

March 30, 2020

Via e-mail

The Hon. Ralph S. Northam, Governor
1111 East Broad Street
Richmond, VA 23219
Ralph.Northam@governor.virginia.gov

Re: Population reduction in jails and prisons as a strategy to mitigate risks of COVID-19 to all Virginians

Dear Governor Northam:

We write you on behalf of some of the most vulnerable residents of our Commonwealth during the COVID-19 pandemic: the men and women confined to Virginia's jails and prisons. The low-income clients we represent live with the trauma of poverty caused by lack of access to housing, food insecurity, chronic illness, unemployment/under-employment, and living with untreated mental illness, among many other systemic injustices. As a result, they are more likely to have contact with the criminal legal system and experience incarceration.¹

Virginia's 41 state prisons, 72 local and regional jails, and nine secure juvenile facilities house over 60,000 people. Prisons and jails are known amplifiers of infectious disease, and measures to try to keep illness from spreading—such as social distancing—are all but impossible in such settings. In light of this, public health experts widely agree that significant steps must be taken to mitigate the risks posed to society by the spread of COVID-19 inside our jails and prisons, up to and including releasing people from custody.² The inevitable arrival of COVID-19 to these facilities not only poses a life-threatening danger to the incarcerated population, but the surrounding local communities as well. Under these dire circumstances, Virginia must include reducing our incarcerated population as part of our overall risk mitigation strategy to decrease the number of people exposed to COVID-19. **These are extraordinary**

¹ See *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, Prison Policy Initiative, May 10, 2016. (“Using Bureau of Justice Statistics data, we find that, in 2015 dollars, people in jail had a median annual income of \$15,109 prior to their incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages.”) available at: <https://www.prisonpolicy.org/reports/incomejails.html>

² See attached Declaration of Dr. Robert Greifinger in *Orteño v. Jennings*, federal litigation in the Northern District of California seeking the immediate release of individuals held in immigration detention due to the risks posed by COVID-19. Dr. Greifinger served as a medical expert in Legal Aid Justice Center's class action lawsuit against the Virginia Department of Corrections, *Scott v. Clarke*, alleging constitutionally inadequate medical care at Fluvanna Correctional Center for Women, which resulted in a settlement agreement and ongoing monitoring of VDOC compliance. See also attached Declaration of Dr. Jaimie Meyer in *Velesaca v. Decker*, federal litigation seeking the release of immigration detainees held in New York City jails due to the threat of COVID-19 (as well as on procedural grounds).

and unprecedented times and we implore you to respond with the bold action necessary to save lives in Virginia.

We are asking you to: (1) use your executive clemency powers to grant pardons to high-risk people and those nearing their release date; (2) immediately approve all properly filed requests for medical clemency; (3) instruct the Director of the Department of Corrections (VDOC) to fully exercise his existing authority to release early individuals nearing their release or parole dates; and (4) provide clear instructions to the Parole Board on expediting determinations and exercising its discretion in light of the pandemic.

*Without an Immediate Reduction to the Incarcerated Population,
All Virginians Are at Risk*

Prisons and jails are dangerous settings for infectious diseases to take root. Densely populated, with many people living in close contact and sharing spaces like sleeping quarters, showers, bathrooms, and meal halls, it is nearly impossible to control the spread of infections inside these facilities. Exacerbating the inability to stop the spread of disease amongst an incarcerated population, many people in jails and prisons are especially vulnerable to contracting illnesses, and experiencing severe complications from them, because of old age or underlying health conditions. Further, healthcare in carceral settings is often inadequate.³ With the United States still in the early stages of responding to the global pandemic of COVID-19, now is the time to address the life-threatening public health consequences that will result from an outbreak of the illness within Virginia's jails and prisons.⁴

First, while certain measures may be able to slow or even contain COVID-19 in the general population, preventive best practices cannot be fully implemented in jails and prisons. Experts recommend protecting people from COVID-19 by appropriate separation through social distancing⁵, particularly when it comes to the most vulnerable. Yet separating sick people from well people to prevent the disease from spreading can be nearly impossible in prisons and jails due to logistical considerations.⁶ In short, carceral institutions combine the worst aspects of a cruise ship and a large public gathering and, thus, can be the perfect breeding ground for the spread of COVID-19.

³ See attached declaration of Dr. Jaimie Meyer at (II)(14), filed in *Velesaca v. Decker*, federal litigation seeking the release of immigration detainees from New York City jails based on the threat of COVID-19 and other procedural grounds. Dr. Meyer is an Assistant Professor of Medicine at Yale School of Medicine who specializes in infectious disease.

⁴ Already, positive COVID-19 tests have come back in staff or people detained at several jails or prisons around the country, including in Louisiana, New York, Houston, Chicago, and Florida.

⁵ See attached Declaration of Robert Greifinger at ¶26, filed in *Ortuño v. Jennings*, federal litigation in the Northern District of California seeking the release of immigration detainees due to the threat of COVID-19. Dr. Greifinger served as a medical expert in *Scott v. Clarke*, federal class action litigation alleging constitutionally inadequate medical care by the Virginia Department of Corrections at the Fluvanna Correctional Center for Women (FCCW). The case resulted in a settlement agreement, under which FCCW is subject to ongoing compliance monitoring.

⁶ Declaration of Dr. Jaimie Meyer at (II)(9).

Moreover, though COVID-19 poses a serious danger to everyone, preliminary data suggest that people with underlying health conditions⁷ and of advanced age⁸ are high-risk for serious complications, including mortality, from COVID-19. Virginia’s jails and prisons are filled with members of these vulnerable populations. As of 2017, people older than 55 made up 12.4% of the people in prison in Virginia, with many prisoners over the age of 65.⁹ Among that older population, 60.7 % have some kind of cardiovascular diagnosis, and 10.2% have diabetes.¹⁰ Similarly, reports suggest that people held in our jails also experience poor health at a high rate, with some Virginia jails spending 33% of their budget on medical care for inmates.¹¹

And jails and prisons do not exist in a vacuum; they are inextricably intertwined with local communities, so the risk COVID-19 poses to these facilities does not stop at the jailhouse door. As in all jails and prisons, Virginia’s correctional officers and correctional healthcare workers enter and exit the prisons every day, raising the risk of transmission of COVID-19 between prisons and their surrounding communities and vice versa. In addition to staff traffic, as relatively short-term facilities, thousands of people are booked into Virginia jails and are released back to the community every day.¹² Introducing just one infected person into one of these facilities can lead to the virus spreading not just through everyone inside but also through anyone leaving the facility—whether a person who is released or staff returning to their homes—who then interacts with people on the outside.¹³

Essentially, these troubling dynamics mean that not only do the people in our carceral institutions face the serious risk of death when, not if, COVID-19 reaches them, every single Virginian faces the same frightening consequences from an outbreak at a jail or prison.¹⁴ For these reasons, Virginia should follow the advice of multiple public health experts by reducing the size of the incarcerated population to limit the reach of COVID-19 across the Commonwealth.¹⁵ **We urge you to take the following steps to reduce Virginia’s incarcerated population, prioritizing the immediate relief available through your executive clemency authority.**

⁷ People with chronic lung disease, heart disease, and diabetes are at elevated risk of COVID-19. Center for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): People who are at higher risk for severe illness, available at: <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>

⁸ Eighty percent of COVID-19 deaths reported in the US have been in patients 65 and older. Center for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Older Adults, available at: <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html>

⁹ Spending on Inmate Healthcare (2018), Joint Legislative Audit and Review Commission, available at <http://jlarc.virginia.gov/pdfs/reports/Rpt511.pdf>; (Additionally, established research indicates that individuals age and decline more quickly in prison, such that they are physiologically 10-15 years older in terms of health risks and degeneration.)

¹⁰ Spending on Inmate Healthcare (2018), Joint Legislative Audit and Review Commission, available at <http://jlarc.virginia.gov/pdfs/reports/Rpt511.pdf>

¹¹ Jails: Inadvertent Health Care Providers: How County Correctional Facilities Are Playing a Role in the Safety Net, Pew Charitable Trusts, 2018, available at: https://www.pewtrusts.org/-/media/assets/2018/01/sfh_jails_inadvertent_health_care_providers.pdf

¹² See Stephen Weiss, Quality of Health Care Services in Virginia Jails and Prisons, and Impact of Requiring Community Services Boards to Provide Mental Health Services in Jails – Final Report of 2-year Study, at slide 13 (2018). (During 2017 in Virginia, there were over 314,000 jail confinements involving 170,303 individuals. However, the average daily population in Virginia jails in 2017 was only 27,477 and the average length of inmate stay only 17 days.)

¹³ Declaration of Robert Greifinger at ¶7.

¹⁴ Declaration of Dr. Jaimie Meyer at (V)(36).

¹⁵ “It Spreads Like Wildfire’: The Coronavirus Comes to New York’s Prisons,” Daniel A. Gross, The New Yorker, March 24, 2020, available at: <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons> (“You have to reduce the population load to reduce the risk of infection,” quoting Gregg Gonsalves, an epidemiology professor at Yale School of Public Health, who has researched access to treatment for hepatitis C in state prisons).

Executive Clemency: The Power to Reduce the Risk for All Virginians

Pardons

Article V, Section 12 of the Virginia Constitution gives you the power to grant pardons to those convicted of crimes. This power is also codified in the Virginia Code.¹⁶ Given the known, extraordinary threat posed by COVID-19, wielding your pardon power to immediately reduce Virginia’s incarcerated population by targeting specific categories of people for release would mitigate the risk to all Virginians.

The extraordinary circumstances of COVID-19 as a global pandemic — as recognized in your Executive Order Number 51, the guidance from the Centers for Disease Control and Prevention about which people in particular are especially vulnerable to COVID-19, and the public health guidance about the special dangers presented to the entire population by the spread of a disease like COVID-19 in carceral settings, combine to give a clear picture of how and to whom your pardon power should be extended at this time to balance the alarming public health risks with a concern for public safety.

We are asking you to employ your pardon power accordingly:

- End the active sentence of anyone in a local¹⁷ or regional jail¹⁸ or in the custody of the Department of Corrections over the age of 50 years old or who has one of the identified health conditions listed by the CDC as high-risk for severe illness from COVID-19;
- End the active sentence of anyone in a local¹⁹ or regional jail²⁰ within 90 days of their release date; and
- End the active sentence of anyone in custody of the Department of Corrections who is within one year of their release date with appropriate, and revocable, conditions.²¹

Given your declaration of a State of Emergency on March 12, 2020, and the rapid and continued spread of COVID-19 since, the robust use of your executive authority to protect Virginians is vital. During a State of Emergency, the Code of Virginia vests the Governor with additional powers “beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof.”²² The Virginia Code expressly provides that “the Governor shall consider, on a continuing basis, hazard mitigation or other measures that could be taken to prevent or reduce harmful consequences of disasters.”²³ COVID-19 is such a disaster and it poses a risk of catastrophic health consequences to all

¹⁶ Va. Code § 53.1-229.

¹⁷ In consultation with local Sheriffs.

¹⁸ In consultation with Superintendents.

¹⁹ In consultation with local Sheriffs.

²⁰ In consultation with Superintendents.

²¹ Conditional pardons refer to pardons granted on certain specified conditions (e.g., that will become null and void on the violation by the grantee of any of the specified terms or conditions). So long as the imposed term is not “impossible, immoral, or illegal,” a conditional pardon is valid. Moreover, given their conditional nature, these pardons are revocable. See *Lee v. Murphy*, 63 Va. 789, 802 (1872); *Willborn v. Saunders*, 170 Va. 153, 159 (1983); Conditional pardon, 60 American Law Reports 14010 (Originally published in 1929).

²² Va. Code § 44-146.16 (emphasis added).

²³ Va. Code § 44 -146.22.

Virginians; the Code supports the proposition that your executive clemency powers should be used broadly during this pandemic to employ various strategies to try to avoid harmful consequences.²⁴

Medical Clemency

To be considered for medical clemency, a person in VDOC custody must be terminally ill, with a life expectancy of three months or less; two physicians are required to attest to this fact, making frivolous claims extremely unlikely.²⁵ We are asking you to approve any currently pending properly filed medical pardon petition as quickly as possible and to direct VDOC to identify any individuals who might qualify for medical clemency and expedite review of their suitability. For all approved medical clemency requests, including those that have already been approved, VDOC should expedite the development of housing and medical plans to facilitate release as soon as possible, taking into consideration the existing capacity of healthcare facilities.

Direct VDOC to Utilize Existing Release Mechanisms

The Director of the Virginia Department of Corrections has the existing statutory authority to expedite the release of people in his custody by up to thirty days in two situations. First, the Director has the authority to release any person in VDOC custody within thirty days of that individual's release date.²⁶ Second, the Director may grant a furlough for up to thirty days for any person who has already been approved for release by the Parole Board and is within thirty days of their scheduled parole release date.²⁷

We are asking you to direct VDOC to employ these clear statutory powers for all who are eligible, before COVID-19 enters Virginia's prisons.

²⁴ The specificity of the categories of incarcerated Virginians whom we implore you to consider pardoning, coupled with the threat of COVID-19 and the current State of Emergency, provide more than ample legal grounds for such use of executive clemency. To the extent that anyone would raise an objection similar to that of *Howell v. McAuliffe*, it is unmerited. In 2016, Governor McAuliffe attempted to use his powers under Article V, Section 12 of the Virginia Constitution to restore the voting rights of approximately 206,000 Virginians. The Virginia Supreme Court found that “[t]he unprecedented scope, magnitude, and categorical nature of Governor McAuliffe’s Executive Order” amounted to an “unconstitutional suspension of the law.” 292 Va. 320, 327-28 (2016). Though the Court observed that “[n]ever before have any of the prior 71 Virginia Governors issued a clemency order of any kind...to a class of unnamed felons without regard for the nature of the crimes or any other *individual circumstances relevant to the request*,” it also noted that those observations, “do not preclude us from recognizing a novel executive power that no prior Governor ever believed existed.” *Id.* at 327, 339 (emphasis added). The exercise of executive clemency contemplated here is both more narrowly defined than the exercise of the Governor in *Howell* and would be taking place against the backdrop of a public health crisis that has occasioned a State of Emergency. First, the individual circumstances of the incarcerated Virginians recommended for pardon in this letter, specifically their advanced age, poor health conditions, and limited time remaining in custody, are directly relevant to the reasons for the pardons and could be identified as such for each individual person pardoned. Further, the novel coronavirus (aka COVID-19) and its deadly spread across the globe has presented a never-before-encountered situation in this nation and in the Commonwealth, one that has occasioned the legal invocation of a State of Emergency (and the expanded powers it sanctions) in Virginia with no specific end in sight; together, these conditions provide ample additional context for your using your executive clemency powers to prevent immediate and irrevocable harm by pardoning specific categories of people in custody to reduce the incarcerated population.

²⁵ Virginia Department of Corrections Operating Procedure 820.2, § III-Definitions (this determination must be based on the “independent opinion of at least two physicians”).

²⁶ Va. Code § 53.1-28.

²⁷ Va. Code § 53.1-37(C).

Direct the Parole Board to Expedite Review and Consider the Pandemic as Context

We also implore you to direct the Virginia Department of Corrections and Parole Board to identify individuals in custody who are eligible for parole, whether discretionary²⁸, geriatric²⁹, or based on Youthful Offender³⁰ status, and to expedite review of their applications. As the Virginia Parole Board currently has a mere 5% parole release rate, we are also asking you to provide guidance that the Parole Board explicitly factor into its decision-making the threat that COVID-19 poses to everyone in Virginia, especially those in carceral settings.³¹

More broadly, for anyone who has already been successful at a parole hearing but remains incarcerated pending administrative processes (housing plans, e.g.), please direct the Department of Corrections to expedite the development of an appropriate reentry plan to facilitate release as soon as possible. Priority should be given to those with COVID-19 risk factors, should they be amongst this set of people.

Conclusion

It is within your power as Governor to save lives—potentially hundreds or even thousands of them—by taking bold, decisive action while there is still time to mitigate the life-threatening spread of COVID-19. On behalf of some of Virginia’s most vulnerable residents, we urge your office to move quickly to implement the measures recommended by this letter. Please contact us to discuss these urgent matters. We are happy to provide any further information as well as communicate your office’s plans for action to our client community.

Thank you.

Sincerely,



Angela A. Ciolfi
Executive Director



Kim Rolla
Interim Legal Director, Civil Rights & Racial Justice Program

Cc: Clark Mercer, Chief of Staff, Office of Governor Ralph S. Northam
Rita Davis, Counselor to Governor Ralph S. Northam
Matt Mansell, Director, Office of Policy and Legislative Affairs, Office of the Governor

²⁸ Va. § Code 53.1-165.1.

²⁹ Va. § Code 53.1-40.01.

³⁰ Va. § Code 19.2-311.

³¹ "Virginia Denies Vast Majority of Parole Requests, Data Shows," Virginia Capital News Services, December 18, 2019, available at <https://patch.com/virginia/richmond/virginia-denies-vast-majority-parole-requests-data-shows>.

Brian Moran, Secretary, Public Safety and Homeland Security
Jae K. Davenport, Deputy Secretary, Public Safety and Homeland Security
Nicky Zamostny, Assistant Secretary, Public Safety and Homeland Security
Kelly Thomasson, Secretary of the Commonwealth
Elizabeth Woodhead, Executive Assistant to the Secretary of the Commonwealth
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