



May 6, 2020

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Re: Need to Expand COVID-19 Testing in Detention and Public Information Act Request

Dear Governor Hogan and Secretary Green:

In light of the central role that testing and identifying positive cases play in managing the spread of COVID in prisons and jails, we write on behalf of the ACLU of Maryland and the Lifer Family Support Network to urge the State and the Division of Correction to prioritize aggressive testing of residents and workers in Maryland's places of detention, particularly where there has been at least one confirmed COVID-19 case. This is a matter reflecting both public health and constitutional dimensions.<sup>1</sup>

### **Public Health Rationales Compel Significant Additional Testing in Detention**

Last week, Governor Hogan announced a mandate for "universal testing" in Maryland's nursing homes, requiring testing whether or not individuals are symptomatic because people not showing symptoms can spread the virus.<sup>2</sup> The

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<sup>1</sup> See generally *Helling v. McKinney*, 509 U.S. 25 (1993) (prison officials violate the Eighth Amendment prohibition on cruel and unusual punishment when they act with deliberate indifference to a serious medical risk).

<sup>2</sup> Executive Order No. 20-04-29-01, <https://governor.maryland.gov/wp-content/uploads/2020/04/Nursing-Homes-Amended-4.29.20.pdf>; Jack Moore, *Maryland Gov. Hogan orders 'universal' coronavirus testing at all nursing homes*, WTOP, Apr. 30, 2020, <https://wtop.com/coronavirus/2020/04/coronavirus-maryland-larry-hogan/>

same public health rationales apply to places of detention, which disproportionately house individuals who are medically vulnerable to the most serious harms of COVID-19. In restrictive congregate settings where people are housed in close proximity to one another, are unable to remove themselves from harm's way and must rely on staff to meet basic needs, the risk for outbreaks is extremely high. For these reasons the Centers for Disease Control designates residents and workers in congregate care settings as "high priority" for testing, along with individuals in hospitals and health care workers and first responders.<sup>3</sup>

Public health experts are urging the State to expand its testing for those in prisons and jails, explaining that "accumulating experience with the transmission of the coronavirus, especially in closed environments like prisons and nursing homes, counsels that testing must be expanded beyond those who are symptomatic."<sup>4</sup> Two weeks ago, California adopted testing criteria prioritizing asymptomatic people working or living in prisons and other high-risk settings.<sup>5</sup> And, unsurprisingly, corrections officials in other states have begun implementing much broader testing. Last week, New Jersey announced it would begin universal testing of all those working or living in state correctional facilities.<sup>6</sup> Tennessee announced the same.<sup>7</sup> And a number of other jurisdictions have done universal or mass testing at facilities suspected of outbreaks, including Ohio, Vermont, Virginia, North Carolina, among others.<sup>8</sup>

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<sup>3</sup> Centers for Disease Control and Prevention, *Priorities for COVID-19 Testing*, <https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html>.

<sup>4</sup> Dr. Chris Beyrer, et al, Letter to Governor Hogan, Apr. 30, 2020, [https://www.jhsph.edu/research/centers-and-institutes/center-for-public-health-and-human-rights/\\_pdf/April%2030%20Followup%20Letter.pdf](https://www.jhsph.edu/research/centers-and-institutes/center-for-public-health-and-human-rights/_pdf/April%2030%20Followup%20Letter.pdf).

<sup>5</sup> Emily Baumgaertner, *California becomes first state to recommend coronavirus tests for some without symptoms*, LA Times, Apr. 21, 2020, <https://www.latimes.com/science/story/2020-04-21/california-first-state-coronavirus-tests-without-symptoms>

<sup>6</sup> Blake Nelson, *All N.J prisoners will be tested for coronavirus beginning next week, Murphy says*, NJ.com, Apr. 30, 2020, <https://www.nj.com/coronavirus/2020/04/mass-coronavirus-testing-in-nj-prisons-should-begin-next-week-murphy-says.html>

<sup>7</sup> Jonathan Matisse, *1,299 inmates test positive for virus at Tennessee prison*, AP, May 1, 2020, <https://apnews.com/5d0dde8eaa0385c9fd97e1545a5857da>

<sup>8</sup> Whitney Evans, *Pressure Builds in Jails and Prisons as COVID-19 Spreads*, VPM, Apr. 29, 2020, <https://vpm.org/news/articles/12976/pressure-builds-in-jails-and-prisons-as-covid-19-spreads> (Virginia); Josiah Bates, *Ohio Began Mass Testing Incarcerated People for COVID-19. The Results Paint a Bleak Picture for the U.S. Prison System*, Time.com, Apr. 22, 2020, <https://time.com/5825030/ohio-mass-testing-prisons-coronavirus-outbreaks/> (Ohio); Vermont DOC, *Department of Corrections Completes Inmate COVID-19 Retesting in St. Albans*, May 1, 2020, <https://doc.vermont.gov/sites/correct/files/documents/Retesting%20Press%20Release%205.1.20.pdf> (Vermont); North Carolina Department of Public Safety, *Actions Taken*, <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19>.

Maryland’s corrections staff have also sought more robust testing. Samuel Olowookere, president of AFSCME Local 1319 for employees at Patuxent Institution has said: “We believe that correctional officers and inmates should be tested to have better control over the situation than we have now. Nobody knows who has it.”<sup>9</sup>

Jails and prisons, like nursing homes and other congregate living situations, have been COVID-19 hotspots in Maryland. There are hundreds of confirmed cases in the Maryland DOC and at least two known deaths from COVID-19. Both of the people who died were Black men over 60 with underlying medical conditions housed at Jessup Correctional Institution. There are more than 1,000 people aged 60 or over and likely several thousand individuals who are medically vulnerable in DOC facilities.<sup>10</sup> Indeed, both the ACLU and the FSN work closely with many individuals and families of individuals who are elderly and individuals with serious medical conditions who have served many decades in prison, and who are terrified that they will not survive the COVID-19 pandemic.

For the same reasons the Governor has stated that large-scale, robust testing is essential in nursing homes and a “pillar” necessary to have in place before easing restrictions in the State at large, it is essential to the public health that the State conduct vigorous testing of people who are incarcerated and staff who work in the facilities, particularly in light of the rapid spread of the virus in such settings and to the broader community through staff movement.

### **Maryland’s Current Testing Practices are Inadequate to Prevent the Spread of COVID-19**

To date, the DOC has not provided any information publicly about the number of people tested, but it is apparent that the State’s existing testing protocols are far too limiting to be of use in managing the spread of COVID-19.

Based on DOC’s prior reports and what people in Maryland prisons – both staff and those who are incarcerated – are reporting, *the only way to be tested is to*

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<sup>9</sup> Danielle Gaines, *AFSCME Presses for More COVID-19 Testing at State Prisons*, Md. Matters, May 1, 2020, <https://www.marylandmatters.org/2020/05/01/afscme-presses-for-more-covid-19-testing-at-state-prisons/>

<sup>10</sup> Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, The New Yorker (Mar. 16, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus>; see also I.A. Binswanger, et al., *Prevalence of chronic medical conditions among jail and prison inmates in the USA compared with the general population*, 63 *Journal of Epidemiology & Community Health* 912–919 (2009), <https://www.ncbi.nlm.nih.gov/pubmed/19648129> (concluding that people incarcerated in U.S. jails and prisons had a higher burden of most chronic medical conditions than the general population, even when adjusting for sociodemographic differences and alcohol consumption).

*be transported off-site*, and testing appears to be limited to those who are seriously ill.<sup>11</sup> Obtaining testing in the DOC requires numerous procedural hurdles. First, an individual has to present with symptoms to medical staff. Then medical staff, employed by the DOC's private health contractor, Corizon, make some kind of assessment as to whether testing is warranted, which itself is subject to some unexplained further review. According to consistent reports from people in DOC facilities, only individuals who exhibit at least three different COVID symptoms are even seriously considered for testing, and those only when they appear to be gravely ill. At that point, DOC correctional officers are forced to transport the individual to some offsite location to be tested; in some instances, staff fearful of contracting the virus have refused, further delaying the testing. Further exacerbating the situation is that DOC policy requires any incarcerated individual to be escorted by two armed correctional officers.

Staff, who have proven to be the lead vectors for transmission, are responsible for their own testing, even if they are turned away from work.

It is now apparent that such a restrictive approach to testing in prisons has serious adverse public health consequences, both for those living or working in the prisons, and for our communities at large.

First, the rates of transmission for the virus are much higher in prisons and jails, where people are unable to practice social distancing, which has widely been recognized as the single most effective way to manage spread of the disease. There are also numerous other well-documented reasons why prisons and jails face much higher rates of spread.<sup>12</sup> These high transmission rates have implications for us all. As explained by the Governor in announcing the need to combat the virus spread in nursing homes, “[t]argeting and containing these outbreaks and clusters is critically important to our state’s recovery efforts.”<sup>13</sup>

Second, the State’s plans for mitigating the spread of the virus in prisons rely heavily on its ability to identify positive cases. For example, the Department’s “contact tracing” efforts depend on identifying positive cases, which are only identified through presentation of clinical symptoms. Yet it has been crystal clear

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<sup>11</sup> Little information has been provided publicly about testing protocols in local jails, but based on media reports and firsthand accounts, local facilities are plagued by similar challenges in lacking adequate testing.

<sup>12</sup> See, e.g., Johns Hopkins faculty letter to Gov. Hogan, Mar. 25, 2020, <https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf>; The Justice Collaborative, Explainer: Prisons and Jails are Particularly Vulnerable to COVID-19 Outbreaks (Mar. 2020) [https://thejusticecollaborative.com/wpcontent/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19 Explainer.pdf](https://thejusticecollaborative.com/wpcontent/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19%20Explainer.pdf).

<sup>13</sup> Jack Moore, *Maryland Gov. Hogan orders ‘universal’ coronavirus testing at all nursing homes*, WTOP, Apr. 30, 2020, <https://wtop.com/coronavirus/2020/04/coronavirus-maryand-larry-hogan/>

from the beginning of this pandemic that asymptomatic individuals are vectors for transmission (indeed, they are almost certainly the primary vectors).

Third, the Department's primary means of enforcing any type of social distancing in its facilities has been to lock individuals in their cells or housing units for prolonged periods with little to no movement. At this point, people in DOC facilities are desperate to get out of their cells—understandably, because they are confined in a space the size of a parking space for 23 or more hours a day. As countless public health experts have noted since the beginning of the pandemic, this is not a sustainable plan. If the Department is ever going to be able to ease restrictions on movement, it must dramatically increase its capacity to prevent spread of the virus within the facilities.<sup>14</sup> One essential component of that is adequate identification of COVID-19 cases so that those individuals can be separated from the general population.

### **The State Must Increase Testing and Transparency**

**For the above reasons, we urge the Governor issue an Executive Order requiring State and local corrections officials to implement significantly increased testing capacity at places of detention, prioritizing facilities with outbreaks or suspected outbreaks. At minimum, this should include broad testing of staff, including contractors, and rapid and broad testing in the facility when a COVID-19 case has been confirmed.**

In light of the importance of these issues, **we also seek basic transparency pertaining to the Department of Correction's COVID-19 testing practices. We request that the Department post *daily* the aggregate number of people tested and confirmed cases by facility.** Timely information is crucial, as courts have expressly relied on the presence or absence of confirmed cases to assess risk of those held in prisons and jails, including the thousands of people in the DOC who are 60 and over and/or who have underlying medical conditions placing them at greater risk. Other jurisdictions around the country provide daily updates, which provide critical guidance to corrections staff, people in the facilities, medical professionals and the courts making determinations in individual cases.<sup>15</sup> Access to this basic information is extraordinarily important to families of people living and working in Maryland's prisons and jails.<sup>16</sup>

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<sup>14</sup> Obviously, further population reductions are also essential.

<sup>F</sup>For example, the U.S. Bureau of Prisons site (noting information is updated daily at 3 pm), <https://www.bop.gov/coronavirus/>. A number of correctional systems are also being transparent with the total number of tests and regular reporting about the number of people who are in medical isolation and quarantine, such as Florida, <http://www.dc.state.fl.us/comm/covid-19.html#testing> and Ohio, <https://coronavirus.ohio.gov/static/DRCCOVID-19Information.pdf>

<sup>16</sup> As the Governor noted in relation to outbreaks in nursing homes, "It is heart wrenching enough that families can't visit loved ones, but even worse when they can't get information about what's going on inside these facilities."

Please consider this letter a public records request for documents that reflect the Department's protocols for COVID-19 testing, the number of tests conducted, and documents reflecting the Department's access to testing, including on-site capacity. This request is made on behalf of the ACLU of Maryland and the Lifer Family Support Network pursuant to the Maryland Public Information Act, Md. Code Ann., General Provisions ("GP") §§ 4-101 to 4-601.

We seek copies of records reflecting:

- a. The Department's policies, protocols and practices relating to who is tested, specific criteria used to determine whether someone is tested, the process for being tested, and the Department's capacity to conduct testing;**
- b. The number of tests conducted to date on behalf of individuals in DOC custody and on behalf of correctional staff or contract staff, by facility;**
- c. Any plans or efforts to further increase the Department's testing capacity.**

To the extent anything we seek has personally-identifying information that prevents release, we are ask that such information be redacted. We are willing to accept records on a rolling basis, and to amend our request if that would facilitate receipt of the information sought.

If you conclude that some portions of the requested records are exempt from disclosure, we will expect, as the Act provides in § 4-203(c)(1)(ii), that you provide us with any portion of the records that is subject to inspection. If all or any part of this request is denied, please provide us (1) the reasons for the denial, (2) the legal authority for the denial, (3) a brief description of the record that will enable the us to assess the applicability of the legal authority for the denial, and (4) notice of the available remedies. Md. Code, Gen. Prov.,§ 4-203(c)(1)(i).

This request must be fulfilled within 30 days, as required by Gen. Prov. § 4-203(a). If you anticipate a delay, we expect a response within 10 days addressing (1) the amount of time that you anticipate it will take, (2) an estimate of the range of fees that may be charged; and (3) the reason for the delay. Md. Code Gen. Prov. § 4-203(b)(2). If we do not receive notice within the required time period, we will treat your failure to respond as a denial and seek appropriate relief.

We are aware that the Department has suspended operation of MPIA deadlines as a general matter. We do not understand this to mean that the Department plans to decline to even consider every MPIA request until after the emergency has ceased.

If the Department's position is that the Department is categorically refusing to honor any MPIA requests at this time, including those pertaining to COVID-19, regardless of the nature of the request or time required to fulfill it, please so advise.

Thank you for your time and attention to this matter, and we look forward to receiving your response. Please feel free to contact us with any questions or concerns.

Sincerely,

/s/

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