



July 7, 2020

**Via email to:**

Governor Michelle Lujan Grisham

c/o Matthew L. Garcia

General Counsel to New Mexico Governor Michelle Lujan Grisham

[Matt.Garcia@state.nm.us](mailto:Matt.Garcia@state.nm.us)

**Re: Preventing another massive outbreak of COVID-19 in NM prison facilities**

Dear Governor Lujan Grisham,

We are writing to express our deep concern at your administration's inadequate approach in addressing the explosion of COVID-19 that is ravaging New Mexico prisons and jails. We know you have implemented some bold measures statewide to keep New Mexicans safe in the face of this deadly global pandemic. The state has an even greater responsibility to affirmatively protect the lives of people in its custody, who are detained against their will and without the power to take any measures for their own protection. We ask you to apply the same strong, decisive, and forward-thinking approach to protect the lives of incarcerated New Mexicans as you have for the rest of the state. After all, "a nation should not be judged by how it treats its highest citizens, but it's lowest ones,"<sup>1</sup> – a notion that could not be more glaring than during this pandemic.

In late March, the ACLU and other advocates for incarcerated people wrote letters to your office, warning you that prison facilities were tinderboxes for infection. We wrote to you, along with the New Mexico Corrections Department ("NMCD") and the Probation and Parole Department ("PPD"), providing a list of concrete measures that would reduce the spread of COVID-19 in New Mexico's prisons and protect the lives of incarcerated people and prison staff.<sup>2</sup>

On April 8, 2020, you issued Executive Order 2020-021, allowing for early release of certain individuals already within 30 days of release who had existing parole plans. While we commend you for this first step, it did not go far enough. To date, approximately 70 individuals have been released a handful of weeks early under the Order.<sup>3</sup> It is unclear how much, if at all, the April 8 Order has reduced the overall prison population, as NMCD continues to receive new intakes.

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<sup>1</sup> Nelson Mandela, *Long Walk to Freedom* (1994).

<sup>2</sup> Our suggested measures were and are based on the work of public health professionals, correctional health experts, and leaders in criminal systems reform work.

<sup>3</sup> Around the same time, the governors of Kentucky and Oklahoma each commuted the sentences of hundreds of inmates in direct response to the COVID-19 threat. See Brian Planalp, *Nearly 1,000 Kentucky prison sentences to be commuted, Beshear says*, Fox19 (Apr. 2, 2020), available at <https://www.fox19.com/2020/04/02/watch-live-gov-beshear-provides-update-covid-kentucky/>; Barbara Hoberock, *Stitt commutes sentences for more than 450 offenders to ease crowding, reduce COVID-19 risk*, Tulsa World (Apr. 11, 2020), available at

In the past three months, dozens of incarcerated people, their loved ones, and some facility staff have notified us of dangerous conditions and insufficient protocols inside many New Mexico prisons, imploring us to take action. We understand that in March, when there were not yet any reported cases of COVID-19 in New Mexico prisons, you may not have fully understood the gravity of the danger to incarcerated New Mexicans. Three months later, however, when at least 448 people held in the Otero County Prison Facility (“OCPF”) have tested positive for COVID-19, we ask that you carefully review and consider the recommendations outlined in this letter.

Since we first wrote to you, we have seen prison after prison across the country become a hotspot for COVID-19. Here in our own state, we watched how quickly the virus can ravage a prison. In a little over a month, OCPF went from having one positive case of COVID-19 on May 15, 2020 to over 400 cases on June 21, 2020. On June 21 alone, OCPF announced 41 new cases, the number of new cases in McKinley and San Juan Counties combined. As of this writing, 90% of the inmates at OCPF have tested positive and at least three have died. The virus has also spread to an unreported number of staff who work at the facility.

Make no mistake: the tragic circumstances at OCPF were neither unlikely nor unique. Now, it appears NM may be on the verge of an outbreak at the Central New Mexico Correctional Facility (“CNMCF”), where six inmates have tested positive and at least twenty staff are out on quarantine after being exposed to COVID-19 positive inmates.

We write now, when the number of COVID-19 cases is again rising across the state, to urge you to revisit the suggestions made by advocates and public health professionals and to swiftly implement new protocols. There is no time to waste if the state wishes to prevent the impending crisis at one of the largest prisons in NM.

We understand and respect that there are long-existing procedures in place that make the necessary changes challenging. However, it is imperative that your office, NMCD, and PPD consider innovative and outside-of-the-box approaches, just as your administration has done in other areas to address the pandemic threat. These departments cannot allow their hands to remain tied by their own outdated rules. Lives urgently depend on their willingness to adapt to these unprecedented times, just as you have rightfully asked every New Mexican to do.

We request that your administration take the following steps:

#### Increased transparency

- NMCD issue a report daily similar to those currently produced by the New Mexico Department of Health (“NMDOH”), regarding the testing of NMCD personnel and inmates in New Mexico prison facilities. The report should include: how many staff were tested and at which facilities; how many inmates were tested and at which facilities; the number of tests that have returned positive, negative, and/or inconclusive; the number of staff and inmates on quarantine and in/from which facilities; the number of NMCD inmates who are hospitalized and from which facilities; the number of inmates who have

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[https://www.tulsaworld.com/news/stitt-commutes-sentences-for-more-than-450-offenders-to-ease-crowding-reduce-covid-19-risk/article\\_e7215f73-5b0e-5b2c-b095-de043a182f7d.html#anchor\\_item\\_1](https://www.tulsaworld.com/news/stitt-commutes-sentences-for-more-than-450-offenders-to-ease-crowding-reduce-covid-19-risk/article_e7215f73-5b0e-5b2c-b095-de043a182f7d.html#anchor_item_1).

died from the virus and at which facilities they had been held.<sup>4</sup> For a brief time in May, NMCD posted a chart on its website showing the number of positive cases among inmates and staff at each facility, but the chart was taken down around the time that the OCPF outbreak was coming to light.

- NMCD issue a report weekly regarding any additional steps being taken to address the threat of COVID-19 in the prisons, including the transfer of inmates between NMCD facilities for quarantine or population adjustments.

### Measures to protect and reduce the population in NM prisons

Reduction of the prison population is essential to prevent additional outbreaks of COVID-19 such as the one currently devastating OCPF. NMCD Secretary Alisha Tafoya Lucero and NMDOH epidemiologist Chad Smelser acknowledged in their joint press conference on June 24, 2020 that once the virus enters a prison facility it is nearly impossible to control the spread because the population lives in extremely close quarters. Thus, the *only* way to address the risk of a massive outbreak among inmates and staff at any given facility is to reduce the population to a point where inmates can maintain distance from one another. We ask that:

- NMCD conduct widespread testing of inmates and staff for COVID-19 on a rolling basis, including at least 25% of staff and 25% of inmates each week.<sup>5</sup> Widespread testing of free New Mexicans has helped to keep our state's COVID-19 deaths relatively low in comparison to other states. The same approach should be used for incarcerated people and NMCD staff. At the very least, once a positive case has been identified among either inmates or staff at a particular prison facility, that facility should immediately undergo 100% testing.<sup>6</sup>
- NMCD use its powers under the Adult Community Corrections Act, NMSA 1978, § 33-9-1 et. seq. to identify non-violent offenders who are 12 months from their parole date and otherwise eligible and swiftly begin placing them in the community. The Department has broad discretion under this Act. In October 2019, the New Mexico Sentencing Commission identified 294 eligible inmates. Releasing those inmates would reduce the prison population and free up heavily-taxed staff and medical resources.

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<sup>4</sup> An example of transparency, the Ohio Department of Rehabilitation and Correction has been providing such information on their website, updated daily, since at least mid-April. See COVID-19 Inmate Testing, ODRC, <https://drc.ohio.gov/>.

<sup>5</sup> An example of strong testing protocols, in late May the Michigan Department of Corrections tested all 38,130 people in its custody – over six times the number incarcerated in New Mexico prisons. John Tunison, *Michigan tests every state prisoner for coronavirus in less than 15 days*, mLive (May 22, 2020), available at <https://www.mlive.com/public-interest/2020/05/michigan-tests-every-state-prisoner-for-coronavirus-in-less-than-15-days.html>. The Ohio Department of Rehabilitation and Correction has administered 15,199 tests since the COVID-19 pandemic began. See *COVID-19 Inmate Testing*, Ohio Department of Rehabilitation and Correction (updated July 5, 2020), <https://coronavirus.ohio.gov/static/reports/DRCCOVID-19Information.pdf>.

<sup>6</sup> For example, after several positive cases were identified at one of West Virginia's eleven prisons, Governor Jim Justice ordered testing of every inmate in that facility, followed by a plan to test all inmates in each of the state's prisons. See Steven Allen Adams, *West Virginia testing for coronavirus in prisons, jails*, The Parkersburg News and Sentinel (June 4, 2020), available at <https://www.newsandsentinel.com/news/local-news/2020/06/west-virginia-testing-for-coronavirus-in-prisons-jails/>.

- Identify inmates who are medically high risk under the criteria set out by the CDC and place them in community custody and/or develop plans of release for those who would not pose a threat to public safety.
- NMCD can use medical and geriatric parole pursuant to NMSA 1978, § 31-21-25.1 to release elderly inmates and those who have medical conditions that make them particularly susceptible to COVID-19.
- Release inmates who are incarcerated due to technical parole violations and place them back on parole in the community. These individuals have existing parole plans.

#### Probation and Parole Department measures to facilitate reduction of the NM prison population

- Review standard conditions imposed on parolees and identify which may be relaxed to facilitate early release of individuals serving time for technical violations, those eligible for release under the Community Corrections Act, or those released by action of the Governor. In particular, the restriction on parolees living with other individuals convicted of a felony presents a significant barrier to parole. For many individuals, that requirement is unnecessary and relaxing it could save lives. Additionally, any work requirements should be suspended in light of the current pandemic and should not be reinstated until all businesses are able to reopen at full capacity.
- Quickly identify inmates who have submitted geriatric parole applications, investigate their plans, expedite their hearings, and facilitate their release as long as public safety is protected. Elderly inmates and those with underlying health conditions are exponentially more vulnerable to severe medical complications and death from COVID-19.
- Hold additional parole hearings in order to expedite the release of inmates who are currently serving in-house parole while awaiting their parole hearings and those whose projected release date comes after their scheduled parole hearings.
- Identify inmates serving in-house parole for lack of an approved placement and quickly determine if placement requirements can be relaxed so that person can be released from the facility so long as public safety is protected. Many inmates have families to go to, but cannot parole there because a family member might also have been convicted of a felony.
- Quickly promulgate a policy to temporarily suspend any incarceration to jail or prison for technical parole violations such as failing a drug test, missing a meeting with an officer, association, violating curfew, or using alcohol. One third of inmates in NMCD custody are there for technical violations.<sup>7</sup> Taking this step will drastically reduce the number of people having contact with jails and prisons.

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<sup>7</sup> Legislative Finance Committee, October 23, 2018 Corrections Department Program Evaluation, p. 1.  
<https://tinyurl.com/y628pn2f>.

- Recommend early termination of supervision where possible for those who have already demonstrated compliance with conditions of supervision. Probation and Parole has the authority to make this recommendation for certain individuals and the Parole Board has the authority to approve this administratively.<sup>8</sup> PPD should act quickly to identify these individuals.
- If a probation or parole officer initiates the revocation process where a person has allegedly committed a new offense, delay scheduling a revocation hearing until after public health concerns have dissipated if it is determined that the person can remain in the community prior to the hearing without danger to the community.
- Work with the district attorneys to ensure that any victims are timely notified of any release in accordance with statute NMSA 1978, 31-26-12(D).
- Use any other available powers to facilitate the release of inmates to reduce the population of the prisons to mitigate the public health risk.

#### Considerations for reentry of incarcerated people into the community

- Many individuals in NMCD custody have family to go home to when they are released. Relaxing some of the boilerplate conditions on parolees, such as the prohibition on living with under individuals with felony convictions, would assist in placement of those released from NM prisons.
- Purchase unused hotel/motel rooms for individuals with no immediate housing available or who need to be quarantined for 14 days before joining family.
- Correctional populations face disproportionately high risk of infection due to higher prevalence of pre-existing health conditions compared with the general population, increasing the need for continuity of care with community-based healthcare providers so that pre-existing health conditions can be appropriately managed. Your administration should work with the contractor Wexford Health Services to ensure those needing medication receive at least a 30-day supply of medication and a prescription. Where eligible, Wexford or facility staff should enroll releasees in Medicaid.

Once again, we are sympathetic to the challenges that this pandemic presents for systems such as prisons, which are not built for swift, widespread change. Indeed, COVID-19 has shone a light on many of the problems and injustices inherent in our system of mass incarceration. Fortunately, criminal justice experts and advocates for reform across the country have provided a roadmap for decarceration during COVID-19. We believe that the outline we have laid out may assist your administration in implementing a new approach to thwart further preventable catastrophes in our prisons and jails.

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<sup>8</sup> See, e.g., Earned Meritorious Deductions for Parolees  
<https://cd.nm.gov/wp-content/uploads/2019/06/CD-055000.pdf>.

The lives of incarcerated individuals and corrections staff are equally worth saving from this deadly pandemic as any other New Mexican's life. The members of our community behind bars are depending on your strong leadership in this moment. We know you will not let them down.

Respectfully,

A handwritten signature in black ink, appearing to read "Peter M. Simonson", followed by a period.

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