



Testimony of

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Before the

New York State Senate

Standing Committee on Crime Victims, Crime and Corrections

and

Standing Committee on Health

Joint Public Hearing – The Impact of COVID-19 on Prisons and Jails

September 22, 2020

My name is Stan Germán and I am the Executive Director of New York County Defender Services (NYCDS). We are a public defense office that represents New Yorkers in thousands of cases in Manhattan’s Criminal Court and Supreme Court every year. Thank you to Chairs Sepulveda and Rivera for holding this hearing on the impact of COVID-19 on people incarcerated in New York’s jails and prisons.

During the height of the coronavirus pandemic, in March and April of this year, our entire staff was working around the clock to file writs of habeas corpus to allow our most vulnerable clients to be released from NYC jails. The number of NYCDS clients incarcerated at the beginning of the pandemic dropped by nearly half. Our collective efforts paid off, and together with other stakeholders, the city jail population dropped to the lowest we have seen since 1946.<sup>1</sup> Yet now, as

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<sup>1</sup> NYC Office of the Mayor, *Press Release: City Jail Population Drops Below 4,000 for First Time Since 1946*, April 21, 2020, available at <https://www1.nyc.gov/office-of-the-mayor/news/278-20/city-jail-population-drops-below-4-000-first-time-since-1946>.

the pandemic continues to rage across the country, we are seeing the city jail population begin to rise once again.<sup>2</sup>

While we had a fair amount of success at the city level securing release for our clients in pretrial detention or serving misdemeanor sentences, we saw almost no movement at the state level. Governor Cuomo has only granted three clemencies amidst the COVID-19 pandemic, fewer than both Democratic and Republican Governors across the country, including California, Kentucky, and Illinois.<sup>3</sup> For NYCDS clients in state custody, we had no meaningful avenue for redress to demand their release. And so they continue to sit in prisons that do not allow for social distancing, do not have sufficient PPE, in close quarters with guards and other staff who cycle in and out of the facility and their communities on a daily basis. Under normal circumstances, it is well-established that jails and prisons are veritable petri dishes for disease that then spreads back into surrounding communities.<sup>4</sup> During a pandemic, these conditions are a recipe for disaster.

In this written testimony, we discuss our efforts to release our clients during the height of the pandemic, recently published survey results about coronavirus conditions in city jails during that time, and we provide recommendations for the Senate to take before the next wave of the pandemic returns.

## **I. Defenders in Action – NYCDS Efforts to Release Clients During the Height of the Pandemic**

On March 22, 2020, we represented 203 adults incarcerated in DOC jails. This was the universe of people who our team has been working urgently to secure release of when the pandemic began. By May 19, 2020, 48 percent, or 98 people, were released from city jails because of the advocacy efforts of NYCDS defenders. At that time, we still had 137 clients who were incarcerated, including 47 who were arrested between March 22 and May 19.<sup>5</sup>

NYCDS effectively utilized various legal strategies to secure our clients' release. We filed dozens of bail applications to request lower bail amounts that families can afford to pay. When the bail applications failed, we filed writs of habeas corpus to challenge the legality of incarceration. In addition, a few people were released at the direction of the city (if they were serving a misdemeanor sentence) or the governor (if they were detained on a parole hold).

Those who were released without a home to return to were provided with hotel rooms, so they were not routed back into the shelter system and connected to social services by our social workers and other city non-profits. These supports made an enormous impact and from the defender

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<sup>2</sup> Samar Khurshid, *After Big Dip, City Jail Population Creeps Back Up*, Gotham Gazette, Sept. 3, 2020, available at <https://www.gothamgazette.com/city/9732-after-big-dip-new-york-city-jail-population-back-up-rikers-crime>.

<sup>3</sup> NYS Office of the Governor, *Press Release: Governor Cuomo Grants Clemency to Three Individuals*, June 17, 2020, available at <https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-three-individuals>.

<sup>4</sup> See, e.g., Sandhya Kajepta et al, "County Jail Incarceration Rates and County Mortality Rates in the United States, 1987-2016," *American Journal of Public Health*, (Jan. 2020), available at <https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305413>.

<sup>5</sup> For more details about the breakdown of releases of our clients during the height of the pandemic, please see our testimony before the NYC Council on May 19, 2020, available at <https://nycds.org/wp-content/uploads/2020/09/2020.05.19-Justice-System-Covid19-in-city-jails-FINAL.pdf>.

perspective, the mass releases were a huge success. According to the *New York Times*, of the 1,500 inmates let out of Rikers from March 16 to April 30, only seven had been rearrested on a weapons charge by mid-July.<sup>6</sup> The Times analysis suggested that the mass release of incarcerated people from city jails because of the coronavirus outbreak and the 2020 bail reform law played almost no role in the spike in recent shootings.

Yet as coronavirus transmission numbers have dropped, we have seen a similar drop in the numbers of judges, assistant prosecutors and other stakeholders to work with defenders to continue the crucial work of decarceration of city jails before the next wave hits. As our recently released Coronavirus Survey report suggests, the NYC Department of Correction is far from prepared for it, when that time comes.

## II. NYCDS Coronavirus Survey

Yesterday NYCDS released a new report assessing the experiences of our incarcerated clients during the COVID-19 pandemic. We are aware of no other survey in the U.S. that has sought to collect data about the experiences of incarcerated people regarding coronavirus. Our 25-question survey received 47 responses from May 12 – June 25, 2020. A copy of our report is included with my testimony.

Our analysis revealed that our surveyed incarcerated clients perceived that hygiene procedures were lacking, that they felt unsafe, and that jail staff did not address their concerns when they raised them. The results of the survey clash with safety assurances made by the Department of Corrections over the past six months.

Some of the results include:

- 32% of respondents reported that DOC staff were not consistently wearing masks.
- Only 26% said that DOC staff were conducting cleanliness inspections multiple times per day.
- Only 22% reported they could observe social distancing guidelines when needed.
- 40% had received a new, clean mask in the past week. 60% had access to cleaning supplies when needed.
- 69% had soap readily and freely available
- 82% said they did not feel safe regarding coronavirus transmission.
  - One client, Mr. R, in response to the last question, said “I would only feel safe at home.”

Our survey by no means captures the experiences of all people incarcerated in city jails. But the responses from this small group are troubling none the less. We urge members of the Senate and Assembly to visit Rikers and other detention facilities across the state to talk to people about their experiences. People who are incarcerated should be listened to and provided what they need to feel safe: space to social distance, cleaning products, regular testing of staff who are entering facilities from the outside, clean masks, and staff who wear masks all day every day when they are on duty.

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<sup>6</sup> Alan Feuer, “The Mayor Blames the Virus for Shootings. Here’s What Crime Data Shows,” *NY Times*, Aug. 4, 2020, available at <https://www.nytimes.com/2020/08/04/nyregion/nyc-shootings-coronavirus.html>.

Failure to ameliorate these conditions will surely lead to a rise in cases, and death, in our jails and prisons when cases begin to surge again in the general population.

### III. An Urgent Need for Improved Testing Protocols

Two weeks ago, New York City public defender offices, including New York County Defender Services, sent a letter to the Department of Correction Commissioner and head of Correctional Health Services.<sup>7</sup> We asked DOC and CHS to clarify how they have revised or supplemented their COVID-19 policies and procedures implemented at the outset of the pandemic to account for changing facts and scientific information acquired over the past six months. We also asked the Board of Correction to clarify how they intend to monitor the agencies' implementation of these policies going forward.

Specifically, we are concerned about DOC's and CHS's testing protocols. The policy for employee testing is located on the DOC COVID-19 Action Plan website.<sup>8</sup> It appears from this policy that corrections staff are not required to undergo regular testing—despite research, promoted publicly by CHS's own Chief Medical Officer, showing that workers in high-risk settings must be tested at least twice per week for that testing to actually assist in curbing the spread of infection.<sup>9</sup> NYC jails, which were among the most infected workplaces in America during the first outbreak here, surely qualify as a high-risk setting.<sup>10</sup> Yet according to their own written policy, DOC personnel are merely “provided access” to testing—and even this testing “access” is limited to staff who are showing symptoms. This policy flies in the face of research on testing high-risk workers as well as studies showing that many infected persons are highly contagious before the onset of symptoms.<sup>11</sup> Rather than mandating frequent testing to protect incarcerated people, DOC staff, and our communities, DOC left its own rank and file in a position where they had to sue the city just to achieve this meager “access” to testing when they start feeling sick.

Testing for the NYC jail population has similarly focused on symptoms—if they're being tested at all. During the first outbreak in NYC jails, the scope of testing for incarcerated people remained limited even as testing in NYC at large expanded drastically.<sup>12</sup> In May 19 City Council testimony,

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<sup>7</sup> Joint NYC Defender Letter Re: DOC and CHS COVID-19 Pandemic Procedures, Sept. 11, 2020, available at <https://nycds.org/wp-content/uploads/2020/09/Joint-Defender-BOC-letter-Sept-2020.pdf>.

<sup>8</sup> NYC Dept. of Correction, DOC Covid-19 Action Plan, available at <https://www1.nyc.gov/site/doc/media/coronavirusap.page> (last visited 9/20/20).

<sup>9</sup> See <https://twitter.com/NathanLo3579/status/1258141974940364801> (retweeted by CHS CMO Ross MacDonald on May 6, 2020).

<sup>10</sup> Deanna Paul & Ben Chapman, “Rikers Island Jail Guards Are Dying in One of the Worst Coronavirus Outbreaks,” *Wall Street Journal*, April 22, 2020, available at <https://www.wsj.com/articles/rikers-island-jail-guards-are-dying-in-one-of-the-worst-coronavirus-outbreaks-11587547801>.

<sup>11</sup> See, e.g., Harvard Health Publishing, “If you've been exposed to the coronavirus,” March 2020, available at <https://www.health.harvard.edu/diseases-and-conditions/if-youve-been-exposed-to-the-coronavirus> (last updated September 11, 2020); Tina Hesman Saey, “COVID-19 may be most contagious one to two days before symptoms appear,” *Science News*, April 15, 2020, available at <https://www.sciencenews.org/article/coronavirus-covid-19-infection-contagious-days-before-symptoms-appear>; National Foundation for Infectious Diseases, “Frequently Asked Questions About Novel Coronavirus (COVID-19),” available at <https://www.nfid.org/infectious-diseases/frequently-asked-questions-about-novel-coronavirus-2019-ncov/>.

<sup>12</sup> Brad Maurer, Seth J. Prins & Sandhya Kajeepta, “There must be mass releases from NYC jails immediately – it's the only way to protect public health,” *The Appeal*, July 9, 2020, available at <https://theappeal.org/there-must-be-mass-releases-from-nyc-jails-immediately-its-the-only-way-to-protect-public-health/>.

CHS Senior Vice President Patsy Yang declared that all newly incarcerated people were being “universally” tested.<sup>13</sup> Yet according to data obtained by NYCDS from a CHS FOIL request in July, this was never true.<sup>14</sup> During the period from April 27 (when the jails began tracking new admissions testing) through June 2, only about one-third of the approximately 1,200 new jail admissions were tested upon intake.

We have been told that people are asked to consent to a COVID-19 test at intake, and if they do not, they are placed in quarantine for fourteen days. It feels unlikely to us that two out of three people refuse a nasal swab test and instead request two weeks of quarantine, but we have no way of knowing. The simple fact is that a huge proportion of people entering NYC’s jail population are not being tested. DOC’s ability to appropriately quarantine all those who have “refused” to be tested is of course dependent on the amount of space available to do so. That space may be available now, while community transmission in our jails is (apparently) low, but what happens when another outbreak hits? The walls at Rikers Island have not moved, and the impossibility of controlling the spread of infections in our jails has not changed. The only possible answer is that we must keep New York State’s jail and prison populations as minimal as possible.

The combination of limited testing—even during periods of high incidence and prevalence—for incarcerated people and staff, DOC’s failure to implement basic infection-control measures like staff consistently and correctly wearing masks, and the steady and significant increase in the jail population over the past several weeks is a recipe for another public health disaster. Our most respected public health officials have sounded the alarm that this coming fall and winter will bring much more infection and death.<sup>15</sup> NYC jails’ first outbreak led to more than 2,000 infections with potentially severe long-term effects, as well as at least 16 tragic deaths among those incarcerated and working in our jails. Given DOC’s apparent failure to learn from this history, I fear we are doomed to repeat it. We must reduce the jail population as much as we possibly can.

DOC’s COVID approach stands in stark contrast to the testing protocols put in place in New York’s nursing homes. At one-point Governor Cuomo mandated twice-weekly testing for nursing home workers, which was in keeping with the then-emerging studies of high-risk workers mentioned previously. News reports also indicate that a massive effort was undertaken to test every single one of New York’s 90,000 nursing home residents.

Nursing homes and jails obviously are not perfectly analogous. But both are congregate settings whose populations are especially vulnerable to COVID-19. And the heavy churn of admissions to and releases from local jails have a significant effect on spreading infections and deaths in the

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<sup>13</sup> Testimony of Patsy Yang to the New York City Council Committees on Justice System and Criminal Justice, May 19, 2020, available at <https://hhinternetauto.blob.core.windows.net/uploads/2020/05/new-york-city-council-hearing-committee-on-criminal-justice-jointly-with-the-committee-on-the-justice-system.pdf>.

<sup>14</sup> NYC Health + Hospitals FOIL Data, July 2, 2020, available at <https://nycds.org/wp-content/uploads/2020/07/FOIL-Data.pdf>.

<sup>15</sup> Connor Perrett, “A top disease expert is warning of ‘another 12 to 14 months of a really hard road ahead of us’ and says the US has no national plan to stop it,” *Business Insider*, Sept. 13, 2020, available at <https://www.businessinsider.com/covid-19-fall-osterholm-really-hard-road-ahead-192020-9>.

broader community.<sup>16</sup> Yet our policy approaches to testing in these two congregate settings with high-risk populations have been starkly different, in terms of both those working and those living in these settings.

Even New York City schools have adopted a more robust testing protocol. According to the UFT, “[u]pon commencement of in-person learning, the NYC DOE will implement the Random Sample Survey of COVID-19 testing of adults and students present in DOC schools.”<sup>17</sup> The testing policy is written, extensive and available to the public through a simple Google search.

Why are our jails not required to provide similar information to the public? This is the kind of information that all New Yorkers who interact with people who go in and out of our city jails, including public defenders, need to know. But as is so often the case with the Department of Correction, all we have are vague policies, lax compliance, a lack of accountability, and non-responsiveness to FOIL requests. In light of this, bold assurances from officials that that they can keep us all safe fall far short. Again: the only solution is to reduce the jail population as much as we possibly can.

#### **IV. Recommendations**

New York State requires leadership from the State Senate to help ensure that incarcerated people are not ravaged by the coronavirus when cases spike again. NYCDS supports the following legislative solutions:

##### **1. *A Bill to Allow for Release from Jails and Prisons During Emergency Situations***

Last month the New Jersey Senate voted in favor of a first-in-the-nation proposal to potentially free thousands of people from New Jersey prisons because of the heightened risk of coronavirus infection. The bill, S.2519, passed with bipartisan support and is still awaiting a vote in the New Jersey Assembly. The American Civil Liberties Union of New Jersey estimated that 3,000 adults and juveniles would be affected, or about one-fifth or the entire prison population.<sup>18</sup> The legislation would grant incarcerated people eligible for parole and scheduled to be released from state prison within 365 days with public health emergency credits. The bill also provides specific protections for victims of violent crime.<sup>19</sup> New Jersey is paving the way on releasing people from prison amid a global pandemic. New York must follow their lead.

##### **2. *Pass Decarceration Legislation Already Introduced in the NYS Senate and Assembly***

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<sup>16</sup> American Civil Liberties Union, *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates Due to Failures to Reduce Jails*, Aug. 1, 2020, available at

[https://www.aclu.org/sites/default/files/field\\_document/aclu\\_covid19-jail-report\\_2020-8\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_covid19-jail-report_2020-8_1.pdf).

<sup>17</sup> NYC Department of Education and UFT, *School Testing Policy Agreement*, available at <https://www.uft.org/sites/default/files/attachments/coronavirus-school-testing-policy.pdf>.

<sup>18</sup> Blake Nelson, “Thousands of NJ inmates could be released early in COVID crisis under bill Senate just passed,” *NJ.com*, Aug. 27, 2020, available at <https://www.nj.com/coronavirus/2020/08/thousands-of-nj-inmates-could-be-released-early-in-covid-crisis-under-bill-senate-just-passed.html>.

<sup>19</sup> NJ Senate Bill No. 2519, introduced June 4, 2020, available at [https://www.njleg.state.nj.us/2020/Bills/S3000/2519\\_R3.PDF](https://www.njleg.state.nj.us/2020/Bills/S3000/2519_R3.PDF).



NYCDS strongly supports the following bills and urges the Senate and Assembly to pass them immediately:

- a. **Elder Parole (S.2144/A.4319A):** Allows the Parole Board to provide an individualized assessment for potential release to incarcerated people aged 55 and older who have already served 15 or more years in prison--the incarcerated population most vulnerable to COVID-19.
  - b. **Fair and Timely Parole (S.497A/A.4346A):** Ensures that the Parole Board's release determination for all people applying for parole release is based on who incarcerated people are today, their rehabilitation, and current risk of violating the law, as opposed to centering release decisions exclusively based on the nature of peoples' crimes.
  - c. **Less is More Act (S.1343C/A.5493B):** Ends the practice of incarcerating people for technical parole violations.
- 3. *Improve Conditions in Jails and Prisons to Make Them Safer and More Humane***
- a. **HALT Solitary Confinement Act (S.1623/A.2500):** Ends the practice of long term solitary confinement, limits the use of solitary to 15 consecutive days or 20 days in any 60 day period, bars particularly vulnerable populations, including older people who are most vulnerable to COVID-19 from any form of solitary confinement for any amount of time, and creates meaningful alternatives to all forms of isolation and punitive segregation. This legislation is particularly important for the public health and safety of incarcerated people and staff amidst COVID-19 because some incarcerated people are not reporting COVID symptoms out of fear that they'll be placed in isolation without access to their belongings or contact with their loved ones.
  - b. **Supplying Sufficient Amounts of PPE:** All incarcerated people must be given ample supply of hand sanitizer, soap, face masks, and other essential personal hygiene and public health products. People must be given at least one new surgical face mask per week.
  - c. **Administering Mass Testing:** As of September 11th, DOCCS has only administered 8,598 COVID-19 tests to people incarcerated in New York State prisons out of an incarcerated population of nearly 40,000, far less than many other Republican and Democratic states. DOCCS must ensure that every single incarcerated person has meaningful access to COVID tests, including first tests, and subsequent tests following a positive test.

Finally, we support many of the other measures recommended by our allies at community-based non-profit organizations that would restore educational programming in jails and prisons, meet the gender-specific needs of women and LGBTQ people, and support family unity for families dealing with incarceration. Now, more than ever, everyone's mental health is at stake, including people who are incarcerated. Programs that support their mental health and well-being must be continued throughout the pandemic.

**V. Conclusion**

The most effective solution to the coronavirus in the jails problem is staring us all in the face. We must not act as if the work to reduce our jail population is finished. The State Senate and Assembly must take bold action to facilitate the release of as many people as possible from our jails and prisons in advance of an inevitable uptick in COVID-19 cases.

If you have any questions about my testimony, please contact me at [sgerman@nycds.org](mailto:sgerman@nycds.org).