

March 18, 2020

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RE: COVID-19 and the Criminal Justice System

Dear Stakeholders,

The ACLU of Montana urges immediate coordination amongst all levels of the criminal legal system to combat the spread of COVID-19. **We know this is a stressful and daunting time for many people, systems, and institutions, and would like to offer ourselves as a source of information, support, and added capacity for problem solving.**

This public health crisis will only worsen in the coming weeks, and it is imperative that stakeholders take proactive measures to reduce the inevitable impacts. The single most important action that we can take is to immediately evaluate each and every individual currently in custody - in state correctional facilities, pre-release centers, and county jails - for potential release. This will limit the possibility of transmission among these vulnerable populations, decrease demands on staff, and alleviate the legitimate concerns of family members.

Last week, we sent a letter asking for information on the Executive's and DOC's plan to address the risk of the virus spreading not only in detention facilities, but also via the criminal legal system generally. Law enforcement, supervision staff, and the courts also play a crucial role in stemming the epidemic in Montana. While we appreciate the DOC thinking through the medical implications for prisoners and staff, the priority should be releasing people who are vulnerable and, as much as possible, ending new incarcerations, revocations from supervision, and other activities that make social distancing impossible.

Development and implementation of holistic policies that align with guidance from public health experts is crucial. This will minimize the harm inflicted on people involved in the criminal legal system – and, by extension, the harm inflicted on broader communities. Public health experts have uniformly 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 precautions or seek medical help. The longer jurisdictions wait to act, the worse this will be.

It is true that no one system actor can be held singularly responsible for addressing this crisis, but leadership from those who set policy and procedure can go a very long way. It is of the utmost importance that stakeholders identified in this letter begin coordinating responses, led by the Executive, the DOC, The State Courts, the Attorney General, and Sheriffs. Partnership and transparency across the system are crucial.

The ACLU of Montana would like to be a partner 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 and jails do not needlessly keep people incarcerated who are especially vulnerable to COVID-19. The non-exhaustive list below includes recommended actions, some of which can be taken immediately, some of which will take time and planning.

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.

Governor Bullock obviously has 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, the Governor should take these immediate actions:

- Convene a group of stakeholders from the criminal legal system and coordinate a broad and thorough plan to reduce the spread of COVID-19.
- 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.
- Mandate that the Department of Corrections and the 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.
- 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.
- Issue Executive Orders that seek to achieve the goals and remedies outlined above and below, *particularly where local system actors are awaiting that guidance.*

Sheriffs and Detention Center Operators must exercise their authority to protect the people who are, will soon become, and who may remain incarcerated. Most importantly, Sheriffs must:

- 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.
- Suspend all practices of holding people in local jails and prisons for civil immigration purposes, i.e. pursuant to a detention agreement with Immigration Customs and Enforcement (ICE) or an ICE detainer.
- 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.
- 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.
- 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.**
- Consult with local health officials to ensure adequate screening and quarantine procedures are in place for anyone who is being released so that COVID-19 is not transmitted into a community from within the facility.

- 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. On this point, we are already receiving troubling reports that local jails are inadequately staffed, leaving incarcerated individuals without access to necessary medical care. Sheriffs and detention center operators should be developing contingency plans to deal with potential no-shows at work or other staffing shortages.

Additionally, 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.**

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.
- 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.
- Limit the number of people being incarcerated by suspending detainers and incarceration for technical (crimeless) rule violations.
- Suspend in-person drug testing

Parole boards should:

- Expedite and expand release opportunities for incarcerated people, reducing the populations in prisons as is recommended by health experts.
- 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.

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.
- Cease arrests for low-level offenses, 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.
- Move for release of all people who do not represent a significant flight risk or physical danger to the community. 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.
- 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 fines, fees, costs, and restitution 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 and court personnel 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.

We are heartened that Chief Justice McGrath has recommended that “every pretrial defendant” in detention should be evaluated for potential release. This is an important step in minimizing the risk to incarcerated populations. We believe that every Court across the state - from federal courts to district courts to courts of limited jurisdiction - should:

- Undertake an immediate evaluation of pretrial detainees and release those individuals who do not represent a significant flight risk or danger to the community.
- Suspend cash bail requirements. During this time of crisis nobody should be incarcerated because they are unable to post bail.
- Adhere to Chief Justice McGrath’s admonishment that courts of limited jurisdiction should delay time payments from defendants. Again, during this emergency nobody should be incarcerated because they cannot pay a fine or fee.
- 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 conclusion, it is essential that stakeholders 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.

Please let us know if we can be useful in convening stakeholders or thinking through implementation issues. Our priority is curtailing the spread of COVID-19 in and via the criminal legal system.

Sincerely,

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