



Arkansas

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Honorable Asa Hutchinson
Governor of the State of Arkansas

Hon. Chief Justice John Dan Kemp
Arkansas Supreme Court

Hon. Chaney Taylor, President
Arkansas District Judges' Council

Marty Sullivan, Director
Administrative Office of the Courts

Dr. Nate Smith, Director
Arkansas Department of Health

Ms. Wendy Kelley, Director
Arkansas Department of Correction

Mr. Bob McMahan, Prosecutor Coordinator
Office of the Prosecutor Coordinator

Mr. Gregg Parrish, Executive Director
Arkansas Public Defender Commission

Mr. John Felts, Chairman
Arkansas Parole Board

Mr. Jerry Bradshaw, Director
Arkansas Community Correction

Mr. Brandon Ellison, President
County Judges Association

Sheriff Scott Bradley, Executive Director
Arkansas Sheriffs' Association

Chief Jackie Davis, President
Arkansas Association of Police Chiefs

Mr. Chris Villines, Executive Director
Arkansas Association of Counties

Mr. Mark Hayes, Executive Director
Arkansas Municipal League

Mr. Jeremy Patterson, President
Arkansas Juvenile Detention Association

RE: COVID-19 and the Criminal Justice System

Dear Stakeholders,

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 thank you for your efforts thus far. We ask that you continue working 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. Detailed, thoughtful planning, beyond simple recommendations on good hygiene, is essential to maintaining the health and safety of those incarcerated as well as prison and jail staff, court staff, and all Arkansans.

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 hands regularly with soap and water, and using alcohol-based hand sanitizer to clean 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,¹ Dr. Marc Stern,² Dr. Oluwadamilola T. Oladeru and Adam Beckman,³ Dr. Anne Spaulding,⁴ Homer Venters,⁵ and Josiah Rich⁶ 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.

We are proud of and commend the leadership in our state thus far, and we urge you to continue partnering with local public health experts in developing additional 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

¹ Kelan Lyons, *Elderly prison population vulnerable to potential coronavirus outbreak*, THE CT MIRROR, March 11, 2020 <https://ctmirror.org/2020/03/11/elderly-prison-population-vulnerable-to-potential-coronavirus-outbreak/>.

² Dr. Marc Stern, *Letter to Washington State Jails*, Wash. Assoc. of Sheriffs and Police Chiefs, March 5, 2020 <https://www.themarshallproject.org/documents/6796536-Suggestions-for-Jails-3-5-20>.

³ Dr. Oluwadamilola T. Oladeru et al., *What COVID-19 Means For America's Incarcerated Population*, HEALTH AFFAIRS, March 10, 2020 <https://www.healthaffairs.org/doi/10.1377/hblog20200310.290180/full/>.

⁴ Dr. Anne Spaulding, *Coronavirus COVID-19 and the Correctional Facility: For the Correctional Healthcare Worker*, March 9, 2020 https://www.ncchc.org/filebin/news/COVID_for_CF_HCW_3.9.20.pdf.

⁵ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES, March 12, 2020 <https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/>.

⁶ Amanda Holpuch, *Calls mount to free low-risk US inmates to curb coronavirus impact on prisons*, THE GUARDIAN, March 13, 2020 <https://www.theguardian.com/us-news/2020/mar/13/coronavirus-us-prisons-jails>.

addressing this crisis. Partnership and transparency across the system and with the public are crucial.

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 issue citations in lieu of arrest 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 and city attorneys 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 and city attorneys should dismiss cases involving minor offenses, thereby limiting the amount of time a person must spend in court. They should also 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 – absolutely ensure compliance with legal precedents in setting bail with a person's ability to pay as a paramount consideration. With a special focus on populations whom the CDC has identified as particularly vulnerable, prosecutors and city attorneys 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 and city attorneys must view incarceration into cramped and often un-hygienic facilities as a last resort, and must ensure that any community-based sentences – such as curfews, geographic restrictions, or electronic monitoring – enable the person to seek medical help or care for a loved one who has COVID-19. In line with the 1983 *Bearden v. Georgia* case, prosecutors and city attorneys should also ask courts to at least temporarily vacate 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.

Judges have the ultimate decision-making authority beyond what prosecutors and city attorneys may seek to achieve. We call upon the judiciary 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. Our state and federal courts and judges wisely have not issued blanket suspensions on all court activity as this would needlessly prolong people's cases and exacerbate the stigma and harm associated with having an open case. The Arkansas Supreme Court has ordered a suspension on all in-person proceedings with several exceptions including many criminal hearings, orders of protection, and

certain proceedings involving minors.⁷ In accordance with this order and in the interest of justice, courts should take care to avoid having more effect than necessary on speedy trial rights, and consistent with Arkansas Rule of Criminal Procedure 28.3, enter orders as to speedy trial on a case by case basis, to ensure due process. As an alternative, where consistent with the confrontation clause, judges should allow anyone with an open criminal case and an upcoming hearing the chance to voluntarily waive that hearing or to voluntarily conduct that hearing via telephone or video conference. Where someone does not have access to either of those technologies, courts may allow counsel to appear in person or via phone on behalf of a charged person without mandating that person's appearance, again, as consistent with the confrontation clause.

Many people may lose income and struggle to keep up with housing costs during the health crisis. Courts should avoid issuing eviction orders at this time to help ensure that people will not lose their homes at a time when shelter is even more essential to the health and welfare of individuals and the general public.

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.

Detention Facilities 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, detention facilities must ensure that they 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.

Detention facilities must implement procedures to care for those who become ill in their custody. 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, detention facilities 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, ADC, counties, and cities 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

⁷ *In Response to the COVID-19 Pandemic*, Ark. Sup. Ct., March 17, 2020
<https://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/683/2020/03/17234403/COVID-19-PC.pdf>.

released within the next sixty days, anyway. For anyone who is being released, please 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.

Detention facilities should 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. When public health officials urge limitations on visitations by family, those 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 and their families. Also, legal visits must not be curtailed. Detention facilities 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.

Children being held in juvenile detention centers, treatment centers, and jails around the state, whether charged as adults or juveniles, should immediately be released where doing so does not pose a threat to public safety. Especially given recent reports alleging abuse and neglect in juvenile facilities,⁸ these children should be released to their families or appropriate caregivers.

Sheriffs should suspend all eviction activities during this public health crisis. Evictions at this time will increase homelessness and housing insecurity, putting all Arkansans at an increased risk of contracting COVID-19.

Detention facilities must also develop and implement their planned response to address issues as outline in our letters to ADC and the Arkansas Sheriffs' Association dated March 6. This includes education of staff and people in custody regarding the virus and prevention methods, staffing in case of shortages, provision of hygiene products, screening and testing of people in custody, appropriate, non-punitive housing to limit spread of the virus, immediate treatment for infected people, and precautions for vulnerable populations.

Probation and Parole Officers and Parole Boards must also exercise their authority to limit the number of people who are incarcerated or who are forced into public spaces. Officers 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, officers should suspend enforcement of any mobility-restricting supervision conditions that impede a person's ability to seek medical care or to support loved ones 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

⁸ Editorial by the Arkansas Democrat Gazette, *Lost in teenage jail*, January 28, 2018
<https://www.arkansasonline.com/news/2018/jan/28/lost-in-teenage-jail-20180128/>.

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.

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. We commend and thank Governor Hutchinson for his leadership and continuing updates to the public. We ask that Governor Hutchinson review and 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, Governor Hutchinson and state and local government can facilitate officials who are processing these releases and enhance coordination 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, the Governor should mandate data collection and distribution from all criminal legal system agencies and all who are part of the state's coronavirus response, as sharing information about this virus is essential in limiting the damage it will cause. Transparency is essential in assuring the public that the state is safeguarding the welfare of people who are incarcerated, people who work with incarcerated populations, and all Arkansans. Finally, we ask that Governor Hutchinson consider issuing Executive Orders that seek to achieve the goals and remedies outlined above.

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, thousands of people cycle through Arkansas jails every year, and there are nearly 20,000 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 appreciate your leadership, and the ACLU of Arkansas is happy to work with you to assist with the steps outlined above. Please let us know if we may serve as a resource for you during this process to ensure implementation of policies that will limit the threats presented by this public health crisis. Thank you again for your leadership and your time and attention to these matters.

Respectfully,



Holly Dickson