.”¹² A parallel action in New York could likewise be used to safely reduce the size of our incarcerated population.

Lastly, we urge you to confer with the state’s district attorneys and encourage them — in consultation with the defense bar, judiciary, and appropriate public health officials — to delay sentencing for people who have been convicted of crimes but not yet remanded to prison.¹³ Where people are being held in jail pending sentencing, their continued detention should also be reconsidered, and new, more lenient conditions for release set if possible.¹⁴ Postponing the imposition of sentence, and releasing people while they await sentencing, will ensure that justice is served while also keeping people out of prison and jail for the duration of the crisis.

Thank you, Governor Cuomo, for your doggedness thus far in working to protect the most vulnerable among us in addition to all those who live and work in New York State. Yet as an organization based in New York state, and one that seeks to drastically reduce the scale of mass incarceration, we urge you to take these further steps to safeguard the lives of other New Yorkers who are at grave risk of serious illness or death.

Respectfully,



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¹² Governor Jared Polis, Exec. Order No. D 2020 016 (March 25, 2020), <https://drive.google.com/file/d/18o0yWHzZleHJ87hmgLuBmXwpM8R74Q5x/view>.

¹³ Delaying sentencing will, necessarily, delay the process of committing people to prison or jail. *See* N.Y. CRIM. PROC. L. § 430.20(1) (requiring commitment to correctional authorities after imposition of sentence).

¹⁴ *See, e.g.*, N.Y. CRIM PROC. L. § 530.45(1) (permitting judges to, upon application of the defendant, set less restrictive release conditions “before sentencing” in certain cases and for certain offenses).