

March 18, 2020

ATTN:
Governor Doug Burgum
North Dakota Department of Corrections
North Dakota Sherriffs and Deputies Association

RE: COVID-19 and the Criminal Justice System



Dear Stakeholders,

P.O. Box 1190
Fargo, ND 58107
701-478-9924
aclund.org

I am writing today on behalf of the American Civil Liberties Union (“ACLU”) of North Dakota in light of the current pandemic to provide guidance to state and local professionals in the criminal legal system, particularly those who work in government administration and corrections.

As the SARS-CoV-2 strain of coronavirus continues to spread across the United States, and as more public and private actors take drastic steps to combat this pandemic, we urge you to develop and implement holistic policies that align with guidance from public health experts and that will minimize the harm inflicted on people involved in the criminal legal system – and, by extension, the harm inflicted on broader communities. Like all other public agencies, all aspects of the system – from policing and pretrial through sentencing, confinement, and release – will come under intense scrutiny for how the system responds to this national public health crisis.

According to the Centers for Disease Control and the World Health Organization, older adults and people of any age with serious chronic medical conditions – such as heart disease, lung disease, or diabetes – or who are otherwise immuno-compromised are at higher risk for contracting and getting very sick from COVID-19.

While immediate medical attention should be sought for anyone exhibiting symptoms of COVID-19, namely fever, dry cough, and difficulty breathing, excellent personal hygienic practices and social distancing are the most effective tools to combat the spread of the virus. This means staying at least three feet away from someone who coughs or sneezes, avoiding or limiting all physical contact, washing your hands regularly with soap and water, and using alcohol-based hand sanitizer to clean your hands after coughing, sneezing, or coming into contact with potentially exposed surfaces, objects, or people.

With this in mind, public health experts and groups such as Dr. Gregg Gonsalves, doctors working in New York City Hospitals, Dr. Marc Stern, Dr. Oluwadamilola T. Oladeru and Adam Beckman, Dr. Anne Spaulding, Homer

Venters, and Josiah Rich have all clearly stated that preventing the harm inflicted by SARS-CoV-2 and COVID-19 can become immensely more difficult for people involved in the criminal legal system. Being arrested and detained, incarcerated, or forced to appear in public spaces such as courts and supervision offices, or having mobility limited even while home, can drastically limit a person's ability to exercise any of the above precautions or to seek medical help. The longer jurisdictions wait to act, the worse this will be.

Therefore, we urge you to partner with local public health experts in developing informed, immediately actionable steps to ensure that public safety and public health are as protected as possible. This must include preventing people from unnecessarily entering the criminal legal system in the first place, and ensuring that prisons do not needlessly keep people incarcerated who are especially vulnerable to COVID-19. The non-exhaustive list below includes recommended actions, and we implore you to remember that no one system actor can be held singularly responsible for addressing this crisis. Partnership and transparency across the system are crucial.



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In accordance with recommendations from public health experts, the following actions will reduce the number of people who are coming into the criminal legal system over the next several months, thereby reducing the overall burden on the system and ensuring that people can adhere to recommended health practices.

Police must drastically limit the number of people who are arrested and then detained, even if just for a short time, in close proximity to other people or in spaces where maintaining hygiene becomes difficult. Police should cease arrests for low-level offenses and issue citations or desk-tickets in lieu of other arrests so that people can return home, balancing the need for arrest with the overwhelming public safety concerns presented by coronavirus and limiting the risk of bringing someone who may have the virus into a station and potentially infecting other personnel or first responders.

Prosecutors must use their immense discretion to limit the number of people who are held in jails or in other confined facilities by drastically reducing their requests for pretrial detention and carceral-based sentences. Prosecutors should move for release in all but the very few cases where pretrial detention is absolutely the least restrictive means necessary to ensure a person's return to court, or should – at the very least – be doubly sure to comply with recent legal precedents in setting bail with a person's ability to pay as a paramount consideration. With a special focus on populations who the CDC has identified as particularly vulnerable, prosecutors should also institute a review-and-release protocol in which bail was sought and imposed over the past thirty days. When seeking a plea or requesting a sentence, prosecutors must view incarceration into cramped and often un-hygienic facilities as a last resort, and must refrain from seeking community-based sentences – such as curfews, geographic restrictions, or electronic monitoring – that limit a person's ability to seek medical help or care for a loved one who has COVID-19. In line with the 1983 *Bearden v. Georgia* case, prosecutors should also temporarily vacate all

finances and fees so that people are not at risk of incarceration due to non-payment, or are not required to come into court or wait in processing centers to remove those financial burdens. Finally, prosecutors should dismiss cases involving minor offenses, thereby limiting the amount of time a person must spend in court.

Judges have the ultimate decision-making authority beyond what prosecutors may seek to achieve, and must also follow the recommendations highlighted above in order to limit the number of people who are coming into and forced to remain in carceral facilities.



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Judges also have the additional responsibility of ensuring that courthouses remain both accessible and safe for people whose cases are currently pending. Judges must not issue a blanket suspension on all court activity as this will needlessly prolong people's cases and exacerbate the stigma and harm associated with having an open case. For any cases that the court does prolong, judges should not waive defendants' rights to a speedy trial. As an alternative, judges should allow anyone with an open criminal case and upcoming hearing the chance to voluntarily waive that hearing or conduct that hearing via telephone or video conference. Where someone does not have access to either of those technologies, allow counsel to appear in person or via phone on behalf of a charged person without mandating that person's appearance.

In accordance with recommendations from public health experts, the following actions will reduce the number of people who are currently incarcerated or supervised and will limit burdens people face due to incarceration or supervision that place them at elevated risk of being affected by the SARS-CoV-2 pandemic.

Sheriffs must exercise their authority to protect the people who are, will soon become, and who may remain incarcerated even after the recommendations discussed above are put into action. Most importantly, Sheriffs must ensure that facilities are as empty, safe, and clean as possible. This means sanitizing facilities and coordinating with local public health experts to ensure that all facilities have adequate supplies of soap, hand sanitizer, tissues, and other hygiene products. Each of these products must be made freely and constantly available to all staff and incarcerated people – even if, for the latter, prohibitions on alcohol need to be modified to accommodate for hand sanitizer distribution. Sheriffs must implement procedures to care for those who become ill in their facilities. Those procedures must include, at a minimum: screening and testing of people for COVID-19, based on the most up to date information available; increased access to medical care and removal of all copays; access to the medication and equipment necessary to treat those who contract the virus; and, the ability to immediately transfer sick patients to outside facilities for care

when necessary. In addition, sheriffs must implement non-punitive procedures for housing people who are exposed to the virus, who are at high risk of serious illness, or who screen or test positive for COVID-19. This should *not* result in prolonged, wide-spread lock downs.

Also, Sheriffs should assess detained and incarcerated populations and maximize the number of people – with a heightened focus on populations identified by the CDC as particularly vulnerable – who can be immediately released, including people who would be released within the next sixty days, anyway. For anyone who is being released, consult with local health officials to ensure adequate screening and quarantine procedures are in place so that COVID-19 is not transmitted into a community from within the facility.



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Sheriffs must implement procedures to allow programming to continue; in jurisdictions where, local health officials have urged limiting volunteer access to jails and prisons, this may mean allowing staff or incarcerated people to run programs. Similarly, visitations by family must not be limited unless public health experts urge that measure to be taken. If and when that does happen, limitations should be explicitly temporary and other forms of communication such as emails, voice calls, and video calls must be made free for all incarcerated people. Also, legal visits must not be curtailed. Finally, Sheriffs must restructure staffing plans to ensure that facilities remain well-staffed even if staff are out sick, and should educate staff on proper hygiene procedures both in and out of work.

Probation and Parole Agents and Parole Boards must also exercise their authority to limit the number of people who are incarcerated or who are forced into public spaces. Agents should cease in-person check-ins to accommodate the need for social distancing, and should allow check-ins to occur by voice or video call. Where those technologies are not accessible to a person under supervision, minimize or temporarily suspend check-in requirements. Additionally, agents should suspend enforcement of any mobility-restricting supervision conditions that impede a person's ability to seek medical care or to support loved on who may have COVID-19. Finally, limit the number of people being incarcerated by suspending detainers and incarceration for technical (crimeless) rule violations. Parole boards should expedite and expand release opportunities for incarcerated people, reducing the populations in prisons as is recommended by health experts. Boards should institute a presumption for release for all people who have a parole hearing scheduled in the next two years. For people whose parole hearings fall outside that time frame – with a focus on populations identified by the CDC as particularly vulnerable – evaluate and seize all opportunities to expedite that process to ensure that anyone who would be released from incarceration at any point has the opportunity to be screened for release immediately.



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Governors obviously have a uniquely powerful role to play in stopping the spread of COVID-19 and limiting the harm it inflicts on communities by decreasing incarcerated populations and creating a culture in which transparency, safety, and the health of all people are the paramount concerns. First and foremost, Governors should grant immediate commutations to anyone whose sentence would end in the next year, to anyone currently being held on a technical (crimeless) supervision violation, and to anyone identified by the CDC as particularly vulnerable whose sentence would end in the next two years. Also, Governors can mandate that Sheriffs who are processing these releases are coordinating with local service providers and public health experts so that people who may not be able to return home have a safe, accessible place to be that is also close to medical facilities and services. Additionally, Governors need to mandate data collection and distribution from all criminal legal system agencies and actors who are part of the state's coronavirus response, as sharing information about this virus is essential in limiting the damage it will cause. Finally, Governors must consider issuing Executive Orders that seek to achieve the goals and remedies outlined above, particularly where local system actors are awaiting that guidance.

In conclusion, it is essential to remember actors within the criminal legal system must coordinate with and defer to local public health experts in limiting the risks presented by coronavirus and COVID-19 to people who come into contact with the system. Currently, 5 million people cycle through jails every year, and there are nearly 7 million people incarcerated or under supervision. Health experts agree that these populations need to be a focus in our national response to the SARS-CoV-2 pandemic, and there is an emerging and broad public consensus that supports common sense steps to achieve the goal of protecting the most vulnerable populations during this pandemic.

The urgency of deliberate and thoughtful action cannot be overstated. We are eager to work with anyone who is willing to take the steps outlined above, and we are willing to be a resource for you throughout this process. We want to ensure implementation of policies that will limit the threats presented by this public health crisis.

Sincerely,

A handwritten signature in black ink, appearing to read "Dane DeKrey". The signature is stylized with a large, looped initial "D" and a long, sweeping underline.

Dane DeKrey
Advocacy Director
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