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March 30, 2020

The Office of Governor Michelle Lujan Grisham
New Mexico State Capitol, Room 400
490 Old Santa Fe Trail
Santa Fe, NM 87501

Dear Governor Lujan Grisham:

We write this letter to request immediate Executive action and offer guidance and support. We are aware that you have received similar recommendations from other criminal justice stakeholders, and will refrain from duplicating their communications with your office. We most certainly support any other recommendations you may have received that would reduce inmate populations and protect New Mexicans from the current health threat. However, some information bears repeating and our priority recommendations are included herein.

There is a consensus among public health officials that the coronavirus pandemic and the transmission of COVID-19 pose an enormous and potentially catastrophic risk to people and staff in correctional facilities. As you know, the only way to prevent widespread COVID-19 infections that would quickly overwhelm our health care infrastructure is to limit human-to-human contact. Admittedly, jails and prisons do not easily lend themselves to that precaution. We ask that you take a comprehensive approach of releasing at-risk prison inmates to prevent their unnecessary deaths, while also drastically reducing inmate populations to at least make it *possible* for the Secretary and individual wardens to manage the population in a manner that reduces potential exposure and infection. We write with recommendations for swift, decisive actions your office can take to save lives and protect incarcerated people, staff, and the public at large from the threats posed by COVID-19.

Incarcerated people in general are at high risk of infectious disease. Because prisoners are housed close together, often have limited access to cleaning supplies, and cannot engage in the “social distancing” recommended for civilians, infections spread easily in prisons. According to an epidemiology professor quoted recently in *The New Yorker*, “If you wanted to set up a situation that would promote rapid transmission of a respiratory virus, you would say prison: it’s close quarters, unsanitary, individuals in frequent contact.” Daniel A. Gross, “*It Spreads Like Wildfire*”: *The Coronavirus Comes to New York’s Prisons*, *The New Yorker*, Mar. 24, 2020, <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>. In New York City, which is currently experiencing one of the worst coronavirus outbreaks in the country, incarcerated people are many times more likely to be infected than non-incarcerated

people. As of a few days ago, the official coronavirus rate in the city as a whole was about 2 in 1,000, while the rate in the city's jails was 14.5 per 1,000. Elizabeth Weill-Greenberg, *New York City Jails Have an Alarming High Infection Rate, According to an Analysis by the Legal Aid Society*, The Appeal, Mar. 26, 2020, <https://theappeal.org/new-york-city-jails-coronavirus-covid-19-legal-aid-society/>.

If coronavirus infection becomes widespread in New Mexico's prisons, it will have catastrophic consequences. Prisons do not have the medical facilities to treat severe respiratory infections, and prisoners who catch the coronavirus are at risk of lifelong health problems or death. Virus inside a prison can infect guards and other prison workers, including health care workers, and exacerbate infection rates outside the prison as well. *See generally* German Lopez, *A Coronavirus Outbreak in Jails or Prisons Could Turn Into a Nightmare*, Vox, Mar. 17, 2020, <https://www.vox.com/policy-and-politics/2020/3/17/21181515/coronavirus-covid-19-jails-prisons-mass-incarceration>.

One way to avoid a crisis situation is to release as many people from prisons and jails as possible. In Montana, the Chief Justice of the Supreme Court asked jails to "release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses." Chief Justice Mike McGrath, Letter to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), *available at* <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>. County jails across the country, including in Albuquerque, have selectively released prisoners. Kevin Johnson, *Local Jails Releasing Hundreds of Prisoners Amid Coronavirus Fears, Up From Dozens Just Weeks Ago*, USA Today, Mar. 26, 2020, <https://www.usatoday.com/story/news/politics/2020/03/26/jails-free-hundreds-prisoners-stop-coronavirus/5077204002/>; Katy Barnitz, *County Jail Releases Medically At-Risk Inmates*, Albuquerque Journal, Mar. 26, 2020, <https://www.abqjournal.com/1436920/mdc-releasing-medically-vulnerable-nonviolent-inmates.html>.

Utah and the federal government have announced plans to release some prison inmates as well. Jessica Miller, *Utah Prison Officials Plan to Release at Least 80 Inmates Early in Response to Coronavirus*, Salt Lake Trib., Mar. 25, 2020, <https://www.sltrib.com/news/2020/03/26/utah-prison-officials/>; Josh Gerstein, *Feds May Send Some Prisoners Home Due to Virus Risks*, Politico, Mar. 26, 2020, <https://www.politico.com/news/2020/03/26/federal-prisoners-coronavirus-150480>. The United Nations High Commissioner for Human Rights has urged the release of older, sick, and low-risk prisoners, and other countries have already released thousands of prisoners. Merrit Kennedy, *U.N. Calls for Countries to Reduce Prison Populations*, NPR, Mar. 25, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/03/25/821417365/u-n-calls-for-countries-to-reduce-prison-populations>; Adela Suliman et al., *Coronavirus Prompts Prisoner Releases Around the World*, NBC News, Mar. 26, 2020, <https://www.nbcnews.com/news/world/coronavirus-prompts-prisoner-releases-around-world-n1169426>.

Based upon the foregoing information, we urge you to adopt the following measures to limit the spread of COVID-19:

1. **Expand parole eligibility to reduce the prison population in New Mexico's state correctional facilities.** We ask that you use every available option for reducing the Corrections population, starting with the most at-risk for fatal complications from COVID-19. We ask that you:

- a. Immediately release those inmates whose age or preexisting medical condition places them at heightened risk of fatal complications from a COVID-19. This may be accomplished by expanding the availability of medical or geriatric parole to include those who are at grave risk from the complications of COVID-19 *should they* become infected, by immediate release to community corrections, or by exercise of your clemency powers. Releasing this class of inmates avoids NMCD incurring the expense of providing intensive care interventions such an inmate would require if infected, but also could prevent those cases of COVID-19 from occurring in the first place.
- b. Reduce the prison population in general by every means available to enable the management of the remaining population in accordance with CDC guidelines:
 - i. Promptly release *all* parole-eligible inmates now, including those currently serving parole in-house, regardless of particular medical risk levels. We ask that you issue amended procedures that fast-track the process and ensure that imperfect parole plans are not a barrier to release.
 - ii. Make broad use of the “controlled release” program under the Adult Community Corrections Act, NMSA §§ 33-9-1 to -10 (2013) (authorizing NMCD to place offenders who are within twelve months of parole eligibility into community-based settings, provided they have never been convicted of a felony offense involving a firearm). *According to the Sentencing Commission’s most recent report on this topic,¹ of the 6,840 inmates who were in confinement as of June 30, 2019, 294 were “controlled release” eligible.*
 - iii. Further expand parole eligibility under a model similar to the now-defunct “corrections population control commission,”² which operated under the Governor’s orders to convene “to consider the release of nonviolent offenders who are within one hundred eighty days of their projected release date.” NMSA 1978, Section 33-2A-7. An ad hoc commission of emergency, temporary appointed members has the potential to act under broader authority and with greater efficiency than the existing parole board. We ask that any such commission release nonviolent offenders who are within *one year* of their projected release date to parole supervision.

¹ Available at <https://nmcs.unm.edu/reports/2019/estimated-number-of-offenders-in-new-mexico-corrections-facilities-in-october-eligible-for-controlled-release.pdf>

² See NMSA 1978, § 33-2A-2 (“The purpose of the Corrections Population Control Act is to establish a corrections population control commission that shall operate as an autonomous, nonpartisan body. The commission shall develop and implement mechanisms to prevent the inmate population from exceeding the rated capacity of correctional facilities and shall take appropriate action when necessary to effect the reduction of the inmate population.”); § 33-2A-8 (“The corrections population control commission is terminated on June 30, 2007. On July 1, 2007, the secretary of corrections shall assume the duties and responsibilities of the commission.”).

- c. In addition to the above recommendations, we ask you to use your clemency powers to begin a process of immediate release of as many Corrections inmates as possible simply to reduce the overall prison population and reduce the risk of a massive outbreak.
- d. Finally, another way to address this would be to *allow courts to reduce sentences that were previously imposed*. Under Rule 5-801 NMRA, when asked by a particular defendant, sentencing courts can modify sentences to impose counts concurrently and/or suspend the remainder of prisoners' sentences, releasing the prisoners to probation and parole supervision (where they would face prison if they re-offended or violated their conditions of release).

Currently, Rule 5-801 limits the availability of this discretionary remedy to a short 90-day window after the sentence is imposed or becomes final after appellate review. We have simultaneously made an emergency request that the Supreme Court amend that rule to waive the 90-day time limit in extraordinary circumstances like this health pandemic. Should the Supreme Court take action on that request, we would as that Corrections coordinate with the courts and criminal justice stakeholders to identify those inmates whose sentences should be reviewed and avoid the need for individual motions at the inmates' initiation.

2. **Demand extreme protective measures in state custodial facilities to protect inmates and staff from infection.** Typical protocols within prison facilities make social distancing impossible and prisons are not built or prepared to fulfill the medical need associated with COVID-19.

For inmates who remain in custody despite the broadest possible release efforts, please order the Corrections Department not only to house inmates in a way consistent with your prior executive orders urging compliance with CDC guidelines, but also to provide those inmates with the tools and resources they need to protect themselves from infection. The Department should enable inmates to comply with the CDC and DOH guidance.³ At a minimum, the Department needs to provide inmates with ample soap and water access since they do not have the liberty to simply avoid spaces occupied or recently occupied by other inmates.⁴

Additionally, as soon as availability makes it possible, make widespread testing of inmates and correctional staff a top priority. It is also critical to ensure that Corrections staff are prepared for the interventions that would be required should an outbreak within a facility or facilities occur.

³ See DOH Public Health Order, 3-19-2020, available at <https://cv.nmhealth.org/wp-content/uploads/2020/03/UPDATED-DOH-PHO-03-19-2020-r.pdf>.

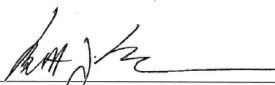
⁴ See <https://www.searchlightnm.org/bars-behind> (reporting that county jails are still requiring inmates to purchase soap from the commissary out of their own pockets and indigent inmates are given sparing amounts of "indigent soap."); https://www.santafenewmexican.com/news/local_news/tort-claim-filed-over-virus-related-prison-conditions-in-new/article_2bd39c00-6f9a-11ea-be6c-3795e306af55.html (reporting that a tort claims notice was filed regarding a similar conditions issue in the Corrections Department).


3. **Reduce vulnerable and overall populations in local custodial facilities.** Direct local stakeholders, including the Department of Public Safety, State Police, prosecutors, and judges overseeing criminal matters to take all possible steps to reduce the *intake* of people into state and local custodial settings and immigrant detention facilities. This includes stopping arrests for low-level offenses, avoiding pretrial detention entirely except in very rare cases, and instead setting conditions of release that allow people the freedom to seek medical help or care for loved ones who have COVID-19. Some of these issues are currently being addressed by Supreme Court. We would ask that the Governor's office coordinate with the Judiciary to ensure that the critical role of law enforcement is balanced to avoid unnecessary risks during this public health crisis.

Madam Governor, you are in a unique position to mandate a coordinated response with a plan rooted in the guidance from public health experts. Please do not hesitate to act. Every day that passes, the certainty of a mass outbreak in our correctional and/or detention facilities grows.

Respectfully submitted,

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By and through:


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