

March 18, 2020

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 New Hampshire, public and private actors must take drastic steps to combat this pandemic. We urge you to specifically develop and implement comprehensive 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, the entire criminal legal system – from policing and pretrial through sentencing, confinement, and release – will come under intense scrutiny for how it responds to this national public health crisis.

The COVID-19 crisis presents a unique set of challenges and public health threats, which must be met with urgent and unprecedented action. This is particularly true for individuals who are most vulnerable. According to the Centers for Disease Control (CDC) and the World Health Organization, older adults (age 65 and older) 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.

People involved in the criminal legal system are also at higher risk given close quarters and because those entering correctional facilities are often already in poor health. Being arrested and detained, incarcerated, or forced to appear in public spaces such as courts and supervision offices can drastically limit a person's ability to exercise the precautions being recommended by public health officials or to seek medical help. The longer jurisdictions wait to act, the worse this and the subsequent fallout will be.

We urge you in lockstep with public health officials to develop immediately actionable steps that ensure public safety and public health are as protected as possible. This should include preventing people from unnecessarily entering the criminal legal system and ensuring that jails and prisons do not needlessly keep people incarcerated who are especially vulnerable to COVID-19. The non-exhaustive list below includes recommended actions.

The ACLU of New Hampshire and the NH Association of Criminal Defense Lawyers remain committed to bail reform in New Hampshire. We applaud the members of the Bail Commission for their continued efforts to improve the criminal justice system in the Granite State. We support the Bail Commission's proposals presented to the NH Senate in recent weeks in Senate Bill 551 and look forward to supporting the passage of such legislation when the legislature reconvenes. The measures recommended here are not intended in any way to impact or replace the ongoing efforts to pass SB551 or to permanently reform procedures related to the criminal legal system in New Hampshire. Instead, these measures are being recommended only on a temporary basis in response to the unique circumstances of the COVID-19 crisis.

In accordance with recommendations from public health experts, the following actions would reduce the number of people who are coming into and detained by the criminal legal system over the next few months. These measures would thereby reduce the overall burden on the criminal legal system and the risk of infection inside correctional facilities, and ensure that jails and prisons can adhere to recommended health practices.

Police should limit the number of people who are arrested and detained, even if just for a short time, in close proximity to other people or in spaces where maintaining hygiene and implementing recommended health practices is difficult. Police should issue citations/hand summonses under RSA 594:14 in lieu of arrests wherever possible so that people can return home, balancing the need for arrest with the overwhelming public safety concerns presented by coronavirus.

Prosecutors should use their immense discretion to limit the number of people who are held in jails or in other confined facilities by reducing their requests for pretrial detention where possible 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 the safety of our communities and a person's return to court, or should be sure to set bail – when bail is necessary – 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 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 should view incarceration in cramped and often un-hygienic facilities as a last resort. Where possible, prosecutors should utilize at-home-confinement as an alternative to incarceration, while avoiding conditions – such as geographic restrictions – that may prevent people from accessing medical care.

Prosecutors should also temporarily vacate all fines and fees so that people are not compelled to go to court to defend themselves in a “failure to pay” hearing amidst this outbreak. Similarly, prosecutors should not seek the issuance of bench warrants for failures to appear during this emergency. Finally, prosecutors should dismiss cases involving minor offenses, thereby limiting the number of people in the criminal legal system.

Judges have the ultimate decision-making authority beyond what prosecutors may seek to achieve, and should 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 court processes remain accessible and safe for people whose cases are currently pending. Judges should avoid issuing 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 courts do 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, judges should allow counsel to appear in person or via phone on behalf of a charged person without mandating that person’s appearance. Finally, as was recently done in Maine, the courts should vacate all outstanding warrants for unpaid fines or fees (excluding child support and restitution), unpaid court-appointed counsel fees, and for failure to appear for unpaid fees and fine hearings.

Probation and Parole Officers 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, minimize or temporarily suspend check-in requirements. Additionally, probation and parole 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, these officers should limit the number of people 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 for release for all people who have a parole hearing scheduled in the next

year. 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.

The Department of Corrections and Parole Board should work together to make maximum use of the medical parole process under RSA 651-A:10-a, where feasible, to release people the CDC has identified as particularly vulnerable, including people over the age of 65 and people who are immunocompromised. This is especially critical in New Hampshire, as our state prison system has a disproportionately elderly population compared to other states. The number of people incarcerated in New Hampshire that are older than 50 years increased 35 percent between 2008 and 2016, when they accounted for one in five people (21 percent) in our state prisons.¹ At-home confinement also should be readily utilized as an alternative to incarceration for elderly and vulnerable prison populations.

The Office of Cost Containment (OCC) should ask the courts to vacate outstanding warrants or orders for unpaid court-appointed counsel fees, and for failure to appear at hearings related to such fees. Again, this approach was recently taken by the Maine courts where warrants were recently vacated for unpaid court-appointed counsel fees and for any related failure to appear. The OCC should suspend or waive the payment of fees under its jurisdiction. These measures will enable people to prioritize their resources on urgent needs during this crisis.

In conclusion, it is essential to remember that 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. Health experts agree that incarcerated populations need to be a focus in our national response to the SARS-CoV-2 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 to vulnerable populations and our communities more broadly.

The ACLU of New Hampshire and the NH Association of Criminal Defense Lawyers thank stakeholders for all the steps they are already taking to protect public safety and health during this

¹ New Hampshire Department of Corrections, Annual Reports 2008-2016

crisis, including protecting people's civil rights. We recognize the unprecedented nature of these asks and urge stakeholders to consider them in the context of the public health crisis we are all in together. This is an unprecedented challenge and calls for creative and exceptional measures to be taken.

Sincerely,



Devon Chaffee
Executive Director, ACLU of New Hampshire



Robin D. Melone
President, NH Association of Criminal Defense Lawyers

CC:

Associate Justice E. Gary Hicks
The Honorable Tina Nadeau
The Honorable David King
Gordon MacDonald, Attorney General
Helen Hanks, Commissioner
Charlie Arlinghaus, Commissioner
Robert Quinn, Commissioner
Kathy Funai, Administrator
Charlie Dennis, President
Jennifer Sargent, Chair
Andrew Livernois, County Attorney
Michaela O'Rourke-Andruzzi, County Attorney
D. Chris McLaughlin, County Attorney
John G. McCormick, County Attorney
Martha Hornick, County Attorney
Michael Conlon, County Attorney

Robin Davis, County Attorney
Patricia Conway, County Attorney
Thomas Velardi, County Attorney
Marc Hathaway, County Attorney
David M. Dionne, Superintendent
Stephen A. Church, Superintendent
Rick Van Wickler, Superintendent
Chris Brackett, Superintendent
Jason Henry, Superintendent
Tom Elliott, Superintendent
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Ross L. Cunningham, Superintendent
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