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## **ACLU of Michigan Statement on COVID-19 and the Criminal Legal System**

As the COVID-19 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 all governmental stakeholders 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 immunocompromised 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 one's hands regularly with soap and water, and using alcohol-based hand sanitizer to clean one's 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](#); [Mavis Nimoh and Drs. Josiah Rich and Scott Allen](#); [Dr. Anne Spaulding](#); [Homer Venters](#); and [Josiah Rich](#) have all clearly stated that preventing the harm inflicted by 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. Furthermore, any failure to act urgently and comprehensively will result in devastating health and economic

consequences that will inevitably have a disproportionate impact on individuals and communities, including communities of color and poorer Michiganders, who are already the worst situated to navigate this crisis.

Therefore, we urge all state actors 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 everyone to remember that no one system actor can be held singularly responsible for addressing this crisis. Partnership and transparency across the system are crucial. In separate letters, the ACLU of Michigan has recommended a number of these measures to every jail and trial court in the state, as well as the Michigan Department of Corrections. It is helpful, however, for all governmental actors to understand how the various branches of government and agencies will need to work together holistically to craft the safest and most efficient response to this crisis.

**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 in close proximity to other people or in spaces where maintaining hygiene becomes difficult, even if just for a short time. In situations where police officers might otherwise have considered arrests, they should issue citations or appearance tickets instead so that people can return home safely. Only arrests associated with the most urgent or severe alleged offenses should justify new arrests at this time, given the overwhelming public safety concerns presented by coronavirus and the risks posed both to police officers and detained persons by 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 affirmatively urge courts to release detainees in all but the very few cases where pretrial detention is absolutely and demonstrably the least restrictive means necessary to ensure a person's return to court and where the alleged offense is extremely serious. Prosecutors should be doubly sure to follow MCR 6.106, which makes release without bail the presumptive option for all defendants, and recent

legal precedents mandating the consideration of a person's ability to pay as a paramount consideration when setting bail. With a special focus on populations whom the CDC has identified as particularly vulnerable, prosecutors should also institute a review-and-release protocol for defendants who remain detained in cases in which bail was sought and imposed over the past thirty days or in which other potentially unaffordable release conditions such as tethers continue to cause defendants to remain incarcerated.

When seeking a plea or requesting a sentence, prosecutors must view incarceration in 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. Indeed, in cases in which the defendant is not detained, prosecutors should affirmatively move to postpone sentencing hearings until after this crisis abates if courts do not do so themselves. In line with the 1983 *Bearden v. Georgia* case, prosecutors should also temporarily suspend all fines 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. This is especially true of offenses like driving without insurance or with a suspended license that may be committed precisely because individuals are responding to the exigencies of this health crisis by avoiding public transportation or seeking medical treatment.

**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.

Judges also have the additional responsibility of ensuring that courthouses remain both accessible and safe for people whose cases are currently pending. Judges should not issue a blanket suspension on all court activity in serious criminal cases except where the defendant themselves seek a postponement 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 disregard 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. Additionally, when court hearings are postponed, courts must provide defendants with clear, timely, and unambiguous notice of postponements and of new hearing dates. Courts should be particularly understanding of defendants who miss rescheduled hearing dates due to failure to receive notice,

misunderstandings, or inability to appear as the result of exigencies related to the current crisis.

**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 COVID-19 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.

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 and widely available 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.

Finally, Sheriffs should also suspend all practices of holding people for civil immigration purposes, i.e. pursuant to a detention agreement with Immigration Customs and Enforcement (ICE) or an ICE detainer.

**Probation and Parole Agents and the Parole Board** 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, agents should minimize or temporarily suspend check-in requirements altogether. 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, agents should limit the number of people being incarcerated by suspending detainers and incarceration for technical (crimeless) rule violations.

The parole board should expedite and expand release opportunities for incarcerated people, reducing the populations in prisons as is recommended by health experts. The board should institute a presumption of 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 – the board should 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.

**Governor Whitmer** has already shown a strong commitment to limiting the spread of COVID-19 outside the carceral setting but also has a uniquely powerful role to play in stopping the spread of COVID-19 and limiting the harm it inflicts on communities by reducing incarcerated populations and promoting a culture in which transparency, safety, and the health of all people are the paramount concerns. First and foremost, Governor Whitmer's office should examine how her emergency powers may be used to 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. Second, Governor Whitmer should exercise her supervisory authority over the Michigan State Police (MSP) and Michigan Department of Corrections (MDOC) to order that they follow best practices during this health crisis as described above.

Also, Governor Whitmer can direct that MDOC, in processing these releases, coordinate 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, Governor Whitmer should 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, we urge Governor Whitmer to 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 nationally 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 COVID-19 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 all governmental actors throughout this process. We want to ensure implementation of policies that will limit the threats presented by this public health crisis.