

March 18, 2020

Governor Phil Scott
Office of Governor Phil Scott
109 State Street, Pavilion
Montpelier, Vermont 05609

Re: Urgent Action Needed to Protect People in Vermont's Prisons from COVID-19 Pandemic



Dear Governor Scott,

The ACLU of Vermont urges you to act immediately to protect the lives of the people in Vermont's prisons. That includes incarcerated Vermonters as well as the corrections staff who work in Department of Corrections (DOC) facilities, and, by extension, their families and communities—and the hundreds of Vermonters currently incarcerated out of state.

Three urgent steps are needed: (1) the prompt release of as many people in custody as possible to prevent infection and spread of COVID-19; (2) strict limits on any new prison admissions and adequate screening to determine the health status of people being incarcerated; and (3) evidence-based, humane, and rights-affirming measures to protect the health and safety of the individuals who remain incarcerated and under the state's supervision.

There is growing alarm about the heightened vulnerability of people living and working in our prisons to infection, severe complications, and death from COVID-19.ⁱ In the absence of immediate and decisive action, COVID-19 could spread among people in Vermont correctional facilities at a rapid pace. For olderⁱⁱ and chronically sick prisoners, COVID-19 infection presents a substantially higher risk of turning even a short period of incarceration into a death sentence.ⁱⁱⁱ

All available public health guidance states that social distancing is the primary tool to combat the spread of COVID-19.^{iv} By their very nature, prisons – where people are confined in extremely close quarters – preclude appropriate prevention measures. Their use must be limited during this emergency.

Vermont has days, not weeks, to take meaningful preventive action.

As you know, COVID-19 spreads far more easily than the flu and has no known vaccine or treatment. Bold action and a coordinated response are necessary.

To the extent any of these measures are not already underway, we call on the State of Vermont to:

PO Box 277
Montpelier, VT 05601
(802) 223-6304
acluvt.org

Julie Kalish
President

James Lyall
Executive Director

1. **Immediately release, to the maximum extent possible, people incarcerated pre-trial and post-conviction.** We outline below a few considerations to initiate state action and emphasize that they do not preclude the release of groups not explicitly discussed in this letter.

Pretrial release: We urge you to exercise your emergency powers to protect incarcerated Vermonters, correctional staff, and our communities by releasing all people who are detained pre-trial, without having been convicted of any crime. We suggest doing so immediately for anyone not lawfully subject to a hold without bail as defined by current law.

Post-conviction release: Likewise, Vermont should release as many sentenced Vermonters as possible, including but not limited to: people over 60; individuals who have serious underlying medical conditions such as diabetes or respiratory conditions and/or people who are immunocompromised; all people who are eligible for parole and community supervision/release; and those currently incarcerated for technical parole or probation violations.

It is well-known that COVID-19 poses the greatest risk to older people, as well as anyone with chronic conditions or weakened immune systems, who are more vulnerable to developing serious complications from COVID-19 and requiring medical care. Incarcerated Vermonters over the age of 60 are at the greatest risk for COVID-19, but generally pose the least public safety risk to our communities.^v As many people as possible in this age group should be released from incarceration to mitigate the spread and impact of COVID-19.

For anyone released from custody, Vermont's DOC should take extra measures and coordinate with state and municipal authorities to ensure that those individuals have access to medical care, health insurance/Medicaid, housing or shelter, and other necessary re-entry services. Particular attention should be given to the needs of older people and women as they face unique challenges to community reentry.

2. **Severely limit any new admissions and provide adequate screening to determine the health status of people being incarcerated.** We urge you to issue an executive order calling on State's Attorneys and other law enforcement entities, including local police departments and federal law enforcement operating within the state, to take every available measure to avoid adding to the incarcerated population. This action is necessary given the high risk of infection posed by adding new prisoners from communities in which COVID-19 is increasingly widespread to facilities that are already over capacity.

Public officials with authority to seek and set bail should maximize release on personal recognizance. Police, prosecutors, and judges should exercise great discretion in arrest, charging, and sentencing decisions. Low-level offenses in particular should not result in arrest or prison time under the current circumstances, given the risk of spreading COVID-19.

Further, the state should ensure that proper testing and diagnostics are available to screen people coming into custody of the DOC for both the presence of COVID-19 and any underlying medical conditions that could put them at higher risk if infected with the virus.

Protect immigrant communities. Immigration detention poses the same health risks as jails and prisons, and Vermont law enforcement must not expose anyone to the unsafe and inhumane immigration detention system. Vermont should release all individuals currently in state custody who are held while awaiting transfer to Immigration and Customs Enforcement (ICE) custody, and you should declare a moratorium on all such future holds or transfers.

3. **Provide evidence-based, humane, and rights-affirming measures to protect the health and safety of the individuals who remain incarcerated and under state supervision**

Provide access to high-quality medical care for anyone who remains incarcerated. This includes preventive care, medical testing, and prompt treatment — including any necessary transfers to higher care in accordance with CDC guidance — for any illness.^{vi} All prisoners must have immediate access to water, food, preventive screening measures (such as body temperature monitoring), and hygiene products, including alcohol-based hand sanitizer of at least 60% alcohol, as recommended by the CDC in other closed settings.^{vii}

Never use solitary confinement as a strategy to limit transmission of COVID-19. Solitary confinement is a form of torture and a violation of human rights in all cases. DOC should never inflict torture or punishment of any kind, including solitary confinement, in response to an individual's medical condition.

Incarcerated people must not be forced to provide services for emergency response and must receive appropriate equipment and training to protect their own and others' safety. Although there is no indication that incarcerated people will be used to respond to COVID-19, DOC should commit to not forcing any prisoner to provide emergency response services. To the extent DOC's COVID-19 planning uses willing incarcerated people to perform hygiene and sanitation measures, it must guarantee these individuals the necessary personal safety or personal protective equipment, including N95 respirators, eye protection, and long-sleeve gowns, and they must receive the same training and personal protective and safety equipment as all DOC staff and medical workers.^{viii}

Provide free phone and video calls to people who remain incarcerated. We are aware that DOC has suspended visitation in Vermont prisons. While this measure is intended to limit the spread of COVID-19, it is also important to recognize that barring incarcerated people from contact with their loved ones is inhumane, especially during a time of crisis, and harmful to incarcerated people's reintegration after release.^{ix} The DOC's stated allowance of one free video call per week for each incarcerated person is not sufficient and people who are incarcerated

should receive free video conference access at least equivalent to their previously allowed in-person visitation time. People need regular access to their loved ones and should not be forced to ration contact. As the New York City correctional system and others have moved toward free prison phone calls, DOC should make prisoner telecommunications permanently free.

Modify all electronic monitoring restrictions to allow safe and efficient access to basic needs, including medical care. Individuals forced to wear electronic monitors as a condition of their release are often restricted to their homes or limited geographic locations. In this time of public health crisis, such restrictions should be lifted as needed to facilitate access to medical care and allow caretakers to support their loved ones.

Suspend mandatory in-person meetings for individuals under court supervision. Trial supervision, parole, and probation check-ins should all be by telephone. The Vermont Supreme Court's Declaration of Judicial Emergency allows parties and counsel to appear by telephone or, where feasible, video. Vermont should ensure that people subject to DOC supervision can check-in by phone, and no one should be penalized for not appearing at DOC community supervision meetings in the midst of a pandemic.

Make public all plans regarding the management of COVID-19 among incarcerated people. Transparency – which engenders public trust and collaboration – has proven critical to combatting COVID-19 around the world. Given the high stakes and lack of public information thus far, the DOC must make transparent its COVID-19 response plans, including for infection prevention, management, and treatment. We appreciate the invitation to join upcoming conference calls about plans for management of COVID-19 and will have a representative from our organization participate.

Governor Scott, we urge you to take bold and immediate action to save lives. Given the urgency of this crisis, we ask that your office respond within five days to each of these recommendations and that DOC publish its plans regarding the protection of Vermont's inmates, including those who are incarcerated out of state in Mississippi.

Sincerely,

A handwritten signature in black ink, appearing to read 'James Lyall', with a long horizontal stroke extending to the right.

James Lyall
Executive Director
ACLU of Vermont

Cc: Jaye Johnson
Legal Counsel
Office of Governor Phil Scott

Mike Smith
Secretary
Agency of Human Services

Mark Levine
Commissioner
Vermont Department of Health

Jim Baker
Commissioner
Vermont Department of Corrections

Emily Tredeau
Supervising Attorney
Prisoners' Rights Office
Office of the Defender General

ⁱ German Lopez, A coronavirus outbreak in prisons or jails could turn into a nightmare, Vox, March 17, 2020, available at <https://www.vox.com/policy-and-politics/2020/3/17/21181515/coronavirus-covid-19-jails-prisons-mass-incarceration>; Amanda Klonsky, An epicenter of the epidemic will be jails and prisons, if inaction continues, NYTimes, March 16, 2020, available at <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>; Alan Keays, Vermont suspending in-person visits for inmates, puts some jury trials on hold, March 13, 2020, VTDigger, available at <https://vtdigger.org/2020/03/13/vermont-suspending-in-person-visits-for-inmates/>; Nicole Wetsman, Prisons and jails are vulnerable to COVID-19 outbreak, The Verge, March 7, 2020, available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

ⁱⁱ Blueprint for Smart Justice Vermont, ACLU of Vermont, October 2019, page 9, available at <https://www.acluvt.org/sites/default/files/wysiwyg/sj-blueprint-vt.pdf>.

ⁱⁱⁱ See World Health Organization Coronavirus disease 2019 (COVID-19) Situation Report – 51, March 11, 2020, available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_8 (“[E]vidence to date suggests that two groups of people are at a higher risk of getting severe COVID-19 disease. These are older people (that is people over 60 years old); and those with underlying medical conditions (such as cardiovascular disease, diabetes, chronic respiratory disease, and cancer.”).

^{iv} The CDC defines social distancing as it applies to COVID-19 as “remaining out of congregated settings, avoiding mass gatherings, and maintaining distances (approximately 6 feet or 2 meters) from others when possible.” See Katie Pearce, What is social distancing and how can it slow the spread of COVID-19?, The Hub, March 13, 2020, available at <https://hub.jhu.edu/2020/03/13/what-is-social-distancing/>.

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- ^v At America's Expense: The Mass Incarceration of the Elderly, American Civil Liberties Union, pages 21-25, June 2012, available at https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf
- ^{vi} Interim Guidance for Emergency Medical Services (EMS) Systems and 911 Public Safety Answering Points (PSAPs) for COVID-19 in the United States, Centers for Diseases Control and Prevention, updated March 10, available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-for-ems.html>.
- ^{vii} Preparing for COVID-19: Long-term Care Facilities, Nursing Homes, Centers for Diseases Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/prevent-spread-in-long-term-care-facilities.html>.
- ^{viii} Clinical management of severe acute respiratory infection when Novel coronavirus (2019-nCoV) infection is suspected: Interim Guidance, World Health Organization, January 28, 2020, available at https://www.who.int/docs/default-source/coronaviruse/clinical-management-of-novel-cov.pdf?sfvrsn=bc7da517_2.
- ^{ix} See Nancy G. La Vigne, Rebecca L. Naser, Lisa E. Brooks, & Jennifer L. Castro, Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships, 21 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 314, 316 (2005); *see also* Rebecca L. Naser & Christy A. Visher, Family Members' Experiences with Incarceration and Reentry, 7 WESTERN CRIMINOLOGY REVIEW 20, 21 (2006) (noting that "a remarkably consistent association has been found between family contact during incarceration and lower recidivism rates").