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Sent via email

Re: COVID-19 Prevention and Management in the Courts

Dear Chief Judge:

The ACLU of Michigan takes the risks and issues posed by the rapid spread of COVID-19/coronavirus extremely seriously, and we appreciate that court systems around the state are giving careful consideration to the impact the virus has on court operations and our communities. We write to highlight a few measures that the ACLU urges that your court consider to protect constitutional rights as well as public health during this difficult time. We commend the Michigan Supreme Court's recent announcement encouraging trial courts to take similar measures to some of those recommended herein, and note that all of our recommendations are consistent with the letter and spirit of the Supreme Court's announcement.

Release Pre-trial Detainees

In order to prevent the further spread of COVID-19, public health officials are unanimous in recommending that we minimize the degree to which Michiganders are in crowded environments. Indeed, Governor Whitmer has ordered that public gatherings of more than 250 people be avoided. Jails, of course, are crowded environments in which detainees have less ability to follow recommended hygienic measures such as frequent washing of hands, social distancing, etc. Every individual who is arrested and transported to jail presents a possible source of transmission into the jail setting, and every moment such individuals spend in jail presents further opportunity for them to become infected as a result of the jail conditions described above. Accordingly, courts can play a major beneficial role in limiting the spread of COVID-19, both inside our jails and in the community more broadly, by doing everything in their power to release pre-trial detainees and ease jail crowding.

One obvious step is to assure the rapid release of detainees on personal bonds, with special attention paid to defendants who are at high risk of serious illness from COVID-19, such as defendants older than 60 and those who have pre-existing medical conditions that place them at risk including, but not limited to, heart disease, lung disease, diabetes, and conditions resulting in the individual being immune-compromised. The Michigan Court Rules already provide that pre-trial detainees should be presumptively released on personal recognizance. MCR 6.106(C). Courts should apply this rule liberally to ensure the immediate release of most newly arrested pre-trial detainees, including the possibility of promulgating general administrative orders providing for detainees accused of most charges to be released automatically with no cash bond and a notice to appear unless the prosecution affirmatively moves for a hearing. In doing so,

Courts should be careful not to impose conditions on mobility such as tethers and house arrests that might limit defendants' ability to seek medical care or care for sick or vulnerable family members.

Additionally, MCR. 6.106(H)(2) provides courts with the authority to modify existing bond decisions on their own initiative. No one who does not demonstrably present an urgent and unusual threat to an identified and articulable individual based on clear and convincing evidence should currently be detained in a crowded jail environment. Accordingly, courts should consider eliminating existing bail conditions (including conditions such as unaffordable tethers) for almost all defendants who are currently in jail as the result of bonds or release conditions that they cannot afford. Again, general administrative orders providing for the elimination of bond or tether requirements in cases where defendants have not paid their cash bond, at least absent objection from the prosecution (which should be minimal under the circumstances), would present the most efficient means of rapidly achieving these goals.

Postpone Unnecessary Hearings for Non-Detained Defendants and Civil Cases, and Minimize the Use of Warrants and Bonds

During this health crisis, it is likely that defendants will be unable to attend hearings for numerous justifiable reasons relating to seeking medical care, transportation disruptions, childcare emergencies due to school cancellations, etc. Courts should respond—as many have already done—by postponing, staying, or rescheduling hearings in most civil cases (especially eviction cases, which should be suspended entirely) and in criminal cases in which the defendant is not already detained and does not object to a postponement. In particular, courts should consider postponing sentencing hearings to protect the current jail population from the possibility that the defendant being sentenced might be ill, to protect the defendant from the risk of transmission in the carceral setting, and to reduce jail crowding. Similarly, courts should do everything possible to eliminate mass hearings like child support collection proceedings that involve numerous accused individuals appearing in large groups, often in a small and contained shared space or cell. Reducing unnecessary hearings will also help to mitigate risks to those who must be in court including court staff whose health and commitment to continue working is vital to keeping our courts running. However, if a criminal defendant is detained and wishes to proceed with trial or any hearings, or if a non-detained defendant wishes to proceed to trial without delays, COVID-19 should not be the basis for delays. If delays are necessary in any criminal case as the result of COVID-19 logistical issues, pre-trial release should be the rule.

In cases that are not postponed or rescheduled automatically, courts should not issue bench warrants as the result of a party's non-appearance. We note with particular concern one Oakland County judge's decision to send a litigant suffering from pneumonia to jail when the very reason for his tardiness in court was his being treated for his (highly contagious) condition.¹

¹ Laitner, *He Was Sick With Pneumonia, But a Judge Sent Him To Jail for Being Late to Court*, Detroit Free Press (March 10, 2020) <<https://www.freep.com/story/news/local/michigan/oakland/2020/03/10/jailed-howard-baum-pneumonia-oakland-county-judge-bowman/5008206002/>>.

Additionally, in cases that are proceeding, courts can reduce the risk to their staff and the general public by reducing criminal defendants' need to appear in person for non-essential hearings. In practice, many criminal hearings are preliminary hearings, status conferences, or motion hearings, at which a defendant's attendance is not truly necessary unless they wish to be present. Of course, any person accused of a crime who wishes to be present at any hearing in their case, must continue to be permitted to do so.

Do Not Order Detention for Violation of Probation or Parole

Probationers and parolees may find it difficult to comply with many of the conditions of their parole or probation in light of the social upheaval caused by COVID-19. Workplace shutdowns, transportation disruptions, office closures, childcare issues, and other similar challenges may make it difficult for probationers and parolees to attend required appointments, satisfy work requirements, and otherwise comply with the many conditions that govern their lives. Indeed, strict compliance with certain conditions, such as appearing for in-person meetings with probation officers or continuing to work in what might be crowded environments presenting high risk for transmission are plainly inadvisable as a matter of public health. Probation officers and courts should work together to formally modify or suspend such conditions and should neither impose nor enforce conditions on mobility such as tethers and house arrests that might limit probationers and parolees ability to seek medical care or care for sick or vulnerable family members. In any case, rather than trying to adjudicate probation or parole violations on a case-by-case basis—a time-consuming process in which courts would likely struggle to keep up with the best science and public health advice—courts should adopt a comprehensive policy of not ordering probationers or parolees detained while the COVID-19 threat persists. This will serve to reduce the need for court hearings, each of which presents a risk to court staff, the public, and the probationers and parolees themselves. It will also, of course, reduce the number and pace of individuals circulating into and out of jails with the concomitant risks both to the carceral setting and to the public at large.

For similar reasons, courts should suspend all requirements to make payments towards court fines or debts given the economic upheaval that will be experienced by many Michiganders, especially low-income Michiganders, in the immediate future. Interest should not accumulate on court debt, and show-cause hearings for non-payment should be suspended until the crisis abates.

Work with Local Law Enforcement Officials and Prosecutors to Limit Arrests to the Most Serious Offenses and to Increase Medical Releases

Another critical way to reduce the risk of transmission between the outside world and the carceral setting is to reduce initial arrests in the first place. The courts should use every means available to them to urge local law enforcement and prosecutors to reduce arrests. Law enforcement officials should be encouraged to issue tickets and notices to appear rather than making arrests for as many charges as possible, and especially for common misdemeanors such as driving without insurance with a suspended license. Similarly, prosecutors should be urged not to file charges in all but the most serious of cases in which immediate action is necessary to address an imminent harm or because of an expiring statute of limitations in a case involving a

serious offense. Judges and magistrates should raise these concerns with prosecutors at every opportunity, including in response to warrant requests.

Courts should also take whatever measures are available to them to urge local sheriffs to release inmates who have been diagnosed with COVID-19 as well as medically vulnerable inmates who would be at particular risk if exposed. Sheriffs should be urged to use whatever measures are available to them to accomplish such releases, including through widespread use of their power to parole prisoners to receive medical treatment. *See* MCL 801.251.

Conclusion

The ACLU of Michigan appreciates the challenges confronting public officials in responding to the COVID-19 outbreak. We would be happy to work with you on the best ways to simultaneously ensure public health and safety while also respecting the civil rights and liberties of all Michiganders. Thank you for your consideration of these matters in a challenging time.

Sincerely,

Dan Korobkin, Legal Director
Phil Mayor, Senior Staff Attorney
ACLU of Michigan

Cc: Chief Justice Bridget Mary McCormack (via email)
Milton L. Mack, Administrator, State Court Administrative Office (via email)