Testimony of Lisa Napoli (Supervising Attorney, Appellate Advocates) on Impact of COVID-19 on New York's Prisons and Jails Before the New York State Senate Committees on Health and on Crime Victims, Crime and Correction
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My name is Lisa Napoli. I am a Supervising Attorney at Appellate Advocates, a New York City indigent defense organization that provides legal representation and re-entry services, among other things, to people with convictions from Brooklyn, Queens, and Staten Island. We are the primary appellate defender in the Appellate Division, Second Department. I was one of the coordinators of our release advocacy and litigation initiative as the COVID-19 public health crisis hit New York and its prison and jail systems. My remarks today are based on Appellate Advocates' communications with clients and DOCCS staff, and my knowledge of other institutional providers' experiences, which was shared pursuant to our coalition work.[i]

Health and Safety Protocols

The known means of controlling the virus's transmission are handwashing, which requires access to soap and water; the use of hand sanitizer as an alternative to soap and water; the wearing of masks; and social distancing. However, in a prison setting, these methods are difficult, if not impossible, to implement.[ii] Therefore, public health experts and health organizations universally agree that a clear priority in addressing this crisis must be to release prisoners in order to reduce the density of the prison population.[iii] In fact, the current crisis has resulted in a rare consensus between defense attorneys, prosecutors, and judges that many incarcerated individuals should be released immediately because of the specific danger that jails and prisons pose in a pandemic.[iv]

DOCCS's website and their likely testimony before the Committees today will reflect the steps they took and when they implemented certain policies. I will use my time to tell you what those actions actually looked like.

DOCCS's response to the COVID-19 crisis was slow, lacked transparency, and its implementation has been spotty. The first masks distributed to inmates were "handkerchiefs" – but ones that were so small that two had to be tied together in order to cover an adult man's face. The distribution of masks was not uniform – some people

at certain facilities reported having access to masks they could wash and re-use, others did not. Notably, a detainee at Fishkill Correctional Facility, the prison with the highest infection and death rates, reported being given two disposable face masks upon arrival – you cannot wash those masks and they are not safe to re-use indefinitely. Likewise, access to hand sanitizer was erratic – some prisons, like Bedford Hills Correctional Facility, had hand sanitizer widely available, while others did not or had sanitizer available initially, which was not replenished. Soap was distributed at some facilities but at others, people had to rely on State soap, which does not lather, or buy soap, which they struggle to afford. Social distancing was problematic: people report eating closely to one another in the mess hall (sometimes seated with a single seat between them, which is less than 6 feet) and definitely being within six feet of each other when being walked to and from locations within a facility as well as when transported between facilities.

Incarcerated men and women were very aware that the COs and civilian staff posed a risk to them and some refused to attend programs or work details so that they would not be forced to come into contact with staff. Inmates at numerous facilities report that COs do not wear masks or only pull them up when a supervisor is nearby.

As for release, the key method to reducing transmission, in an April 3 letter to the Governor, Appellate Advocates and other public defenders proposed a coherent and reasonable plan to release 1) individuals who have less than one year remaining before their conditional release dates; 2) individuals who were granted parole and whose release is pending; 3) individuals over the age of 50; 4) individuals who have significant underlying health conditions that exacerbate the risks of COVID-19; and 5) individuals incarcerated for technical parole violations. Prior to this and for a period afterward, DOCCS had sent mixed messages about how to secure the release of our vulnerable clients' release by implying we should apply for medical parole, then denying those applications and stating that commutation applications were appropriate, which are not being granted either. In mid-April, the Governor ordered the release of people age 55 and over who were convicted of non-violent offenses and were within 90 days of their release. But, to the extent this was a clearly-stated release plan, it came late and was of minimal impact: the first group of qualifying individuals was only 71 people – Appellate Advocates had only two clients in that group.

DOCCS ended up reducing the overall population significantly, but without any transparency. It appears they relied on closing intake from the local jails, which has since resumed on a limited basis; attrition; and the Governor's minimal release order. These methods did not remove those who are the most vulnerable to the virus. And if

this was their reduction strategy, DOCCS should have just told the advocates who were repeatedly pushing for guidance so we could identify eligible people and plan for their release by setting up community support, including housing.

DOCCS may justify its lack of action by asserting that they were stymied by a lack of resources to approve addresses for so many people at once. Appellate Advocates and the other institutional defenders repeatedly made clear that we were ready to look for addresses for our clients that were approved for release (in fact, in many cases, we had already identified suitable addresses). We were more than willing to partner with DOCCS.

Testing

Until very recently, DOCCS restricted its testing protocol to symptomatic people. Appellate Advocates knows of only a handful of symptomatic people who were officially identified has having COVID-19. The majority of those who were sick were not tested or they refused to ask for testing or any medical attention because they were afraid of being quarantined. When medical care was provided to COVID patients, with the exception of two people who went to the hospital because of underlying conditions, it was the provision of Tylenol or ibuprofen and nothing more.

Troublingly, DOCCS does not have a policy of testing people prior to release. Nor does DOCCS test people prior to transport to another facility—even when they set up Adirondack as the facility to serve older, at-risk people. None of Appellate Advocates' clients who went to Adirondack were tested before being transferred or upon arrival, with which the other institutional defenders concurred.

Transport

DOCCS chose to transport people between facilities, even at the height of the pandemic. This was a risky practice, particularly when coupled with the lack of testing to ensure that an infected person was not being sent to a facility that had no outbreak.

Towards the beginning of the outbreak, DOCCS chose to transfer infected people to Fishkill and Sing Sing. On the one hand, this makes sense to group together the sick and infected and isolate them from everyone else. But there was no specialized care or precautions at either facility, and this movement of prisoners created a greater risk of viral transmission. Moreover, this movement of prisoners eroded DOCCS's

transparency: someone could test positive at Orleans and then be whisked off to Sing Sing, so it would look like Orleans had no virus – in other words, it impeded the minimal ability of the public and advocates to see where the virus was present and to assess the safety of different facilities.

RECOMMENDATIONS

We may well see a second wave of the virus, which some experts believe could be worse than the first. It makes sense, therefore, to consider what policies and practices can be implemented that will mitigate the damage caused by a second wave.

1. A coherent release plan that is designed to meaningfully reduce the prison population by removing individuals who are at a heightened risk of infection and severe complications due to underlying conditions, as well as those who pose minimal threat to public safety, such as the plan proposed in the April 3 letter to the Governor from Appellate Advocates and other organizations.

   The utilization of a release plan to reduce the prison population and the clear statement of such a plan has a strong underlying rationale: 1) aggressively mitigating the risk of the virus's transmission protects not only people incarcerated in prisons, but the people who work at those prisons and their families and communities. Many upstate communities are economically reliant on prison employment, plus many of those same communities have less medical resources available to handle a spike in the virus, such as New York City saw in March and April; and 2) it is a gross waste of limited public resources for publicly-funded defense organizations to squander time and money on pursuing pointless release options that DOCCS has will not consider.

2. Add a COVID-19 category to medical parole eligibility so that people who are medically vulnerable will have a flexible and expansive avenue for release.

3. Permit outside monitors, such as the Correctional Association of New York and Prisoners' Legal Services, to make unannounced visits.

4. Permit the use of hand sanitizer and ensure that it is placed in common areas in all facilities, with regular upkeep; provide soap (not State soap) and cleaning materials (such as bleach) to all inmates on a weekly or bi-weekly basis; and distribute two washable cloth masks to each inmate and ensure that these are replaced regularly.

5. Implement a testing protocol that includes testing prior to transport; no transport without a negative result unless there has been a decision to transport positive people to a specific facility.

6. Require staff to wear masks at all times.

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[i] We attend bi-weekly Joint Appellate Defenders meetings with The Legal Aid Societies of New York City, and Westchester, Nassau, and Suffolk Counties; the Office of the Appellate Defender; and the Center for Appellate Litigation, as well as others) at which information about prison conditions, DOCCS"s COVID-19 response, and other related issues are discussed.

[ii] According to Dr. Homer Venters, former Chief Medical Officer for New York City jails, these preventative measures "are completely not applicable in [prison] settings." Lauren-Brooke Eisen, Brennan Ctr. For Justice, "How Coronavirus Could Affect U.S. Jails and Prisons" (Mar. 13, 2020), available at www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons. This reality has also been recognized by the Centers for Disease Control ("CDC") and the World Health Organization ("WHO"). See, e.g., CDC, "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities" (July 22, 2020), www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (hereinafter "CDC Interim Prison Guidance"); **Error! Main Document Only.**WHO, "Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance" (Mar. 15, 2020), available at https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf (hereinafter "WHO Interim Prison Guidance"). Because they "live, work, eat, study, and recreate within congregate environments," incarcerated people cannot engage in effective social distancing, and the potential for COVID-19 to spread once introduced is much higher than in non-congregate environments. **Error! Main Document Only.**CDC, "Interim Prison Guidance"; see also WHO, "Interim Prison Guidance" at 2.

[iii] See, e.g., Matthew J. Akiyama, M.D., et al., "Flattening the Curve for Incarcerated Populations — Covid-19 in Jails and Prisons," 382 New England J. Med. 2075 (May 28, 2020)(describing challenges of implementing health and safety protocols in prison setting and recommending decarceration to save lives of incarcerated people, prison staff, and residents of communities in which prisons located), available at **Error! Main**

Document Only.https://www.nejm.org/doi/pdf/10.1056/NEJMp2005687?articleTools=true; Eric Gonzalez et al., "Andrew Cuomo, Stop a Coronavirus Disaster: Release People from Prison," N.Y. Times (Mar. 30, 2020) (op-ed co-written with former New York City health commissioner stated that "we and a number of public health experts call on Mr. Cuomo to release as many people as possible from New York's correctional facilities"), available at **Error! Main Document Only.**https://www.nytimes.com/2020/03/30/opinion/nyc-prison-release-covid.html; WHO, "Preventing COVID-19 outbreak in prisons: a challenging but essential task for authorities" (Mar. 23, 2020), available at **Error! Main Document Only.**http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/news/news/2020/3/preventing-covid-19-outbreak-in-prisons-a-challenging-but-essential-task-for-authorities.

[iv] In March, 25 elected prosecutors -- including the Brooklyn and Manhattan District Attorneys -- issued a joint statement urging "prosecutors, public health officials, and other leaders to work together to implement concrete steps in the near term to dramatically reduce the number of incarcerated individuals and the threat of disastrous [COVID-19] outbreaks." Fair and Just Prosecution, "Joint Statement from Elected Prosecutors On COVID-19" (Mar. 2020), available at **Error! Main Document Only.**https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf.