

March 31, 2020

Dear Governor Kelly,

As you well know, our state is facing a pandemic disaster with the spread of COVID-19. We commend you for the quick, decisive action that you've taken thus far to proactively protect the citizens of Kansas from this deadly disease. However, we are concerned that little has been done to protect a segment of our citizens who are at the highest risk of infection and death, and pose one of the greatest unchecked risks to the communities in which they reside: inmates in our Kansas jails and prisons.

The best defense against COVID-19 is to avoid catching it in the first place. And for this reason the most consistent recommendations from KDHE, CDC, and WHO have been to practice good hygiene and physically distance from others as much as possible¹ – both of which are nearly impossible to do effectively and consistently in most jails and correctional facilities.²

If left unaddressed, the consequences of such large populations being unable to effectively take the most basic precautions to avoid this illness will likely be dire. In New York and Louisiana, for example, we are already seeing the effects of a failure to take this risk seriously and address it proactively.³ And the consequences do not stop at the prison gates – when people in prison are not safe or healthy, then neither are people out in the community.⁴ **We are asking you to take additional decisive action under the authority of the Emergency Management Act and your March 12, 2020 Emergency Declaration to prevent Kansas from befalling a similar fate.**⁵

¹ Just yesterday, Dr. Robert Redfield, CDC Director, said “[t]he last thing I wanted to say.... I have total confidence that we’ll bring this virus down, but the tool that we’re going to do that is this request: for all Americans to really embrace the social distancing that we’ve requested.” <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us>

² <https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons>

³ <https://slate.com/news-and-politics/2020/03/coronavirus-is-spreading-on-rikers-island.html>; https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html ; <https://time.com/5808020/rikers-island-coronavirus/>

⁴ <https://www.themarshallproject.org/2020/03/31/why-jails-are-so-important-in-the-fight-against-coronavirus>

⁵ K.S.A. 48-925(c)(5) [Governor may direct and compel the evacuation of all or part of the population from any area of the state stricken or threatened by a disaster, if the governor deems this action necessary for the preservation of life or other disaster mitigation, response or recovery], (c)(10) [Governor may require and direct the cooperation and assistance of state and local governmental agencies and officials], and (c)(11) [Governor may perform and exercise

Regardless of why an inmate is being held in custody, we as a state have a clear moral and constitutional obligation to provide medical care to the people we choose to incarcerate. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).⁶ On the news, we have all witnessed hospitals being overrun by the medical needs of large numbers of patients afflicted with COVID-19. Given this reality, and our limited medical care centers in prisons and jails, when COVID-19 takes hold - and spreads - in one of our prisons or jails, we will not be able to sufficiently treat the number of incarcerated patients.

Our correctional facilities are overcrowded.⁷ Unsurprisingly, it is difficult for inmates to adequately distance themselves when packed into a facility that is beyond full capacity. And a highly contagious virus like COVID-19 takes advantage of such close conditions. For example, as of this past weekend, the COVID-19 infection rate at New York City's Rikers Island Jail was 7 times higher than the rate in New York City overall, and an astounding 77 times higher than the infection rate for the United States.⁸ Yesterday, Dr. Ross MacDonald, the chief physician at Rikers, "raise[d] an alarm."⁹ He argued that although his staff is "giving it our all through every brutal day of this crisis," it is not enough, due to the nature of COVID-19. Even with what he believes to be the best prison health care available, Dr. MacDonald urges that "the focus remain on releasing as many vulnerable people as possible."

Dr. MacDonald is not alone. In a letter signed by 16 other health care professionals, Dr. Fred Rottnek, St. Louis University medical professor, "noted correctional facilities are often poorly ventilated and share heating, ventilation and air conditioning systems, which 'accelerates the spread of disease through droplets.'"¹⁰ This means that "isolating" prisoners from new admittees and/or people who appear healthy is not an adequate solution. The letter's signers "recommended prison and jails evaluate the release of any inmates and detainees considered medically vulnerable, 55 or older or unable to pay a cash bond. [They] also suggested releasing enough inmates to accommodate the CDC's social distancing guidelines."

Speaking of vulnerable people, an estimated 39-43% of all incarcerated people, and over 70% of older prisoners, have at least one chronic condition, some of the most

such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.]

⁶ <https://news.bloomberglaw.com/us-law-week/insight-protecting-prisoners-in-pandemics-is-a-constitutional-must>

⁷ <https://www.kcur.org/post/number-incarcerated-women-kansas-climbs-putting-stress-lone-prison#stream/0> , <https://www.kansas.com/news/politics-government/article233705142.html>

⁸ https://legalaidnyc.org/wp-content/uploads/2020/03/Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails_March-28-2020-5-PM.pdf

⁹ <https://twitter.com/RossMacDonaldMD/status/1244822686280437765>

¹⁰ <https://www.kansascity.com/news/coronavirus/article241530616.html>

common of which are diabetes, hypertension, and heart problems.¹¹ According to the CDC, each of these conditions, as well as others, puts them at a “high-risk for severe illness from COVID-19.”¹² Younger and medically noncompromised prisoners are also at risk of coronavirus in a correctional setting. As of March 23, 2020, New York City reported that “[p]eople ranging in ages from 18 to 44 have accounted for 46 percent of positive tests,”¹³ and 38% of those hospitalized in the U.S. are between 20 and 54.

Again, these problems do not stay contained in prisons and jails. As seen in New York and elsewhere, the virus has also spread among corrections staff and law enforcement officers. Any spread of COVID-19 in correctional facilities undoubtedly endangers the local communities as workers leave the prison or jail to return home to their families and their community at the end of their shifts.¹⁴ The spread can also occur when inmates are transferred to local hospitals.

As for Kansas prisons, even before this pandemic, you expressed concern about the health care provided by our current provider,¹⁵ which stands to lose its contract if its

¹¹ Brie A. Williams *et al.*, *How Health Care Reform Can Transform the Health of Criminal Justice-Involved Individuals*, 33 *Health Affairs* 462-67 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4034754/>; Brie A. Williams *et al.*, *Coming Home: Health Status and Homelessness Risk of Older Pre-release Prisoners*, 25 *J. Gen. Internal Med.* 1038-44 (2010), available at <https://link.springer.com/content/pdf/10.1007/s11606-010-1416-8.pdf>; Laura M. Maruschak *et al.*, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Dept of Justice (Oct. 4, 2016), at 5, available at <https://www.bjs.gov/content/pub/pdf/mpsfpi112.pdf>.

¹² Harvard Health Publishing, *Coronavirus Research Center*, Harvard Medical School (Mar. 25, 2020), <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>; Centers for Disease Control and Prevention, *Coronavirus Disease 2019: People Who Are at Higher Risk*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>

¹³ Kimiko de Freytas-Tamura, *20-Somethings Now Realizing That They Can Get Coronavirus, Too*, *N.Y. Times* (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/nyc-coronavirus-young.html>.

¹⁴ <https://www.ny1.com/nyc/all-boroughs/coronavirus-blog/2020/03/16/nyc-correction-employee-dies-of-coronavirus>

KANSAS DEPARTMENT OF CORRECTIONS

Performance Outcomes
Calendar Year 2018 Performance Guarantees

	Number Audits	Compliant	Non-Compliant	% Compliant
Intake Health Assessment	36	3	33	8.3%
Periodic Health Assessment	30	6	24	20.0%
Sick Call	21	2	19	9.5%
Special Needs / Chronic Care	15	1	14	6.7%
Specialty Services	4	4	0	100.0%
RDU Evaluations	3	1	2	33.3%
Mental Health Special Needs / Treatment Planning	16	2	14	12.5%
Mental Health Sick Call	13	5	8	38.5%
Mental Health Groups	63	43	20	68.3%

¹⁵

<https://www.kcur.org/post/kansas-prison-health-contractor-piling-penalties-poor-performance#stream/0>

services do not improve.¹⁶ When limited prison and jail medical resources run out or prove to be otherwise insufficient for the severity of an inmates' condition, then inmates would have to be hospitalized in local community hospitals, using the communities' already scarce hospital beds and medical resources. As the table below demonstrates, the addition of even a small number of inmates seeking medical care in the local hospital systems could quickly overwhelm these communities.

KDOC facility	Total capacity of the prison	# of inmates as of 3/27/20 (overcapacity noted in RED)	Approx. population of surrounding community	# of hospital beds in the town (taken from hospital's website or KS Hospital Association's website; hospitals classified "rural" in italics)
El Dorado	1,955	2,088	12,935	48
Hutchinson	1,862	1,912	40,623	190
Norton	975	962	2,768	25
Lansing	1,906	1,665	11,964	unk., but 6 ICU
Larned	598	590	3,772	25 or fewer
Winfield	554	615	12,058	Under 50
Ellsworth	913	911	3,075	25 or fewer
Topeka	903	912	125,904	964
Wichita Work Release	255	249	389,255	Over 100

Other states have reviewed the risks of COVID-19 to their inmate populations and have begun to take decisive action. For example, New York recently released 1,100 parole violators: about 600 were in prison, and the others in local jails.¹⁷ Rhode Island Corrections officials have begun compiling a list of prisoners held in jail on low bail amounts and are working with prosecutors and defense counsel to assess who might be

¹⁶ <https://www.ksnt.com/news/top-stories/kansas-prison-health-care-provider-falling-short/>

¹⁷ <https://www.timesunion.com/news/article/Deaths-surge-again-in-New-York-from-coronavirus-15160973.php>

able to be released.¹⁸ Vermont has begun releasing some inmates to allow those who are left to better distance in their facilities.¹⁹ Illinois Gov. Pritzker has eased restrictions on prison release in response to COVID-19.²⁰ Colorado Gov. Polis suspended certain caps on earned time credits among other acts in order to allow its Department of Corrections to more easily reduce its inmate population in response to COVID-19.²¹

On the other hand, the governor of Missouri appears to be taking the opposite approach. “Before the first inmate tested positive, the local ACLU urged Gov. Mike Parson to commute the sentence of any inmate considered particularly vulnerable to the virus whose sentence would end within the next two years. Asked about the issue during a news conference, Parson said there were no plans to release any of the state’s nearly 26,000 inmates.” He added, “People are incarcerated for a reason and that’s because what the law is[.]”²² He appears to be maintaining this position despite what local jails are doing and the information from the people who work and live there.

Furthermore, while we want you to take action, it needs to be obtainable relief. For example, although Attorney General Barr issued a memo allowing the transfer of federal inmates to home confinement to better handle the risk of COVID-19 to its prison population, the government has not taken the necessary steps to put this into action. Additionally, it will exclude so many people that it will be close to meaningless.²³

As concerned and interested members of our Kansas community who regularly serve these incarcerated people who are most at risk, we are asking that you work closely with the Department of Corrections, along with any other interested parties to:

1. Release medically fragile and older adults who are at higher risk for serious complications from COVID-19.²⁴
2. Release people who have six months or fewer left to serve on their sentences.

¹⁸ <https://www.southcoasttoday.com/news/20200325/ri-prisons-looking-to-reduce-inmate-numbers-due-to-virus>

¹⁹ <https://www.vnews.com/Vermont-NH-prisons-working-to-reduce-population-to-prevent-virus-spread-33512589>

²⁰ <http://loyolaphoenix.com/2020/03/illinois-reaches-1285-covid-19-cases-gov-pritzker-eases-restrictions-on-prison-release/>

²¹ <https://drive.google.com/file/d/18o0yWHzZleHJ87hmgLuBmXwpM8R74Q5x/view>

²² <https://www.kansascity.com/news/coronavirus/article241530616.html>

²³ <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>;
<https://www.themarshallproject.org/2020/03/28/how-bill-barr-s-covid-19-prisoner-release-plan-could-favor-white-people>

²⁴ There are over 300 people in Kansas prisons who over 60, and over 1,500 who are over 50.
<https://www.kansas.com/news/politics-government/article239842598.html>

3. Release people imprisoned for technical violations of probation or parole. For new violators, avoid putting them in county jails pending disposition, when possible.²⁵
4. Create and publicize a protocol to support release from incarceration in a way that promotes public health.²⁶
5. Issue an order calling on prosecutors and law enforcement entities within the state to take every available measure to avoid adding to the population of prisons and jails.
6. Pause the transfer of people from county jails to prisons.
7. Provide opportunities for people who remain incarcerated to be able to comply with best practices, *i.e.* good hygiene and physically distancing from others, as much as possible, at no cost to those incarcerated.
8. Encourage county jails to take similar actions in their facilities.
9. 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.

COVID-19 presents risks to all Kansans, and it has brought us together to do what is right for our state. In order to protect the most vulnerable among us, we must allow and encourage everyone to engage in practices that “flatten the curve.” Without prompt and decisive action, our overcapacity prisons and jails will foster the spread of COVID-19, which will overwhelm both correctional and community health care systems, many of which are in smaller towns. The only moral and constitutional solution is to immediately order, under your emergency authority, the release of as many people as possible.

We urge you to join the growing number of governors and other community leaders who have decided to act in an effort to save lives. The time to act is now – before a positive case is announced - and we stand ready to help you in any way we can.

Sincerely,

Jennifer Roth, Kansas Association of Criminal Defense Lawyers
Heather Cessna, Executive Director, Kansas Board of Indigents’ Defense Services
Melody Brannon, Federal Public Defender, District of Kansas
Tricia Rojo Bushnell, Executive Director, Midwest Innocence Project

²⁵ According to the Kansas Sentencing Commission, last year, 77% of women and 65% of men who entered Kansas prisons did so as probation and parole violators, who have shorter sentences (9.4 and 5.7 mos., respectively) than people sent directly to prison. Violators are often locked up because of “technical violations,” including things that are legal if done by a non-supervised person.

²⁶ See, *e.g.*, <https://www.vera.org/downloads/publications/coronavirus-guidance-los-angeles.pdf>.